

## THE STATE OF EXCEPTION IN INDIA

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### Abstract

The end of colonialism gave way to the rise of nation states in South Asia Region engraft with a sense of pan nationalism. The State became the vanguard, the epitome of power and sovereignty. As such, any assertions contradicting to the well established idea is labelled as an incursion to the supremacy of the State. And that the ruling authority has superimposed the state of exception through extraordinary laws. It is at this backdrop that this paper attempts to animate why such laws are enforced and promulgated on particular events or incidents. The paper further argues echoing De Martino(320) that if exceptional measures are the results of periods of political crisis and as such must be understood on political and not on juridico- constitutional grounds. This paper further questions the notion of what encapsulates to act politically.

**Key words:** State of exception, extraordinary laws, terrorist, Khalistan movement.

“Our complicity begins with our country’s reaction to the 9/11 attack and our failure .....to debate the respond honestly. The war in Iraq, the abuse of detainees, electronic eavesdropping, Guantanamo Bay- these things were all done on our behalf and they may turn out in the end to create more terrorist”

Jess Walter “ A conversation with Jess Walter”.

### Introduction

Carl Schmitt identifies the State of Exception as a situation in which law is suspended by sovereign power. According to Schmitt, “Sovereignty is he who decides on the exception” (Schmitt 5; Agamben 1). Until recently when legal and political theorists confront the conceptual difficulties that emerge when the law provides for its own suspension, the scholarly research on the state of exception had focused on the paradigmatic

case of Weimar Germany and the influential writing of Carl Schmitt (Kohn 1). The state of exception exists when crises are resolved by granting prerogative to the military or the executive and curtailing the rights of citizens and their representatives (Kohn 1). For instance in India, Armed Force Special Power Act (AFSPA), Terrorist and Disruptive Activities (Prevention) Act commonly known as TADA etc. become the law of the land when the need arises. They are as powerful as their former. However, there are few exception carried by these extraordinary laws. AFSPA gives full power to armed forces which at times results to human rights violations as they have legal immunity for any action carried out under the Act. At times it has the capacity to overpower the existing ordinary laws.

Speaking about the application of terminologies to describe an event, it may be said that it can altogether be disturbing as such connotations implicitly share the dominant political idea. Endorsing Agamben which states “terminological choices can never be neutral” (5). The same applied to one of the most historic events in Indian history. Is the revolt of 1857, ‘the first war of independence’ or ‘the Sepoy Mutiny’? The answer to which may well assume different connotation at different time; but least to say, it is not devoid from the influence of prevailing dominant political idea. Words like ‘disturbed area’, ‘violence’, ‘threats’, ‘failure of state mechanism’ etc. are intoned to describe the state of affairs that need concerted efforts to normalize the situation. Riveting on Stephen Humphreys’ statement, “The state of exception assumes a ‘fictitious’ and political character, where a vocabulary of war is maintained metaphorically to justify recourse to extensive government powers” (679). As such, the promulgation of exceptional measures was to justify and provide legal framework to the use of military power or executive on the ground of advancing security and in curtailing threats. The paper is conceptualized in the light of Agamben’s definition as State power’s immediate response to the most extreme internal conflicts (2). Agamben’s further highlighted that the state of exception is not a state of law but a space without law, a zone of anomie (50).

### State of Exception in India

Independent India constituted itself to protect its people, territory and its sovereignty under the umbrella of the Constitution. The new India, however, is not free from threats. Post Independent India had to deal with both external and internal problems, requiring concerted efforts to protect its new formed nation and ideals. Securing its sovereignty and national integration became the top most priority and the biggest contemporary challenge in the midst of upsurge of various movements ranging from autonomy to secessionist movements across the State. In order to protect itself from the unending threats, it came up with laws which were extraordinary in nature to upkeep the security of the newly born State.

The composition and consortium of its new people who fail to comprehend their status in the new-formed State resulted in breeding secessionist movements. The need to ascertain security was well founded. The successive waves of secessionist movements which could

otherwise undermine and challenge the legitimacy of the State placed a mantle on the State to tackle it. India's internal security and threats which existed in four main arenas viz., rebellion in Punjab, militancy in Jammu & Kashmir, insurgency in North East India, and left wing in the Peninsular region along with incidents of terrorism, organized crime, communal and caste - based violence was altogether enough to call in for extraordinary measures (Basu 3; Manoharan 368; Ansari). These extraordinary measures were operated under the ambit of the law itself purely to legitimize in an attempt to curtail the rising threats.

In India, numerous counter -terrorist laws have been passed. Anti-terrorist legislation in India, however, dates back to the British Raj with the introduction of Preventive Detention in 1793. It contains government's right to detain anyone on any ground of suspicion. India too retained it by passing the Preventive Detention Act (PDA) of 1950 in order to subvert any untoward anti-national activity and anti-social activity. On a closure examination, the Act contravenes in matters to detenu's right to be represented by a legal practitioner of his choice enshrined under Article 22(1) of the Constitution (Rahman, 2004). This was followed shortly by the enactment of Armed Forces Special Power Act (AFSPA) 1953 which dealt with specific targeted regions of India. PDA was repealed in 1969, but it was shortly replaced by Maintenance of Internal Security Act (MISA) in 1971 and later followed by Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) in 1974. Unlike AFSPA, the Terrorist and Disruptive Activities (Prevention) Act (TADA) was another antiterrorist legislation that was meant to apply throughout India which came into force under the backdrop of Punjab insurgency. TADA was adopted in 1985 to be valid only for two years but was later renewed in 1987 and extended for another six years (Mohapatra 329). Notwithstanding the existence of laws to tackle the rising threats, in the wake of rising associations and activities that question the integrity of India, numerous Acts were enacted, amended and repealed. However, the paradox remains that each time it was repealed on the ground that it was undemocratic and unconstitutional; it bore another Act and with each amendment it became more stringent surpassing the former laws. For instance, the Unlawful Activities Prevention Act (UAPA) 1967 was designed to deal with association and activities that questions the territorial integrity of India. It contained provisions terming any secessionist associations as unlawful. A further amendment to UAPA was made in 2004 to replace the Prevention of Terrorism Act (POTA) 2002 and amended again in the year 2008. Unlike in the earlier provisions of UAPA (1967, 2004) and POTA (2002), the 2008 amendment to UAPA lacks the scope for review mechanism as it was enacted hastily in the wake of 26/11, Mumbai attack (Nair 1,12; Noorani 1).

### **Khalistan Movement and the Case of Exception**

In an attempt to subdue the Khalistan Movement, which is a movement intended to carve out a separate homeland for the Sikhs. Operation Blue Star was executed to subdue the movement relying solely on the might of the Indian Armed Forces.

This operation was the first of its kind in India in which seven divisions of the army were deployed and all three wings of the armed forces- the army, and on lesser scale the navy and the air force were brought in to suppress an internal rebellion. As many as 13 tanks were used in the attack (P.Singh 561).

During the course of Khalistan movement, several extraordinary laws came into force. Under the Armed Forces Special Power Act (Punjab & Chandigarh) 1983, section 4 gave the

security forces the explicit power to shoot and kill anyone on the ground of suspicion. Section 6 of the same Act states that no legal proceeding can be constituted against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act. In 1984 the parliament amended the National Security Act containing a provision where a person can be detained without trial for 2 years in Punjab. Furthermore detention can be extended for an indefinite period for reason such as, 'maintenance of public order', 'security of the State'. The TADA of 1987 was implemented containing provisions that surpass normal criminal procedure. Under TADA it is made admissible the confession of detainees in the legal proceeding which was termed as draconian and anti-rights. It authorized detention of persons in disturbed areas based on mere suspicion. Detainees were presumed guilty until proven innocent under section 21, and section 20 prohibits granting of bail even if the detainee has not been charged after ninety days. But the paradox remain in that the largest numbers of arrests made under TADA was in Gujarat, a state not threatened by any secessionist or terrorist movements (Mohapatra 331).

### **The Case of Exception in Northeast India**

The uncharted territory of North East India with its distinct composition, unique history, culture comes under the purview of distinct administrative setup, both during the pre and post colonial period. The region couple with rugged topography and inaccessibility to other regions of India had its own shared of problems in the wake of Indian Independence. Unaware of the greater movement that was taking place in the mainland, the people of the North East were petrified and confused as to what their fate will be once the Britishers are gone. There are various documented reasons to substantiate the rise of insurgency in the North East. Some of which are cultural gap felt by the people and also the lack of political will from the center. In post- colonial India, various groups were formed across India and to name few in Northeast India the Naga National Council (1945), the Mizo Union (1946) and People's Liberation Army of Manipur etc was formed mainly to determine the political fate of its people. The Mizo uprising of 1966 or the MNF Movement (Mizo National Front) which was directed against the Government with an aimed to establish its own greater sovereign state was greatly suppressed by the might of Indian military power. The event was marked by the use of air strike against its own people for the first time in the history of India. In addition to this, Indian Army ordered the people of the entire adjoining villages to stay in a single colony for better administrative convenience. The grouping of villagers made life extremely difficult as these people have to leave their life stocks and their properties behind and live under the military watch. This happened right after the world had just learned the price of a concentration camp. Isn't fair to say this form of treatment meted is the resemblance of driving the last nail into the coffin of its own child? Or can we absolve ourself from the crime we have committed except the camp does not possess a gas chamber?

The incident at Mao gate and in Tuensang region between the Assam Rifles and the Naga people trigger the promulgation of Disturbed Area Act (DDA) of 1955 when the Assam Rifles called in for help at the Central. In spite of the annulment of this Act, however, the need to promulgate another Act was at the forefront to quell down the Naga and Manipuri uprising. A more stringent and draconian act, the Armed Forces Special Power Act (AFSPA) 1958 came into force. In 1972, it was extend to the whole of North East region and then to Jammu and Kashmir in 1990. Under this Act, no advisory board was empowered to review arrest made under the

AFSPA which gave a further edge and undue power to the military. In due course of time its power was mishandled and misused as can be seen in the case of Manorama Devi<sup>1</sup> in the year 2004. This eventually culminates in a protest staged outside Kangla Fort by 12 naked women with a slogan that read, 'Indian Army, Rape Us'. It was indeed a sight that baffles and shocked the entire nation. Indeed, the use of violence and curtailment of rights became the last resort of the powerlessness of the government where its legitimacy is corroded (Ramakrishnan 23).

### Conclusion

The employment of security forces, legal provision like counter-terrorism and insurgency provisions to secure internal security does come along within the scope of power and force. Though the centrality of anti-terrorist laws is to uphold and defend the constitutional order, however, in some juncture, it becomes unconstitutional. In other words, the operationalisation of it at times contravened with the fundamental rights of its citizens under the provision on Indian Constitution. At times, the adoption of extraordinary laws lays bare the position of its people whose rights and entitlements were curbed down under those laws. The problem with extraordinary laws lay with the fact that it is operationalised under the ambit of the law which in due course could otherwise infringe the existing ordinary laws. This aspect of 'normalisation of extraordinary laws' marked its place more permanent when its intention was temporary that is to meet or address extraordinary events or cases intended to be overturned (U K Singh 1,152). Thomas P. Crocker rightly pointed out pertaining to events that conjure the State of Exception as following 'what begins in the rhetoric of balance ends in the hierarchical dominance of the State of Exception over the rule of law' (303). Though power is the essence of all governments, power where it can also tie down against its own people negates the very essence from which it derives its power. Nevertheless, the applications of these laws stemmed out from the exceptional cases of violence. Yet, the law is silent on matters related to the misuse of power. In some occasions, it became a weapon to terrorise, subvert and contain the voice of dissent. In the larger scenario, the need to ponder and probe further as to what extent does relying on military approach had so far been effective in curtailing internal threats. Should the sovereign or the State address the state of exception through more inclusive, firm, and resolute reconciliatory approach? Is it not one of the main fundamental tenets of Liberal Democracy to hear the voice of dissidents, and those who are asserting what they feel is rightfully in the larger domain of governance?.

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<sup>i</sup> A young woman aged 32, who was a victim of atrocities committed by Armed Forces personnel in Manipur. She was picked up in the night by 17 Assam Rifles team. She was brutally and mercilessly tortured and later found dead with multiple gunshot injuries on her private parts and thighs. Her murder gave a new impetus to calls for withdrawal of AFSPA in Manipur.

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