

LAW'S AUTONOMY:

A PARADIGM OF STATE POWER

1. Introduction

Autonomy is said to be an inherent characteristic of every individual. This, however, gives rise to a paradox: since all individuals have autonomy, no one is completely autonomous.

It goes without saying that everyone who has autonomy must assert it. This implies a state where autonomies frequently encroach upon each other, giving rise to possibilities of conflict/ dispute. Rules and laws are an attempt to resolve the paradox arising from the existence of autonomy as an inherent of every thing, by prioritising autonomies inter se. Implicit in any concept of *regulation* is a notion of *curbing*. In other words, a rule or a law that essays to preserve autonomy is actually, regulating it and, in many cases, curbing it.

Authority is a necessary condition for the existence of rules or laws. For, except in an ideal situation of perfect anarchy, rules and laws are not obeyed without enforcement or, at least the threat of it. The term as used here is intended to connote *authority* as synonymous with *power*: the structures constructed by every society of human beings to consolidate authority and control; which are invariably wielded by selected members of the society and, which, as a consequence, are synonymous with the power that some human beings wield over the vast majority, irrespective of ideology.

It is axiomatic that *authority* must usurp autonomy, if it is to exist. Married, as it is, to rules and laws, the latter too, fully partake of this quality. In other words, rules and laws become usurpers of autonomy as a result of the symbiotic link between them and *authority*. Thus, laws negate autonomy in two ways; directly, by regulating or curbing autonomy and, indirectly, by virtue of their inalienable association with authority.

It can be argued that it is *authority* that is by far the bigger culprit vis a vis autonomy and, one might be correct in stating this. However, the link between law and authority is such that for all practical purposes, and for the purposes of this analysis, they can be treated as one. In fact, till the advent of modernity, laws did not enjoy supremacy over authority and, truthfully speaking, even after its advent their ascendancy is merely idiomatic. As such, it would be perfectly valid to use the terms, law, power and, authority, interchangeably.

Legitimate power is finite. Its bounds are delineated at several levels: by a written (or unwritten) constitution, a body of laws subordinate to the constitution, dealing with various subjects, rules and regulations constituting what is known as subordinate legislation, executive instructions and conventions and, finally, practices entrenched at all levels of the executive hierarchy which, in a sense, interpret the law and apply it to concrete situations. All these may, broadly, be termed 'Law' and their operation upon a subject population, the 'Rule of Law'.

Viewed thus, rule of law can be treated as an accountability principle, designed to mitigate the natural tendency of *authority* to absolutism, usurping the autonomy of its constituents. It modifies the concept of the State, from a system for the consolidation of power and authority to an autonomous, self-correcting body politic. Much like the human body, which generates its own defences against external and internal depredations, the body politic is, in principle, designed to respond to any disease in itself and apply remedial measures.

Impunity is (or, at least, ought to be) alien to this idealised conception of the body politic. It can be likened to the cancer that attacks a healthy cell, perverting its very nature and creating a whole new paradigm of life. It is a breach of the 'Rule of Law,' for the achievement of objects extraneous to the reasons for which the body politic is stated to have been constituted.

Rule of law implies accountability. To the extent rule of law persists in a system of power and authority, it does operate to do so. Wherever it is absent or, is subverted, accountability vanishes and authority veers towards abuse of power or, impunity.

Historically, States have mostly been short on accountability but till the advent of the modern nation-state and, the 'Rule of Law,' it was people that ruled and oppressed; law was secondary. A significant part of the rhetoric justifying the creation and evolution of the modern nation-state focuses on its potential – through the 'Rule of Law' – to be more just and egalitarian than any other system of organised political power. However, empirical evidence overwhelms us with proof that things have not changed very much. States continue to lack accountability and, repress their citizens in all manner of ways; the difference being that today, repression is institutionalised and given the name – 'Rule of Law.'

This paper seeks to illustrate the mechanics of impunity in a modern nation-state: namely India. It begins by examining the provisions of section 197 of the Code of Criminal Procedure 1973 (CrPC), which prohibits prosecution of judges and public servants without the prior sanction of the government under which he/ she is/ was serving. One may say that section 197 CrPC delineates

the *de jure* extent and limits of impunity, though the clear statement of the Supreme Court on this provision is that it is not intended to operate so as to place a wrong doer above the law.

Thereafter, the paper delves into the manner in which impunity is constructed and justified by the State and its various manifestations, working in tandem. This is done by analysing the manner in which the State dealt with a challenge to the Armed Forces Special Powers Act 1958 (AFSPA for short). Apart from its other draconian provisions, the AFSPA contains an immunity clause, *pari materia* with section 197 CrPC. Thus, the AFSPA, both, licences extraordinary powers, violative of the guaranteed rights of the people and, grants immunity from prosecution for action in violation of, even, these draconian provisions, in terms identical to section 197 CrPC.

The AFSPA is a special law enforced in the north eastern states, in Punjab and in Jammu and Kashmir.¹ It permits the armed forces of the Union to be deployed in the states, in aid of the civil power. The Act grants these forces powers, to the extent of causing death, in the course of their “duties”. Allegations of abuse of these powers have been endemic since the earliest days. However, most complaints are dismissed as false or unfounded at the level of the armed forces themselves. Judicial scrutiny of the complaints that reach the Courts has been pathetically inept, if not worse. In the rare case that a complaint was scrutinised by the Supreme Court, it deliberately decided not to impose, even, a fine upon the Army though it concluded that everyone, from senior army officers to defence ministry bureaucrats, had lied on oath to protect themselves from the consequences of their illegal actions.²

Needless to say, when members of the military, police and other armed forces commit gross excesses of their powers and they are not punished for their actions, the perpetrators know that their activities are condoned by the State and, that they can kill, torture or disappear without fear of being brought to justice.

The analysis traces the course of the litigation in the case known as the Naga Peoples Movement For Human Rights V. Union of India (NPMHR case, for short) from its inception before the Guwahati High Court in 1980.³ It follows the manner in which this and all other connected cases were transferred from that Court to the Delhi High Court, the decision of the Delhi Court and, concludes with a critical examination of the Supreme Court’s decision in the case in 1998. The decision of the Supreme Court disposed of all the cases by

¹ It was in force in Punjab during the years of insurgency between 1984 and 1994 and, was allowed to lapse once the “problem” had been “solved”. However, it continues to be in force in the North East and in Jammu and Kashmir.

² *Sebastian Hongray V. Union of India and others*: AIR 1984 SC 571

³ AIR 1998 SC 431

a common judgement. This analysis shows the manner in which *de jure* impunity is converted into *de facto* impunity.

The next section gives a summary of facts discovered in the course of investigating ninety six cases of disappearance in the State of Jammu and Kashmir. Most of the cases arise out of the actions of the armed forces in exercise of powers under the AFSPA and, pertain to the period 1990 to 2000. Relating back to the decision of the Supreme Court in the NPMHR case, the summary shows that the list of “Do’s and Donts” that the Army claimed it was following in its operations under the AFSPA were mere window dressing for the purposes of the Court proceedings. The fact that the Supreme Court refused to go into even a single case of violation, even as it declared that the “Do’s and Don’ts” of the Army would henceforth have the force of law and, would consequently be enforceable through the courts, is indicative of the court’s attitude to actual cases violation of the law, notwithstanding the high moral tone of its judgements.

This attitude is reflected in the summary of cases from Jammu and Kashmir. In none of the cases studied did the High Court inflict the slightest punishment upon the wrongdoers, even when their identity was clearly established.

2. De Jure Impunity

2.1 Section 197 CrPC

The immunity of the sovereign was the exception to the maxim ‘*Ubi Jus Ibi Remedium*’. In modern times the sovereign is pretty much a figure head, wherever the institution continues to subsist, with a few notable exceptions. Thus the nature of sovereign immunity has evolved, with the change in the nature of the State, since now it is not the sovereign but his minions who need this immunity.

The oldest law providing protection to officers of the State is the ‘Judicial Officers Protection Act’ of 1850. This Act is still extant. It contains the first systematic enunciation of the “good faith” rule, upon which many immunity laws are based. Some years later, in the first comprehensive Criminal Procedure Code enacted by the British in India, in 1861, a much more sweeping provision was incorporated, granting judges and public servants protection from prosecution without the prior sanction of the government under which he/ she was serving. This provision has continued to subsist till date, in substantially the same form. In the Criminal Procedure Code now in use (CrPC 1973), this protection is contained in section 197.

Section 197 reads as follows:

- (1) When any person who is or was a Judge or Magistrate or a public servant, not removable from his office save by or with the sanction of the Government, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction -
- (a) in the case of person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union of the Central Government;
 - (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.
 - (c)
 - (d)⁴

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government."

Section 197 CrPC embodies an exception to the general rule, laid down in an earlier section of the Code, which empowers Magistrates to take cognizance of an offence by any of the methods enumerated therein.⁵ Judicial dictionaries define 'cognizance' to mean 'jurisdiction' or 'the exercise of jurisdiction' or, the 'power to try and determine causes'.⁶ In common parlance, the word is stated as meaning 'taking notice of'. Section 197 CrPC, therefore, bars a court from entertaining a complaint or, taking notice of it or, exercising jurisdiction with respect to it, if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty.⁷

Indian Courts have had countless opportunities to demarcate the nature and scope of the protection given by this provision. An overwhelming majority of the cases relate to charges against public servants under the Prevention of Corruption Act 1988 or, cases that arose in connection with executive action by officials of the civil administration in non-penal code situations.⁸ Cases connected with custodial offences by the police, army or other security forces are few and far between. However, the principles applicable for the application of section 197 CrPC are identical in all cases.

⁴ Sub-sections 1 (c) and (d) omitted here as they are not relevant.

⁵ Section 190 CrPC

⁶ This definition has been taken from Black's Law Dictionary

⁷ Section 2 (n) of the CrPC-1973 defines an offence as "any act or omission made punishable by any law for the time being in force ..."

⁸ This succeeded the eponymous Act of 1947.

The Supreme Court has held that section 197 CrPC is not, *ipso facto*, a bar against the registration of an FIR or complaint. Nor does it prevent the police from investigating the offence alleged to have been committed. On completion of their investigation the police can, even, prepare and file a charge sheet against the accused judge or public servant, without section 197 coming in the way. The Supreme Court has gone to the extent of saying that in many cases, the question as to whether the protection of section 197 is available to the accused judge or public servant can only be decided during the course of a trial. Thus, the Court has held that section 197 does not automatically bar the trial of a judge or public servant.

In other words, the law does not conceive of section 197 CrPC as an impunity provision. In *Gauri Shankar Prasad V. State of Bihar*⁹ the Supreme Court has held that—

“the object of the section was to save officials from vexatious proceedings against judges, magistrates and public servants but it is no part of the policy to set an official above the common law.”

2.2 Conditions Precedent For Invoking Section 197

Before the section can be invoked by an accused public servant the following requirements must be satisfied:

- a) The person accused of an offence is/ was a public servant
- b) The accused must be a person removable from his office only with the sanction of the State government or of the Central government.¹⁰
- c) The person must be accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his office duties.
- d) At the time of the commission of the alleged offence, the person must have been employed in connection with the affairs of the Union or the State, as the case may be.

The main legal issue that arises in the context of section 197 CrPC is the scope of the protection offered by the provision. This issue has been extensively debated and decided upon by the Supreme Court by an analysis of the following expression from the section—

‘any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty’.

⁹ 2000 (5) SCC 15

¹⁰ This depends on whether the person is employed with the State or the Central government

The first part of the provision answers quite simply, to the plain meaning of the words used. It is only those acts or omissions which are done by a public servant in discharge of (or purported discharge of) official duty, that are entitled to the protection of section 197.

- In *P.P. Unnikrishnan V. Puttiyottil Alikutty*,¹¹ the Court held that under Section 197 CrPC, no protection has been granted to the public servant if the act complained of is not in connection with the discharge of his duty or in excuse of his duty.
- In *P. Arulswami V. State of Madras*¹² the Court held that the every offence committed by a public servant does not require sanction for prosecution under Section 197(1) of the Criminal Procedure Code; nor, even, every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. In other words, it is quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted.

In response to the second part of the question, the Supreme Court has held that “There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty.”¹³ However, it has laid down certain guiding principles:

In *S.B. Saha V. M.S. Kochar*,¹⁴ the Court held that—

“The words ‘*any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty*’ ... in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, ‘it is no part of an official duty to commit an offence, and never can be’. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution and the said provision.”¹⁵ (Italics supplied)

¹¹ 2000 (8) SCC 131

¹² AIR 1967 SC 776

¹³ State of Orissa V. Ganesh Chandra Jew 2004 (8) SCC 40

¹⁴ 1979 (4) SCC 177

¹⁵ The Court has also held that section 197 has to be construed narrowly and in a restricted manner if the public servant has engaged or indulged in criminal activities. For instance, if a police officer uses force in discharge of his duties, then sanction would be necessary for

In *Matajog Dobey V. H.C. Bhari*¹⁶ the Court held that a public servant would be entitled to the protection of section 197 only when there is a reasonable connection between the act done by the public servant and his official duty. This position was reiterated in *Mohd. Hadi Raja V. State of Bihar*¹⁷ where the Court held that the action constituting the offence alleged to have been committed must have a reasonable and rational nexus with the official duties required to be discharged by such public servant.

In *State of Orissa V. Ganesh Chandra Jew*¹⁸ the Court held that though there could not be a universal rule a “safe and sure” test would be to see if the public servant would have become answerable for a charge of dereliction of his official duty had he not committed the offending act. In this case the Court also reiterated a very important principle for the application of the provision: that section 197 CrPC is not an automatic bar that prevents all proceedings in a complaint before the court till the concerned government has given its approval for the prosecution of the accused official.

To sum up, the protection provided under section 197 CrPC is not available when official duty is merely a cloak for doing the objectionable act. There must be a direct and reasonable nexus between the offence committed and the discharge of the official duty.¹⁹ The *sine qua non* for the applicability of section 197 is that the offence charged must be one, which has been committed by the public servant under colour of the office held by him.²⁰ A broad test for determining whether section 197 is attracted or not, is—

“whether the public servant, if challenged, can reasonably claim that- what he does, he does in virtue of his office.”²¹

Thus it is not mandatory that the question of whether “sanction” is required or not should be decided at the outset, in all cases where a public servant is accused of an offence. In many cases, it may not be possible to decide the question effectively without giving an opportunity to the accused official to establish that what he did was in discharge of official duty. In other words,

prosecution. But if the same officer commits an act, which is an offence, in course of his service, though not in discharge of his duty, the bar under section 197 CrPC would not be attracted.

¹⁶ AIR 1956 SC 44

¹⁷ 1998 (5) SCC 91

¹⁸ 2004 (8) SCC 40

¹⁹ For example, a charge of dishonest misappropriation of goods by a customs officer can not be said to be in discharge of “official duty” and, as such, Section 197 CrPC had no application.

²⁰ Rizwan Ahmed Javed Shaikh V. Jammal Patel 2001 (5) SCC 501

²¹ Hori Ram V. Emperor, 1939 FCR 159 (A Federal Court decision. This court substituted for the Privy Council during the interregnum between Independence in 1947 and the promulgation of the Indian Constitution in 1950, when it was succeeded by the Supreme Court.)

often the only way the accused public servant can establish that the act done by him was done in the course of the performance of his duty and, was a reasonable one, is by contesting the charges laid against him in the course of a trial. In such cases, the Supreme Court has held, the question of sanction should be left open, to be decided in the main judgment, which would be delivered upon conclusion of the trial.²²

3. De Facto Impunity

3.1 The De Jure Limits: The Armed Forces Special Powers Act

In 1942, the British government issued the ‘Armed Forces (Special Powers) Ordinance’, to deal with the situation arising out of the Quit India movement. Thereafter, in 1947, four Ordinances were issued by the government to deal with the situation arising out of the partition.²³ These Ordinances were replaced by the Armed Forces (Special Powers) Act, 1948. This Act was a temporary statute enacted for a period of one year but was continued till it was repealed in 1957. The Armed Forces (Assam and Manipur) Special Powers Act, 1958 succeeded this.

It was enacted to enable certain special powers to be conferred upon the members of the armed forces in the “disturbed areas” in the State of Assam and the Union territory of Manipur.²⁴ Subsequently, the Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 and the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, were brought on to the statute book. All three Acts are broadly similar, though there are differences of language and structure between the three Acts.²⁵ There has been only one significant legal challenge to these legislations: to the AFSPA, 1958. We will, therefore, discuss this Act.

In order to operationalise the provisions of the Act, it is necessary to, first, issue a notification under section three, declaring an area to be a ‘disturbed

²² P.K. Pradhan V. State of Sikkim, 2001(6) SCC 704

²³ Namely: (1) the Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance 1947; the Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance 1947; the East Punjab and Delhi Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (17 of 1947) and, (4) the United Provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance 1947.

²⁴ Currently, the AFSPA extends to the whole of the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura.

²⁵ Section three of the AFSPA 1958 and the AFSPA (Punjab) are, virtually, identical, while the equivalent section in the AFSPA (Jammu and Kashmir) is structured somewhat differently. However, in all other respects the two latter Acts, for Punjab and Jammu and Kashmir, are identical to each other but are slightly different in structure and language to the AFSPA 1958. In substance, however, all three Acts are similar.

area'. This notification can be issued by the Governor of the State or, the Administrator of the Union territory or, by the Central Government. The Supreme Court has held that the declaration of 'disturbed area' is to be based upon the subjective opinion of the Governor of the State²⁶ that the area in question is—

"in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary".²⁷

The declaration can be with respect to the whole or part of the State or Union Territory, as the case may be.²⁸

Sections four and five of the AFSPA are the operative provisions: conferring 'special powers' on the armed forces of the Central government. They read as follows:

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

²⁶ Or, the Administrator of the Union territory or, the Central Government, as the case may be.

²⁷ Originally, the power to issue the notification was only conferred on the Governor of the State or the Administrator of the Union Territory. The Act was amended in 1972, to enable the Central government to, also, issue a notification under section 3.

²⁸ Section three of the J&K Act is substantially different in its wording though, perhaps, not in its effect. The corresponding sections of the AFSPA 1958 and the AFSPA (Punjab) leave the judgement as to what is a sufficiently "disturbed or dangerous condition" so as to necessitate a declaration of 'disturbed area' entirely upon the subjective opinion of the Governor, etc. On the other hand, section three of the J&K AFSPA spells out, though in very broad terms, the nature of the mischief that is sought to be curbed by declaring an area 'disturbed'. The two sub-sections that contain this expansion are reproduced below:

(A notification declaring the whole or any part of the State to be 'disturbed' can be issued if the Governor or, the Central government is of the opinion that the use of armed forces in aid of the civil power is necessary to prevent...)

- "a) activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people;
- b) activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution of India"

- (b) If he is of opinion that it is necessary so to do, destroy an arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as training camp for armed volunteers or utilised as a hid-out by armed gangs or absconders wanted for any offence;
 - (c) Arrest, without warrant, any person who has committed a cognizable offence or against whom 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;
 - (d) Enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary.²⁹
5. Arrested persons to be made over to the police: - Any person arrested and taken into custody under this Act shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.³⁰

Section six of the Act contains what we will call the impunity provision. It is couched in terms, virtually, identical to those contained in section 197 of the CrPC. It reads as follows:

- 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.³¹

It is pertinent to state here that since section 197 CrPC and section 6 of the AFSPA are *pari materia*, the latter provision must necessarily be construed in the same manner as the former one. In other words, this provision, too, cannot be construed as an impunity provision, placing the offender outside the pale of the law. Yet, this is precisely the effect of the provision, despite protestations to the contrary by all concerned, including the Supreme Court.

²⁹ The J&K Act, in addition, incorporates the words “and seize any such property, arms, ammunition or explosive substances” at this point of the sub-section. The J&K Act has an additional sub-section (numbered sub-section ‘e’), which specifically empowers the stopping, search and seizure of “any vehicle or vessel”, on lines identical to the power of search and seizure contained in sub-section ‘d’.

³⁰ The corresponding provision of the J&K Act is section 6. Section 5 of the J&K Act confers an additional power upon the armed forces, not found in the AFSPA 1958, empowering the breaking open of locks, etc, “if the key thereof is withheld”.

³¹ This section is identical in all the three Acts though in the J&K Act it is numbered as ‘section 7’.

3.2 Managing Impunity: The Background to the Legal Challenge

The validity of the AFSPA was challenged in the case titled *Naga People's Movement for Human Rights V. Union of India*.³²

Before starting on the discussion of the judgement by the Supreme Court in this case, it is worthwhile to trace its course (and the course of several other cases that were also decided by this judgement). This tracery is as revealing of the intent of the State, as the judgement.

The saga began in 1980, with an order passed by a Single Judge of the Guwahati High Court in a writ petition challenging the validity of the AFSPA 1958. This case was one of two petitions³³ challenging the AFSPA 1958 and, challenging the validity of notifications (declaring certain areas as 'disturbed') issued under it, in April 1980.³⁴ The order of the Single Judge stayed the operation of the notification issued by the Government of Assam under section three of the AFSPA 1958, declaring certain areas of the State of Assam, "disturbed".

The Union of India appealed against this order of the Single Judge before a Division Bench of the Guwahati High Court. Simultaneously, it filed a petition before the Supreme Court, seeking the transfer of the petitions, and the appeal pending before the Division Bench, to the Delhi High Court. Acceding to this request, the Supreme Court transferred all these cases to the Delhi High Court.³⁵

It is necessary to understand the context behind the request for the transfer of these petitions to the Delhi High Court, de hors the reasons stated on the record. The entire north-east region had remained under the AFSPA 1958 or its precursors since independence in 1947. It, and its predecessor legislations, had been extensively used by the government to deal with the Naga insurgency and the various other difficulties that the Union of India had faced over the years.³⁶ Throughout this period, numerous petitions had been filed before the Guwahati High Court, in various individual cases, against violation of rights by the security forces. The government had managed to get by for

³² AIR 1998 SC 431

³³ Civil Rule No. 182 of 1980 and, No. 192 of 1980

³⁴ A third petition challenged the validity of the Assam Disturbed Areas Act, 1955, enacted by the State Legislature of Assam.

³⁵ These petitions were registered as Civil Writ Petitions Nos. 832-34 of 1980 and, as LPA No. 108 of 1980, in the Delhi High Court.

³⁶ Apart from the Naga insurgency, in 1966 the Mizos of the Lushai hills, which is now known as the State of Mizoram, had revolted against the government's callous disregard of their plight in the throes of an acute famine. This was crushed mercilessly, unleashing the full might of the armed forces, including the use of aerial bombardment. In 1980, the people of the State of Assam, the largest State in the north-east had also raised the banner of revolt.

several years with a mix of filibuster and disregard for the orders passed by the Court. However, this time the challenge was to the AFSPA 1958 itself and, the “stay” granted by the Guwahati High Court, effectively, stalled the government’s north-east policy.³⁷ Thus, the request for transfer of these cases was part of the Union government’s efforts to “manage” them.

To persuade the Supreme Court, the Central government argued that the Delhi High Court was a more convenient forum to decide this dispute, Delhi being the seat of the Central government. The argument was misconceived. By this logic all litigation against the Union government ought to be transferred to (or be filed in) the Delhi High Court. On the contrary, under the Constitution, all High Courts are equal and, the Guwahati High Court was as competent as any other to decide upon the challenge raised. The crux of the issue seems to have been the Central government’s lack of faith that the judges of the Guwahati High Court would acquiesce with its wishes and, the belief that it could better control the cases in Delhi. Events proved that the government was correct in its assessment.

In June 1983, the Delhi High Court decided the petitions transferred to it by the Supreme Court and, upheld the validity of the AFSPA 1958. It, also, held that the provisions of the AFSPA 1958 do not violate Articles 14, 19 and 21 of the Constitution. Appeals were filed against this decision, which remained pending before the Supreme Court for nearly fourteen years, without a hearing.³⁸

In the years that these appeals against the Delhi High Court’s judgement remained pending, four other petitions were filed before the Guwahati High Court. Among other things, these petitions challenged, afresh, the validity of the AFSPA 1958. They, also, challenged a notification/ declaration (of ‘disturbed’ area) dated November 1990 under section three of the said Act. All four petitions were disposed of by a Division Bench of the Guwahati High Court by a judgment dated March 1991, which held that the issue of the validity of the AFSPA 1958 stood concluded by the 1983 decision of the Delhi High Court. However, the Court struck down a part of the notification dated November 1990, under section three of the AFSPA 1958.³⁹ While disposing of these petitions, the High Court also ordered the Central government to

³⁷ The AFSPA was the main ‘force multiplier’ of the Indian government, enabling it to cow down vast areas on the strength of the regime of impunity that it fostered.

³⁸ The Supreme Court did not stay the operation of the Delhi High Court’s decision.

³⁹ This notification was based upon the report by the Governor of Assam to the President of India, naming certain districts of Assam as being in the grips of a serious law and order problem. On the basis of this report, however, the entire State was declared a ‘disturbed’ area. The Guwahati Court held that only those districts of the State of Assam that were mentioned in the Governor’s report could be declared as disturbed areas.

review, every month, whether the notification under section three of the AFSPA 1958 was necessary to be continued.

Lastly, the Guwahati High Court ordered that the contents of its decision in two earlier cases,⁴⁰ be made known to all Commissioned officers, Non-commissioned Officers, Warrant Officers and Havildars of the armed forces. It, also, ordered that the Central government issue the following instructions to the above mentioned classes of officers:

- (a) Any person arrested by the army or other armed forces of the Union shall be handed over to the nearest police station with least possible delay and be produced before the nearest magistrate within twenty four hours from the time of arrest.
- (b) Only a person who has, either, committed a cognizable offence or against whom reasonable suspicion (of having committed such offence) exists should be arrested. Innocent persons should not be, first, subjected to arrest and, subsequently, released, declaring them to be 'white'.

Both, the Central and, the State governments had appealed to the Supreme Court against this decision of the Guwahati High Court.⁴¹

The 1991 decision of the Guwahati High Court, in the second batch of petitions, is proof of the real reason for the transfer of the first set of cases to the Delhi High Court. Perhaps because it had a better appreciation of the ground realities of life under an AFSPA regime, the Guwahati High Court was not amenable to the government's point of view on the illegalities committed under the Act. Nor was it willing to turn a Nelson's eye to the complaints of violation of the fundamental rights by the armed forces deployed under the said Act. The decision was, also, proof that the security forces, backed by the Central government, were, at the very least, reluctant to obey the orders of the said High Court, with regard to the practice of illegal arrests and, worse, under the garb of operations under the Act.

In addition, over the years, between 1980 and 1984, five writ petitions had, also, been filed under Article 32 of the Constitution, directly before the Supreme Court, *inter alia*, challenging the validity of the AFSPA 1958 and the notifications issued under it, declaring 'disturbed areas' in the States of Assam, Manipur and Tripura. These writ petitions also listed instances of infringement of the human rights of the residents of those States, by armed forces personnel, in exercise of the powers conferred by the AFSPA 1958.

⁴⁰ Nungshi Tombi Devi V. Rishang Keishang, 1982(1) GLR 756, and, The Civil Liberties and Human Rights Organisations (CLAHRO) V. PK Kukrety, 1988 (2) GLR 137. Both cases pertained to violation of fundamental rights and, in both, the Guwahati High Court had found against the armed forces.

⁴¹ Civil Appeals Nos. 2173--76 of 1991.

All these cases were disposed of by the judgement in the NPMHR case. In a curiously blatant display of its bias in the matter, the Supreme Court thought it fit to preface its judgement with the following remarks—

“The allegations involving infringement of rights by personnel of armed forces have been inquired into and action has been taken against the persons found to be responsible for such infringements. The only question that survives for consideration in these Writ petitions is about the validity of the provisions of the Central Act and ...”⁴²

A strong word has been used to describe the attitude of the Supreme Court, with justification. The Court could have been under no misconception of the real basis of the challenge to the constitutional validity of the AFSPA. Notwithstanding the legal arguments in which the cases were couched, it was obvious that they had been filed to bring the widespread abuse of powers by the security forces deployed under the AFSPA, to the attention of the Court. Apart from the examples contained in the petitions, a report of an inquiry into many of the incidents of violation of rights was, also, placed before the Court. The report was based upon an investigation by a Commission of Inquiry headed by a retired judge of the Guwahati High Court. Yet, the judgement of the Supreme Court hardly touched upon this aspect of the matter, being satisfied by oral assurances on behalf of the Central government. To cap it all, the Court thought it fit to open the substantive part of its judgement on a note of dismissal with respect to these complaints.

3.3 The Validity Of A Statute: The Test of Fundamental Rights

Article 13 of the Indian Constitution stipulates that all laws inconsistent with or in derogation of the fundamental rights guaranteed therein shall be void to the extent of such inconsistency. Because of this link, some of the most valuable human rights law laid down by the Supreme Court has emerged out of Article 13 jurisprudence.⁴³ One of earliest cases which invoked Article 13 to challenge the validity of a law was *AK Gopalan V. The State of Madras*.⁴⁴

⁴² This is excerpted from para eight of the judgement, which follows immediately upon an account of the antecedents of the cases before the Court, as discussed above.

⁴³ Interestingly though, the overwhelming bulk of the path breaking affirmation of the supremacy of the fundamental rights by the Supreme Court has come about in cases involving the right to property, directly or indirectly. On the other hand, from the Gopalan case (*Infra*) to the ADM Jabalpur case (AIR 1976 SC 1207), to the Bhopal Gas leak disaster case (1990 [1] SCC 613), to the case challenging the constitutional validity of the notorious TADA (1994 [3] SCC 569) and, the NPMHR case, the Court has always deferred to the ‘imperatives of rule’; repeatedly granting the Union and the State executive authorities the liberties that they claimed over the rights of the citizens and, the residents of the country.

⁴⁴ AIR 1950 SC 27. (This case challenged the validity of a preventive detention law, on the ground that it violated Article 21.)

This case challenged an alleged violation of the right to life and liberty, which is guaranteed by Article 21 of the Constitution.

Article 21 reads as follows—

“No person shall be deprived of his life or personal liberty except according to procedure established by law”⁴⁵

The phrase “procedure established by law” lies at the crux of this guarantee. The Supreme Court started from a narrow, pedantic interpretation of this phrase in the AK Gopalan case. In that case, a majority of the judges of the Court held that the word “law”, as used in the phrase, meant “State-made law” and, was not—

“an equivalent of law in the abstract or general sense embodying the principles of natural justice”.

In other words, the Court held that howsoever unreasonable, a law was valid if made by a legislature competent to enact it.⁴⁶ In an attempt to allay the alarming implications of such an exposition, one of the judges further stated that the law so made must be—

“the ordinary well established criminal procedure, i.e., those settled usages and normal modes of procedure sanctioned by the Criminal Procedure Code, which is the general law of criminal procedure in this country”.⁴⁷

This interpretation was abandoned by a series of decisions since the 1970s, culminating in the judgement in the Maneka Gandhi case.⁴⁸ Thus, it was no longer enough to claim that a law was validly passed by the parliament and had received the assent of the President. For a law to be valid it had, also, to pass the test of being in consonance with the “basic structure” of the Constitution. If a law violated this “basic structure” then it was not valid law, even if validly passed by the parliament or a State legislature. The whole of the chapter III of the Constitution, containing the fundamental rights guaranteed under it, has been held to be part of this “basic structure”. By this way, the meaning of the phrase “procedure established by law” was been transformed to mean procedure that is just, fair and proper; in accord with the

⁴⁵ Over the decades, Article 21 has become an omnibus provision, encompassing within itself everything, from the basic right to life and liberty to the right to livelihood, food, shelter, health, education, environment and much more. Interpreting the provision in ever expanding concentricities the Court has expounded that the right to life includes within itself all that forms part of a life of dignity as a civilised human being.

⁴⁶ Thus, for example, if the parliament passed a Bill permitting the State to carry out executions without any judicial process, and if such a Bill received the assent of the President of India, it would be “law” and the procedure prescribed in such law would be “procedure established by law”, under which the State would be entitled to conduct extra judicial executions.

⁴⁷ An expression vague enough to encompass almost everything that might have been done by an ingenious State apparatus over the past century of imperial rule.

⁴⁸ Maneka Gandhi V. Union of India (AIR 1978 SC 597)

objects underlying the establishment of the Indian republic: and, not just procedure prescribed by the parliament.

In the Maneka Gandhi case, the Supreme Court declared that the fundamental rights were an expression of what was—

“indelibly written in the subconscious memory of the race which fought for well nigh thirty years for securing freedom from British rule”

It said that the fundamental rights embodied “fair play in action” and, any law that was arbitrary, unfair or unreasonable must be struck down as being in violation of the injunction of Article thirteen. Thus, at the time that the Court decided upon the NPMHR case, the law on the subject of the constitutional vires of a legislation was as laid down in the Maneka Gandhi case.

Article 13 reads as follows:

- 1) All laws in force in the territory of India immediately before commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
- 2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
- 3) In this article, unless the context otherwise requires,—
 - a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or sages having in the territory of India the force of law;
 - b) “laws in force” includes laws passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
- 4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.⁴⁹

⁴⁹ The significance of the exception to the rule of Article 13, contained in clause four of the Article, was whittled down in a series of decisions. In *Kesavananda Bharati V. State of Kerala* (AIR 1973 SC 1461) the Supreme Court held that the ‘basic structure (or features)’ of the Constitution cannot be amended under Article 368. In *Minerva Mills V. Union of India* (AIR 1980 SC 1789) the Court held that Articles 14 and 19 lie at the heart of “basic fundamental freedoms”, without which a free democracy is impossible and which must, therefore, be preserved at all costs. In the Maneka Gandhi case the Court held that the fundamental rights are not mutually exclusive, water tight compartments and, must be read together, in order to give full effect to them. Thus, a law essaying to take away the right to life or liberty under Article twenty one must also satisfy the test of Article 14, which was held to embody ‘reasonableness’ and non-arbitrariness. By this way, it has also come to be held that the fundamental rights, including the power of judicial review by the Supreme Court and the High Courts, was part of the ‘basic structure’, which cannot be abridged or abrogated.

3.4 Validating Impunity: A Case Study

The Supreme Court confined its consideration of the challenge to the validity of the AFSPA to two main grounds:

- a) that it was beyond the legislative competence of the Parliament to pass such an Act with respect to the States and,
- b) that provisions of the Act violated the provisions of the Articles 14, 19 and 21 of the Constitution.

The Court rejected both these contentions and, upheld the constitutional validity of the Act. Having done so, it listed a series of “Do’s and Don’ts”, that the Army claimed it followed, while operating under the Act and, declared that they would, henceforth, have the binding force of law, as declared by the Supreme Court.⁵⁰ Needless to say, the summary of case in section 5 below make it clear that these “Do’s and Don’ts” have always been, and remain, mere words in a book, with no force.⁵¹

The Supreme Court’s inclination to defer to the executive power of the State is evidenced by its repeated acquiescence to curbs or encroachment upon the rights of the people. From concepts of the greater public good, to the duty of the State to act as *parens patriae*, to the (real or perceived) threat to the sovereignty and integrity of the nation, all of these and, more, have been invoked by the Court while holding valid an impugned legislation or, the action of the State agencies, notwithstanding clear proof of constitutional illegality and/ or violation of the fundamental rights. In the case of the AFSPA, the Court clung to the theme suggested by Article 355 of the Constitution, to bolster the weak legal arguments and position. Article 355 of the Constitution reads as follows:

355. 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 out in accordance with the provisions of this Constitution.

At, virtually, each stage of its scrutiny into the validity of the AFSPA 1958, the Court referred to Article 355 to justify the law. There was nothing original to the Court’s approach. During the debate on the AFSPA Bill in the parliament, the Home Minister said that the AFSPA powers stem from Article 355 of the Constitution, which gives the Central Government authority to protect the States against external aggression. Subsequently, the Attorney General of India, in response to queries posed by the members of the UN

⁵⁰ Articles 141 and 142 of the Indian Constitution make all decisions of the Supreme Court “law”, binding and enforceable as such, throughout the country.

⁵¹ Though rooted in the legal position that the soldiers are required to adhere to, the ‘do’s and don’ts’ read like precepts from a moral science code that might be circulated among school children being introduced for the first time to the idea of normative conduct.

Human Rights Committee in 1991, reiterated the stand that Article 355 justified the AFSPA and its provisions. The Court conveniently, picked up on the theme. Its opinion can be summed up as follows—

“(The) Union Government (was) under an obligation to take (all) steps (necessary) to deal with a situation of internal disturbance in a State”
so as to ensure that its governance was carried out in accordance with the Constitutional mandate.

The challenge to the legislative competence of the Parliament to pass a law such as the AFSPA was based upon the division of powers between the State and Central legislatures, as contained in the seventh schedule of the Indian Constitution. This schedule contains three lists: the Union list, the State list and, the Concurrent list. The names are self explanatory. All residuary powers are vested in the Union legislature and executive.

The core of the argument under this head of challenge was that the AFSPA dealt with the subject of “Public Order”, which was covered by Entry-1 of the State list. Since the subjects under this list are reserved for the State legislatures, it was argued that Parliament could not have passed a law dealing with it. It was, also, argued that under the AFSPA, the maintenance of public order in a State was effectively handed over to the Union armed forces, contravening the constitutional restriction.⁵² The third leg of the challenge argued that the AFSPA was a ‘colourable legislation and a fraud on the Constitution’. It was contended that the AFSPA was, essentially, a device to deal with a situation of armed rebellion, the procedure for dealing with which situation has been provided for in Articles 352 to 360, under the ‘Emergency Provisions’ chapter of the Constitution. These provisions also incorporated within themselves constraints limiting their application and, enabling a responsible and effective monitoring of their use and abuse. However, by enacting the AFSPA the Parliament had attempted to bypass these safeguards, illegally conferring upon the Central government an unfettered and uncontrolled power.

The Supreme Court rejected these arguments, interpreting the three lists of the seventh schedule in such a manner as to validate the enactment of the AFSPA 1958 by the Parliament.

⁵² Section 3 of the AFSPA speaks of deployment of the armed forces in aid of the civil power of the State. This implied that it was the prerogative of the State government to ask for such assistance and, the armed forces would be under the control, continuous supervision and direction of the concerned State government. However, under the provisions of the Act, as soon as the whole or any part of a State has been declared to be disturbed area under Section 3, members of armed forces get power to act, independent of the control or supervision of the executive authority of the State government.

It repudiated the argument that the AFSPA was tantamount to usurping of the State government powers, holding that—

“what is contemplated ... is that ... the said forces shall operate ... 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.”

Denying that the powers conferred under the AFSPA ‘enable the armed forces of the Union to supplant or act as substitute for the civil power of the State’, the Court argued that all essential functions – registration of reports (FIRs), investigation, prosecution, trial and, execution of sentences – remain within the realm of the State’s criminal justice apparatus.⁵³ The AFSPA only empowered the armed forces to assist the civil power of the State in tasks such as cognizance of offences, search, seizure and arrest and, destruction of arms dumps and, shelters and structures used as training camps, or as hide-outs, by armed gangs, etc. To avoid the difficulty posed to this view by the fact that the Central government had the power to unilaterally declare any area to be ‘disturbed’, under section 3 of the AFSPA, without reference to the State government, the Court declared that it was ‘desirable that the State Government should be consulted and its co-operation sought while making a declaration (under section 3)’.⁵⁴

Having rejected the legal argument advanced against the validity of the provision by these means, in a fine piece of legal legerdemain, the Court simultaneously declared that—

“However, prior consultation with the State government is not obligatory”.

In other words, in order to reject the argument that the Central government’s power to “independently” declare an area as ‘disturbed, under section 3 of the Act, was ultra vires the Constitution, the Court found it necessary to say that it must consult with the State government. The suggestion having served its purpose, it was diluted to a mere ‘suggestion’ because it would have been highly inconvenient for the Central government to, actually, comply with this requirement; since the intention behind the amendment granting the Central government this unilateral power under section 3 was, precisely, to enable it to bypass the State government whenever it wished to do so.

The third argument, that the AFSPA was a fraud upon the Constitution, was rejected in the following terms:

⁵³ While it may be the legally correct view of the provisions, in view of the ground reality (of which the Court cannot be held ignorant) this view can, at best, be described as romantic.

⁵⁴ The Court argued that even where the declaration under section 3 had been issued by the Central government it did not amount to ‘taking over of the State administration by the Army because the powers under the Act can be exercised by the armed forces only with the cooperation of the authorities of the State Government concerned’.

The Court held that a declaration of emergency can result in the suspension of all fundamental rights guaranteed under Chapter III of the Constitution, except the right to life (Article 21) and, certain basic principles intrinsic to ‘Rule of Law’ (Article 20). Thus—

“The consequences of a proclamation of emergency under Article 352 are ... much more drastic and far reaching and, therefore, the Constitution takes care to provide for certain safeguards in Article 352 for invoking the said provision.”⁵⁵

The Court relied on the fact that in 1978 the Parliament had amended Article 352, the emergency provision, substituting the phrase “internal disturbance” with the expression “armed rebellion” to hold that the object of inserting a more serious expression was to limit the invocation of emergency powers—

“only to more serious situations ... and to exclude (them) ... in situations of internal disturbance which are of lesser gravity”.

Juxtaposing the two – the Emergency Provisions of the Constitution and the AFSPA – the Court made out the latter to be the lesser of the two evils. Thus, the Court said, even assuming that the ‘disturbed area’ notifications were based upon the existence of an armed rebellion, it was not necessary that the situation be met with a declaration of emergency, if other options were available. To quote—

“If the disturbance ... does not pose a threat to the security of the country and the situation can be handled by deployment of armed forces of the Union in the disturbed area, there appears to be no reason why the drastic power under Article 352 should be invoked.”⁵⁶

Needless to add, the Court wrapped up this leg of its judgement with a reference to Article 355 of the Constitution, declaring that the provisions of the AFSPA—

“have been enacted to enable the Central Government to discharge the obligation imposed on it under Article 355 of the Constitution and to prevent the situation arising due to internal disturbance assuming such seriousness as to require invoking the drastic provisions of Article 356 of the Constitution”.

Thereupon, the Court proceeded to the challenges to the constitutional validity of the AFSPA on the ground of violation of the fundamental rights.

⁵⁵ As a consequence of a proclamation of emergency under Article 352, the Parliament can make a law extending the duration of the *Lok Sabha* (House of the People) and, legislate with respect to any matter in the State List. Similarly, the executive power of the Union is enlarged, enabling it give directions to any State as to the manner in which its executive power shall be exercised. In such situation the Union government can even, modify the constitutional provisions relating to distribution of revenues between the Centre and the States.

⁵⁶ With respect to the notifications under challenge before it in the instant case the Court held that “There is no material on the record to show that the disturbed conditions ... are due to an armed rebellion.”

The grounds of this challenge can be summed up thus:

- The definition of ‘disturbed area’ in Section 2(b) of the AFSPA 1958, is vague and, hence, legally not valid.⁵⁷
- Section 3 of the AFSPA is bad in law because it does not require a periodic review of a declaration (notifying an area as ‘disturbed’) issued under it and, a declaration once issued can operate without any limit of time.
- Section four of the AFSPA is bad:
 - a) Because there already exists sufficient power with the State government to deploy armed forces in aid of civil power under the Criminal Procedure Code (CrPC). The CrPC provisions incorporate several safeguards for the protection of the rights of the people, which are absent in the AFSPA. In such a circumstance, the enactment of a more drastic legislation violates the guaranteed constitutional protections and rights and, is unjustified.
 - b) Because, it allows even non-commissioned officers, who are much inferior in rank, to wield the powers under section 4; resulting in a likelihood of the powers being misused and abused.⁵⁸
 - c) Clause (a) of Section 4 is liable to be struck down since it permits the use of force, to the extent of causing death. Conferment of such a wide and unfettered power is unreasonable and arbitrary. The offences specified in section 4(a), is: violation of an order—

“prohibiting the assembly of five or more persons or (an order prohibiting) the carrying of weapons ... or of fire arms, ammunition or explosive substances”.

Under section 143 of the IPC, being a member of an unlawful assembly is punishable with imprisonment of up to six months and/or a fine. Joining such an assembly armed with a deadly weapon raises the maximum punishment to imprisonment for two years and a fine. However, the AFSPA empowers that such persons can be put to death and, bars a prosecution against the guilty officials without the prior sanction of the Central government.

⁵⁷ Section 2(b) says that a ‘disturbed area’ is one that has been declared to be so by a notification under Section 3. In other words, a tautology.

⁵⁸ An argument frequently (and, often, successfully) made, while challenging the validity of a Statute or, a provision of law or, while challenging an administrative action; namely that conferring powers upon a junior (in rank) official increases the likelihood of misuse. In our view, this argument has very limited validity in the context of a challenge to the AFSPA, given that in a very large number of the cases discussed in this report the arrestors were commission/ gazetted officers.

- d) Clause (b) of section 4 is bad for conferring a very wide power, which permits the destruction of a structure utilised as a hideout by absconders irrespective of the offence. In other words, even the residence of a person who is accused of a trivial offence (and is absconding) can be destroyed in exercise of powers under thus clause.
- e) Clause (c) of section 4 was attacked for two reasons. One: because it conferred a power to arrest, without warrant. Two: because section 5, which must be read along with clause (c), does not oblige the officer exercising the power of arrest under clause (c) to comply with the requirements of clauses (1) and (2) of Article 22 of the Constitution.⁵⁹
- f) Clause (d) of section 4 was, also, challenged as conferring a very wide and unfettered power to enter and search, without a warrant, any premises and, further, permitting the concerned officer to use ‘such force as may be necessary’, for this purpose.
- Section 6 of the AFSPA, which bars prosecution of persons for ‘anything done or purported to be done in exercise of the powers conferred by (the said) Act’, except with the previous sanction of the Central Government was assailed on the ground that it, virtually, provides immunity to persons exercising the powers conferred under Section 4. It was argued that sections 45 and 197 CrPC already provide sufficient protection to members of the armed forces from arrest and prosecution and, a separate provision giving further protection is not called for.⁶⁰ Further, it was submitted that even if the accused person were prosecuted, he would be entitled to plead a statutory defence under Section 76 and 79 of the Indian Penal Code.⁶¹ As such, it was argued, the only object of providing additional protection to the armed forces personnel was to engender a climate of impunity, which was impermissible.⁶²

⁵⁹ Article 22 of the Constitution guarantees certain rights and protections to all persons who are “arrested or detained”. It has been discussed in the Arrest chapter.

⁶⁰ Section 197 CrPC has been discussed, above. As the Supreme Court has said, it is *pari materia* with section 6 of the AFSPA. Section 45 CrPC provides a, similar, immunity from arrest, to members of the armed forces and to “such (other) class or category” of persons, “charged with the maintenance of public order”, as may be specified by the State government, by way of a notification. This provision has been used by many State governments to protect its police officers from arrest, without prior sanction.

⁶¹ Sections 76 and 79 are part of Chapter IV of the Indian Penal Code (IPC), containing the ‘General Exceptions’ available to all those accused of an offence under the Code. Section 76 exonerates a person who “by mistake of fact” does something thinking that he/ she is bound in law to do that act. It is illustrated by the example of a soldier who fires upon a mob on the order of his superior officer, in accordance with law. Section 79 is similar, except that it uses the word “justified” instead of “bound”.

⁶² Section 6 does not act as a bar to a habeas corpus petition, though the Army has attempted to argue so in at least one case. Theoretically, a habeas corpus petition can compel the security forces to produce the illegally detained person before the Court and, to hand over his custody

The challenge to the AFSPA 1958 required the Supreme Court to test its validity by the yardstick of the fundamental rights chapter of the Constitution, besides testing it in all other prescribed manners. The nature of this test had been settled by a catena of judgements. In order to be held valid, a law must satisfy the following, amongst other, tests—⁶³

- a) It must be “right and just and fair” and not arbitrary, fanciful or oppressive.
- b) The principles of natural justice are part of the concept of “right and just and fair” and, must be satisfied by all laws, in order to be held valid.⁶⁴
- c) Not only the law but the exercise of the power vested in any person or authority must satisfy the tests prescribed. For, even where a statutory provision empowering an authority to take action is constitutionally valid, action taken under it may offend a fundamental right and in that event, though the statutory provision is valid, the action may violate the fundamental rights.
- d) In determining the impact of State action upon the fundamental constitutional guarantees, the object of the legislature is not relevant; nor is the form of the action. The only thing that is relevant to be considered is the effect of the action upon the individual’s right. If the action affects the fundamental right, directly and inevitably, then, this effect must be presumed to have been intended by the authority taking the action.⁶⁵
- e) The parliament cannot be presumed to have intended to confer power on an authority to act in contravention of the fundamental rights. It is a basic constitutional assumption underlying every statutory grant of power that the authority on which the power is conferred should act constitutionally and not in violation of any fundamental rights.

to a lawful authority. However, in practice, this did not happen in any of the cases which have been summarised below. Further, the writ cannot lead to the prosecution of the accused officer, for which separate proceedings have to be filed, which require ‘sanction’, in terms of section 6 of the AFSPA.

⁶³ ‘Law’, includes procedure, as well as substantive law.

⁶⁴ Natural justice is the quintessence of the process of justice inspired and guided by ‘fair-play in action’. (Maneka Gandhi V. Union of India)

⁶⁵ The Court held (in the Maneka Gandhi case) that: “it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief.”

- f) A law cannot be validated by “reading down” its provisions, so as to make it consistent with the fundamental rights.⁶⁶

It is amply clear from the above tests that the examples of actual violation were, by themselves, a major ground of challenge to the constitutional validity of the AFSPA. Besides illustrating the manner in which the rights of the people living under the AFSPA regime were being violated, these examples served to show that the direct and inevitable effect of the AFSPA was to violate the fundamental rights of these people. Being fundamental to the challenge, no part of this argument could have been ignored, or dismissed by the Court in a cursory manner. Yet, this is precisely what it did.

Nor, was the Court’s legal reasoning very convincing. Further, the Court’s frequent reference to Article 355 of the Constitution, invoking its mandate of ‘constitutional governance’ was ironical, given that it dismissed the allegation of widespread abuse of the powers under the AFSPA without a scrutiny. In the circumstances, it would not be excessive to state that enforcement of the Constitutional guarantee of fundamental rights to all does not seem to form part of the Court’s definition of ‘ensuring government in accordance with the Constitution’.

It is unnecessary to reproduce the reasoning of the Supreme Court to refute the arguments of the petitioners, in their entirety. It is sufficient to state that the Court did not find merit in any of the arguments advanced by them. The substance of the Court’s reasons is summarised below. However, it is pertinent to state that the Court “read” into the provisions of the AFSPA, wherever necessary, to hold that it was a valid legislation and, it did not violate any of the Articles, 14, 19 and 21 of the Constitution.⁶⁷

- To validate section 3 of the Act, it held that—
“A declaration under Section 3 has to be for a limited duration and there should be periodic review of the declaration before the expiry of six months.”

The Court said that ‘the making of the declaration carries within it an obligation to review the gravity of the situation from time to time’. So far, so good but the Court completely ignored the fact that vast areas had been

⁶⁶ In the *Minerva Mills* case it was argued on behalf of the Union of India that ‘defects’ or ‘deficiencies’ in the constitutional amendment under challenge in that case, which patently violated the fundamental rights and, the ‘basic structure’ of the Constitution, should be rectified by the Court by interpreting it in such a manner that it became a valid amendment. This would have required that though the amendment did not contain certain provisions, in order to save it from being declared invalid, those provisions be “read” into the amendment. The Court refused to do so, declaring that— “The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature.”

⁶⁷ To ‘read’ into a provision means to state that besides what is explicitly stated, the terms of the provision, and its context, imply further things: to be done or, to be not done.

treated as ‘disturbed’ for several decades without a break or a review. Further, despite this fact, the Court accepted an oral assurance by the Attorney General on behalf of the Union of India that all notifications issued under the AFSPA are kept under constant review, though the notifications themselves may not mention the period of their validity.

- To validate the provisions of section 4 of the AFSPA, it held that:
 - a) While exercising the powers conferred under Section 4(a) of the AFSPA, the officer in the armed forces shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order.
 - b) A person arrested and taken into custody in exercise of the powers under Section 4(c) of the AFSPA should be handed over to the officer-in-charge of the nearest police station with least possible delay so that he can be produced before nearest magistrate within 24 hours of such arrest excluding the time taken for journey from the place of arrest to the court of magistrate.
 - c) The property or the arms, ammunitions, etc. seized during the course of search conducted under Section 4(d) of the AFSPA must be handed over to officer-in-charge of the nearest police station together with a report of the circumstances occasioning such search and seizure.
 - d) The provisions of Cr.P.C. governing search and seizure have to be followed during the course of search and seizure conducted in exercise of the powers conferred under Section 4(d) of the Central Act.

The Court’s refusal to look into the actual cases of abuse of ASPA powers was very useful when rejecting the arguments against section 4 of the Act. For example, it upheld the powers conferred under section 4(a), holding that they were virtually identical to those routinely exercised by the police under the CrPC. Further, the Court contended, these powers can only be exercised when:

- (i) a prohibitory order of the nature specified in that clause is in force in the disturbed area;
- (ii) 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
- (iii) a due warning, as the officer considers necessary is given before taking action.

The Court declared that these conditions, precedent to exercise of powers under the provision, indicated that while exercising them—

“the officer shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order. In the circumstances, it cannot be said that clause (a) of Section 4 suffers from the vice of arbitrariness or is unreasonable.”

The flaws in the Court's reasoning are revealed by a simple comparison with the powers of the police under the CrPC. Section 129 of the CrPC empowers an Executive Magistrate, an officer in-charge of a police station, or any police officer not below the rank of sub-inspector to disperse an unlawful assembly, which "manifestly endanger(s)" public security. On the other hand, section 4(a) merely requires that the assembly be "unlawful". Thus, the AFSPA entitles the armed forces officer to act, even, against a peaceful assembly. Further, the CrPC provisions do not say that the "force" used to disperse the assembly may extend to "causing of death". Even in a worst case scenario, where the Magistrate is not available and the situation is critical, requiring immediate action, the armed forces officers acting in aid of civil power, under the provision of the CrPC, are enjoined to use as little force as necessary in doing so. They can only "arrest and confine". Further, under the CrPC provisions, it is mandatory for the armed forces officer to contact the Magistrate as soon as it "becomes practicable" to do so. Lastly, only commissioned or gazetted officers of the armed forces are permitted to exercise these powers in the absence of a supervisory Magistrate whereas, under the AFSPA, non commissioned officers are also entitled to exercise the powers conferred by section 4.

- Dismissing the apprehensions of the petitioners with respect to section 6 the Court said that—

"Section 6 of the Central Act (AFSPA) in so far as it confers a discretion on the Central Government to grant or refuse sanction for instituting prosecution or a suit or proceeding against any person in respect of anything done or purported to be done in exercise of the powers conferred by the Act does not suffer from the vice of arbitrariness. Since the order of the Central Government refusing or granting the sanction under Section 6 is subject to judicial review, the Central Government shall pass an order giving reasons."⁶⁸

Having brushed aside the challenge to the AFSPA, the Court laid down a series of palliatives aimed at assuaging the apprehensions of the petitioners.

⁶⁸ The actual manner in which section six of the AFSPA is works (or, is used) to protect the armed forces is illustrated by a case from Jammu and Kashmir. Sajad Bazaz was arrested and disappeared by the BSF in 1990. The police investigated the case and prepared a charge-sheet against the deputy commandant of the concerned battalion. The BSF resisted the regular criminal process as long as they could, perhaps with the idea that they would be able to wear out Sajad's father. Meanwhile, the Central government continued to sit on the State government's request for grant of "sanction" to prosecute, without accepting or rejecting it. When this strategy failed, the BSF constituted a court martial and, tried and acquitted the accused officer of all offences. Thereafter, the Central government replied to the request for grant of "sanction", rejecting it on the ground that the accused officer had already been tried and acquitted of all charges and, under the BSF Act, he could not be tried again for the same offences or, on the same facts.

- The Court directed that ‘While exercising the powers conferred under clauses (a) to (d) of Section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of “Do's and Don'ts” issued by the army authorities which are binding and any disregard to the said instructions would entail suitable action under the Army Act, 1950. The instructions contained in the list of “Do's and Don'ts” shall be suitably amended so as to bring them in conformity with the guidelines contained in the decisions of this Court and to incorporate the safeguards that are contained in clauses (a) to (d) of Section 4 and Section 5 of the AFSPA as construed’
- 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 shall be thoroughly inquired into and, if on enquiry it is found that the allegations are correct, the victim should be suitably compensated and the necessary sanction for institution of prosecution and/or a suit or other proceeding should be granted under Section 6 of the Central Act.

This was the end of the matter, so far as the Court was concerned. The judgement concluded by listing the instructions that the Army claimed were issued by it, from time to time and, were required to be followed by all personnel while acting under the AFSPA. One gets a sense of the insincerity, even as one reads these instructions. They read as if written out for the sole purpose of submitting to the Court.

4. The Window Dressing

Do's

1. Action before Operation

- (a) Act only in the area declared 'Disturbed Area' under Section 3 of the Act.
- (b) Power to open fire using force or arrest is to be exercised under this Act only by an officer/JCO/WO and NCO.
- (c) Before launching any raid/search, definite information about the activity to be obtained from the local civil authorities.⁶⁹
- (d) As far as possible co-opt representative of local civil administration during the raid.⁷⁰

⁶⁹ Ironical since, most of the time the civil authorities have no clue to the activities of the armed forces. See the 20 Grenadier cases *supra*, where the police authorities repeatedly wrote to the various army command headquarters, seeking information regarding the whereabouts of the persons arrested by them.

2. Action during Operation

- (a) In case of necessity of opening fire and using any force against the suspect, or any person acting in contravention to law and order, ascertain first that it is essential for maintenance of public order. Open fire only after due warning.
- (b) Arrest only those who have committed cognizable offence or who are about to commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit cognizable offence.
- (c) Ensure that troop under command do not harass innocent people, destroy property of the public or unnecessarily enter into the house/dwelling of people not connected with any unlawful activities.
- (d) Ensure that women are not searched/ arrested without the presence of female police. In fact women should be searched by female police only.

3. Action after operation

- (a) After arrest prepare a list of the persons so arrested.
- (b) Handover the arrested persons to the nearest Police Station with least possible delay.
- (c) While handing over to the police a report should accompany with detailed circumstances occasioning the arrest.
- (d) Every delay in handing over the suspects to the police must be justified and should be reasonable depending upon the place, time of arrest and the terrain in which such person has been arrested. Least possible delay may be 2-3 hours extendable to 24 hours or so depending upon particular case.
- (e) After raid make out a list of all arms, ammunition or any other incriminating material/document taken into possession.
- (f) All such arms, ammunition, stores, etc. should be handed over to the police along with the seizure memo.
- (g) Obtain receipt of persons arms/ammunition, stores etc. so handed over to the police.
- (h) Make record of the area where operation is launched having the date and time and the persons participating in such raid.
- (i) Make a record of the commander and other officers/JCOs/NCOs forming part of such force.
- (k) Ensure medical relief to any person injured during the encounter, if any person dies in the encounter his dead body be handed over immediately to the police along with the details leading to such death.

⁷⁰ This instruction, is consistent with the phrase “in aid of civil power”, contained in section 3 of the Act, besides being common sense, since the civil authorities would be better informed regarding local conditions, including the antecedents of the suspects. However, in real life this instruction is farcical given the circumstances in which the AFSPA is invoked. In most cases the local administration has broken down so completely as to be, virtually, non-existent. Besides, in many cases the local authorities are sympathetic to the militants and/ or afraid of them. Thus, the armed forces usually operate on the basis of their own network of informants.

4. Dealing with Civil Court⁷¹

- (a) Directions of the High Court/Supreme Court should be promptly attended to.
- (b) Whenever summoned by the courts, decorum of the court must be maintained and proper respect paid.
- (c) Answer questions of the court politely and with dignity.
- (d) Maintain detailed record of the entire operation correctly and explicitly.

Don'ts

1. Do not keep a person under custody for any period longer than the bare necessity for handing over to the nearest Police Station.
2. Do not use any force after having arrested a person except when he is trying to escape.
3. Do not use third degree methods to extract information or to extract confession or other involvement in unlawful activities.
4. After arrest of a person by the member of the Armed forces, he shall not be interrogated by the member of the armed force.
5. Do not release the person directly after apprehending on your own. If any person is to be released, he must be released through civil authorities.
6. Do not tamper with official records.
7. The Armed Forces shall not take back person after he is handed over to civil police.

The instructions which must be followed while providing aid to the civil authority are as under:-

Do's

1. Act in closest possible communication with civil authorities throughout.
2. Maintain inter-communication if possible by telephone/radio.
3. Get the permission/requisition from the Magistrate when present.
4. Use the little force and do as little injury to person and property as may be consistent with attainment of objective in view.
5. In case you decide to open fire:-
 - (a) Give warning in local language that fire will be effective.
 - (b) Attract attention before firing by bugle or other means.
 - (c) Distribute your men in fire units with specified Commanders.
 - (d) Control fire by issuing personal orders.
 - (e) Note number of rounds fired.
 - (f) Aim at the front of crowd actually rioting or inciting to riot or at conspicuous ring leaders, i.e., do not fire into the thick of the crowd at the back.
 - (g) Aim low and shoot for effect.

⁷¹ The case studies in chapter 2 are proof, if any was needed, that these instructions are mere window dressing.

- (h) Keep Light Machine Gun and medium Gun in reserve.
 - (i) Cease firing immediately once the object has been attained.
 - (j) Take immediate steps to secure wounded.
6. Maintain cordial relations with civilian authorities and Para Military Forces.
 7. Ensure high standard of discipline.

Don'ts

8. Do not use excessive force.
9. Do not get involved in hand to hand struggle with the mob.
10. Do not ill treat any one, in particular, women and children.
11. No harassment of civilians.
12. No torture.
13. No meddling in civilian administration affairs
14. No military disgrace by loss/surrender of weapons.
16. Do not accept presents, donations and rewards.
17. Avoid indiscriminate firing.

5. A Summary of Facts From Actual Cases Arising From The Operation Of The AFSPA In Jammu And Kashmir

5.1 Facets Of Impunity: The Armed Forces

Denials abound: The boy/ man was never arrested; or, he was arrested on “suspicion” but released on being found “innocent”; or, he escaped from custody during an arms recovery trip; or, he was a “source” and so, there was no question of his arrest; or the army unit did not conduct this search or raid; or, the unit was busy elsewhere; or, the place from where he was arrested was outside the area of operation of the unit; or, even, the unit in question was not posted in Kashmir at the relevant time; or, the major/ captain or whoever was named, does not exist.

The disregard of the armed forces for the legal process was the determining factor in the petitions before the High Court, at every stage. Thus, we have the spectacle of a High Court, virtually, pleading with the respondents to file replies. In one case the accused agency, the BSF, took over five years to file their response to the petition. In as many as nineteen cases, the respondents took two years or more to file their replies. In a further, twenty nine cases they took between one year and two years to file their replies. Coupled with the fact that the accused unit of the armed forces did not file any reply at all in as many as twenty seven cases, the inference is clear.

The nature of their responses is equally revealing. In over eighty percent of the petitions in which the accused unit filed a response, it was a bald denial of arrest. Of the remaining responses, in eight cases they admitted the arrest but

claimed that the person concerned had been released, subsequently. In two cases, they claimed that the arrested person had “escaped” from their custody. In four cases the arrested person was held in legally recorded and, acknowledged, custody after his arrest.

Their conduct was worse when the case was sent to the Inquiry Judge. In a very large number of the sixty two cases in which inquiries were ordered by the High Court, the accused unit did not participate in the inquiry proceedings, at all. In several cases, the Inquiry Judge recorded adverse remarks about the conduct of the accused unit, specifically attributing the delay in completing the inquiry to their tactics. In none of the cases did the security forces produce the records pertaining to the deployment of their troops, or the records pertaining to the crackdowns that are a daily routine of life in Kashmir, or the records pertaining to the arrest/ detention of people. Nor did they ever bring before the court any of the soldiers/ officers responsible for the impugned actions. In one case, the CRPF “made” the Commandant and the Deputy Commandant of the 53 Bn “to retire” rather than produce them before the Inquiry officer appointed by the High Court. This fact was mentioned by the Inquiry Officer in his report to the High Court.

That they did not file a reply before the High Court or, that they did not participate in the inquiry proceedings did not mean that the security forces were not following the proceedings. In several cases the accused unit of the armed forces did not file a reply before the High Court or cooperate in the judicial inquiry ordered but chose to file objections to the inquiry report; which had held against them. Thus, the overall picture is one of watchful disregard for the court and its processes. Wherever the security forces felt that they needed to intervene, they did so.

This position of watchful disregard becomes clearer when the context is widened to include the response of the Central government in cases where the State government requested it for grant of sanction to prosecute officers/ members of the Central security forces (including the army), who had been charged with penal offences.⁷²

In four petitions, the police are on record as having completed their investigation and finalised a charge sheet against the officers/ soldiers responsible for the arrest/ disappearance.⁷³ In two of these cases we have no

⁷² Section 197 of the CrPC-1973 is the generic provision with respect to the requirement to obtain “sanction” from the “appropriate” government in cases where public servants are sought to be prosecuted/ tried for offences under the IPC. Section 7 of the Jammu and Kashmir AFSPA contains a similar provision. This issue is discussed separately in the chapter on legal issues.

⁷³ An FIR or a complaint was stated to have been filed in sixty of the eighty five cases where petitions were filed.

information except for the fact that the police had stated before the Court that their investigation was complete and the charge sheet ready for being filed before the competent court. In two other cases, the High Court involved itself in monitoring and, to some extent, supervising the State government in the process of obtaining “sanction” from the Central government. In both these cases the Central government rejected the request for grant of sanction to prosecute the officers concerned.

We have reason to believe that these two cases are not the only ones in which the Central government has refused the request for sanction. In fact, it is our information that the Central government has granted sanction to prosecute in only one of the over hundred and fifty cases in which such sanction has been sought.⁷⁴

In other words, it is reasonable to infer that the Central government is not inclined to permit the courts in the State of Jammu and Kashmir to exercise jurisdiction and control over forces under its command. The conduct of the Central security forces, in the habeas corpus petitions studied in this report, mirrors this attitude and, once this attitude is factored in, the conduct of these forces becomes explicable.

5.2 Facets Of Impunity: The Court

Lack of accountability is writ large on every aspect of the Court’s process. The Court staff repeatedly failed to issue summonses or notices to the parties. Nothing happened. The Judge might fulminate in one order, calling for an explanation, but by the next date of hearing the matter was usually forgotten. In many cases, notices were not issued to the parties for months at a stretch, though the Court had repeatedly ordered issuance of the notices. In other cases, where the Court had ordered an inquiry, the order was not communicated to the concerned inquiry judge for years at an end. The Court too, took years to wake up to the fact. Thus, in some cases the inquiry ordered commenced as many as five to six years after it was ordered. No action was taken against the persons responsible in any of these cases.

Government lawyers are among the worst culprits. Their conduct makes sense only when seen as emanating from the representatives of a powerful State, which is scornful of the legal process. Cases were repeatedly adjourned because they were not present in Court at the appointed time. Misleading the

⁷⁴ This is the case of Parveena Ahangar, whose son, Javed, was disappeared in 1990. Sanction to prosecute was recently granted by the Central government in this case, after a fourteen year struggle for justice. However, we are informed that the court seized of the matter has been unable to enforce the attendance of the accused officer because the police cannot “trace” him.

Court, making wrong statements, is another trait that they display. In several cases, the final order of the Court was passed in the absence of the counsel for the petitioner, on the basis of arguments advanced by the counsel for the State government and/ or the security forces, which arguments were not borne out by the record.

At the core of any meaningful judicial proceeding lies a discipline that the system enforces, through the judge, upon all the parties concerned. The discipline consists of enforcing adherence to the established procedure, by following which it is postulated that the court would arrive at the truth. There is no point castigating the procedure if the players do not follow it.

Indubitably, in a habeas corpus petition the brunt of the discipline has to be borne by the respondents. It is the duty of the court to enforce the discipline as much as it is the duty of the respondents to submit to it. It is not an acceptable excuse for a court to say that it is helpless to enforce this discipline, however, recalcitrant the respondents may be. A court (or a judge) who cannot enforce this discipline has no business calling itself one.

The object of a habeas corpus petition is to secure the safety of the person detained. In the context of a habeas corpus petition, this is justice. The next best “justice”, if for some reason if the safety of the person cannot be secured, is to ascertain precisely what happened to the person and to identify the parties responsible for the violation of the right to life of the missing person. Once this is done, it is incumbent upon the court to ensure that the guilty parties are proceeded against in accordance with law. Everything else is incidental and secondary.

Another absurdity is the fact that habeas corpus proceedings in India are treated as adversarial in nature. The right to life is a guarantee extended to all. The guarantee states that no one shall be deprived of their life except in accordance with the procedure established by law. It is not a guarantee that is personal to each individual. On the contrary, it is a guarantee collectively given to all persons who find themselves under the jurisdiction of the Indian Constitution. Enforcing this guarantee is a matter of public interest. It is a settled law that public interest litigations are not adversarial in nature. Therefore, it is the duty of all parties to such litigation to ensure that they assist the court to the best of their ability, so as to enable it to arrive at the truth, in the shortest possible time. Yet, every petition is hotly contested. The petitioners are made out to be liars or, worse: unpatriotic and anti-national. They are accused of being supporters of terrorism or, of having come under the pressure of the terrorists; having filed the petition to “malign” the security forces and “undermine” their morale.

6. Conclusion

In this paper I have tried to show how a basic legal provision, seemingly consistent with democratic rule of law, is seamlessly melded by a process of executive malafides and judicial pusillanimity into impenetrable armour, protecting the armed forces from the consequences of their criminal actions. The legal core of this process of impunity lies in the power of the State to control (read- prevent) the prosecution of “public servants” and “members of the Armed Forces of the Union” who commit crimes “while acting or purporting to act” in the discharge of their official duties.

Having conferred the power to act with impunity, section 6 of the AFSPA bars all ‘legal proceedings’ against “any person” for ‘anything done or purported to be done in exercise of the powers conferred by this Act’, except with the prior “sanction” of the Central government. Though the Supreme Court has made it clear in a number of decisions that the protection conferred by this provision does not cover criminality or criminal acts, it is almost universally interpreted to grant immunity from prosecution of any kind, in the absence of the Central government’s permission.⁷⁵ Needless to say, the Central government’s record is abysmal: it routinely rejects permission, even in cases where there is cast iron evidence to support the allegations.

Another aspect of the design of impunity is the fact that in all States where the AFSPA is (or has been enforced) the operation of normal law enforcement machinery of the State is suspended *qua* the operations of the armed forces. The most common refrain of the people in such areas is that the police refused to register complaints about their family member’s arrest/ abduction. When asked, the police deny that anyone attempted to lodge a complaint. In Kashmir, they frequently claim that they are under instructions not to register cases against the security forces. Even when they do register cases, the police make very little attempt to investigate the complaint or, to book the culprits.

Completing the circle is the failure of the courts to enforce their authority to uphold the rule of law and to do justice. In the absence of judicial redress the constitutional guarantee of the right to life is suspect; since it subsists entirely at the mercy of the executive. We are, then, faced with a conundrum: an executive that abides by the Rule of Law does not violate the rights of the people. In such States, the judiciary is not called upon to protect the rights of the people, except occasionally. Where the executive does not respect these rights, it becomes necessary for the judiciary to intervene and to restore the balance of rights. In such States, however, more often than not, the judicial remedy is ineffective.

⁷⁵ To be more precise, by section 197 of the Indian Code of Criminal Procedure, which is identical to section 6 in form and substance.

Though the solution to the problem posed largely lies outside the realm of judicial practice, there is much that ails the commitment of the Indian judicial system to upholding the rights to life and liberty and, the Rule of Law. It is patent that developing the necessary political resolve to rid India of this lawless, impunity will be a painful and a long drawn out process. In the meanwhile, it ill behoves the judiciary of this country to abdicate its responsibility, howsoever arduous. To quote Montesquieu—

“Law should be like death, which spares no one.”