

Judiciary : Troops in Counter Terrorism Tasks

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“Law and arbitrary power are in eternal enmity”.

- Edmund Burke

The views enunciated by the Supreme Court in Naga People's case¹ serve as a milestone in the field of national security jurisprudence. The five judge bench² in its judgement elaborately dealt with the challenge to the legality of the deployment of the Armed Forces in aid to civil power. The Central Government had amongst its opponents the Naga People's Movement of Human Rights and the National Human Rights Commission. The Court firmly ruled that the Armed Forces (Special Powers) Act, 1958 (in short AFSPA) cannot be regarded as a colourable legislation or a fraud on the Constitution. It turned down the plea to declare the Act as a concealed measure intended to achieve the same result as attainable under Article 352 and 356 of the Constitution dealing with proclamation of emergency. It rejected the theory that a recourse to the AFSPA amounts to handing over the maintenance of public order in the state to Armed Forces directly. While conceding that Section 4 of the said Act contained more drastic powers, it opined that such conferment of powers could not be held arbitrary or violative of the Articles 14, 9 or 21 of the Constitution. The highest court disagreed to entertain petitions where allegations were made regarding infringement of human rights by the Armed Forces personnel in exercise of the powers conferred on them under AFSPA.

It would be erroneous to deduce that the Apex Court gave a carte blanche to the military men to assume authority and exercise it at will. The Supreme Court in a candid manner firmly issued a note of caution regarding the extent of use of the military power. A number of significant observations were made by the Court to limit

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the authority available to the Army personnel and manner of its application by them while operating under the provisions of AFSPA. The court struck a fine balance between the security needs of the country and the contemporary norms of civilised behaviour. The basic theme of the judgement warrants a careful scrutiny. Does the judiciary show a contradiction in its reasoning? The answer is no. The approach concedes an uncompromising need to cater for national security. It is demonstrative of a firm resolve to equip the State with effective means to deal with a disturbed area. At the same time, care has been taken not to bestow unbridled authority on the Armed Forces personnel. Reasonable checks have been put in place to guard against gross violation of personal liberty and human rights by the men in uniform. Judicial creativity has been used to devise well defined safeguards to prevent excessive or reckless exercise of military power against civilian population.

Overall Limitation

The critics had argued that inordinate imposition of the AFSPA for long durations was a negation of the democratic aspirations of the citizens. Responding to the likely abuse of the extra ordinary powers available under the AFSPA, the Court indicated that a declaration for treating an area as "disturbed" under Section 3 of the Act has to be for a limited duration and there should be periodic review of declaration before the expiry of six months. It defended the federal feature of the Constitution by allowing the Central Government to make a declaration under Section 3 suo motu without consulting the State Government. However, it introduced a directive to say that it would be desirable for the Central Government to consult the State Governments while making the declaration.

The Court chose to retain the role of the State or the Union Territory concerned at the centre stage when it ruled that the word "aid" postulates the continued existence of the authority to be aided. The underlying aim was not to permit the civil administration to become dormant and abdicate its duty to strive for restoration of normalcy. This would mean that even after the deployment of the Armed Forces the civil power will continue to function. The Armed Forces shall operate in the state concerned in cooperation with the administration so that the situation which has necessitated their

deployment is effectively dealt with and normalcy is restored. This was a very significant observation. The powers that have been conferred under Section 4 of the AFSPA do not enable the Armed Forces of the Union to supplant or act as substitute for the civil power of the state. The conferment of the said power on the Central Government regarding declaration of area to be disturbed area does not, however, result in taking over of the state administration by the Army because the powers under Section 4 can be exercised by the personnel of the Armed Forces only with the cooperation of the authorities of the state government concerned. The judiciary thus discounted the feasibility of the military units to operate independently. For an area to be declared as 'disturbed area' there must exist a grave situation of law and order on the basis of which the Governor/Administrator of the State/Union Territory or the Central Government can form an opinion that area is in such a disturbed or dangerous condition that the use of Armed Forces in aid to civil power is necessary.

The Supreme Court also gave its attention to the period for which a notification declaring an area as disturbed could remain in force. The term 'for the time being' implies that the declaration under Section 3 has to be for a limited duration and cannot be a declaration which will operate indefinitely. A periodic review of the declaration made under Section 3 of the AFSPA should be made by the Government/ Administration that has issued such declaration before the expiry of a period of six months. The said authority should decide whether the declaration should be continued and, in case the declaration is required to be continued, whether the extent of the disturbed area should be reduced.

Use of Minimum Force Doctrine

The military officers are armed with special powers under Section 4 of the Act. These powers are quite effective. The powers include authority to fire upon or otherwise use force even to the extent of causing death. Three essential preconditions were inserted by the Court in this regard. Firstly, a prohibitory order of the nature specified in Section 4(a) is in force. Secondly, 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. Thirdly, a due warning as the officer considers necessary is given before taking action. Underlining the wide impact of this extra ordinary power, the Supreme Court expressed its hope that the "officers in the Armed Forces shall use minimum force required for effective action against the person/persons acting on contravention of the prohibitory order". Such a declaration of its expectation made the comment assume the form of a legal 'diktat'.

Yet another limitation was introduced by the highest Court with regard to Section 4. This pertained to the period for which a person arrested by the military personnel could be detained in their custody. The court directed that the person who is arrested has to be made over to the nearest police station with the least possibly delay so that he can be produced before the nearest magistrate within 24 hours of such arrest excluding the time taken for journey from the place of arrest to the court of magistrate. No such person could be detained in custody beyond the period of twenty four hours without the authority of a magistrate.

Having thus indicated its mind on the conceptual principle of use of minimum force, the court deemed it appropriate to go into the nitty-gritty of actual procedures at the working level. This was intended to remove any scope for ambiguity. The court declared, "While exercising the powers conferred under clauses (a) to (d) of Section 4, the officers of the Armed Forces shall strictly follow the list of "Do's and Don'ts" issued by the Army authorities which are binding and disregard to the said instructions would entail suitable action under the Army Act, 1950. By so taking note of the contents of "Do's and Don'ts" and by calling them executive instructions, the court clothed them with legal sanction after first declaring them to be in conformity with constitutional scheme. "A seal of approval was intended to fill the yawning gaps in the provisions and for the purpose of securing uniformity in application of the rule."

Cordon and Search

The troops are often required to undertake cordon and search operations. The contents of Section 4(d) of the Act governing search and seizure did not suffer from any limitation or procedural restriction

in the AFSPA and nor did the Act make reference to any other Statute. The Supreme Court in its order made it clear that “the provisions of Criminal Procedure Code (CrPC) governing search and seizure have to be followed.” The Court while underlining the need for the seized property or material to be produced in the court for prosecution of the culprits from whose possession the same was recovered allowed the Army to retain them in their custody. It is to be noted that for the first time by such a judicial pronouncement the procedure set forth in the CrPC was made applicable for the functioning of the military men deployed to control a difficult situation in an area legally found to be disturbed.

It was alleged before the Court that innocent persons were being arrested and later given a clean chit as being ‘white’. The Supreme Court travelled much beyond to examine the import and reach of the “Do’s and Don’ts”. Expanding further, the Apex Court called upon the authorities to suitably amend the instructions contained in the list of “Do’s and Don’ts” to firstly incorporate the safeguards against an arbitrary exercise of powers conferred under Sections 4 and 5 of the AFSPA and secondly to bring them in conformity with the guidelines contained in its decisions. It found it necessary to address special precautions to be observed while dealing with women. The Court directed, “The Army officers while effecting the arrest of woman or making search of women or in searching the place in the actual occupancy of a female shall follow the procedure meant for the police officers as contemplated under the various provisions of the Code of the Criminal Procedure,” namely proviso to Sections 47(2), 51(2), 100(3) and proviso to Section 160(1) of the CrPC.

Check Against Misuse or Abuse

The statutory provisions contained in Section 6 confer protection to persons acting under the Act. These provide that no prosecution, suit or other legal proceedings shall be instituted except with the previous sanction of the Central Government, against any persons in respect of anything done or purported to be done in exercise of powers conferred by the Act. The Supreme Court took the opportunity to travel much beyond the scope of Section 6 to

cover territory so far uncharted. It held, "as 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..... should be thoroughly inquired into."

The above probe is meant to be taken to a logical conclusion. What happens if the report of allegations is found to contain some substance? The Supreme Court directed "the victim should be suitably compensated by the State and the requisite sanction under Section 6..... should be granted for institution of prosecution and/ or civil suit or other proceedings against the person/persons responsible for such violation".

Protectionism

During the course of arguments held in the Naga People's case, a fear was expressed by the opponents that the executive would strive to shield the men in uniform who transgress the authority provided to them in a disturbed area. It was urged that the Statute vested an absolutely arbitrary power on the government to grant or withhold sanction at their sweet will and pleasure, and legislature did not lay down or even indicate any guiding principles to control the exercise of the discretion. The critics had contended that Section 6 thus virtually provided immunity to persons exercising the power under Section 4. The Supreme Court conceded that the prior sanction of the Central Government is a legal necessity before prosecution or a suit or other legal proceedings, However, it struck a note of caution to declare that the powers conferred on Central Government are not arbitrary. "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." It thus made the Union Government accountable for its decision.

Compensatory Justice

The Indian judiciary has been quite vigilant to firmly deal with situations involving human rights violations. Taking a cue from the judicial reasoning propounded by the Apex Court, a number of

court decisions have initiated a trend for award of monetary compensation to the victims of the Armed Forces alleged misuse of authority. The reasoning admitted that monetary compensation cannot undo the physical and mental trauma of violence causing bodily harm. But nevertheless, pecuniary amends may partially take form of appearing as a solace and rehabilitation effort.

In the case of Tekarongsan Sir and others V Union of India; Guwahati High Court (Kohima) dealt with an incident of injuries caused due to indiscriminate firing. It firmly stressed that "nobody is authorised under the mandate of the Constitution to take away the right to life and liberty of a person except according to procedure established by law. Respects for the rights of individuals is the bedrock of true democracy. It is the bounden duty of the State to repair the damage done by its officers to the individual's rights. In order to prevent the violation of such rights reasonably and also to secure the due compliance of Article 21, it is needed to mulch its violators in the payment of monetary compensation."³

Hiren Chandra Ray's case⁴ brought to light a matter where the death of a suspect took place while he was in the custody of the troops. He had been picked up by the Army personnel from a civil area. His interrogation had revealed his involvement with a banned military outfit. Later during an ambush he was killed in the crossfire. The court concluded that the uncontroverted facts revealed that the death had taken place while in Army custody. "The Army failed to protect the life of the deceased." The father of the deceased was considered to be entitled to compensation of Rupees one lac in public litigation. The court did not limit the relief that could be granted. "The petitioner will be at liberty to seek relief before the competent forum for other claim and compensation in accordance with any other law."

In Babuchand Singh's case⁵, there was irrefutable evidence to show the security forces having picked up a 36 years old male who had subsequently remained untraceable. The inquiry conducted by the District Judge was unable to pinpoint the individual(s) responsible for the disappearance. It was thus an illustration of collective responsibility. The court held, "in the facts and circumstances of the case, we are of the view that the respondents

are jointly and severally responsible for the act complained of, there being no material on record to justify such action in law. The respondents are, therefore, liable to pay compensation for wrongful deprivation of the life and liberty of the petitioner's son. We cannot persuade ourselves to hold that only because there is no indication in the enquiry report as to which officer / officers is / are responsible personally, the respondents can be relieved of their liability in law. Though there is no clinching material on record to conclude as to what was his income at the relevant time, it is not a sufficient consideration to deny him the relief of compensation. A sum of Rupees two lacs as compensation would meet the ends of justice. The Central Government would pay a sum of Rs.1,50,000/- and the balance of Rs.50,000/- would be paid by the State Government with the liability because it cannot shed its responsibility in the matter as the Army had been called in by the State Government to aid it."

Custodial Death

In the matter of Solomi Shingnaisui, Ms V Union of India; the same High Court commented that, "the authorities are duty bound to pay compensation for the custodial death of a citizen. Compensation can be granted under the public law by the Supreme Court and High Courts in addition to private law remedy for tortuous action and punishment to wrong doers under the criminal law for established breaches of fundamental rights".⁶

Fatema Begum's case⁷ concerned the forcible taking away of a businessman by the soldiers from his house. His body was recovered 40 kilometres away with gun shot wounds. The deceased was reported to be in no way connected with anti social and criminal activities. The High Court disbelieved the Army version about the individual having died in an encounter. The court opined that "the Government has a duty not only to compensate the family members of the deceased, but also to take law to its logical end to bring the offenders to book. The State cannot avoid its liability for the misdeed of its employees which resulted in the death of a person in custody, howsoever grave the offences the deceased might have been charged with. Law does not permit any authority to infringe upon one's right to life and act beyond the parameters of law which

results in deprivation of the right to life, except in due course of law. This is an instance of an offence which calls for exemplary punishment. The Army personnel in the instant case, in gross abuse of powers, had killed the husband of the petitioner while he was in their custody. The death in the manner aforesaid cannot but shake the confidence of the people in the Army who are otherwise regarded as protector of the lives and property of citizens. The untold miseries of the wives and children of the deceased on the death of their only bread earner call for no description. The State has no alternative but to compensate them. Considering various circumstances, this Court is of the opinion that an amount of Rs two lakhs by way of compensation will meet the ends of justice in the instant case. Besides, the Superintendent of Police of the Area is directed to ensure that investigation is completed within six months and Final Form submitted. The Union was directed to cooperate with investigating agency in all possible manner.

Disappearance of Detenu

An infantry contingent commanded by a Major had conducted search in and around the house of the husband of the petitioner. He was placed under arrest at gun point and taken away to the Army Cantonment. Thereafter he continued to remain untraceable. The outcome of an enquiry revealed absence of evidence that the detenu had left Army camp or was ever released.

The High Court held the respondents to be squarely responsible with regard to the mysterious disappearance of the detenu. "Now what remains to be seen is as to what relief the petitioner is entitled to. Missing of precious and valuable life from the custody of the respondent is definitely an act of infringement of fundamental rights. Although precious life cannot be measured in terms of Rupees, in the light of various judgements of the Apex Court, the petitioner is at least entitled to adequate compensation at this stage". Accordingly the High Court directed the respondents to pay compensation to the petitioner in the nature of palliative. It held that, "the Union of India is vicariously liable for any acts or commission of its instrumentality even if they acted beyond their authority".⁸

Judicial creativity has thus remained alive to the security concerns by skillfully plugging the gaps noticed in statutory provisions. The courts have readily armed the soldiers with effective powers to enable them to undertake their tasks competently. At the same time, prompt action has been taken on the factual instances of misuse or abuse of authority. This was a win-win situation for both. The judiciary emerged as the upholder of human rights and guardian of rule of law. The Armed Forces, on the other hand, got the benefit of legitimate sanction to their operating procedures. Henceforth, it could genuinely claim its actions having been accorded accountability and transparency.

Notes

1. Naga People's Movement of Human Rights V Union of India; *Military Law Journal* 1998 SC 29, AIR 1998 SC 431.
2. Hon'ble Mr Chief Justice JS Verma, MM Punchhi, SC Agrawal, Dr AS Anand and SP Bharucha.

Hon'ble Mr Chief Justice Dr AS Anand, KT Thomas, RC Lahoti, N Santosh Hegde and SN Variava in the order dated 7 August 2001 on the modification application.
3. Civil Rule No.115(k) of 1997, Order dated 26 September 2002.
4. Hiren Chandra Ray V UOI; Gauhati High Court WP No.2730 of 2002 Order dated 21 June 2002.
5. Babuchand Singh, L V UOI; Imphal High Court Civil Rule (HC) No.33 of 1996, Order dated 29 April 2003.
6. Gauhati High Court (Imphal) WP No.591 of 1999; Order dated 24 April 2001.
7. Fatema Begum V UOI Gauhati High Court WP(C) No 1843 of 2001.
8. Zukheli Sema, Smt V Union of India; 1999 *Criminal Law Journal* 49 (Gauhati).