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Critical Analysis Of Ackerman's Emergency Constitution

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Received-23.05.2024, Revised-30.05.2024, Accepted-08.06.2024 E-mail: aaryvrat2013@gmail.com

Abstract: *Bruce Ackerman's emergency constitution offers a theoretical framework designed to provide guidance for governments during emergencies. It establishes specific guidelines and principles aimed at balancing the need for effective government action in crisis situations with the protection of civil liberties and adherence to constitutional principles. This framework seeks to address the challenge of prolonged emergencies. However, Ackerman's framework faces several limitations, raising questions about the practicality of implementing his approach. Numerous challenges impact its feasibility and enforceability in liberal democracies worldwide. This raises the question whether Ackerman's emergency constitution truly a viable method for managing government operations during crises. The current paper critically explores the success of Ackerman's proposal that largely hinges on the context and manner of its implementation. Adopting such a framework calls for a thorough and detailed evaluation of its pros and cons in today's context. There is a pressing need to establish a robust emergency powers framework that balances governmental security concerns with the protection of individual rights.*

Key Words: Emergency Constitution, Supermajoritarian Escalator, Executive Overreach, Civil liberties.

Bruce Arnold Ackerman is a Sterling Professor at the Yale Law School. In 2004, his essay *The Emergency Constitution* was published in the *Yale Law Journal*. As the title suggests, Ackerman proposes a statute to deal with a state of emergency, an urgent rework of the American constitutional concepts related to emergency powers and safeguarding civil liberties. The events of September 11 (2001) shook the conscience of nations across the globe. With the passage of time, it became evident that multiple non-state agents have acquired access to weapons of mass destruction and advanced technology, making them equally powerful as the state agents. There's a need for adopting emergency powers by nations across the globe that can break the vicious and abusive cycle of repressive laws and new forms of terror attacks. While developing a coherent and durable framework that can break through in times of uncertainty such as that during the period of an emergency, it's imperative to weigh in the influence of such a scheme on the domain of civil liberties. War against countries will eventually come to an end but the war against terrorism is endless. The government has to strike a balance between its competing interests of either having a totalitarian understanding of freedom, where they can interfere in the realm of individual's exercise of their liberty, or strict protection of civil liberties from their arbitrary actions when emergency is proclaimed.

Ackerman's proposal of an emergency constitutional regime is pivoted around the idea that a state of emergency shall be of limited time period in order to avoid normalisation of emergency powers. The newly fashioned emergency regime shall exhibit the ability to have the panicked public under control while also facilitating the government to take effective short-term measures to counter threat. Since the American Constitution doesn't allow the unlimited use of emergency powers, Ackerman argues that an emergency powers statute should entail the authorization of expanded powers of the President for a certain time period in a well-defined manner, maybe a week or two, till the legislature has considered the matter. During this time period, an alternative criminal justice system would exist where the President has substantial power to detain anyone on mere suspicion, the right to suspend writ of habeas corpus for reasons regarding "public safety" and the power to abstain from judicial review of the legality of such detention. The government has to reassure its panicked public that aggressive measures are taken to curb the predicament in order to avoid its recurrence. Post the proclamation, the President has to return to the Congress routinely every two months for reauthorization of the emergency. The continuation of emergency would only be granted if the Congress periodically voted in favour with a majority, wherein the escalating supermajority would gradually increase to 80%, ultimately resulting in the end of state of emergency in a timely manner. This is the supermajoritarian escalator intended to maintain a check on the possible abuse of powers by the executive. Ackerman justifies the overlooking of the minority opinions during the period of emergency due to its critical short-lived nature, ruled by uncertainty and need for immediate action. He also recommends a financial scheme which, based on principles of justice, would provide compensation to the individual for the time spent in detention as a substitute for their encroached freedom to uphold the security of the nation. Ackerman is of the belief that the courts would not function as efficiently during the state of emergency



due to the state of panic that dominates the collective consciousness and their usual subservient attitude towards executive's assertions on national security issues would result in limiting their role as forefront legal actors. There would be limited procedural as well as substantive rights available to those detained. Hence, Ackerman's proposal for the revision of the constitutional design dealing with emergency powers elaborates on bringing about structural changes to its mechanism for the period of the emergency to be short-lived. He strives to prepare a pre-committed plan for the times of uncertainty when the efficiency of the organs of government to carry out their functions may be severely impacted in a panic driven environment of crisis.

However, Ackerman's premises suffer from the various shortcomings which may point to the impracticality of adopting his approach. There are various challenges to its feasibility and practicality of its enforcement in liberal democracies across the globe. Is Ackerman's proposal of an emergency constitution a reasonable way to regulate the functioning of the government during times of crisis? Let us critically explore it further.

LIMITED PERIOD OF EMERGENCY- Ackerman's proposed arrangement of the constitutional regime is based on the idea that a state of emergency should last for a limited period of time. There's a dire need of short-term measures to counter the imminent threat of terrorism to the sovereignty of the nation in order to avoid permanent irreversible damages to the polity, social unity and legal order of the nation. He assumes that even though the nature of emergencies may not be alike, emergency powers can be alike. This generalisation of operation of emergency powers cannot be sustained as a global solution to counter uncertainty as the threat that terrorism guises is of complex and distinct nature. As history is testament, emergencies have the potential to exist for longer periods due to the constantly evolving nature of threats, making its discourse unpredictable. Ackerman's endeavour to restrain the emergency time periods as an end goal is commendable. However, the means adopted to attain it are flawed.

The supermajoritarian escalator would be insufficient to deal with the abridgement of civil liberties of individuals. Mass incarceration of individuals on a non-objective basis of suspicion would only "make" the public feel safe. It would not ensure their actual safety from threats. A mere political safeguard is inadequate to resolve peripheral issues related to national security during a crisis. There are situations where even post withdrawal of emergency measures, there is a pressing need for continuation of non-emergency measures due to the spillover effects of arbitrary measures adopted during the crisis. Setting a general limit to the conclusion of the emergency period goes against the dogma of the varied capability of nations to respond to war-like situations.

Hence, it's not only about the proper maintenance of political structure while countering threats. The goal should be to weaken the ability of terror groups to subsist. The source of their survival has to be hit hard. Due to the unequal distribution of power and resources, nations respond to war-like situations in a diverse manner. The short-term measures should focus on the sustainability of social unity and political order in the long term. Even if an emergency lasts for a longer time, what's valuable is its ability to bring the status quo in the social, political, economic and legal realm that existed prior to its proclamation.

SUPERMAJORITARIAN ESCALATOR- According to Ackerman, the central idea of providing the Executive expanded emergency powers is in lieu of the supermajoritarian escalator. The emergency has to be declared by the President in response to an actual attack. Congressional termination of the emergency can facilitate restraining the executive from making whimsical permanent fixtures by periodically voting for its continuation. It acts as a barrier to indefinite continuation of the emergency. This helps counteract the normalisation of the state of emergency by setting the course of the extra constitutional regime on a trail of a gradual ending over several months. This political check induces the tendency of using emergency powers rather more consciously and cautiously by the President.

However, this does not bar the future Congress from easily overriding the application of supermajoritarian escalators as it's merely an enactment, not a constitutional amendment. If the majority, let's assume 79%, believes the emergency should be put to an end, the minority 21% would still rule the continuation of the emergency. This would also push the future Congress to reconsider the option of abandoning the emergency statute altogether. If they feel the need to adopt a more nuanced approach suited to countering an existing threat, a pre-committed emergency statute may not be the best choice for them. The supermajoritarian escalator also does not address the host of difficulties surrounding issues of violation of civil liberties that far outweigh the benefits gained by imposition of arbitrary emergency measures for reassuring public safety. It's also important to observe that the supermajoritarian escalator will have no effect on the detentions that take place immediately after the proclamation of emergency.

As a result, does it really counter the possible discretionary actions of the President that encroach upon the exercise of civil liberties of an individual? Will it act as a strong restraint on exercise of discretionary presidential power during the



next crisis? Ackerman's underlying assumption here is that the Executive would act in a despotic manner and to constrain it, a statute has to be put in place prior. However, the US is a liberal modern state and authoritarianism is not a highly probable consequence anytime soon, while there exists a strict framework of checks and balances on the organs of the government.

PREVENTIVE DETENTION- Ackerman's premise entails that the government has to work on the reassurance rationale during times of crisis. The aim is to counter the threat of the crisis with short term measures in order to avoid possible damages in the long run. It indicates the need for the state to act in a swift manner to demonstrate its ability to take combative actions against terror groups who threaten its sovereignty and safety of the public. This would reassure the panic-stricken public that the state has contained the crisis threatening their survival. The political freedom of the executive is at its peak during the time between the proclamation of emergency till the point where the supermajority decides to end its operation. However, it does not imply the Executive has unlimited discretionary power to encroach upon the liberty of its citizens under the *carte blanche* of critical measures to secure public safety. The proposed emergency constitution provides the President with expanded powers during the proclamation of emergency where individuals can be detained on the basis of suspicion. Such detention may last up to 45-60 days. Ackerman believes this dragnet is justified in pursuit of reassurance rationale as such actions would make the public feel secure about their survival. However, he's critical of suspicion-less detention where individuals are detained without evidence of their wrongdoing as it violates due process and individual's rights.

He argues that an emergency constitution shall limit suspicion-less detention by subjecting the government's use of emergency powers to check and balances and suspension of the civil liberties should be curbed to prevent abuse of power. There's a need to strike a balance between upholding the security of the nation during a crisis and encroaching upon civil liberties and rule of law. He also highlights the role of the judiciary here in order to review and monitor the actions of the executive in order to prevent its overreach. However, Ackerman has not explained the basis on which it is justified to exempt some liberties of individuals during the operation of emergency powers and neither has he addressed the reasonable grounds of such suspicion. Due to this vagueness, the conundrum here is that Ackerman wishes to secure the safety of the citizens on one hand, and also supports a dragnet of detention during times of crisis. The complete suspension of a required explanation of a certain level of threshold breeds arbitrary use of the detention powers to fulfil unwarranted desires of the majoritarian regime (e.g., racial profiling). Merely detaining the innocents on the reassurance rationale is not a sufficient trade off with encroachment into the domain of their civic rights. Such detention also signifies that the Executive is rather more concerned about their political image than actual safety of its citizens.

Nevertheless, it's important to highlight that even if such detention is allowed for, the executive should exercise their powers in a cautious manner. The encroachment into the domain of civil liberties should be on justifiable grounds in order to uphold the rule of law.

COMPENSATION- Ackerman provides for a compensation scheme as an action of the government to those individuals who were detained initially during the crisis to counter their losses. Such a scheme holds the government accountable for their actions during the emergency period and ensures that experiences of individuals who suffered harm are acknowledged and addressed. It is a means of restitution for the victim and their families and leads to future governments abstaining from engaging in excessive use of emergency powers. It would also deter the executive from unnecessary detentions as higher the number of detainees, higher the cost to be incurred by the government for the restoration of their losses. Such a scheme helps build trust in the government institutions by demonstrating that the government will take due actions for fair treatment of its citizens during times of uncertainty and chaos.

However, implementing such a scheme can be a financial burden for the government in case the damages incurred due to the emergency are widespread, restraining their overall ability in responding responsibly to the crisis. It would require the government to divert its funds from investment in other critical needs during a period of crisis. Ackerman also does not describe the process of who would exactly be eligible for this compensation. What's the objective basis of granting such compensation? Would it only be granted to the individuals who are eventually found innocent? Will it truly compensate for the losses suffered by the victims whose freedoms were encroached upon? Will such compensation necessarily deter the government from unfairly detaining individuals? These are some questions that remain unaddressed under this compensatory scheme.

ROLE OF JUDICIARY AS FOREFRONT LEGAL CUSTODIAN- Ackerman presumes the legislative branch to act more effectively than the executive branch as it has to be politically receptive in responding fairly during times of crises. During the early stages of the crises, it is justified for the legislature to have a more proactive role than the judiciary as the government simply cannot afford serious judicial review at the time when the sovereignty of the nation is being threatened.



The arbitrary misuse of emergency powers by the executive should be subjected to the scrutiny of constitutional courts as its decisions will have a major impact on the public and political image of the executive. However, the American judges usually abstain themselves from providing advisory opinions. Their proactive role can help counter the harmful effects that follow when a supermajority has considered the end of an emergency but the executive continues to execute its emergency powers. The courts have to cautiously apply their judicial minds in ascertaining the legality of the executive's actions for the purpose of setting meaningful precedents. Since their political notion is dear to the executive, going against the verdict of the courts would cast them in the bad light as an enemy of the constitutional order. This would also deter the future members of the executive from engaging in irresponsible behaviour.

At the micro level, the courts adjudicate on issues that go beyond the domain of separation of powers. The primary focus is on the instances related to infringement of civil liberties of the citizens. The supermajoritarian escalator would assist in streamlining the course of actions courts may pursue when the actions of the executive are of despotic nature. However, deferring the adjudication of the legality of detention till the detention has ended is a major limitation. The role of the judiciary is to determine the constitutionality of the emergency measures deployed during the period of crisis. Hence, it's important to acknowledge that there are situations wherein the detrimental effects of delaying the access to justice outweighs the benefits of emergency measures solely based on the reassurance principle.

Ackerman also talks about suspension of writ of habeas corpus at the onset of the emergency period as the urgency to attend to the crisis at hand becomes the utmost priority of the government. According to the suspension clause in the American constitution, the writ of habeas corpus, that protects the liberty of the citizens, is suspended only in case of exceptional circumstances, such as an "invasion" or "rebellion". The framers of the American constitution intended to suspend the writ only when it's necessary to ensure public safety, not for "reassuring" their safety. There are existing US detention laws that don't suspend the writ of habeas corpus. However, the context of an emergency period is altogether a different set of circumstances. Ackerman also believes the supermajoritarian escalator would inhibit widening scope of interpretation of the terms "Invasion" and "Rebellion", possibly limiting the suspension of habeas corpus to only exceptional circumstances. In its application, the proposed emergency constitution does away with prompt (not complete) access to adjudication of the legality of detention of all, including wartime as well as non-wartime detainees. Judicial review of the emergency measures and their outcomes at a later stage can help the courts have a better understanding of the course of events to determine the legality of the wartime detentions as well as outcomes of emergency measures. There's need for more clarity on the cost and benefit analysis of eliminating judicial review completely from the purview of determining the legality of detention at the initial stage of the emergency. As per the doctrine of stare decisis, strict rulings by the courts regarding exercise of emergency powers by the executive can help set precedents that will deter its future members from misusing such powers for their own political gains. Nevertheless, the judges have to cautiously determine their course of actions in response to the emergency measures and its outcomes.

CONCLUSION- Bruce Ackerman's emergency constitution is a theoretical framework that sets out certain guidelines and principles to guide the government during periods of emergency. It aims to strike a balance between the government's need to respond effectively in times of crisis and the protection of civil liberties and constitutional principles. The framework strives to address the issue of an emergency lasting for longer periods of time. His concept of supermajorities would ensure the end of emergency in a timely manner while also checking on the possible abuse of emergency powers by the executive. However, it would not necessarily be able to counter most of the possible terror threats in a short span of time. Ackerman has also not addressed other risks (than preventive detention) to civil liberties during such times and focused mostly on the structural aspects of the organs of the government. There's also scope for future governments to exploit the framework for attaining personal political advantage as it advocates for detention on no objective criteria of suspicion. The effectiveness of his proposition truly depends on how and in which circumstances it's implemented. Its adoption requires a more nuanced and comprehensive analysis of its advantages and disadvantages in today's time. There's an urgent necessity to develop a well-designed emergency powers framework that accounts for the government's security needs as well as the rights of individuals.

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