IX. EXCEPTION TO THE RULE: CONSTITUTIONAL EXCEPTIONALISM IN INDIAN AND UK NATIONAL SECURITY LAW

- KAPIL KUMAR VERMA & RAVI SHARMA***

Abstract

The State of Exception has emerged as a prominent area of legal discussion in light of emergencies that have emerged worldwide, which can include internal strife to external threats. The State of Exception describes a state of affairs more commonly understood as an Emergency or legality of the extraordinary. This can also be said to be something between 'public law and political fact'. The main theorist who established a framework for understanding the State of Exception is Carl Schmitt. He was trying to understand the idea of sovereignty and legality in the tumultuous years of the Weimar Constitution. The state of exception offers a critique of the failure of the liberal order. Although the State of Exception is a derivative of the Civil Law System,

[*] Kapil Kumar Verma, is a Ph.D. Scholar at the Centre for Study of Law and Governance. Jawaharlal Nehru University, New Delhi. All errors, if any, are solely attributable to the authors. The authors may be reached at kapilkumarverma.lawyer@gmail.com, for any comments or feedback.

[**] Ravi Sharma is a practising Advocate at the Delhi High Court.

Anglo-American Common law has borrowed heavily from it when the questions are of a similar nature. After 9/11 the global war on terror also made countries like UK and India look towards a theory of legality for extra-legal authority that is considered as an anathema to liberal constitutional order. The paper looks into the theory of State of Exception in the context of India and the laws of the United Kingdom. The analysis is on the basis of practice and legal framework, as legal jurisprudence in Courts has not considered such questions from a Schmittinan viewpoint.

Keywords: State of Exception, Emergency law, National Security Law, Public Law, Constitutionalism

I. INTRODUCTION

The term exceptional is used in this context to indicate a measure that deviates from normal constitutional standards and is, by virtue of that deviation, seen as inappropriate or regrettable.[1]

German Political theorist Carl Schmitt argues that legal cannot be applied to chaos and needs a "homogeneous medium." No legal norm, in Schmitt's view, is able to govern an extreme case of emergency or an absolute state of exception.[2]

[1] Thomas Poole 'Constitutional exceptionalism and the common law' (ICON, Volume 7, Number 2) P247

[2] Stanford Encyclopedia of Philosophy Carl Scmidtt (August 2019) < https://plato.stanford.edu/entries/schmitt/ > last seen on 13 September 2023)

The paper describes the notions of constitutional exceptionalism in cases of national security law in common law jurisdictions in India and the United Kingdom in a framework of State of Exception. National security exceptionalism doctrine came to the forefront of discussions after the 9/11 terrorist attacks in the USA, where extraordinary measures were sanctioned in the name of national security. Drawing from the discussion on the Weimar Constitution regarding the form of authority that characterises exceptionalism, Carl Schmitt in Political Theology says, "Sovereign is he who decides on the exception" [*Souverdn ist, wer ilber den Ausnahmezustand entscheidet]*.[3] Schmitt's philosophy has argued against the liberal notions of turning the constitutional questions of politics into procedures whereby they tend to obscure the raw notion of sovereignty. The answer to which has been quite clear is that who decides the exception to ordinary circumstances is the sovereign. The term national security can convey many meanings here, and there is a difference between law and order and public order as well. For clarity, we mean national security as security of the state: "Public order in the rulings of this Court was said to comprehend disorders of less gravity than those affecting the security of State, law and order also comprehends disorders of less gravity than those affecting public order."[4]

[3] JOHN P. McCORMICK 'CARL SCHMITT'S CRITIQUE OF LIBERALISM AGAINST POLITICS AS TECHNOLOGY' (1999 Cambridge University Press) 121

[4] Shreya Singhal v. Union Of India, AIR 2015 SC 1523.

The paper examines the meaning of exceptionalism in modern Constitutional democracy and where it can be located in the national security laws in India and the United Kingdom. Then, the differences in their approach to exceptionalism will be examined, and an attempt will be made to ascertain the reasons in distinguishing those reasons.

II. DEFINING EXCEPTIONALISM

German theorist Carl Schmitt originally conceptualised this as *Ausnahmezustand,* which can be correlated to modern conceptions of public emergency or martial law. In his essay On dictatorship, he dealt with the issue of the liberal Weimar constitution and the importance of a Strong ruler and cited examples of Ancient Rome.[5] This was brought through the Reich president's powers to declare a State of emergency under Article 48. But how Schmitt conceptualises it as the power that is not subject to the Constitution itself while the prevailing Weimar Constitution subjects the State of Exception to safeguards and supervision of Reichstag as stated, "The Reich President must, without delay, inform the Reichstag of all measures taken under Paragraph 1 or Paragraph 2 of this Article."[6]

State of exception can be understood to involve the following things

1. Suspension of Basic Rights[7]
2. Extraordinary Courts[8]
3. Fair trial requirements may be relaxed

[5] Carl Schmitt 'Dictatorship' (2014 Polity press) 87
[6] Weimar Constitution(1919) Article 48.
[7] Carl Schmitt 'Dictatorship' (2014 Polity press) 182
[8] ibid

4. Derogation from due process requirements

This list is only indicative, it can include many other ideas.

III. NATIONAL SECURITY LAW

Though the conception on the exact definition of National Security law may not be clear we can understand it as a framework by which each state handles threats to its government, its values, and its very existence[9]. This definition of national security law is quite wide but for the study we shall limit ourselves to laws that deal with terrorism per se as that is considered one of the primary enemies of public tranquillity and order. As discourse on the 'War on terror' is moving towards its evaluation especially because it led to curtailment of freedoms, as well as excesses around the globe. America also asked its allies and neutral countries to suppress anyone that might lead to any act of terror. This manifested itself in the enactment of laws that curtailed basic freedoms and natural rights such as free trial, the right to know the grounds of detention, disappearances etc. there were a multitude of emergencies in place in USA at a point that were not even informed or actively monitored by the congress.[10] the idea of national security is not a conception of law but that of policy. The courts have usually wielded the executive for the definition, in the case of Secretary of State for the

[9] Kim Lane Scheppele, 'The International Standardization of National Security Law' (2010) 4 J Nat'l Sec L & Pol'y 437

[10] Daniel Skeffington 'Emergency Powers in UK (2022) < https://consoc.org.uk/emergency-powers-in-the-united-kingdom/ > last visited on15 November 2023.

Home Department v Rehman[11] court in the United Kingdom ruled "what national security means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is in the interests of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter of judicial decision. They are entrusted to the executive"[12] Thus this definitional question may be difficult to legally define but we have limited the scope of the study by limiting our scope to only anti-terror laws.

IV. NATIONAL SECURITY AND THE CONSTITUTION

The relationship between national security pertains to two questions, firstly regarding the rights of people who are subject to the respective jurisdiction as national security provides a blanket protection to executive action without adequate safeguards. This in longer tenures has a chilling effect on the public. Courts have often tried to use proportionality tests to deal with the issues of terror law and rights. The Constitution provides for safeguards as to Preventive detention, Fair trial, admissibility of Evidence, Confession, and Self-incrimination, but these are set aside while dealing with such kinds of cases. These powers are not of a temporary nature, initial emergency measures give way to their permanent entrenchment. Special police/paramilitary are employed to enforce these laws along with alteration in the division of

[11] Secretary of State for the Home Department v Rehman [2001] UKHL 47, [50]
[12] Paul F Scott 'The National Security Constitution' (2018 Hart Publishing) 5

powers with federal entities. While these conditions prevail and the applicability of these laws becomes the norms how can one think of the Constitutional protection being the norms as the application of these laws leads to widespread curtailment of liberty especially when these measures were to be temporary in nature?

V. EXCEPTION AND CONSTITUTION

The idea of dictatorship is not a sovereign dictatorship but a commissary one.[13] The Dictator with exemplary power may be an exception to the ordinary function of the constitution and ideas that regulate ordinary functioning like separation of powers and accountability have to give way. The idea that Schmitt also puts forward is that the President is subject to the powers of the Constitution and can not change it to supersede it[14]. The distinction drawn between ordinary constitutional process and that of Exception is that "exceptional cases and states of exception cannot be resolved by everyday routine."[15]

In modern constitutional parlance, the term exceptionalism generally refers to emergency powers, which may differ from its original conceptualization, where it refers purely to extra-constitutional powers exercised outside the context so provided by the Constitution.

VI. SCHMITT'S CONCEPTUALIZATION OF EXCEPTION

[13] Carl Schmitt 'Dictatorship' (2014 Polity press) 205
[14] Carl Schmitt 'Dictatorship' (2014 Polity press) 208
[15] Carl Schmitt 'Dictatorship' (2014 Polity press) 219

Schmitt believed that a strong Sovereign authority could achieve national unity and that a democratic parliament was unable to do so. Therefore, his approach required limiting democratic parliament. Schmitt was alluding to the Weimar constitution's Article 48, the state of exception clause, which granted the president the power to declare the existence of threats to the republic and to take appropriate action in response. Schmitt thought this article gave the president too much power, thus he disregarded the objections as baseless. Rather, he advocated for a broad or latitudinarian interpretation that would enable the president to effectively defend the state.[16] His idea of Sovereign dictatorship relied on the definition of Sovereignty, the standard definition of sovereignty is based on Bodin's observation that, in specific situations, exceptions to the general rule will always be required, and that the sovereign is the one who determines what qualifies as an exception.[17]

Schmitt's statement suggests that in order to avoid misunderstanding or disagreement, it would seem necessary to resort to a unified organisation with a monopoly on decision-making in all emergency situations. It would seem ideal to have such a person watchful even in ordinary times because the chances of such an occurrence are high (particularly in the Weimar setting), and because the same figure who acts on the exception must first announce that it exists. Hence,

[16] Carl Schmitt 'THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBES
MEANING AND FAILURE OF A POLITICAL SYMBOL' (Greednwood press 1996) xi

[17] Carl Schmitt ' The Crisis of Parliamentary Democracy' (MIT Press 1988) 48

normalcy and exception collapse in defiance of the fundamental tenets of classical dictatorship, and exceptional absolutism imperiously encroaches on the regular rule of law.[18]

VII. ROMAN DICTATOR

Much is written by Machiavelli on the position of Dictator in Rome, where he was appointed for 1 year non reappoint terms. Regular magistrates were superseded by the dictator, an absolute ruler appointed in times of crisis, in the early Roman era. The dictatorship changed as Rome grew over time. By formal edicts, the dictator started granting consuls and magistrates the authority to continue in their positions. During the Second Punic War, this established precedent turned the dictator become a *collega maior* of the consuls, a constitutional authority overlaid on the pre-existing government. To acknowledge that the realisation of a legal norm invariably depends on forms of (unregulated) discretionary action, an analysis of the problem of dictatorship is essential: To speak in abstract terms, the problem of dictatorship, which far too rarely has been systematically analysed, is the problem of the concrete exception within legal theory. This is demonstrated by Schmitt's scenario of a commissarial dictatorship. Ordinary legal standards are suspended in a commissarial dictatorship

[18] JOHN P. McCORMICK 'CARL SCHMITT'S CRITIQUE OF LIBERALISM AGAINST POLITICS AS TECHNOLOGY' (1999 Cambridge University Press) 137

in order to achieve a concrete goal" that is vital to the upholding of the legal system.[19]

VIII. COMPONENTS

Schmitt's Weimar study on emergency powers makes a number of significant observations, especially in relation to the famous opening line of Political Theology that undermines the distinction between sovereign and commissarial dictatorships:

a. "liberal constitutionalism has been insufficiently attentive to the idea of political exceptions"[20]

b. "the notion of sovereignty should be uncoupled from the institution of emergency powers in constitutions that have them; and"[21]

c. "there ought to be a constitutional distinction between who decides and who acts in emergency situations."[22]

These aspects are considered as sine qua non for the idea conceptualised by Carl Schmitt in terms of dictatorship, in the state of exceptionalism.

IX. CONSTITUTIONAL LIMITATION

The idea of an emergency that can be declared by the Executive on its own account was unknown before the 20th century, such as in the United States where the power to suspend habeas corpus could only be

[19] *Scheuerman, William E. 'Carl Schmitt : The End of Law' (*Rowman & Littlefield 1999) 31

[20] *Scheuerman, William E. 'Carl Schmitt : The End of Law' (*Rowman & Littlefield 1999)148

[21] ibid

[22] ibid

done by Congress. The 1919 Constitution introduced these powers to enable the security and subsistence of the State. This is essential to limit these powers to preserve the Rule of Law or Rechtsstaat.

The limitations of these powers include

1. Explicit Declaration of Emergency[23]
2. The exact content of authorisations in times of emergency[24]
3. Automatic suspension[25]
4. Parliamentary accountability

X. CRITICISM OF LIBERALISM

Schmitt is considered one of the important critics of liberal theory, he based his idea on the premise that liberalism tries to only deduct the idea of extra-constitutional authority from any ideas one engages with. They remove the apparent power dynamics by holding text as supreme and hiding the sovereignty idea behind certain procedures. Because it obfuscates who is sovereign and must make the decision and take action at that precise moment, the separation of powers is simply an excessively mechanical architecture that invariably paralyses a state in the face of an exception[26] the first statement of Schmitt's Political Theology—"Sovereign is he who decides on the exception*" [Souverdn ist, wer ilber den Ausnahmezustand entscheidet]*—may be the most

[23] Carl Schmitt 'Dictatorship' (2014 Polity press) 222

[24] Carl Schmitt 'Dictatorship' (2014 Polity press) 223

[25] Ibid.

[26] JOHN P. McCORMICK 'CARL SCHMITT'S CRITIQUE OF LIBERALISM AGAINST POLITICS AS TECHNOLOGY' (1999 Cambridge University Press) 136

well-known, if not the most notorious. However, the true significance of this well-known statement is sometimes overlooked. [27] Liberal regimes are not only subject to emergencies due to liberalism's denial of the exception and avoidance of the discretionary activity that was previously sanctioned to cope with it, but they are also susceptible to alternatives such as the one that Schmitt eventually proposed.

XI. EXCEPTION AND EMERGENCY

Carl Schmitt in his book tries to outline certain characteristics for the state of exception like special courts, procedures, suspension of rights, etc.[28] The state of exception's strong ties to civil conflict, rebellion, and resistance are undoubtedly some of the factors that make it so hard to define. Civil war falls into the category of undecidability with regard to the state of exception, which is the instant response of state power to the most extreme internal disputes because it is the antithesis of normal conditions. Consequently, we have been able to see a paradoxical occurrence throughout the 20th century that can be succinctly described as a legal civil war.[29] Though this idea of exception has come to identify originally with existential threats but now this application has extended to preventive acts to preserve State before a threat manifests, especially after the initiation of a war on terror. While trying

[27] JOHN P. McCORMICK 'CARL SCHMITT'S CRITIQUE OF LIBERALISM AGAINST POLITICS AS TECHNOLOGY' (1999 Cambridge University Press) 121

[28] Carl Schmitt 'Dictatorship' (2014 Polity press) 182

[29] Giorgio Agamben, Kevin Attell 'State of Exception' (University Of Chicago Press, 2005) 2

to make a comparison of two States, UK and India it's essential to have a framework or characteristics. For this purpose, we can rely on the following characteristics being present or absent in the jurisdiction and try to identify the reasons for this idea of exceptionalism/emergency so adopted.

a) Preventive detention
b) Protections as to Trial
c) Admissibility of Evidence
d) Special police/paramilitary
e) Alteration in division or devolution of powers

These variables are provided as essential protections by the Constitution thus these variables facilitate better inquiry.

XII. UNITED KINGDOM

The United Kingdom initially used measures commonly referred to as "emergency powers" in the 1914 Defence of the Realm Act, the 1920 Emergencies Act, and the 1939 War Powers Act. The idea of "martial law," as it was applied both domestically and in Britain's colonial possessions and was derived largely from the Crown's royal prerogatives, served as the model for these Acts.[30] This legacy is not by accident, emergency powers have typically been used in response to conflicts or the prospect of war throughout history. Of the ninety-four dictatorships in Republican Rome, only four were deployed in response

[30] Daniel Skeffington 'Emergency Powers in UK (2022) < https://consoc.org.uk/emergency-powers-in-the-united-kingdom/ > last visited on15 November 2023.

to uprisings; the great majority dealt specifically with the implementation of emergency measures in a wartime setting.

The Terrorism Act of 2000 establishes legislative measures, such as definitions of terrorist offences and authorities for law enforcement, to prevent terrorism. Act of 2015 to Combat Terrorism and Security enhances the government's capacity to combat terrorism by giving it more authority to impose travel bans, control orders, and aviation security-related policies. The Anti-Terrorism Crime and Security Act of 2001 was introduced by the government in the wake of the 9/11 attacks, permitting the indefinite detention of suspected foreign terrorists. After indefinite detention was replaced with control orders in 2005, people suspected of terrorism were subject to restrictions. The Terrorism Act of 2006, enacted in response to the 7/7 attacks, made statements endorsing or glorifying terrorism illegal and extended pre-charge detention to 28 days. In addition, the government stressed the deportation of foreign nationals as a counterterrorism tactic while negotiating diplomatic guarantees to guard against mistreatment. These legislative actions show the UK's changing response to terrorism, notwithstanding disagreements and court challenges.

Home Secretary exercises the set of powers for the executive to deal with the threats to national security, he exercises discretion on the basis of "(a) the scope and character of the organization's operations; (b) the particular danger it poses to the United Kingdom; (c) the particular risk it poses to British nationals living abroad; (d) the degree of the organization's presence in the country; and (e) the necessity of aiding other international community members in the worldwide war against

terrorism".[31] These sets of variables are upheld in the courts as well. The distinction is drawn at great lengths between a citizen and a non-citizen in U.K. law as threats that are faced usually come from outsiders or the Irish. Thus, the laws are usually inclined towards foreigners.

The argument put forward by Paul F Scott in Counterterrorism Constitution illustrates how the terrorist threat has changed over time, with a greater emphasis now being placed on global issues than national ones. Its evolution is shaped by the interactions between national and international regimes. The Human Rights Act adopts global standards, denouncing legislative reactions, and occasionally influences areas where domestic courts fall short.

As far as the investigative process is concerned laws expressly authorise recognised investigative powers, and increased standards from the European Convention on Human Rights—uncovered by legal challenges and whistleblowing—compel the government to divulge additional information. There's a change from a secretive to a more transparent system, even though responsibility for misuse is not immediately addressed. We are not experts on all relevant laws or practices. They can gather information on a large number of citizens; the powers are broad and not limited to a select few. Citizens' perceptions of themselves in politics are shaped by the power of the government in democracies. Investigatory laws may soon have a

[31] Paul F Scott 'The National Security Constitution' (2018 Hart Publishing) 34

significant impact on how individuals view themselves—not just as targets but also as commodities.[32]

Like other democracies, the UK struggles to strike a balance between civil liberties and human rights in the face of changing security threats. The combination of terrorists' freedom of movement within the European Union and homegrown extremism presents a significant challenge to law enforcement and intelligence services.[33] The UK has proven to have a strong legal system by enacting anti-terror laws, despite the world's legislatures responding to non-state actors and technological advancements comparatively slowly. In order to avoid alienation and extremism, it is imperative that the government consults with the Muslim community when formulating policies. Even though some laws have come under fire for violating people's rights, continuous monitoring, regular reviews, and sunset clauses serve to prevent abuses and guarantee that the necessary counterterrorism measures stay within the bounds of the law.[34]

XIII. INDIA

There are a number of laws that give power to the government to curtail liberty in extraordinary measures. There are many laws to that effect, such as the Unlawful Activities (Prevention) Act (UAPA) and the National Security Act. The Unlawful Activities (Prevention) Act (UAPA) gives the government the authority to stop illegal activity,

[32] Paul F Scott 'The National Security Constitution' (2018 Hart Publishing) 103

[33] Christian A. Honeywood 'Britain's Approach to Balancing Counter-Terrorism Laws with Human Rights (2016 Journal of Strategic Security , Vol. 9, No. 3)

[34] ibid

including terrorism. It permits preventive detention and calls for the outlawing of terrorist organisations. The UAPA has been used in several case filings. The law has been applied to people and groups engaged in terrorist activity. The National Security Act (NSA) has the feature of permitting preventive detention in specific circumstances to stop people from acting in a way that jeopardises national security. military Forces (Special Powers) Act (AFSPA) Feature: Allows the military forces to preserve public order in "disturbed areas" by designating them with special powers. Opponents claim that it gives members of the military forces immunity. POTA gave law enforcement more authority, although it was criticised for possible abuse. Cases involving cybercrime, such as hacking and actions connected to internet terrorism, have been brought under the IT Act. Kartar Singh v. State of Punjab[35] decision emphasised the need for safeguards against misuse while upholding the constitutional validity of the Terrorist and Disruptive Activities (Prevention) Act, 1985.

The government repealed POTA in 2004 even though the Supreme Court of India upheld its constitutional validity with certain checks and balances. The article contrasts the harsh POTA regulations with the most recent Unlawful Activities (Prevention) Act (UAPA) amendment, expressing concern about the latter. We can emphasise the necessity of India's ongoing resistance to violations of human rights.[36] One can

[35] Kartar Singh v. State of Punjab (1994) 3 SCC 569.

[36] C. Raj Kumar 'Human Rights Implications of National Security Laws in India: Combating T Combating Terrorism While Perserving Civil Liberties (2005 Denver Journal of International Law & Policy Volume 33 Number 2)222

advocate for constitutional provisions to be developed in order to strike a balance between human rights advocacy and counterterrorism efforts. In order to preserve civil liberties and fight terrorism, it promotes the development of Indian law in cooperation with non-governmental and intergovernmental organisations. It is emphasised that safeguarding human rights requires stopping abuse and deterioration brought about by inappropriate government action.[37]

In light of India's past experiences with legislation such as TADA and POTA, the article cautions against reneging on human rights pledges in the face of terrorism. It highlights how crucial it is to defend the universal principles of human rights and fundamental freedoms in trying times and encourages meaningful discussion, disagreement, and dissent within civil and political society. This is essential to denounce terrorism, and to respond carefully to make sure that it is in line with universal human rights values because future generations will be the ones to judge these actions.[38]

A unique understanding can also be brought from the abrogation of Article 370 by the parliament in an extra-constitutional procedural order. Some theorists have argued that it has to be looked into, not as a matter of liberal constitutional order but as a State of Exception where

[37] C. Raj Kumar 'Human Rights Implications of National Security Laws in India: Combating T Combating Terrorism While Perserving Civil Liberties (2005 Denver Journal of International Law & Policy Volume 33 Number 2)222

[38] C. Raj Kumar 'Human Rights Implications of National Security Laws in India: Combating T Combating Terrorism While Preserving Civil Liberties (2005 Denver Journal of International Law & Policy Volume 33 Number 2)222

the normal constitutional order could not be sustained[39]. Something that is between Constitutional, legal, 'public law and political fact' in the words of Giorgio Agamben. Applying the Schmitian framework, one makes a case wherein there is a breakdown of trust between the State and society, futility or lack of genuine electoral participation, violence and conflict, and prolonged occurrence of mentioned factors make a case for considering Article 370 abrogation legality under the lens of Exceptionalism. In its ruling the Supreme Court ruled in the affirmative but the logics were not connected to the State of Exception. The State of exception is a dangerous vehicle in sustaining a liberal democratic constitution that works for all

XIV. CONTEMPORARY DISCOURSE

Schmitt's main argument is clear. The fundamental idea of the state falls short of achieving the level of totality necessary to maintain its political monopoly. Schmitt acknowledges that the state possesses a unique and unmatched ability to confine all political activity within its own conceptual confines. It draws a clear line between the inside and the outside. The modern state has essentially made itself the bearer of politics as the centre of decision-making and the arbitrator of the friend/enemy difference.[40]

[39] Ankit Kaushik, 'Constitutional Exceptionalism in Kashmir' [2019] Verfassungsblog <https://verfassungsblog.de/constitutional-exceptionalism-in-kashmir/> accessed 17 March 2025.

[40] WILLIAM HOOKER 'Carl Schmitt's International Thought Order and Orientation' (2009 Cambridge University Press) 47

This is visible in the domains where regional, subunits or other loyalties or de-facto control emerges as a challenge to state-dominated political order. The threats that have emerged require surveillance and proactive security. Looking at one such example where the United States has many emergencies operating at a time. The issues are emerging from what he calls Partisans. Whether Schmitt was concerned about localised partisans resisting this slip towards a formless global context or whether this feedback mechanism was required was an intriguing subject. Al-Qaeda may be the exception rather than the rule in this situation, and Hezbollah in Lebanon or Shia armed organisations in Iraq would make for intriguing (though less dramatic) modern examples of Schmitt's partisan phenomena. These kinds of groupings exhibit the kind of ambitious irregularity that constantly aims to reach regularity.[41] This idea is more in terms of political theory, but in terms of modern threats to state securities can be understood on the basis of such formulation. It focuses on the application of emergency powers in the German State throughout the Weimar Republic and National Socialist periods (1918–1945). He theorised in his writings about the nature of sovereignty and the role of dictatorship."[42]

The most recent development in the discourse of the State of exception relates to Ukraine, The Ukrainian Parliament gave President Volodymyr Zelenskyy permission to declare a state of emergency in all

[41] WILLIAM HOOKER 'Carl Schmitt's International Thought Order and Orientation' (2009 Cambridge University Press) 188

[42] Daniel Skeffington 'Emergency Powers in UK (2022) < https://consoc.org.uk/emergency-powers-in-the-united-kingdom/ > last visited on15 November 2023.

of Ukraine on February 23, 2022. This authorization allowed the government to impose restrictions on the freedom of information and movement, prohibit large-scale gatherings, and stop strike action. After the invasion of Crimea in April 2014, Russian-backed insurgencies took control of the two occupied regions of Donetsk and Luhansk, imposing a state of emergency. The day before Russian forces invaded Ukraine in 2022 under the guise of a special military operation to de-Nazify the country, the state's emergency powers were declared.[43]

XV. CONCLUSION

Conclusively, we may be able to reach this consensus that the legal and constitutional positions in the United Kingdom and India respectively represent the unique circumstances that the state security presented to them. At the same time, the United Kingdom was initially affected by Irish separatists and at a later point, by Al-Qaida and other anti-western threats. The same threats were not present for India, but the issues that India had to face included cross-border terrorism in Kashmir, insurgency in Punjab, or left-wing insurgency in parts of Central India. While the state capacity of the United Kingdom was larger compared to the Indian State and had to do with limited state resources spread over a wide area, the legal regimes represented that balance of state capacity and state self-preservation.

[43] Daniel Skeffington 'Emergency Powers in UK (2022) < https://consoc.org.uk/emergency-powers-in-the-united-kingdom/ > last visited on15 November 2023.

While applying the idea of exceptionalism in its original form, as propounded by Carl Schmitt, one might not be able to locate extra-constitutional authorities or the sovereign in either of the two systems, but applying the state of exception as a state of emergency while also understanding them as the use of extraordinary force is not usually available under the constitution we can locate the idea of exception and its application. It's been argued that dictatorial powers are best as short-term measures, and they should never be renewed indefinitely. However, these legislations usually start as temporary measures but become permanent over time to deal with terror situations. This also raises the equation that constitutional rights that are so sacrosanct become exceptions. Thus, a system of checks and balances is essential even in the face of exceptional circumstances. Liberalism has shown resilience to the original criticism by Carl Schmitt, while exceptional circumstances require exceptional measures, and the test that Schmitt provides to ascertain has not given way to any external sovereign to deal with national security issues. The solution of constitutionalising the externality of the State of exception appears to be the only suitable way to deal with the State of exception in a democratic order.