

SOVEREIGNTY, LAW AND THE 'STATE OF EXCEPTION'

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INTRODUCTION

The concept of sovereignty is an aspect that requires a comprehensive understanding in the studying of legal systems today. In the early 19th century when Austin gave the definition of a sovereign, apart from assuming it to be a body of people who are supreme in their authority, he created a distinction between the *sovereign* and the *members of the sovereign*. While the principle is clear the members of the sovereign are subjected to the sovereign by the doctrine of checks and balances, the core argument of this paper is to critique the idea of a 'state of exception' where the 'members of the sovereign' create exceptions to the restraints they are originally subjected to. The 'state of exception' is a recent concept in jurisprudence (2005) propounded by Italian scholar Giorgio Agamben¹ where in certain authorities; members of the sovereign seek to place themselves above the law in certain circumstances. The author would like to look at this concept in the Indian context and has surveyed various case law in this regard. On the same lines, this idea is related to an interplay between the exercise of power by the sovereign and the guarantee of fundamental freedoms, an idea which is intrinsically related to the role of the Judiciary that the author has sought to bring out in the paper.

This paper then is an attempt to present a dynamic view point about sovereignty and its relationship between law and the state of exception with specific analysis in the Indian context. Part I seeks to look at the concept of sovereignty and presents the prevalent idea of it in the Indian Legal system. Part II explains the State of Exception as propounded by Giorgio Agamben and Part III critiques this concept as regards its application in the Indian context with case law and presents certain concluding observations.

PART-I

THE NATURE OF AUSTIN' S SOVEREIGN

After Austin's return from Germany he started a series of lectures on his idea of jurisprudence and a sound theory of law. His theory of sovereignty is found in his 6th lecture where he also promotes the idea of subjection to an authority. It is critiqued by a lot of scholars that Austin, in his theory of sovereignty tried to justify the notions of Hobbs, Bodin and Rousseau. Austin seemed to be heavily impressed by Hobbs'

1. Giorgio Agamben, STATE OF EXCEPTION, 1st ed. 2005, Univ. of Chicago Press.

Leviathan, power and the unqualified obeisance to the king of England². In his lecture, Austin asserts that subjection is the correlative of sovereignty and sovereignty is inseparably connected with the expression 'independent political society'³. The sovereign in an 'independent political society' is divided in two parts; *the portion of the sovereign* and the portion *to which its members are subject*. Austin contends that, in order to merge the latter with the former it would be necessary to find a political sovereign in which all the members are adults of sound mind.

The attempt by Austin to base sovereignty on the habitual obedience of the subjects has been severely criticized.⁴ It is said that he sought to confuse between the notions of legal⁵ and political sovereignty⁶. However, Austin tacitly stated that the ultimate source of law is an abstract concept and what he sought to do was provide an unfailing test of locating legal sovereignty in the state.⁷ He said that law cannot itself be based on law but must be based on something outside and above the law and in doing so sought to base it upon fact, i.e. the habitual obedience of the mass of the population.

To proceed from the theoretical perspective presented above, a true understanding of the situation of the sovereign in India relevant for our discussion can be had from the case of *Indira Gandhi v. Raj Narain*,⁸ where the Court had the daunting task to address the issue of parliamentary sovereignty and checks and restraints on the powers of the parliament. Emphasizing that absolute sovereignty⁹ does not exist in India, the Court looked into the nature of a sovereign¹⁰ and stated that the 'sovereign', if conceived of as an omnipotent being, has no existence in the real world.¹¹ Several thoughtful writers have deprecated the use of the expression in legal discussion as it has theological and religious overtones. Nevertheless, as the practice has become inveterate it will only create confusion if any departure is made in this case from the practice. If it is made clear that sovereign is not a 'mortal God' and can express himself or itself only in the manner and form prescribed by law and can be sovereign

2. *Leviathan* was written by Thomas Hobbs in 1651. It promoted his idea of social contract by the symbol of a fire breathing dragon that symbolized an authority of power meant to protect the State.

3. WB Bizzell, "A Critique of the Austinian Theory of Sovereignty", 22 Green Bag 514, (1910).

4. MDA Freeman, (ed.), LLOYD'S INTRODUCTION TO JURISPRUDENCE, 7th ed. 2001, p. 213.

5. Legal Sovereignty is the capacity to determine the application of law and that body that is not subject to its principles.

6. Political sovereignty is more regarded the power to make decisions unfettered by an external/ internal force. It is that body in the state that is uninfluenced and supreme amongst the people.

7. WL Morrison, "Some Myths about Positivism", (1958) 68 Yale LJ 212.

8. *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299.

9. According to the Court, "A sovereign in any system of civilized jurisprudence is not like an oriental despot who can do anything he likes, in any manner he likes and at any time he likes." AN Ray, J. at para 321.

10. In *Synthetics v. State of UP*, (1990) 1 SCC 109, the Court held that the word 'sovereign' means that the State has power to legislate on any subject that is in conformity with the limitations prescribed by the Constitution. In *Delhi Transport Corp. v. Mazdoor Congress*, AIR 1991 SC 101, the Court held that all Governmental exercise of power must be subject to the Constitution as it is supreme in nature.

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only when he or it acts in a certain way also prescribed by law, then perhaps the use of the expression will have no harmful consequence.

'Legal Sovereignty', according to the Court, is a capacity to determine the actions of persons in certain intended ways by means of a law....were the actions of those who exercise the authority, in those respects in which they do exercise it, are not subject to any exercise by other persons of the kind of authority which they are exercising¹². The Parliament in India does not have sovereign power to make any law it wishes, but is sovereign over the law that is just by procedure.¹³ Understanding the above by an Austinian notion of sovereignty, the Parliament is just a member of the sovereign and not the sovereign itself. Its powers are subject to some higher authority, which in our opinion is the Constitution and more specifically Article 13(2) of the Constitution.

THE DICHOTOMY IN THE LAW

I have thus explained the nature of the sovereign and the where it is located in the Indian legal system. Such an understanding assumes great relevance after the case of *Keshavananda Bharti v. Union of India*¹⁴ in 1973. While laying down the structure for the basic structure doctrine, Nani Palkiwala argued that all organizations are the very creation of the Constitution and hence none of these bodies can place themselves above it. In a sense, every legal authority is subject to the provisions of the constitution and the Parliament, which is one of its outcomes cannot destroy its basic foundation.¹⁵ It is not surprising then that all the eleven judgments in some way or the other recognized this theory and the majority¹⁶ completely abided by it.

Emphasizing that certain aspects of the constitution are inalienable,¹⁷ the Court also propounded the *Basic Structure Doctrine*¹⁸. Seven of the thirteen judges in the *Kesavananda Bharti* case, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent

11. *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299 at para 281.

12. *Ibid.* at para 282.

13. *Ibid.* at para 327. See also Owen Dixon, "Law and the Constitution", 50 L.Q.R. 590 at 604, '*the law that a sovereign can act only by law is supreme but as to what may be done by a law so made, the sovereign is supreme over that law*'.

14. *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

15. MV Kamath, NANI A. PALKHIVALA, p. 246.

16. The Majority judgments were given by Sikri CJ, Shelat, Grover, Hegde, Jagmohan Reddy, Khanna and Mukherjea JJ.

17. This gave rise to the Basic Structure Doctrine meaning that certain features of the Constitution are inalienable and the Parliament is itself subject to it. The consequence is that no Amendment to the Constitution can be made that alters or abrogates any law that is a part of the Basic Structure.

18. The phrase 'basic structure' was introduced for the first time by M.K. Nambiar and other counsels while arguing for the petitioners in the case of *IC Golaknath v. Union of India*, AIR 1967 SC 1643, but it was only in 1973 with *Keshavananda Bharti's* case that the concept surfaced in the text of the Apex Court's verdict.

limitations. Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.¹⁹

I would not like to further delve on the various aspects of the *Basic Structure* doctrine but would like to state that the doctrine has established the supremacy of the Constitution²⁰ and that no *member of the sovereign*, i.e. the legislature, judiciary or the executive shall place himself above it. All organizations are subject to the Constitution and its principles are non-derogable. While this is THE LAW in the Country today, we notice that that Court has itself created some exceptions to this doctrine and its application. The idea of a sovereign has been subjected to certain exceptions. Questions are raised that if rights ascribed in the Constitution are to be given priority over the exercise of government control, why is it that we ourselves create exceptions to this principle in times of emergency and in dealing with acts like terrorism²¹? Another perturbing issue is the abrogation of the fundamental laws by the armed forces in various areas that seeks to place them above the Constitution in certain circumstances²².

It is this idea of *members of the sovereign* placing themselves above the sovereign that I'd like to explore in this paper. While I do so, I would also like to present a critique of the 'State of Exception' as propounded by Italian legal scholar Giorgio Agamben, present live examples of its application and look at it in the Indian context.

PART-II

GIORGIO AGAMBEN AND THE 'STATE OF EXCEPTION'

In 1998, Giorgio Agamben wrote *Homo Sacer: Sovereign Power and Bare Life*,²³ where he describes the homo sacer as an individual who exists in the law as an exile²⁴ and holds that life exists in two capacities. One is natural biological life (Greek: Zoë) and the other is life (Greek: bios). The effect of homo sacer is, he says, is being stripped of one's political and biological lives. As "bare life", the homo sacer finds himself submitted to the sovereign's state of exception, and has no political significance. Agamben says that the states of homo sacer, political refugees, those

19. *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

20. Lord Bringham of Cornhill, "Law Day Lecture", (2000) 1 SCC (Jour) 29. See also *Nair Service Society v. State of Kerala*, (2007) 4 SCC 1; *P. Kannadasan v. State of Tamil Nadu*, (1996) 5 SCC 670; *AK Gopalan v. State of Madras*, 1950 SCR 88; *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*, 2007 (4) Kar LJ. 249.

21. *ADM Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207; *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569.

22. *Inderjit Baruah v. State*, AIR 1983 Del 513.

23. Giorgio Agamben, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE*, 1998, Stanford, CA.

24. According to Agamben, this is a paradox: It is only because of the law that society can recognize the individual as homo sacer, and so the law that mandates the exclusion is also what gives the individual an identity.

persecuted in the Holocaust, and the “enemy combatants” imprisoned in Guantanamo Bay and other sites are similar. As support for this, he mentions that the Jews were stripped of their citizenship before they were placed in concentration camps²⁵.

Thus, Agamben argues, “the so-called sacred and inalienable rights of man prove to be completely unprotected at the very moment it is no longer possible to characterize them as rights of the citizens of a state”²⁶. *Homo Sacer* is the total disregard to the rights of the citizens and comes into play when members of the sovereign exercise their power without any restrictions, checks and balances. Tyranny then gets imbibed in democracy.

This idea of a State of Exception was further elaborated in his book titled ‘*State of Exception*’ in 2005. In the book he borrows Carl Schmidt’s definition of sovereignty stating;

*Sovereignty is the power to decide the state of exception, to decide to whom the law applies and to whom not. The authority that can declare an emergency is the sovereign.*²⁷

Going further from here, Agamben identifies the State of exception as a modern institution that has its roots in the French revolution²⁸, first world war and the present day political government.²⁹ The modern formulation of the state of exception arrives with a 1789 decree of the French constituent assembly, distinguishing a ‘state of peace’ from a ‘state of siege’ in which ‘all the functions entrusted to the civilian authority for maintaining order and internal policing pass to the military commander, who exercises them under his exclusive responsibility’.³⁰ From there the state of exception is gradually emancipated from its war context and is introduced during peacetime to cope with social disorder and economic crises. The key observations are, first, that ‘the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one’,³¹ second, that the state of exception immediately assumes a ‘fictitious’ or political character, where a vocabulary of war is maintained metaphorically to justify recourse to extensive government powers.³²

25. Giorgio Agamben, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE*, 1998, Stanford, CA.

26. Ben Chappell, “Rehearsals of the Sovereign: States of Exception and Threat Governmentality”, <http://cdy.sagepub.com> (Last visited 13th Aug. 2007).

27. Christoph Burchard, “Interlinking the Domestic with the International: Carl Schmitt on Democracy and International Relations”, *LJIL* 19 (2006) 1.

28. Giorgio Agamben, *STATE OF EXCEPTION*, 1st ed. 2005, p. 24, Univ. of Chicago Press.

29. Agamben explicitly links the State of Exception to the treatment of detainees in Guantanamo bay by the US government.

30. Giorgio Agamben, *STATE OF EXCEPTION*, 1st ed. 2005, p. 5, Univ. of Chicago Press.

31. *Ibid.* at p. 19.

32. *Ibid.* at p. 17.

This theory is an integral part of positive law and is linked to the idea of the sovereign.³³ The State of exception is generally a phenomenon where in certain authorities; members of the sovereign seek to place themselves above the law in certain circumstances. That larger thesis emerges only gradually. Agamben seeks to base the state of exception as ‘an integral part of positive law because the necessity that grounds it is an autonomous source of law’. This approach is today codified in various constitutions³⁴ through the notion of derogation and emergency. When faced with a public emergency that ‘threatens the life of the nation’, human rights statutes³⁵ – and many constitutions – permit states to suspend the protection of certain basic rights. The existence of derogation like clauses is generally represented as a ‘concession’ to the ‘inevitability’ of exceptional state measures in times of emergency, and also as a means to somehow control these.³⁶ In practice, the derogation model ‘creates a space between fundamental rights and the rule of law’, wherein states can remain lawful while transgressing individual rights.

Agamben also understands the state of exception to be ‘essentially extrajudicial’, something prior to or other than law. This can also be seen in a Constitutional endorsement of the state of exception (emergency provisions) in most countries. Echoing Alexander Hamilton, that ‘the circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed’,³⁷ proponents argue that it is neither possible nor desirable to control executive action in times of emergency using standard judicial accountability mechanisms.³⁸

The idea of a ‘state of exception’ is intrinsically related to the interplay between sovereignty and the guarantee of fundamental freedoms. In fact, over the past decade, this concept has been diluted to the extent that it is also applicable to non-emergency situations like handling terrorism and is used as an excuse to violate ‘due process’ clauses. Notable instances in this area are the passing of the Patriot Act³⁹ in USA

33. *Ibid.* at p. 23.

34. Agamben notes that by 1996 atleast 147 countries had some sort of emergency provisions in their Constitutions. In 1978, an estimated 30 Countries were in a state of emergency.

35. This is also noticed in many Human Rights Treaties and Conventions. International Covenant on Civil and Political Rights (ICCPR; entered into force 1976), Art. 4; European Convention on Human Rights (ECHR; entered into force 1950), Art. 15; American Convention on Human Rights (ACHR; entered into force 1978), Art. 27.

36. Hickman, “Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism”, 68 *Modern Law Review* (2005) 655.

37. Quoting Alexander Hamilton from the *FEDERALIST PAPERS*.

38. Stephen Humphreys, “Legalising Lawlessness: On Giorgio Agamben’s State of Exception”, *EJIL* (2006), Vol. 17 No. 3, 677–687.

39. Also known as Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.

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and the Guantanamo cases. The Patriot Act for instance gives unbridled powers to the Authorities to violate basic constitutional rights in the name of protecting the Country from terrorism. When speaking about the USA Patriot Act, Agamben writes,

*“What is new about President Bush’s order is that it radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being. Not only do the Taliban captured in Afghanistan not enjoy the status of POW’s as defined by the Geneva Convention, they do not even have the status of people charged with a crime according to American laws”*⁴⁰

The Guantanamo cases are also related to the ‘state of exception’. The Military Commissions Act⁴¹ in the USA did not provide for *habeas corpus* provisions or the application of the Geneva Conventions to the prisoners in Abu Gharaib. They were to be treated as ‘enemy combatants’ without any status and tried before the Military Commission set up by the Bush Administration. In Agamben’s philosophy then they were *homo sacers* in a state of exception created by the sovereign.

It is however worthy to note that in *Hamdan v. Rumsfeld*,⁴² the Supreme Court held that military commissions set up by the Bush administration to try detainees at Guantanamo Bay lack “the power to proceed because its structures and procedures violate both the UCMJ and the four Geneva Conventions signed in 1949.”

Another case in this regard is *Rasul v. Bush*⁴³, where the United States Supreme Court decision held that the U.S. court system has the authority to decide whether foreign nationals (non-U.S. citizens) held in Guantanamo Bay were rightfully imprisoned or not. The core contention of the litigation was that the United States government cannot order indefinite detention without due process. The detainees have the right to challenge the legality of their detention in court. To make that challenge meaningful, they have the right to be informed of the charges they face, and the right to present evidence on their own behalves and to cross-examine their accusers. The failure of the Bush Administration to provide these protections raises serious questions about their commitment to the U.S. Constitution which is supreme and inviolable in nature.⁴⁴

40. Giorgio Agamben, *THE STATE OF EXCEPTION*, 1st ed. 2005, p. 3. In *American Civil Liberties Union v. Ashcroft* (2004), the ACLU challenged the legality of infringing the right to privacy by taping phone conversation and surveillance by the FBI under the Patriot Act which the Court held to be illegal and violative of due process.

41. The Military Commissions Act, 2006.

42. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749.

43. *Rasul v. Bush*, 542 U.S. 466 (2004).

44. William Rehnquist, CJ., gave the opinion that the US Constitution is supreme and no statute has the violate due process clauses.

Both the cases I have quoted above have sought to place the idea that the state of exception can be negated by appropriate action by the judiciary. The Courts then have the daunting task of applying the principles of checks and restraints to regulate the powers of the members of the sovereign. While we have noticed that to some extent, this is being done in the United States, we shall now proceed to analyse the 'state of exception' in the Indian Context.

PART-III

STATE OF EXCEPTION IN THE INDIAN CONTEXT

I would now like to discuss the relevance of the 'state of exception' in the Indian context. While there may be many aspects involved, we would like to focus on three main issues; emergency, terrorism and the armed forces. This would also include a critique of the decision in *Masooda Parveen v. Union of India*.⁴⁵

In *ADM Jabalpur v. Sivakant Shukla*⁴⁶, the Supreme Court in a four is to one ratio held that a Presidential order issued during the proclamation of an emergency taking away the fundamental rights guaranteed under Articles 14, 21 and 22 was perfectly constitutional in nature. In what is famously referred to as the *habeas corpus* case, the Supreme Court became the guardian of sovereign action and not the protector of fundamental rights.⁴⁷ What happened in that case was that many politicians, journalists, and social activists were arrested by Prime Minister Indira Gandhi under the Maintenance of Internal Security Act (MISA)⁴⁸ on non-existent or frivolous grounds after Emergency was declared in 1975. The detentions were challenged, but they were met with the government's plea that Article 21 was the sole repository of liberty, and that as the right to move for enforcement of that right had been suspended by the Presidential order of June 27, 1975, petitions were liable to be dismissed at the threshold. This objection having been overruled by nine high courts, the appeal was heard by a five-judge bench in the Supreme Court. The Court unfortunately upheld the emergency proclamation and defended the member of the sovereign in its unjust action.

Of the five judges, only one of them, Justice Khanna, showed courage in negating this totalitarian claim. To quote Justice Khanna⁴⁹,

45. *Masooda Parveen v. Union of India*, WP (Civ) 275 of 1999, decided on 2nd May 2007.

46. *ADM Jabalpur v. Sivakant Shukla*, AIR 1976 SC 1207. The case of *Makhan Singh v. State of Punjab*, (1964) 1 Cr LJ 269 had also brought up this issue during the emergency proclamation in 1963 and the Court upheld the restrictions on habeas corpus on the wordings of the notification.

47. Peter D'Souza, "When the Supreme Court struck down the Habeas Corpus", PUCL Bulletin, June 2001.

48. Maintenance of Internal Security Act, 1973.

49. *ADM Jabalpur v. Sivakant Shukla*, AIR 1976 SC 1207.

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“As observed by Chief Justice Huges, Judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. A dissent in a Court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possible correct the error into which the dissenting Judge believes the court to have been betrayed.”

The Other four judges⁵⁰ sought to rely solely on the English case of *Liversidge v. Anderson*⁵¹ where the English judges held that all civil and political rights could be taken away during war time. A State of exception for the guarantee of fundamental freedoms was then created by the members of the sovereign by placing themselves above the Constitution.⁵²

Such a case brings ambiguity to the point as to whether the Constitution is an instrument to further sovereign interests or the guardian on fundamental freedoms? Can members of the sovereign who are subjected to the Constitution violate the exceptions that they created to the basic structure and place themselves above the law? Agamben rightly points out in this regard that the state of exception is the creation of the sovereign to exercise greater control and reduce the citizen to bare life or *homo sacer*.⁵³

While emergency provisions are the most evident form of the creation of a state of exception, the members of the sovereign are finding other ways to create such states. One example of this is the introduction of drastic measures to tackle the instance of terrorism.. In *Kartar Singh v. State of Punjab*⁵⁴, the Supreme Court upheld the validity of the Terrorist and Anti- Disruptive Activities Act, 1985⁵⁵ and 1987⁵⁶ claiming them to be the need of the hour to *handle the menace of terrorism*. The consequence was legalizing confessions made before a police officer, extending the limit of habeas corpus, limitless search power and discretion by the officer to declare anyone as a terrorist and an area as a terrorist affected area.

One of the points that has been emphasized in this case is that if a law ensures and protects the greater social interest, then such a law will be regarded as a wholesome

50. Chandrachud J., Bhagwati J., AN Ray C.J., and MH Beg J. were a part of the majority.

51. *Liversidge v. Anderson*, HL (1942). See Rajinder Sachar, “ADM Jabalpur case: A Supreme Mistake”, PUCL Bulletin, August 2006.

52. KG Kannabiran says that the Supreme Court stooped to its lowest in giving this shocking judgment. KG Kannabiran, “The Court has always held against Liberty”, PUCL Bulletin, August 2006.

53. Giorgio Agamben, *STATE OF EXCEPTION*, 1st ed. 2005, Univ. of Chicago Press.

54. *Kartar Singh v. State of Punjab*, 1994 SCC (4) 569.

55. Terrorist and Disruptive Activities (Prevention) Act, (13 of 1985).

56. Terrorist and Disruptive Activities (Prevention) Act, (28 of 1987).

and beneficial law although it may infringe the liberty of some individuals.⁵⁷ Such a law will ensure the liberty of a greater number of the members of the society at the cost of one or few.⁵⁸ In my view, this is a false interpretation of the rights guaranteed in Article 21. Article 21 clearly states “No one shall be deprived.....established by law”. Such a right is clearly an individual right the responsibility for the protection of which is in the hands of the State.⁵⁹ Having acknowledged this, the State is not allowed to deprive the life and liberty of one individual in light of the interests of a majority group. Our Constitution is the paramount parchment and is the sole protector of the rights of an individual. The word ‘right’ is a strong one and its correct usage is not in suggesting it, but to assert it and demand it from the State⁶⁰. No member of the sovereign has the power to abrogate the rights of any individual and this holds true specially when it comes to the rights of a given set of individuals with regard to the interests of a majority. While such principles were strongly upheld in the 1970’s⁶¹, a line of cases in the 1980’s⁶² show us that the Courts have not given importance to this concept and applied otherwise.

On the same lines if we look at the ‘procedure established by law’ which Krishna Iyer J. said is synonymous to ‘due process of law’ in the United States, we see that individuals rights are not permitted to be compromised in light of a majority or in the name of security of the State⁶³. Reference may be drawn to *Hamdi v. Rumsfeld* in the United States, where the Court held that strict procedures and measures like unlawful detention to tackle terrorism violate due process and state security cannot be used as an excuse.⁶⁴ Due process includes the very foundation of natural justice principles and any action by the State must not violate them. These principles are sacrosanct in the sense that no law or authority can over look them in any condition. Every member of the sovereign is bound to follow the principles of ‘due process’ or ‘procedure established by law’ and cannot create exceptions as per the situation at hand. A few scholars argue that the judiciary in our country has never been rights oriented claiming that it has always sought to protect the interests of the State vis a

57. *Kartar Singh v. State of Punjab*, 1994 SCC (4) 569.

58. M.P. Jain, *INDIAN CONSTITUTION LAW*, 5th ed. 2003, p. 1277.

59. *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746.

60. Conor Gearty, “Can Human Rights Survive: the Crisis of Authority”, 2005 HAMLIN LECTURES, 10th November 2005.

61. *Keshavananda Bharti v. Union of India*, AIR 1973 SC 1461 : *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 : *AK Roy v. Union of India*, AIR 1982 SC 710 : *ADM Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1027.

62. *In re The Special Courts Bill*, AIR 1979 SC 478 : *Inderjit Baruah v. State*, AIR 1983 Del 513 : *Kartar Singh v. State of Punjab*, 1994 SCC (4) 569.

63. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) : *Rasul v. Bush*, 542 U.S. 466 (2004).

64. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

vis the individuals⁶⁵. This can recently also be observed in the case of *PUCL v. Union of India*⁶⁶ where the Court upheld the validity of the Prevention of Terrorism Act (POTA).

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In May 2007, the Supreme Court in its judgment in *Masooda Parveen v. Union of India*⁶⁷ made important revelations as to the State of Exception and its application in the Indian context. It is infact shocking to even imagine the Court can create such an exception and give unbridled power to the army to handle the situation in Kashmir.

The deceased and husband of the petitioner, Ghulam Mohi-uddin Regoo was one day taken by 17 Jat Regiment soldiers and brutally tortured. The reason that the wife and most witnesses gave was because he had refused to pay an extortion fee to the soldiers. The petitioner alleged that her husband was tortured to death by the army and later his body was returned in pieces to her. The explanation given by the Army was that he was leading them to a hideout which was blown up the moment he reached there with the soldiers. Surprisingly no soldier was injured by the blast and the only fatality was Ghulam's death. Ghulam's wife, Masooda filed a petition before the Court demanding compensation and a job on "compassionate grounds."

The Army said that Ghulam was a militant so no ordinary law would apply to them in this regard. They went on further to say that since Ghulam was a militant, Masooda would have to suffer for her husband's wrongdoing. The Army's rationale was readily accepted by the Supreme Court which impliedly stated that since there is 'no evidence to say that he was not a militant, so he is presumed one', that is, if the Army identifies a person as a militant he is one until proved otherwise. There was no evidence produced by the Army to support this notion and nothing on record about Ghulam's mode of death. From what I understand, in a petition for habeas corpus, it is upon the state to show that death was incidental and it is all the more onerous on the state to show so. It further stated,

"We are not unmindful of the fact that prompt action by the army in such matters is the key to success and any delay can result in leakage of information which would frustrate the very purpose of the army action."

65. Jayanth K Krishnan, "Scholarly Discourse, Public Perceptions and the cementing of norms: The Case of the Indian Supreme Court and a Plea for Research", WILLIAM MITCHELL LEGAL STUDIES RESEARCH PAPER SERIES Working Paper No. 77 August 2007.

66. *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580.

67. *Masooda Parveen v. Union of India*, WP (Civ) 275 of 1999, decided on 2nd May 2007.

So the Court has violated the ruling in *Naga People's Movement v. Union of India*⁶⁸, and given an upper hand to the Army to indulge in such nefarious activities. The Court also authoritatively stated that since Masooda's husband was a terrorist, so compensation *on compassionate grounds* is to be given to her. The exception was created by the Court. The Army which is to be subjected to the sovereign; i.e. the Constitution, is then given a free hand by the Court to place itself above it.

Another instance of a 'State of Exception' is the enactment of the Armed Forces (Special Powers) Act, 1958⁶⁹ by the Parliament that sought to give special powers to the Army in conducting its activities in certain territories within India. The Act gives the Armed Forces wide powers to shoot, arrest and search, all in the name of "aiding civil power." First applied to the North Eastern states of Assam and Manipur, the Act was then amended in 1972 to extend to all the seven states in the north-eastern region of India. The enforcement of the AFSPA has resulted in innumerable incidents of arbitrary detention, torture, rape, and looting by security personnel⁷⁰. This legislation is sought to be justified by the Government of India, on the plea that it is required to stop the North East states from seceding from the Indian Union. After persistent human rights violations, the Government appointed the Justice BP Jeevan Reddy Commission⁷¹ to inquire and recommend the changes in the Act. The Commission took note of the abuse of power and recommended certain changes to the Act to make it humane in nature. However, these recommendations have not yet been considered.

It must be noticed that in as much as the members of the sovereign create the 'state of exception', it is the Supreme Court the ultimately gives sanction to its conduct. There used to prevail a notion that the Supreme Court stands as a guardian of fundamental rights and due process.⁷² A law, the consequence of which is the violation of any of the fundamental rights in the Constitution must be struck down.⁷³ In all the cases that are explained above, the Court has maintained that even though fundamental rights have been violated, the situations demand their sanction and thus validated them. This seems to attract Jhering's notion of law serving as a means

68. In *Naga People's Movement v. Union of India*, (1998) 2 SCC 109, the Court laid down guidelines for search, seizure and arrests to be made by the Army and categorically stated that no rights must be violated in such circumstances.

69. Armed Forces (Special Powers) Act, 1958.

70. "Armed Forces Special Powers Act : A Study in National Security Tyranny", Report by the *South Asian Human Rights Documentation Centre*. Available at http://www.hrdc.net/sahrdc/resources/armed_forces.htm .

71. The Entire Report is available at <http://www.hindu.com/nic/afa/>.

72. Bhagwati J. in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

73. The Supreme Court in *RC Cooper v. Union of India*, (1970) 1 SCC 250 was of the view that State action must be adjudged in the light of its operation upon the rights of individuals and groups of individuals in all its dimensions. This was further upheld by Raj C.J. in *Bennett Coleman Co. v. Union of India*, (1972) 2 SCC 106.

to an end⁷⁴. Accordingly, in such a purposeful evaluation of law, even if it sacrifices individual liberty, it will be valid⁷⁵. To quote from *Kartar Singh's case*⁷⁶;

“that it has been felt that in order to combat and cope with such activities effectively, it had become necessary to take appropriate legal steps effectively and expeditiously so that the alarming increase of these activities which are a matter of serious concern, could be prevented and severely dealt with.”

So much so, that while recently in a case testing the Constitutional validity of state sponsored armed groups, the Chief Justice stated⁷⁷ that there is nothing wrong with arming private groups, discharging a constitutional responsibility to protect in order to tackle the menace of Maoist trouble in a territory. What can be seen time and again is the Court sanction to State action when the purpose is justified, irrespective of the violation of rights. It is this situation that needs to be timely addressed. From a Court that once had the notion of standing up to State injustice⁷⁸, we seem to be more and more validating state action for invalid ends. The creation of a 'state of exception' is a method of confirming the validity of this means-end approach taken by the State and the Supreme Court. But the question arises if such a notion is justified? Can there be separate situations, determined by the State themselves as to when fundamental rights can be abrogated?

The answer lies in understanding whether people in a country are to be treated as 'citizens' or 'subjects'. The distinction lies in the fact that 'citizens enjoy rights' while 'subjects obey laws'. The State of exception seeks to treat the people as subjects to meet the ends of the state to be allegedly in 'state and societal interest'. Such an approach is not justified. State action must be tested from the touchstone of violation of rights; individual rights are supreme and inalienable and in modern democracies States must not abrogate them in greater interest. While the United States Supreme Court seeks to invalidate a state of exception in certain circumstances, regrettably the Indian Supreme Court stands by the State in protecting its actions. It is submitted that the 'State of Exception' is a Pandora's box to the destruction of democracy and this can only be negated by an active role played by the Courts in respective legal systems.

74. R. Von Jhering, "Law as a Means to an End", MDA Freeman, (ed.), LLOYD'S INTRODUCTION TO JURISPRUDENCE, 7th Ed. 2001, p. 703.

75. I. Jenkins, "Jhering", (1960-61) 14 Vanderbilt L. Rev. 169.

76. Ratnavel Pandian J., *Kartar Singh v. State of Punjab*, 1994 (3) SCC 569.

77. The Hindu, "Constitution of Salwa Judum Challenged", Sunday, May 20th, 2007. Available at <http://www.hindu.com/2007/05/20/stories/2007052013221300.htm>.

78. Jayanth Krishnan, "Scholarly Discourse, Public Perceptions and the Cementing of Norms: the Case of the Indian Supreme Court and a Plea for Research", Vol. 9, Journal of Appellate Process and Practice, (forthcoming 2008).