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Safeguarding Human Rights In Armed Conflict Situations: A Case Study Of The Armed Forces (Special Powers) Act, 1958

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Abstract

Safeguarding human rights in armed conflict situations is as important as safeguarding human rights in normal peace time. It is international minimum standard that non-derrogable human rights must be protected and safeguards even amidst the clash of arms. Both bodies of law viz. International Humanitarian Law and International Human Rights Law apply to situations of armed conflict and provide complementary and mutually reinforcing protection. The Armed Forces (Special Powers) Act, 1958 is an illustration of emergency law which curtains even no-derrogable human rights which is inconsistent with established international norms.

Key words: Armed Conflict, Human Rights, International Humanitarian Law, non-derrogable human rights, Special Powers

Introduction

In recent decades, armed conflict has blighted the lives of millions of civilians. Serious violations of international humanitarian and human rights law are common in many armed conflicts. In certain circumstances, some of these violations may even constitute genocide, war crimes or crimes against humanity.

International human rights law (IHRL) and international humanitarian law (IHL) share the goal of preserving the dignity and humanity of all. Over the years, the General Assembly, the Commission on Human Rights and, more recently, the Human Rights Council has considered that, armed conflict, parties to the conflict have legally binding obligations concerning the rights of persons affected by the conflict. Although different in scope, IHRL and IHL offer a series of protections to persons in armed conflict, whether civilians, persons who are no longer participating directly in hostilities or active participants in the conflict. Indeed, as well as by United Nations organs, treaty bodies and human rights special procedures, both bodies of law apply to situations of armed conflict and provide complementary and mutually reinforcing protection.

Objectives and Research Methodology

This paper addresses, in particular, the complementary application of two bodies of law, viz. IHRL and IHL. It provides the necessary legal background and analysis of the relevant notions, in order for researcher to better understand the relationship between both bodies of law, as well as the implications of their complementary application in situations of armed conflict. The paper also provides the armed conflict situations in Manipur with relevant applicable laws of IHRL and IHL with special reference to sociology of the Armed Forces (Special Powers) Act, 1958.

The researcher adopted collaborative legal research methodology in particular its doctrinal and empirical components. The researcher formulated research problems concerning of conflicting interest of armed conflict situations vis-à-vis safeguarding human rights, by applying case study and analytical legal method of thought process after brief review of literature in the field. Primary sources like case law, legal documents, conference proceedings and secondary sources like commentary by authoritative experts and juristic writings are used in the process. And finally, generalization and interpretation of the study by tools of legal reasoning through induction, deduction, analogy, justification and dialectical reasoning.

Finding, Discussion and Analysis

A brief commentary on the finding, discussion and analysis of the study suffices as separate headings and sub-headings and analytical discussion of the matter.

The Armed Forces (Special Powers) Act, 1958

The Armed Forces (Special Powers) Act (AFSPA) was enacted by the Parliament in 1958 and it was known initially as Armed Forces (Assam and Manipur) Special Powers Act, 1958. Its predecessor – the Armed Forces Special Powers Ordinance, 1942 had been enacted in order to neutralize 'Quit India Movement'. This Act was originally enacted as a temporary measure to suppress demands for self-determination in the post-independence period in the Naga Hills but in fact large part of the NE is still declared 'disturbed' under the Act and civilian population is still under grip of the military rule. The Act is described by Pillay (2012) as "dated and colonial-era law that breach contemporary international human rights standards."

The Act defines "Armed forces" as the military forces and the air forces operating as land forces, and includes other armed forces of the Union so operating. Section 3 defines "disturbed area" by stating how an area can be declared disturbed. It grants the power to declare an area disturbed to the Central Government and the Governor of the State, but does not describe the circumstances under which the authority would be justified in making such a declaration. Rather, the AFSPA only requires that such authority be "of the opinion that whole or parts of the area are in a dangerous or disturbed condition such that the use of the Armed Forces in the aid of civil powers is necessary." This lack of precision in the definition of disturbed area demonstrates that the government is not interested in putting safeguards on its application of the AFSPA.

The Central Government can also overrule the opinion of a state government and declare an area disturbed. This happened in Tripura, when the Central Government declared Tripura a disturbed area, overruling the opposition of the State Government.

At the writing of this paper, the entire State of Manipur (except Imphal Municipal area), Nagaland and Assam, are under AFSPA. In Arunachal Pradesh, 16 Police Stations/Out Posts areas bordering Assam and three districts Tirap, Changland and Longding are under the Act. In Meghalaya, 20 Km belt bordering Assam has been declared ''Disturbed'' under the Act (MHA, 2016-17). In the words of Ministry of Home Affairs 'due to significant improvement in the security situation in North East States, the AFSPA has been removed

from 33 districts & partially from 1 other district of Assam, 15 Police Stations areas in 6 districts of Manipur and 15 Police Stations areas in 7 districts of Nagaland w.e.f. 01.04.2022 (MHA: 2021-22)

The Act gives blanket power to armed forces to kill its own citizen in mere suspicion and once the area is declared to be disturbed there is a reign of terror prevails (Premananda, 2010-11). Section 4 empowers special powers to the armed forces in disturbed areas not only to commissioned officer, but also to warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces. The special power may be summed up in one line as "If he is of opinion that … fire upon or otherwise use force, even to causing of death, against any person; Arrest, without warrant, any person …. a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest; Enter and search without warrant any premises ….". Whenever, there is declaration of disturbed area all the peoples are put under suspicion as enemy and this mere suspicion granted license to kill under the cloak of AFSPA and such crudest blanket provision is nowhere in the present world except in NE India and Jammu & Kashnmir. In addition, the Act grant impunity under Section 6 which confers a protection upon persons acting under the Act and thereby perpetrators escaped from punishment and the victims of human rights leaves without a remedy.

In this regard, it is worth recalling what the Constitutional Bench said in *Naga People's Movement of Human Rights* (1998) – our armed forces are not trained to fight and kill our own countrymen and women. To this the Apex Court (2016) again adds that ordinarily our armed forces should not be used against our countrymen and women. If members of our armed forces are deployed and employed to kill citizens of our country on mere allegation or suspicion that they are 'enemy' not only the rule of law but our democracy would be in grave danger.

AFSPA is *prima facie* racial, discriminatory and genocidal. This policy of Govt. of India (GoI) has been manifested in repealing Terrorist and Disruptive Activities (Prevention) Act, 1985 and the Prevention of Terrorism Act, 2002 and not the black law AFSPA. Moreover, GoI never thinks about application of AFSPA like law and even deployment Indian army in highly dreaded regions of India like Left Wing Extremist affected states viz. Bihar, Chhattisarh, Jahrakhand, Madhya Pradesh, Odisha and West Bengal (MHA, 2016-17). This aspect of discrimination is clearly highlighted in Ministry of Home Affairs, GoI created Committee i.e., Justice Jeevan Reddy Committee Report (2005), Justice Verma Committee Report (2013), Justice Santosh Hedge Committee Report (2016) and also by many International Committee viz. the UN Committee of Elimination of Racial Discrimination (CERD, 2007), CEDAW, CRC also endorsed racial discriminatory nature of the Act.

It is documented that there were 1528 cases of extrajudicial execution including 33 women and 98 children by governmental armed forces since January 1979 till May 2012 (CSCHR & UN: 2012). When the State uses such excessive or retaliatory force leading to death, it is referred to as an extra-judicial killing or extra-judicial execution or as the Apex Court put it in *People's Union for Civil Liberties* (1997) 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 (AIR 2016 SC 3400). There were 44 cases of brutal torture, 16 cases of enforced disappearances from 1980 to 1999 and 12 cases of massacres that resulted 110 dead including numerous women and child were documented by HRI (2009). These cases are illustrative in nature like a tip of an iceberg. Most of the cases were unreported and undocumented and above all national media is also silent and discriminatory attitude in many aspects. 12 illustrative cases of massacres in Manipur by armed forces of India are listed in the following table:

Table 1: showing Massacres in Manipur perpetrated by armed forces of India

Sl.No.	**No of people killed**	**Place**	**Year**
1.	14	Imphal	2001
2.	12	Tabunglong, Tamenglong	2000
3.	10	Malom	2000
4.	10	Tonsem Lamkhai	1999
5.	5	Churachandpur	1999
6.	9	Nungleibam	1997
7.	9	RMC Hospital	1996
8.	4	Ningkao, Tamenglong	1994
9.	4	Makui, Tamenlong	1994
10.	5	Tera Bazar, Imphal	1993
11.	15	Oinam Village, Senapati	1987
12.	13	Heirangoithong, Imphal	1984

(Source: HRI, 2009)

The fact of the matter is that 'extrajudicial executions under the cloak of AFSPA have become virtually a part of state policy'. In this regard, the Supreme Court of India (AIR 1998 SC 431 & AIR 2016 SC 3400) very surprisingly upheld the Constitutional validity of the AFSPA. This judgment of apex court has run a short of juristic ammunitions and the verdict borders on the extreme edge of technical formalism of the crudest positivist kind. Christof Heyns (2013) rightly observed that "it is therefore difficult to understand how the SC, which has been so progressive in other areas, also concerning the right to life, could have ruled in 1997 that AFSPA, did violate the Constitution."

The State of Manipur has given the following statistics before the Apex Court (AIR 2016 SC 3400) for the period 2000 to October 2012 highlighting 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

The AFSPA is more than an emergency provision. It violates the right to life and further suspends the Constitutional right to file suit. Further, emergency rule can only be declared for a specified period of time, and the President's proclamation of emergency must be review by Parliament. The AFSPA is in place for an indefinite period of time and there is no legislative review. In fact, the declaration that an area is disturbed under the AFSPA is essentially amounts to declaring a state of Emergency but bypasses the Constitutional safeguards. The parliamentary debate on the passing of this Act was the testimony of this fact. Moreover, the UN Human Rights Committee (1997) also strongly endorsed the imposition of an Undeclared Emergency Regime because of AFSPA in Manipur.

In this regard, Heyns (2012:31) rightly opinion that the AFSPA in effect allows the state to override rights in the 'disturbed areas' in a much more intrusive way than would be the case under a state of emergency, since the right to life is in effect suspended, and this is done without the safeguards applicable to states of emergency. A law such as AFSPA has no role to play in a democracy.

The former Chief Minister of Manipur, O. Ibobi Singh, reportedly said that since 1980 when Manipur became a disturbed area over 8,000 innocent people and 12,000 members of armed opposition groups and security forces have lost their lives" (Ploughshares, 2012). Given the longevity of the conflict, it is likely that overall, at least 40,000 people have been killed since 1979. In another information and data covering casualties of

armed confrontation from 1992 to 2016, at least 6077 people were killed in insurgency related incidents under the cloak of AFSA in Manipur, among them 2265 were civilians including women and children (MHA, 2016-17).

In this regard, in its report submitted to the Apex Court in April 2013, the Justice N. S. Hedge Commission found that all seven deaths in six cases it investigated were extrajudicial executions, and also said that the AFSPA was widely abused by security forces in Manipur. The commission said that the continued operation of the AFSPA in Manipur has made "a mockery of the law", and that security forces have been "transgressing the legal bounds for their counter-insurgency operations in the state". The commission echoed a statement made by the Jeevan Reddy Committee, which said that the law had become "a symbol; of oppression, an object of hate and instrument of discrimination and high-handedness."

It is worth mentioning that the Supreme Court of India (April 19, 2017) reminded the Centre that India's neighbor Bangladesh had prosecuted armed forces personnel and politicians for the war crimes they allegedly committed in 1971 as it rejected the Centre's plea that cases of alleged extra-judicial killings by armed forces in insurgency-hit Manipur in 2003 should not be reopened as more than a decade had passed since. The Apex Court said the fresh probe was required to send out the message that armed personnel could not be let off after killing innocent people.

In July 2016 (AIR 2016 SC 3400), the apex court had directed a thorough probe into the alleged fake encounter killings in Manipur saying that the use of "excessive or retaliatory force" by the armed forces or police was not permissible in 'disturbed areas' under the controversial AFSPA.

From the above data and analysis, it is apparent that civilians including women and child have been the main victims of ongoing armed conflict in the state of Manipur.

Rape – a tactic of war instrumented by AFSPA

Rape and other forms of sexual violence have been used as a tactic of terror in many wars throughout history. Rape in armed conflict situations in NE particularly in Manipur (Premananda, 2014) is not merely a matter of chance, of women victims being in the wrong place at the wrong time. Nor is it a question of sex. It is rather a question of power and control 'to rape a woman is to humiliate her community'. Chinkin (1999, 328) has opinion that complex, combined emotions of hatred, superiority, vengeance for real or imagined past wrongs and national pride are engendered and deliberated manipulated in armed conflict. They are given expression through rape of the other side's women.

License to rape has been granted by AFSPA with impunity. Rape has also been directed as an instrument or weapon of war in NE particularly in Manipur 'intended to humiliate, shame, degrade and terrify the entire ethnic group'.

It is fact that the ongoing armed conflict situation in Manipur inherently creates a hostile environment for women, for which both parties to the conflict are responsible for this ugly face of conflict. Most of the rape cases committed by the army remained unreported due to fear of social stigma and the futility of taking up an embracing legal battle against the might of the army. The Human Rights Initiative (2009) documented 10 cases of rape by the state actors in this conflict situation in Manipur. Some cases of rape by Indian armed forces in Manipur are listed in the following table showing how mercilessly they accomplished the crime which is licensed by AFSPA and no prosecution in most of these heinous crimes:

Table 2: showing merciless alleged rape in Manipur by armed forces of India

Sl. No	Victims	Place	Year	Remarks
1.	Miss Thangjam Manorama	Bamon Kampu	2004	killed in alleged encounter after arrest, torture and gang rape
2.	Miss Nandeibam Sanjita	Uchathol Jiribam	2003	
3.	Mrs Meinam ongbi Bina	Luwangsangbam Matai Village	2001	
4.	Mrs Mercy Kabui	Lamdan Village	2000	Gang rape
5.	Mrs Naorem ongbi Thoinu	Kakching	1998	
6.	Mrs Elangbam ongbi Ahanjaoubi	Takyentkongbal	1996	Gang raped in front of her disabled 12 years old son
7.	Mrs Torhing	Chandel	1995	
8.	-	Oinam village, Senapati	1987	3 women were reportedly raped, five women allegedly molested and around 300 persons were tortured
9.	Miss Luingamla	Ngaimu Village, Ukhrul	1986	
10.	Mrs Ningthoujam ongbi Pramo Devi	Kairenphabi Junior High School complex, Thoubal	1984	
11.	Miss K.S. Martha	Huining village, Ukhrul	1981	She was disabled at time of incident
12.	Mrs Memcha Devi	Singjamei, Imphal	1980	She was pregnant at the time of rape
13.	Miss Rose	Ngaprum Khullen, Ukhrul	1974	She committed suicide due to unbearable humiliation

(Based on data provided by HRI, 2009)

Such grave breaches and serious violations of human rights of right to life and human dignity and humanitarian law are committed by the security forces with the virtual impunity and immunity enjoyed by them under the Armed Forces (Special Powers) Act, 1958 and the toothless the Geneva Conventions Act, 1960.

In this context, it is pertinent to mentioned that the trial of *Jean-Paul Akayesu* (1998) established precedent that rape is a crime of genocide. In the context of Rwanda the Tribunal finds that in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women and in this respect, it appears clearly to the Tribunal that the acts of rape and sexual violence, as other acts of serious bodily and mentally harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process. Analogically, mercilessly gang rape, brutally torture and murder of Thangjam Manorama by Assam Rifles in Manipur on 11 July 2004 and raping of Elangbam Ahanjaobi by two havildars of the 2nd Mahar Regiment in the front of her physically handicapped son at her home during an operation in the Takyel area in 1996 and Miss Rose of Urkhrul in 1974 and many more in Manipur are an act of genocide and using rape as an instrument of war in Manipur.

The intent to employ rape as a larger campaign as a method of warfare in NE has also been evidenced from the fact that the Justice Verma Committee (2013) recommendation in the aftermath of Delhi gang rape case for amendment of AFSPA was out rightly rejected by GOI. The Committee very strongly observed that "…. we notice that impunity for systematic or sexual violence in the process of Internal Security duties is being legitimized by AFSPA …" and accordingly recommended to amend Sec. 6 the AFSPA (which granted blanket immunity and impunity to commit rape and other sexual violence) by inserting a proviso to done away the 'previous sanction of the Central Government' provision (so as also recommended by UN CEDAW, in 2000 & 2007) in case of rape and gang rape. But the whole exercise conducted by Committee was in futile and GOI still stick to its hidden agenda, which is one of the prohibited methods of warfare under IHL. In this regard, in interviews to the media, Justice J.S. Verma said that sexual violence could not in any way be associated with the performance of any official task, and therefore should not need prior sanction from the government (AI, 2013).

The Amnesty International (1997) has also remarked that rape of women has been used as instrument of torture by the armed forces in India. The "slash and burn" repressive military methods targeting civilian population and terrorizing the whole population have continued and it virtually appeared that such methods are widespread and systematic policy, as the union and state governments choose to maintain cultivated silence. The Court martial are exception and are rarely conducted in the state of Manipur. Mr. Colin Gonsalves (2004), learned senior counsel during the course of hearing of the Writ Petitions, filed by Assam Rifles in Guwahati High Court, pointed out that the house of the deceased Km. Th. Manorama Devi was raided at night without informing the local people and without the presence of any lady constable. No effort was made by the raiding party to obtain the services of a lady constable. She was taken to custody at gun point and moved from one place to another, raped and murdered by shooting from a close range. A Commission of Inquiry headed by Shri C. Upendra, a retired District and Sessions Judge, was set up by the state govt. of Manipur to make an enquiry into a definite matter of public importance, namely the alleged killing of Km. Th. Manorama Devi. However, the said Inquiry report was turned to be meaningless for the Assam Rifles personnel involved in the incident. No action has been taken till date by the Union Ministry of Home Affairs in this regard, and the matter had been kept in cold storage. It can be drawn from this useless exercise of punishing the erring state actors that the human rights and constitutional remedy approach is a useless tool in the present context of armed conflict situations in Manipur (HRI, 2009).

In this context, it is worth mentioning that the Supreme Court (HuffPost India, 2017) rapped the Army asking why it had maintained silence over allegations of rape and murder against its personnel in Manipur and questioned the state government for not proceeding with these cases against them. The Apex Court posed this query after it was told that there were allegations against two Army personnel that they had raped a 15-year-old girl in 2003 following which she had committed suicide. The bench said:

> "It is just a sheer helplessness or is it a tacit understanding that you will not proceed against the Army personnel. You see, she was a young girl and there are no allegations that she was an insurgent. She was working in a farm where two people came and raped her. She committed suicide and you are saying what can we do. Are you saying that let Army people come and rape".

From the above data and analysis, it is apparent that civilians including women and child have been the main victims of ongoing armed conflict in the state of Manipur.

Conclusion and recommendation

It is necessary to know the truth that the law is tempered with justice. The exercise for knowing the truth mandates (AIR 2016 SC 3400) 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.

A number of decisions by human rights and judicial organs have concluded that International Human Rights Law applies at all time, irrespective of whether there is peace or an armed conflict. Meanwhile, International Humanitarian Law specifically applies only to situations of armed conflict. Thus, in armed conflict, IHRL is applicable concurrently with IHL. Thus, IHRL and IHL are required to adjust constantly to avoid gaps in the protection they provide and they share the common goal of preserving the dignity and humanity of all. The application of both bodies of law should be carried out in a complementary and mutually reinforcing manner. Doing so prevents gaps in protection and could facilitate a dialogue with the parties to the conflict concerning the extent of their legal obligations. Moreover, the complementary application of both bodies of law will also provide the necessary elements for triggering national or international accountability mechanisms for violations committed in the conflict. Finally, both legal regimes also provide the necessary mechanisms to ensure that victims can exercise their right to a remedy and to reparation.

It is found that IHL lays down rules that are applicable to both state and non-state actors whereas IHRL lays down rules binding governments in their relations with individuals. While there is a growing body of opinion according to which non-state actors – particularly if they exercise governmental-like functions – must also be expected to respect human rights norms, the issue remains unsettled.

Only way to mitigate the effects of the armed conflict in any part of the world including Manipur is to apply by both parties in hostilities the relevant provisions of IHRL and IHL. It is worth to mention the Apex Court *ratio* in *Extra Judicial Execution Victim Families Association* (2016) that "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 read with "List of Dos and Don'ts while providing aid to civil authority" restrain the Army from using excessive force. .. Therefore, even while dealing with the 'enemy' the rule of law would apply and if there has been excess beyond the call of duty, those members of the Manipur Police or the armed forces who have committed the excess which do not have a reasonable connection with the performance of their duty would be liable to be proceeded against."

So, in compliance to the mandate of the Constitution of India, the Government of India (GOI), being a party to the Geneva Conventions should recognize the existence of armed conflicts in Manipur to facilitate implementation and enforcement of IHRL and IHL effectively with a view to mitigating the consequences of armed conflicts and punish the perpetrators of IHL in Manipur. In this regard, the existing stand of the GOI requires revolutionary reversal and all the guerrillas should also comply with the rules and customs of war.

In this mist of the ongoing armed confrontation between state empowered by AFSPA and non-state actors in contradiction with human rights and humanitarian rules, women and children have become the soft target in the state of Manipur and thereby terrorizing the whole population by the governmental armed forces.

It is found that the National Human Rights Commission and State Commission which are mandated to investigate human rights abuses and recommend punishment of guilty has turned out to be a toothless tiger. The Apex Court (2016) also endorses in describing the NHRC as a toothless tiger and it is required to amend

suitably Section 19 of the Protection of Human Rights Act, 1994 to empower the NHRC to investigate and recommend against human rights violation by the mighty armed forces of India else entire democratic set up will be a mockery.

It is a welcome gesture that the Apex Court at least (1998 and reaffirmed in 2016) held that the use of excessive force or retaliatory force by the Manipur Police or the armed forces of the Union is not permitted. The 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 and the proceedings in respect thereof can be instituted in a criminal court subject to the appropriate procedure being followed.

The most workable measure in this juncture is to win the heart of people of NE India in particular Manipur and in this regard it high time to repeal AFSPA in the line of what Justice Reddy Commission recommendation as the Act for whatever reason has become a symbol of oppression, an object of hate and an instrument of discrimination and highhandedness or at least amend the Section 6 thereof as Justice Verma Committee recommended.

Last but not the least, it is worth recalling what the Constitutional Bench said in *Naga People's Movement of Human Rights* (1998) – 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. 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.

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