
THE CONSTITUTIONAL PARADOX: HOW EMERGENCY POWERS AND BLACK LAWS THREATEN DEMOCRATIC FREEDOMS IN INDIA

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ABSTRACT

This paper examines the tension at the heart of India's constitutional order: the very emergency powers designed to safeguard the state may, under certain conditions, undermine the democratic freedoms they are meant to protect. The research paper begins with a description of emergency rule under the constitution where the primary focus will be a discussion of Arts 352, 356, and 360 dealing with 'national emergency', 'state emergency', and 'financial emergency' respectively. Arts 352, 356, 360 aim at consolidation of the state and its governance, but decades of legal and political scholarship highlight the ominous embedding of the potential for the erosion of democracy within these provisions. The second thematic focus is on the 'black laws'. These laws are usually passed as emergency or exceptional legislation in the name of "national security or public order". They are built on the principle of concentration of power, the restriction of fundamental rights and the provision of flimsy legal procedural frameworks. The term "black laws" is historically most associated with the colonial legislation (like the 1919 Rowlatt Act, known as the "Black Act") or agricultural regulation where legislation is hastily passed with little public and legislative discussion, and a high degree of executive discretion is authorized. By means of doctrinal analysis, historical case studies, including the 1975-77 Emergency period, and a normative critique, this paper argues that the paradox created by the use of emergency powers and black laws is that while such provisions seek to protect a democracy, they simultaneously facilitate the stripping away of its fundamental elements: the "right to free speech", the "right to assemble", "due process", and state centrism. This paper proposes the addition of stronger safeguards (judicial safeguards, sunset provisions, parliamentary supervision, protections at the state level) and invites the study of this nexus of digital surveillance, state of emergency, and erosion of democracy.

Keywords: Black Laws, Art 352, Art 356, Emergency Powers, Constitution.

Introduction

The Indian Constitution is a thoughtful integration of liberty and power and an attempt at balancing the paradox of a strong unified state and individual autonomy. The authors of the Indian Constitution attempted to avoid authoritarianism after colonial subjection and the partition of the Country. They intended the Constitution to endure any internal disorder or external threat. This very framework carries a contradiction: the extraordinary emergency powers that may subvert the very democracy they are intended to defend. This is the paradox of the Indian Constitution. Part XVIII (Art 352 to 360)¹ emergency provisions were intended to defend the Republic in times of war, rebellion, or economic crisis, and should not have been intended as a routine governance tool. The intended purpose of these provisions was to temporarily preserve order. However, the consequences of the overreach of these provisions show the exercise of the will of the executive reflects the weakness of the democracy.

The rationale of necessity and security justifying “suspension of rights” and “centralisation of power” along-with the erosion of federal autonomy has been overused.² To compound this issue are the so-called ‘black laws’—legislation passed ostensibly for national security and public order, which extends the emergency paradigm into everyday life. From preventive detention laws to anti-terror legislation, these laws conflate legality and repression.³ Emergency laws and ‘black laws’ demonstrate how, without adequate safeguards and moral restraint, constitutional provisions can turn a democracy’s protective framework into a mechanism for control.⁴ This paper addresses this paradox and its consequences for constitutional morality, liberty, and governance in contemporary India.

Emergency Powers in the Constitutional Framework

Part XVIII of the Constitution empowers the executive to act decisively during threats to national security or constitutional order. The rationale was to prevent disintegration during emergencies, but the breadth of these powers has consistently raised fears of centralisation.

¹ The Constitution of India, 1950.

² James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (Chicago: University of Chicago Press, 2006), 45.

³ Diane Webber, *Preventive Detention of Terror Suspects: A New Legal Framework* (London: Routledge, 2016), 55.

⁴ Charles M. Fombad and L. A. Abdulrauf, "Comparative Overview of the Constitutional Framework for Controlling the Exercise of Emergency Powers in Africa," *African Human Rights Law Journal* 20, no. 2 (2020): 380.

Art 352 (National Emergency)⁵ allows the “President to proclaim an emergency when India’s security is threatened by war, external aggression, or armed rebellion.” During such periods, fundamental rights under Art 19 may be suspended, and Parliament assumes legislative authority over all state subjects. In effect, the constitutional order transitions into a unitary regime under the executive’s command.

Art 356 (President’s Rule)⁶ authorises the President to assume control of a State’s administration if its government cannot be carried on constitutionally. This provision, originally intended as a safeguard, has often been exploited for political purposes—dismissing opposition-led governments and weakening federal autonomy.

Art 360 (Financial Emergency)⁷ empowers the Union to assume fiscal control if the nation’s financial stability is endangered. Although never invoked, it permits drastic curbs such as salary reductions for public servants, posing latent threats to economic governance and autonomy.

Historical Experience and the Crisis of 1975–77

The Emergency of 1975 remains the most vivid demonstration of constitutional vulnerability. Declared by Prime Minister Indira Gandhi under Art 352⁸ on the grounds of “internal disturbance,” it suspended fundamental rights, censored the press, and authorised mass detentions under the “Maintenance of Internal Security Act (MISA)”. The event transformed India’s parliamentary democracy into an executive autocracy cloaked in constitutional legality.

The judiciary’s response deepened the paradox. In **ADM Jabalpur v. Shivkant Shukla (1976)**⁹, the SC’s majority ruled that during an emergency, even the “right to life” could be suspended. Justice H.R. Khanna’s lone dissent—asserting that “life and liberty are not gifts of the State”—remains one of Indian constitutionalism’s defining moral statements. The subsequent **Forty-Fourth Amendment (1978)** sought to redress the abuse: it replaced “internal disturbance” with “armed rebellion,” mandated Cabinet advice in writing, and ensured that Arts 20 and 21 could “never be suspended”.

Yet, the Emergency’s legacy persisted beyond its formal withdrawal. Art 356 continued to

⁵ The Constitution of India, 1950.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ AIR 1976 SC 1207.

serve as an instrument of political control, invoked over a hundred times in post-Independence history. The SC's judgment in **S.R. Bommai v. UOI (1994)**¹⁰ imposed judicial limits by requiring that the President's satisfaction be subject to review and that majority support must be "tested on the Assembly floor". Nonetheless, the centralising impulse remains embedded in constitutional practice.

The Continuum of Black Laws

Judicial scrutiny has been inconsistent. In **Kartar Singh v. State of Punjab (1994)**¹¹, the SC held that apart from constitutional emergencies, there is no reason why during peacetime does the state require the power, enacted in peacetime, 'black laws'. Although draped in claims of legitimacy, these laws, likely repression, have colonial origins: "the 1919 Rowlatt, or Black, Act, and the post-Independence Preventive Detention Act (1950), MISA (1971), TADA (1985), POTA (2002), and the UAPA, or Unlawful Activities (Prevention) Act (1967, amended 2019)." Regarding these laws, What do they have in common, besides the peacetime stroke of the pen, 'black laws', the grievances black letter laws? What, for instance, "abrogation of the right to a defense", the "right to silence", and exclusion the "right to due process"? Under TADA, one could be detained for years without know the charge and 'anti-national' literature could be possessed. POTA did little to reverse the UAPA, which still stands as India's principal counter-terror legislation enacted in 2005.

The court sustained the constitutionality of TADA while recognizing possible abuse of the statute. The judgement revealed a broader issue faced by the judiciary: how to reconcile individual freedom with the demands of national security. The statutes preventively define 'justice' and promote the institutionalization of a 'permanent emergency' and the normalisation of the extraordinary powers of the state in peacetime.

Doctrinal and Normative Reflections

Doctrinally, both emergency provisions and black laws remain constitutional; normatively, they challenge the essence of constitutionalism. The framers envisaged these powers as temporary safeguards, but vague textual triggers—"security of India," "public order," "sovereignty"—permit broad discretion. The issue thus lies not merely in legality but in

¹⁰ 1994 SCC (3) 1.

¹¹ 1994 SCC (3) 569.

constitutional morality.

The Indian judiciary's post-Emergency jurisprudence has attempted to restore balance. In **Maneka Gandhi v. UOI (1978)**¹², the Court expanded Art 21 into a repository of procedural fairness, while **Justice K.S. Puttaswamy v. UOI (2017)**¹³ affirmed privacy as intrinsic to dignity and liberty. These decisions reinterpret constitutional rights as living principles rather than textual privileges.

From a philosophical standpoint, India's emergency powers have the issues posed by Carl Schmitt: "sovereign is he who decides on the exception." When the suspension of legality is sanctioned, the dichotomy between law and power dissipates. Giorgio Agamben's 'state of exception' concept further exemplifies this: the extraordinary eventually becomes the ordinary mode of governance. Federalism suffers further erosion with these doctrines. The over invocation of Art 356 transforms a cooperative federation into a monolithic administered state, undermining the pluralistic aspirations of the Constituent Assembly. The enduring paradox thus is that constitutional legality permits what constitutional morality expressly forbids.

Digital Surveillance and the New Emergency

New forms of exceptionalism are appearing in the twenty-first century. While formal 'emergencies' are 'rare', the logic of control and surveillance thrives 'behind' technology.¹⁴ State surveillance, algorithmic profiling, and data aggregation trigger emergency powers without the need for overt declaration. Unconstitutional surveillance and control of dissent are justified as 'digital' expansion of the State. No declaration of emergency is needed, as surveillance technologies are always available to control and monitor dissent. Automated coercive technology and surveillance infrastructures offer control without the need for visible structures of accountability, constituting a 'permanent emergency' as the coercive infrastructure of the state in the absence of emergency powers. The challenge is as much legal as it is epistemic, in that it requires frameworks of constitutional law to deal with the visible enforcement of coercive power and control that is invisible.

¹² AIR 1978 SC 597.

¹³ AIR 2018 SC (SUPP) 1841.

¹⁴ André S. Baguinho, "The Political Philosophy of Surveillance: From Historical Roots to COVID-19," (Master's thesis, Universidade Catolica Portuguesa, 2021), 15.

Re-imagining Safeguards for a Democratic Future

Strengthening constitutional balances between security and liberty is most urgent.¹⁵ India needs stronger structural safeguards. For example, judicial review of emergency declarations and extensions should be automatically enforced, and courts should be allowed to examine ‘necessity’ and ‘proportionality’ of the measures.¹⁶ Other emergency laws and laws passed in exceptional circumstances should automatically expire unless renewed, in full, by parliamentary super-majority vote. In the context of monitoring, reporting and parliamentary accountability should be tied to issuance of emergency powers, preventive detention, and surveillance, and to emergency economic measures. Transparency is a constitutional necessity, not a favour. Finally, the intergovernmental aspect should be strengthened: before invoking Art 356¹⁷, there should be a requirement to consult the Inter-State Council or a constitutional review commission. In the context of the digital reality, privacy regulators should enjoy the independence of other constitutional authorities, like the Election Commission. Judicial review should be required to authorise any surveillance and expiration measures, and oversight panels should be periodically informed. The revival of constitutional morality should progress in civic education and the discipline of public discourse, as law alone cannot counter authoritarianism, and liberty is an active civic commitment. Democratic accountability, independent media, and a robust civil society are the best means to counter emergency authoritarianism.

Conclusion

The understanding of Indian constitutionalism illustrates how challenges to democracy do not always come from the threat of coups or invasions. Conversely, the most harmful challenges come from lawful, unrestrained, and disproportionate actions. Laws passed to provide Emergency conditions and Black Laws to protect the Republic, paradoxically, risk the spirit of the Republic. The close to two and half year suspension of constitutional rights, the 1975-77 Emergency, and the rampant digital surveillance, presumed as liberties, raise the paradox of tolerance. The need to resolve the paradox calls for an uncompromising stance on constitutional morality, i.e. the spirit of the constitution calls for justice, accountability, and transparency irrespective of political motives, and must never recede to moral, or political, silence to re-

¹⁵ K. J. Hill, "Balancing National Security and the Constitution: The Security Blanket Over Civil Liberties," (PhD diss., Johns Hopkins University, 2020), 22.

¹⁶ Ibid.

¹⁷ The Constitution of India, 1950.

endorse the paradox. The presumption for the misuse of Emergency Powers and Black Laws must be exceptional and not habitual. Only the reaffirmation of the constitutional spirit and recognition of the rights and the institutional balance can guarantee the survival of the Republic, the Republic of dying on the brink of a crisis. The promise of the Indian Constitution, to secure liberty, fraternity, and equality to every citizen, must survive every shadow and every test of an emergency.

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