REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO.129 OF 2012

Extra Judicial Execution Victim Families Association (EEVFAM)
& Anr. .....Petitioners

versus

Union of India & Anr. ….Respondents

J U D G M E N T

Madan B. Lokur, J.

1. This writ petition under Article 32 of the Constitution raises important and fundamental questions of human rights violations – not in the context of the accused but in the context of the victims. Do the next of kin of deceased victims have any rights at all, other than receipt of monetary compensation?

2. The allegations made in the writ petition concern what are described as fake encounters or extra-judicial executions said to have been carried out by the Manipur Police and the armed forces of the Union, including the Army. According to the police and security forces, the encounters are genuine and the victims were militants or terrorists or insurgents killed in counter insurgency or anti terrorist operations. Whether the allegations are completely or partially true or are entirely rubbish and whether the encounter is genuine or not is yet to be determined, but in any case there is a need to know the truth.

3. The right to know the truth has gained increasing importance over the years. This right was articulated by the United Nations High Commissioner for Human Rights in the sixty-second session of the Human Rights Commission. In a Study on the right to the truth, it was stated in paragraph 8 that though the right had its origins in enforced disappearances, it has gradually extended to include extra-judicial executions. This paragraph reads as follows:

> "With the emergence of the practice of enforced disappearances in the 1970s, the concept of the right to the truth became the object of increasing attention from international and regional human rights bodies and special procedures mandate-holders. In particular, the ad hoc working group on human rights in Chile, the Working Group on Enforced or Involuntary Disappearances (WGEID) and the Inter-American Commission on Human Rights (IACHR) developed an important doctrine on this right with regard to the crime of enforced disappearances. These mechanisms initially based the legal source for this right upon articles 32 and 33 of the Additional Protocol to the Geneva Conventions, of 12 August 1949. Commentators have taken the same approach. However, although this right was initially referred to solely within the context of enforced disappearances, it has been gradually extended to other serious human rights violations, such as extrajudicial executions and torture. The Human Rights Committee has urged a State party to the International Covenant on Civil and Political Rights to guarantee that the victims of human rights violations know the truth with respect to the acts committed and know who the perpetrators of such acts were."[1]

It is necessary to know the truth so that the law is tempered with justice. The exercise for knowing the truth mandates ascertaining whether fake encounters or extra-judicial executions have taken place and if so, who are the perpetrators of the human rights violations and how can the next of kin be commiserated with and what further steps ought to be taken, if any.

[1] Promotion and Protection of Human Rights: Study on the right to the truth. Report of the Office of the United Nations High Commissioner for Human Rights; 8th February, 2006. Commission on Human Rights, Sixty-second session, Item 17 of the provisional agenda.

The background

4. The Extra Judicial Execution Victim Families Association (petitioner no.1) in W.P. (Crl.) No. 129 of 2012 says that it is a registered trust having as its members the wives and mothers of persons whom they say have been extra-judicially executed by the Manipur Police and the security forces (mainly the Assam Rifles and the Army). The Human Rights Alert (petitioner no. 2) also claims to be a registered trust. They are hereinafter compendiously referred to as the petitioners.

5. The petitioners claim to have compiled 1528 alleged extra-judicial executions carried out by the police and security forces in Manipur. It is alleged that a majority of them have been carried out in cold blood while the victims were in custody and allegedly after torturing them. The compilation was presented in the form of a Memorandum to the United Nations Special Rapporteur on extra-judicial, summary or arbitrary executions during his mission to India in March 2012. We do not know what action has been taken on the Memorandum, but a perusal of the compilation indicates that the place of encounter is not documented in some cases and the identity of the victim is not known in some cases. Of these 1528 cases documented by the petitioners, they have made a more elaborate documentation of 62 cases. For the purposes of the writ petition filed under Article 32 of the Constitution, they have referred to 10 specific cases (out of 62) where, according to them, eye-witness accounts exist of extra-judicial executions but the police and the security forces have justified them as encounters with militants. The details of these 10 cases are mentioned in the writ petition but

it is not necessary for us to individually discuss them.

6. The petitioners say that not a single First Information Report (for short 'FIR') has been registered by the Manipur police against the police or the security forces even though several complaints have been made in respect of the alleged extra-judicial executions. As a result of the failure of the Manipur police to register an FIR not a single investigation or prosecution has commenced and the cries of anguish of the families of the victims have fallen on deaf ears.

7. The petitioners say that the victims of the extra-judicial executions include innocent persons with no criminal record whatsoever but they are later on conveniently labeled as militants. The petitioners also say that the National Human Rights Commission (the NHRC) which is mandated to investigate human rights abuses and recommend punishment of the guilty has turned out to be a toothless tiger. The Manipur State Human Rights Commission is defunct due to the non-appointment of members and non-allocation of resources despite an order of the Manipur Bench of the Gauhati High Court in PIL W.P. No. 15 of 2011. It is under these circumstances that the petitioners have been compelled to approach this Court under Article 32 of the Constitution for appropriate orders for setting up a Special Investigation Team (for short 'SIT') of police officers from outside the State of Manipur to investigate instances of alleged extra-judicial executions and thereafter prosecute the offenders in accordance with law.

8. Dr. Th. Suresh Singh is the petitioner in W.P. (C) No. 445 of 2012 and he says that he is a vigilant citizen who safeguards the fundamental rights of all people in Manipur. In his individual capacity as a public interest litigant he prays

for a direction that the areas in Manipur declared as a "disturbed area" in terms of Section 3 of the Armed Forces (Special Powers) Act, 1958 (for short 'the AFSPA') be withdrawn and the notification issued in this regard be quashed.

9. At the outset it may be stated that though both the writ petitions were listed for hearing over several days, the sum and substance of the submissions related to the setting up of an SIT to investigate the alleged extra-judicial executions with a clear understanding that W.P. (C) No. 445 of 2012 would be taken up for consideration later. Therefore, we are not at all considering the prayers made in W.P. (C) No. 445 of 2012.

Affidavits filed by the Union of India

10. During the course of hearing, a detailed reference was made by the learned Attorney General to the counter affidavit filed by the Union of India on 15th December, 2012 in W.P. (C) No. 445 of 2012. This was more for convenience in placing the detailed facts rather than anything else. In the affidavit, it has been stated, *inter alia,* that the security of the nation is of paramount importance and this involves the security of the States as well. A reference is made to Article 355 of the Constitution which casts a duty on the Union to protect every State against external aggression and internal disturbances and also to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution.[2] A reference is also made to Entry 2A of List I of the Seventh Schedule of the Constitution (the Union List) relating to the deployment of armed

[2] **355. Duty of the Union to protect States against external aggression and internal disturbance.** - It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.

forces of the Union in any State in aid of the civil power.[3]

11. It is stated that militant groups are operating in north-east India demanding separation from the country and indulging in violence by way of killing innocent civilians with a view to create a fear psychosis and indulging in extortion so as to promote their ideology and goals. These militant groups possess sophisticated arms and have cross border support from countries inimical to the country's interests; they have no respect for the law of the land and indulge in crimes without having any fear of the law and order machinery.

12. It is submitted that violence has become a way of life in the north-eastern States and the State Governments do not possess the strength to maintain public order and as such military aid by the Union to the States becomes inevitable.

13. With specific regard to Manipur it is stated that there is a constant threat from armed militant groups and therefore there is a need for counter insurgency operations through the armed forces in conjunction with the civil administration. These operations also hold out a threat to the lives of the armed forces personnel since the militants wield deadly weapons. It is in this background that the AFSPA came to be enacted and amended subsequently keeping in view the hostile environment and the imperative to give legal and logistic protection to the armed forces personnel posted on duty so as to enable them to operate with the required thrust and drive.

14. It is stated that to sensitize the armed forces personnel on human rights

[3] 2-A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.

aspects, the Ministry of Defence of the Government of India has issued 'Dos' and Don'ts'. The armed forces follow these instructions strictly and observe restraint in their operations.

15. It is submitted that a review of the security situation and potential militancy levels in the "disturbed area" is a highly specialized issue requiring requisite expertise in the domain of internal security. The actions that need to be taken by the appropriate Government to deal with such situations of internal disturbances are not issues that can be decided in a court of law.

16. It is stated that AFSPA was withdrawn from the Imphal Municipal Area in August 2004[4] illustrating that the appropriate government has been periodically reviewing the security situation in the "disturbed area" and wherever necessary, the application of AFSPA has been withdrawn.

17. With reference to the allegation that in view of Section 4(a) of the AFSPA a person can be killed without any reason by the armed forces, this is categorically denied by stating that there are several safeguards and pre-requisite conditions that need to be fulfilled under AFSPA before a person might be killed by the armed forces. These safeguards and pre-requisite conditions have been mentioned in the affidavit and it is concluded that it is absolutely wrong to suggest that the armed forces personnel can kill any person without any reason, as alleged. The pre-conditions, *inter alia*, are:

(a) There has to be a **declaration of disturbed area** by a high level authority as mentioned in the Act.

(b) The concerned officer has to be of the opinion that it is **necessary**

[4] 12th August, 2004

to do for the maintenance of public order.

(c) He has to **give such due warning** as he may consider necessary.

(d) The person against whom action is being taken by armed forces must be "**acting in contravention of any law or order** for the time being in force in the disturbed area**".**

(e) Such law or order **must relate to prohibiting** the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances.

18. It is submitted that though Manipur is facing an insurgency problem and the police and the armed forces are dealing with that problem to the best of their ability, the common man is not generally affected by the counter insurgency operations. It is stated that the people of Manipur have been actively participating in the electoral process and by way of example it is stated that in the 1990 elections for the assembly seats, the voting turnout was 89.95% and similarly in the 2012 elections for the assembly seats the voting percentage was 83.24%. It is submitted that the voting percentage in Manipur is amongst the highest in the country.

19. It is emphasized that only 5000 militants are holding a population of about 23 lakhs in Manipur to ransom and keeping the people in constant fear. It is further stated that the root cause of militancy in Manipur is the constant endeavour of insurgent groups to extort money so that their leaders can lead a luxurious life in foreign countries. Additionally, ethnic rivalries, the tribal divide and factions in society and the unemployed youth are being exploited by militant outfits to fuel tension.

20. It is pointed out that the militant groups take advantage of a long international border of over 250 kms that is shared with Myanmar and that the border is heavily forested and has a very difficult terrain. The border area is inhabited by the same tribes on either side. These tribes have family relations and social interactions and therefore a free movement regime to move upto 16 kms on both sides is permitted. Taking advantage of this, the militant outfits utilize the other side of the border in conveniently conducting their operations of extortion, kidnapping, killing, looting and ambushing the security forces.

21. With regard to the amendments to the AFSPA it is stated that the Justice Jeevan Reddy Committee was set up by the Government of India in 2004 and it submitted a report on 6th June, 2005 recommending the repeal of AFSPA and suggesting amendments to the Unlawful Activities (Prevention) Act, 1967 (for short 'the UAPA') to achieve the purpose of AFSPA. However, the Cabinet Committee on Security has not approved the proposal and a final decision has not yet been taken by the Cabinet and the exercise of amending the AFSPA is under consideration of the Government of India.

22. It is submitted in this context that the 2nd Administrative Reforms Commission had endorsed the view of the Justice Jeevan Reddy Committee and the Group of Ministers in the Government of India decided on 17th August, 2012 to consult the State Governments and that process is still on.

23. It is submitted that several militants have surrendered as a result of a dialogue between the Government and militant outfits willing to abjure violence. The Government has also framed a surrender policy whereby the militants who

surrender are provided incentives including assurances of livelihood.

24. On the human rights issue, it is stated that a Human Rights Division in the Army Headquarters ensures that prescribed 'Dos' and Don'ts' (while dealing with militants and insurgents) are adhered to. Additionally, the Chief of Army Staff has also issued 'Ten Commandments' and this indicates that the armed forces consistently (and constantly) keep a watch on issues of human rights.

25. It is submitted that complaints of violation of human rights as reported by the NHRC are received by the Ministry of Defence in respect of alleged violations by the Army and in the Ministry of Home Affairs (Human Rights Division) in the case of Central Armed Police Forces. As far as the Ministry of Defence is concerned, the complaints are sent to the Army Headquarters (Human Rights Division) and they are then investigated by the District Magistrate and the local police. A separate enquiry is also conducted by the Army and wherever necessary appropriate action is taken. In respect of allegations against the Central Armed Police Forces, State level investigations are conducted and the factual position determined. It is then that a decision is taken whether an encounter is genuine or fake.

26. It is further submitted that as many as 70 personnel have been punished for human rights violations and therefore it is incorrect to say that no one has been punished for human rights violations.

27. The Union of India has filed two substantive affidavits in W.P. (Crl.) No. 129 of 2012. The first is an affidavit dated 5th December, 2012 which is a somewhat abridged version of the subsequent affidavit of 15th December, 2012 in

W.P. (C) No. 455 of 2012. The second is an affidavit filed in September 2013. There is a third affidavit which is a response to the report of the Justice Hegde Commission[5] but we are not concerned with its contents in any detail.

28. In the affidavit of 5th December, 2012 it is stated that the persons killed allegedly through 'extra-judicial executions' as stated by the petitioners are those killed during counter-insurgency operations in Manipur. It is further stated that "in most of these cases, persons might have been killed in the lawful exercise of the powers and/or performance of the official duties by personnel from the police and armed forces."

29. Attention is then drawn to provisions of law that permit the killing of a human being by a police officer or armed forces personnel subject to certain conditions and which may not amount to an offence but might be justifiable under law. Reference in this regard is made to Section 46 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') and it is submitted that in certain extreme situations it may be justifiable even if the death of a person being arrested is caused if the conditions mentioned in the Section are satisfied and if the person being arrested is accused of an offence punishable with death or with imprisonment for life.

30. Reference is also made to Sections 129 to 132 of the Cr.P.C. relating to the "Maintenance of Public Order and Tranquility". These sections allow the use of force, including by the armed forces, to disperse an unlawful assembly and in extreme situations use of such force may even lead to causing the death of a person while dispersing such an unlawful assembly.

[5] Referred to later.

31. The affidavit also refers to Chapter 4 of the Indian Penal Code (for short 'the IPC') particularly Sections 99 to 106 which deal with the right of private defence. It is submitted that when personnel from the police or armed forces are attacked with firearms etc. by insurgents or other criminals, uniformed personnel have the right to exercise their right of private defence which may extend to causing the death of such an insurgent or criminal.

32. Reliance is placed on Section 4 of the AFSPA where, for the maintenance of public order in a "disturbed area" the armed forces may fire upon or otherwise use force even to the extent of causing death. However, this power is given only to certain personnel of the armed forces and that power may be exercised only if that person is of opinion that it is necessary to do so for the maintenance of public order, after giving such due warning as he may consider necessary. It is also provided that the person fired upon must be acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or carrying of weapons or of things capable of being used as weapons or of firearms, ammunition or explosive substances.

33. It is stated that without going into the alleged extra-judicial executions, the death of 1528 persons in the cases mentioned by the petitioners is caused by uniformed personnel in the lawful exercise of powers vested and in circumstances that justify the use of such force under the legal provisions mentioned above.

34. It is emphasized that only around 1500 militants are holding a population of about 23 lakhs in Manipur to ransom and keeping the people in constant fear.[6]

[6] This may be contrasted with the assertion in the affidavit of 15th December, 2012 in W.P. (C) No. 445 of 2012 of the number of militants. The Census of 2011 suggests a population of over 27 lakhs in Manipur.

35. In the affidavit of September 2013, a broad overview of insurgency in the north-east is given by the Union of India. With specific reference to Manipur, it is stated that a large number of terrorist groups are active in the State with varying demands including outright secession from India. These terrorist groups have safe havens across the border and they have been indulging in the cold blooded murder of dignitaries, security force personnel and innocent citizens including political leaders, bureaucratic functionaries etc. These groups have resorted to burning copies of the Constitution of India and the national flag and have, to a certain extent, subverted the local administration and muzzled the voice of the people by violence and threats of violence.

36. It is further stated that the armed forces conduct operations within the framework of the military ethos wherein local customs and traditions are deeply valued and respected and restraint is exercised. This is reflected, significantly, in the number of casualties suffered since 1990 - approximately for every two terrorists killed, one security force personnel has been killed and for every two security force personnel killed, three of them have been wounded in operations.

37. The Union of India has filed detailed written submissions on 4th May, 2016 which essentially reiterate and reaffirm the submissions made on affidavit. However, it is pointed out that "a militant or terrorist or insurgent, is an 'Enemy' within the aforesaid definition [Section 3(x) of the Army Act, 1950] and it is the bounden duty of all Army Personnel to act against a militant or a terrorist or an insurgent, while he is deployed in a 'disturbed area' under AFSPA. In case Army personnel do not act against an enemy or show cowardice, it is a Court-martial

offence under Army Act Section 34, punishable with death."[7] Reference is made to ***Ex-Havildar Ratan Singh v. Union of India***[8] to conclude that a militant is an enemy within the definition of Section 3(x) of the Army Act, 1950. This view is carried forward by submitting that the victims have been persons waging war against the Government of India and in terms of Section 121 of the IPC anyone who joins an insurrection against the Government of India has committed an offence of waging war. In this regard, reference is made to ***State (NCT of Delhi) v. Navjot Sandhu***[9] wherein it is held that under Section 121 of the IPC 'war' is not contemplated as conventional warfare between two nations. Organizing and joining an insurrection against the Government of India is also a form of war.

Affidavits filed by the State of Manipur

38. The State of Manipur has filed five affidavits in W.P. (Crl.) No. 129 of 2012 but only two of them are substantive. In the affidavit dated 17th November, 2012 it is stated that of the 10 cases detailed by the petitioners in the writ petition, reports have been furnished by Manipur to the NHRC in all of them and significantly, in none of these cases has the NHRC given a finding of violation of human rights. In this context, it is submitted that the NHRC is a high-powered body whose Chairman is a retired Chief Justice of India and under the circumstances, it cannot be described as a toothless tiger. However, it is submitted that this Court may require the NHRC to indicate the status of the 10 cases and intervene only if the

[7] Section 3(x) of the Army Act, 1950: "enemy" includes all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of any person subject to military law to act.
[8] 1992 Supp (1) SCC 716
[9] (2005) 11 SCC 600

NHRC has failed to perform its statutory functions to safeguard vital fundamental rights.

39. With regard to the problem of insurgency in Manipur, it is stated that Manipur has an international border of over 360 kms with Myanmar. About 30 extremist organizations operate in Manipur and all of them are very powerful and heavily armed with sophisticated weapons, including rocket launchers. Their aim and object is to form an independent Manipur by its secession from India. They have been indulging in violent activities including killing of civilians and security forces and law abiding citizens of Manipur to achieve their objective. They have also been intimidating, extorting and looting civilians for collection of funds and making efforts to get established abroad for influencing public opinion and securing their assistance by way of arms and training in achieving their secessionist objective. Though these organizations have been declared as unlawful organizations under the UAPA, the ordinary criminal laws are insufficient to deal with insurgency problems which have warranted enforcement of the AFSPA. The State of Manipur has also given the following statistics for the period 2000 to October 2012 of police personnel killed and injured, security forces personnel killed and injured and civilians killed and injured to highlight the problem of insurgency in the State:

Police killed	Police injured	Security forces killed	Security forces injured	Civilians killed	Civilians injured
105	178	260	466	1214	1173

40. It is further stated that the facts indicate that the insurgents are different from other criminals inasmuch as they are heavily armed and operate from foreign countries and it is not possible to identify the members of the banned organizations and though they may be few in number, they have many supporters and sympathizers who provide logistical support to them.

41. The other affidavit filed by the State of Manipur on 3rd August, 2013 is effectively a reply to the Court appointed Committee (which Committee is referred to a little later). The affidavit reiterates the presence of a large number of underground groups who propagate freedom, independence and sovereignty of the State of Manipur and possess sophisticated arms, some of which are transported from neighbouring countries. The affidavit reiterates the statistics and submissions made in the earlier affidavit of 17th November, 2012 and indicates that the genesis of declaring the entire State as a "disturbed area" goes back to a notification dated 15th October, 1970 and it has continued to be declared as a "disturbed area" since then. In August 2004 the Imphal Municipal Area in the State was de-notified as a "disturbed area" under the AFSPA. The State Government has been trying to de-notify more and more areas but given the circumstances, it is finding it difficult and unable to do so.

42. It is stated that to synergize security issues and counter insurgency operations in Manipur a Unified Headquarter was established on 16th September, 2004. This consists of the Combined Headquarters headed by the Chief Minister of Manipur as its Chairman, Strategy and Operations Group headed by the Chief Secretary, Manipur as its Chairman and Operational Intelligence Group headed by the

Director General of Police as its Chairman. Under the circumstances, it is stated that even though the number of incidents of militancy are large and casualties are heavy, the State Government will not tolerate even one false encounter and will also ensure that no innocent security personnel is victimized or harassed for an innocent act performed in good faith and without any *mala fide* intentions.

43. With regard to the specific cases dealt with by the Court appointed Commission and the recommendations made by the said Commission, the State of Manipur has raised several preliminary objections and made several submissions. For the present purposes, it is not necessary for us to go into this aspect of the matter. It is stressed that the implementation of AFSPA is necessary and that it has yielded positive results in reducing militancy in Manipur.

44. The State of Manipur has filed a supplementary counter affidavit on 4th December, 2012 detailing its viewpoint with regard to the 10 cases identified by the petitioners. For our purposes, it is not necessary to deal with the merits of these cases. Written submissions have also been filed by Manipur on 3rd May, 2016 and these are a reiteration of the views expressed in the affidavits filed.

Affidavits filed by the NHRC

45. The NHRC has filed as many as four affidavits in W.P. (Crl.) No. 129 of 2012.

46. In the first affidavit dated 30.11.2012/03.12.2012, it is stated that the NHRC has issued guidelines on 29th March, 1997 recommending the correct procedure to be followed by all the States in relation to deaths due to encounters between the police and others. These guidelines were forwarded with a request to all the States to issue appropriate directions through the Director General of Police to all the

Police Stations.

47. The guidelines were revised on 2nd December, 2003 on the basis of experience gained over the previous six years. It was noted, unfortunately, that most of the States were not following the earlier guidelines in their true spirit.

48. One of the important modifications made in the guidelines issued on 2nd December, 2003 was the requirement of a Magisterial Enquiry in all cases of death which occur in the course of police action. Another significant modification was that all States were required to furnish six-monthly statements to the NHRC in respect of all deaths in police stations in a prescribed format along with the post-mortem report and inquest report.

49. The guidelines were further modified on 12th May, 2010 once again with the NHRC observing that most of the States were not following the recommendations earlier made in their true spirit. These guidelines recommended that the Magisterial Enquiry must be compulsorily conducted and completed in all cases of death which occur in the course of police action preferably within three months. It was also recommended that a report be sent to the NHRC in a format prescribed in the guidelines in all cases of death in police action within 48 hours of the death occurring.

50. The NHRC has generally stated in the affidavit that in all cases the State Governments invariably take more than reasonable time to submit the Magisterial Enquiry report, post-mortem report, inquest report and ballistic expert report and in view of these delays the NHRC is not in a position to conclude its proceedings at an early date.

51. With regard to deaths due to action taken by members of the armed forces, the NHRC says that it has no option, in view of Section 19 of the Protection of Human Rights Act, 1993 except to seek a report from the Central Government and thereafter make a recommendation and publish it with the action taken by the Central Government.[10]

52. It is stated that between 2007 and 2012, the NHRC has received 1671 complaints/information regarding fake encounters (not necessarily from Manipur) and it has awarded monetary compensation to the tune of Rs. 10,51,80,000/- (Rs. Ten Crores Fifty One Lakhs and Eighty Thousand) in 191 cases. It is further stated that on receiving the Magisterial Enquiry report and other related reports, if the NHRC finds itself in agreement with them, and if as per the report the encounter has been found to be genuine, then it closes the complaint by passing an order to that effect. However, if it is found that the encounter was fake, then a show cause notice is issued to the concerned State Government to appropriately compensate the family of the victim. In other words, between 2007 and 2012 the NHRC has found 191 cases of fake encounters. It is not clear which of these, if any, relate to

[10] **19. Procedure with respect to armed forces**.—(1) Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of the armed forces, the Commission shall adopt the following procedure, namely:—

(*a*) it may, either on its own motion or on receipt of a petition, seek a report from the Central Government;

(*b*) after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government.

(2) The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow.

(3) The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations.

(4) The Commission shall provide a copy of the report published under sub-section (3) to the petitioner or his representative.

the 1528 cases from Manipur.

53. By way of a complaint (if we may call it that) the NHRC states in the affidavit that it has written to the Central Government to increase its staff but the request has not been acted upon. It also states that to give more teeth to the guidelines issued by the NHRC, it would be appropriate if this Court directs all the States to strictly comply with them both in letter and spirit.

54. In the second affidavit dated 3rd January, 2013 it is stated that as far back as on 10th August, 1995 the NHRC had advised all Chief Ministers to introduce video-filming of the post-mortem examination with effect from 1st October, 1995 in all cases of deaths in police action or armed forces action to avoid any distortions of facts due to alleged pressure of the local police.

55. In a communication dated 27th March, 1997 the NHRC expressed its distress to all the Chief Ministers on the quality of post-mortem reports being prepared and sent to the NHRC. Along with the letter, the NHRC annexed a Model Autopsy Form prepared by it based on the U.N. Model Autopsy Protocol and recommended to all the State Governments to prescribe the said Model Autopsy Form and the Additional Procedure for Inquest as indicated in the letter dated 27th March, 1997.

56. In the affidavit, the NHRC expresses helplessness in taking any coercive measures since it has no power to take action against persons or authorities who do not follow the guidelines laid down by it nor does it have power to give directions or pass orders but can only make recommendations. By way of an example, it is stated that the Government of Delhi by its letters dated 9th February, 2011 and 14th June, 2011 has refused to conduct a Magisterial Enquiry in case of police

encounters and has clearly stated that if the Home Department is satisfied that such an enquiry is to be conducted, only then would it be conducted.

57. The NHRC has again lamented the shortage of staff available with it resulting in delays taking place and follow up action being made more difficult. The NHRC has also lamented the poor quality of the Magisterial Enquiry reports received by it wherein the family of the person killed is not examined nor independent witnesses examined.

58. The NHRC has annexed some statistics of disposal of cases along with the affidavit but they are not necessary for the present purposes. The NHRC has prayed that in view of the circumstances and on the basis of its experience of several years the suggestions incorporated in the affidavit may be made an order of this Court.

59. With regard to the alleged fake encounter killings, the third affidavit dated 21st February, 2014 filed by the NHRC is extremely vague. All that it says is that the NHRC held a camp sitting in Imphal, Manipur between 23rd October, 2013 and 25th October, 2013 to consider the pending complaints of extra-judicial killings by the armed forces/police. During the sittings the NHRC had listed 46 cases, as per the cause list attached, but only in 5 cases it could reach a conclusion that the victims were murdered/killed by the armed forces/police while they were in their custody. Accordingly, monetary relief ranging from Rs. 5 lakhs to Rs. 20 lakhs was ordered to be given to their next of kin. It is not at all clear which five cases were dealt with. It is also not clear what happened to the remaining cases. All that the NHRC has annexed with the affidavit is the record of proceedings in one case

relating to late Thangjam Thoithoi in which his next of kin was awarded Rs. 5 lakhs by way of compensation.

60. In the fourth affidavit dated 27th July, 2015 the NHRC has given the progress in respect of 62 cases of which details are given in the writ petition. Subsequently, during the course of hearing, the up to date information was given to us and therefore it is not necessary to refer to the information given in the affidavit. All that needs to be said is that the NHRC has complained that the State of Manipur has not been furnishing the required documents and information within the prescribed time and has also not been submitting the compliance report in respect of the recommendations made for providing monetary relief.

61. As mentioned above, the NHRC has furnished information in respect of the 62 cases during the course of hearing and also in the written submissions filed on 4th May, 2016. The gist of the information is as follows:

Compensation awarded by NHRC or High Court	Show cause notices pending for award of compensation	Pending disposal with the NHRC	Cases closed	No case registered with the NHRC	Total
27	4	17	7	7	62

62. The above chart clearly suggests that 31 of the 62 cases were those of a fake encounter or an extra-judicial killing. In 7 of the 62 cases no complaint was made to the NHRC. As regards, the cases that have been closed, we find from a perusal of some orders produced before us that some of these complaints have been closed without any application of mind and simply because of the conclusion arrived at in the Magisterial Enquiry report, which is really an administrative report.

63. The written submissions submitted by the NHRC are a reiteration of the submissions made in the various affidavits filed by it and presently do not need any detailed discussion. However, it is pointed out (perhaps with a tinge of frustration) that the petitioners might not be very wrong in describing the NHRC as a toothless tiger!

Proceedings in this Court

64. The petition was taken up for consideration by this Court from time to time on the above broad pleadings. At this stage it is necessary to have a brief overview of the proceedings that took place in this Court over the last couple of years.

65. On 1st October, 2012 notice was issued in the writ petition to the respondents, that is, the Union of India and the State of Manipur. A request was also sent to the National Human Rights Commission for its response in the matter. Ms. Menaka Guruswamy an advocate of this Court was requested to assist as Amicus Curiae.

66. On 4th January, 2013 the case was heard at great length and it was proposed to appoint a high-powered Commission to inform this Court about the correct facts with regard to the killing of persons in the cases cited by the petitioners. Accordingly, a three-member Commission was constituted with Mr. Justice N. Santosh Hegde, a former Judge of this Court as the Chairperson; Mr. J.M. Lyngdoh, former Chief Election Commissioner and Mr. Ajay Kumar Singh, former Director General of Police and Inspector General of Police, Karnataka as Members.

67. The Commission was requested to make a thorough enquiry in six identified cases and record a finding regarding the antecedents of the victims and the

circumstances in which they were killed. The State Government and all other agencies were directed to hand over to the three-member Commission all relevant records. The Commission was free to devise its own procedure and also address the larger question of the role of the State Police and the security forces in Manipur and to make recommendations. The Commission was requested to give its report within twelve weeks. The order passed by this Court is reported as ***Extra-Judicial Execution Victim Families Association v. Union of India***.[11]

68. On 30th March, 2013 the Commission submitted its report and the case was taken up on 4th April, 2013. While recording its gratitude for the painstaking effort put in by the three-member Commission, this Court noted that the Commission had found that in all the six cases, the killing of the victims was not in any true encounter with the police or the security forces. A very brief resume of the conclusions arrived at by the three-member Commission was noted as follows:

Case 1 – Md. Azad Khan

> The incident in which the deceased Md. Azad Khan was killed was not an encounter nor was he killed in exercise of the right of self-defence.

69. The Commission further found that there was no evidence to conclude that the deceased was an activist of any unlawful organization or was involved in any criminal activities. However, as per the report of the NHRC now made available to us, it is stated that the High Court of Manipur passed a direction in W.P. (Crl.) 49 of 2009 for monetary relief of Rs. 5 lakhs to the mother of the deceased since the police personnel and Assam Rifles personnel were responsible for the death.

Case 2 – Khumbongmayum Orsonjit

[11] (2013) 2 SCC 493

> The incident in which the deceased Khumbongmayum Orsonjit died is not an encounter nor can the security forces plead that it was in the exercise of their right of private defence.

70. The Commission further found that Khumbongmayum Orsonjit did not have any adverse criminal antecedents. As per the latest report of the NHRC, a notice has been issued to the Ministry of Home Affairs of the Government of India to show cause why monetary relief should not be paid to the next of kin of the deceased. Apparently, the matter is still pending with the NHRC.

Case 3 – Nameirakpam Gobind Meitei & Nameirakpam Nobo Meitei

> The incident in question is not an encounter but an operation by the security forces wherein death of the victims was caused knowingly.

71. The Commission further found that the two deceased did not have any criminal antecedents. As per the latest report of the NHRC, a recommendation has been made to the Government of Manipur for payment of Rs. 5 lakhs to the next of kin of the two deceased. The matter is still pending with the NHRC on the request of the State Government awaiting the decision of the present petition by this Court.

Case 4 - Elangbam Kiranjit Singh

> Even if the case put forward by the complainant cannot be accepted, the case put forth by the security forces cannot also be accepted because they exceeded their right of private defence. Therefore, this Commission is of the opinion that the incident, in question, cannot be justified on the ground of self-defence.

72. The Commission further found that there were no adverse antecedents against the deceased. As per the latest report of the NHRC, a notice has been issued to the

Government of Manipur to show cause why monetary relief be not paid to the next of kin of the deceased. Apparently the matter is pending with the NHRC awaiting compliance by the State Government.

Case 5 - Chongtham Umakanta

> This incident in which Umakanta died has compelled us to come to the conclusion that though the manner in which he was picked up, as stated by the complainant, cannot be accepted. The manner in which he died definitely indicates that this could not have been an encounter. For the reasons stated above, we are of the considered opinion that the case put forth on behalf of the security forces that the incident was an encounter and that Umakanta was killed in an encounter or in self-defence cannot be accepted.

73. The Commission further found that although there were allegations against the deceased, the veracity of those allegations was not established. We have been informed that the NHRC has made a recommendation to the Government of Manipur for payment of Rs. 5 lakhs to the next of kin of the deceased. Apparently the matter is pending with the NHRC.

Case 6 - Akoijam Priyobrata @ Bochou Singh

> The deceased did not die in an encounter.

74. The Commission further found that there is no acceptable material to come to the conclusion that the deceased had any adverse antecedents. The NHRC has recommended to the Government of Manipur to pay Rs. 5 lakhs to the next of kin of the deceased. The matter is still pending with the NHRC on the request of the State Government awaiting our decision in this petition.

75. In other words, in all the six cases, the Commission found that the encounter

(if any) was not genuine or that the use of force was excessive.

76. We may mention that during the course of oral submissions, the learned Attorney General was rather critical of the procedure adopted by the Commission and the conclusions arrived at. His principal grievance was that the right of self-defence has no role in an encounter with militants and terrorists. [This is contrary to the stand taken by the Union of India in the affidavit filed in December 2012]. He also relied on ***Kailash Gour v. State of Assam***[12] to contend that the rules of evidence and the standards of evaluating the evidence cannot be given a go-by even by a Court appointed Commission.

77. It is not necessary for us to deeply go into the report of the Commission in the view that we are taking. For the present, we must acknowledge the efforts put in by the Commission and also acknowledge that it has put us on the right track and has convinced us that the allegations made by the petitioners cannot be summarily rubbished. There is some truth in the allegations, calling for a deeper probe. How the whole truth should be arrived at is the question that concerns us. However, before that exercise is undertaken, the position in law must be clear and that is what we will endeavour to do.

Maintainability of the writ petition

78. An objection was raised by the learned Attorney General to the effect that in a writ petition like the present one, a prayer to order a police investigation is not maintainable. It was submitted that the procedure laid down in the Cr.P.C. is quite

[12] (2012) 2 SCC 34

adequate and if there is any inaction on the part of the authorities, recourse may be had to the grievance redressal procedure laid down in the Cr.P.C. In this context reliance was placed on ***Hari Singh v. State of U.P.,***[13] ***Aleque Padamsee v. Union of India,***[14] ***Sunil Gangadhar Karve v. State of Maharashtra***[15] and ***Doliben Kantilal Patel v. State of Gujarat.***[16]

79. We are not impressed by this submission. This is not an ordinary case of a police complaint or a simple case of an FIR not being registered. This case involves allegations that the law enforcement authorities, that is, the Manipur Police along with the armed forces acting in aid of the civil power are themselves perpetrators of gross human rights violations. This is also not a case where the ordinary criminal law remedy provides an adequate answer. A particular situation of internal disturbance has prevailed for decades and the ordinary citizens of Manipur have had little access and recourse to law in the situation that they find themselves placed in. To make matters worse, FIRs have been registered against the victims by the local police thereby leaving the next of kin of the deceased with virtually no remedy under the Cr.P.C.

80. This case immediately brings to mind the view expressed by Dr. Ambedkar with respect to Article 32 of the Constitution: "If I was asked to name any particular article in this Constitution as the most important - an article without which this Constitution would be a nullity - I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it." If in

[13] (2006) 5 SCC 733
[14] (2007) 6 SCC 171
[15] (2014) 14 SCC 48
[16] (2013) 9 SCC 447

a case such as the present, the petitioners are precluded, at the threshold, from approaching this Court or a High Court under Article 226 of the Constitution, possible grave injustice would have been done to the next of the kin of the victims who are alleged to have been killed in a fake encounter or have been victims of alleged extra-judicial executions. We are not satisfied that this petition under Article 32 of the Constitution should not be entertained. The truth has to be found out however inconvenient it may be for the petitioners or for the respondents. In matters concerning gross violations of human rights this Court and every constitutional court should adopt an 'open door policy'. The preliminary objection is rejected.

Constitutional provisions

81. The background of the case, as we have understood it, leads us to conclude that we are concerned in this petition not so much with a law and order situation in Manipur, but a public order situation.

82. Maintenance of public order falls within the jurisdiction of a State in view of Entry 1 of List II of the Seventh Schedule to the Constitution.[17] But, the Union Government may deploy its armed forces in any State in aid of the civil power in terms of Entry 2A of List I of the Seventh Schedule to the Constitution.[18] This has been the constitutional position ever since Entry 1 of List II of the Seventh Schedule was amended by the Constitution (Forty-second Amendment) Act, 1976 and Entry 2A was inserted in List I of the Seventh Schedule to the Constitution by

[17] 1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).
[18] See footnote 2.

the same Amendment Act. What is of importance is that deployment of the armed forces should only be in aid of the civil power.

83. Article 352 of the Constitution finds place in Part XVIII of the Constitution relating to emergency provisions. This Article was amended by the Constitution (Forty-fourth Amendment) Act, 1978 and the amendment that concerns us is the substitution of the words 'armed rebellion' by the words 'internal disturbance' in clause (1) of Article 352 of the Constitution.[19]

84. The impact of the above substitution of words was the subject matter of consideration by a Constitution Bench of this Court in ***Naga People's Movement of Human Rights v. Union of India***.[20] It was held therein that though an internal disturbance is cause for concern, it does not threaten the security of the country or a part thereof unlike an armed rebellion which could pose a threat to the security of the country or a part thereof. Since the impact of a proclamation of emergency under Article 352 of the Constitution is rather serious, its invocation is limited to situations of a threat to the security of the country or a part thereof either through a war or an external aggression or an armed rebellion, but not an internal disturbance. To put it negatively, an internal disturbance is not a ground for a proclamation of emergency under Article 352 of the Constitution. This is what the

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[19] For the present purposes, the relevant portion of Article 352 of the Constitution as it now stands is of importance:

352. Proclamation of Emergency.—(1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation.

Explanation.—A Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof.

(2) A Proclamation issued under clause (1) may be varied or revoked by a subsequent Proclamation.

[20] (1998) 2 SCC 109

Constitution Bench had to say in this regard:

> "Prior to the amendment of Article 352 by the Forty-fourth Amendment of the Constitution it was open to the President to issue a proclamation of emergency if he was satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or "internal disturbance". By the Forty-fourth Amendment the words "internal disturbance" in Article 352 have been substituted by the words "armed rebellion". The expression "internal disturbance" has a wider connotation than "armed rebellion" in the sense that "armed rebellion" is likely to pose a threat to the security of the country or a part thereof, while "internal disturbance", though serious in nature, would not pose a threat to the security of the country or a part thereof. The intention underlying the substitution of the word "internal disturbance" by the word "armed rebellion" in Article 352 is to limit the invocation of the emergency powers under Article 352 only to more serious situations where there is a threat to the security of the country or a part thereof on account of war or external aggression or armed rebellion and to exclude the invocation of emergency powers in situations of internal disturbance which are of lesser gravity. This has been done because a proclamation of emergency under Article 352 has serious implications having effect on the executive as well as the legislative powers of the States as well as the Union."

85. However, a proclamation of emergency could be made in the event of an internal disturbance (not covered by Article 352 of the Constitution) by resort to Article 356 of the Constitution.[21] This has been so held in ***Naga People's Movement of Human Rights*** in the following words:

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[21] **356. Provisions in case of failure of constitutional machinery in States.**—(1) If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation—

(*a*) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(*b*) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(*c*) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that xxx xxx xxx [Not relevant for the present purposes]

> "There can be a situation arising out of internal disturbance which may justify the issuance of a proclamation under Article 356 of the Constitution enabling the President to assume to himself all or any of the functions of the Government of the State. That would depend on the gravity of the situation arising on account of such internal disturbance and on the President being satisfied that a situation has arisen where the Government of the State cannot be carried on in accordance with provisions of the Constitution."

86. There is therefore a clear distinction between an armed rebellion that threatens the security of the country or a part thereof and an internal disturbance. The former comes within the purview of Article 352 and Article 356 of the Constitution while the latter comes within the purview only of Article 356 of the Constitution and not Article 352 of the Constitution. However, as observed by the Justice Punchhi Commission on Centre-State Relations in March 2010 an 'internal disturbance' by itself cannot be a ground for invoking the power under Article 356(1) of the Constitution "if it is not intertwined with a situation where the government of a State cannot be carried on in accordance with the provisions of the Constitution."[22] This is what was said:

> "The 44th Constitutional Amendment substituted "armed rebellion" for "internal disturbance" in Article 352. "Internal disturbance" is, therefore, no longer a ground for taking action under that Article. Further, it cannot, by itself, be a ground for imposing President's rule under Article 356(1), if it is not intertwined with a situation where the government of a State cannot be carried on in accordance with the provisions of the Constitution."

87. At this stage, it is also important to refer to Article 355 of the Constitution.[23] This Article makes it the duty of the Union Government to protect a State from

[22] Page 101 in Volume 2 of the Report
[23] See footnote 1.

external aggression and internal disturbance. By necessary implication, an external aggression for this purpose includes a war and an armed rebellion that threatens the security of the country or a part thereof. We therefore have four situations: war, external aggression and armed rebellion, all of which can threaten the security of the country or a part thereof and fourthly an internal disturbance. In providing protection against an internal disturbance, the Union Government is entitled and empowered to deploy the armed forces of the Union under Entry 2A of List I of the Seventh Schedule to the Constitution "in aid of the civil power".

88. The conclusion therefore is that in the event of a war, external aggression or an armed rebellion that threatens the security of the country or a part thereof, it is the duty of the Union Government to protect the States and depending on the gravity of the situation, the President might also issue a proclamation of emergency. That apart, the Union Government also has a duty to protect the States from an internal disturbance. However the President cannot, in the event of the latter situation, issue a proclamation of emergency except by using the drastic power under Article 356 of the Constitution which has in-built checks and balances. In providing protection to the States in the event of an internal disturbance, the armed forces of the Union may be deployed "in aid of the civil power". What does the expression "in aid of the civil power" mean?

89. In ***Naga People's Movement of Human Rights*** the Constitution Bench sought to explain this expression by implication, namely, a situation that has made the deployment of the armed forces of the Union necessary for the maintenance of public order. It was made clear that such deployment does not mean that the civil

power becomes dormant – the civil power continues to function and the armed forces do not supplant or substitute the civil power - they only supplement it. This is what this Court had to say:

> "The expression "in aid of the civil power" in Entry 1 of the State List and in Entry 2-A of the Union List implies that deployment of the armed forces of the Union shall be for the purpose of enabling the civil power in the State to deal with the situation affecting maintenance of public order which has necessitated the deployment of the armed forces in the State. The word "aid" postulates the continued existence of the authority to be aided. This would mean that even after deployment of the armed forces the civil power will continue to function. The power to make a law providing for deployment of the armed forces of the Union in aid of the civil power in the State does not comprehend the power to enact a law which would enable the armed forces of the Union to supplant or act as a substitute for the civil power in the State. We are, however, unable to agree with the submission of the learned counsel for the petitioners that during the course of such deployment the supervision and control over the use of armed forces has to be with the civil authorities of the State concerned or that the State concerned will have the exclusive power to determine the purpose, the time period and the areas within which the armed forces should be requested to act in aid of civil power. In our opinion, what is contemplated by Entry 2-A of the Union List and Entry 1 of the State List is that in the event of deployment of the armed forces of the Union in aid of the civil power in a State, the said forces shall operate in the State concerned in cooperation with the civil administration so that the situation which has necessitated the deployment of the armed forces is effectively dealt with and normalcy is restored."

90. On a reading of the above passage, it is clear that the Constitution Bench does not limit the deployment of the armed forces of the Union only to a situation affecting public order. The armed forces of the Union could be deployed for situations of law and order (although this would be extremely unusual and rare) as also for humanitarian aid such as in the event of an earthquake or floods, should it be necessary, in aid of the civil power. This is because Entry 2A of List I of the

Seventh Schedule to the Constitution (for short Entry 2A of the Union List) does not limit the deployment of the armed forces to any particular situation. The view of this Court, beginning with the decision of the Federal Court in ***United Provinces v. Atiqa Begum***[24] has always been that legislative entries must not be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it.[25] But we are making this observation only *en passant*.

91. Be that as it may, what is of significance is that this Court has implied that the armed forces of the Union could be deployed in public order situations to aid the civil power and on such deployment, they shall operate in cooperation and conjunction with the civil administration and until normalcy is restored. This view is predicated on and postulates that normalcy would be restored within a reasonable period. What would be the consequence if normalcy is not restored for a prolonged or indeterminate period? In our opinion, it would be indicative of the failure of the civil administration to take effective aid of the armed forces in restoring normalcy or would be indicative of the failure of the armed forces in effectively aiding the civil administration in restoring normalcy or both. Whatever be the case, normalcy not being restored cannot be a fig leaf for prolonged, permanent or indefinite deployment of the armed forces (particularly for public order or law and order purposes) as it would mock at our democratic process and would be a travesty of the jurisdiction conferred by Entry 2A of the Union List for

[24] (1940) FCR 110

[25] Navinchandra Mafatlal v. Commissioner of Income Tax, 1955 (1) SCR 189 (5 Judges Bench). This view has been followed by the Constitution Bench in Jagannath Baksh Singh v. State of U.P., (1963) 1 SCR 220 and several other decisions rendered by this Court.

the deployment of the armed forces to normalize a situation particularly of an internal disturbance.

92. This discussion is intended to lay down three broad principles:

(a) The public order situation in Manipur is, at best, an internal disturbance. There is no threat to the security of the country or a part thereof either by war or an external aggression or an armed rebellion.

(b) For tackling the internal disturbance, the armed forces of the Union can be deployed in aid of the civil power. The armed forces do not supplant the civil administration but only supplement it.

(c) The deployment of the armed forces is intended to restore normalcy and it would be extremely odd if normalcy were not restored within some reasonable period, certainly not an indefinite period or an indeterminate period.

Statutory provisions

(i) The Armed Forces (Special Powers) Act, 1958

93. The Armed Forces (Special Powers) Act, 1958 (hereinafter 'the AFSPA') was originally enacted as the Armed Forces (Assam and Manipur) Special Powers Act, 1958. It was initially extended to the State of Assam and the Union Territory of Manipur. Since then the entire Union Territory of Manipur (and subsequently the entire State of Manipur) has been declared a disturbed area in terms of Section 3 of the AFSPA.[26] In other words, Manipur has been a disturbed area for about sixty

[26] **3. Power to declare areas to be disturbed areas**.—If, in relation to any State or Union Territory to which this Act extends, the Governor of that State or the Administrator of that Union Territory or the Central Government, in either case, if of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory

years! A declaration that the State of Manipur is a disturbed area can be made by the Governor of Manipur or the Central Government if either is of opinion that the State of Manipur or a part thereof "is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary". The declaration under Section 3 of the AFSPA is made through a notification published in the Official Gazette. As mentioned above, Manipur has been a disturbed area since 1958 as a result of declarations issued under Section 3 of the AFSPA from time to time. However, the Imphal Municipal Area ceased to be a 'disturbed area' from 12th August, 2004.

94. The postulates for a declaration under Section 3 of the AFSPA are that a public order situation exists and that the assistance of the armed forces of the Union is required in aid of the civil power. In such a situation, the AFSPA enables the armed forces of the Union to exercise vast powers.

95. One of the vast powers exercisable by the armed forces of the Union in a disturbed area is in terms of Section 4(a) of the AFSPA. The power so exercisable includes the use of force even to the extent of causing the death of "any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances".[27]

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or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area.

[27] **4. Special powers of the armed forces**.—Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,—

(*a*) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things

96. Clearly, the power to cause death is relatable to maintenance of public order in a disturbed area and is to be exercised under definite circumstances that is: (i) after giving such due warning as the authorized officer may consider necessary; (ii) the alleged offender is acting in contravention of any law or order in force in the disturbed area which (a) prohibits the assembly of five or more persons or (b) prohibits the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances. In the present case, we are not concerned with other powers conferred by Section 4 of the AFSPA. What we are concerned with is whether any of the victims referred to by the petitioners contravened any prohibitory order, that is, an order prohibiting an assembly of five or more persons or an order prohibiting the carrying of any weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances. We are also concerned, in the facts of this case, with the power to cause death for violating such a prohibitory order.

97. Section 6 of the AFSPA grants immunity, *inter alia*, from prosecution to any person in respect of anything done or purported to be done in exercise of the powers conferred by the AFSPA (including Section 4(a) thereof), except with the previous sanction of the Central Government.[28]

(ii) Code of Criminal Procedure, 1973

98. Section 4 of the Cr.P.C. as well as Section 5 of the Cr.P.C. concern themselves

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capable of being used as weapons or of fire-arms, ammunition or explosive substances;

(*b*) to (d) xxx xxx xxx [Not relevant for the present purposes].

[28] **6. Protection to persons acting under Act -** No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

with investigation, enquiry, trial and other proceedings in relation to offences.[29] The sum and substance of both these provisions is that the investigation, enquiry, trial and other proceedings in respect of offences under the Indian Penal Code, 1860 (or the IPC) and other laws shall be carried out in accordance with the provisions of the Cr.P.C. However, this does not preclude any enactment regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Further, the applicability of any other special or local law or any special jurisdiction or power conferred or any special procedure provided by any other law for the time being in force shall not be affected by the Cr. P.C. For example, there are special requirements for dealing with juveniles in conflict with law and therefore that special law would be applicable to those juveniles to the extent it provides for the investigation, enquiry or procedure different from the Cr.P.C. In other words, unless a statute specifically provides for it, the investigation, enquiry, trial and other proceedings in respect of offences under the IPC and other laws shall be carried out in accordance with the provisions of the Cr.P.C. This is mentioned in the context of the submission by the learned Attorney General that the provisions of the Cr.P.C. would not be applicable to offences committed by Army personnel on active duty.

(iii) The Unlawful Activities (Prevention) Act, 1967

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[29] **4. Trial of offences under the Indian Penal Code and other laws** - (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. Saving - Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

99. The Unlawful Activities (Prevention) Act, 1967 (hereafter 'the UAPA') is concerned, *inter alia*, with cession and secession of a part of the territory of India and terrorist activities. Section 2(m) of the UAPA defines a terrorist organization as one listed in Schedule 1 to the UAPA or an organization operating under the same name as the listed organization.[30] Schedule 1 of the UAPA lists some organizations in Manipur such as People's Liberation Army (PLA), United National Liberation Front (UNLF), People's Revolutionary Party of Kangleipak (PREPAK), Kangleipak Communist Party (KCP), Kanglei Yaol Kanba Lup (KYKL) and Manipur People's Liberation Front (MPLF). By definition, therefore, these are terrorist organizations.

100. An unlawful activity is defined in Section 2(o) of the UAPA as, *inter alia*, an activity intended to or supporting any claim to cede a part of the territory of India or secede a part of the territory of India from the Union.[31] Similarly, an unlawful association is defined in Section 2(p) of the UAPA as an association that

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[30] (*m*) "terrorist organisation" means an organisation listed in the Schedule or an organisation operating under the same name as an organisation so listed;

[31] (*o*) "unlawful activity", in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),—

(*i*) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(*ii*) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or

(*iii*) which causes or is intended to cause disaffection against India;

has, as its object, *inter alia*, any unlawful activity.[32]

101. In terms of Section 15 of the UAPA a terrorist act is one that threatens or is likely to threaten, amongst others, the unity, integrity, security or sovereignty of India or intends to strike terror or is likely to strike terror in the people or any section of the people by any one of the activities mentioned in the section such as using bombs or firearms or other lethal weapons that cause or are likely to cause

[32] (*p*) "unlawful association" means any association,—

(*i*) which has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity; or

(*ii*) which has for its object any activity which is punishable under Section 153-A or Section 153-B of the Indian Penal Code (45 of 1860), or which encourages or aids persons to undertake any such activity, or of which the members undertake any such activity :

Provided that nothing contained in sub-clause (*ii*) shall apply to the State of Jammu and Kashmir;

death or injury.[33]

102. In view of the above, there is no doubt that the organizations in Manipur that are mentioned above are not only terrorist organizations or terrorist gangs (as defined in Section 2(l) of the UAPA)[34] but are unlawful associations, for they

[33] **15. Terrorist act.-** (1) Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic security, or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,—

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause—

(i) death of, or injuries to, any person or persons; or

(ii) loss of, or damage to, or destruction of, property; or

(iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or

(*iii-a*) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or

(iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or an international or inter-governmental organisation or any other person to do or abstain from doing any act; or,

commits a terrorist act.

Explanation.—For the purpose of this sub-section,—

(*a*) "public functionary" means the constitutional authorities or any other functionary notified in the Official Gazette by the Central Government as public functionary;

(*b*) "high quality counterfeit Indian currency" means the counterfeit currency as may be declared after examination by an authorised or notified forensic authority that such currency imitates compromises with the key security features as specified in the Third Schedule.

(2) The terrorist act includes an act which constitutes an offence within the scope of, and as defined in any of the treaties specified in the Second Schedule.

[34] (*l*) "terrorist gang" means any association, other than terrorist organisation, whether systematic or otherwise, which is concerned with, or involved in, terrorist act;

threaten the unity, integrity, security or sovereignty of India. Would membership of such an organization incriminate a person? This will be discussed a little later.

(iv) The Army Act, 1950

103. The Army Act, 1950 (for short 'the Army Act') is of considerable importance for deciding the present controversy. A person subject to the Army Act is said to be in active service if that person is, *inter alia*, attached to or forms a part of a force engaged in an operation against an enemy. There is no dispute that the Army personnel in Manipur are on active service. An 'enemy' is inclusively defined as armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of any person subject to military law to act.[35] The enemy must be armed.

104. The Army Act also provides for offences in relation to the enemy which are punishable with death,[36] offences not punishable with death[37] and offences that are more severely punishable while on active service.[38] The significance of these provisions is best understood in the background of the submission of the learned Attorney General that under the AFSPA, the armed forces are entitled while maintaining public order in a disturbed area to cause the death of an enemy, that is

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[35] **3. Definitions**.—In this Act, unless the context otherwise requires,—

(*i*) "active service", as applied to a person subject to this Act, means the time during which such person—

(*a*) is attached to, or forms part of, a force which is engaged in operations against an enemy, or

(*b*) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or

(*c*) is attached to or forms part of a force which is in military occupation of a foreign country;

(*x*) "enemy" includes all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of any person subject to military law to act;

[36] Section 34

[37] Section 35

[38] Section 36

a militant, terrorist, insurgent, underground element or secessionist who belongs to or is associated with a terrorist organization or terrorist gang or unlawful association and is threatening or is likely to threaten the unity, integrity, security or sovereignty of India.

105. For an offence committed by a person subject to the Army Act, the alleged offender may be tried by a Court Martial but the period of limitation for the trial of such an alleged offender is regulated by Section 122 of the Army Act. The limitation provided is a period of three years commencing from (a) the date of the offence; or (b) when the commission of the offence is not known to the person aggrieved or the competent authority, the date on which the commission of such an offence comes to the knowledge of the person aggrieved or the competent authority whichever is earlier; or (c) when the identity of the offender is not known, the date on which the identity is known to the person aggrieved or the competent authority, whichever is earlier.

106. Section 125 and Section 126 of the Army Act are of considerable importance in this context and as far as this case is concerned.[39] These Sections ought to be read in conjunction with Section 4 and Section 5 of the Cr.P.C. These

[39] **125. Choice between criminal court and court-martial** - When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody.

126. Power of criminal court to require delivery of offender - (1) When a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in Section 125 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government.

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference upon such reference shall be final.

Sections provide that when both a criminal court and a Court Martial have jurisdiction in respect of an offence, the first option would be with the Army to decide whether the accused person should be proceeded against in a criminal court or before a Court Martial. However, if the criminal court is of opinion that the proceedings should be instituted before itself, it may require the Army to send the alleged offender to the nearest Magistrate to be proceeded against or to postpone the proceedings pending a reference to the Central Government. In other words, in the event of a conflict of jurisdiction, whether an alleged offender should be tried by a criminal court constituted under the Cr.P.C. or by a Court Martial constituted under the Army Act, that conflict shall be referred to the Central Government for passing an appropriate order.

107. In this context, it is necessary to refer to the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978. These Rules provide, *inter alia*, that when a person subject to the Army Act is brought before a Magistrate and is charged with an offence also triable by a Court Martial, then such Magistrate shall not proceed to try that person or commit the case to the Court of Session unless he is moved thereto by a competent Army authority or the Magistrate records his opinion in writing that he should so proceed without being so moved.[40] In the latter event, the Magistrate shall give a written notice of fifteen days to the Commanding

[40] **Rule 3**: Where a person subject military, naval, air force or Coast Guard law, or any other laws relating to the Armed Forces of the Union for the time being in force is brought before a Magistrate and charged with an offence for which he is also liable to be tried by a Court Martial or Coast Guard Court, as the case may be such Magistrate shall not proceed to try such person or to commit the case to the Court of Session, unless:-

(a) he is moved thereto by a competent military, naval, air force or Coast Guard authority; or

(b) he is of opinion, for reasons to be recorded, that he should so proceed or to commit without being moved thereto by such authority.

Officer of that person and shall until then effectively stay his hands.[41]

108. In the event a Magistrate concludes that a person subject to the Army Act has committed an offence triable by the Magistrate but the presence of such a person cannot be procured except through the competent Army authority, then the Magistrate "may by a written notice require the Commanding Officer of such person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to law, or to stay the proceedings against such person before the Court Martial …… and to make a reference to the Central Government for determination as to the court before which proceedings should be instituted."[42]

Is there a war-like situation in Manipur?

109. The principal contention of the learned Attorney General in opposing any investigation or inquiry into the alleged extra-judicial killings is that a war-like situation has been and is prevailing in Manipur. It is to control any escalation of the situation that vast powers have been given to the armed forces under AFSPA and the constitutionality of AFSPA has been upheld by the Constitution Bench in

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[41] **Rule 4**: Before proceeding under clause (b) of rule 3, the Magistrate shall give a written notice to the Commanding Officer or the competent military, naval, air force or Coast Guard authority, as the case may be, of the accused and until the expiry of a period of fifteen days from the date of service of the notice he shall not :-

(a) Convict or acquit the accused xxxx xxxx; or
(b) frame in writing a charge against the accused xxx xxx; or
(c) make an order committing the accused for trial to the Court of Session xxx xxx; or
(d) make over the case for inquiry or trial under section 192 of the said Code.

[42] **Rule 8**: Notwithstanding anything in the foregoing rules, where it comes to the notice of a Magistrate that a person subject to military, naval, air force or coast guard law, or any other law relating to the Armed Forces of the Union for the time being in force has committed an offence, proceedings in respect of which ought to be instituted before him and that the presence of such person cannot be procured except through military, naval, air force or coast guard authorities, the Magistrate may by a written notice require the commanding officer of such person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to law, or to stay the proceedings against such person before the Court Martial or coast guard court, as the case may be if since instituted, and to make a reference to the Central Government for determination as to the court before which proceedings should be instituted.

Naga People's Movement of Human Rights. It is only due to the efforts of the Manipur Police and the armed forces of the Union that the security environment in Manipur has not deteriorated but has vastly improved over the years. The efforts made in the past and the successes gained, the efforts being presently made and the efforts that will be made in the future should not get hamstrung through wanton and sometimes irresponsible allegations of violations of human rights and use of excessive force. These have a deleterious and demoralizing impact on the security forces to no one's advantage except the militants, terrorists and insurgents. This is apart from the submission that the deaths caused were justified, being deaths of militants, terrorists and insurgents in counter insurgency or anti terrorist operations.

110. There is no doubt from the records of the case that Manipur has been and is facing a public order situation equivalent to an internal disturbance. The tragedy is that this situation has continued since 1958 – for almost 60 years. This goes so far back that when we requested learned counsel for the State of Manipur to place before us the declarations under AFSPA and the prohibitory orders issued under Section 144 of the Cr.P.C. only fairly recent declarations and prohibitory orders were produced, the rest having perhaps been lost in antiquity. A generation or two has gone by and issues have festered for decades. It is high time that concerted and sincere efforts are continuously made by the four stakeholders – civil society in Manipur, the insurgents, the State of Manipur and the Government of India to find a lasting and peaceful solution to the festering problem, with a little consideration from all quarters. It is never too late to bring peace and harmony in society.

111. Be that as it may, we need to be clear that the situation in Manipur has never been one of a war or an external aggression or an armed rebellion that threatens the security of the country or a part thereof. No such declaration has been made by the Union of India – explicitly or even implicitly - and nothing has been shown to us that would warrant a conclusion that there is a war or an external aggression or an armed rebellion in Manipur. That is not anybody's case at all nor has it even been suggested.

112. In support of his contention that a war-like situation was and is prevailing in Manipur, the learned Attorney General relied on ***Navjot Sandhu*** to submit that under Section 121 of the IPC 'war' is not necessarily conventional warfare between two nations and even organizing and joining an insurrection against the Government of India is a form of war. The militants in Manipur were creating a situation of an insurrection and this was resulting in a war-like situation in Manipur. Alternatively, the victims were members of banned organizations under the UAPA and were provoking cession or secession from India and were therefore 'enemy'. On this basis it was contended that even if there is no war-like situation prevailing in Manipur, the victims being 'enemy', their killing is justified in counter insurgency or anti terrorist operations.

113. ***Navjot Sandhu*** was a case in which Parliament was attacked by terrorists. There can be no doubt that those who attacked the heart of our democracy were our enemies for all practical purposes, regardless of whether they were carrying out a war against our country or not. It is not necessary for us to dwell at length on the facts of that case since we have already observed that there is no declaration of

a war in Manipur, even as per the case of the Union of India. However, the question is: Is an internal disturbance equivalent to a war-like situation? In this regard certain observations in ***Navjot Sandhu*** are of significance.

114. This Court analyzed the law on the subject in ***Navjot Sandhu*** and held (*inter alia*) in paragraphs 282 and 283 of the Report that in the context of 'war' (i) the *animus* of the party is important; (ii) the use of force or arms is necessary; (iii) the number of members in the party is not relevant and even a few can cause devastation; (iv) 'pomp and pageantry' accompanying a war is irrelevant and even a stealthy operation could be a war. However, what is important is that it was made clear that all acts of violent resistance, even against the armed forces and public officials could not be branded as acts of war. It was held as follows:

> "282. On the analysis of the various passages found in the cases and commentaries referred to above, what are the highlights we come across? The most important is the intention or purpose behind the defiance or rising against the Government. As said by [Sir Michael] Foster, "The true criterion is *quo animo* did the parties assemble?" In other words the intention and purpose of the warlike operations directed against the governmental machinery is an important criterion. If the object and purpose is to strike at the sovereign authority of the Ruler or the Government to achieve a public and general purpose in contradistinction to a private and a particular purpose, that is an important indicia of waging war. Of course, the purpose must be intended to be achieved by use of force and arms and by defiance of government troops or armed personnel deployed to maintain public tranquillity. Though the *modus operandi* of preparing for the offensive act against the Government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, armed or equipped is immaterial. Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more devastating damage than a large group of persons armed with ordinary weapons or firearms. Then, the other settled proposition is that there need not be the pomp and pageantry usually

associated with war such as the offenders forming themselves in battle line and arraying in a warlike manner. Even a stealthy operation to overwhelm the armed or other personnel deployed by the Government and to attain a commanding position by which terms could be dictated to the Government might very well be an act of waging war.

283. While these are the acceptable criteria of waging war, we must dissociate ourselves from the old English and Indian authorities to the extent that they lay down a too general test of attainment of an object of general public nature or a political object. We have already expressed reservations in adopting this test in its literal sense and construing it in a manner out of tune with the present day. **The court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 [of the IPC] all acts of lawless and violent acts resulting in destruction of public properties, etc., and all acts of violent resistance to the armed personnel to achieve certain political objectives. The moment it is found that the object sought to be attained is of a general public nature or has a political hue, the offensive violent acts targeted against the armed forces and public officials should not be branded as acts of waging war. The expression "waging war" should not be stretched too far to hold that all the acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of waging war against the Government.** A balanced and realistic approach is called for in construing the expression "waging war" irrespective of how it was viewed in the long long past. **An organised movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes were viewed as acts of treason in the form of levying war. We doubt whether such construction is in tune with the modern day perspectives and standards.** Another aspect on which a clarification is called for is in regard to the observation made in the old decisions that "neither the number engaged, nor the force employed, nor the species of weapons with which they may be armed" is really material to prove the offence of levying/waging war. This was said by Lord President Hope in *R.* v. Hardie[43] in 1820 and the same statement finds its echo in many other English cases and in the case of *Maganlal Radhakishan v. Emperor.*[44] But, in our view, these are not irrelevant factors. They will certainly help the court in

[43] (1820) 1 State Tr NS 609, 610
[44] AIR 1946 Nagpur 173, 185

> forming an idea whether the intention and design to wage war against the established Government exists or the offence falls short of it. For instance, the firepower or the devastating potential of the arms and explosives that may be carried by a group of persons — may be large or small, as in the present case, and the scale of violence that follows may at times become useful indicators of the nature and dimension of the action resorted to. These, coupled with the other factors, may give rise to an inference of waging war." (Emphasis supplied by us).

115. Therefore, *animus* to wage a war or any other similar activity is important before a non-conventional war or war-like situation can be said to exist. Every act of violence, even though it may be directed against the armed forces or public officials would not lead to an inference that a war is going on or that war-like conditions are prevailing. Similarly, sporadic but organized killings by militants and ambushes would not lead to a conclusion of the existence of a war or war-like conditions. Were such a blanket proposition accepted, it would reflect poorly on our armed forces that they are unable to effectively tackle a war-like situation for the last almost six decades. It would also reflect poorly on the Union of India that it is unable to resort to available constitutional provisions and measures to bring a war-like situation under control for almost six decades. We cannot be expected to cast or even countenance any such aspersions on our armed forces or the Union of India. All that we can and do say is that in such a situation, our Constitution recognizes only an internal disturbance, which is what the situation in Manipur is and that ought to be dealt with by the civil administration with the services of the armed forces that are available in aid of the civil power.

116. The submission of the learned Attorney General is nothing but a play on

words and we reject it and hold that an internal disturbance is not equivalent to or akin to a war-like situation and proceed on the basis that there is no war or war-like situation in Manipur but only an internal disturbance, within the meaning of that expression in the Constitution - nothing more and nothing less.

117. Therefore, the questions before us are quite straightforward – to quell this internal disturbance, has there been use of excessive force by the Manipur Police and the armed forces in the 1528 cases compiled by the petitioners through fake encounters or extra-judicial executions during the period of internal disturbance in Manipur as alleged by the petitioners. Secondly, has the use of force by the armed forces been retaliatory to the point of causing death and was the retaliatory force permissible in law on the ground that the victims were 'enemy' as defined in Section 3(x) of the Army Act?

Use of excessive force and retaliation

118**.** At the outset, a distinction must be drawn between the right of self-defence or private defence and use of excessive force or retaliation. Very simply put, the right of self-defence or private defence is a right that can be exercised to defend oneself but not to retaliate.[45] This view was reiterated but expressed somewhat differently in ***Rajesh Kumar v. Dharamvir***[46] when it was said: "To put it differently, the right is one of defence and not of requital or reprisal. Such being the nature of right, the High Court could not have exonerated the accused persons of the charges levelled against them by bestowing on them the right to *retaliate* and *attack* the complainant party."

[45] Manjeet Singh v. State of H.P., (2014) 5 SCC 697
[46] (1997) 4 SCC 496

119. A similar opinion was expressed somewhat more lucidly in ***V. Subramani v. State of Tamil Nadu***[47] when it was said:

> "Due weightage has to be given to, and hypertechnical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private defence can legitimately be negatived. The court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact."

120. In ***Rohtash Kumar v. State of Haryana***[48] this Court cautioned against the use of retaliatory force even against a dreaded criminal. It was held:

> "It also appears that he [the appellant] was declared absconder. But merely because a person is a dreaded criminal or a proclaimed offender, he cannot be killed in cold blood. The police must make an effort to arrest such accused. In a given case if a dreaded criminal launches a murderous attack on the police to prevent them from doing their duty, the police may have to retaliate and, in that retaliation, such a criminal may get killed. That could be a case of genuine encounter. But in the facts of this case, we are unable to draw such a conclusion."

121. Finally, reference may be made to ***Darshan Singh v. State of Punjab***[49] wherein this Court held:

> "When there is real apprehension that the aggressor might cause death or grievous hurt, in that event the right of private defence of the defender could even extend to causing of death. A mere reasonable apprehension is enough to put the right of self-defence into operation, but it is also a settled position of law that a right of

[47] (2005) 10 SCC 358
[48] (2013) 14 SCC 290
[49] (2010) 2 SCC 333

> self-defence is only a right to defend oneself and not to retaliate. It is not a right to take revenge."

122. From the above, it is abundantly clear that the right of self-defence or private defence falls in one basket and use of excessive force or retaliatory force falls in another basket. Therefore, while a victim of aggression has a right of private defence or self-defence (recognized by Sections 96 to 106 of the IPC) if that victim exceeds the right of private defence or self-defence by using excessive force or retaliatory measures, he then becomes an aggressor and commits a punishable offence. Unfortunately occasionally, use of excessive force or retaliation leads to the death of the original aggressor. When the State uses such excessive or retaliatory force leading to death, it is referred to as an extra-judicial killing or an extra-judicial execution or as this Court put it in ***People's Union for Civil Liberties v. Union of India and another***[50] it is called "administrative liquidation". Society and the courts obviously cannot and do not accept such a death caused by the State since it is destructive of the rule of law and plainly unconstitutional.

123. The problem before the courts tends to become vexed when the victims are alleged to be militants, insurgents or terrorists. In such cases, how does anyone (including the court) assess the degree of force required in a given situation and whether it was excessive and retaliatory or not? Scrutiny by the courts in such cases leads to complaints by the State of its having to fight militants, insurgents and terrorists with one hand tied behind its back. This is not a valid criticism since,

[50] (1997) 3 SCC 433

and this is important, in such cases it is not the encounter or the operation that is under scrutiny but the smoking gun that is under scrutiny. There is a qualitative difference between use of force in an operation and use of such deadly force that is akin to using a sledgehammer to kill a fly; one is an act of self-defence while the other is an act of retaliation.

124. This concern, both from the perspective of the State and from the perspective of preserving and protecting human rights of a citizen is adverted to by Prof. Aharon Barak a former President of the Supreme Court of Israel who acknowledges that sometimes a democracy must fight with one hand tied behind its back in the following words:

> "While terrorism poses difficult questions for every country, it poses especially challenging questions for democratic countries, because not every effective means is a legal means. I discussed this in one case, in which our Court held that violent interrogation of a suspected terrorist is not lawful, even if doing so may save human life by preventing impending terrorist acts:
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> > "We are aware that this decision does not make it easier to deal with that reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties." [51]

125. It is this preservation of the rule of law, recognition of human rights and check on the abuse or misuse of power that has been the highlight of a few

[51] Aharon Barak: The Judge in a Democracy, page 283 (Princeton University Press)

decisions placed before us. In ***Matajog Dobey v. H.C. Bhari***[52] a cautious step by step approach was advocated by the Constitution Bench of this Court in the matter of grant of sanction to prosecute an official under the provisions of the Code of Criminal Procedure, 1898. The first step is to ascertain whether the act complained of is an offence and the second step is to determine whether it was committed in the discharge of official duty. "There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation." Causing the death of a person is certainly an offence, but whether there was a "reasonable connection" between the death and the official act or whether excessive force or retaliatory force was used in the act has to be determined at an appropriate stage. It does not matter whether the victim was a common person or a militant or a terrorist, nor does it matter whether the aggressor was a common person or the State. The law is the same for both and is equally applicable to both. It is for this reason that with regard to the abuse or misuse of power by the State this Court expressed the following view in ***Naga People's Movement of Human Rights*** in paragraph 61 of the Report:

[52] (1955) 2 SCR 925

> "In order that the people may feel assured that there is an effective check against misuse or abuse of powers by the members of the armed forces it is necessary that a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act [the AFSPA] should be thoroughly inquired into and, if it is found that there is substance in the allegation, the victim should be suitably compensated by the State and the requisite sanction under Section 6 of the Central Act should be granted for instruction of prosecution and/or a civil suit or other proceedings against the person/persons responsible for such violation."

126. In other words, the decision of the Constitution Bench requires that every death caused by the armed forces, including in the disturbed area of Manipur "should be thoroughly enquired into" if there is a complaint or allegation of abuse or misuse of power. All of us are bound by this direction of the Constitution Bench which has been given to assure the people that there is no abuse or misuse of power by the armed forces.

127. ***Om Prakash v. State of Jharkhand***[53] dealt with an alleged fake encounter by the police and use of excessive force resulting in the death, *inter alia*, of the complainant's son. The version of the police was that they were fired upon and they had to retaliate to save themselves and that resulted in the death. The complainant preferred a private complaint before the concerned Chief Judicial Magistrate and also before the NHRC. The decision of this Court arose out of the private complaint. Be that as it may, the complaint made to the NHRC was enquired into and the NHRC concluded that it was not a case of a fake encounter. This Court also took a similar view. Though the case related primarily to the grant of sanction to prosecute under Section 197 of the Cr.P.C., it was held, relying upon

[53] (2012) 12 SCC 72

K. Satwant Singh v. State of Punjab[54] and ***State of Orissa v. Ganesh Chandra Jew***[55] that if there is a "reasonable connection" between the official duty and the use of excessive force, then the use of excessive force will not be a ground for denial of protection under Section 197 of the Cr.P.C. Thereafter, it was held in paragraph 42 of the Report that it is not the duty of the police to kill a person even if he is a dreaded criminal and that such killings must be deprecated. It was said:

> "It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This Court has repeatedly admonished trigger-happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognised as legal by our criminal justice administration system. They amount to State-sponsored terrorism. But, one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. The requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution."

128. How does anyone determine whether the action of causing the death of a person was "indefensible, mala fide and vindictive"? It can only be through a thorough enquiry as postulated in ***Naga People's Movement of Human Rights*** and in ***Om Prakash*** that enquiry had been conducted at the instance of the NHRC by the Criminal Investigation Department or the CID.

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[54] (1960) 2 SCR 89
[55] (2004) 8 SCC 40

129. Similarly, in ***State of Maharashtra v. Saeed Sohail Sheikh***[56] the issue related to the alleged high-handedness of jail officials in the transfer of prisoners under the Maharashtra Control of Organized Crime Act, 1999. The prisoners were in custody in connection with what is known as the Bombay Blast case.

130. On the directions of the Bombay High Court, a Sessions Judge conducted an inquiry into the incident and submitted his report. The report was accepted by the High Court and on the basis thereof the Government was directed to hold a departmental inquiry against the officials for use of excessive force in bringing the situation in the jail under control.

131. This Court then considered the question whether the High Court was justified in giving the direction that it did. It was held that the report was preliminary[57] and "flawed in many respects". Nevertheless this Court held that the inquiry report could provide "no more than a *prima facie* basis for the Government to consider whether any further investigation into the incident was required to be conducted either for disciplinary action or for launching prosecution of those found guilty."

132. It was further observed in paragraph 39 of the Report that accountability is a facet of the rule of law and in a country governed by the rule of law "police excesses whether inside or outside the jail cannot be countenanced in the name of maintaining discipline or dealing with anti-national elements." It was said:

> "In a country governed by the rule of law police excesses whether inside or outside the jail cannot be countenanced in the name of

[56] (2012) 13 SCC 192
[57] There is nothing to indicate that the report was preliminary.

> maintaining discipline or dealing with anti-national elements. Accountability is one of the facets of the rule of law. If anyone is found to have acted in breach of law or abused his position while exercising powers that must be exercised only within the parameters of law, the breach and the abuse can be punished. That is especially so when the abuse is alleged to have been committed under the cover of authority exercised by people in uniform. Any such action is also open to critical scrutiny and examination by the courts."

133. In ***People's Union for Civil Liberties*** it was alleged that two persons from Manipur were killed in a fake encounter by the police. This was denied by the police who averred that the deceased were killed in a cross-fire between the police and an unlawful organization in Mizoram. In a writ petition filed in this Court, the District and Sessions Judge was directed to conduct an inquiry and submit a report. In his report given to this Court, the District and Sessions Judge concluded that there was no encounter and that the two deceased were shot dead by the police while in custody. Objections to the report were filed by the State of Manipur but were rejected by this Court.

134. It was submitted by the learned counsel for the State of Manipur that it was a disturbed area and that several terrorist groups were operating in the State. On a consideration of the submissions put forward, this Court held in paragraph 6 of the Report that the actions of the police could not be countenanced even in a disturbed area and that "administrative liquidation" was not a course open to them. It was said:

> "It is true that Manipur is a disturbed area, that there appears to be a good amount of terrorist activity affecting public order and, may be, even security of that State. It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal with terrorism. It may be necessary to fight

> terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. If the version of the police with respect to the incident in question were true, there could have been no question of any interference by the court. Nobody can say that the police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the court to say how the terrorists should be fought. We cannot be blind to the fact that even after fifty years of our independence, our territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be dealt with by force is a matter of policy for the Government to determine. The courts may not be the appropriate forum to determine those questions. All this is beyond dispute. But the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in the case of disturbed areas. If the police had information that terrorists were gathering at a particular place and if they had surprised them and arrested them, the proper course for them was to deal with them according to law. "Administrative liquidation" was certainly not a course open to them."

135. It must be held, and there can be no doubt about it, that in view of the consistent opinion expressed by this Court, that an allegation or complaint of absence of a reasonable connection between an official act and use of excessive force or retaliatory force will not be countenanced and an allegation of this nature would always require to be met regardless of whether the State is concerned with a dreaded criminal or a militant, terrorist or insurgent. It must also be held that to provide assurance to the people, such an allegation must be thoroughly enquired into. This is the requirement of a democracy and the requirement of preservation of the rule of law and the preservation of individual liberties. A consequential question that will arise is who should conduct that thorough enquiry.

136. In this regard, it was submitted by the learned Attorney General that apart

from anything else, an internal enquiry is conducted through the Human Rights Division of the Army and the Ministry of Defence to ensure that any violation of human rights is duly punished. In this regard, it was submitted that though the enquiry may be internal, it is nevertheless fair and over the years as many as 70 personnel have been punished for human rights violations. Therefore, there is no need to have any independent enquiry into the alleged fake encounters.

137. We are not inclined to accept this submission. We had asked the learned Attorney General to hand over sample files so that we could understand the nature of the internal enquiry and how it was conducted. We were handed over a sealed cover which upon opening revealed that what was handed over to us were four files relating to four cases enquired into by the Justice Hegde Commission. These four cases are Case 1 - Md. Azad Khan, Case 3 - Nameirakpam Gobind Meitei & Nameirakpam Nobo Meitei, Case 4 - Elangbam Kiranjit Singh and Case 5 - Chongtham Umakanta. In all these cases the respondents have come to the conclusion that the allegations were not supported by any credible evidence and therefore the case needed closure. However as we have noticed above, on a thorough enquiry having been made by the Justice Hegde Commission the view taken was that all these persons were killed in a fake encounter or that the force used against them was excessive. Under these circumstances, we do not wish to comment on the nature of the internal enquiry conducted by the respondents but only record that these cases apparently never reached the Human Rights Division of the Army or the Ministry of Defence.

Retaliation against an enemy

138. It was contended by the learned Attorney General that the general principles of self-defence or private defence provided for in several decisions of this Court, including ***Darshan Singh*** would not be applicable to the disturbed area of Manipur since the armed forces in that State were engaged with militants and terrorists who are 'enemy' as defined in Section 3(x) of the Army Act. This is a shift from the stand taken in affidavit filed by the Union of India but we let it pass. Reliance was placed by the learned Attorney General on an observation in ***Ratan Singh*** that militants are "undisputedly" included in the expression 'enemy' as defined under Section 3(x) of the Army Act. In that case, the record shows that Ratan Singh was a member of the IPKF (Operation Pawan) in Sri Lanka and when fired upon by militants, he quit his post. It was in this context that this Court observed that "The operation in which the appellant was engaged was directed against the militants who were undisputedly included in the expression 'enemy' within Section 3(*x*) [of the Army Act]." The reference was specific to "the militants" against whom the IPKF was required to act. There was no general or blanket conclusion arrived at by this Court that all militants in every situation are 'enemy'.

139. In any event, before a person can be branded as a militant or a terrorist or an insurgent, there must be the commission or some attempt or semblance of a violent overt act. A person carrying a weapon in a disturbed area in violation of a prohibition to that effect cannot be labeled a militant or terrorist or insurgent. In ***Navjot Sandhu*** this Court cited Sir James Stephen with approval in paragraph 276 of the Report to the following effect:

> "Unlawful assemblies, riots, insurrections, rebellions, levying of war are offences which run into each other and not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that **the normal tranquillity of a civilised society is, in each of the cases mentioned, disturbed either by actual force or at least by the show and threat of it**."[58] (Emphasis supplied by us).

140. Similarly, though in a slightly different context, it was held by this Court in ***Indra Das v. State of Assam***[59] after referring to and relying upon ***Arup Bhuyan v. State of Assam***[60] that mere membership of a banned organization does not incriminate a person. He might be a passive member and not an active one and so it is necessary to prove that he has indulged in some act of violence or imminent violence. This is what was said:

> "In *Arup Bhuyan case* we have stated that mere membership of a banned organisation cannot incriminate a person unless he is proved to have resorted to acts of violence or incited people to imminent violence, or does an act intended to create disorder or disturbance of public peace by resort to imminent violence. In the present case, even assuming that the appellant was a member of ULFA which is a banned organisation, there is no evidence to show that he did acts of the nature abovementioned. Thus, even if he was a member of ULFA it has not been proved that he was an active member and not merely a passive member. Hence the decision in *Arup Bhuyan case* squarely applies in this case."

141. In so far as the present case is concerned, the Justice Hegde Commission found that none of the victims in the six cases examined by it at the instance of this Court had any criminal antecedents or that there was any credible evidence to show that they had affiliations with a banned or unlawful organization. Therefore

[58] Digest of Criminal Law by Sir James Stephen
[59] (2011) 3 SCC 380
[60] (2011) 3 SCC 377

it would not be correct to say that merely because a person was carrying arms in a prohibited area, that person automatically became an enemy or an active member of a banned or unlawful organization. We note, without comment, the contention of the petitioners that in most cases the arms are planted on the victims.

142. Significantly, the word 'enemy' is used in conjunction with the word 'alien' in Article 22 of the Constitution. But the Army Act provides for a broader and more inclusive meaning. Nevertheless it inherently connotes an overt or covert act of violence or an imminent act of violence or such an attempt by any armed person. There can be little doubt that 'armed mutineers' and 'armed rebels' by definition deal in violence. This Court has associated 'mutiny' with violence in ***Union of India v. Tulsiram Patel***[61] and ***Shivaji Atmaji Sawant v. State of Maharashtra***.[62] Armed rioters are also involved in violence. Section 146 of the IPC[63] explains rioting as use of force or violence by an unlawful assembly or by any member thereof in prosecution of the common object of such assembly. Similarly, an act of piracy inherently involves violence. Article 101 of the United Nations Convention on the Law of the Sea explains piracy as follows:

> "Piracy consists of any of the following acts:
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

[61] (1985) 3 SCC 398 at paragraph 161
[62] (1986) 2 SCC 112 at paragraphs 6 and 7
[63] 146. Rioting - Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”

Therefore merely because a person is carrying arms in a disturbed area, he does not *ipso facto* become an enemy. There has to be something much more to brand such a person as an enemy. That a person is not a mere law-breaker but an enemy can be determined only by a thorough enquiry as postulated by ***Naga People's Movement of Human Rights***.

143. In cases such as the present, there is a greater duty of care and an equally greater necessity of a thorough enquiry since, we must not forget, the alleged 'enemy' in this case is a citizen of our country entitled to all fundamental rights including under Article 21 of the Constitution. In this regard, it is worth recalling what the Constitution Bench said in ***Naga People's Movement of Human Rights*** - our armed forces are not trained to fight and kill our own countrymen and women. To this we may add that ordinarily our armed forces should not be used against our countrymen and women. This Court observed in ***Naga People's Movement of Human Rights*** in paragraph 39 of the Report:

> “The primary task of the armed forces of the Union is to defend the country in the event of war or when it is faced with external aggression. Their training and orientation is to defeat the hostile forces. A situation of internal disturbance involving the local population requires a different approach. Involvement of armed forces in handling such a situation brings them in confrontation with their countrymen. Prolonged or too frequent deployment of armed forces for handling such situations is likely to generate a feeling of alienation among the people against the armed forces who by their sacrifices in the defence of their country have earned a place in the

> hearts of the people. It also has an adverse effect on the morale and discipline of the personnel of the armed forces."

If members of our armed forces are deployed and employed to kill citizens of our country on the mere allegation or suspicion that they are 'enemy' not only the rule of law but our democracy would be in grave danger.

144. In view of our discussion, it is not possible to accept the contention of the learned Attorney General that a person carrying weapons in violation of prohibitory orders in the disturbed area of Manipur is *ipso facto* an enemy or that the security forces in Manipur in such a case are dealing with an 'enemy' as defined in Section 3(x) of the Army Act. This is far too sweeping and general an allegation and cannot be accepted as it is or at its face value. Each instance of an alleged extra-judicial killing of even such a person would have to be examined or thoroughly enquired into to ascertain and determine the facts. In the enquiry, it might turn out that the victim was in fact an enemy and an unprovoked aggressor and was killed in an exchange of fire. But the question for enquiry would still remain whether excessive or retaliatory force was used to kill that enemy.

145. The learned Attorney General also relied upon the UAPA to contend that a terrorist is an enemy, though not specifically mentioned in Section 3(x) of the Army Act and it is the duty of a person subject to military law to act against a terrorist. The argument of the learned Attorney General proceeds on the basis that in the present case every victim is a militant or a terrorist. There is no such presumption one way or the other and there is also no presumption one way or the other that all the operations and encounters were faked as sought to be contended

by the petitioners. The facts have not yet been determined in this regard in all cases. Moreover, the stand of the State of Manipur in its affidavit of 17th November, 2012 is that the ordinary criminal laws including the UAPA are inadequate to deal with the problem of insurgency in Manipur necessitating the enforcement of the AFSPA. Hence, reliance on the UAPA does not advance the case of the learned Attorney General.

146. Undoubtedly, the challenges of militancy and terrorism staring us in the face are grave. In ***People's Union for Civil Liberties v. Union of India***[64] the legislative competence of Parliament to enact the Prevention of Terrorism Act, 2002 was under question. In that decision, this Court described terrorism as an "undeclared war" as well as a "proxy war". Adverting to the reality of terrorism, this Court observed that terrorist acts are meant, in several ways, to destabilize the nation and, amongst others, demoralize the security forces. It was observed that terrorism is a new challenge for law enforcement and that the terrorist threat we are facing is now on an unprecedented global scale. It was further observed that to face terrorism we need new approaches, techniques, weapons, expertise and of course new laws. It is under these circumstances that the Prevention of Terrorism Act was enacted.

147. In a similar vein, Section 15 of the UAPA which was relied on by the learned Attorney General virtually defines a terrorist as the perpetrator of an act with intent to threaten or likely to threaten the unity, integrity, security, economic security or sovereignty of India or with intent to strike terror or likely to strike

[64] (2004) 9 SCC 580

terror in the people or any section of the people in India by any of the acts mentioned in the said section.

148. This Court had occasion to advert to the challenges from terrorists, the response of the State and the constitutional commitment of the Courts. In ***Saeed Sohail Sheikh*** it was held in paragraph 40 of the Report as follows:

> "Having said that we cannot ignore the fact that the country today faces challenges and threats from extremist elements operating from within and outside India. Those dealing with such elements have at times to pay a heavy price by sacrificing their lives in the discharge of their duties. The glory of the constitutional democracy that we have adopted, however, is that whatever be the challenges posed by such dark forces, the country's commitment to the rule of law remains steadfast. Courts in this country have protected and would continue to protect the ideals of the rights of the citizen being inviolable except in accordance with the procedure established by law."

149. Killing an 'enemy' is not the only available solution and that is what the Geneva Conventions and the principles of international humanitarian law tell us. Equally importantly, the instructions issued by the Army Headquarters under the caption: "*List of Dos and Don'ts while acting under the Armed Forces (Special Powers) Act, 1958"* read with "*List of Dos and Don'ts while providing aid to civil authority"* restrain the Army from using excessive force. In ***Naga People's Movement of Human Rights*** it was held by the Constitution Bench in paragraph 58 of the Report:

> "The instructions in the form of "Dos and Don'ts" to which reference has been made by the learned Attorney General have to be treated as binding instructions which are required to be followed by the members of the armed forces exercising powers under the Central Act and a serious note should be taken of violation of the

> instructions and the persons found responsible for such violation should be suitably punished under the Army Act, 1950."

Therefore, even while dealing with the 'enemy' the rule of law would apply and if there have been excesses beyond the call of duty, those members of the Manipur Police or the armed forces who have committed the excesses which do not have a reasonable connection with the performance of their official duty would be liable to be proceeded against.

150. Advocating caution and use of minimal force against our own people, it was held in ***Naga People's Movement of Human Rights*** that power can be exercised under Section 4(a) of the AFSPA only under certain circumstances. It was said in this context:

> "The powers under Section 4(a) can be exercised only when (a) a prohibitory order of the nature specified in that clause is in force in the disturbed area; (b) the officer exercising those powers forms the opinion that it is necessary to take action for maintenance of public order against the person/persons acting in contravention of such prohibitory order; and (c) a due warning as the officer considers necessary is given before taking action. The laying down of these conditions gives an indication that while exercising the powers the officer shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order."

151. In this context it is important to quote the Ten Commandments issued by the Chief of Army Staff. These read as follows and nothing can better elucidate how the security forces are expected to act in Manipur:

COAS TEN COMMANDMENTS

> Remember that people you are dealing with, are your own countrymen. All your conduct must be dictated by this one significant consideration.

Operations must be people friendly, using **minimum force** and avoiding **collateral damage** – restrain must be the key.

Good intelligence is the key to success – the thrust of your operations must be intelligence based and must include the militant leadership.

Be compassionate, help the people and **win their hearts and minds.** Employ all resources under your command to improve their living conditions.

No operations without police representative. No operations against women cadres under any circumstances without mahila police. Operations against women insurgents be preferably carried out by police.

- Be truthful, honest and maintain highest standards of integrity, honour, discipline, courage and sacrifice.
- Sustain physical and moral strength, mental robustness and motivation.
- Train hard, be vigilant and maintain highest standards of military professionalism.
- Synergise your actions with the civil administration and other security forces.
- Uphold Dharma and take pride in your country and the army.

It is quite clear from the various instructions issued (and which are binding on the armed forces) that minimum force is to be used even against terrorists, militants and insurgents. This is very much in tune with international law even in times of war when the Geneva Conventions and the principles of international humanitarian law are applicable. There is absolutely no reason why an equally toned down response cannot be given by our armed forces in times of internal disturbances and why no enquiry should be held if the response is alleged to be disproportionate.

152. At this stage, we would like to make it clear that Section 6 of the AFSPA

and Section 49 of the UAPA[65] presently have no application to this case. It has yet to be determined whether the deaths were in fake encounters as alleged or whether the deaths were in genuine encounters in counter insurgency operations and it has also to be determined whether the use of force was disproportionate or retaliatory or not. If any death was unjustified, there is no blanket immunity available to the perpetrator(s) of the offence. No one can act with impunity particularly when there is a loss of an innocent life.

Army Act and the Cr.P.C.

153. A contention was raised by the learned Attorney General that an offence committed by a member of armed forces must be tried under the provisions of the Army Act through Court Martial proceedings and not under the Cr.P.C. In other words, if anyone from the Army is found to have used excessive force, he should be proceeded against under the provisions of the Army Act and not in a criminal court. Reliance was placed in this regard on ***Balbir Singh v. State of Punjab***.[66]

154. If we go further back, in ***Som Datt Datta v. Union of India***[67] a Constitution Bench of this Court was concerned with a challenge to a finding of guilt by a Court Martial for an offence punishable under Section 304 and Section 149 of the IPC. The contention of the petitioner was that the Court Martial had no

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[65] **49. Protection of action taken in good faith -** No suit, prosecution or other legal proceeding shall lie against -

(*a*) the Central Government or a State Government or any officer or authority of the Central Government or State Government or District Magistrate or any officer authorised in this behalf by the Government or the District Magistrate or any other authority on whom powers have been conferred under this Act, for anything which is in good faith done or purported to be done in pursuance of this Act or any rule or order made thereunder; and

(*b*) any serving or retired member of the armed forces or paramilitary forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism.

[66] (1995) 1 SCC 90

[67] (1969) 2 SCR 177

jurisdiction to try him and that only a criminal court constituted under the Cr.P.C. had jurisdiction to try him. On a consideration of Section 69 and Section 70 of the Army Act, the Constitution Bench held that under the Army Act there are three categories of offences, namely:

> (1) Offences committed by a person subject to the Act triable by a Court Martial in respect whereof specific punishments have been assigned;
>
> (2) Civil offences committed by a person subject to the Act at any place in or beyond India, but deemed to be offences committed under the Act and, if charged under Section 69 of the Act, triable by a Court Martial; and
>
> (3) Offences of murder and culpable homicide not amounting to murder or rape committed by a person subject to the Act against a person not subject to the military law.

It was held by the Constitution Bench that subject to a few exceptions, the third category of cases is not triable by a Court Martial but is triable only by ordinary criminal courts. The exceptions are to be found in Section 70 of the Army Act and one of them is if the offence is committed by the accused while in active service.

155. The Constitution Bench then considered the provisions of Section 125 and Section 126 of the Army Act in this context. It was held that Section 125 pre-supposes that in respect of an offence both a criminal court and a Court Martial have concurrent jurisdiction. Section 125 of the Army Act read with Section 126 thereof gives discretion to the officer mentioned in Section 125 to decide before which forum the proceedings shall be instituted. If it is decided that the proceedings should be instituted before a Court Martial then the accused is taken into military custody. However, if the criminal court is of opinion that the

offence should be tried before itself then it must follow the procedure laid down in Section 126 of the Army Act pending a reference to the Central Government. It was held that these two sections of the Army Act provide a satisfactory machinery to resolve a conflict of jurisdiction, having regard to the exigencies of the situation, in any particular case. It was said:

> "Section 125 presupposes that in respect of an offence both a Criminal Court as well as a Court Martial have each concurrent jurisdiction. Such a situation can arise in a case of an act or omission punishable both under the Army Act as well as under any law in force in India. It may also arise in the case of an offence deemed to be an offence under the Army Act. Under the scheme of the two sections, in the first instance, it is left to the discretion of the officer mentioned in Section 125 to decide before which court the proceedings shall be instituted, and, if the officer decides that they should be instituted before a court Martial, the accused person is to be detained in military custody; but if a Criminal Court is of opinion that the said offence shall be tried before itself, it may issue the requisite notice under Section 126 either to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the Central Government. On receipt of the said requisition, the officer may either deliver over the offender to the said court or refer the question of proper court for the determination of the Central Government whose order shall be final. These two sections of the Army Act provide a satisfactory machinery to resolve the conflict of jurisdiction, having regard to the exigencies of the situation in any particular case."

On the facts of the case, it was held that the police had not completed its investigation into the alleged offence and that the accused had not been brought before the Magistrate after the filing of the charge sheet, hence the criminal court alone did not have jurisdiction over the accused.

156. At this stage, it may be mentioned in the above context that in ***Ram Swarup v. Union India***[68] a Constitution Bench of this Court held that the exercise

[68] (1964) 5 SCR 931

of discretion by the competent authority under Sections 125 and 126 of the Army Act is not unguided and does not violate Article 14 of the Constitution.

157. In ***Balbir Singh*** the accused was in active service in the Air Force and was tried and convicted by a criminal court for an offence punishable under Sections 302 and 34 of the IPC. The contention urged before this Court was that the criminal court inherently lacked jurisdiction to try the accused. This Court considered the provisions of Section 72 of the Air Force Act, 1950 (corresponding to Section 70 of the Army Act), Sections 124 and 125 of the said Act (corresponding to Sections 125 and 126 of the Army Act) and the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952. It was held that in the event of a Court Martial and a criminal court both having jurisdiction to try the offence, the first option to try a person subject to the Air Force Act who is in active service is with the Air Force authorities. If the Air Force authorities do not exercise that option or decide not to try that person by a Court Martial, then the accused could be tried by the criminal court in accordance with the procedure laid down by the Cr.P.C. It was further held that if the criminal court decides to proceed in the matter despite the contrary view of the Air Force authorities, then the conflict of jurisdiction shall be resolved by the Central Government under Section 125(2) of the said Act and the decision of the Central Government would be final.

158. In paragraph 17 of the Report this was held as follows:

> "A conjoint reading of the above provisions shows that when a criminal court and court-martial each have jurisdiction in respect of

> the trial of the offence, it shall be in the discretion of the officer commanding the group, wing or station in which the accused is serving or such other officer as may be prescribed, in the first instance, to decide before which court the proceedings shall be instituted and if that officer decides that they should be instituted before a "court-martial", to direct that the accused persons shall be detained in air force custody. Thus, the option to try a person subject to the Air Force Act who commits an offence while on "active service" is in the first instance with the Air Force Authorities. The criminal court, when such an accused is brought before it shall not proceed to try such a person or to inquire with a view to his commitment for trial and shall give a notice to the Commanding Officer of the accused, to decide whether they would like to try the accused by a court-martial or allow the criminal court to proceed with the trial. In case, the Air Force Authorities decide either not to try such a person by a court-martial or fail to exercise the option when intimated by the criminal court within the period prescribed by Rule 4 of the 1952 Rules (*supra*), the accused can be tried by the ordinary criminal court in accordance with the Code of Criminal Procedure. On the other hand if the Authorities under the Act opt to try the accused by the 'court-martial', the criminal court shall direct delivery of the custody of the accused to the Authorities under the Act and to forward to the Authorities a statement of the offence of which he is accused. It is explicit that the option to try the accused subject to the Act by a court-martial is with the Air Force Authorities and the accused person has *no option or right to claim trial by a particular forum*.
>
> ……
>
> However, in the event the criminal court is of the opinion, for reasons to be recorded, that instead of giving option to the Authorities under the Act, the said court should proceed with the trial of the accused, without being moved by the competent authority under the Act and the Authorities under the Act decide to the contrary, the conflict of jurisdiction shall be resolved by the Central Government under Section 125(2) of the Act and the decision as to the forum of trial by the Central Government in that eventuality shall be final."

We may note that the provisions of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978 now applicable are substantively similar

to the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 dealt with in ***Balbir Singh***.

159. This issue also came up for consideration in ***General Officer Commanding, Rashtriya Rifles v. Central Bureau of Investigation***[69] where the provisions of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 and the AFSPA were considered. The decision arose out a charge sheet filed in the criminal court in Srinagar on an allegation of deaths caused by Army personnel in a fake encounter and a charge sheet filed in a criminal court in Kamrup on a similar allegation of deaths caused by Army personnel in a fake encounter. In both courts the view canvassed by the Army was that the prosecution could not be launched without the previous sanction of the Central Government, the action complained of was in performance of official duties and therefore the charge sheet ought to be returned to the investigating agency.

160. This Court explained that institution of proceedings is required to be understood in the context of the scheme of the Army Act and so far as criminal proceedings are concerned institution does not mean filing, presenting or initiating proceedings but it means taking cognizance of the offence as per the provisions of the Cr.P.C. and that cognizance means taking judicial notice of an offence by an application of mind to the complaint or police report and thereafter proceeding under the provisions of the Cr.P.C. Relying upon ***Matajog Dobey*** it was held that the criminal court lacks jurisdiction to take cognizance of the offence unless sanction is granted by the Central Government.

[69] (2012) 6 SCC 228

161. A reference was then made to Sections 125 and 126 of the Army Act and it was held in paragraph 86 of the Report, following ***Som Datt Datta*** and ***Balbir Singh*** as follows:

> "Military authority may ask the criminal court dealing with the case that the accused would be tried by the Court Martial in view of the provisions of Section 125 of the Army Act. However, the option given by the authority is not final in view of the provisions of Section 126 of the Army Act. Criminal court having jurisdiction to try the offender may require the competent military officer to deliver the offender to the Magistrate concerned to be proceeded with according to law or to postpone the proceedings pending reference to the Central Government, if that criminal court is of the opinion that proceedings be instituted before itself in respect of that offence. Thus, in case the criminal court makes such a request, the military officer either has to comply with it or make a reference to the Central Government whose orders would be final with respect to the venue of the trial. Therefore, the discretion exercised by the military officer is subject to the control of the Central Government. Such matter is being governed by the provisions of Section 475 CrPC read with the provisions of the J&K Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1983."

162. This Court then recorded its conclusions in paragraph 95 of the Report and they read as follows:

> "95.To sum up:
>
> 95.1. The conjoint reading of the relevant statutory provisions and Rules make it clear that the term "institution" contained in Section 7 of the 1990 Act means taking cognizance of the offence and not mere presentation of the charge-sheet by the investigating agency.
>
> 95.2. The competent army authority has to exercise his discretion to opt as to whether the trial could be by a Court Martial or criminal court after filing of the charge-sheet and not after the cognizance of the offence is taken by the court.
>
> 95.3. Facts of this case require sanction of the Central Government to proceed with the criminal prosecution/trial.
>
> 95.4. In case option is made to try the accused by a Court

Martial, sanction of the Central Government is not required."

163. The law is therefore very clear that if an offence is committed even by Army personnel, there is no concept of absolute immunity from trial by the criminal court constituted under the Cr.P.C. To contend that this would have a deleterious and demoralizing impact on the security forces is certainly one way of looking at it, but from the point of view of a citizen, living under the shadow of a gun that can be wielded with impunity, outright acceptance of the proposition advanced is equally unsettling and demoralizing, particularly in a constitutional democracy like ours.

164. The result of the interplay between Section 4 and Section 5 of the Cr.P.C. and Sections 125 and 126 of the Army Act makes it quite clear that the decision to try a person who has committed an offence punishable under the Army Act and who is subject to the provisions of the Army Act does not always or necessarily lie only with the Army – the criminal court under the Cr.P.C. could also try the alleged offender in certain circumstances in accordance with the procedure laid down by the Cr.P.C.

Issue of limitation

165. The next contention of the learned Attorney General was that even today the Army would be entitled to hold a Court of Inquiry and determine whether an offence had been committed by any of its personnel, identify the offender (if any) and then punish him in accordance with the provisions of the Army Act. It was submitted that the issue of limitation postulated by Section 122 of the Army Act would not come in the way.

166. It may be mentioned that the period of limitation provided under Section 122 of the Army Act commences from (a) the date of the offence (the commission of which is denied in the present case); (b) where the commission of the offence was not known to the competent authority, the first day on which the commission of such offence comes to the knowledge of the competent authority; (c) when it is not known who committed the offence, the first day on which the identity of the alleged offender is known to the competent authority.

167. Reference was made by the learned Attorney General to ***Union of India v. V.N. Singh***[70] in which the allegation related to irregularities in local purchases. It was only much later when a Staff Court of Inquiry gave its recommendations blaming the respondent that Court Martial proceedings were initiated against him. This Court took the view that the period of limitation for convening a Court Martial would commence from the date on which the competent authority of the respondent came to know of the involvement of the respondent in the irregularities.

168. Similarly, ***J.S. Sekhon v. Union of India***[71] concerned an allegation of irregularities in some purchases. It is only after a Court of Inquiry gave an adverse recommendation against the appellant that he had defrauded the Army through irregular purchases that a Court Martial was convened.

169. None of decisions really take us much further in understanding a situation such as the present in which the Army categorically says that no offence has been committed by any of its personnel. If that be so, there is no question of holding

[70] (2010) 5 SCC 579
[71] (2010) 11 SCC 586

any Court of Inquiry and Section 122 of the Army Act does not even come into picture, nor does the question whether a particular person is guilty of any offence or not. Therefore, even holding a Court Martial cannot arise. But if the Army has an open mind on the issue, it can certainly hold a Court of Inquiry, if the law permits it to do so at this distant point of time.

170. However, we make it clear that even if the armed forces decide to take action and inquire into the allegations at their own level, it would not preclude any other inquiry or investigation into the allegations made.

171. Insofar as holding a Magisterial Enquiry is concerned, the NHRC has stated in their affidavits that the guidelines issued from time to time are not being followed in their true spirit. That apart, the NHRC has complained that the State Governments (including perhaps the State of Manipur) invariably take more than reasonable time to submit important documents such as the port-mortem report, inquest report and the ballistic expert report as well as the Magisterial Enquiry report. Therefore, it appears that the Magisterial Enquiry is not given its due importance but in any event since it is an administrative enquiry (which is apparently conducted in a casual manner) and not a judicial enquiry, not much credence can be attached to the Magisterial Enquiry report. In this context, it may also be mentioned that the NHRC has also complained about the poor quality of the Magisterial Enquiry reports received by it and it is pointed out that in some instances the family of the person killed is not examined nor any independent witness is examined by the Magistrate. That being the position, it is not possible to attach any importance to the Magisterial Enquiry conducted at the behest of the

State Government, even though it might have been conducted under Section 176 of the Cr.P.C.

172. Therefore, we make it clear that even if the State Government decides to hold Magisterial Enquiries and take suitable action on the report given, it would not preclude any other inquiry or investigation into the allegations made. In situations of the kind that we are dealing with, there can be no substitute for a judicial inquiry or an inquiry by the NHRC or an inquiry under the Commissions of Inquiry Act, 1952.

Conclusions

173. On an overall consideration of the submissions made and the material before us, we conclude :

(a) This writ petition alleging gross violations of human rights is maintainable in this Court under Article 32 of the Constitution.

(b) We respectfully follow and reiterate the view expressed by the Constitution Bench of this Court in ***Naga People's Movement of Human Rights*** that the use of excessive force or retaliatory force by the Manipur Police or the armed forces of the Union is not permissible. As is evident from the Dos and Don'ts and the Ten Commandments of the Chief of Army Staff, the Army believes in this ethos and accepts that this principle would apply even in an area declared as a disturbed area under AFSPA and against militants, insurgents and terrorists. There is no reason why this principle should not apply to the other armed forces of the Union and the Manipur Police.

(c) We respectfully follow and reiterate the view expressed by the Constitution

Bench of this Court in ***Naga People's Movement of Human Rights*** that an allegation of excessive force resulting in the death of any person by the Manipur Police or the armed forces in Manipur must be thoroughly enquired into. For the time being, we leave it open for decision on who should conduct the inquiry and appropriate directions in this regard will be given after the exercise mentioned below is conducted.

(d) We respectfully follow and reiterate the view expressed by this Court that in the event of an offence having been committed by any person in the Manipur Police or the armed forces through the use of excessive force or retaliatory force, resulting in the death of any person, the proceedings in respect thereof can be instituted in a criminal court subject to the appropriate procedure being followed.

Further steps

174. Unfortunately, we have not been given accurate and complete information about each of the 1528 cases that the petitioners have complained about. Therefore, there is a need to obtain and collate this information before any final directions can be given. Learned *Amicus* has told us that there are 15 cases out of 62 in which it has been held by the Justice Hegde Commission or by judicial inquiries conducted at the instance of the Gauhati High Court that the encounters were faked. On the other hand, the NHRC has informed us that there are 31 cases out of 62 in which it has been concluded that the encounters were not genuine and compensation awarded to the next of kin of the victims or the award of compensation is pending.

175. Therefore, as a first step, we direct:

(a) Of the 62 cases that the petitioners have documented, their representative and the learned *Amicus* will prepare a simple tabular statement indicating whether in each case a judicial enquiry or an inquiry by the NHRC or an inquiry under the Commissions of Inquiry Act, 1952 has been held and the result of the inquiry and whether any First Information Report or complaint or petition has been filed by the next of kin of the deceased. We request the NHRC to render assistance to the learned *Amicus* in this regard. We make it clear that since a Magisterial Enquiry is not a judicial inquiry and, as mentioned above, it is not possible to attach any importance to Magisterial Enquiries, the tabular statement will not include Magisterial Enquiries.

(b) The representative of the petitioners and the learned *Amicus* will revisit the remaining cases (1528 minus 62) and carry out an identical exercise as above. This exercise is required to be conducted for eliminating those cases in which there is no information about the identity of the victim or the place of occurrence or any other relevant detail and then present an accurate and faithful chart of cases in a simple tabular form.

176. We propose to consider the grievance of the NHRC that it has become a toothless tiger, after hearing the Union of India and the NHRC on this important issue. We also propose to consider the nature of the guidelines issued by the NHRC – whether they are binding or only advisory.

177. For the time being we keep open the question whether Court Martial proceedings can be initiated by the Army against an offender, if any, to await the

result of the first step as mentioned above. We are making it clear that we have not precluded the petitioners from contesting this issue. We are not deciding it for the time being only because full facts are not available to us. However, if the law permits and the Army is so inclined, it may hold a Court of Inquiry in each case.

178. We record our appreciation for the assistance rendered by the learned *Amicus* at every stage of hearing of the case and for the valuable assistance rendered and expect her to continue assisting us till the closure of this petition.

179. List the matter for further proceedings immediately after four weeks.

…….J
(Madan B. Lokur)

…….J
(Uday Umesh Lalit)

New Delhi;
July 8, 2016