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State of Exception in India: A Transformative Journey From ADM Jabalpur To Jyoti Chorge

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ABSTRACT

The judiciary in India has treated the Preventive Detention system as a complete code in itself and the constitutional provisions for emergency regime were non-justiciable as held in the infamous case of ADM Jabalpur. Lately, the Courts have extended this state of exception to anti-terror statutes too. The existence of these three systems continue in isolation from the Indian Constitution and its values. By retaining the validity of such regimes and statutes, the Courts have created a separate territory of jurisprudence, which is primarily marked by executive supremacy and denial of remedies. The pervasive justification of salus populi suprema lex may lead to the creation of a permanent state of exception.

This reasoning by the judiciary seems flawed, as it negates the transformative character given to the Constitution by its makers. The judgement given by Bombay High Court in Jyoti Chorge v. State of Maharashtra vindicates the transformative nature of the Indian Constitution by holding onto its liberty-protecting civil rights tradition of the judiciary. It refuses to bow down in front of the executive by the mere incantation of a state of exception. The judgement puts the Constitution at the forefront, while interpreting the anti-terror statue.

I. INTRODUCTION

Through Article 19(1)(a), the constitution grants the freedom of speech and expression to the citizens of India, however it is a well known fact that this freedom is accompanied by certain restrictions[3]. Three out of these eight restrictions act as a regulatory mechanism to revolutionary speech. These include- the sovereignty and integrity of India, the security of the State and public order. However, the interpretation of these reasonable restrictions are left in the hands of the courts in order to understand the reasoning behind the same. The problem with this was that the court more or less started approaching the State with differential treatment.

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For instance, it upheld colonial rules such as those against blasphemy and for press censorship. The reasoning given behind these were to safeguard the State's assessment in going against subversive speech.

A sense of transformativeness was brought upon in 1960 when the courts criminalised advocating for tax evasion and at the same time posed a restraint on the State. The court began to put the burden of proving the nexus between the subversive speech and its impact on the society on the State itself. In fact, in 1989 the court held that the proximity should be as close as that of a 'spark in a powder keg'[4]. This was followed by the infamous case of *Shreya Singhal v. Union of India.*

The Supreme Court of India through its judgement in *Shreya Singhal v. Union of India*[5] struck down the controversial Section 66A of the IT Act. The notorious section was infamous for being misused by political parties in power to curtail freedom of speech and expression of dissenting groups and individuals. In the landmark judgement, the Court deliberated on the fundamental importance of freedom of speech in a diverse and pluralist land like India. Sitting in the bench, J. Nariman wrote at length to defend the constitutionality of free speech to the effect that it even covers revolutionary views of individuals, with the only exception of penalising speech that incites violence. After this case, mere incitement or revolutionary speech was not enough to qualify as a reasonable restriction, it has to be coupled with proving that this incitement had a direct impact on the State. Nevertheless, when it comes to 'exceptional situations', the Court has more or less breached its power of jurisprudence.

In a nutshell, the State is granted a "state of exception" in two scenarios- Preventive Detention as mentioned in Article 22 of the constitution and Emergency which are mentioned in Part XVIII of the same. When it comes to the Preventive Detention System (PDS) in the country, it lacks the elements of due process, personal rights and rigorous judicial power of the State[6]. Even though the constitution clearly states that the person who is arrested must be presented before a judicial authority within 24 hours, the State has the power to countermandate the same. Infact, the Advisory board which reviews the detention of the judgement can also be overruled by the State.[7] The concept gets murky because it's not completely self-interpretative. More than the constitutional text, the courts rely on precedents. This creates a problem when the courts support executive supremacy by waging for differential treatment.

[4] S. Rengarajan and Ors v. P. Jagjivan Ram (1989), 2 SCC 574
[5] Writ Petition No. 167 of 2012
[6] Baxi Upendra, *The Crisis of the Indian Legal System* (Vikas Publishing House, 1982).
[7] Article 22(4), Constitution of India

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The Indian Constitution, under the Article 352, 356 and 360 provides the executive with 'Emergency' powers respectively. The President of India is bestowed with the power to declare a state of Emergency for a part or whole of the nation if they are satisfied that "the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion[8]. Once Emergency is proclaimed by the State, the fundamental right guaranteed under Article 19 stands suspended. The constitutional provisions also allow the President to suspend other fundamental rights (with the exception of rights guaranteed under Article 20 and 21 respectively[9]) by simply passing a written order.

Though India since independence had to see 'State of Emergency' multiple times, the most infamous is the Emergency imposed by Indira Gandhi in the year 1975 on the grounds of 'internal disturbance'. Mrs. Gandhi at that time stated that increasing protests against her government across the nation imposed a grave danger on the internal security of the nation. Today, after more than four decades of the emergency, it is quite evident that the 'State of Emergency' that was proclaimed by the then PM Indira Gandhi was largely based on political and personal reasons. The judgement in the The State of Uttar Pradesh v. Raj Narain[10] which held Mrs. Gandhi, guilty of electoral malpractices, acted as a catalyst in prompting her to impose Emergency throughout the nation.

Interestingly, in the aftermath of the Emergency era, the competence of the political executive led by Indira is not the only thing that is questioned. The notoriety of the Indian Courts between 1975 to 1977 is also one of the main striking points. The culmination of the judicial apathy and indifference towards its duties can be observed in the Supreme Court's judgement in the *ADM Jabalpur* case[11]. In the case, the Supreme Court bench in a majority judgement (Justice Khanna dissented[12]) held that when a State of Emergency exists, the courts or the judiciary is not allowed to hear habeas corpus petitions of people who have been detained by the State during the Emergency Regime. The judgement gave the State a free hand in curtailing the personal and civil liberties of opposition leaders and their thousands of supporters by putting them in

[8] The present language of Article 352 is more narrow and restrictive. Emergency provisions of the Constitution were amended after the Emergency led under the Prime-Ministership of Indira Gandhi ended in 1977. The phrase "internal disturbance" was replaced by "armed rebellion".
[9] The forty fourth (44th) amendment of 1978 restricted the scope of Article 359.
[10] (1975 AIR 865, 1975 SCR (3) 333)
[11] *ADM Jabalpur v. Shivakant Shukla* (1976) 2 SCC 521
[12] Khanna J. delivered a remarkable dissenting judgment which he concluded with borrowing words from Chief Justice Hughes: "A dissent in a court of last resort….. is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting Judge believes the court to have been betrayed." In hindsight, Justice Khanna's words and dissent were no less than a prophecy. With the 44 Amendment of the Constitution, his dissent judgement became the law of the land. Article 20 and 21 were excluded from the preview of suspension in a state of Emergency.

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jail for indefinite time durations, many even faced torture[13].

ADM Jabalpur became an orphan soon after the very birth of it in 1975, so much so that not only it got criticised by jurists around the world[14], but Justice P N Bhagwati himself admitted that the judgement was a mistake on part of the judiciary and resulted in an utter surrender to the executive[15]. The final nail in the coffin was put by none other than the Supreme Court itself in 2017 when the nine judge bench in *KS Puttaswamy v. The Union of India*[16] held that *ADM Jabalpur* should be struck down[17].

Though discredited as a pariah judgement, a mistake on the part of judiciary, still today, the case of *ADM Jabalpur* is relevant in understanding the jurisprudence of Courts and the gradual development of relationship dynamics between the two heavyweights of Indian democracy; Executive and Judiciary through the lenses of the four judges in the majority judgement[18].

A brief overview of the facts of the case and the judgement would be perplexing to any audience. How could a bench of senior Supreme Court judges go wrong with their judgement? It is only after a close reading and understanding of the reasoning provided by the four judges in their separate but concurring judgments, one realizes that much to everyone's dismay, the judgement in *ADM Jabalpur* is far from being a pariah. The case rather marked a continuity in the Court's understanding and approach to the 'state of exception'.

II. SUPREMACY OF THE EXECUTIVE

At a very core and fundamental level of India's understanding of Constitutional order is the compulsion on the State to justify any and all restrictions upon the civil and individual rights of its citizens in the Courts of Law. It is then the task of the judiciary to scrutinize the legal

[13] H.M Seervai, Constitutional Law of India, Volume 2, Appendix, Part I, page 2205

[14] Seema Chishti, The darkest hour: ADM Jabalpur was a test for SC. Only the dissenter passed it, The Indian Express (2019), https://indianexpress.com/article/opinion/columns/supreme-court-adm-jabalpur-the-darkest-hour-5945825/ (last visited Feb 8, 2021).

[15] A Chief Justice of India says 'I am sorry' but 30 years too late - Politics News , Firstpost, Firstpost (2017), https://www.firstpost.com/politics/a-chief-justice-of-india-says-i-am-sorry-but-thirty-years-too-late-85799.html#:~:text=And%20Justice%20P%20N%20Bhagwati%20was,as%20the%20Habeas%20Corpus%20case. (last visited Feb 8, 2021).

[16] *KS Puttaswamy v. The Union of India* MANU / SC / 0548 / 2017

[17] DY Chandrachud J stated, "The judgments rendered by all the four judges constituting the majority in ADM Jabalpur are seriously flawed. Life and personal liberty are inalienable to human existence…The human element in the life of the individual is integrally founded on the sanctity of life…No civilized state can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the state nor does the Constitution create these rights…
…Justice Khanna was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the state on whose mercy these rights would depend."

[18] Chief Justice A.N. Ray, Justice M. Hameedullah Beg, Justice P.N. Bhagwati and Justice Y.V. Chandrachud gave the majority judgement.

arguments and the factual foundations presented before it by the State keeping in mind the constitutional morals and standards envisaged by the makers of the Constitution.

In the 'State of Exception', prominently marked in its inglorious form by Emergency, this conventional practise gets completely reversed. With the reversal, it is the Executive who then decides when a state of exception comes into force, and subsequently also commands what rights the citizens will enjoy in such a regime. In *ADM Jabalpur,* Justice Beg explains this concept in a brief yet articulating manner, "Conditions may supervene, in the life of a nation, in which the basic values we have stood for and struggled to attain, the security, integrity, and independence of the country imperilled by forces operating from within or from outside the country. What these forces are, how they are operating, what information exists for the involvement of various individuals ... could not possibly be disclosed publicly or become matters suitable for inquiry into or discussion in a Court of Law[19]."

In such a state of absolutist executive, a very prominent conflict of interest arises. It gives rise to a self-legitimising executive, where the State itself becomes the jury and judges on complaints of power abuse by the Executive. The naive idea that the State always acts in good faith overrides any legitimate concerns regarding the total unaccountability and concentration of power in the hands of the Executive can be detrimental to the people and its democratic setup[20], followed by the principle that mere grounds of suspicion cannot be a reason to strike down a law.

This particular reasoning adopted by the Judiciary in *ADM Jabalpur* case can be seen yet again in *Kartar Singh v. State of Punjab*[21]. In the case, the Supreme Court upheld the constitutional validity of TADA (Terrorist and Disruptive Activities (Prevention) Act). The Act was initially enacted to fight insurgency in the state of Punjab and was supposed to be a temporary Act, though later the Act was extended to the whole of India. Since TADA was a tailor made Act to contain insurgency, many of the provisions of the Act departed from the conventional laws on criminal procedure in India. One such reversal was the provision of confessions made by the accused to the police as admissible in courts. In *Kartar Singh*, the petitioner argued that such "extraordinary provisions" gave the State and its machinery unchecked and arbitrary powers which were in direct contravention with the fundamental rights guaranteed to the citizens under Article 14, 19 and 21 of the Indian Constitution respectively. While setting aside all the minute

[19] *ADM Jabalpur*, supra
[20] Chandrachud J. noted "It simply cannot happen,.... Above all the lofty faith in democracy which ushered the birth of the Nation will, I hope, eliminate all the fear that great powers are capable of the greatest abuse." in *ADM Jabalpur* ¶ 418
[21] Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569

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details and complexities of the case, the fundamental question looming infront of the Supreme Court was if the menace of terrorism required "special laws" that did not adhere to the conventional prodecural safeguards or whether India already had laws and legal framework that allowed the State to deal with terrorism[22].

After hearing both sides, the Court delivered its judgement of upholding the constitutional validity of TADA. While doing so, the Court focused on the ground reality of the situation in the judgement, the negative impact that terrorism has on the lives of citizens and the integrity of the nation. The court highlighted the harsh provisions of the Act, like the admissibility of police confessions, but justified them nonetheless stating that "departing from the procedures prescribed under the ordinary procedural law, are evidently for the reasons that the prevalent ordinary procedural law was found to be inadequate." The constitutionality of TADA was not primarily validated by the Constitution itself, but rather by invoking the idea of 'State of Exception'. The fundamental problem with the judgements like *Kartar Singh v. The State of Punjab* is the Court's decision to treat factual propositions in the case as axioms. Once a fact is considered as a self-evident truth, it becomes a precursor to the other aspects of the case including the constitutional arguments involved, and ultimately has a defining influence on the outcome too. The same reasoning can be seen in other similar cases like the *People's Union for Civil Liberties v. Union of India*[23] or *Naga People's Movement for Human Rights v. Union of India*[24], where the constitutional validity of POTA (Prevention of Terrorism Act) and AFSPA (Armed Forces Special Powers Act) were upheld by the court.

The corollary to treating the state of exception as the existing, normative sense in which the Act was to be investigated was to vest concentrated powers in the executive's hands, including the power to be a judge in its own cause. In the case of counter-terrorism, the Court has upheld this element of executive supremacy in three different contexts: at the stage of initiation of the state of emergency legal system, at the stage of execution, and finally, at the stage of accountability.

III. DENIAL OF REMEDIES

During the Emergency Era, the government through a presidential decree, stopped individuals

[22] A. Portelli, writes while commenting on the terror trials of 1970s in Italy (in The Oral Shape of the Law in The Death of Luigi Trastulli and Other Stories: Form and Meaning in Oral and Public History 241, 246, Albany: State University of New York Press 1991) that Courts end up doing multi-layered task of not only interpreting the country's constitution but also have to take in account the contemporary political and social conditions and juxtaposing the three with history.

[23] *PUCL v. Union of India*, (2004) 9 SCC 580

[24] *Naga People's Movement for Human Rights v. Union of India* (1998) 2 SCC 109

from going to courts to enforce their fundamental right guaranteed under Article 21 of the Indian Constitution, including the right to habeas corpus, which essentially allowed individuals to be presented in person inside a court and be charged with any crime in front of a judge.

At the heart of the argument in the ADM *Jabalpur* case, it was argued that denying the right to approach courts was diluting or indirectly effacing Article 21 itself. It was contested that a right without remedy or a mechanism to enforce it, is nothing but an illusory right which is only restricted to papers and has no significance in reality. The bench in *ADM Jabalpur* did not agree with the above argument, stating that rights guaranteed under Article 21 continue to exist, but its enforcement was only temporarily barred under the Emergency regime. In the post-emergency era, this decree of the executive and the court's approval of it was heavily criticized.

Still the executive did not completely do away with such activities, the only difference was that in the post-emergency era, such steps were taken in a more discreet manner with the help of legislations and not presidential decrees. The anti-terrorism laws that followed after the Khalistan problem and Kashmir insurgency became the tool to achieve the same.

The government using the garb of anti-terror laws like TADA, POTA and the newly amended UAPA (Unlawful Activities Prevention Act), prohibits the Court to grant bail to the accused unless the court feels that there are reasonable grounds for believing that he has not committed the offence or would not be committing the crime on being released. The bail provisions in TADA effectively made it near to impossible for an accused to get bail. It was argued in *Kartar Singh* case that the bail conditions required the defendant to disprove the prosecution's case without the chance to put it to critical scrutiny in a trial. It has lately become a common practice in Anti - Terror laws to reverse the fundamental rule of "innocent until proven guilty". The courts too have upheld the constitutional validity of such provisions by using the same reasoning of "larger public interest[25]" as used in *ADM Jabalpur*, though without considering it as a precedent.

The outcome of such laws and judicial interpretation has been calamitous. Once an individual is charged under such provisions, they stay behind bars for years while the trial goes on[26]. There have been multiple cases where the accused wrongfully stayed in jail for decades, and only

[25] "the courts while dispensing justice in cases ... under the TADA Act, should keep in mind not only the liberty of the accused but also the interest of the victim ... and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration" in Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569 ¶ 351

[26] Sonam Saigal, Prisoners of the system The Hindu (2017), https://www.thehindu.com/news/cities/mumbai/prisoners-of-the-system/article17333262.ece (last visited Feb 23, 2021).

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walked free when the court trial ended in acquittal[27]. These special laws, especially the bail provisions have achieved the same ends of depriving individuals and groups of their personal liberty for a considerably long period of time without any firm reasonable grounds as achieved by the Emergency regime. Though, the former does it in a very discreet and subtle manner by selectively obstructing remedies usually available under criminal law.

IV. THE JURISDICTION OF SUSPICION

In the case of *ADM Jabalpur*, Justice Beg endorsed the 'jurisdiction of suspicion': "Preventive detention, in itself, is a departure from ordinary norms… it has been aptly described as a 'jurisdiction of suspicion'.... It enables executive authorities to proceed on bare suspicion which has to give rise to a 'satisfaction'....[28]"

The important aspect here is the subjective 'satisfaction' which Justice Beg talks about in the end. If the whole premise of the argument is based on satisfaction, which is nothing more than the subjective belief of the executive about who might be a potential threat to the nation. The jurisdiction of suspicion did not require any proximity between supposed threat and breaking of law in reality.

The post-Emergency terror laws replicate the jurisdiction of suspicion in at least three respects. The first is the government's ability to outlaw so-called "terrorist groups." The absence of a pre-decisional hearing before banning organizations under the POTA was argued to be unconstitutional in PUCL v. Union of India, because it violated Article 19(1)(guarantee)'s freedom of association. The Court's response was perplexing:

"Under Article 19(4) of the Constitution the State can impose reasonable restrictions, inter alia, in the interest of sovereignty and integrity of the country. POTA is enacted to protect sovereignty and integrity of India from the menace of terrorism. Imposing restrictions under Article 19(4) of the Constitution also includes declaring an organization as a terrorist organization as under POTA. Hence Section 18 is not unconstitutional."[29]

However, the Court seemed to have forgotten about the word fair in Article 19 somewhere between the first and last sentences (4). The omission is critical because the provision of reasonable' chat restrictions derives from the requirement of proximity and thorough judicial review, which is at the core of the Court's civil rights jurisprudence. The Court was able to

[27] Behind bars for no fault: People wrongly arrested in terror cases: India News - Times of India The Times of India (2017), https://timesofindia.indiatimes.com/india/behind-bars-for-no-fault-people-wrongly-arrested-in-terror-cases/articleshow/60016707.cms (last visited Feb 23, 2021).
[28] *ADM Jabalpur*, supra
[29]

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abolish both sets of restrictions on State power by omitting the term, which it then justified (for good measure) by referring to the peculiar context of terrorism'.

Taking the view of guilt was the second way the Court internalized the jurisdiction of suspicion. This viewpoint is evident in the Court's decision in Kartar Singh to uphold witness confidentiality provisions (that severely curtailed the ability of defence counsel to conduct cross-examination). This was justified on the grounds that witnesses who testified in terror trials risked facing extreme retaliation. Similarly, the Court noted in upholding the denial of anticipatory bail:

"Can it be said with certainty that terrorists and disruptionists who create terrorism and disruption and inject sense of insecurity, are not likely to abscond or misuse their liberty if released on anticipatory bail."

Of course, the odd part about this observation is that it suggests that the individual seeking anticipatory bail is a terrorist or a disruptionist—labels that are only supposed to be applied to individuals after they have been convicted in a full-fledged courtroom. In other terms, the Supreme Court upheld the denial of basic procedural protections on the grounds that terrorists would exploit them, thus excluding the risk that they would unjustly prejudice innocent citizens wrongfully accused of terrorism (and therefore unable to threaten witnesses or'misuse' their liberty).

Finally, terror laws reflect a highly crude and unreconstructed interpretation of guilt by association. Under the AFSPA, an entire area or territory may be declared subject to the Act's provisions and military impunity system. TADA, POTA, and UAPA all made (and continue to make) it illegal to be a member of a terrorist or unlawful organization. The definition of membership is a nebulous one, encompassing a wide variety of possible actions (such as implicit endorsement, ideological agreement, or even attendance at meetings) that fall well short of actual commission of terrorist acts, or even of conspiracy. It essentially criminalizes affiliation itself, obviating the need to commit those acts once more. Article 19 defines the fundamental elements of reasonableness.

V. SALUS POPULI SUPREMA LEX

The legal maxim essentially denotes that the laws of the state should be based on the welfare of the community as a whole. The fact that the current legal framework cannot be read without article 22 of the constitution and Part XVIII of the same denotes that the State has the direct authority to bereave a person of his individual liberty without any trial or proof of guilt. The simple defence which vests with the State is that the particular act is done for the "greater

good", hence intersecting with the principle of *Salus populi suprema lex*.

One of the main arguments against this scenario is that it overpowers the state by introducing a sense of arbitrariness and going against the principle of constitutionalism. But, mere probability of abuse of power does not furnish the provision to be unconstitutional in nature. The same view was taken by the courts in *Kartar Singh vs. State of Punjab*. However, as soon as the suspicion of probability is replaced by a full-fledged misuse, the particular act can be considered to be unconstitutional as pointed out in the *PUCL* case.

Another argument observed in the courts involves the division of the objection into two parts-

The nature of the offence,whether it can be rendered to be offensive or not, and the act of misuse or abuse of the provision. However, this is a highly mechanical way of looking at the whole scenario. The crux of the matter is not dividing the provision into two different affairs but it is the simple fact that the state has excessive power in the scenario of preventive detention and emergencies without any accountability. This has a direct impact on the relationship between an individual and a welfare state in a democratic set-up thus making the provision unconstitutional.

However, relevance must be given to the fact that the Constitution itself elucidates upon certain constraints in order to avoid state arbitrariness in the country. Moreover, even in the events where the State does use its authority in an innocuous manner, it is to be justified to its fullest. Firstly, the decision must be justified on preventive grounds which is to say that this was the only possible solution to the particular problem. Second, the State is required to meet a standard of proximity and prudency and lastly, the reasoning behind the decision must be carefully examined by an independent judiciary. The role of an independent judiciary becomes highly relevant here in order to act as a restraint to the abuse or overuse of powers by the State. This brings another perspective on the table. A unitary view on the misuse of power by the State is not the only reason for unconstitutionality but it also involves the removal of these constraints which are provided by the Constitution itself. As mentioned in the *ADM Jabalpur* case-

" It is enough to state that all these are permissible consequences from the acceptance of the contention that Article 21 is the sole repository of the right of life and personal liberty and that consequent upon the issue of the presidential order, no one can approach any court and seek relief during the period of emergency against deprivation of life or personal liberty. In other words, the position would be that so far as executive officers are concerned, in matters relating to life and personal liberty of citizens, they would not be governed by any law, they would not be answerable to any court and they would be wielding more or less despotic powers"

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VI. NORMALISATION OF STATE OF EXCEPTION

The Apex Court's judgments in *ADM Jabalpur* and later in terror statute cases show a definite pattern. At the start, the court creates a template of factual axioms. Following this, a state of exception is created which allows the court to treat the case and outcome in a special manner, which is tailor-made considering the situation at hand. Interestingly, all these cases have a linear narrative, which highlights dangerously gruesome or violent events, though seldom the reason behind such happenings is investigated. The anti-terror laws give unabated and concentrated powers in the hands of the State. The conventional and standard procedures that are followed in criminal cases in India are done away by stating 'State of Exception'. In a sense, instead of taking 'State of Exception' and trying to fit it in the larger mould of the Constitution and its morals, the courts in these above discussed judgements did the opposite. It seems as if the interpretation of the constitution itself was done so as to justify and allow the ever increasing 'State of Exception' in the country.

This has also created a larger problem, the creation of a third state of exception, which is partly created by both the executive and the judiciary. Unlike the already two existing ones, i.e the preventive detention system and the Emergency regime, this third state of exception is not created by the constitution and thus entails no boundaries and limitations with respect to time duration and space. It is rather a self-growing state with its roots strongly holding onto the security paradigm of the nation, that is day by day making the line between normal and exception blurrier.

VII. JYOTI CHORGE; A TRANSFORMATIVE INTERPRETATION OF THE CONSTITUTION

In the year 2002, a group of young individuals came up with a group by the name Kabir Kala Manch. The aim of the troupe was to fight social injustices through art and music. A few years down the line, the organisation members were arrested and sent to prison under UAPA. The State charged the group to be a cultural front for the banned CPI-Maoist. The members of the organisation were labelled as "naxalites". The charge sheet filed by the police states that the accused individuals had 'naxalite literature' in their possession. Among the other things, publicity material for CPI(M) and contact details of other CPI(M) members were found. The State also mentioned that the organisation and its members performed plays that sympathised with the communist ideology and which instigated people against the established

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government.[30] The state also presented witnesses (who were themselves former naxalites who had surrendered). These witnesses stated that they saw some of the organisation members at CPI(M) meetings, few of them also carried weapons on themselves. One of the accused, Dhavala Rama Dhengale was made to confess that he provided shelter to maoists for a CPI(M) meet, though later he retracted the statement back.

Since these individuals were charged under the UAPA, they could not get immediate bail. So they had to spend a year and half in the cell of a jail before the trial started before the Bombay High Court with the bail applications of Jyoti Chorge and Sushma Ramtekke, co-accused in the chargesheet. Since under the UAPA, Courts are statutorily prohibited from issuing or granting bail unless there are reasonable grounds to hold that the accused has not committed the crime.

The main question in front of the Bombay High Court was; did the charges against the particular individuals against whom the prosecution had filed the chargesheet qualify to be prosecuted under UAPA?

The main argument from the prosecution's side was that the accused individuals were members of Communist Party of India - Maoist , and were fully aware of the work and activities carried out by the banned organisation. Interestingly, even though the State had brought in the harsh UAPA Act against the individuals, yet it did have sufficient evidence to show that the accused had themselves commited any act of terrorism. The prosecution seemed to use the same argument as used in *ADM Jabalpur* and *Kartar Singh* that the ideology itself of CPI-M was very dangerous and was possibly capable of destroying the integrity of the nation. In this case, we see the same elements being used, i.e supremacy of the executive (by having the unchecked authority of deciding who is threat to a nation), denial of remedies (by not allowing the accused individuals to get bail), and the overarching naive philosophy of *salus populi suprema lex.* Given the precedent set by *Kartar Singh* and *PUCL*, it would not have been difficult for the Bombay High Court to decide the final outcome in the case. J. Thipsay agreed with the chargesheet and evidences produced by the prosecution, that the accused were in some sense, a "member" of the banned organisation CPI-M. Though at this point he deviated from the precedent set by previous judgements mentioned above, he observes that "Because of these drastic provisions, the concept of membership that has been contemplated in section 20 and incidentally, in section 38 needs to be carefully considered, and properly interpreted in the light

[30] Jyoti Chorge v. State of Maharashtra Crl. Bail Application No. 1020/2012

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of Article 19 of the Constitution of India[31]" Here is where this judgement took a completely antithetical approach in comparison to *Kartar Singh* and *PUCL*.While these two judgements used the template of 'State of Exception' to justify the "drastic provisions" of anti-terror statutes, *Jyoti Chorge* used the mold of Constitution to draw a boundary around the concept of state of exception. By doing this, J. Thipsay demolished the first pillar of state of exception, i.e Supremacy of the executive. It was made clearer than the constitution and its morals were to be always considered paramount.

The prosecution then shifted its narrative by invoking the importance of national security, stating that, "there was a great danger to the whole nation from the CPI Maoist), and that the unity and integrity of the nation was already in danger because of their activities has been deliberately worded very widely by keeping these aspects in section 20 of the UAPA Act mind... mere association with such type of people, and sharing the ideology would make a person a member of their organization." It was projected as if the problem of Naxalism is a highly contagious disease and any individual brought in contact with it, must be compulsorily quarantined and if not, the result would be nationwide pandemic. J Thipsay disagreed with this argument too, as he differentiated between active membership and passive membership. He took help from previous judgements *Arup Bhuyan*[32], *Indra Das*[33], and *Raneef*[34] and held that it was only active membership of a banned organisation which irrefutably incited violence or lawlessness, that was to be penalised. Moving ahead, Justice observed that, "passive membership is not what is contemplated by section 20 of the UAP Act. It is very clear from the observations made by the Supreme Court that if section 20 were to be interpreted in that manner, it would at once be considered as violative of the provisions of section 19 of the Constitution of India[35]." The arguments on the prosecution's side could be briefly summarized to say that the accused are 'sympathizers' of the naxal ideology and could in future play an active role in CPI-M activities. Taking into account the feeble evidence produced by the prosecution, Justice Thipsay held that under the Indian Constitution, this could not be considered a ground for denying personal liberty and thus granted them bail.

VIII. CONCLUSION

This paper attempts to bring clarity on the court's state of exception jurisprudence. The Constitution made the Preventive Detention System a separate code in itself and the Emergency

[31] Ibid., ¶ 18
[32] Arup Bhuyan v. State of Assam (2011) 3 SCC 377
[33] Indra Das v. State of Assam (2011) 3 SCC 380
[34] State of Kerala v. Raneef (2011) 1 SCC 784
[35] Jyoti Chorge v. State of Maharashtra Crl. Bail Application No. 1020/2012 ¶29

regime was declared as non-justiciable. Lately, this jurisprudence has been extended by the courts to anti-terror statutes too. By providing a constitutional blanket to such systems and regimes, the court has carried forward the colonial jurisprudence. This approach creates a separate island, primarily marked by executive supremacy, denial of remedies and the doctrine of *salus populi suprema lex*, which ultimately results in a permanent state of exception.

This reasoning of the court ignores the transformative nature of the Indian constitution. By text, the constitution limited the possibilities of state of exception. By structure, it limited the state of exception by giving fundamental rights. And lastly, by philosophy, it limited the scope of state of exception by moving to a culture of justification, where the executive had to justify its actions. So when the constituent assembly allowed for the existence of a state of exception, it meant it to exist in a much narrower and definite extent. In independent India, the state of exception was to always exist within the culture of justification and under the ambit of judicial review.

The judgement given by court in *Jyoti Chorge* comes as a strong antipode to the judgements given in *ADM Jabalpur, Kartar Singh* and *PUCL*. The most distinctive aspect of *Jyoti Chorge* which sets it aside from other cases is the constitutional interpretation of individual rights in balance with national security and the idea of 'State of Exception'. The court showed great courage by not accepting the dictum of *salus populi suprema lex* and opposed it by invoking the very idea of democracy itself[36]. The Court held that India was a democractic state and the idea of democracy did not allow the state of exception to become a frequent daily happening. The real test for a democracy is to check the state of exception and the stupendous authority claimed by the executive against the Constitution and its values. So, if the Executive comes up with a legislation that penalises membership of a banned organisation, then it's the duty of the Constitution and its guardians to automatically restrict the ambit of how widely the concept of membership can be construed. Under no circumstances should it be allowed to unduly encroach upon the fundamental right of personal liberty. Any state of exception should draw its boundaries keeping in mind the fundamental and unalienable rights of freedom to speech, association and assembly. These rights are not only at the core of any democractic state, but also a key ingredient to the philosophy of *salus populi suprema lex*.

Another salient point from *Jyoti Chorge* is the court's decision not to make factual points as a defining narrative and fulcrum axiom around which the whole case revolves. In *Kartar Singh*

[36] "We are living in a democracy, and the above observations apply to all democracies", the Court observed in Arup Bhuyan v. State of Assam (2011) 3 SCC 377

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and *PUCL*, the justification to the harshier provisions of TADA and POTA came from the strong narrative of organised and faceless organisations and individuals who incite violence and spread terror across the country. In *Jyoti Chorge*, Justice Thipsay not only listened to the facts and narrative presented by the prosecution, but also examined the past conduct of all accused individuals. He observed that, "A number of persons are influenced, and get attracted towards the Maoist Philosophy because of the oppression of the weaker section which they might have experienced in the social set up it is impossible to hold that all such persons are to be treated as members of a terrorist organization, or that they are liable to be punished for having some faith in such philosophy, or for having sympathy for those who propagate such philosophy.[37]"

Justice Thipsay does not examine the case in isolation, but adds the prism of existing social and political problems and conflicts in the nation. This dynamic understanding of the situation allows the court to limit the scope of state of exception and continue with its standard liberty-protecting jurisprudence. Thus, the judgement in *Jyoti Chorge* is not merely a matter of bail petition, but rather it delves with the deeper question of core constitutional values and their ideal form of existence. The judgement refutes the ever growing legitimacy and normalisation of state of exception by using national security statutes as a medium.

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[37] Jyoti Chorge v. State of Maharashtra Crl. Bail Application No. 1020/201 ¶32

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