

‘The legalisation of dictatorial rule: Indira Gandhi’s Emergency (1975-1977)’

“O’Casey, D.E.M., beloved husband of T. Ruth, loving father of L.I. Bertie, brother of Faith, Hope and Justitia, expired on June 26,¹” read the obituary section of the *Times of India* on 28 June 1975, two days after India, for the first time since independence, fell to dictatorial rule, showing that its liberal and democratic Constitution failed to protect fundamental rights and uphold the separation of powers in government.

The Indian Constitution is regarded as one of the most democratic in the world, with many checks and balances on the different branches of government. Despite many challenges to Indian democracy, it has, unlike other South Asian states, prevented the rise of dictatorial, military rule.² Nonetheless, there have been instances where its democratic ideals have been subverted and therefore weakened. Moreover, despite the democratic nature of the constitution, over time, laws that undermined the central tenants of the Constitution and erode the autonomy of institutions that are meant to curb governmental overreach were passed.

The Indian Emergency (1975-1977) was a watershed moment in India’s democratic history. It was period of dictatorial rule in Indian history imposed by Indira Gandhi, India’s third Prime Minister. During this period, the Indian government suspended fundamental rights of Indian citizens and undermined the separation of powers between the Executive, Legislature and the Judiciary. Unlike other instances where leaders have subverted their country’s constitution to gain power through coups, Indira Gandhi used provisions within the Indian constitution to declare Emergency. She also passed new laws to legalise her overreach and enforce it. Through an examination of different laws passed before the imposition of Emergency, such as the Maintenance of Internal Security Act (MISA) and the Defence of

¹ "When a smartly worded obit exposed the death of democracy - Times of India," The Times of India, June 26, 2015, accessed March 19, 2018, <https://timesofindia.indiatimes.com/india/When-a-smartly-worded-obit-exposed-the-death-of-democracy/articleshow/47823701.cms>.

² Tushar K. Barua, "Military regime in Pakistan and Bangladesh: a contrast in political processes," *Geographica Helvetica* 34, no. 2 (1979): accessed March 18, 2018, doi:10.5194/gh-34-68-1979.

India Act (DIA), and after its enactment, including the Thirty-Eighth, Thirty-Ninth and Forty-Second Amendments to the Constitution, this paper shall argue that any Prime Minister can use existing laws to subvert democratic traditions and civil liberties and that the legacy of The Emergency has impacted Indian politics even today.

Indira Gandhi, with the support of other members of the Indian National Congress (INC), became Prime Minister in 1966. She successfully split from the old guard INC who had initially supported her and became a dominant force in Indian politics. Her dominance was seen in the 1971 general elections when she earned over two-thirds of the available seats, a supermajority in Parliament.³ This supermajority enabled her to amend the Constitution. This overwhelming mandate, in addition to her party's success in the elections, resulted in a desire to reinforce her authority across the nation and in various institutions. As she began centralising decision-making in the INC and eliminating its democratic structures, she also began trying to increase executive authority in other parts of governments, primarily by reducing the power of the judiciary. This desire for more power resulted in tussles between her government and the courts, specifically over the extent that the government and parliament have in amending the Constitution and abrogating fundamental rights. These disputes are important in understanding the extent to which Mrs Gandhi attempted to undermine judicial powers during The Emergency.

Before delving into arguments about the Indian legal system and the changes The Emergency brought, a brief overview of Indian fundamental rights is needed. Part III of the Constitution guarantees Indians the right to freedom, equality, education, religion, constitutional remedies and the right against exploitation and explicitly states that any law that violates this part will be void. However, when the Constitution was enacted, there were

³ "General (5th Lok Sabha) Election Results India," Elections in India, accessed March 02, 2018, <http://www.elections.in/parliamentary-constituencies/1971-election-results.html>.

existing laws and later on, new laws that eroded said civil liberties. For example, Emergency provisions enabled the government to suspend fundamental rights if needed, which was the case whenever Emergency was enacted and when India was at war with China (1962) and Pakistan (1971).⁴

In addition to the Constitution, other Indian laws, allowed the government to infringe upon individual freedoms. The Indian Penal Code (IPC) and Criminal Code (ICC) contain many laws that subvert fundamental rights, like the freedom of speech and right to dissent, even though they violate parts of the Constitution. For example, under the IPC section 124A, a law from the British era, an individual could be arrested on sedition charges in an attempt to “bring into hatred or contempt...towards the Government established by law in India,”⁵ which has been routinely abused to arrest dissenters against the government. As recently as 2015, the Narendra Modi government arrested a college student in Delhi, Kanhaiya Kumar on this charge for protesting the execution of a Kashmiri separatist.⁶ Such laws, which were used by the British colonial government to suppress dissent, helped Indira Gandhi impose and reinforce her rule after Emergency was declared. When deemed necessary, governments have invoked these laws throughout India’s history. The presence of said laws reinforce the ease with which governments are able to subvert democracy in the name of national security, showing the fragility of Indian democracy across different eras.

Just as colonial IPC laws have been used in contemporary times to enforce governmental authority, Indira Gandhi used laws from the Nehruvian era to detain opposition and suppress individual freedoms. In 1962, following the Sino-Indian War, Jawaharlal Nehru,

⁴ Venkat Iyer, *States of emergency: The Indian experience* (New Delhi: Butterworths India, 2000), Pages 103, 131.

⁵ Jaspal Singh, *Indian penal code*, III ed. (Delhi: Pioneer, 1994), Page 128.

⁶ In 2016, students at Jawaharlal Nehru University (JNU) protested against the execution of Afzal Guru. The protest resulted in clashed between the Hindu Nationalist student union (ABVP) and Democratic Students Union (DSU). Police were called in to manage the clashes and later arrested Kanhaiya Kumar, president of the JNU student union.

India's first prime minister, declared External Emergency and suspended fundamental rights and the ability for one to move to the courts to enforce fundamental rights. To supplement this declaration, he introduced the DIA, which gave the government a wide-range of powers to detain and arrest individuals and limit their ability to challenge their detention in the courts.⁷ It also allowed the government to determine 'protected areas' and 'prohibited places,' or areas from where people could enter and exit. This limited the movement of people and violated their rights to free movement and to protest. Indira Gandhi used these rules during the 1975 Emergency to prevent the opposition from protesting and/or fleeing the country. Furthermore, the DIA was used to suspend the writ of Habeas Corpus in 1975, which allowed opposition to be indefinitely detained. The then Attorney-General in a 1976 court case argued against the writ of habeas corpus saying that "There is no rights for personal law at the time being,⁸" reinforcing the idea that Emergency powers were more important than civil liberties. The revocation of the writ showed that Indira Gandhi, using laws passed by her father, could reinforce her authority in the country. Good

Indira Gandhi also had plenty of laws to rely on after she had declared external emergency following the 1971 war with Pakistan. She reintroduced the DIA, but more importantly introduced the Maintenance of Internal Security Act (MISA), which conferred a wide-range of powers to the government varying from indefinite preventive detention, the ability to search and seize property without a warrant and to wiretap individuals.⁹ Moreover, because these laws were introduced under Emergency rule, the fundamental rights of Indians were suspended, which is why these draconian laws were allowed. This reiterates that the Indian Constitution and legal system has provided ways for leaders to legally impose dictatorial rule under certain circumstances without many constraints.

⁷ *States of Emergency*, Pages 105-108

⁸ William Borders, "Indian Court Upholds Political Jailings," *The New York Times*(New Delhi), April 29, 1976, accessed March 17, 2018, <https://timesmachine.nytimes.com/timesmachine/1976/04/29/75590253.pdf>.

⁹ *Ibid.* Pages 135-136

Despite the sweeping powers provided under the aforementioned laws, the judiciary was able to reign in governmental authority. Indira Gandhi however, after her thumping victory in the 1971 elections, attempted to subvert the courts. The question of judicial review and Parliament's supremacy in providing and revoking fundamental rights was discussed from the time the Constitution was enacted. However, from 1967 onwards, rulings from the Supreme Court aimed to limit the extent to which Parliament could amend them. In 1967, the Supreme Court ruled that Parliament could not, under any circumstance, abrogate fundamental rights enshrined in the Constitution. In response, Indira Gandhi, with the help of Parliament, passed the 24th Amendment, which said that Parliament had the power to amend and revoke any part of the Constitution, including fundamental rights.¹⁰ This law was extremely controversial because it allowed fundamental rights to be suspended. Many newspapers and opposition leaders protested the amendment and lamented the erosion of fundamental rights. Part of the 24th Amendment was deemed unconstitutional in a Supreme Court judgement in 1973 under the 'Basic Structure Doctrine,' that was introduced in this ruling. According to the Basic Structure Doctrine, Parliament does not have the authority to amend those parts of the Constitution that the court deems essential.¹¹ Although the doctrine did not indicate what articles fell under its purview, it generally refers to fundamental rights, the separation of powers, and equality of status and opportunity. Some justices defended this decision by saying, "...a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed,"¹² and thus outlined their logic for the Basic Structure Doctrine. This judgement further strained relations between the government and the Courts because it challenged Indira Gandhi's aim to increase her power.

Ramachandra Guha, Indian historian, explains how other members of the judiciary were

¹⁰ G. G. Mirchandani, *Subverting the Constitution* (New Delhi: Abhinav Publications, 1977), Page 34

¹¹ Bidyut Chakrabarty, *Indian constitution: text, context and interpretation* (New Delhi: SAGE Publications Ltd, 2017), Chapter 6, Page 119-135.

¹² *Ibid*, Page 127

particularly affected by Indira Gandhi's desire to subvert the courts. One Supreme Court justice, K.S. Hegde had expressed concern that "the political exigencies and self-interest of individual leaders [had] perverted the working of the administrative machinery,"¹³ and that "the centre has encroached on the powers reserved to states by recourse to extra-constitutional methods,"¹⁴ showing the extent to which influential and powerful individuals criticised Indira Gandhi's authoritarian tendencies and her desire to undermine checks and balances in the Constitution.

The final court case that cemented her desire to impose Emergency was one filed by Raj Narain, Indira Gandhi's opponent in the 1971 general elections. He alleged that Indira Gandhi used her influence as Prime Minister and resorted to bribery to win her Parliamentary seat. On 12 June 1975, the Allahabad High Court found her guilty of misusing government machinery for election, declaring her election victory null and void and banned her from running for office for six years.¹⁵ Although the Supreme Court ruled a few days later that Indira Gandhi could remain Prime Minister, she was unable to exercise privileges granted to Members of Parliament.¹⁶ This decision undermined her authority as Prime Minister and leader of the Congress Party, resulting in many opposition leaders, newspapers, journalists and intellectuals calling for her resignation.

In response to this judgement, the opposition, led by freedom fighter Jayprakash Narayan, went on a series of strikes and protests demanding her removal from politics. These protests, compounded with her various constitutional battles with the judiciary, reiterated her belief that her rule was under threat. Therefore, in her determination to cement her rule and prevent rivals from taking control, she declared internal Emergency citing "internal

¹³ Ramachandra Guha, *India after Gandhi: The History of the World's Largest Democracy*, 2nd ed. (New Delhi: Picador India, 2017), Page 470

¹⁴ *Ibid.*

¹⁵ *Ibid.*, Page 486

¹⁶ *Ibid.*, Page 487

disturbances,¹⁷ under Article 352, suspended fundamental rights, and arrested various opposition leaders.

At the onset of internal Emergency, on the night of 25 June 1975, the government not only reissued MISA and DIA, but also issued Censorship Orders, which compelled all publications to seek a censor's approval for their material before being released. The government then disconnected electricity supplies to major newspapers to ensure a media blackout.¹⁸ The President issued an Ordinance under Article 359(1) and suspended the rights of all people, including foreigners to move to any court for the enforcement of their fundamental rights under articles 14, 21 and 22. All pending cases in front of courts were also to be suspended during The Emergency period.¹⁹ These radical actions nonetheless were legal under Article 352 of the Constitution and aforementioned laws passed in previous Emergencies, showing that Indira Gandhi did have precedent to support her declaration of Emergency. Therefore, she did not have to create new laws to introduce Emergency but relied on previous ones instead.

Coomi Kapoor, in her book, *The Emergency: A Personal History* explains the extent to which Indira Gandhi's government abused MISA and DIA rules to curtail dissent. She notes that, "an ugly feature of arrests and detentions under DIA was the immediate rearrest of persons released on bail."²⁰ She also mentions how, upon declaring Emergency, Indira Gandhi cut off electricity to all newspapers and issued censorship orders to curtail any dissent under MISA.²¹ Kapoor's book highlights the extent to which Indira Gandhi was willing to go to entrench her rule, even if that meant bullying and intimidating opposition using pre-existing laws.

¹⁷ Constitution of India, 1950, article 352.

¹⁸ *States of Emergency*. Page 158.

¹⁹ *Ibid*, Page 159-160.

²⁰ Coomi Kapoor, *The emergency: a personal history*, Gurgaon, Haryana, India: Penguin, Viking, 2015, Page 41

²¹ *Ibid*. Page 52

Despite having so many laws to already support The Emergency, the government still passed many new laws to continue enforcing it and help cement Indira Gandhi's power. Some of the first laws passed after Emergency was declared were the Thirty-Eighth and Thirty-Ninth Amendments to the Constitution. The Thirty-Eighth Amendment retroactively made Presidential orders introduced during an Emergency period final and beyond the scope of the judiciary.²² This amendment therefore curbed the powers of the judiciary, which was the one institution that could have stopped an abuse of Executive power. It also prevented constitutional challenges to the suspension of fundamental rights, an issue that had been debated through the early years of her tenure, as seen in the 1967 court case.

The Thirty-Ninth Amendment tried to make the elections of the Speaker of the Lok Sabha (lower house of Parliament), President, Vice-President and Prime Minister beyond the scope of the courts,²³ rendering Gandhi's disqualification void and also curbing the powers of the one institution that had checked her power thus far and removed her from office. This bill tried to ensure that "the parliamentary law creating a new forum for trial of election matters relating to the incumbents of the high offices above mentioned shall not be called in question in any Court,"²⁴ reiterating the determination with which Indira Gandhi was able to subvert democracy to remain in office. The amendment also placed MISA under the Ninth Schedule of the Constitution. Laws under Ninth Schedule of the Constitution were beyond the scope of judicial review because they did infringe on fundamental rights and could only be removed by an act of Parliament that passes with a supermajority.²⁵ This move ensured that MISA would not be challenged in courts as being unconstitutional, allowing the government to legally violate fundamental rights.

²² Constitution of India, 1950.

²³ *Subverting the Constitution*, Page 41.

²⁴ Granville Austin, *Working a democratic constitution a history of the Indian experience* (New Delhi: Oxford University Press, 2011), Page 319.

²⁵ J. Venkatesan, "IX Schedule laws open to review," *The Hindu*, January 11, 2007, accessed March 06, 2018, <http://www.thehindu.com/todays-paper/IX-Schedule-laws-open-to-review/article14705323.ece>.

The most sweeping legislative change made by Indira Gandhi during The Emergency was the Forty-Second Amendment, which has been nicknamed ‘India’s Mini-Constitution.’ Looking at Statement of Objectives and Reasons for the amendment, it is clear that it was a way to address the hurdles Indira Gandhi faced while consolidating her power. Point three of the objectives says, “It is also proposed to...make special provisions for dealing with anti-national activities, whether by individuals or associations,²⁶” highlighting that this amendment was a way for the government to determine ‘anti-national’ activities, increasing its power of citizens. It also aimed to curb the Basic Structure Doctrine and reiterate Parliamentary supremacy over the Constitution by putting “the matter [purview of article 368 in amending the Constitution] beyond doubt.”²⁷ Most importantly, it attempted to limit the power of the High Courts in interfering in the government’s agenda by attempting “to secure the speedy disposal of matters of special importance in the context of the socio-economic development and progress” since “it is considered expedient to provide for administrative and other tribunals [to deal with such matters].”²⁸ Although these objectives appear to be written to help the nation, in reality, they all were ways for Indira Gandhi to deal with challenges to her power. Because she was disqualified from office by a High Court, she specifically tried to curb its powers. The opposition was clamouring for her resignation, which is why she wanted sweeping power to deal with ‘anti-nationals,’ or dissidents and since the Supreme Court’s rulings under the Basic Structure Doctrine limited her power to amend the Constitution, the amendment ensured Parliamentary supremacy in doing so, preventing the Supreme Court from challenging her. These aims alone show that despite using previous laws to impose Emergency, Indira Gandhi did introduce new legislation to remove institutional barriers to her authority.

²⁶ Indian Constitution, Amend, XLII. <https://archive.india.gov.in/govt/documents/amendment/amend42.htm>

²⁷ *Ibid.*

²⁸ *Ibid.*

One of the predominant features of the amendment was that it stressed Parliament's supremacy in the country and reduced the judiciary's powers in controlling the Executive's and Legislature's power. It specifically removed judicial review in guaranteeing fundamental rights²⁹ and therefore struck down the 'Basic Structure Doctrine' that was enshrined in the Supreme Court's 1973 ruling. It also prevented the judiciary from questioning any amendments made to the Constitution, undermining the separation of powers that had been envisioned. Therefore, through this amendment, Indira Gandhi was able to overpower one of the strongest institutions that could curb her rule, showing how important it was to cement her position in Indian politics.

Section five of the Amendment legitimised the arbitrary arrests that had occurred during this period by "saving laws in respect of anti-national activities," and said that these laws could not be made "void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, article 14, article 19 or article 31."³⁰ This was significant because it allowed the government to detain individuals under MISA and not have them questioned by the judiciary, removing any checks on governmental abuse. Thus, the executive could not be held accountable for violating fundamental rights, rendering India's checks and balances ineffective, the judiciary toothless and the people at the mercy of the government.

The Amendment also increased the duration of Parliament from five years to six, which allowed Indira Gandhi to postpone elections that were scheduled for 1976, allowing her to not be held accountable by voters.³¹ The Forty-Second Amendment let her prolong her rule indefinitely. Not only did this move extend her mandate, but it also allowed Parliament to legislate laws that would not be annulled by the judiciary. It shows that although Indira

²⁹ Rajeev Dhavan and Alice Jacob, *Indian Constitution: trends and issues* (Bombay: Tripathi Private, 1978), Page 11.

³⁰ Indian Constitution, Amend, XLII.

³¹ *Ibid*, section 17.

Gandhi was able to legally declare Emergency she was only able to enforce it and remove political opposition because of laws passed during The Emergency. In short, all the Constitutional Amendments passed during this time gave Parliament “unfettered power to preserve or destroy the Constitution,” writes Granville Austin, a leading expert in Indian Constitutional Law,³² and guaranteed her rule by creating new legal means to stay in office.

After Emergency was revoked, Indira Gandhi lost the 1977 general elections and the first ever non-Congress government lead by the Janata Party (People’s Party) was formed at the Centre. It repealed MISA, censorship orders, DIA and other abusive laws that had been passed during The Emergency. Through the 43rd and 44th Amendments, it undid parts of the Forty-Second Amendment. The Emergency provisions were amended to remove the ambiguous phrase that justified The Emergency, ‘internal disturbances’ to ‘armed rebellion’ to prevent an abuse of Emergency Powers. It also ensured that the President could only declare an Emergency if the decision was communicated to him in writing by the cabinet and two-thirds of both houses of Parliament agreed to such a declaration.³³ Furthermore, it restored power back to the High Courts and ensured that the judiciary could question the suspension of fundamental rights. Shanti Bhushan, a prominent lawyer who fought cases against Indira Gandhi’s government remarked that the 44th Amendment helped save Indian democracy.³⁴

Despite these reversals, the legacy of subverting democratic traditions continues in India even today, 43 years after The Emergency occurred. President’s rule has been imposed

³² Granville Austin, *Working a democratic constitution a history of the Indian experience* (New Delhi: Oxford University Press, 2011), 2012, accessed March 19, 2018, page 374, <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195656107.001.0001/acprof-9780195656107-chapter-19>.

³³ Indian Constitution, Amend, XLIV. <https://archive.india.gov.in/govt/documents/amendment/amend44.htm>

³⁴ Pretika Khanna, "The 44th amendment ensured democracy’s survival in India: Shanti Bhushan," Live Mint, June 23, 2015, accessed March 19, 2018, <http://www.livemint.com/Politics/zwYWP4CHWdDDZ3KY7xHUVK/The-44th-amendment-ensured-democracys-survival-in-India-Sh.html>.

124 times in independent India³⁵ and laws that subvert democratic freedoms, like the sedition law as previously mentioned, and the Armed Forces Special Powers Act (AFSPA) are still in use today. Many noted politicians and academics, such as Prem Shankar Jha, an economist and journalist are worried about the current BJP government's authoritarian tendencies. Jha writes, "Narendra Modi is driving the country towards an Emergency with a blooded efficiency that has only unflattering historical parallel."³⁶ L.K. Advani, a prominent member of the Janata Party, the main opposition to the Congress during the Emergency, in an interview, expressed concern at the weaknesses of Indian democracy in 2015 and believes that it could happen again. In his view, "the forces that can crush democracy, notwithstanding the constitutional and legal safeguards, are stronger."³⁷ These observations highlight that governments do have the authority to subvert the rule of law and if they want to and will do so.

In order to prevent another Emergency-like situation, the government itself has to be willing to relinquish some of its power and repeal outdated laws that were intended to entrench the rule of the colonial government. Ironically, the same tools that Britain used to rule the subcontinent have been used by successive governments, from Nehru in 1962, to Indira Gandhi in 1975 and Narendra Modi today. It seems as if democracy might not be so overtly attacked again, but the lack of institutional autonomy, the disregard for the rule of law and a backlogged judiciary will prevent Indian democracy from fully functioning. Indira Gandhi might have used precedent to institute The Emergency, but her actions during those two years severely undermined and threatened Indian democracy. Since then, the Executive

³⁵ "What is President's rule?" The Hindu, August 13, 2017, accessed March 19, 2018, <http://www.thehindu.com/todays-paper/tp-in-school/what-is-presidents-rule/article19487737.ece>.

³⁶ "Forty Two Years After the Emergency, India's Democracy is Once Again in Danger," The Wire, June 25, 2017, accessed March 19, 2018, <https://thewire.in/featured/forty-two-years-emergency-indias-democracy-danger>.

³⁷ Vandita Mishra, "Forces that can crush democracy are stronger...I don't have the confidence it (Emergency) cannot happen again: BJP leader LK Advani," The Indian Express, June 25, 2015, , accessed March 19, 2018, <http://indianexpress.com/article/india/india-others/forces-that-can-crush-democracy-are-stronger-i-dont-have-the-confidence-it-emergency-cannot-happen-again-l-k-advani/>.

has tried to increase its power by infringing on the autonomy of institutions and is trying to subvert democratic traditions once again, in more implicit ways.

Appendix

Relevant Constitutional Amendments & Laws

Law Name	Year Passed	Aim	Significance
24th Amendment	5 November 1971	Enable Parliament to amend and remove fundamental rights from the Constitution.	Allowed the government to violate fundamental rights. Led to the 'Basic Structure Doctrine' in a 1973 Supreme Court Ruling.
Thirty-Eighth Amendment	1 August 1975	Make Presidential orders during an Emergency beyond the scope of the courts	Orders passed by the President after the declaration of Emergency could not be questioned by the judiciary, removing checks on Executive power
Thirty-Ninth Amendment	10 August 1975	Prime Ministerial, Presidential and Speaker elections were placed beyond the scope of High Courts	Retroactively reversed Indira Gandhi's disqualification from Parliament. This enabled her to legally remain in office
Forty-Second Amendment	2 November 1976	Amend the basic structure of the Constitution, remove judicial review, enable Parliament to amend all aspects of the Constitution and remove checks on all Executive Authority	Legalised Indira Gandhi's suppression of fundamental rights, extended Parliament's term by another year, undermined democracy and removed individual civil liberties. Destroyed the basic structure of the Constitution.
Defence of India Act	1950, 1962, 1971, 1975	Provides sweeping powers to the government to arrest and detain individuals and also ban protests	Abused heavily during The Emergency to arrest and detain opposition.
Maintenance of Internal Security Act (MISA)	1971, 1975	Provides sweeping powers to the government to arrest and detain individuals; also suspends writ to habeas corpus	Abused heavily during The Emergency to arrest and detain opposition.
Censorship Orders	1962, 1971, 1975	All articles in publications had to be vetted and approved of by censors	Forced the press to comply with the government or be shut down

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