5. The idea of the political, reconfiguring sovereignty and exception: Analysing theoretical perspectives of Carl Schmitt and Giorgio Agamben.

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Abstract

The idea of 'political' is the most controversial term in the contemporary social science discourse and it remains vaguely understood. The 'political' is the fundamental authoritative domain pertaining to the state which ropes into it one of the basic concepts of politics i.e- sovereignty. The interconnectedness between 'political' and sovereignty is challenged with the emergence of liberal democracy. The idea of 'political' in the theoretical perspective of Carl Schmitt is related to the notion of sovereignty which is in contrary to the conventional understanding of sovereignty. His idea of sovereignty is specifically related to an exception. Giorgio Agamben's theory of 'state of exception' is inspired from Carl Schmitt's idea of sovereignty and its relation to exception though it re-interpreted exception as a permanent rule. This paper attempts to analyse Carl Schmitt's and Agamben's theories through this interesting tripartite relation among the political, sovereignty and exception which gives an interesting account to reconfigure sovereignty and its effects felt on Indian emergency of 1975-77 and anti-terror laws in recent times. Also in what ways it appears as a challenge to the centrality of law in a democracy.

Keywords: Political, Sovereignty, Exception, Democracy, Rule of Law.

Full Text

INTRODUCTION

In one way or the other, the 'political' is generally juxtaposed to the state or in relation to it. But the view of understanding the 'political' in terms of laws is much prevalent in the juridical administrative sense. The concept of the political is a work by the German philosopher Carl Schmitt. It examines the fundamental nature of the 'political' and its place in the modern world. Carl Schmitt refers to a domain of political as the highest decisive authority outside any other domains of religion, economics, culture, etc.

CONCEPT OF THE POLITICAL

For Carl Schmitt, the 'political' refers to the conquering power by waging wars against the enemy state in the sense of classical European state. The 'political' demonstrates the power to make distinction between a friend and an enemy state. But with the emergence of liberalism such an understanding of the 'political' in the sense of classical European state was overshadowed. Therefore, it would not be wrong to say that liberalism deliberately posed a great challenge to such an identity of the 'political'. He argued that liberalism blurred the distinction between state and society in the sense that state is no longer considered as a political domain above society but an integral part of it. State becomes that political entity in democracy which fulfils the needs, aspirations; protect the individual freedom, justice, and equality among people. State manages the conflicts, antagonisms; adversaries emerged of other domains like religion, education, economics etc. Thus, state attains the status of a total state or an all embracing state as it includes all other entities within its own existence.

The emergence of the modern sovereign states in the 19th and 20th centuries, he described that the 'political' suffice as long as the state and public institutions can be assumed as something self-evident and concrete. The 'political' is then justified as long as the state is truly a clear and unequivocal eminent entity confronting non-political groups and affairs-in other words for as long as the state possesses the monopoly on 'politics'(Schmitt 2007, p.22). Politics in liberal democracy refers to the adversaries like party conflicts, civil war and it no longer holds the view related

to the friend-enemy grouping. Broadly, in liberalism the 'enemy' is identified as the disturber of peace and humanity. Politics is dealt with the set of practices and political institutions through which a normal order is created to facilitate smooth conduct of administration of political affairs by harmonising conflicts, antagonisms occurs at the domain of the 'political' pertaining to the state. Even if sometimes, non-political entities like religion, culture, economy, education intervenes in the political and creates conflictual atmosphere; it is only the state which decides on its best abilities to deal with such conflicts and undertakes suitable actions at its best interests. Although, liberalism has not radically denied the state but has attempted only to tie the political to the ethical and to subjugate it to economics (ibid, p.61). The political concept of battle in liberal thought becomes competition in the domain of economics and discussions in the intellectual realm (ibid, p.71). Therefore, Carl Schmitt argued that constructing this bipolarity liberalism attempts to annihilate the 'political' as the domain of conquering power and repression. Interestingly, he also strongly argued that war is always a possibility, a necessity which requires the intervention of the highest decisive entity. That is why, in his subsequent work *The Political Theology* he demonstrated that sovereign is he who decides in the exception. He also said that if such a political entity exists at all, it is always the decisive entity, and it is sovereign in the sense that the decision about the critical situation, even if it is the exception, must always necessarily reside there (ibid, p.38). Therefore, it cannot be denied that Carl Schmitt refers to sovereignty associated with the highest decision making entity which defines the 'political'

The Pluralists often criticised the view that state is the highest decision making political entity. The Pluralists theory described state is one among the various associations of the society and sovereignty cannot be associated absolutely with the state.

CONCEPT OF SOVEREIGNTY

The conventional understanding of the concept of sovereignty under nation-state paradigm refers to sovereignty as 'external' in terms of independent sovereign states or an autonomous entity in the international order and as 'internal' in terms of sovereignty refers to a supreme authority within the state that makes its

decisions binding to all citizens. However, understanding of sovereignty in an exception gives an interesting outlook to reconfigure the notion of sovereignty in Carl Schmitt's words as stated above. Giorgio Agamben is influenced by Carl Schmitt's idea of the association between sovereignty and exception. He further re-interprets the relation between sovereignty and exception which leads to a normalised permanent rule. In his text, *state of exception*, Agamben elaborated and re-defines exception which highlights the proliferation of sovereign power in a larger perspective.

STATE OF EXCEPTION AND SOVEREIGN POWER

State of exception refers to a space devoid of lawlessness because of the suspension of the existing legal order in a state of necessity. It creates sovereign as the highest decision making body in an exception. Therefore, it establishes interconnectedness between sovereignty and an exception. In the modern democratic states, the executive behaves like the sovereign in any kind of grave necessity or emergency as an exception. The centrality of the rule of law is challenged in an exception. The rule of law is replaced by the executive ordinances, decrees and acts like an autonomous source of law because of the necessity grounded it. It is not wrong to say that exception blurs the distinction between a political fact and legal fact and establishes a normalised permanent rule which is beyond the purview of original law.

Therefore, in his text *state of exception*, Agamben quotes Walter Benjamin and stated:

"state of exception....has become the rule", it not only appears increasingly as a technique of government rather than an exceptional measure but it also let its own nature as the constitutive paradigm of the Judicial order come to light" (Agamben 2005, p.6)

In his text, *homo sacer: sovereign power and bare life,* Agamben also stated that:

> "The exception does not substract itself from the rule;
> rather, the rule, suspending itself, gives rise to the ex-

> caption and maintaining itself in relation to the exception, first constitutes itself as a rule...The sovereign decision of the exception is the originary juridico-political structure on the basis of which what is included in the juridical order and what is excluded from it acquire their meaning" (Agamben 1998,p.20)

Implication of the above mentioned quotes refers to the decisions of the sovereign of executing law beyond the juridical order. Any measure taken by the political authority appeared as the legal order, despite the fact that such executive decrees are beyond the purview of law which contradicted the centrality of law and conventional understanding of sovereignty.

INDIAN EMERGENCY OF 1975-77: A STATE OF EXCEPTION

Indian emergency of 1975-77 emerged out of the necessity to control political disorder, internal violence and chaos within the state. The then congress Prime Minister Mrs. Indira Gandhi persuaded the then President Fakruddin Ali Ahmed to declare emergency. As a result, emergency was declared on 25th June 1975. It can be considered as the 'state of exception' because it not only suspended the existing legal order but also establishes a permanent rule. Emergency put democracy at halt and created a fascist-type of a state. It not only curtailed freedom, fundamental rights, tortures, detentions of opposition leaders and imprisonments but also brought many important changes in the Indian constitution. The centrality of law is severely threatened and questioned at the same time. It led to the abuse and misuse of emergency provisions of the Indian constitution. Several constitutional amendments were introduced like 37th amendment, 38th amendment, 42nd amendment etc. It also led to the revisioning of the Indian constitution due to the high handedness of the executive powers. The after-life of Indian emergency of 1975-77 can be traced in terms of anti-terror laws like Terrorists Activities Disruptive Act (TADA), Prevention of Terrorists Activities Act (POTA), and Maintenance of Internal Security Act (MISA) in the post-emergency India. Although, these anti-terror laws and acts repealed yet it has been replaced by a new anti-

terror act of Armed Forces Special Powers Act (AFSPA) in North-East and J& K in India which is still in continuation. Therefore, it can be said that anti-terror laws although, exists outside the purview of rule of law yet it acts like autonomous sources of law because of the necessity grounded it. That is to say, maintaining peace and security. It blurs the distinction between political and legal fact as what Agamben has said. The right to life is one of the most important rights of human beings threatened by these acts and this way it is also breaking apart from the ordinary rule of law which on the contrary protects the life, liberty and freedom of the people.

POST-EMERGENCY ANTI-TERROR LAWS IN INDIA

Emergency justified its existence as a means to protect the security of India, its integrity and sovereignty. To achieve the end of peace and security against the anti-state elements emergency deployed many stringent laws which became acts to punish the disturber of peace and security. The executive unlimited powers and highhandedness led to the monopoly of the executive to determine what situation would be called as an urgent situation and by what means needed to tackle it. Although, the emergency as a political event which took place during 1975-77 had supposed to be end after nineteen long months yet it cannot be denied today, that the traces of the emergency still remain alive in the forms of anti-terror laws in contemporary India. They remain out of the purview of the ordinary legal system and also known as extraordinary laws. Due to the executive supremacy entitled upon it such laws are autonomous. The necessity that grounds such laws compels it to act autonomously. These laws are especially applicable in the parts of North-East and J&K in India where ordinary criminal procedure of the existing rule of law is abandoned or suspended to deal with terrorists' activities and anti-state elements. Therefore, it can be said that the executive orders are acting like laws even though it remains outside the ordinary legal order. The executive, being a political fact is intervening into the sphere of the Judiciary, the legal fact. Therefore, 'emergency as exception' is still traceable in the forms of anti-terror laws or extra-ordinary laws which established anti-terror laws as a permanent rule in India. The moment the executive decisions interfere the legal aspect it appears executive powers are

neither completely inside nor outside the legal system but moves along with it to make its effects felt as how it has been seen in contemporary India. It has to be understood that at one point the two different zones got interlocked and crosses over. Hence, political fact blurs legal fact and makes it indistinct.

There are two trends that explain the expansion of executive powers and leading to centralisation of power. Two distinct and related trends may be identified in the process of , each having important ramifications for institutional structures and norms of democratic governance: a) a trend towards the 'executivisation' of law leading to the use of law as a 'political instrument', eroding thereby the basic principles of the rule of law, and b) their imbrications in centre-state relation as an abrasive centralising force, counterproductive in a polity that sees federalism as a manifestation of democratic decentralisation and a means to preserve political, ideological and cultural plurality (Singh 2007, p. 16).

ARMED FORCES SPECIAL POWERS ACT (AFSPA)

The Armed Forces Special Powers Act (AFSPA) was promulgated to curb the menace of terrorist and disruptive activities in the entire North-East and J&K state of India. The Special Powers Ordinance was replaced by the Armed Forces Special Powers Bill. This Bill was passed by both the Houses of the Parliament and it received the assent of the President on 11th September, 1958. It came on the statute book as The Armed Forces Special Powers Act, 1958. This Act has granted special powers to the armed forces deployed in the disturbed areas of Assam and Manipur. As a result of which the armed forces gained extensive powers and it further led to the abuse and misuse of their powers.

Any officer can arrests and detain persons with or without warrants. The common masses of these disturbed mentioned areas were forcibly brought in jails and had to undergone severe punishments. The armed forces also fire upon persons on the ground of mere suspicion. There was no requirement of evidences and suspected persons even lost the right to issue writs of Habeous Corpus to know the reasons of their arrests. The fundamental rights of people are curtailed. This Act proved to be the most dastardly Act passed by the Indian legislation. The impunity of armed forces also committed other heinous crimes like- rapes and destruction of

buildings, custodial torture of the victims which led to deaths, fake encounters in the name of maintaining security and stability of the disturbed areas. Rape of a Manipuri woman named Manorama by armed forces had witnessed strong protests in all over the North-east. They even took out a nude protest in the Kangla Fort at Manipur against the impunity of power attained by the armed forces. Its implementation led to huge violation of human rights. Among the North-Eastern states, the state of Manipur was worst affected with the operation of AFSPA in recent times.

JEEVAN REDDY COMMITTEE REPORT

The union government had appointed the Jeevan Reddy committee to probe into the misuse of powers by armed forces under AFSPA. The act had not come out with appropriate solutions to deal with the impunity of the armed forces. This committee had only shifted some of the important provisions of this act to another act of Unlawful Activities Prevention Act (ULPA). To justify the transfer of the provisions of AFSPA into another statute, in this case the ULPA, the committee said 'a major consequence of the proposed course would be to erase the feeling of discrimination and alienation among the people of the North-eastern states that they have been subjected to, what they call, "draconian" enactment made especially for them. The ULPA applies to entire India including to the North -Eastern states. The complaint of discrimination would then no longer be valid' (Gonsalves 2010, p.265). This committee also recommended establishing
grievances cell to deal with the cases of impunity of armed forces. The committee recommended that it should be composed of three persons 'namely, a senior member of the local administration as its chair, a captain of the armed/ security forces and a senior member of the local police'. The role of the grievance cells is to 'receive complaints regarding allegations of missing powers or abuse of law by security/ armed forces, make prompt enquiries and furnish information to the complaint' (ibid, p. 266). Thus, it can be said that armed forces officers would deal with the abuse of power cases. In such a condition, it would be unfair to get justice because grievances cell would be functioned by the members of security forces who were alleged to have committed such abuse of powers. Moreover, neither guidelines were issued to enquire any case of open fire to persons on grounds of mere

suspicion nor enquiries made to check the minimal use of power by armed forces. Thus, it can be argued that this committee had not put forward an appropriate resolution. Justice to the victims of AFSPA is still a distant dream.

Many Human Rights Activists, Chief Justices, retired Judges, Social Activists, NGO's and incessant fast struggle by Irom Sharmila, a Manipuri woman have been strongly protesting against AFSPA and urging to repeal this Act soon. But unfortunately, it is still in operation. Whether the armed forces were requested to be deployed by the states or not, it is still deployed if the Union government felt the situation in the North-Eastern states were worsening. Today, implementation of AFSPA has undeniably created a great havoc. It has attained the status of a permanent rule and not operating for a temporary period.

CONCLUDING REMARKS

It can be concluded that Carl Schmitt's idea of sovereignty and Giorgio Agamben's State of exception provides an interesting account to reconfigure sovereignty and its relation to an exception. It depicts the possibilities of an exception in case of Indian democracy. Undoubtedly, sovereign power as exception greatly challenged the conventional understanding of sovereignty and centrality of law in a democracy. The Indian Emergency of 1975-77 highlighted effects of sovereign power in a 'state of exception' as put forward by Agamben in a larger perspective and the post-emergency after-life can also be traced in the proliferation of anti-terror acts like AFSPA in North-East and J &K parts of India which established exception as a permanent rule in contemporary India.

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