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CONSTITUTIONAL ENDURANCE IN CRISIS

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ABSTRACT

This paper examines the concept of constitutional endurance in crisis, focusing on India's response to various significant challenges since its independence in 1947. Constitutions serve as the supreme law, outlining the structure and principles of governance, yet their resilience varies in times of crisis. This study analyzes how India's constitution has adapted to historical crises, including the Partition, the Emergency of 1975-77, the Kashmir conflict, and the COVID-19 pandemic. Key constitutional amendments influenced by these crises demonstrate a pattern of balancing democratic values, federalism, and fundamental rights with national unity, security, and development. The tension between upholding constitutional principles and effective crisis management is explored, highlighting the critical role of emergency powers and their potential for misuse. Comparative analysis of other nations' responses to health, economic, and political crises reveals common strategies and lessons for enhancing constitutional resilience. International law's influence on national constitutional responses is also considered. The paper identifies challenges to constitutional endurance, such as legitimacy, stability, and adaptability, and emphasizes the importance of checks and balances in mitigating abuses of power. Strategies for strengthening constitutional resilience include fostering constitutional culture and education, improving constitutional design, and developing foresight and preparedness for future crises. Ultimately, constitutional endurance is portrayed as a dynamic and evolving process, requiring continuous vigilance, participation, and adaptation by all constitutional actors and citizens to uphold the foundational values and vision of the nation.

INTRODUCTION

Constitutions are the supreme laws of the land, defining the basic structure, principles, and values of a political system. They are also the frameworks for governing during normal times and crises. However, not all constitutions are equally capable of adapting to changing circumstances

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and challenges, especially in times of crisis. Some constitutions may collapse, some may survive, and some may thrive. The ability of a constitution to persist and maintain its functionality and legitimacy despite difficulties or hardships is what we call constitutional endurance in crisis². The study of constitutional endurance in crisis is crucial for comprehending how constitutions respond to diverse crises and the implications for a country's stability and development. This examination aids in evaluating the effectiveness and legitimacy of constitutional mechanisms, including emergency powers, amendments, judicial review, and public participation. By identifying contributing or hindering factors such as historical, legal, political, social, and international influences, this study helps draw lessons for constitutional design and reform, aiming to enhance resilience in future crises.

This paper focuses on India, with one of the world's oldest and most enduring constitutions³, exploring its response to crises since independence in 1947, including the Partition, Emergency, Kashmir conflict, and the COVID-19 pandemic. Examining constitutional principles and mechanisms, the roles of key actors, the influence of international law, public perception's impact on legitimacy, and comparative analyses with other constitutions, the paper seeks to address key questions. By doing so, it aims to provide insights into the challenges and opportunities for constitutional endurance in India and offer conclusions and recommendations for constitutional design and resilience in times of crisis.

HISTORICAL PERSPECTIVE

India's Constitution, adopted in 1950, is one of the world's oldest and most enduring written constitutions. It has survived various crises that have challenged its democratic and federal structure, such as the Partition of India and Pakistan in 1947, the Emergency imposed by Prime Minister Indira Gandhi in 1975-77, and the ongoing Kashmir Conflict that has involved several wars and insurgencies⁴. These crises have tested the resilience and adaptability of the

² [Endurance of the Indian Constitution | SCC Blog \(sconline.com\)](#) (visited on February 18, 2024)

³ [India's enduring document of governance - The Hindu](#) (visited on February 18, 2024)

⁴ Madhav Khosla, "Democracy and Decolonization: How India Was Made" 18 *Information Account International Journal of Constitutional Law* 1031-1035, (2021).

Constitution, and have also led to several constitutional amendments that have altered its provisions and principles.

Some of the major constitutional amendments that were influenced by these crises are:

- The First Amendment (1951), which added the Ninth Schedule to protect land reform laws from judicial review, and also imposed restrictions on the freedom of speech and expression in the interest of public order and security of the state.
- The Twenty-fourth Amendment (1971), which affirmed the power of Parliament to amend any part of the Constitution, including the fundamental rights, and also made it obligatory for the President to give assent to any constitutional amendment bill passed by Parliament.
- The Thirty-eighth Amendment (1975), which barred any judicial review of the President's proclamation of emergency, the President's satisfaction in respect of such proclamation, and the laws made during the emergency.
- The Forty-second Amendment (1976), which made sweeping changes to the Constitution during the Emergency, such as expanding the scope of Article 368 to enable Parliament to amend any part of the Constitution by a special majority, adding the words "socialist" and "secular" to the preamble, inserting a new chapter on the fundamental duties of citizens, and curtailing the power of the judiciary and the states.
- The Forty-fourth Amendment (1978), which reversed some of the changes made by the Forty-second Amendment, such as restoring the power of judicial review, reducing the duration of the emergency, and requiring the approval of both Houses of Parliament for the proclamation of emergency.
- The Fifty-second Amendment (1985), which added the Tenth Schedule to deal with the problem of defections of legislators from one party to another, and laid down the grounds for disqualification of members of Parliament and state legislatures on account of defection.

- The One Hundred and First Amendment (2016), which introduced the Goods and Services Tax (GST), a uniform indirect tax regime for the whole country, and abolished various central and state taxes.

A common pattern that can be observed in the constitutional responses to these crises is that they have often involved a trade-off between the values of democracy, federalism, and fundamental rights on the one hand, and the demands of national unity, security, and development on the other. The Constitution has been amended to balance these competing interests and to accommodate the changing realities of the Indian polity. However, some of these amendments have also been criticized for undermining the original vision and spirit of the Constitution, and for eroding the checks and balances among the organs and levels of government. Therefore, the constitutional endurance in crisis also depends on the constitutional morality and vigilance of the people, the institutions, and the civil society.

CONSTITUTIONAL PRINCIPLES VS. CRISIS MANAGEMENT

Constitutional principles are the fundamental values and norms that guide the design and operation of a constitutional system. They include democracy, rule of law, separation of powers, federalism, human rights, and judicial review. Crisis management, on the other hand, is the process of dealing with emergencies and threats that pose a serious challenge to the stability and security of a state and its people. Crises can be of various types, such as wars, natural disasters, pandemics, terrorist attacks, or political upheavals.

There is often a tension between upholding constitutional principles and responding effectively to crises. On the one hand, constitutional principles provide the legitimacy and framework for the exercise of state power and protect the rights and interests of the citizens. On the other hand, crises may require swift and decisive actions by the state, which may entail the suspension or limitation of some constitutional principles or procedures. For example, during a war, the state may declare a state of emergency, which may grant the executive extraordinary powers, curtail the role of the legislature and the judiciary, and restrict the civil liberties of the people. Similarly, during a pandemic, the state may impose lockdowns, quarantines, and travel bans, which may affect the freedom of movement, assembly, and expression of the people.

The challenge for constitutional governance is to balance the need for crisis management with respect for constitutional principles. This balance is not easy to achieve, as different situations may demand different trade-offs and compromises. Moreover, the balance may also depend on the preferences and perspectives of the actors involved, such as the government, the opposition, the courts, the media, and the public. Therefore, constitutional governance requires constant dialogue, deliberation, and accountability among these actors, as well as the adaptation of the constitutional system to the changing circumstances.

ROLE OF EMERGENCY POWERS

Emergency powers are the special powers granted to the executive branch of the government during situations of grave danger or threat to the nation, such as war, natural disaster, or civil unrest. Emergency powers are usually derived from constitutional provisions that authorize the executive to declare a state of emergency, suspend or limit some constitutional rights and procedures, and take extraordinary measures to restore order and security. Emergency powers are intended to enable the government to act swiftly and decisively to deal with the crisis, and to protect the public interest and the constitutional order⁵.

However, emergency powers also pose a challenge to the constitutional endurance and the rule of law, as they may be misused or abused by the executive to expand its authority, suppress dissent, and violate human rights. Therefore, emergency powers need to be regulated and monitored by the constitution and other institutions, such as the legislature, the judiciary, and the civil society. The constitution should specify the conditions, procedures, and limits for the declaration and termination of a state of emergency, the scope and duration of the emergency powers, and the safeguards and remedies for the protection of the rights and interests of the people. The legislature should have the power to approve, review, and revoke the state of emergency, and to oversee the actions of the executive. The judiciary should have the power to adjudicate the constitutionality and legality of the emergency measures, and to provide relief to

⁵ Christian Bjørnskov, Stefan Voigt, *et.al.*, “Emergencies: On the Misuse of Government Powers” 100 *Springer* 1-32 (2021).

the victims of the emergency. The civil society should have the power to inform, educate, and mobilize the public, and to hold the government accountable for its emergency actions.

One of the most relevant and controversial cases of the use of emergency powers in India is the Emergency of 1975-77, which was declared by Prime Minister Indira Gandhi under Article 352 of the Constitution, on the grounds of “internal disturbance”. The Emergency gave sweeping powers to the executive to suspend the fundamental rights of the citizens, to censor the media, to arrest and detain political opponents, to amend the Constitution, and to interfere with the functioning of the states. The Emergency was widely criticized as a dictatorial and undemocratic move by Indira Gandhi, who wanted to suppress the growing opposition and the popular movements against her government. The Emergency had a lasting impact on the constitutional endurance and the rule of law in India, as it exposed the weaknesses and loopholes of the constitutional system, and also triggered a series of constitutional reforms and judicial interventions to prevent the recurrence of such a situation. Some of the major constitutional amendments and judicial decisions that were influenced by the Emergency are:

- The **Forty-fourth Amendment** (1978), which reversed some of the changes made by the Forty-second Amendment during the Emergency, such as restoring the power of judicial review, reducing the duration of the emergency, and requiring the approval of both Houses of Parliament for the proclamation of emergency. It also added a new clause to Article 352, which required that the emergency could only be declared on the basis of “armed rebellion” and not “internal disturbance”.
- The **Minerva Mills case** (1980)⁶, which struck down two clauses of the Forty-second Amendment that gave unlimited power to Parliament to amend the Constitution, and that excluded any judicial review of the constitutional amendments. The Supreme Court held that the basic structure of the Constitution, which includes the supremacy of the Constitution, the separation of powers, and the judicial review, could not be amended by Parliament.
- The **ADM Jabalpur case**⁷ (1976), upheld the suspension of the right to life and liberty during the Emergency, and denied the right of habeas corpus to the detainees. The

⁶ *Minerva Mills v. Union of India*, (1980) 3 SCC 625

⁷ *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207

Supreme Court held that the President's order under Article 359, which suspended the enforcement of fundamental rights, was valid and could not be challenged in any court. This case is widely regarded as the darkest hour of the Indian judiciary and was later overruled by the Supreme Court in the Puttaswamy case (2017), which recognized the right to privacy as a fundamental right.

INTERNATIONAL LAW AND CONSTITUTIONAL RESPONSES

International law and constitutional responses are related in three ways:

- International legal frameworks can influence the constitutional adaptations of states, especially when they face crises. For example the World Trade Organization, the International Monetary Fund, and the World Bank have influenced the economic and fiscal policies of India, which have required constitutional amendments to introduce the Goods and Services Tax and the Fiscal Responsibility and Budget Management Act⁸.
- International law can shape the constitutional responses of states to crises, by providing norms, standards, and mechanisms for addressing them. For example, the Indian Independence Act of 1947, the Radcliffe Award of 1947, the Liaquat-Nehru Pact of 1950, and the Shimla Agreement of 1972 were some of the international legal instruments that influenced the constitutional response of India to the Partition⁹
- International law can create tension between the national sovereignty and the international obligations of states, as they may have to balance their own interests and preferences with the expectations and demands of the international law. These relations affect the constitutional endurance in crisis, which requires a careful and prudent balance between the national and international interests and values.

⁸ The Constitution of India and International Law (ipleaders.in)

⁹ IMPLEMENTATION OF INTERNATIONAL LAW IN INDIAN LEGAL SYSTEM by Vivek Sehrawat *

COMPARATIVE ANALYSIS

Constitutional endurance in crisis can be better understood by comparing the constitutional responses of different states across various types of crises, such as health, economic, and political crises. By doing so, we can identify the commonalities and differences in the constitutional reactions, and extract the lessons for constitutional design that can enhance the resilience and adaptability of the constitutional system.

Health, economic, and political crises are three major categories of crises that can pose serious challenges to the constitutional endurance of states. Health crises are situations where a disease or a health hazard threatens the life and well-being of a large number of people, such as the COVID-19 pandemic, the Ebola outbreak, or the HIV/AIDS epidemic. Economic crises are situations where a financial or a market failure disrupts the stability and growth of the economy, such as the Great Depression, the Global Financial Crisis, or the Eurozone Crisis. Political crises are situations where a conflict or a violence undermines the legitimacy and authority of the government, such as the Arab Spring, the Brexit Referendum, or the Capitol Riot.

The constitutional responses of states to these crises may vary depending on the nature, severity, and duration of the crisis, as well as the constitutional system, culture, and context of the state. However, some general patterns can be observed, such as:

- The declaration of a state of emergency, which grants the executive branch extraordinary powers to deal with the crisis, and may suspend or limit some constitutional rights and procedures. For example, many states declared a state of emergency to respond to the COVID-19 pandemic, which allowed them to impose lockdowns, quarantines, and travel bans, and to access emergency funds and resources.
- The amendment of the constitution, which formalizes the changes to the constitutional provisions or principles to address the crisis, and may modify the constitutional design or structure accordingly. For example, many states amended their constitutions to respond to the Global Financial Crisis, which required them to adopt fiscal rules, debt limits, or balanced budget amendments.
- The interpretation of the constitution, which clarifies the meaning and application of the constitutional norms or standards to the crisis, and may resolve the constitutional

disputes or controversies arising from the crisis. For example, many states relied on the interpretation of their constitutions to respond to the Brexit Referendum, which raised questions about the constitutional status, role, and rights of the United Kingdom, Scotland, Northern Ireland, and the European Union.

The comparison of constitutional responses across crises can also provide the lessons for constitutional design, which can inform and improve the constitutional endurance in crisis. Some of the lessons are:

- The balance between stability and flexibility, which means that the constitution should provide a stable and predictable framework for the exercise of state power, but also allow for some flexibility and adaptability to cope with the changing and uncertain situations of crisis. For example, a lesson from the constitutional responses to the COVID-19 pandemic is that the constitution should have clear and consistent rules for the declaration and termination of a state of emergency, but also grant some discretion and latitude to the executive to take necessary and proportionate measures to protect public health and safety.
- The balance between centralization and decentralization, which means that the constitution should allocate and distribute the powers and responsibilities among the different levels and branches of government, but also ensure some coordination and cooperation among them. For example, a lesson from the constitutional responses to the Global Financial Crisis is that the constitution should have a strong and independent central bank to regulate and supervise the monetary and financial system, but also involve the legislature and the judiciary in the oversight and accountability of the fiscal and economic policies.
- The balance between sovereignty and integration, which means that the constitution should preserve and protect the national identity and interests of the state, but also recognize and respect the international norms and obligations of the state. For example, a lesson from the constitutional responses to the Brexit Referendum is that the constitution should have a clear and democratic process for the withdrawal or accession of the state from or to a regional or international organization, but also safeguard the rights and interests of the citizens and the regions affected by the decision.

CHALLENGES TO CONSTITUTIONAL ENDURANCE DURING AND AFTER CRISES

Crises are situations of grave danger or threat to the stability and security of a state and its people, such as wars, natural disasters, pandemics, terrorist attacks, or political upheavals. Crises pose serious challenges to the constitutional endurance of states, such as:

- The legitimacy challenge, which refers to the loss or erosion of the public trust and confidence in the constitution and the constitutional institutions, due to the perceived failure or inadequacy of the constitutional response to the crisis, or the perceived violation or deviation from the constitutional norms and standards by the constitutional actors.
- The stability challenge, which refers to the disruption or breakdown of the constitutional order and the constitutional system, due to the escalation or intensification of the crisis, or the emergence or exacerbation of the constitutional conflicts or controversies among the constitutional actors or the constitutional levels or branches of government.
- The adaptability challenge, which refers to the difficulty or resistance of the constitution and the constitutional actors to cope with or adjust to the changing and uncertain situations of the crisis, or to learn from or implement the lessons or reforms of the crisis.

ROLE OF CHECKS AND BALANCES IN MITIGATING ABUSES OF CONSTITUTIONAL POWER

Checks and balances are the mechanisms and processes that ensure the separation and distribution of powers and responsibilities among the different levels and branches of government, and that enable the oversight and accountability of the actions and decisions of the constitutional actors. Checks and balances play a vital role in mitigating the abuses of constitutional power, especially during crises, such as:

- Preventing the concentration or usurpation of power by the executive branch, which may be tempted or justified to exercise extraordinary or emergency powers, or to suspend or

limit some constitutional rights and procedures, to deal with the crisis, but which may also entail the risk or reality of dictatorship, authoritarianism, or tyranny.

- Preserving the role and function of the legislative and judicial branches, which may be sidelined or undermined by the executive branch, or by the crisis itself, but which are essential for the representation and participation of the people, the protection and enforcement of the rights and interests of the people, and the resolution and adjudication of the constitutional disputes or controversies arising from the crisis.
- Promoting the coordination and cooperation among the different levels and branches of government, which may have different or conflicting views or interests regarding the crisis, but which are also interdependent and complementary for an effective and efficient response to the crisis, and for the restoration and recovery of the constitutional order and system.

STRATEGIES FOR ENHANCING CONSTITUTIONAL RESILIENCE IN FUTURE CRISES

Constitutional resilience is the capacity of a constitution to withstand and overcome the challenges posed by crises, and to emerge stronger and better from the crises. Constitutional resilience is a desirable and achievable outcome of constitutional endurance, which can be enhanced by various strategies, such as:

- Strengthening the constitutional culture and education, which means fostering and cultivating the awareness, understanding, and appreciation of the constitution and the constitutional values and vision among the constitutional actors and the citizens, and providing and facilitating access, information, and resources for the constitutional learning and development of the constitutional actors and the citizens.
- Improving the constitutional design and structure, which means reviewing and revising the constitutional provisions and principles to address the gaps, loopholes, or biases in the constitutional system, and to incorporate the best practices, standards, or innovations in the constitutional governance, especially in the areas of human rights, democracy, rule of law, and federalism.

- Developing constitutional foresight and preparedness, which means anticipating and analysing the potential or emerging crises that may affect constitutional endurance, and devising and implementing the plans, policies, or measures to prevent, mitigate, or respond to the crises, as well as monitoring and evaluating the outcomes and impacts of the crises.

CONCLUSION

Constitutional endurance is the ability of a constitution to survive and function effectively in times of crisis, as well as to adapt and evolve in response to changing circumstances and demands¹⁰. In this paper, I have explored various aspects of constitutional endurance, such as:

- The definition and measurement of constitutional endurance, and the factors and conditions that affect it.
- The comparison and evaluation of constitutional responses across different types of crises, such as health, economic, and political crises.
- The influence and impact of international law on constitutional adaptations and reactions to crises.
- The challenges and opportunities for enhancing constitutional resilience and innovation in future crises.

Understanding constitutional endurance in crisis is important for the preservation and promotion of the constitutional values and vision that define the identity and destiny of a nation. Constitutional endurance is not a given or a guarantee, but a challenge and a goal, which requires constant vigilance, participation, and evaluation by the constitutional actors and the citizens.

Constitutional responses to crises are not static or fixed, but dynamic and evolving, which reflect the nature and context of the crisis, the constitutional system and culture, and the political and social forces at play. Constitutional responses to crises can also provide lessons and insights for constitutional design, which can inform and improve constitutional governance in crisis.

¹⁰ Zachary Elkins, Tom Ginsburg, *et.al.*, “The Endurance of National Constitutions” *Cambridge University Press* 207-214 (2009).

Therefore, constitutional endurance in crisis is not only a matter of law, but also of politics, ethics, and civic engagement. It is a collective and collaborative endeavour, which involves the interaction and cooperation of the national and the international, the formal and the informal, and the present and the future constitutional actors and stakeholders.