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**A Constitution Can Protect Fundamental Rights in Times of Emergency:**

**Lessons from India and the Philippines**

*A state of emergency is “fundamentally dangerous.”[[1]](#footnote-1) It threatens to turn the “basic democratic structures into mere appendages of an arbitrary authority”[[2]](#footnote-2) and creates a situation where the “temptation to disregard constitutional freedoms is at its zenith, while the effectiveness of traditional checks and balances is at its nadir.”[[3]](#footnote-3) There is a tragic tension “between democratic values and responses to emergencies”[[4]](#footnote-4) where states have to question whether the violation of fundamental rights can be justified in the name of the continued existence of the democratic state.[[5]](#footnote-5)*

Constitutional codification of emergency measures is not an unusual phenomenon,[[6]](#footnote-6) “[t]here is hardly any modern constitution which does not recogni[z]e the right of the executive to suspend the normal rules of government, including the rights and freedoms of citizens, during periods of crisis.”[[7]](#footnote-7) Courts have upheld this constitutional power finding that such suspension is an “unavoidable necessity” holding that “there are simply cases in which those who are at the helm of the State, and bear responsibility for its survival and security, regard certain deviations from the law for the sake of protecting the security of the State as necessary. . . ” [[8]](#footnote-8)

Despite the recognition of the need for emergency powers, there is little consensus on how to effectively manage emergency powers. Crises often result in the “expansion of governmental powers, the concentration of powers in the hands of the executive, and the concomitant contraction of individual freedoms and liberties.” [[9]](#footnote-9) There is a sense, however, despite any intent to carefully circumscribe emergency provisions, there is no guarantee such provisions will be followed to the letter,[[10]](#footnote-10) and there is a philosophical concern that “during times of crisis no constitutional regime can function constitutionally.”[[11]](#footnote-11) So, how do countries that recognize the need for emergency powers, but venerate fundamental rights, reconcile the two, and ensure that “during an emergency, the law of necessity [does not] supersede[] the law of the Constitution?”[[12]](#footnote-12)

In India and the Philippines, constitutional drafters attempted to address the need for and concerns about emergency powers by outlining the scope of these powers and providing legislative and judicial safeguards in their respective constitutions.[[13]](#footnote-13) Heavily influenced by their colonial experience, the legal systems of their colonial masters and mindful of the precarious security situations at the time of independence, the Indian Constitution of 1949 and the Philippine Constitution of 1935 initially provided for broad executive powers in times of emergency, including the suspension of fundamental liberty and due process rights or the suspension right of judicial recourse to protect fundamental rights.[[14]](#footnote-14) As one scholar has noted regarding to India, the Indian Constituent Assembly “placed much faith in the sense of responsibility and self-restraint of future parliaments and governments to use the emergency powers sparingly and judiciously- a faith which . . . turn[ed] out to be misplaced.”[[15]](#footnote-15) The minimal safeguards each constitutional convention put in place proved insufficient to restrain power-hungry executives in the decades following ratification.

National crises in India and the Philippines since independence provide valuable lessons for the protection of fundamental rights during times of emergency. De jure declarations of emergency in both countries validated the three core concerns about the use of emergency powers: the fact that elements of the crisis or the crisis itself can be “artfully created;”[[16]](#footnote-16) judicial endorsement of what Cass Sunstein has termed “national security fundamentalism” where people believe that where national security is threatened the executive must be permitted to do whatever necessary to protect the country;[[17]](#footnote-17) and that emergencies, once begun, are difficult to end.[[18]](#footnote-18) However, each country’s experience also demonstrates that the most effective protection of fundamental rights stems from an independent, willing, and strong judiciary that is willing to constitutionalize fundamental rights by standing up for citizens against the government and enforcing the bounds of codified emergency powers and a constitution that retains its permanence in times of crisis.

Part I of this paper will provide an overview of the constitution and drafting process in India and the Philippines, highlighting discussions of fundamental rights and emergency powers. Part II will sketch the historical interactions of emergency powers and fundamental rights in each country and Part III will address the lessons that can be drawn from each of these experiences and will make recommendations for future protection of fundamental rights.

1. **In the Beginning: Constitutional Drafting**

When the 385-member Indian Constituent Assembly gathered for the first time on December 9, 1946, the framers were met with a daunting security situation. [[19]](#footnote-19) The impending partition of India, localized revolutions, separatist insurrections, political assassinations in nearby Burma, and large-scale political violence, all impelled them to create a strong and powerful central government.[[20]](#footnote-20) However, given their colonial history and the recent horrors of World War II, they also had a strong preference for “constitutionally-guaranteed fundamental rights.”[[21]](#footnote-21) The framers included among these the rights to equality before the law; prohibitions against discrimination on grounds of race, religion, caste, sex, or place of birth;[[22]](#footnote-22) the freedoms of speech, assembly, movement, association; [[23]](#footnote-23) the rights to life, personal liberty, and education; [[24]](#footnote-24) the right to freedom of conscience and religion;[[25]](#footnote-25) and, some would argue, most importantly,[[26]](#footnote-26) the right to appeal to the courts for the enforcement of fundamental rights.[[27]](#footnote-27) Delegates to the Assembly believed that these rights “should be looked upon, not from the point of view of any particular difficulty of the moment, but as something you want to make permanent in the Constitution,” and that the implication of having an entire chapter outlining fundamental rights was that “man has certain rights that are inalienable and cannot be questioned by any humanly constituted legislative authority.”[[28]](#footnote-28)

Nowhere was the tension between the precarious political reality and fundamental rights more evident than in the Assembly’s discussion of emergency powers.[[29]](#footnote-29) Emergency powers have a long history in India. A favorite tool of the British, who reigned over the subcontinent from 1813 to 1947, they were employed liberally to manage social and political tensions and to establish and consolidate control.[[30]](#footnote-30) The most influential piece of British legislation on the emergency powers provisions in the Indian Constitution was the Government of India Act of 1935. [[31]](#footnote-31) This Act allowed the Governor-General to issue a proclamation allowing the use of emergency powers when he believed “a grave emergency exists whereby the security of India is threatened by war or internal disturbance.”[[32]](#footnote-32) Such a proclamation allowed the Governor-General to legislate by executive decree on both a national and provincial level.[[33]](#footnote-33) The Act also provided for supervisory legislative powers for the Governor-General and provincial governors in case of a failure of constitutional machinery, allowing these individuals to govern by ordinance.[[34]](#footnote-34) The broad sweep of powers conveyed upon the Governor General by the 1935 Act was famously described by Winston Churchill as “likely ‘to rouse Mussolini’s envy.’”[[35]](#footnote-35)

The Constituent Assembly chose to adopt many of the emergency powers wholesale from the 1935 Act.[[36]](#footnote-36) The first draft of emergency powers language prepared for consideration contained three clauses.[[37]](#footnote-37) The first clause allowed a provincial governor to declare a state of emergency.[[38]](#footnote-38) The second clause allowed the President to declare a state of emergency whenever he was satisfied that the security of India was “threatened by war or internal disturbance,”[[39]](#footnote-39) employing the same language as the 1935 British law. The final clause allowed the federal government to direct provincial authorities in “matters concerning the running of the provincial administration.”[[40]](#footnote-40) The drafting committee tweaked the language and submitted an expanded six-article chapter to the Assembly for debate.

The article that raised the most contention allowed for the suspension of the right to appeal to the judiciary for the enforcement of fundamental rights during emergencies.[[41]](#footnote-41) When this article was posed to the Assembly’s Sub-Committee on Fundamental Rights, a majority of members rejected the proposal outright, arguing that allowing for suspension would “render the entire exercise of guaranteeing fundamental rights meaningless.” One member noted, however, that recent unrest and riots throughout the country convinced him that “more than ever all the Fundamental Rights guaranteed under the Constitution must be subject to public order, security, and safety, though such a provision may to some extent neutralize the effect of the rights guaranteed under the Constitution.”[[42]](#footnote-42)

Despite their concerns, the committee eventually forwarded the proposed language to the Assembly.[[43]](#footnote-43) When the suspension proposal was considered by the entire Assembly, members characterized the right to appeal to the judiciary as “one right more precious perhaps than any other” and many speakers appealed to the Assembly to limit the power of suspension to only a small group of “core” rights.[[44]](#footnote-44) Another prescient concern was with the use of the term “internal disturbance” as a ground for declaring an emergency. One member was specifically concerned about the subjective nature of the term since disturbance could be “defined according to the mood of the moment,” especially in light of an impending general election, and that an emergency could be “declared merely on the apprehension of a disturbance.”[[45]](#footnote-45) However, political leaders convinced the delegates that such powers would be used “sparingly, in situations of grave necessity only,” and the Assembly approved the chapter.[[46]](#footnote-46)

The Constituent Assembly sought to circumscribe the use of emergency powers by establishing what they believed would be effective safeguards to prevent abuses of power.[[47]](#footnote-47) Chief among these protections are the requirements for the proclamation of a state of emergency, providing for an independent judiciary, and ensuring the permanence of the Constitution. All of the safeguards are indicative of the Assembly’s overall desire to construct a middle way between a British focus on parliamentary powers and an American focus on judicial powers.[[48]](#footnote-48) The Assembly placed the power to declare a national emergency in the hands of a President.[[49]](#footnote-49) While a Prime Minister can request that a President declare a state of emergency, it is at the President’s discretion to declare such a state.[[50]](#footnote-50)

Also key to the balance between fundamental rights and emergency provisions for the Constituent Assembly was the independence of the judiciary. In his speech preceding the Constituent Assembly’s motion to adopt the Constitution Dr. Rajendra Prasad, President of the Constitutional Assembly noted, “[w]e have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence.”[[51]](#footnote-51) The Assembly crafted articles to ensure independent selection and tenure of judges, [[52]](#footnote-52) and enshrined the independence of the judiciary in article fifty’s requirement to “separate the judiciary from the executive in the public services of the State.” [[53]](#footnote-53)

There was also a clear intent on the part of the delegates to the Assembly to instill a sense of permanence in the Constitution.[[54]](#footnote-54) In order to amend the Indian Constitution, a bill must be introduced specifically for that purpose, passed by a two-thirds majority of Members of Parliament (MPs) present and voting in each House of Parliament, and that the majority represents a simple majority of the total membership of each House.[[55]](#footnote-55) While the amendment threshold has not proven sufficient to prevent power-hungry politicians from exploiting the Constitution in times of emergency,[[56]](#footnote-56) the idea of the permanence of the Constitution has allowed it to remain in effect during times of crises, unlike the Philippine Constitution, which has gone through six iterations since it was first promulgated in 1935.

*One Hundred Years, Six Republics: The Rollercoaster Ride of Philippine Constitutionalism*

As an independent republic, the Republic of the Philippines has seen its way through six Constitutions in the past 110 years. Each constitution has left an indelible mark on the national conscious, judicial independence, and the process of constitutionalizing fundamental rights.

The first Constitution was drafted in support of the Philippine Rebellion at the turn of the nineteenth century. The Malolos Constitution, as it was called, went into effect on January 21, 1899. It created a representative government, included a detailed Bill of Rights, called for the separation between church and state, and established the dominance of a unicameral legislature over the executive and judiciary.[[57]](#footnote-57) The Constitution was the first coherent articulation of “Filipino nationhood” and represented the difficulty of balancing a concern against abuse of power and the need for a centralized government that was “framed by war, mediated by politics, and filtered through the emerging class structure of a nation born with competing internal interests.”[[58]](#footnote-58)

When the United States declared war on Spain in February, 1898, it initially supported the fledging revolutionary movement.[[59]](#footnote-59) Once the Spanish-American war was over, however, the United States refused to recognize the new Republic, launching the Philippine-American War.[[60]](#footnote-60) At the end of the war, the Republic was dismantled, but republicanism continued with the U.S. Congress’ passage of the Philippine Bill of 1902,[[61]](#footnote-61) providing a bill of rights for Filipinos, for the appointment of two non-voting commissioners to represent the Philippines in the U.S. Congress, and the establishment of a directly elected Philippine Assembly.[[62]](#footnote-62)

The American occupation of the Philippines was a key factor in the development of constitutional theory and experience for political actors. During the Spanish occupation, “[c]onstitutionalism was but a vague concept,” and “[t]he notion of a constitution as an instrument that limits governmental authority and establishes rule of law for all, the governor and the subject, the public official and the private individual, was not comprehended in theory or practice.”[[63]](#footnote-63) Under American “tutelage training”[[64]](#footnote-64) Filipinos were able to engage in critical state-building tasks that led to the development of the 1935 Constitution.[[65]](#footnote-65)

With the help of a strong American lobby who wished to capitalize financially on an independent Philippines, Filipino pleas for independence were finally heeded with the adoption of the Tydings-McDuffie Act on March 24, 1934.[[66]](#footnote-66) Accepted by the Philippine Legislature on May 1st, the Act provided for establishment of Philippine independence after a transition period of ten years during which the Philippines would be ruled by a commonwealth government to be established by a constitutional convention.[[67]](#footnote-67)

The Constitutional Convention began on July 30, 1934. The 1935 Commonwealth Constitution retained the existing legislative-executive balance by providing for a National Assembly and a directly elected president and vice president.[[68]](#footnote-68) It contained an extensive bill of rights, outlining twenty-one to be observed including due process, equal protection and unqualified freedoms of speech, press, assembly and redress.[[69]](#footnote-69) It specifically allowed Congress to delegate legislative power to the president in times of “war and other national emergency”[[70]](#footnote-70) and allowed the President in times of “invasion, insurrection, or rebellion or imminent danger thereof, when the public safety requires it” to suspend the writ of habeas corpus or to declare martial law.[[71]](#footnote-71)

The Constitution was amended once, in 1940, to establish a four-year tenure for the President and Vice-President with the ability to be reelected for another term, the establishment of a bicameral legislature, and to create of a Commission on Elections to supervise elections and plebiscites.[[72]](#footnote-72) Otherwise, the document remained unaltered until the Japanese occupation of the Philippines during World War II. In 1943, the Preparatory Commission for Philippine Independency (PCPI) ratified an occupational constitution for the Republic in September of 1943. The constitution, promulgated during a national emergency, omitted certain protections that are the hallmark of democratic and republican constitutions such as universal suffrage, prohibition against a bill of attainder, certain provisions regarding criminal procedure and other key checks and balances. [[73]](#footnote-73) The constitution was intended to be transitory in nature.[[74]](#footnote-74) The head of the PCPI and later key player in Ferdinand Marcos’ rise to power Jose P. Laurel noted:

I will not say that this Constitution is an instrument that has been placed side by side with the best written constitutions of the world. . . I shall not point to the Constitution as a constitution that can stand the test of logic, symmetry, of logical arrangement. . . But I will say that it is the best constitution we could prepare or fashion under the circumstances and realities that confront us during these days.[[75]](#footnote-75)

The 1943 Constitution was only in force in the occupied parts of the Philippines and was never recognized by the United States or the Philippine government in exile. For the majority of the country, and in the eyes of the world, the 1935 Constitution remained binding law in the Philippines until the 1973 Constitution of the Marcos era.

The fourth Philippine Constitution began with promise, with a 1967 congressional resolution calling for a constitutional convention to explore whether “commonwealth structures properly suited the new Philippines.”[[76]](#footnote-76) Elected in 1965, Philippine President Ferdinand Marcos was initially ambivalent about the convention. [[77]](#footnote-77) He was antagonistic to its intention to alter the existing order but was, in the words of one scholar, “intrigued by the possibility of manipulating the convention so as to change the 1935 prohibition against the president’s serving more than two terms.” [[78]](#footnote-78) Following his declaration of martial law in 1972, Marcos moved quickly to dismiss and then reconvene the convention, minus oppositionists that had been jailed after the declaration, and to have the 1973 Constitution ratified via plebiscite.[[79]](#footnote-79) The government claimed that the constitution had been approved by over 95 percent of the population, however, they had made the failure to vote a felony that was punishable by law.[[80]](#footnote-80) Reviewing the document, the Supreme Court ruled that the constitution had not been “validly ratified” but they did not declare the plebiscite illegal and the constitution went into effect. [[81]](#footnote-81)

Although it included an expansive bill of rights, [[82]](#footnote-82) the 1973 Constitution dramatically changed the political structure of the Philippine Republic.[[83]](#footnote-83) It reduced the legislature to unicameral body,[[84]](#footnote-84) transformed the republic from a presidential to a parliamentary system,[[85]](#footnote-85) and changed the amendments process to only require a two-thirds vote to call a constitutional convention.[[86]](#footnote-86) The most contentious of the provisions was Article 17. Under the 1935 Constitution, Marcos’ second four-year term as president would end on December 30, 1973. [[87]](#footnote-87) However, Article 17 allowed him to stay in power indefinitely, or at least until he chose to call for elections.[[88]](#footnote-88) It also protected the proclamations and orders he issued under martial law, declaring all such proclamations to be valid and effective even after the lifting of martial law unless explicitly modified or repealed by the new National Assembly.[[89]](#footnote-89) This clause meant that even when martial law was lifted on January 17, 1981, there were no significant changes in government power or authorities.[[90]](#footnote-90)

When Corazon Aquino rose to power at the end of the Marcos regime, discussed further in the next section, she faced a political quagmire. Technically elected pursuant to the election procedures of the 1973 Constitution; she had to find a way to legitimize her presidency by de-legitimizing the document that led to her election.[[91]](#footnote-91) Aquino chose to base the legitimacy of her election on the February 22-25, 1986 Epifanio de los Santos Avenue (Edsa) revolt, proclaimed her own provisional Freedom Constitution in 1986 and called for a new constitution to be created within the next year.[[92]](#footnote-92) The Freedom Constitution, the Philippines’ fifth constitution in less than one hundred years, is a minimalist constitution, consisting of only seven articles. It adopted wholesale some sections of the 1973 Constitution, including the Bill of Rights,[[93]](#footnote-93) continued the process of executive legislation,[[94]](#footnote-94) and empowered the President to call a commission to draft a new constitution.[[95]](#footnote-95)

The new constitutional commission was appointed in May of 1986.[[96]](#footnote-96) The forty-eight delegates chosen were similar to those who sat at Malolos almost one hundred years prior, educated, elite, and mostly lawyers.[[97]](#footnote-97) The committee debated parliamentary and presidential governments, throwing their hat in with presidential government by one vote, as well as local governance, land reform, and economic protectionism.[[98]](#footnote-98) Given the constraints of Aquino’s one-year timeline, the commission chose to draft a framework constitution rather than a comprehensive constitution, leaving the rest of the details to be sorted by the newly elected legislature.[[99]](#footnote-99)

The Constitution as drafted by the 1986 commission and as approved by popular referendum in 1987, remains in place today. It restored the governmental composition of the 1935 Constitution including a bicameral legislature,[[100]](#footnote-100) an independent Supreme Court,[[101]](#footnote-101) and a presidential executive power.[[102]](#footnote-102) The 1987 Constitution is more focused on setting the boundaries of policy than its 1935 predecessor,[[103]](#footnote-103) and embraces a few themes absent from the 1935 Constitution. First, the ideals of pacifism and beneficence pervade the preamble of the 1987 Constitution. It uses the first person possessive, “we, the sovereign Filipino people” [[104]](#footnote-104) instead of the third person “the Filipino people” of the 1935 Constitution.[[105]](#footnote-105) It states the people’s intent to “build a just and humane society” to secure the “blessings of independence and liberty under the rule of law and a regime of truth, justice, freedom, love, equality, and peace.”[[106]](#footnote-106)Also, drawing upon lessons from the previous regime, the 1987 Constitution dramatically restricts presidential use of martial law. It limits a declaration of martial law and suspension of the writ of *habeas corpus* to sixty days, and requires the President to submit a report in writing, or in person, to Congress within forty-eight hours of such a declaration.[[107]](#footnote-107) A simple majority of both houses of Congress, voting jointly, can revoke, suspend, or extend a declaration of martial law, and such vote is immune from executive veto.[[108]](#footnote-108) The 1987 Constitution also gives explicit authority to the Supreme Court to review the sufficiency of the factual basis of a proclamation of martial law or the suspension of *habeas corpus*.[[109]](#footnote-109) It further states that martial law “does not suspend the Constitution, nor supplant the functioning of the civil courts or legislative assemblies.”[[110]](#footnote-110)

The new Constitution was, in the words of the President of the 1986 Constitutional Commission, “a nationalist Constitution. . . [that] [b]y restricting martial law powers, the Constitution has made this draconian option unattractive for any government.”[[111]](#footnote-111) Subsequent executives have not adhered to this view as national emergencies have been declared multiple times since 1987; however, the 1987 Constitution helped to constitutionalize the fundamental values of the Philippine Republic and has emboldened the courts to protect those values.

1. **Where the Rubber Hit the Road: Emergencies and Fundamental Rights in Practice**

Despite the best intentions of the drafters, the Indian and Philippine Constitutions as originally written did not provide adequate safeguards to protect fundamental rights in times of emergency. In both cases, the judiciary was incapable of upholding the rule of law and the Constitution was too easily amended or rescinded. However, each country demonstrated a clear preference for constitutional sanction in times of crisis and, given time and in the face of growing excesses, the judiciary found its way to its role as champion of fundamental rights.

*Emergencies and the Rule of Law in India* [[112]](#footnote-112)

India has experienced three national emergencies since independence. Each emergency was characterized by executive excess, legislative compliance and judicial lassitude; and each has provided valuable lessons for the rule of law in India and the protection of fundamental rights in times of crisis.[[113]](#footnote-113)

The first national emergency was declared on October 26, 1962 during an armed incursion by the Chinese across the Indo-Chinese border.[[114]](#footnote-114) The Prime Minister advised the President to declare an emergency following the text of article 352 and “it was widely accepted that there was ample justification for the invocation of emergency power.”[[115]](#footnote-115) The President suspended fundamental rights under article 19,[[116]](#footnote-116) suspended access to the courts for enforcement of some fundamental rights and Parliament passed the Defence of India Act of 1962.[[117]](#footnote-117) Rules made under the Act “conferred sweeping powers on both the central and state governments in areas such as preventative detention, defence preparation, control of arms and explosives, management of news and information, requisitioning and acquisitioning of property, and control of industrial relations.”[[118]](#footnote-118) Although no domestic newspapers were banned during the emergency, a Central Press Advisory Committee was established to “alert the government to prejudicial material.”[[119]](#footnote-119) Overall the period of emergency had relatively minimal impact on the traditional freedoms of expression, assembly and association.[[120]](#footnote-120) While the initial declaration was widely accepted, and freedoms were not dramatically impinged, [[121]](#footnote-121) the most offensive aspect of the 1962 emergency was its continuation far beyond the period necessary to restore normal governmental operations.[[122]](#footnote-122)

The Chinese incursion was over almost as soon as it began and a formal cease-fire was declared on November 21, 1962, however, the state of emergency and its suspension of fundamental rights persisted.[[123]](#footnote-123) Despite calls for the rescindment of the declaration, the Prime Minister stated in April 1963 that “the emergency would last a considerable time, whether there was actual fighting or not.”[[124]](#footnote-124) The Supreme Court seemed to support the executive’s prerogative to make this decision. It upheld the President’s order suspending access to the courts for the enforcement of fundamental rights during an emergency under article 359 in 1964.[[125]](#footnote-125) The Court held that “[h]owever long the Proclamation of Emergency should continue, and what restrictions should be imposed on the fundamental rights of citizens during the pendency of the emergency, are matters which must be left to the executive because the executive knows the requirements of the situation . . .”[[126]](#footnote-126)

Over the next eight years the Supreme Court effectively removed itself from the emergency powers debate. It found that the judiciary could not end a proclamation of emergency,[[127]](#footnote-127) and that deciding whether a real emergency exists is “a political, not justiciable issue.”[[128]](#footnote-128) The court did not shy away from expressing its displeasure about the emergency powers and the abuse that could occur from prolonged use,[[129]](#footnote-129) but it remained unable to find constitutional gumption to stop the use of emergency powers.

Calls for an end to the 1962 emergency were temporarily halted in April 1965 when fighting broke out on the India-Pakistan border, but when the skirmishes ceased, resistance against the emergency continued.[[130]](#footnote-130) Finally, in February 1966, the Home Minister announced that while the government could not rescind the emergency, it would only employ emergency powers in the future when national security was directly threatened.[[131]](#footnote-131)

Five years later, when conflict reemerged on the India-Pakistan border, the President, at the behest of Prime Minister Indira Gandhi, declared the second formal state of emergency in India.[[132]](#footnote-132) Similar to the first declaration, the need for emergency powers seemed clear, and the constitutional procedure for declaring an emergency seemed to be observed. However, when the fighting ended sixteen days later the state of emergency remained in force.[[133]](#footnote-133) A Presidential Order issued three years later, in November 1974 strengthened emergency powers under the new declaration[[134]](#footnote-134) by suspending the right to appeal to the courts for enforcement of the rights granted by articles 14, 21, and 22.[[135]](#footnote-135) This second state of emergency was left in place, practically forgotten by the abuses of the next “Emergency,” until the Janata government came to power on March 27, 1977.[[136]](#footnote-136)

June 1975 to March 1977 has been called “one of the darkest periods in the post-independence period,” and is referred to as “the Emergency.”[[137]](#footnote-137) The genesis of the Emergency is rooted in Indira Gandhi’s 1975 reelection to Parliament.[[138]](#footnote-138) A state high court invalidated Mrs. Gandhi’s election, claiming electoral misconduct.[[139]](#footnote-139) The court issued a partial stay, allowing Mrs. Gandhi to remain in office pending an appeal to the Supreme Court.[[140]](#footnote-140) Previous run-ins with the Supreme Court made the Court “hardly Gandhi’s favorite forum,”[[141]](#footnote-141) and Mrs. Gandhi did not seem inclined to allow the Court to decide her political fate. Two days after the partial stay was issued,[[142]](#footnote-142) and on the heels of a call for nationwide protests against her reign,[[143]](#footnote-143) Mrs. Gandhi authorized her special police force to arrest opposition leaders and cut power lines in every region of the capital where a newspaper was produced.[[144]](#footnote-144) She then informed her cabinet of “with a *fait accompli*”[[145]](#footnote-145) the next morning, and instructed the president to declare a national emergency.[[146]](#footnote-146) Explaining her actions, Gandhi stated that “there comes a time in the life of a nation where decisions have to be taken. When there is an atmosphere of violence and indiscipline and one can visibly see the nation going down.”[[147]](#footnote-147)

The first declaration of a national emergency on grounds of an internal disturbance[[148]](#footnote-148) sent India on a two-year rollercoaster that suspended and threatened the core of Indian democracy. One political prisoner wrote, “I went wrong in assuming that a Prime Minister in a democracy would use all the normal and abnormal laws to defeat a peaceful democratic movement, but would not *destroy* democracy itself and substitute it for a totalitarian system.”[[149]](#footnote-149) The constitutional historian Granville Austin found that “[t]he Emergency’s purposes were shown to be not those claimed for it. It was not to preserve democracy, but to stop it in its tracks.”[[150]](#footnote-150) Another scholar described the two years of emergency in India as ones where “democracy ceased to exist.”[[151]](#footnote-151)

Parliament moved quickly to enact a slew of constitutional amendments to protect the government and the declaration of an emergency. The thirty-eighth amendment prohibited judicial review of an emergency proclamation or of any laws enacted during an emergency that contravened fundamental rights.[[152]](#footnote-152) The thirty-ninth amendment forbid judicial review of the election of the prime minister and speaker of the house; [[153]](#footnote-153) and the fortieth amendment incorporated censorship laws into the ninth schedule to “insulate them from judicial review.”[[154]](#footnote-154) The President was also given the unusual power to make any further amendments to the Constitution via executive order, in order to ease any difficulties from the implementation of the amendments already passed by parliament.[[155]](#footnote-155) Additionally, all constitutional amendments were declared immune from judicial challenge on any ground and “it was declared that the power of Parliament to amend the Constitution was unlimited.”[[156]](#footnote-156) These amendments represent “a subversion of the constitutional processes by politicians for personal aggrandizement.”[[157]](#footnote-157)

Members of the opposition party and opponents to Mrs. Gandhi’s rule within her own Congress party were quickly imprisoned.[[158]](#footnote-158) According to a government commission established in 1977 to examine the excesses of the Emergency, over 110,000 people were detained during the emergency,[[159]](#footnote-159) many of whom were badly treated, tortured, or killed.[[160]](#footnote-160) The government closed the four primary news agencies in the country and replaced them with one government-run media outlet[[161]](#footnote-161) and passed a Censorship Order under the Defence of India Act of 1971.[[162]](#footnote-162) The Order required “every newspaper, periodical or other document to submit to scrutiny to any authorised officer any news, comment, or rumor or other report relating to certain specified subjects before its publication.”[[163]](#footnote-163) The Order also included guidance to publishers encouraging them to suppress “dangerous” news themselves, and to refrain from publishing anything that was “likely to promote feelings of enmity and hatred between different classes of people.”[[164]](#footnote-164) Further guidance prohibited reporting on parliamentary debates and judicial decisions.[[165]](#footnote-165) Also targeted by the Emergency were the freedoms of expression and association.[[166]](#footnote-166) Organizations were targeted as dangerous or subversive and public meetings and demonstrations were often banned by central and local governments.[[167]](#footnote-167)

The Supreme Court continued to place itself at the margins of the emergency powers debate. In *A.D.M. Jabalpur v. Shiv Kant Shukla*,[[168]](#footnote-168) which became known as the *Habeas Corpus* case,[[169]](#footnote-169)the court held in a four-to-one decision that political detainees could be denied all access to the courts during an emergency.[[170]](#footnote-170) The court further held that “in effect, if not in intent, that as to life and personal liberty, *all laws* were abrogated during the emergency.”[[171]](#footnote-171) In the eyes of one academic, the Court’s reluctance to rule against the government was based in part in its lack of legitimacy in the eyes of the Indian people.[[172]](#footnote-172) The Court “sadly lacked the legitimacy to reinforce the supremacy of the Constitution. . . miserably fail[ing] thereby to deliver its most solemn constitutional function.”[[173]](#footnote-173)

The history of the Emergency was not just a history of the failure of the judiciary to check the executive; it was also as a history of the failure of a legislative check. The Emergency destroyed the “myth of government accountability to Parliament” as Mrs. Gandhi was able to “get parliamentary approval for some of the most draconian laws, including amendments to the Constitution which sought to subvert the very basis of democracy.”[[174]](#footnote-174) It is worth noting, however, that these laws were passed when “large numbers of opposition MPs in both Houses had been interned under the preventative detention laws and a sweeping censorship order in force which made any public discussion of the changes virtually impossible.”[[175]](#footnote-175)

The Emergency came to an end in 1977 when Mrs. Gandhi decided to call for parliamentary elections.[[176]](#footnote-176) Some scholars hypothesize that Mrs. Gandhi intended to use the election to silence critics by legitimizing the role of her son, Sanjay, in her administration,[[177]](#footnote-177) however, there is no clear explanation as to why she decided to call for elections. The Janata party won a majority of seats in the lower house of Parliament, and opposition parties combined won more than two-thirds of all available seats.[[178]](#footnote-178)

As one of her last acts, Mrs. Gandhi advised the acting President to revoke the emergency.[[179]](#footnote-179) He complied on March 21, 1977 and also withdrew the Censorship Order and removed the ban on organizations that had been barred during the Emergency.[[180]](#footnote-180) The new Janata government quickly amended the Constitution to reverse most of the Emergency amendments and to impose additional safeguards on emergency powers.[[181]](#footnote-181) The Janata amendments removed the ability of the government to declare an emergency based on an “internal disturbance” instead only permitting an emergency during an “armed rebellion.”[[182]](#footnote-182) The amendments also constrain the government’s ability to suspend certain fundamental rights during an emergency. The right to life, personal liberty and rights relating to criminal prosecution can no longer be suspended during an emergency; and the freedoms of speech, expression, assembly and association are only automatically suspended in emergencies based on war or external aggression.[[183]](#footnote-183) However, the amendments still allow the government to suspend the right to appeal to the courts for enforcement of most fundamental rights during an emergency.[[184]](#footnote-184) The experience of the Emergency, highlighted the need for constitutional and administrative controls “on the exercise of executive power and for more effective institutional checks and balances, but []also demonstrated that, in the absence of a high degree of integrity and courage on the part of those charged with enforcing these mechanisms, they are foredoomed to failure.”[[185]](#footnote-185)

In the years after the Emergency the Supreme Court experienced a sea change. It began to “take people’s suffering seriously,” and made “constitutional values [] relevant to the citizenry.”[[186]](#footnote-186) By taking up cases on social justice, freedom from torture, and freedom of expression, the Court legitimized many of the constitutional values that were weakened during the Emergency and in doing so, re-legitimized itself as an institution.[[187]](#footnote-187) In *Maneka Gandhi v. Union of India*,[[188]](#footnote-188) members of the Court declared that “personal liberty makes for the worth of the human person” and that “life is a terrestrial opportunity for unfolding personality,” where “absent liberty, other freedoms are frozen.”[[189]](#footnote-189) Holding that any practice that restrains life and liberty must be “just, fair and reasonable” and cannot be “arbitrary, fanciful or oppressive,”[[190]](#footnote-190) and finding that “equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other to the whim and caprice of an absolute monarch,”[[191]](#footnote-191) the Supreme Court finally took a stance against arbitrary government. The *Maneka* Court’s holding of a “broad protection of individual freedom against unreasonable or arbitrary curtailment [] paved the way for a dramatic increase in constitutional protection of human rights in India. . . .”[[192]](#footnote-192)

Two years later in *Minerva Mills v. Union of India*,[[193]](#footnote-193) the “struggle for the survival of judicial review in the Indian Constitution ended with a qualified victory for the judiciary”[[194]](#footnote-194) when the Court found that amendments that threatened the governmental structure set out in the Constitution cannot be immune from judicial review, striking down Mrs. Gandhi’s forty-second amendment.[[195]](#footnote-195) The Court took another step to cement its legitimacy in the *Judges Case*, [[196]](#footnote-196) where it acknowledged the independence of the judiciary as a “basic feature of the Indian Constitution.”[[197]](#footnote-197)

India has refrained from declaring a nation-wide state of emergency since the Emergency ended in 1977. However, even if the government were to declare another national state of emergency, the lessons learned regarding the independence of the judiciary and the durability of a constitution in times of crisis would like be sufficient to protect fundamental rights in the face of executive or legislative action.

*Emergencies and Martial Law in the Philippines*

The Philippine tradition of exploiting a perceived crisis to justify centralization of power and expansion of executive emergency power began at the birth of the constitutional republic in 1935. The first President, Manuel Quezon, preyed upon fears about a local uprising and the activities of communist party organizers to justify the centralization of power under the presidency.[[198]](#footnote-198) Abandoning the historical intentions of legislative dominance enshrined in the Malolos Constitution forty decades prior, [[199]](#footnote-199) Quezon “presided over a weak National Assembly and enjoyed largely uncontested executive authority.”[[200]](#footnote-200) It was not in Quezon’s “nature to accept limitations on his power,”[[201]](#footnote-201) he is reported to have opined:

To tell the truth, gentlemen, I should like to continue being President of the Philippines if I were sure I would live 100 years. Have you ever known anyone who had voluntarily renounced power unless it was for a lady that, in his opinion was more important than power itself, or because of the threatening attitude of the people? Everybody likes power. It is the greatest urge of human nature. I like to exercise power.[[202]](#footnote-202)

Historian Alfred W. McCoy has suggested that the lineage of Filipino dictators can be traced to Quezon. As the “first Filipino with the power to integrate all levels of politics into a single system. . . Quezon set the precedent for future leaders seeking to strengthen state power. . .” [[203]](#footnote-203)

The emergency powers provisions remained dormant for the next three decades, save a declaration of emergency and martial law in 1944 by the puppet Japanese occupying regime.[[204]](#footnote-204) Most would argue that the events that lead to the next declaration of martial law in the Philippines began in January, 1970. While exiting the building after an address to Congress, President Ferdinand Marcos[[205]](#footnote-205) and his infamously well-heeled wife, Imelda, were assaulted with stones by worker and student groups protesting the speech.[[206]](#footnote-206) Police and presidential security forces suppressed the riot, but a few days later, a similar demonstration occurred at the presidential palace, Malacañang, and four students were killed while the police attempted to break up the riot, inaugurating a year of street violence between protestors and the police. [[207]](#footnote-207) The following year a bomb exploded during an opposition party electoral rally in downtown Manila, wounding over one hundred people, including eight senatorial candidates.[[208]](#footnote-208) Although later accounts attributed the bombing to communist activists, most of the opposition blamed Marcos for the attack.[[209]](#footnote-209) Marcos insisted that his efforts at societal reform were waylaid by a “paralyzing political process and a chaotic press,” and he called for a new society with “constitutional authoritarianism” to discipline the nation, encourage economic growth, and foster social well-being. [[210]](#footnote-210)

Some scholars, however, argue that the events of 1970-1972 were not the primary catalyst of the declaration of martial law. For these scholars, Marcos’ drive to consolidate his personal power combined with his unwavering belief in his mandate to “discipline and develop”[[211]](#footnote-211) the Philippines made such an assumption of power practically inevitable. In his first inaugural address, Marcos presented himself as the savior of the Filipino people, noting that the “government is gripping the iron hand of venality, its treasury is barren, its resources are wasted, its civil service slothful and indifferent, its armed forces demoralized, and its councils sterile.”[[212]](#footnote-212) Opposition protests, the calling of the constitutional convention, and the guarantee that he would lose his power as president when his term expired in December 1973 combined to create an opportunity to act that Marcos could not pass up.[[213]](#footnote-213) The limited safeguards of the 1935 Constitution[[214]](#footnote-214) failed, allowing Marcos to “artfully create”[[215]](#footnote-215) his own emergency [[216]](#footnote-216) and demonstrating the need for strong, independent safeguards on the use of such potentially invasive emergency powers.

On September 23, 1972 Marcos, invoking the Constitution, declared a state of emergency and instituted martial law.[[217]](#footnote-217) During the first day of martial law Marcos directed the Armed Forces of the Philippines (AFP) to raid and close schools, houses of worship, and media outlets.[[218]](#footnote-218) Thousands of critics were arrested, including those whose only crime was political opposition to Marcos.[[219]](#footnote-219) He suspended the writ of habeas corpus, established military tribunals, suspended the right of peaceable assembly, significantly constrained the rights of free speech and free press, and denied labor the opportunity to organize and strike.[[220]](#footnote-220) During the next fourteen years of his reign Marcos issued almost 2,000 presidential decrees, over 1300 letters of instruction, and almost 900 executive orders.[[221]](#footnote-221) He transformed the use of martial law powers from those intended to manage an imminent crisis to a tool to launch a “liberal revolution”[[222]](#footnote-222) and create a “New Society.”[[223]](#footnote-223)

The declaration of martial law was also influenced by the events of the world at large. The Chinese Cultural Revolution had just ended, and protests in the United States over the Vietnam War were broadcast on international television, creating “an environment in which radicalism seemed on the ascendancy.”[[224]](#footnote-224) Marcos was able to manipulate this fear of anarchy and capitalize on the section of the Philippine press who were predicting an apocalypse to garner support for his draconian tactics.[[225]](#footnote-225) For many Filipinos, martial law was a welcome change from three years of protests and political clashes.[[226]](#footnote-226) Marcos also initially received international support. During the first few years of martial law tourism tripled and the economy grew at an average of seven percent.[[227]](#footnote-227) If human rights were violated, they were excused because his authoritarian reign was not as brutal as those of his neighbors, and members of the Filipino business community seemed willing to trade others’ personal liberties for their economic development.[[228]](#footnote-228) This popular acquiescence, military support, and American silence and later financial support helped Marcos quickly consolidate power.[[229]](#footnote-229)

However, the Philippines learned from its years under martial law. Marcos’ oppressive tactics cultivated an oppositionist civil society and engendering a “new breed of investigative journalists,” whose noses were trained to sniff out corruption.[[230]](#footnote-230) Economic elites were tired of turmoil and worried about the “brazen nature of the assassination” of Benigno “Ninoy” Aquino in August of 1983.[[231]](#footnote-231) Opposition united to exploit Marcos’ overconfidence and his “fondness for constitutional cover” and convinced Marcos to hold local and parliamentary elections in 1984.[[232]](#footnote-232) Marcos also decided to call a snap presidential election in 1985.[[233]](#footnote-233) In the wake of widespread public support Ninoy Aquino’s widow, Corazon “Cory” Aquino threw her hat in the ring to challenge Marcos. When the official tally declared Marcos the winner, the country was in an uproar. In the midst of rumors of a thwarted military coup-d’état, citizens were called to the famous Epifanio de los Santos Avenue (Edsa) to support the military rebels. The People Power Revolution, as it was termed, brought a swift end to the Marcos regime in February 25, 1986.[[234]](#footnote-234)

This newly engaged citizenry helped answer the question President Corazon Aquino posed in 1987, “can we have order without tyranny and peace without oppression?”[[235]](#footnote-235) Changes that came with the ratification of the 1987 Constitution were intended to discourage any future declaration of martial law and to carefully guard all presidential emergency powers.[[236]](#footnote-236) The most important of these would prove be the increased jurisdiction of the Supreme Court to review the factual sufficiency of any declaration of martial law.[[237]](#footnote-237)

These safeguards remained untested for almost two decades. Although faced with seven attempted coups d’état during her time in office, President Aquino refrained from declaring a national emergency or instituting martial law.[[238]](#footnote-238) Her immediate successor, Fidel Ramos, was granted emergency powers in 1993 to manage the nation’s electricity crisis by increasing electricity rates and bypassing a public bidding process for electricity plant construction. [[239]](#footnote-239) However, this delegation of power had little to no effect on fundamental rights.

The next use of emergency powers occurred during the tenure of the current President of the Philippines, Gloria Macapagal-Arroyo, and proved ultimately to be a success for presidential restraint and the strength of the 1987 constitutional safeguards. Arroyo, daughter of former President Diosdado Macapagal, served as Vice President to President Joseph Estrada. When the House of Representatives passed articles of impeachment against Estrada charging him with “plunder, graft, and corruption,” the military leadership withdrew their support from Estrada, ushered him from Malacañang, and Arroyo was sworn in as President of the Philippines on January 20, 2001.[[240]](#footnote-240) When Estrada was officially arrested in late April of 2001, the former president’s supporters mobilized three million people for a protest at the Edsa shrine.[[241]](#footnote-241) Four days later, three hundred thousand people left the shrine and marched on Malcañang, fighting street battles with local police and national military forces along the way.[[242]](#footnote-242) President Arroyo declared a “state of rebellion” on May 1 and ordered a full counterattack.[[243]](#footnote-243) As the day drew to a close, the rebels retreated and the police began to arrest the leaders of the revolt; President Arroyo lifted the declaration six days later on May 7, marking the first time in independent Filipino history when a declaration of emergency was rescinded almost immediately after the threat had been neutralized. [[244]](#footnote-244)

The true test of constitutional safeguards came with Arroyo’s declaration of a state of emergency in February, 2006. Initially provoked by an attempted coup of junior military officers,[[245]](#footnote-245) Arroyo justified the declaration of the emergency in Proclamation No. 1017 as an impeder to an alleged conspiracy of communists and “military adventurists” to bring down the government.[[246]](#footnote-246) Thus, on the eve of the celebration of the return to democracy after Marcos’ martial law, the country was once again thrust into a national emergency.

General Order Number 5, promulgated in support of the emergency opined that the claims of the conspirators had been “recklessly magnified by certain segments of the national media,” and called upon the military and the national police to “immediately carry out the necessary and appropriate actions and measures to suppress and prevent acts of terrorism and lawless violence.”[[247]](#footnote-247) Under the guise of Proclamation No. 1017 and General Order Number 5, “several high profile personalities—including a respected university professor, a congressman, and a retired general—were arrested without warrants of arrest, and the offices of a newspaper were searched without a search warrant.”[[248]](#footnote-248)

In a group of consolidated cases, and a victory for constitutional safeguards, the Supreme Court struck down Proclamation No. 1017.[[249]](#footnote-249) While affirming the President’s power to declare a national emergency, the court found that Proclamation No. 1017’s “extraneous provisions” that gave the president the power to “issue decrees; (2) to direct the AFP to enforce obedience to **all laws** even those not related to lawless violence as well as decrees promulgated by the President; and (3) to impose standards on media or any form of prior restraint on the press, are *ultra vires* and **unconstitutional.**”[[250]](#footnote-250)

The declarations of emergencies that occurred after Marcos’ institution of martial law demonstrate that a state of emergency is not as taboo in Philippine politics as it may now be in Indian politics. However, President Arroyo’s restraint in 2001 and the Supreme Court’s stance in 2006 indicate that sufficient safeguards may now be in place in the Philippines to adequately protect fundamental rights during an emergency.

1. **Emergencies and Fundamental Rights in the Future: What’s a Constitution to Do?**

*Despite the Risks, Emergency Powers Should be Codified in a Constitution*

There is a concern that countries such as India have developed a “chronic crisis of national security that has become part of the very essence of [their] being.”[[251]](#footnote-251)This recurring crisis theory has created a “tendency toward the routinising of the extraordinary through the institutionalization of emergency powers during non-emergency times and without formal derogation from human rights obligations.”[[252]](#footnote-252) These de facto emergency powers have the potential to create a situation where “emergency government has become the norm [and] [f]ashioning legal tools to respond to emergencies on the belief that the assumption of separation will serve as a firewall protecting human rights, civil liberties, and the legal system as a whole may be misguided.”[[253]](#footnote-253)

Some scholars also contend that codifying emergency powers admits an inherent weakness in democratic power structures to handle crises.[[254]](#footnote-254) By accommodating conditions for emergencies within the legal system a constitution may “induce the government to use its emergency powers expansively even when such use is uncalled for under the prevailing circumstances,”[[255]](#footnote-255) or encourage a leader to create the conditions that would allow him or her to declare an emergency to access the expansive powers.[[256]](#footnote-256) There is also concern for the precedent set by a establishing a constitutional sanction on extraconstitutional executive action in a country like the Philippines where a proclivity for voting,[[257]](#footnote-257) is combined with a “willingness to take to the streets”[[258]](#footnote-258) and where “extraconstitutional acts of popular mobilization . . . are becoming habitual.”[[259]](#footnote-259)

However, constitutions are not irrelevant in times of crisis. The Indian Parliament’s decision to amend the Constitution in order to legitimize and protect Mrs. Gandhi’s actions during the Emergency, rather than simply pass authorizing legislation, demonstrate the importance of a constitutional sanction in India. Indian veneration of the Constitution remained throughout the Emergency, Mrs. Gandhi’s son, Sanjay’s proposal to convene a new Constituent Assembly to draft a new constitution, and ostensibly postpone elections for a few years was met with harsh resistance from both the opposition and Gandhi’s own Congress party.[[260]](#footnote-260) Indian parliamentarians were willing to amend, but not abandon, their Constitution. Likewise, Marcos’ “fondness for constitutional cover”[[261]](#footnote-261) for his authority demonstrated his respect for a constitution as the founding legal document of a regime.

Despite the risks, emergency powers should be codified in a constitution. Codification allows a country to provide safeguards and institute a crisis system of checks and balances to protect the fundamental rights of citizens against emergency excesses. As the Indian emergencies show, a country cannot rely on the “moderating influence of [] unwritten conventions on government behaviour,”[[262]](#footnote-262) the bounds of such behavior must be scripted, if they are to be enforced. Codification lies at the core of governmental legitimacy and satisfies a “need for external signature of legality” to distinguish between legal and non-legal violence or acts.”[[263]](#footnote-263) All states are “more or less under the rule of law. And even under the most extreme constitutional emergency powers, states are never entirely subject to the sovereign will of an individual.”[[264]](#footnote-264) For example, the Emergency and Marcos’ reign of martial law were both brought to an end by pressure to hold a democratic election.

Citizens are also unlikely to find sufficient protection for fundamental rights in international human rights treaties. While the excesses of the Emergency convinced the Indian government to accede to the International Covenant on Civil and Political Rights (ICCPR) in 1979,[[265]](#footnote-265) India made several reservations to its accession.[[266]](#footnote-266) India insisted that the rights to freedom of movement, expression, assembly and association listed in the treaty could still be restricted by the Indian Constitution.[[267]](#footnote-267) Additionally, while the United Nations Economic and Social Council appointed a Special Rapporteur on States of Emergency in 1982 to monitor compliance with domestic and international norms,”[[268]](#footnote-268) the Special Rapporteur has “not lived up to expectations.”[[269]](#footnote-269)

When a country codifies emergency powers in its constitution it should take care to specify a sufficiently high threshold for their use and specific legal and institutional checks on the actions an executive can take during an emergency. Lessons from the Philippines and India demonstrate that a constitution can protect fundamental rights if provides for explicit judicial review of and during an emergency and if it assures its permanence in times of crisis.

*Lesson 1: The Judiciary Can Champion Fundamental Rights, If You Let It*

One scholar of Indian history marks the record of national emergencies in India as confirmation of the “growing global consensus that, even in countries which have sophisticated judicial systems functioning within a strong tradition of independence and impartiality, judges, especially at the highest level, often fail to live up to the popular expectations in the matter of resisting executive claims during sensitive periods of crisis.”[[270]](#footnote-270) Additionally, the post-colonial transition can often tie the hands of a new government as courts have to “confront a precedent a precedent of emergency jurisprudence within new conditions of state legitimacy.”[[271]](#footnote-271) However, Indian Supreme Court in cases after the Emergency and the Philippines Supreme Court in 2006 have shown that this does not have to be the case. Whether a judiciary has clearly defined jurisdiction to review the sufficiency of a declaration of emergency, as in the Philippines[[272]](#footnote-272) or whether the Supreme Court has to affirm its independence[[273]](#footnote-273) and offensively assert its power to protect individual freedom,[[274]](#footnote-274) and to review constitutional amendments by judicial fiat, [[275]](#footnote-275) courts have the unique ability to champion society over executive draconianism.[[276]](#footnote-276)

The strongest lesson from both the Philippine and Indian cases for effective safeguards against possible executive excesses during an emergency is to codify judicial review of the factual basis for the declaration of an emergency and to constitutionalize the role of fundamental rights and the judiciary as the protector of fundamental rights in a democratic society. While codification is instant, constitutionalization is a process of socialization, which can take years or even decades to establish.[[277]](#footnote-277) It would be unfortunate if this process was predicated on a country experiencing a period of crisis such as Marcos’ martial law or Mrs. Gandhi’s emergency to propel the constitutionalization process. However, it is possible that, “[t]here is no panacea for the maintenance of civil liberties during emergency. In the long run, the crucial factor in the preservations of civil liberties is the existence of a citizen body which is conscious that civil liberties matter, and is will, if need be, to fight for them.”[[278]](#footnote-278)

*Lesson 2: Crisis Powers Should Never be Permanent*

Although India has been governed by the same constitution since 1949, the document has been amended over ninety times in the past fifty years.[[279]](#footnote-279) As such, when the National Assembly wanted to validate Mrs. Gandhi’s actions in the early days of the emergency they turned to the “familiar route of constitutional amendment.”[[280]](#footnote-280)

The measures adopted during an emergency are supposed to be only those which are minimally necessary to return the government and the country to normalcy.[[281]](#footnote-281) Therefore, there should be no need to make the changes permanent or to constitutionally anoint executive actions during an emergency. A national emergency represents a suspension of normal governmental structures and operations in order to deal with an imminent threat, it should not be the vehicle for great societal change, as Marcos envisioned.[[282]](#footnote-282) One of the most effective safeguard to ward off the institutionalization of an emergency is to codify in a constitutional grant of emergency powers a prohibition against the passage of constitutional amendments or the calling for a new constitutional convention while a country remains under a formal declaration of emergency. [[283]](#footnote-283)

1. Nomi Claire Lazar, States of Emergency in Liberal Democracies 8 (2009). [↑](#footnote-ref-1)
2. Jyotirindra Das Gupta, *Emergency Regimes and Development Politics in Asia*, 18 Asian Survey 315, 319 (Apr. 1978). [↑](#footnote-ref-2)
3. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?* 112 Yale L.J. 1011, 1027 (2003). [↑](#footnote-ref-3)
4. *Id.* at 1028. [↑](#footnote-ref-4)
5. *Id.* at 1029. [↑](#footnote-ref-5)
6. Gupta, *supra* note 2, at 315. [↑](#footnote-ref-6)
7. Venkat Iyer, States of Emergency: The Indian Experience 3 (2000). [↑](#footnote-ref-7)
8. HCJ *428/86 Barzilai v. Government of Israel* P.D. 40(3) 505, 580 (1986) *available at* http://elyon1.court.gov.il/files\_eng/86/280/004/Z01/86004280.z01.pdf. [↑](#footnote-ref-8)
9. Gross, *supra* note 3, at 1029. Professor Gross also notes, “[e]xperience shows that when grave national crises are upon us, democratic nations tend to race to the bottom as far as the protection of human rights and civil liberties, indeed of basic and fundamental principles, is concerned. Emergencies suspend, or at least redefine, de facto, if not de jure, much of our cherished fundamental freedoms and rights.”*Id.* at 1019. [↑](#footnote-ref-9)
10. Gupta, *supra* note 2, at 315. [↑](#footnote-ref-10)
11. Nasser Hussain, The Jurisprudence of Emergency: Colonialism and the Rule of Law 17-18 (2003). [↑](#footnote-ref-11)
12. Martin Sheffer, *Presidential Power to Suspend Habeas Corpus: the Taney-Bates Dialogue and Ex Parte Merryman*, 11 Okla. City U. L. Rev. 1, 23 (1986) *in* Richard Posner, Not a Suicide Pact: The Constitution in a Time of National Emergency 70 (2006). The law of necessity was no strange to ancient Indian culture. The *Mahabharata*, an Indian epic which dates from the 8th century B.C.E. to the 4th century C.E. states “[w]hen face to face with dire adversity, government could to anything. The justification of it all is that abnormal times have ethics of their own, *Appaddharma* as it is called. It must be clearly understood that in days of distress all the ordinary rules of morality and custom are suspended.” *quoted in* Iyer, *supra* note 7, at 2. [↑](#footnote-ref-12)
13. *See* India Const. art.352-360; Const. (1935), Art. VII §10 (2) (Phil.). [↑](#footnote-ref-13)
14. Const. (1935), Art. 14, (Phil.); India Const. art. 359 § 1. [↑](#footnote-ref-14)
15. Iyer, *supra* note 7, at 93. [↑](#footnote-ref-15)
16. Gupta, *supra* note 2, at 316, 322. *But cf*  Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty and the Courts 30 (Oxford Univ. Press 2007) (“There is no reason to think that the government will systematically overestimate or overvalue security during emergencies nor that it will systematically overestimate the magnitude of a threat, compared to its behavior during non-emergencies.”) . [↑](#footnote-ref-16)
17. Cass Sunstein, *Monkey Wrench: The Supreme Court Has Always Thwarted Presidents Who Demanded Unlimited Legal Power in Wartime*, 2005-Oct Legal Affairs 36, 37 (2005). [↑](#footnote-ref-17)
18. Gross, *supra*  note 3, at 1073 (“Emergency regimes tend to perpetuate themselves, regardless of the intentions of those who originally invoked them. Once brought to life, they are not so easily terminable.”). [↑](#footnote-ref-18)
19. Iyer, *supra* note 7, at 76, 101. [↑](#footnote-ref-19)
20. *Id*.; Burt Neuborne, *The Supreme Court of India*, 1 Int’l J. Const. L. 476, 478 (2003). [↑](#footnote-ref-20)
21. Iyer, *supra* note 7, at 77; *see also*, B. Shiva Rao, 5 The Framing of India’s Constitution: A Study 170 (Subhash C. Kashyab ed., 2004) (“The inclusion of a set of fundamental rights in India’s Constitution had its genesis in the forces that operated in the national struggle during British rule. With the resort by the British executive to such arbitrary acts as internments and deportations without trial and curbs on the liberty of the press in the early decades of this century, it became an article of faith with the leaders of the freedom movement.”). [↑](#footnote-ref-21)
22. India Const. art 14-18. [↑](#footnote-ref-22)
23. India Const. art. 19. The Constitution as originally passed allowed for the imposition of reasonable limitations on the right to freedom of speech and expression in the interests of “the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.” *Id.* [↑](#footnote-ref-23)
24. India Const. art. 21-21A. [↑](#footnote-ref-24)
25. India Const. art. 25-28. [↑](#footnote-ref-25)
26. Iyer, *supra* note 7, at 77. [↑](#footnote-ref-26)
27. India Const. art. 32. [↑](#footnote-ref-27)
28. Iyer, *supra* note 7, at 78. [↑](#footnote-ref-28)
29. Professor Jinks describes this tension as “substantial institutional commitments to both universal principles of justice and specific order maintenance strategies necessitated by what is seen as India’s unique socio-political predicament.” Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventative Detention and Personal Liberty in India*, 22 Mich. J. Int’l L. 311, 321 (2001). [↑](#footnote-ref-29)
30. Iyer, *supra* note 7, at 67. [↑](#footnote-ref-30)
31. *Id.* at 71. [↑](#footnote-ref-31)
32. *Id.* at 71. The Government of India Act of 1919 allowed the Governor-General to issue ordinances “in case of emergency. . . for the peace and good government of British India.” *Id.* at 70. [↑](#footnote-ref-32)
33. *Id.* at 71. [↑](#footnote-ref-33)
34. Anil Kalhan et al, *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India* 20 Colum. J. Asian L. 93, 131 (2006). [↑](#footnote-ref-34)
35. Kalhan et al, *supra* note 34 at 131. [↑](#footnote-ref-35)
36. Iyer, *supra* note 7, at 80. [↑](#footnote-ref-36)
37. *Id.* at 81. [↑](#footnote-ref-37)
38. *Id.* [↑](#footnote-ref-38)
39. *Id.* [↑](#footnote-ref-39)
40. *Id.* [↑](#footnote-ref-40)
41. *Id.* at 89. [↑](#footnote-ref-41)
42. Granville Austin, The Indian Constitution: Cornerstone of a Nation 70 (1999). [↑](#footnote-ref-42)
43. Iyer, *supra* note 7, at 77n.61, 84 . [↑](#footnote-ref-43)
44. *Id.* at 90. Delegate Pandiit Hriday Nath Kunzru stated, “It is not necessary for the purpose of quelling internal disturbance or meeting external aggression that we should deprive the people of all their fundamental rights. All that is necessary is that notwithstanding the rights conferred by this Constitution on the people, such of as them, if allowed to be exercised in any unrestricted manner, will create difficulties in the way of re-establishing peace, may not be legally enforced” *Id.* [↑](#footnote-ref-44)
45. *Id.* at 85. [↑](#footnote-ref-45)
46. *Id.* at 79. [↑](#footnote-ref-46)
47. *Id. at* x. [↑](#footnote-ref-47)
48. *Id.* at 77. [↑](#footnote-ref-48)
49. India Const. art. 352. [↑](#footnote-ref-49)
50. India Const. art. 352. [↑](#footnote-ref-50)
51. M.P. Singh, *Securing the Independence of the Judiciary- the Indian Experience*, 10 Ind. Int’l & Comp. L. Rev. 245, 245 (2000). [↑](#footnote-ref-51)
52. Int'l Comm'n of Jurists, *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers* 173, 179 (11th ed. 2002) *available at* http://www.icj.org/IMG/pdf/india.pdf. [↑](#footnote-ref-52)
53. India Const. art. 50 (“The State shall take steps to separate the judiciary from the executive in the public services of the State.”) . [↑](#footnote-ref-53)
54. Iyer, *supra* note 7, at 93. [↑](#footnote-ref-54)
55. India Const. art. 358 §1-2. [↑](#footnote-ref-55)
56. Iyer, *supra* note 7, at 97. [↑](#footnote-ref-56)
57. Patricio N. Abinales & Donna J. Amoroso, State and Society in the Philippines 115 (2005). The Malolos Constitution included religious, press, educational and professional freedoms. For a full list of the Malolos Bill of Rights see Rufus B. Rodriguez, Constitutionalism in the Philippines 13 (1997). [↑](#footnote-ref-57)
58. Abinales & Amoroso, *supra* note 60, at 113-15. [↑](#footnote-ref-58)
59. *Id.* at 113. [↑](#footnote-ref-59)
60. Rodriguez, *supra* note 60, at 16. [↑](#footnote-ref-60)
61. Also known as the Cooper Act of 1902 or the First Philippine Organic Act. For a history of the first Philippine Assembly see, National Historical Institute, *The History of the First Philippine Assembly (1907-1916)* http://www.nhi.gov.ph//index2.php?option=com\_content&do\_pdf=1&id=14. [↑](#footnote-ref-61)
62. Rodriguez, *supra* note 60, at 21. [↑](#footnote-ref-62)
63. *Id.* at 9-10. [↑](#footnote-ref-63)
64. Abinales & Amoroso, *supra* note 60, at 113. [↑](#footnote-ref-64)
65. Abinales & Amoroso, *supra* note 60, at 3. [↑](#footnote-ref-65)
66. Frank M. Keesing, The Philippines: A Nation in the Making (1937). [↑](#footnote-ref-66)
67. Rodriguez, *supra* note 60, at 27. [↑](#footnote-ref-67)
68. Abinales & Amoroso, *supra* note 60, at 147. [↑](#footnote-ref-68)
69. Const. (1935), Art. III §1-21, (Phil.). [↑](#footnote-ref-69)
70. Const. (1935), Art. VI §26, (Phil.). [↑](#footnote-ref-70)
71. Const. (1935), Art. VII §10 (2), (Phil.). [↑](#footnote-ref-71)
72. Rodriguez, *supra* note 60, at 33. [↑](#footnote-ref-72)
73. Rodriguez, *supra* note 60, at 35. [↑](#footnote-ref-73)
74. Article XII of the 1943 Constitution provides “Within one year after the termination of the Greater East Asia War, the National Assembly shall by law provide for the election by popular suffrage of delegates to a Constitutional Convention, which shall meet not later than sixty days after their election in order to formulate and adopt a new Constitution . . .” Const. (1943), Art. XII § 1, (Phil). [↑](#footnote-ref-74)
75. Rodriguez, *supra* note 60, at 37. [↑](#footnote-ref-75)
76. David J. Steinberg, The Philippines: A Singular and Plural Place 120 (4thed. 2000). [↑](#footnote-ref-76)
77. *Id.* [↑](#footnote-ref-77)
78. *Id.* [↑](#footnote-ref-78)
79. Abinales & Amoroso, *supra* note 60, at 206-207. [↑](#footnote-ref-79)
80. Steinberg, *supra* note 80, at 135. [↑](#footnote-ref-80)
81. *Id.* [↑](#footnote-ref-81)
82. Const. (1973), Art. IV (Phil.). [↑](#footnote-ref-82)
83. Abinales & Amoroso, *supra* note 60, at 206-207. [↑](#footnote-ref-83)
84. Const. (1973), Art. VIII §1, (Phil.) [↑](#footnote-ref-84)
85. *Compare* Const. (1973), Art. IX § 1, (Phil.) (“The Executive power shall be exercised by the Prime Minister with the assistance of the Cabinet.”), *and* Const. (1935) Art. VII §1, (Phil.) (“The executive power shall be vested in a President of the Philippines.”). [↑](#footnote-ref-85)
86. Const. (1973), Art. XVI §1(2), (Phil.) *and* Const. (1935), Art. XV, (Phil.). [↑](#footnote-ref-86)
87. Steinberg, *supra* note 80, at 135. [↑](#footnote-ref-87)
88. *Id.* [↑](#footnote-ref-88)
89. Const. (1973), Art. XVII §3(2), (Phil.). [↑](#footnote-ref-89)
90. Steinberg, *supra* note 80, at 135-36. [↑](#footnote-ref-90)
91. *Id.* at 153-54. [↑](#footnote-ref-91)
92. *Id.* at 154. [↑](#footnote-ref-92)
93. Const. (1986), Art. I §1, (Phil.). [↑](#footnote-ref-93)
94. Const. (1986), Art. II §1, (Phil.). [↑](#footnote-ref-94)
95. Const. (1986), Art. V §1, (Phil.). [↑](#footnote-ref-95)
96. Steinberg, *supra* note 80, at 154. [↑](#footnote-ref-96)
97. *Id.* [↑](#footnote-ref-97)
98. Abinales & Amoroso, *supra* note 60, at 233. [↑](#footnote-ref-98)
99. *Id.* at 234. [↑](#footnote-ref-99)
100. Const. (1987), Art. VI §1, (Phil.). [↑](#footnote-ref-100)
101. *See, e.g.,* Const. (1987), Art. VI §30, (Phil.). (“No law shall be passed increasing the appellate jurisdiction of the Supreme Court as provided in this Constitution without its advice and concurrence.”). [↑](#footnote-ref-101)
102. Const. (1987), Art. VII §4, (Phil.). The president is also limited to one six-year term, and anyone who has succeeded as president and has served more than four years is not eligible for re-election. *Id.* [↑](#footnote-ref-102)
103. The 1987 Constitution included State Policies in its Declaration of Principles that were not included in the 1935 Constitution. The policies range from a declaration of a nuclear-free zone to promoting social justice and a policy to “protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature. Const. (1987), Art. II, (Phil.). [↑](#footnote-ref-103)
104. Const. (1987), Pmbl., (Phil.). [↑](#footnote-ref-104)
105. Const. (1935), Pmbl., (Phil.). [↑](#footnote-ref-105)
106. The Preamble of the 1935 Constitution stated that the Constitution’s purpose was to secure the “blessings of independence under a regime of justice, liberty, and democracy” Const. (1935), Pmbl., (Phil.). [↑](#footnote-ref-106)
107. Const. (1987), Art. VII §18, (Phil.). [↑](#footnote-ref-107)
108. Const. (1987), Art. VII §18, (Phil.). [↑](#footnote-ref-108)
109. Const. (1987), Art. VII §18, (Phil.). [↑](#footnote-ref-109)
110. Const. (1987), Art. VII §18, (Phil.). [↑](#footnote-ref-110)
111. Rodriguez, *supra* note 60, at 50. [↑](#footnote-ref-111)
112. This part of the paper will only address formally declared states of national emergencies in India. The scope and history of India’s standard preventative detention laws are outside the purview of this paper. For a recitation of the influence of these laws see, Jinks, *supra* note 29. Likewise, the declaration of a state of emergency in Punjab in 1988, although codified in the constitution is also outside the scope of this paper’s focus on national emergencies. [↑](#footnote-ref-112)
113. *See* Jinks, *supra* note 29, at 344 (“In India, the status of the rule of law in states of emergency takes on special significance.”). [↑](#footnote-ref-113)
114. Iyer, *supra* note 7, at 103. [↑](#footnote-ref-114)
115. *Id.* at 103-104. [↑](#footnote-ref-115)
116. Article 19 rights include: freedom of speech and expression, peaceably assembly, freedom to form associations, to move freely throughout the country, and to practice any occupation or business. India Const. art. 19. [↑](#footnote-ref-116)
117. Iyer, *supra* note 7, at 108. [↑](#footnote-ref-117)
118. *Id.* [↑](#footnote-ref-118)
119. *Id.*  [↑](#footnote-ref-119)
120. *Id.* at 131. [↑](#footnote-ref-120)
121. *Id.* at 130. [↑](#footnote-ref-121)
122. Kalhan et al, *supra* note 34, at 133. [↑](#footnote-ref-122)
123. Iyer, *supra* note 7, at 116. [↑](#footnote-ref-123)
124. *Id.* at 118. [↑](#footnote-ref-124)
125. Makhan Singh Tarsikka v. State of Punjab, AIR 1964 S.C. 381, 392. [↑](#footnote-ref-125)
126. *Id.* at 403. [↑](#footnote-ref-126)
127. PL Lakhanpal v. Union of India, AIR 1967 S.C. 243, 245. [↑](#footnote-ref-127)
128. Bhut Nath Mate v. State of West Bengal, AIR 1974 S.C. 806. [↑](#footnote-ref-128)
129. *See, e.g.* G Sadanandan v. State of Kerala AIR 1966 S.C. 1925,1930 (“the tendency to treat [the suspension of fundamental rights] in a casual and cavalier manner which may conceivably result from the continuous use of such unfettered powers, may ultimately pose a serious threat to the basic values on which the democratic way of life in this country is founded.”); Ghulam Sarwar v. Union of India, AIR 1967 S.C. 1335, 1338 (“there is the correlative danger of the abuse of such extra ordinary power leading to totalitarianism.”) [↑](#footnote-ref-129)
130. Iyer, *supra* note 7, at 135. [↑](#footnote-ref-130)
131. *Id.* at 127. [↑](#footnote-ref-131)
132. Neuborne, *supra* note 20, at 490. [↑](#footnote-ref-132)
133. Iyer, *supra* note 7, at 141. [↑](#footnote-ref-133)
134. *Id.* Also, Parliament acted on its constitutional authorization under art 19 § 2 to impose “reasonable restrictions” on freedoms of speech, expression, assembly and association in the “interests of India” by enacting the Unlawful Activities (Prevention Act of 1967). This act, still in force today, allows the national government power to ban as “unlawful” any “association involved in any action. . . that is intended to express or support any claim to secession or that ‘disclaims, questions, disrupts, or is intended to disrupt the sovereignty and territorial integrity of India.’” Kalhan et al, *supra* note 34, at 136. [↑](#footnote-ref-134)
135. These include the right to equality, the right to liberty, and the right to be informed of the crime for which you have been arrested. India Const. art. 14, 21-22. [↑](#footnote-ref-135)
136. Iyer, *supra* note 7, at 200. [↑](#footnote-ref-136)
137. Kalhan et al, *supra* note 34, at 137. [↑](#footnote-ref-137)
138. *Id.* [↑](#footnote-ref-138)
139. *Id.* [↑](#footnote-ref-139)
140. Neuborne, *supra* note 20, at 493. [↑](#footnote-ref-140)
141. *Id.* For a review of Indira Gandhi’s history with the Supreme Court see *Id*. 489-91. [↑](#footnote-ref-141)
142. *Id.* at 493. [↑](#footnote-ref-142)
143. Stanley Wolpert, India 199 (4th ed. 2009). [↑](#footnote-ref-143)
144. *Id.* [↑](#footnote-ref-144)
145. Iyer, *supra* note 7, at 98. [↑](#footnote-ref-145)
146. Wolpert, *supra* note 147, at 99. [↑](#footnote-ref-146)
147. *Id.* at 200. [↑](#footnote-ref-147)
148. Neuborne, *supra* note 20, at 478 n.13. [↑](#footnote-ref-148)
149. Wolpert, *supra* note 147, at 200. [↑](#footnote-ref-149)
150. Granville Austin, Working a Democratic Constitution 296 (199). [↑](#footnote-ref-150)
151. Michael Davis, Book Review, *Constitutionalism and New Democracies*, 36 Geo. Wash. Int’l L. Rev. 681 (2004). [↑](#footnote-ref-151)
152. Neuborne, *supra* note 20, at 493. (Raj Narain, the impetus of the high court case that invalidated Gandhi’s election, included a challenge to the thirty-ninth amendment in his Supreme Court appeal. The court unanimously reversed Gandhi’s criminal conviction, but five of the nine justices annulled the thirty-ninth amendment.). [↑](#footnote-ref-152)
153. *Id.* [↑](#footnote-ref-153)
154. *Id.* [↑](#footnote-ref-154)
155. Iyer, *supra* note 7, at 165 (2000). [↑](#footnote-ref-155)
156. *Id.* [↑](#footnote-ref-156)
157. Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 Am. U. Int’l L. Rev. 413, 474 (1998). Another analyst described these changes as ensuring “that the state apparatus would be allowed to operate as the unconstrained guardian of the nation.” Gupta, *supra* note 2, at 332. [↑](#footnote-ref-157)
158. Kalhan et al, *supra* note 34, at 137. [↑](#footnote-ref-158)
159. Iyer, *supra* note 7, at 141. [↑](#footnote-ref-159)
160. *Id.* at 180-81. [↑](#footnote-ref-160)
161. Kalhan et al, *supra* note 34, at 138. [↑](#footnote-ref-161)
162. Iyer, *supra* note 7, at 167. [↑](#footnote-ref-162)
163. *Id.* at 171-72. [↑](#footnote-ref-163)
164. *Id.* at 173. [↑](#footnote-ref-164)
165. *Id.* at 174. [↑](#footnote-ref-165)
166. *Id.* at 182, 185. [↑](#footnote-ref-166)
167. *Id.* at 185. [↑](#footnote-ref-167)
168. AIR 1976 S.C. 1207. [↑](#footnote-ref-168)
169. Iyer, *supra* note 7, at 188. [↑](#footnote-ref-169)
170. AIR 1976 S.C. 1207. The one dissenting judge was next in line to become Chief Justice. However, he was superseded and replaced with a judge who was had been more supportive of the administration. Neuborne, *supra* note 20, at 482. [↑](#footnote-ref-170)
171. AIR 1976 S.C. 1207. [↑](#footnote-ref-171)
172. Sripati, *supra* note 157, at 474 (“Until the mid-1970s, the Indian citizenry viewed the Supreme Court as a bastion of the rich and wealthy. Essentially, the Court lacked legitimacy and a solid foundation of support by the people. . .”). [↑](#footnote-ref-172)
173. *Id.*  [↑](#footnote-ref-173)
174. Iyer, *supra* note 7, at 100. [↑](#footnote-ref-174)
175. *Id.* at 160. *See also*, Kalhan et al, *supra* note 34, at 137. [↑](#footnote-ref-175)
176. Kalhan et al, *supra* note 34, at 138. [↑](#footnote-ref-176)
177. Iyer, *supra* note 7, at 199. [↑](#footnote-ref-177)
178. Kalhan et al, *supra* note 34, at 138. [↑](#footnote-ref-178)
179. Iyer, *supra* note 7, at 199. [↑](#footnote-ref-179)
180. *Id.* [↑](#footnote-ref-180)
181. *Id.* at 200-201. [↑](#footnote-ref-181)
182. Kalhan et al, *supra* note 34, at 139. [↑](#footnote-ref-182)
183. *Id.* [↑](#footnote-ref-183)
184. *Id.* [↑](#footnote-ref-184)
185. Iyer, *supra* note 7, at 205. [↑](#footnote-ref-185)
186. Sripati, *supra* note 157, at 474. [↑](#footnote-ref-186)
187. *Id.* at 484-85. [↑](#footnote-ref-187)
188. A.I.R. 1978 S.C. 597, 620. [↑](#footnote-ref-188)
189. A.I.R. 1978 S.C. 597 (V.R. Krishna Iyer, J., concurring). [↑](#footnote-ref-189)
190. A.I.R. 1978 S.C. 622. [↑](#footnote-ref-190)
191. A.I.R. 1978 S.C. 622. [↑](#footnote-ref-191)
192. Neuborne, *supra* note 20, at 480. [↑](#footnote-ref-192)
193. AIR 1980 S.C. 1789. [↑](#footnote-ref-193)
194. Neuborne, *supra* note 20, at 495. [↑](#footnote-ref-194)
195. The Court held, “Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore you cannot destroy its identity.” AIR 1980 S.C. 1789, 1798, [↑](#footnote-ref-195)
196. S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149. [↑](#footnote-ref-196)
197. Singh, *supra* note 53, at 245. [↑](#footnote-ref-197)
198. Abinales & Amoroso, *supra* note 60, at 153. [↑](#footnote-ref-198)
199. Rodriguez, *supra* note 60, at 15. [↑](#footnote-ref-199)
200. Paul D. Hutchcroft, *The Arroyo Imbroglio in the Philippines* 19 J. Democracy 141, 142 (Jan. 2008) *available at* http://muse.jhu.edu/journals/journal\_of\_democracy/v019/19.1hutchcroft.pdf. [↑](#footnote-ref-200)
201. Abinales & Amoroso, *supra* note 60, at 153. [↑](#footnote-ref-201)
202. *Id.* at 155. [↑](#footnote-ref-202)
203. *Id.* [↑](#footnote-ref-203)
204. *See* The LAWPH*i*L Project, Philippines Laws and Jurisprudence Databank, Proclamations, http://www.lawphil.net/executive/proc/proc.html. [↑](#footnote-ref-204)
205. Marcos is also the only Philippine President to have been tried and convicted of murder. He and other family members were arrested for the murder of the man who defeated his father in a local congressional election. He petitioned the court for the opportunity to finish his legal education, which was granted. He was found guilty, and after he passed the bar exam he successfully argued his own appeal. The judge who granted his appeal was Jose P. Laurel, the chairman of the 1943 Constitution drafting committee, who continued to be a significant influence in Marcos’ life. For a full story of Marcos’ legal quandary see Steinberg, *supra* note 80, at 116. [↑](#footnote-ref-205)
206. Abinales & Amoroso, *supra* note 60, at 202. [↑](#footnote-ref-206)
207. *Id.* [↑](#footnote-ref-207)
208. Steinberg, *supra* note 80, at 120-21. [↑](#footnote-ref-208)
209. Abinales & Amoroso, *supra* note 60, at 202-204. [↑](#footnote-ref-209)
210. Steinberg, *supra* note 80, at 121. [↑](#footnote-ref-210)
211. Gupta, *supra* note 2, at 322. [↑](#footnote-ref-211)
212. Steinberg, *supra* note 80, at 119. [↑](#footnote-ref-212)
213. Marcos’ Education minister later described Marcos’ belief in the need for a strong government: “The first duty of government is to govern; and if a government cannot govern, it has no claim to either the physical obedience or the moral allegiance of the people. But the government that is weak cannot govern well, and worse, a weak government is a threat to liberty, for a government that cannot redress wrongs cannot protect rights.” Abinales & Amoroso, *supra* note 60, at 204. [↑](#footnote-ref-213)
214. Article VI of the 1935 Constitution allowed Congress in times of “war or other national emergency” to authorize the President to issue regulations to carry out a national policy “for a limited period and subject to such restrictions as it may proscribe.” Const. (1935), Art. VI §26, (Phil.). And Article VII endowed the President, that in the case of “invasion, insurrection, rebellion, or imminent danger thereof, when the public safety requires it” to suspend the writ of habeas corpus or to place the country under martial law. Const. (1935), Art VII §10 cl. 2, (Phil.). [↑](#footnote-ref-214)
215. Gupta, *supra* note 2, at, 316, 322. [↑](#footnote-ref-215)
216. *See* Steinberg, *supra* note 80, at 123 (“[I]t slowly became obvious that martial law was a vehicle for Marcs’ personal aggrandizement.”). [↑](#footnote-ref-216)
217. Abinales & Amoroso, *supra* note 60, at 204-205. [↑](#footnote-ref-217)
218. *Id.*  [↑](#footnote-ref-218)
219. Steinberg, *supra* note 80, at 121-22. [↑](#footnote-ref-219)
220. *Id.*  [↑](#footnote-ref-220)
221. Abinales & Amoroso, *supra* note 60, at 207. [↑](#footnote-ref-221)
222. Gupta, *supra* note 2, at 322. [↑](#footnote-ref-222)
223. Abinales & Amoroso, *supra* note 60, at 207. [↑](#footnote-ref-223)
224. Steinberg, *supra* note 80, at 128. [↑](#footnote-ref-224)
225. *Id.*  [↑](#footnote-ref-225)
226. Abinales & Amoroso, *supra* note 60, at 205. [↑](#footnote-ref-226)
227. Steinberg, *supra* note 80, at 123. [↑](#footnote-ref-227)
228. *Id.*  [↑](#footnote-ref-228)
229. Abinales & Amoroso, *supra* note 60, at 205. American military aid exploded from $18.5 million in 1972 to $45.3 million in 1973. *Id* at 209. [↑](#footnote-ref-229)
230. Hutchcroft, *supra* note 200, at 142. [↑](#footnote-ref-230)
231. Abinales & Amoroso, *supra* note 60, at 223. [↑](#footnote-ref-231)
232. *Id.* at 205. Marcos had already won re-election in June 1981 with almost 88 percent of the vote, though opposition leaders boycotted the election. Steinberg, *supra* note 80, at 135. [↑](#footnote-ref-232)
233. Abinales & Amoroso, *supra* note 60, at 223. [↑](#footnote-ref-233)
234. Steinberg, *supra* note 80, at 225. [↑](#footnote-ref-234)
235. *Id.* at 152. [↑](#footnote-ref-235)
236. Rodriguez, *supra* note 60, at 50. [↑](#footnote-ref-236)
237. Const. (1987), Art. VII §18, (Phil.) (“The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus* or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.”) [↑](#footnote-ref-237)
238. Steinberg, *supra* note 80, at 159-163, 166. [↑](#footnote-ref-238)
239. *Id.* at 199. [↑](#footnote-ref-239)
240. Abinales & Amoroso, *supra* note 60, at 276-77. [↑](#footnote-ref-240)
241. *Id.* at 277. [↑](#footnote-ref-241)
242. *Id.* [↑](#footnote-ref-242)
243. Proclamation No. 38, Declaring a State of Rebellion in the National Capital Region (May 1, 2001) *available at* http://www.lawphil.net/executive/proc/proc\_38\_2001.html. [↑](#footnote-ref-243)
244. Abinales & Amoroso, *supra* note 60, at 277. [↑](#footnote-ref-244)
245. Hutchcroft, *supra* note 200, at 147. [↑](#footnote-ref-245)
246. Proclamation No. 1017, Declaring a State of National Emergency (Feb. 24, 2006) *available at* http://www.lawphil.net/executive/proc/proc\_1017\_2006.html [↑](#footnote-ref-246)
247. General Order No. 5, Directing the Armed Forces of the Philippines and the Philippine National Police to Suppress the Rebellion in the National Capital Region (Feb. 24, 2006) *available at* http://www.lawphil.net/executive/genor/go2006/genor\_5\_2006.html [↑](#footnote-ref-247)
248. Michael Doyle et al, *International Legal Developments in Review: 2006: Regional & Comparative Law, Asia and Pacific Law*, 41 Int’l Law. 711, 743 (Summer 2007). [↑](#footnote-ref-248)
249. David et al v. Macapagal-Arroyo et. al, G.R. No. 171396 (S.C. May 3, 2006) *available at* http://sc.judiciary.gov.ph/jurisprudence/2006/may2006/G.R.%20No.%20171396.htm. [↑](#footnote-ref-249)
250. *Id.* [↑](#footnote-ref-250)
251. Kalhan et al, *supra* note 34, at, 99 (citation omitted). [↑](#footnote-ref-251)
252. *Id.*  [↑](#footnote-ref-252)
253. Gross, *supra* note 3, at 1022. [↑](#footnote-ref-253)
254. Clinton Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies 294 (2002) (an emergency is “at once an admission of the incapacity of democratic institutions to defend the order within which they function”). [↑](#footnote-ref-254)
255. Gross, *supra* note 3, at 1052. [↑](#footnote-ref-255)
256. *Id;*. *see also* Gupta, *supra* note 2, at 316, 322. [↑](#footnote-ref-256)
257. Voter turnout in the Philippines has been above 60 percent in the last five decades. Abinales & Amoroso, *supra* note 60, at 15. [↑](#footnote-ref-257)
258. *Id.* at 15-16. [↑](#footnote-ref-258)
259. *Id.* [↑](#footnote-ref-259)
260. Iyer, *supra* note 7, at 199. [↑](#footnote-ref-260)
261. Abinales & Amoroso, *supra* note 60, at 205. [↑](#footnote-ref-261)
262. Iyer, *supra* note 7, at 77 . [↑](#footnote-ref-262)
263. Kalhan et al, *supra* note 34, at 107 [↑](#footnote-ref-263)
264. Lazar, *supra* note 1, at 17. [↑](#footnote-ref-264)
265. Iyer, *supra* note 7, at 203. The Philippines joined the convention in October 1986, after the end of the Marcos regime, but did make any substantive reservations to the treaty. United Nations Treaty Collection, Status of Treaties, Chapter IV § 4, International Covenant on Civil and Political Rights *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\_no=IV-4&chapter=4&lang=en. [↑](#footnote-ref-265)
266. United Nations Treaty Collection, Status of Treaties, Chapter IV § 3, International Covenant on Economic, Social and Cultural Rights, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\_no=IV-3&chapter=4&lang=en [↑](#footnote-ref-266)
267. Iyer, *supra* note 7, at 203. [↑](#footnote-ref-267)
268. Iyer, *supra* note 7, at 29-30. [↑](#footnote-ref-268)
269. Iyer, *supra* note 7, at 325. [↑](#footnote-ref-269)
270. Iyer, *supra* note 7, at x-xi. [↑](#footnote-ref-270)
271. Hussain, Iyer, *supra* note 11, at 107. [↑](#footnote-ref-271)
272. Const. (1987), Art. VII §18, (Phil.) (“The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus* or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.”) [↑](#footnote-ref-272)
273. S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149. [↑](#footnote-ref-273)
274. Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597, 620. This is especially important given the “ameliorative aspirations of Indian constitutionalism.” Gary G. Jacobsohn, *The Permeability of Constitutional Borders*, 82 Tex. L. Rev. 1763, 1792 (2004). [↑](#footnote-ref-274)
275. Minerva Mills v. Union of India, AIR 1980 S.C. 1789. [↑](#footnote-ref-275)
276. Gross, *supra* note 3, at 1035 (“Courts are seen as the bulwarks that safeguard rights and freedoms against encroachment by the state. As exigencies tend to test the protection of such rights and freedoms, courts are expected to be evermore vigilant in a time of emergency.”). [↑](#footnote-ref-276)
277. *See* Rodriguez, *supra* note 60, at 3 (“during the martial law period we had a Constitution but no constitutionalism.”). [↑](#footnote-ref-277)
278. Herbert Marx, *The Emergency Powers in Civil Liberties in Canada*, 16 McGill L.J. 39, 91 (citation omitted) *in* Iyer, *supra* note 7, at 336. [↑](#footnote-ref-278)
279. *CJ All Praise for Indian Constitution*, Times (India), Nov. 27, 2009 *available at* http://timesofindia.indiatimes.com/city/chennai/CJ-all-praise-for-Indian-Constitution/articleshow/5273302.cms. [↑](#footnote-ref-279)
280. Neuborne, *supra* note 20, at 493. [↑](#footnote-ref-280)
281. Gross, *supra* note 3, at 1023. [↑](#footnote-ref-281)
282. Gupta, *supra* note 2, at 322. [↑](#footnote-ref-282)
283. Rossiter, *supra* note 260, at 303 (“Emergency powers are strictly conditioned by their purpose, and this purpose is the restoration of normal conditions. The actions directed to this end should therefore be provisional.”). [↑](#footnote-ref-283)