CONSTITUTIONAL LAW IN SPECIFIC SOCIO-LEGAL CONTEXTS

A CASE STUDY OF THE HIGH COURT IN NAGALAND WITH EMPHASIS ON *HABEAS CORPUS*

Dissertation submitted to Jawaharlal Nehru University in partial fulfillment of the requirements for the award of the Degree of

MASTER OF PHILOSOPHY

CHUBATILA

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DECLARATION

I declare that the dissertation entitled **"Constitutional Law in Specific Socio-Legal Contexts: A Case Study of the High Court in Nagaland with Emphasis on *Habeas Corpus*"** submitted by me in partial fulfillment of the requirements for the award of the degree of Master of Philosophy of Jawaharlal Nehru University is my own work. This dissertation has not been submitted for any other degree of either this University or any other University.

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CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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LIST OF ACRONYMS

ACHR- Asian Centre for Human Rights

AFSPA- Armed Forces (Special Powers) Act

CrPC-Code of Criminal Procedure

FIR- First Information Report

GoI- Government of India

JAG- Justice and Advocate General

MISI-Maintenance of Internal Security Act

MP- Member of Parliament

NNC-Naga National Council

NPMHR-Naga Peoples' Movement for Human Rights

NSA-National Security Act

NSCN-IM-National Socialist Council- Isak-Muivah

NSCN-K- National Socialist Council of Nagalim-Khaplang

POTA-Prevention of Terrorism Act

PUCL-People's Union for Civil Liberties

PUDR- Peoples' Union for Democratic Rights

SAHRDC- South Asian Human Rights Documentation Centre

TADA- Terrorist and Disruptive Activities (Prevention) Act

UAPA-Unlawful Activities (Prevention) Act

CONTENTS

CHAPTER ONE

Framing the Problem of Emergency in Law: Introductory Remarks

1.1 Introduction

As I embarked upon the project of writing my dissertation, memories of my fears of uniformed men banging on our doors at the most unusual hours of the night in Mokokchung, a small town in Nagaland, began to haunt me. I recalled everyday life in Nagaland in the early 1990s.This was a situation marked by night curfews which began at 6 p.m. and meant unannounced visits by the security forces[1] at times when most felt vulnerable, mostly in the early hours of the morning. Not once do I remember any women officers accompanying the men from the forces for the various "search" operations conducted at those odd hours. Nor was there the question of any citizen being able to assert their constitutional rights during these searches.

If I were to think back and reflect on what a "normal(ized)" situation meant to the ordinary citizens till the time before the ceasefire between the Government of India (GoI) and the National Socialist Council of Nagaland (NSCN) in 1997, not to forget the initial ceasefire of 1964 between the Government of India and the Naga National Council,[2] it would be one predominated and marred by sounds of gunshots, men getting arrested arbitrarily (either some relatives or some neighbours), stories heard of women being raped and left dead in some corner of the town by "unknown" people, newspaper headlines flashed with everyday news emboldened "an encounter between..." or "one/two/three etc shot dead". There was nothing unusual about it. It was an everyday affair, the "normal".

[1] It may be noted that whether it was from the Central Police Reserved Force, the Assam Rifles, or other para-military forces they hardly made any difference to the people.
[2] The details of the 1964 ceasefire are discussed in the latter part of this chapter.

In this dissertation, I attempt to narrate the story about the socio-legal and political forces at play in maintaining "law and order situation"[3] in Nagaland since the time the infamous Armed Forces Special Powers Act of 1958[4] (hereafter referred to as AFSPA) was extended to cover the state in the year 1972, along with other states in the region. In this thesis I will look at the Act and its implementation over the years to see whether and if the areas under which this Act has been deployed, Nagaland in particular, is constituted as a "*state of permanent emergency/exception*"[5] by gradual institutionalization of temporary crisis arrangements into permanent ones.

Thereafter, borrowing from Nasser Hussain, the dissertation would refer to disposed *habeas corpus* judgments from the Gauhati High Court Bench of Kohima, where this study was based and undertaken, to understand and explore the idea that "the suspension of *habeas corpus* is a marker of emergency" (Hussain 2007). Suspension is not used to connote in the formal sense of the term but understood to mean by-passing or short-circuiting the procedural legal process so as to amount to a somewhat similar situation of it being suspended.[6] The question which underlay this research is how do we think of regimes of constitutional rights in situations when the everyday law is suspended and the institution of the military i.e., discourses of the security state take prominent place in the terrifying work of a police state?

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[3] In the present situation of stalemate between the GoI and the NSCN, the GoI does not refer to the situation of unrest as a "law and order" problem anymore but rather as a "political" one. This we see in the writing of Naga academics such as Dr. A. Lanunungsang (in, Prasenjit Biswas and C. Joshua Thomas (ed.) 2006:383-404).

[4] Earlier Armed Forces Special Powers Act (Assam and Manipur) 1958, extended through the Amendment of the Act in 1972 to include the whole of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura.

[5] The idea of a '*state of exception*' originated from thinkers such as Carl Schmitt and further developed by Giorgio Agamben. Although the concept has been clearly discussed in the latter parts of the work, it would be necessary to mention here that the terms "*state of emergency*" and "*state of exception*" have been used synonymously (although it would be problematic for some), with the understanding that it is in a state of exception that emergency measures are instituted, and at the same time emergency situations calls for exceptional measures.

[6] Agamben uses the term *iustitium* to refer to "suspension of the law" by which he means putting all legal prescriptions out of operation (Agamben 2005:45); he says this suspension creates/results in an *anomie* in the state of exception which is so essential and strategically relevant to the juridical order that this seemingly lawless space is related very closely to the law (Agamben 2005:51).

It is in a state of exception that excesses committed by the state via its armed forces remain unreported and out of the public domain. Infact, such excesses might outnumber those which are alleged in the court. Around the same time that maximum number of *habeas corpus* petitions came to court, side-by-side, mass civilian torture and harassment was a very common feature witnessed in Nagaland. There have been quite a number of instances where such harassments went unnoticed and unreported. However, this research is primarily concerned with those cases which have been reported through the cases filed in courts since the only chance of prosecution for offences of torture and illegal detention lies in, and is derived through written documents, statements and records, which also erase violence on the bodies of the detenus.

For this, the work will draw upon and see how the notion of constitutional law has been understood and used, particularly in the legal realm and in the dispensation of everyday justice. This is necessary since constitutional law and its application cannot be relevant if the socio-legal context of any place and situation is not taken into consideration while it is interpreted. The current work is deemed important since the issue of constitutional law operating through the High Court and the specificity of the socio-legal context in the area has not been explored much although some anthropological works have looked at customary law in Nagaland.[7]

The Constitution's Thirteenth Amendment Act, 1962, provides for special status to Nagaland regarding the undisrupted practice, usage and implementation of naga customary law within Nagaland in matters of social, economic, religious, administrative, civil, criminal, and law and order matters. This work would not, however, delve into the intricacies in the relationship between state law and customary law since the current study reveals that the role of customary law in cases of illegal detention is non-existent and such cases are appealed in the High Court. While this is important work, the work done by human rights activists on the issue of constitutional rights, in the context of states of emergency, has not really been looked at by

[7] However, more research is needed to explore anthropological interest in customary law in the state of Nagaland; especially whether such work has linked customary law with the histories of the struggles for self-determination.

sociologists or political scientists, with a few notable exceptions, to suggest that constitutional law exists in plural contexts or that its interpretation must be located in social, political and historical contexts. Without such location, constitutional law loses its meaning and essence.

However, ongoing research in different areas of life and law in Nagaland suggests that the everyday use of state law cannot be understood without looking at the histories of self-determination in Nagaland. The rejection of state law, in certain domains of life and law; the different ways in which indigenous legal institutions and substantive law has been organized; and the existence of a "Naga Constitution"[8] signaling a *living* constitution; all challenges the foundational violence of the Indian Constitution in the context of struggles for self-determination, albeit the latter is not monolithic.

Some scholars such as Kolsky (2005) suggest that the everyday use of state law is over determined by the way in which the "rule of colonial difference" - the notion of superiority the colonial rulers had over the subjects that being different gave them the legitimacy to rule over them - not only essentialised the difference between the British and the "natives", but also the creation of the very categories of "tribe", "custom" and indeed the very "disposition" of the Naga people. Writings on the Naga people such as that of M. Horam (1939) while making a break with the colonial past continue to be animated by colonial categories. The evocation of the "Naked Nagas", the title of a book written by a colonial anthropologist, Christoph von Filrer-Haimendorf, (1978) continues to underlie assumptions about the people and point out how discourses of assimilation of the Naga people to the Indian mainland operates with notions of racialised differences. Another avid writer on the North-East, Sanjib Baruah speaks about how North East as an imaginative geography has itself been seen as a space of exception – homogenizing differences within – a space that must be marked with a permanent rule of exceptional laws which are seen by the Indian state as a necessity to its sovereignty.

This chapter will provide the layout of theoretical framework upon which the current work is premised. It will also provide an insight into the socio-legal context in which the current case

[8] This is observed by the underground movement, particularly the NSCN-IM.

study came about, as well as its significance. Infact, this chapter will attempt to serve as the connecting thread between all the remaining chapters. It will begin by looking at the Constitution as a text *per se,* followed by delving into the concept of Constitutional law, and moving on to the Bench of the High Court in Nagaland, being the case under enquiry. The intention being to understand how the laws provided for in the Constitution have been interpreted, and how this interpretation in turn impacts on emergency and exceptional situations as well as shapes and defines normal and everyday contexts. Hence, we will specifically look at notions of *habeas corpus* in the context of emergencies particularly narrowing it down to the situation in Nagaland in the 1990s when "law and order" (or rather, the political) situation was at its most chaotic phase and illegal detention and indefinite arrests became an order of the day.

Chapter two mainly deals with the extraordinariness of the Armed Forces Special Powers Act, 1958, and the chapter begins with the political climate in which the Act came about. Using the analysis of disposed *habeas corpus* judgments from the field of study, i.e the Kohima Bench of the Gauhati High Court I examine whether the Act and its powers have been implemented as a 'paradigm of governing' thereby constituting Nagaland as a state of exception. In this chapter I also probe into the kinds of constitutional laws invoked through the Act as well as the various human rights infringements on the citizens under the so-called "disturbed areas". For this, I look at previous judgments that have invalidated or challenged the constitutional validity of the AFSPA which has been the enabling mechanism for such excesses of the state.

The third chapter revolves around the question of torture and custodial deaths, and its silent erasure through the various documents and records comprising a *habeas corpus* petition which defines and constitutes a detenue once he is "arrested" or "apprehended". More importantly I try to study the various standardization and categorization deployed by the army through different categorization, and whether any relation can be drawn between those detenus graded "black" and those tortured while under illegal detention. I focus on how the discourse of the army which classifies the body population into 'white', 'black' and 'grey' intersects with legal discourse on the legality of the detention of those classified as "insurgents". The chapter highlights the techniques used to produce "suspect communities", a phrase used by Singh in

the context of anti-terror legislation. Furthermore, I examine whether there is a relationship between longer detention, torture or custodial death in relation to those detenus who are classified as "black", "white" or "grey".

The concluding chapter summarises theoretical as well as empirical concerns evoked by the study. It makes an attempt at linking and merging the theoretical paradigm with the findings of the research from the field, however inadequate it may be. It also highlights some problems that this research had encountered, while at the same time raising some analytical questions which might serve us purposeful for further inquiry.

1.2 Understanding the Constitution as a Text

The importance of studying the constitution for better understanding of political, social and economic complexities has been emphasized in various discourses so far. Eminent thinkers on Indian politics such as Rajeev Bhargava (2008) have emphasized the need to analyse the Constitution and its legal aspects and provisions in comprehending the political institutions and its apparatuses. We also see changes in understanding of the Constitution as a text, to be read as a moral and ethical document and not merely as a text devoid of any moral-ethical dimension.

However, it is Upendra Baxi (2008) who makes a shift from such understandings of the Constitution and moves on to distinguish clearly between the Constitution as a text, or what he abbreviates as C1, the Constitution as interpretation of the text itself, or C2, and as the theory or ideology of the constitution or Constitutionalism which is shaped by the Constitution in its textual from as well as in its interpretation. The latter he terms as C3.[9] This distinction is really useful when it comes to understanding the complexities of constitutional law, especially since it allows one to map how constitutional law is embedded in social, political and historical processes rather than treat constitution as a frozen and self-referential text.

[9] This distinction is given in Baxi, Upendra. *Outline of a Theory of Practice of Indian Constitution*. In, Bhargava (ed.) 2008

The Constitution, generally understood, is a written (or unwritten) document or a set of rules that lays down norms of conduct for individual citizens. Scholars like Baxi are of the view that "behind every written Constitution is an unwritten one" with the latter often overriding the former that is "elaborately written" (Baxi, 2008:3). Again, many other important writers on the Indian Constitution in particular, Rajeev Bhargava (2008) and Bhikhu Parekh (2008) opine that there is nothing unalterable about the Constitution, so long as it reflects and accommodates the will of all sections of the society. All these arguments reflect the interpretative extent of the Constitution that has been written decades ago.

For the purposes of this research, I will especially look at Constitutional Rights provided under Part III of the Indian Constitution, in particular, Articles 14, 21 and 22 which stipulates for Right to Equality, including Equality Before the Law and Equal Protection Before the Law, Right to Life or personal liberty and the deprivation of that right only according to "procedure established by law", and Protection against arbitrary arrest and detention.[10] This analysis will proceed in relation to extraordinary laws which define how certain spaces and temporalities are marked by exceptions to the rule of law regime. It would be important to state here that an analysis of extraordinary law cannot be devoid of reference to the colonial regime.

We know that a common feature of most post-colonial societies entails an analysis of how colonial legality had its own style of leaving its imprints in the colonies (not to forget the inverse effect on them from the colonial experiences), which was to be the underlying principle along which most legal principles and discourses were to be premised upon. This is particularly visible especially in the area of criminal law and other repressive laws meant to contain secession, revolts and other oppositions to the government. A report of the Independent People's Tribunal states, "since Independence, the Indian Government has adopted the same strategies to deal with civil dissent and opposition to its governance in a variety of circumstances, echoing the system of colonial governance under the British" (Pelly 2008:2). It goes on to give the example of how the Armed Forces Special Powers Ordinance introduced by the British in 1942 to repress the "Quit India" Movement was resurged in the

[10] Referred to Bakshi. 2005. P.N. *The Constitution of India*. 7th Edition. Law Publishers (India) Pvt. Ltd. Allahabad.

form of the Armed Forces Special Powers Act in 1958 to counter the various secessionist movements in the North-East as well as Kashmir and the Punjab. The analysis which follows, however does not explore the constitution as a historic text, although it suggests the points at which the genealogies to colonial law become apparent.

To clarify this point further, I focus on that aspect of the Constitution, which implies the interpretation of laws provided for in the Constitution, what Baxi refers to as C2 or "constitutional hermeneutics" in his conceptualization of Constitutions, and not as a historic text, what Baxi calls C1(2008). By constitutional hermeneutics we mean judicial interpretations of the written text over time. These interpretations are usually more pronounced through the judicial organ of the state, through various discourses in the court-room and through its judgments. Hence, I will be directly looking at judgments on *habeas corpus* and its analysis in interpreting provisions given in the Constitution related to citizenship and the right to life and liberty.

These interpretations will be looked at specifically from the way in which cases of *habeas corpus* disposed before and around the time of the ceasefire have been dealt with by the judiciary operating in the state. For this, I will analyse *habeas corpus* judgments covering the period from the year 1995 till 2006 gathered during field work from the Gauhati High Court, Kohima Bench to understand whether the interpretation of constitutional law constitutes the North East as a permanent state of exception. A similar argument has been made by Ujjwal Kumar Singh (2007) in the context of the anti-terror laws in India. His study based on analysis of newspaper reports and judgments shows us how temporary laws have become permanent – thereby defining states of exception as permanent. He also shows us how ordinary laws are brought within the ambit of extraordinary laws – what he calls "interlocking of the ordinary with the extraordinary" – thereby showing us that even routine criminal law is brought under the ambit of the extraordinary (Singh 2007). He details how procedural changes espoused in extraordinary laws creep into ordinary laws, thereby making temporary measures permanent.

In carrying out such an exercise, I wish to understand various categorization and standardization used in the judgments and related documents to see how the law defines

certain categories of people, which are integrated or domesticated in legal discourse for both extraordinary and normal contexts.[11]

Before we engage in a thicker discussion on the state of emergency/exception and its relation to the writ of *habeas corpus* it would be deemed necessary to introduce in brief the political situation in Nagaland and place the situation of legal aspects in Nagaland. In doing so, one would contextualize the case of constitutional law in Nagaland to see whether constitutional law is embedded in specific socio-legal contexts. Hence the interpretation of judgments on *habeas corpus* cannot but begin with looking at the context in which appellate law has developed in Nagaland.

1.3 The Archive - A Brief History of the High Court

The fact that Nagaland is yet to have its own High Court till today has been the object of public discussion lately. The absence of a much needed Court of Records in an area where massive human rights infringements take place is quite significant and questionable. Hence, the High Court becomes part of electoral politics and a signifier of the "development" of the state. The questions of easier accessibility to justice and the symbolic role of the High Court in a state still remains denied in Nagaland.

The only Bench existing under the jurisdiction of the Gauhati High Court in Nagaland is the Kohima Bench which entertains all kinds of civil suits, criminal cases and property (particularly land) disputes that come up from the lower courts including the District Courts. This Bench was made into a full-fledged Bench only on the 1st of December, 1977. It is only recently that decision was made to construct a separate, full-fledged High Court in Kohima for the state of Nagaland.[12] The new High Court building is still under construction a few kilometers away from the state capital, Kohima. This is amidst all debate and tussle about the

[11] The analysis of such standardization and categorization are discussed in greater details in Chapter 3.

[12] Foundation stone was laid for the New High Court complex at Mereima, near Kohima by the Chief Justice of India, Justice K.G.Balakrishnan on the 21st of May, 2007 and construction is still on. Apparently, this comes about after a lot of internal tussle between the guardians of customary law, the administrators and the legal fraternity over the issue of the Constitution overriding the customary law in the state. However, our focus is not over the conditions leading up to this stage of the formation and construction of a separate High Court.

"modern legal system" overtaking the traditional legal system of customary law between the legal fraternity in Nagaland and the safe guarders and protectors of the latter system. The Chief Minister of Nagaland who was present for the occasion of laying the foundation stone of the new building marked the peaceful transition when, in his address, mentioned "while we nurture and applaud our own customary laws, we have also chosen to adopt the modern legal system and have taken all measures to strengthen and make it more efficient."[13] This principle of legal "efficiency" could be one primary factor behind the construction of the full-fledged High Court for Nagaland.

My research was dependant on disposed judgments of *habeas corpus* from the Kohima Bench of the Gauhati High Court. The High Court Benches of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram and Tripura apart from Nagaland come under the umbrella of the Gauhati High Court. I excavated these files of judgments from the dusty library of the High Court; the cases covered the period from the year 1994 to 1998 and one case in 2006. No particular time frame was followed in selecting these judgments except that these were all the disposed cases that had come to the Kohima Bench after it was set up as a full-fledged Bench in the year 1977. The officials and the practicing lawyers of the Bench enlightened me of the fact that since the composition of a division Bench was quite irregular, cases of *habeas corpus* were normally filed at the principal seat, i.e. the Gauhati High Court, before the Kohima Bench became more regular around the years 1992 and 1993.

Apart from those judgments, the study also relied on personal interviews held with some of the practicing lawyers from the High Court Bench in Nagaland since the Bench was constituted. The interviewees have all been practicing since the time prior to the ceasefire, the heydays of *habeas corpus* cases being filed.

However, it is regretful that this research could not study and accommodate the voices of people who had been detained as well as their relatives'. It would have been more enriched by incorporating the experiences people had to go through during and after the detentions. Also,

[13]From a newspaper report available online at:
http://nagarealm.com/index.php?name=News&file=article&sid=3621.

it would have been interesting to interact with the local police and doctors working at the state-run hospitals even before the ceasefire was declared. These were not feasible given the time and space constraints during the research.

I would also like to acknowledge the fact that there might have been inconsistencies in the High Court Bench, from where the cases for analysis were collected, with regard to record-keeping. The maintenance of the disposed cases was such that some of the cases entered under the 'disposed cases register' could not be found in the library, while about two unmentioned ones were found. The fact that the Kohima Bench had been irregular before the early 1990s somewhat explains the irregularity in the record-keeping of the disposed cases in the High Court Bench.

1.4 State Law and the Movement for Self-Determination

The contestations around building a High Court in Nagaland must be read in the context of the history of self-determination movement in Nagaland. The history of political unrest in Nagaland and its uneasy relationship with New Delhi dates back almost a century prior to India's independence in 1947.[14] In fact, it is one of the oldest political stand-offs in the history of internal struggles of a nation, post-independence, the root cause of which is inherent in the nature of the colonizers' approach towards the Nagas and the way they dealt with the people through various policies beginning in the late 19th Century. We see this argument even in the writings of Marcus Franke, when he says "...the war that afflicts the Naga Hills today, and which has spread to the whole of what is called India's North-East today, may be understood as a continuation of the imperial conquest begun by the British" (Marcus 2006:69). He traces the usage of force and consequently, violence, on the Nagas[15] first by the British colonizers and later by the Indian government when the Naga people would not comply with their

[14] There are a lot of disagreements and variations on the genesis of the Indo-Naga conflict among authors. However, it was mainly as a result of the British colonial interference during the late 19th Century with their annexation of the Ahom (now, Assam) Kingdom and further into neighboring areas inhabited by the Nagas.

[15] The category "Naga" is a highly contested term today, more so with the complexities attached to the independence movement and the demand for a "Greater Nagalim" by the Isak-Muivah (I-M) faction of the National Socialist Council of Nagalim. Sanjib Baruah also mentions this problematic in his work '*Confronting Constructionism*', wherein he highlights how the Indian Government in its various Census deploys the term "tribe" for the separate Naga tribes and not the word "Naga" (in Baruah.2003: p.322).

policies regarding the latter's question and demand for self-determination. The policy of the British that shifted between 'controlling' Naga tribes on the one hand and pursuing non-interference into Naga affairs[16] on the other was to turn into a major breeding ground for future political complexities both for the Nagas as well as the Government at the Centre.

The Naga encounter with the British and much later with the Indian state were both detrimental and decisive in shaping its socio-legal and political present. Sanjib Baruah opines that "the Naga–British encounter was one of the most violent chapters in the history of British conquest of the subcontinent" (2003:26). He also narrates the violent story of ten 'punitive expeditions' against Nagas between 1835 and 1851. Baruah similarly sees the attitude of the Government of India towards the Naga issue as a continual process that has been inherited from the British colonialists. Hence, he says: "in its inability to see Naga nationhood as a work in progress, this mind-set is remarkably reminiscent of colonial writings that sought to deny the status of nationhood to colonized peoples on account of their supposedly perpetual state of conflict and disunity"[17]

For a better understanding of the work, it would be necessary here to give a brief introduction on the Indo- Naga relationship- their historical relationship and its developments over the last six decades in particular. Owing to the policy of non-interference adopted for the Nagas by the British, the Government of India Act, 1935 had kept the Naga Hills as an "Excluded Area", outside the domain of India.[18]

One of the crucial issues in the Indo-Naga relationship is that of the betrayal of the Nagas by the Government of India on the Hydari Agreement or the Nine Point Agreement signed between the Naga National Council,[19] and the then Governor of Assam Sir Akbar Hydari, in June 1947. The agreement was the deciding factor for the Nagas in their quest for independence right after the colonialists left India. Apart from recognizing the Naga National

[16] see Chasie, *Chapter 7*:244
[17] See Baruah, (2003:334)
[18] The fact that the Naga Hills was left excluded, as outside India, and that the place was never under the control of the latter, was the one point on which the pioneers of the Naga movement demanded the independence.
[19] The NNC is the first political organization of the people of Nagaland, which went on to become the umbrella organization in the fight for Naga independence. It was formed out of the earlier Naga Hills Tribal Council. (see Chasie,*Chapter7,* p.245)

Council (NNC) as the sole political authority of the Nagas, the agreement also contained some other important points. The main point of agreement and the one on which the NNC laid major emphasis was the Ninth point of Agreement which stated –

> The Governor of Assam as the Agent of the Government of the Indian Union will have a special responsibility for a period of 10 years to ensure the observance of the Agreement, at the end of this period the Naga Council will be asked whether they require the above agreement to be extended for a further period or a new agreement regarding the future of Naga people arrived at.[20]

It was on this point that the NNC's main demand was placed, and which was not taken into serious consideration by the Government of India. It was at this juncture that the Naga people's demand turned to immediate independence from the Indian mainland. This situation of confusion revolving around the interpretation of the "review" which was to be done after ten years, created a stalemate letting the NNC to declare Naga Independence on August 14, 1947, one day prior to the independence of India (see Chasie). It was in the year 1963 on 1st December that the state of Nagaland was conferred full statehood, and it went for its first General elections in January, 1964. However, the political climate was so tense between the Government of India and the Naga leaders that a cease-fire agreement between the two was entered into by May 24th, 1964 and the details ratified in the month of August. As Gordon P. Means and Ingunn N. Means writes, "the truce took effect on September 6, 1964, amid great jubilation" (Means and Means 1966-1967:300). The terms and conditions under which this cease-fire was signed by both parties are:

> The Government of India agreed that:
> the security forces will not undertake
> a) Jungle operations
> b) Raiding of camps of the underground
> c) Patrolling beyond one thousand yards of security posts
> d) Searching of villages\aerial action
> e) Arrests and
> f) Imposition of labour by way of punishment
> During this period fines connected with allegations of complicity with underground activities will not be imposed.

[20] At, http://www.ipcs.org/TheNaga-AkbarHydariAccord1947.pdf. accessed on 31/01/2009.

...on the International border security forces will maintain patrolling to a depth of three miles.

On their part, the underground resolved to the following conditions:
refrain from

a) Sniping and ambushing
b) Imposition of fines
c) Kidnapping and recruiting
d) Sabotage activities
e) Raiding and firing on security posts, towns and administrative centres, wherever there are security posts and approaching within one thousand yards of security posts.

...there will be no parading with arms in inhabited areas...

...no arms will be imported from abroad by the underground during the period of stoppage of operations. (P. Means, 1971:1019-1020)

Since then, the relationship between the two have been one of suspicion and unrest, at the expense of thousands of innocent lives lost in various encounters over many decades. Also interesting is how the "Nagas" themselves are enmeshed in an imbroglio in this very movement for independence. However, we do not go foray into that issue for this work.

To abbreviate a complex story due to constraints of space, the endless confrontations between the underground factions and the Indian Army led to a point where ceasefire had to be declared in the state of Nagaland. It was initially the Isak-Muivah faction of the NSCN which agreed to ceasefire with the Government of India affecting from the 1st of August, 1997 followed shortly by the Khaplang faction in November 14, 1998. It was in July 2007, after many extensions, that indefinite cease-fire was declared. The main contents of the agreement were:

For securing a peaceful political solution, discussion has been held between the Government of India and the NSCN leadership. It has been mutually decided to cease-fire for a period of three (3) months with effect from the 1 August 1997 and embarks upon political level discussions on the bases of the following terms:

1.The talks shall be unconditional from both sides;
2.At the highest level; that is, at the Prime Ministers' level; and
3.The venue of the talks shall be anywhere in the world, outside India.

(Raising: 2002)

The latest ceasefire of 1997 has been extended periodically till today between the two parties- the NSCN-IM and the Government of India. The declaration of the ceasefire raises many questions for our study as well. It provokes one to question the "normal" situation of law and order as opposed to one which is "disturbed" due to the labeling of which draconian Acts such as the Armed Forces Special Powers Act (AFSPA, 1958) has been in operation. Questions such as - Why is the AFSPA still unrevoked if the ceasefire is in place? Is the ceasefire supposed to bring about "normalcy" or does it accentuate the situation of emergency? If the AFSPA is an emergency normalized measure, what would be the "normal" here? Is the normal abrogated by the ceasefire? Or is it a condition of "suspended normality"? - continue to haunt many concerned about the issue.

The ceasefire has brought about certain shifts in the positions of both parties in the negotiating table. After the ceasefire, the Government of India's requirement of the NSCN-IM to accept the Indian Constitution has changed, at the same time the NSCN also has decided to begin negotiations with the government without demanding that the latter first concede its demand for an independent Nagaland.[21]

To assess the ceasefire, in what is called the "*Kohima Declaration*", of 2001, the partial ceasefire which has lasted for over three and a half years was discussed at length as a cause for concern because-

> (a) Political dialogue has (was) yet to start. (b) The Armed Forces Special Powers Act and other draconian laws continue to be in operation. (c) Organizations with which negotiations are to be held have been banned and warrants of arrest issued against their leaders. (d) Violations of basic rights of people carry on. (e) A campaign of calumny has been unleashed against Naga civil society groups. (Mohan and Krome, 2001:1484)

The main demands of this Declaration included:

> (a) The withdrawal of Armed Forces Special Powers Act, National Security Act, Nagaland Security Regulation, 1962, Assam Maintenance of Public Order, 1963, Unlawful Activities Prevention Act and other such draconian laws and democratic rights of people be restored; (b) government of India must ensure withdrawal of all cases against the members of the Naga National Movement; (c) ceasefire be honoured in letter

[21] In, Long Road to Peace in Nagaland. Aug.2-8, 1997. *Economic and Political Weekly*, Vol.32, No.31, pp.1939.

> and spirit between the two parties, namely, the government of India and NSCN (IM) and role of the civil administration be fully established; and (d) the government of India without further delay fulfill its commitment to hold unconditional talks at the highest level. (Mohan and Krome 2001:1484)

In a more recent study on the ceasefire, a fact-finding committee was constituted for the 'Naga' areas including eminent lawyers like Nandita Haksar and Sebastian Hongray. The team made a very significant detection by finding out and "disclosing" that: "the fact that there was no ceasefire between the NSCN (IM) and the NSCN (K) was being used by the Indian state to empower the armed forces and to undermine the ceasefire monitoring mechanism."[22] This further leads us to question the intricacies involved in the ceasefire story operating in Nagaland.

This seemingly lengthy discussion on the ceasefire is deemed necessary to understand its effects on an insurgency-affected area, where arbitrary detentions of "suspects" used to be an everyday affair before the ceasefire. Prior to the declaration of the ceasefire cases of detention coming to the High Court was quite rampant. However, once the ceasefire was in place, *habeas corpus*[23] cases were almost forgotten. And this is quite puzzling since the AFSPA, under which all these detentions used to take place, was still in force. However, before we go into all that, I now look at the meaning of *habeas corpus*, followed by inquiring into the working of the only High Court Bench in Nagaland where all these *habeas corpus* cases come.

1.5 Understanding *the writ of habeas corpus*

I begin this section by turning to the doctrinal histories of jurisprudence of *habeas corpus* in India. As we know, the literal meaning of the word "*habeas corpus*", with its etymological roots in Latin, is "have the body", "produce the body", or broadly, "let the body go free"(Hussain 2003:36). It is a legal remedy provided for in almost every modern Constitution

[22] This was published in one of the local dailies of Nagaland, *Morung Express,* on March 17, 2009.
[23] It is a writ petition filed in court, whereby the court directs the party responsible for the detention to "produce the body". This is discussed in greater detail in the later part of this chapter.

of the world today to its citizens as a safeguard of individual freedom and liberty, particularly from the excesses of state power. This writ is "a court order commanding that an imprisoned person be personally produced in court and that an explanation be provided as to why that person is detained."[24] It seeks to establish the procedural legality of the detention. It is one of the most fundamental legal remedy guaranteeing the right of a person to be free from unlawful detention or custody. Hence, Clark and McCoy aptly call it "the most fundamental legal right" (Clark and McCoy, 2000).

Hartmann (2005) suggests that the origin of modern institution of the writ of *habeas corpus* can be traced to the year 1215 when King John was forced by the feudal lords to sign the Magna Carta.[25] Most significant is the commonly called "*nullus liber homo*" clause or Article 39 of Magna Carta which states,

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land. (Hartmann 2005:5)

Although the term "free men" here mostly included the feudal lords and barons, it served to be an important step in setting the trend for further developments of the concept, to gradually include in its ambit the ordinary people as well. Traditionally, the writ required that the body be produced before the court to ascertain the legality of detention. However, in the contemporary times, the procedure of issuing show cause allows the proceeding to be decided without having to produce the body in court. [26]

Clark and McCoy (2000) argue that the writ is dependent upon various political and legal features. This is so because the writ exists to establish the legality of detention. Once this is established, the purpose of the writ is fulfilled and nothing further can be done. As Clark and McCoy mentions, "if laws authorizing detentions permit what would otherwise be arbitrary detentions, then the writ is denied is efficacy" (2000:35). The writ cannot therefore go beyond

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[24] Donald E. Wilkes, Jr.:2002.
[25] See Thom Hartmann's (2005) article *"First They Came for the Terrorists"*, Jan 10, p.5, http://commondreams.org/views05/010-33.html.
[26] See (Donald E. Wilkes. Jr. 2002).

determining the legality or illegality of the detention. Let us now examine the history of *habeas corpus* in colonial India to see its gradual evolvement to the post-colonial present.

To understand the contemporary exercise of *habeas corpus* in India, one needs to look into the circumstances that led up to its introduction. Nasser Hussain, in his provocative work on emergencies called *The Jurisprudence of Emergency,* (2003) traces the legal history of *habeas corpus* in India to the seventeenth Century during the time of Lord Coke, through the jurisdiction of the Crown Court in Calcutta. The writ originated as a means to facilitate sovereign power over his subjects and his territory and in order to bring the latter into direct confrontation with the law. However the writ may be currently understood and used, originally when it was introduced it was meant as a "protection that grew out of a reciprocal subjection and allegiance" (Hussain 2003:69). This is an insightful thought for nation-states such as India where citizens' allegiance to the state is questionable, especially when demands for secession from the state are quite rampant from different groups within itself.

However, what began as a writ of sovereign privilege was converted by Lord Coke and his successors into a subject's right of appeal. Hussain looks at how *habeas corpus* was used to legitimize colonial rule in India and how it gradually evolved into a resource of rights for the citizens against the state executive. Hussain makes a foray into the question of emergency powers and its deep implication with the suspension of *habeas corpus* by taking a more insightful look at rights viz-a-viz the executive powers in colonial India through the Crown and its representatives. In doing so, he draws connection between the suspension of the writ and its relation to the rule of law. He interestingly sheds light on the way the writ was used over the colonial subjects as a technique of governing or, to use Foucault's term, "governmentality"[27] and as a manoeuvre towards the consolidation of state power. Hence, Hussain very aptly states that "more than the production of a right, new or otherwise, *habeas corpus* indicates a maneuver in the production of a new configuration of law and sovereignty" (Hussain 2003:72).

Habeas Corpus was an indicator for the Crown in recognizing his subjects as well as "a mode of binding subjects to the law and its economies of power" (Hussain 2003: 70). As Hussain

[27] This idea has also been mentioned in Chapter 3(see foot note 3).

mentions, "the extent of the King's sovereignty is understood by where the "writ runs", where it can be issued and enforced" (2003:70). Hence, it also acted as a signifier of administrative control over the same jurisdiction over which it 'ran'. The legal subject, then, is posited as a by-product necessitated and created by power and, as he calls it, "one of its prime effects" (Hussain 2003:71).

Having discussed the context in which the writ of *habeas corpus* originated and evolved since the time of the colonialists, we now move on to see how it was further developed in India after its independence. In the Indian Constitution, Articles 32[28] and 226[29] define the writ jurisdiction of the Supreme Court and the intermediate courts, such as the High Court. These articles allow these courts to use the writ of *habeas corpus* to enforce the fundamental rights guaranteed in Part III of the Constitution, such as equality and the protection of life and liberty. The writ of *habeas corpus* is an extraordinary remedy, and petitioners can legitimately invoke it only when they have exhausted all other administrative and legal remedies. As mentioned by Hussain, the original purpose of *habeas corpus* was not to release people from custody but to secure their presence in custody, due to which he finds it ironical (Hussain 2003:69). This colonial history has to be read alongside reflections on postcolonial legality.

In Indian politics and history, the right to *habeas corpus* has gained much importance. During the Partition, abducted women and children were denied the right to *habeas corpus*.[30] Likewise, the period of Emergency proclaimed by Indira Gandhi witnessed the denial of the right to *habeas corpus* to citizens, leading to mass arrests. Thereafter, the 44th amendment was

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[28] This article confers: "[Remedies for enforcement of rights conferred by this Part.- [1] The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. [2] The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari*, whichever may be appropriate for the enforcement of any of the rights conferred by this Part. [3] Without prejudice to the powers conferred on the Supreme Court by Cls. (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Cl. (2). [4] The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution" (cited in Bakshi 2005:60)

[29] This article confers: "[Power of the High Courts to issue certain writs.- [1] Notwithstanding anything in Art. 32 4[***] every High Court shall have the power, throughout the territories in relation to which it exercises its jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs, including, 5[writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari* or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose.]" (cited in Bakshi 2005:160)

[30] see, Veena Das. 1995.

made ensuring that right to personal liberty cannot be taken away even under emergency.[31] It may be noted that historically the politics of partition marked the emergence of the conception of citizens as potential secessionists and terrorists.[32] This practice has been and is continued implicitly in many insurgency affected areas of the country even today.

The suspension of habeas corpus is generally taken as a marker of emergency in general.

(Hussain 2003:70)

Taking a cue from Hussain, I proceed to looking at the suspension of the rights and privileges under the writ of *habeas corpus* as a major indicator of an emergency situation in any Constitutional set-up. This would then provide a lead-in to discussing what "Emergency" is, and its relation to the creation of a "State of Exception".

1.6 Emergency and Constitutions

The term 'emergency' embodies a much broader idea than mere war from outside the state, natural calamities and catastrophes sweeping the whole or part of a country and such. Today, it is understood by many writers as well as administrators and legislators as one which entails and demands for immediate attention even in matters internal to the state itself. For instance, Clark and McCoy explain a state of emergency as "*something that does not permit of exact definition: it connotes a state of measures calling for drastic action*" (Clark and McCoy 2000:83). They make a very interesting comment by saying that emergency situations are inclusive of those situations where "public order, preventive detention, or internal security laws co-exist with the normal legal system" (Clark and McCoy 200:83). The notion of 'Emergency' and the space for its proclamation is implicit in almost all written constitutions as many authors have reiterated, most vocal amongst them being Carl Schmitt, Agamben and Nasser Hussain, among others.

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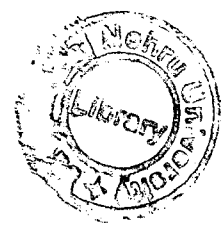
[31] See Baxi, Upendra. 1980.
[32] See Kasibathla 2005.

Giorgio Agamben in a more theoretically intense idea of emergency (which he terms the '*state of exception*'), conceives of it as arising from necessity which qualifies the decision or act as legal. In his own words, "if something is done out of necessity, it is done licitly, since what is not licit in law necessity makes licit. Likewise, necessity has no law" (Agamben, 2005:24). In the Indian context, writers like Venkat Iyer also pose the relation between emergency and the idea of necessity. He traces the concept of emergency way back to the institution of organized government, and places it juridically upon the "principle of necessity, which recognizes the right of every sovereign state to take all reasonable steps needed to protect and preserve the integrity of the state." (Iyer 2000:1). Hence, in all these writings we see the close interlink between emergency situations and the principle of necessity.

Nasser Hussain undertakes a critical study of provisions for emergencies in the Constitutions of modern States today. He looks at how emergency provisions requiring the suspension of the rule of law are both explicitly and implicitly provided for in most Constitutions and how emergency appears as "a constant third term in discussions of law and state"(Hussain 2003:17). In his own words, "emergency is an elastic category, stretching over political disturbances such as riots, the situation of sovereign war, and even constitutional crises within the sphere of the state" (Hussain 2003: 17). Hussain calls such situations as '*moments of exception*' (HUssain 2003:17). Hence, we can see that he is not concerned only with Constitutional emergencies in that strict sense of the term when he is talking about emergency.

Inheritances of a colonial past cannot be simply overlooked for many reasons in a work like this. Firstly, it will give us a broader understanding of the pre-colonial and post-colonial settings in which socio-legal principles developed and functioned. Secondly, it would show us how a post-colonial state, in its attempt move away from its former condition of being subjugated, to one of asserting its prerogative and sovereignty over its subjects, ends up emulating and practicing the very legal and governmental principles and techniques that they were trying to do away with, however ironical it may be. Hence, carrying forward the colonial legacy of governmentality by which techniques particularly of criminalization and methods of torture were normalized and given an externally "humane" face and form.



In an important work called *State Terrorism: Torture, Extra-Judicial Killings and Forced Disappearances in India* by the Independent People's Tribunal in association with the Human Rights Law Network, post-colonial criminal laws are seen as a "reincarnation" of the colonial legal policy undertaken by the state. The very introduction of the book states this very clearly when the author writes "since Independence, the Indian Government has adopted the same strategies to deal with civil dissent and opposition to its governance in a variety of circumstances, echoing the system of colonial governance under the British" (Pelly 2008). Hence, the provisions for emergency situations are very well an inheritance of the colonial past. This is quite evident in the way in which many repressive and black laws existing today in the country such as the Prevention of Terrorism Act (POTA), Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), and especially the AFSPA have been originated and employed in such a manner that the same techniques which the colonial state used in controlling and governing the natives continue to be in use by the post-colonial state over its citizens in maintaining its hold over them.[33] As Dr. Naorem Sanajaoba opines, "AFSPA is the best evidence of sustaining colonial law in a new post- colonial era" (2006:10). The narrative of emergency and its provisions are largely written or built into written constitutions which imply its inherent colonial nature.

1.7 State of Exception or Emergency and the Writ of *Habeas Corpus*

It is quite evident from the practice of many democratic states, as we have seen even in India during the Emergency period proclaimed by Indira Gandhi, that situations of emergency and laws related to it entails curbing, either partially or wholly, of the extent to which the writ of *habeas corpus* functions. Sharpe notes that "most of the habeas corpus cases challenging executive power arise in times of war and emergency, and conversely, the most significant block of cases interpreting emergency powers are the habeas corpus cases" (cited in Hussain 2003:70). This shows the reciprocal relationship between the state of emergency and *habeas corpus* whereby one define and interpret each other. Hence, Hussain has rightly said that the

[33] This has been discussed in more detail in relation to the AFSPA and its usage in the second chapter under the section "*Background to the AFSPA*"

suspension of the writ is taken as a marker of emergency. We can also add, therefore, that a state of emergency defines the limits of *habeas corpus* and its operational aspects.

Taking the theoretical paradigm of Giorgio Agamben's 'state of exception', I attempt to explore the paradox inherent in the Indian Constitution in granting Right to Life and Liberty to citizens on the one hand and the impossibility/hindrances to enjoy them on the other as a result of the 'undeclared emergency' in the form of the deployment and enforcement of Armed Forces Special Powers Act since 1958 in almost the whole of North-East of India. Although Emergency has not been declared under Article 356 of the Constitution in Nagaland and the rest of North-East India, the declaration of the area as "disturbed" essentially amounts to declaring a state of Emergency, but evades constitutional safeguards. The Armed Forces Special Powers Act of 1958 which goes against the provision of a citizen's Right to Life and Liberty is more draconian than Emergency Rule. It grants state of Emergency powers without declaring an Emergency as prescribed in the Constitution. I argue that this technique enabled through the mechanism of modern governmentality, creates Nagaland and most of the North-East of India into a state of exception where the exception has now become the 'rule' or the 'norm', where the temporary has become permanent and entrenched.

Agamben (2005) uses the term *state of exception* to explain a judicial phenomenon in which law is suspended on occasion of armed revolt or internal disturbance. He describes the state of exception as a "point of imbalance between public law and political fact...situated...in an ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political...no-man's-land between public law and political fact..." (2005:1). What is interesting is the way Agamben looks at the state of exception as the dominant paradigm of government in contemporary politics whereby an exceptional measure transforms into a technique of government. Agamben clearly mentions the rationale over his choice of "state of exception" as the terminology more qualified than the German *Notstand* or "state of necessity" and French *état de siege fictive* or emergency decrees and state of siege. (2005:4). In French parlance, the term *"state of siege"* is generally employed to explain an extraordinary police measure to tackle internal sedition or disorder (2005:5).The state of siege could only be declared with a law. Agamben however, finds both the notions of state of siege and martial

law to be inadequate and misleading in defining and understanding the phenomenon under investigation (2005:4). To put it simply, Agamben's concept can be understood as the relationship between law, state of exception and politics.

In examining the position of the state of exception in the sphere of the juridical order, Agamben identifies two strands in the legal tradition.[34] While the first strand consider it as something external, "essentially extrajuridical, de facto elements, even though they may have consequences in the sphere of law" the second strand considers it as "an integral part of positive law because the necessity that grounds it acts as an autonomous source of law"(Agamben 2005:23). Agamben levels out this dichotomy by suggesting it to be "neither external nor internal to the juridical order...precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other" (2005:23). It is this principle of being unable to distinguish between the inside and the outside that renders the state of exception possible.

To avoid terminological confusions, it would be helpful for us to understand the difference between the "state of emergency" in Hussain's terms and the "state of exception" in Schmitt's terms. Although both terms seem to imply the same meaning, i.e. suspension of the normal order and the rule of law in times of State exigencies, Hussain find it difficult to use the theoretical framework of the state of exception as he finds it inadequate to explain the hyper-legalities of modern emergencies. In his work on Guantanamo, Hussain mentions this difficulty very clearly when he says,

> ...its (*referring to the state of exception*) specific substance and connotative associations are ones of decision and declaration, abeyance and suspension, and an emptying out of set rules from governance. But this is all at odds with the proliferation of regulations and administrative procedures that mark the daily management of contemporary crisis (Hussain 2007:740).

This hyperlegality Hussain sees in the proliferation of new laws and regulations even transformed from older ones to be employed for more novel purposes. It is a technique of governmentality employed by the modern state in its operation of modern power. In this work,

[34] Ujjwal Singh has also clearly mentioned these two strands drawn by Agamben in his work *The State, Democracy and Anti-Terror Laws in India*, (2007) Sage Publications, New Delhi, p.20.

Hussain makes a stronger claim that the state of exception no longer exists to mean the suspension of a regular law, or even a space of non law, as in the traditional sense, but rather that it is hardly an exception at all today. He mentions, "today most emergency laws are neither temporary nor categorically distinct from a larger set of state practices."[35] Hussain examines the emergency regime and looks at the nature of 'hyperlegality' that has been operating in Guantánamo Bay, Cuba, post-9/11 where hundreds of men have been detained without no proof of them being either prisoners of war or criminals, under excessive interrogation and kept "as a kind of al Qaida data base to be minded indefinitely."[36]

Hussain looks at the situation of Guantánamo as a perfect example of how administrative and bureaucratic legality is intensified in the modern state of exception, (or rather, emergency). It is also a site where ordinary regulations and exceptional powers transfuse to form a "blurred zone of governmentality."[37] This indicates the blurring of the norm and the exception in Guantánamo as an indicator of modern hyperlegality in a state of emergency of which Hussain talks of.

Hussain compares this permanent state of exception in Guantánamo to India where the British Constitution permitted temporary exceptional powers to those overseeing the colony. Hussain looks at how *habeas corpus* was used to legitimize colonial rule in India and how it gradually evolved into a resource of rights for the citizens against the state executive. Likewise, he evokes the colonial historicity of Guantánamo which as a naval base had been acquired simultaneously with the Panama Canal Zone. He mentions how the United States in 1903 supported a Panamanian secessionist movement in order to acquire the ten-mile zone of the canal with all "rights, power and authority."[38]Since then, the United States had claimed the space as between laws, "in the interstices of multiple legal orders" to use Hussain's words. However, he finds it problematic to refer to Guantánamo as a "space beyond regular law" as the United States prefers to call it. It is this form of multiple legal orders and particular form of disciplinary rule in Guantánamo that form the state of exception with its modern hyperlegalities which is both beyond the norm and the exception for Hussain.

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[35] i.b.i.d., p.735
[36]Quoted in i.b.i.d., p.750, as mentioned by an interrogator to CBS News.
[37] i.b.i.d., p.749
[38] i.b.i.d., p.738

1.8 Conclusion

To make a conceptual link between the notion of emergency, state of exception and *habeas corpus*, it is pertinent for us to understand that it is in the state of exception that even citizens' judicial remedies apart from their fundamental rights are abrogated and suspended. Citizens become, to use Agamben's words, 'bare bodies', undistinguishable. It is therefore important to look at the context of *habeas corpus* as it remains imperative to the definition of the exception. As reported by the UN Working Group on Arbitrary Detention in its report of December 17, 1993, States of Emergency tend to be a 'fruitful source of arbitrary arrests', so much so that the measures taken by the military in 'maintaining law and order' far outweigh the situation (Report: 1993). In a state of exception, the remedy of *habeas corpus* becomes operational when governance mechanism of the state takes over powers of law from the state to maintain 'internal cohesion' on the one hand, and takes away basic fundamental rights of citizens on the other.

An important technique by which the state adopts the state of exception on certain geographical areas or community groups within the state is through what Ujjwal Singh terms the "politics of exclusion". This is achieved through extraordinary laws which become instrumental in maintaining the hegemonic structures of the nation-state. Hence, he brings out the sharp difference between the AFSPA and other anti-terror laws, particularly the POTA, when he states:

> it (AFSPA) externalizes and excises from the political community, entire populations of a region...while the AFSPA caters specially to the 'extraordinary' situation in the North-East, other repressive laws which operated in the rest of the country- the NSA, the UAPA 1967/2004, and the lapsed TADA and POTA-were and are in force here (Singh, 2008:248).

Singh takes the instance of Acts such as the Preventive Detention Act, the Prevention of Terrorism Act and the AFSPA to show how the state externalizes parts of the population from the political community to iron out diversity(2007: 49-50). He mentions how these Acts reflect any intolerance of specificity in the name of 'harmony' or 'consensus' vital to 'national integration', and in the process exacerbates conflicts and distancing between plural

collectivities. This provides us with a clear example of how the state constitutes the exception in a legitimate fashion.

Taking the very close example of the Armed Forces Special Powers Act being presently deployed as a technique of governing in a state of emergency in Nagaland, one could look at how this Act and its operation explains how all these - i.e. Constitutional law, state of exception, *habeas corpus*, violence - play out together. As mentioned earlier, Ujjwal Singh talks about the state of exception as one where extraordinary laws are deployed to tackle the crimes of extraordinary nature. He mentions the process of permanent entrenchment of this state of exception to the norm, when the norm becomes subservient to the exception (2007:19). Here, he assumes the existence of an authority who decides on the exception as different and divergent from the normal and the existence of a 'normal' situation as well. By a normal situation, he means "the general rule, the universally applicable principles and the ordinary state of affairs" and which stands outside and parallel to the exception; while the emergency "would be no more than an exception to that rule, lasting a relatively shorter time, and yielding no substantial permanent effects"(2007:19). One can also question where the boundary is drawn between the normal and the exceptional especially in cases where the line is difficult to draw. It would be apt to add here what Carl Schmitt has to say on the difference between the norm and the exception- "the normal proves nothing, the exception proves everything."[39] Moreover, the move to legislate a national law such as AFSPA to counteract the perception that North East is marked out as exceptional, has made it clear that the model of routine law increasingly is that of emergency laws.

[39] Quoted in Hussain. 2007:734.

CHAPTER TWO

Extraordinariness and the Exception Under the AFSPA

2.1 Introduction

In this chapter, I will try to explore the extraordinary and unconstitutional nature of law embedded in the Armed Forces Special Act, 1958 (further amended in 1972). For this, the chapter will begin with a close re-reading of the Act *per se*, the situation post-independence in which it was born including the various Acts that had been passed prior to the AFSPA which acted as precursors to the Act and its implications. This will be followed by an analysis of the features of AFSPA and its extraordinariness in relation to the rights of citizens under the purview of the Act, as also its repressive nature.

The following section will be devoted to understanding the intimate relationship between the AFSPA and the State of Exception in which, using the analysis of judgments on *habeas corpus* from the field of study, the Act and its implementation is seen to be deployed as a 'paradigm of governing' in the areas of the North-East and other parts of India such as Punjab and Kashmir. The cases will also be looked at to see whether and how human rights violations are committed and the kind of human rights laws invoked by it; what kind of Constitutional rights are abrogated and whether the Constitutional validity of the AFSPA has been challenged in any landmark Judgments, and its implications to the writ of *habeas corpus*.

Also, we will look at whether and how different guidelines issued for observance by the security forces during the use of AFSPA has been complied with and enforced in Nagaland, particularly the "do's and don'ts" issued by the Army Headquarters as well as the eleven "guidelines on torture" framed in the significantly known *D.K. Basu Vs State of West Bengal* [1] judgment.

[1] (1997) 1 SCC 416

2.2 Features of the AFSPA

In this section, I will attempt to analyse the Act in greater detail in such a way as to bring out its extraordinarily repressive nature for citizens in Nagaland; how it delegitimizes and over rules other prevalent laws like the Code of Criminal Procedure (CrPC) for instance, which could have dealt with the problem of "aiding civil power" if the problem really laid there. Constitutionally, the role of the armed forces is merely to "aid civil power", and not to propel the same. In situations warranting exigencies such as breakdown of constitutional order or machinery, the Constitution through the CrPC mandates that the army should aid civil power. AFSPA over-rides and makes illegal all these Constitutional provisions in its exercise.[2]

2.2.1 Background to the AFSPA

The AFSPA can be seen as the much expected response of the Indian state post-independence to respond to secessionist challenges posed by militant groups in North-East India. In the garb of tackling the menace of "law and order" problem, as the Indian state sees it, the Act was extended all over the insurgency-ridden region whereby it was claimed that the armed forces act as the "mediatory mechanism" between the Centre and these states. Under the pretext of aiding civil power in controlling "law and order" problem, the Indian state systematically extended its policy of creating a state of exception through expanding state power and unleashing a regime of terror in the process.

The AFSPA was not an entirely new introduction to the list of techniques of the Indian state in taking care of its "law and order" problem.[3] Thus, the Report of the Independent Peoples Tribunal in its publication remarked, "ironically, this strategy of repression has been adopted by successive Indian governments after Independence despite being antithetical to the liberal democratic constitutional tradition of independent India" (Pelly 2009:35). The first anti-revolt suppression used against the Indian people was re-introduced in the form of the Armed Forces

[2] These issues are also raised in detail in the *NPMHR V. UoI,(INDLAW SC 1720), 1997* judgment, which is discussed in greater detail in the latter part of this chapter.

[3] We have already discussed in Chapter 1 how this draconian legislation has its colonial legacy and history behind its subtle appearance, being introduced initially to quash the Quit India Movement of 1942 against the British.

Special Powers Act, 1958 by the predecessor government, initially to be used for the people of the North-East followed by the other regions.

In addition to the Armed Forces (Special Powers) Ordinance of 1942, the Assam Maintenance of Public Order Act of 1953, along with the Assam Disturbed Areas Act of 1955 (that became operational in 1956), which became applicable to the Naga Hills as well, became the sort of foundation stones for the AFSPA in 1958 since it was from these Acts that the major guidelines were borrowed. For instance, the third clause of the Assam Maintenance of Public Order Act was, to borrow Chasie and Hazarika's words, "to form the core of the AFSPA" (2009:10). This clause provides for total immunity to any armed personnel who arrest, or shoot any person without any warrant and without being produced at the nearest magistrate or at the police station. Hence, we still see continuities in the form of resurgences embedded in various draconian legislations.

The Armed Forces Special Powers Act initially came into force as an ordinance on May 22, 1958 despite a lot of oppositions from the negligible number of Members of Parliament (MPs) from the North-Eastern states. Apprehensions from MPs from other states about the Act could also be seen in the way they opposed it fearing such powers "would circumvent the Constitution by effectively imposing an emergency in these areas without actually declaring one and that it abrogated the powers of the civil powers in favour of the armed forces" (Pelly 2009:35). Despite it all, the Act made its headway to be implemented first in the North-East followed by the states of Punjab and Union territory of Chandigarh in 1983 and the state of Jammu and Kashmir in 1990.

2.2.2 "Disturbed Area" As the Lone Enabling Criterion for AFSPA to be Declared: The Disturbing Feature

Section 3 of the Armed Forces Special Powers Act, 1958 stipulates the only criterion for an area to be brought under the purview of the AFSPA. The Section states:

> If, in relation to any state or Union Territory to which this act extends, the Governor of that State or the administrator of that Union Territory or the Central Government, in either case, if of the opinion that the whole or any part of such State of Union territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may by notification in the Official Gazette, declare the whole or such part of such State or Union territory to be a disturbed area. (AFSPA: Section3)[4]

It is quite apparent here that the decision to declare an area as "disturbed" does not require any nod or vote-taking or assent from either of the two Houses of Parliament. It lies upon the sole discretion of either the Governor or the administrator of the area. He just has to form his own "opinion" about whether the area is in a "disturbed" or "dangerous" condition such that it deems necessary to invoke the deployment of the armed forces. There is no one to question him on his decision. As Hazarika and Chasie so rightly says, "This is the enabling provision that legalizes the use of AFSPA; without it the Act cannot be used" (2009:12). Once this conclusion is reached at, an area qualifies itself as "disturbed."

A South Asian Human Rights Documentation Centre (SAHRDC) based in New Delhi, in one of its publications, mentioned that "the declaration that an area is disturbed essentially amounts to declaring a state of emergency but bypasses the Constitutional safeguards"(2004). This power of declaration has also been the factor of tension between the Centre and the States where the AFSPA has been declared, particularly since the 1972 amendment whereby the Central government was also empowered to declare an area as "disturbed." Hence, the SAHRDC has commented, "rather, the Central Government now has the ability to overrule the opinion of a state governor and declare an area disturbed."[5] This shows the increasing power of the Centre over the states in matters of "law and order" earlier left at the discretion of the states themselves. This way, control and command from the centre is strengthened at the same time.

One of the main contentions against the AFSPA arises from Section 4 of the Act which confers special powers upon the members (including any commissioned officer, warrant

[4] The full copy of the Act is also attached in Annexure-I of the dissertation.
[5] See, Armed Forces Special Powers Act: A Study in National Security Tyranny. *South Asian Human Rights Documentation Centre,* http://www.hrdc.net/sahrdc/resources/armed_forces.htm#legal.

officer, non commissioned officer or any other person of equivalent rank) of the armed forces deployed in the disturbed areas. Clause (a) of this section clearly lays down the special power for the personnel in the armed forces to "fire upon or otherwise use force, even to the causing of death" if he is of the opinion that it is deemed necessary for the maintenance of public order. Moreover,

> Under Section 4(a) the right to life is clearly violated. An officer shooting to kill, because he is of the opinion that it is necessary, does not conform, even prima facie, with the Article 21 Constitutional requirement that the right to life cannot be abridged except according to procedure established by law.(AFSPA: Section 4)

The latter part of the same clause also abrogates the rights of people to freedom of association enshrined in the Fundamental Rights of the Constitution under Article 19 clause (c) for citizens in the so-called "disturbed" area since this special Act has been in force for over 50 years now. The Act does not specify at all, which form of association are illegal or dangerous for the nation's security.

This section places the life of any person in the hands of the armed forces on mere suspicion, without having to invoke the due process of law given in the Constitution. This is in clear violation of the protection of life and personal liberty provision specified in Article 21 of the Constitution, thereby creating a short-circuit in the process of the supposedly prescribed "due process" of law.

Section 4 also empowers the security personnel from arresting a person without any arrest warrant being issued beforehand. This special provision is yet again unconstitutional and extraordinary. It is unconstitutional since it applies only to some parts of the country, for some specific sets of citizens, and at the same time does not make the CrPC applicable for these areas. A very detailed comparison is made between the CrPC and the AFSPA by the South Asian Human Rights Documentation Centre in which the infringement of the Right to Equality before the law under Article 14 by the AFSPA, particularly for the citizens under the AFSPA declared areas has been highlighted. The SAHRDC in its report on the AFSPA states, "Since the people residing in areas declared "disturbed" are denied the protection of the right

to life, denied the protections of the Criminal Procedure Code and prohibited from seeking judicial redress, they are also denied equality before the law."[6]

The other ambiguity in the AFSPA is contained in the Section 5 of the Act particularly with the term "least possible delay" when it states:

> 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.(AFSPA: Section 5)

This phrase has raised a lot of issues related to the time-frame and the limit within which a detained person has to be made over to the nearest police station. Generally, the Constitution provides that any person detained has to be brought to the nearest police station or the magistrate within 24 hours of the arrest, excluding the time taken to travel from the place of arrest. This is clearly provided for in Article 22, clause (2) of the Constitution. However, in the AFSPA declared areas this provision is totally abrogated.

The AFSPA also ensures that the armed personnel get away scot-free after any kind of excess committed upon the people. This immunity is provided for in Section 6 of the Act which states:

> 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. (AFSPA: Section 6)

This section guarantees the required protection to personnel acting under the Act such that the wrongs committed go unnoticed and even unpunished for. Regarding this Section, it was Mr. Mahanty, who, in the first Lok Sabha debate on the Act said that it "immediately takes away, abrogates, pinches, frustrates the right to constitutional remedy which has been given in article 32(1) of the Constitution."[7] This particular section gives the armed forces blanket powers to carry out any kind of operation in violation of serious human rights without having to be

[6] Online at, http://www.hrdc.net/sahrdc/resources/armed_forces.htm#legal.
[7] See, (SAHRDC: 2004)

answerable to anyone. This special power has been the enabling provision for quite a number of excesses committed by the security forces in the North-East, as elsewhere, since the Act has come about.

2.3 Human Rights Violations Under the AFSPA

Recent public uproar and hue and cry over the deployment of the Armed Forces Special Act and serious human rights violations in specific parts of the country cannot be overlooked. This is particularly so in the North-Eastern states of Manipur and Nagaland. The Manorama Devi episode as well as the much-talked about hunger strike being undergone by Irom Shormila, in protest against the AFSPA in Manipur and for repealing the same, reflects very clearly the inhuman and ugly side of the Act that empowers the "Friends of the Hill People", as the security forces are so called, especially the Assam Rifles.

The body of Thangjam Manorama Devi, a 32-year-old woman, allegedly a member of the banned People's Liberation Army, was found dumped in Imphal on the 11th of July 2004, marked with terrible signs of torture and rape. Five days later, about some 30 ordinary women took on to the streets and demonstrated naked in front of the Assam Rifles headquarters at Kangla Fort in Imphal shouting slogans such as "Indian Army, Rape Us Too!"[8] These women had to face the ire of the state by being jailed for three months.

Drawing a connection between the public stripping by the women in Manipur, in protest against Manorama's death in Manipur while under custody after allegedly being physically assaulted, and *bare life* being overpowered by the sovereign power of the security forces, Bimol Akoijam mentions:

> Disrobing in public marked the loss of qualified life as the act negates the deeply entrenched cultural meaning and conventions around the female body... the July 15

[8] See, Coverstory, Dec 09, 2006, *Tehelka*, http://www.tehelka.com/story_main23.asp?filename=Ne120906The_unlikely_CS.asp&id=2

protest registered a sense that life in Manipur is no longer a *qualified life* but a *bare life*. (*emphasis added*)[9]

He argues that it is only in a state of exception that such acts can be and are committed by the security forces and such "violence is resorted to and justified in order to protect the state so as to ensure the rights of the individual citizens."[10]

However, even before the custodial death of Manorama Devi, a 34 year-old Manipuri woman named Irom Sharmila had began her fast unto death on November 4, 2000 against the AFSPA and the violence it perpetrated on the people. After six years in a hospital in Imphal, without any substantial results, Sharmila was shifted to New Delhi. While camping in Jantar Mantar, she was rounded up, arrested on the reason of "attempt to suicide" and taken to the All India Institute of Medical Sciences where she had been incarcerated and force-fed. From the hospital she has been "demanding that she be produced in court, demanding that the State explain why she is in custody."[11] This is one horrid example of the way the state responds to protests by citizens against its repressive actions or measures.

2.4 Post-Manorama Incident and Justice Jeevan Reddy Review Committee Report

Taking into mind the legitimate demands of the people in Manipur for their human rights particularly after Manorama's death and Sharmila's indefinite fast, a review Committee of the AFSPA was instituted under the chairmanship of Justice (Retd.) P.B. Jeevan Reddy, along with four other members. The main concern of the committee was to "foster human rights" among the people and "amend the provisions of the Act to bring them in consonance with the obligations of the government towards protection of Human Rights" (2005:6). For this, the

[9] See, Akoijam. *Bare Bodies, Bare Life/Un-Learned Lessons from July 15, 2004*, http://www.kanglaonline.com/index.php?template=kshow&kid=945&Idoc_session=592d3528506cd3cb5769b74f716e2fa4.

[10] i.b.i.d.,

[11] In, Coverstory, Dec 09, 2006, *Tehelka*, http://www.tehelka.com/story_main23.asp?filename=Ne120906The_unlikely_CS.asp&id=2.

committee was either to amend the provisions of the Act or replace it by a more humane one. The predominant views of the Committee which needs mention here are:

> (a) The Armed Forces (Special Powers) Act, 1958 should be repealed. Therefore, recommending the continuation of the present Act, with or without am particulars. It is true that the Hon'ble Supreme Court has upheld its constitutional validity but that circumstance is not an endorsement of the desirability or advisability of the Act.
> (b)...to recommend insertion of appropriate provisions in the Unlawful Activities (Prevention) Act, 1967 (as amended in the year 2004) ... instead of suggesting a new piece of legislation. (2005:74-75)

Even after four years of the Committee's recommendation, the Union Home Ministry, under whose direction the Committee was set up, did not do anything about its implementation. Infact, the blatant attack on the excesses committed by the state through its armed forces which has been highlighted by the report was left out of the public domain, suppressed. This had been the starting for the Indian state to ignore strong recommendations to repeal the AFSPA, as it was followed by the recommendations of the Constitutional Reforms Committee under Veerapan Moily for repeal of AFSPA in 2007 and the Working Group on Confidence-Building Measures in Jammu and Kashmir headed by Mohammad Hamid Ansari also in 2007.[12]

If one were to research the excesses committed by the state agents through the AFSPA, accurate data would be very difficult to get from any official or governmental source apart from some documentations carried out by some Human Rights groups or watchdogs such as the South Asian Human Rights Documentation Centre, the Asian Human Rights group and Peoples' Union for Democratic Rights. In a publication by the Asian Human Rights Centre based in New Delhi, the rationale given for such absence of data on human rights abuses was that, "as the AFSPA is an Act, which provides enhanced punishment without defining crimes, there are no data on the abuse of the AFSPA." [13] The *NPMHR v. Union of India & Ors*[14] is a well known case in the writ petition of which allegations against infringement on human

[12] Also mentioned in, Human Rights Watch Report, (August 2008:19).
[13] *Asian Rights Body Urges Government To Repeal The AFSPA'* Uzbekistan news.net, Monday, 18th August 2008, http://www.uzbekistannews.net/story/395987.
[14] *NPMHR V. UoI & Ors, INDLAW SC 1720, 199, para 8*

rights by personnel of armed forces committed under the AFSPA and its provisions has been challenged.

A meeting of the civil society on human rights, justice and the Naga peace process was held on the 18th and 19th of March 2001, which submitted a referendum to the President of India on the 24th of April, 2001. The referendum stated that:

> The arrests of ordinary Naga citizens in Nagaland by security forces continue to remain unacknowledged. The allegations of torture, extra judicial killings and custodial rape continue to mount. As the security forces are protected by the Armed Forces Special Powers Act the criminal justice system has become virtually non-functional. (2001:2)

This is just another reflection on the human rights abuses carried out in Nagaland as an everyday affair. Sadly enough such abuses occur in utter violation of the cease-fire ground rules which the Government of India and the NSCN entered into to be abided by.

Of the many infringements against human rights committed, apart from cases of numerous extrajudicial killings, instances of sexual abuse, rape or molestation of women by the security forces during times of conflict would account for the maximum since they all go unreported. This had been for many factors, the major being fear of social ostracism. Bodies of women and the exploitation thereof during excesses committed by the state appear to go hand-in-hand from what we deduce through the North-East experience.

2.5 AFSPA and the State of Exception Paradigm

Having briefly surveyed the forms of human rights violations, in the following section I will attempt to look at the AFSPA and its theoretical relation to the idea of Agamben's state of exception, by which he means the "state's immediate response to the most extreme internal conflicts" (2005:1). AFSPA could be taken as the exception by which the extreme internal conflict in Nagaland, as in the other North-Eastern states, is met and dealt with by the Indian state since independence, without any explicit suspension of the constitution. In a very important work on the AFSPA and its implementation in Nagaland over the years, Charles Chasie along with Sanjoy Hazarika opine very explicitly that with the Act, "emergency and

draconian powers are dressed up as normal procedure"(2009:13). With the Act, the citizens experience and live with a number of practices not corresponding to the "due process of law" and which have become normalized, all these courtesy the AFSPA and its proficient personnel. Such a paradigm allows for the principle of "rule of law" provided for in the Constitution to be breached upon.

AFSPA could also be seen as a technique used in a state of exception "that allows for the physical elimination, not only of political adversaries, but of entire categories of citizens who for some reasons cannot be integrated into the political system" (Agamben 2005:2). Culturally, ethnically, linguistically and racially the people of the North-East stand in clear distinction from the rest of mainland India. This has caused unnecessary or unwanted suspicion between the people, leading to more complicated situations at the administrative level; and this has been so since and even before the nation achieved its independence. Ujjwal Kumar Singh also mentions a similar idea, although he employs the term "politics of exclusion" to refer to this point. Whatever the terminology used, the intention is to drive home the same point, the point that the citizens in North-East as well as Kashmir and elsewhere are seen as non-conformists, and therefore, "suspect," hence requiring some technique of exclusion which is enabled through laws such as the AFSPA. This form of state repression is quite common.

The deployment of AFSPA and the implicit suspension of the writ of *habeas corpus* qualify the situation as a marker of emergency.[15] This situation was witnessed in Nagaland with the informal suspension of the writ of *habeas corpus* during the period prior to the ceasefire[16] with the AFSPA. Since the detenus were not produced in the police station after arrest, (as mandated by the highly ambiguous Section 5 of the Act) a sort of paralysis with the writ still occurs within that interim period between the court's order to produce the detenue and the time taken to make over the body to the police station, i.e. since the desired purpose is not achieved.

[15] This idea is propounded by Nasser Hussain in, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, 2003.

[16] Details of the ceasefire entered into have been discussed in Chapter 1. However, we are referring to the ceasefire of 1997 here, and not the earlier one entered to in 1964.

The repressive and extraordinary nature of the AFSPA is also seen in the irrational exercise of power by the armed forces in totally disproportionate fashion to the crime or offence committed. For instance, the Act, through Section 4(a), empowers the personnel of the armed forces to take the life of a person on mere suspicion even before any grounds have been established to frame him under any charges. Also, the fact that the same clause provides for the same "punishment unto death" powers for the armed forces for an unlawful assembly of five or more persons, while for the same offence in other parts of the country a mere jail term of six months, or a fine, or both is imposed, implies that the punishment is quite disproportionate and the principle of and provision for equality before the law is also disrupted. A similar point has also been raised by Iyer in his work. He says, "even where those powers have been directed at suspected terrorists and those guilty of criminal offences, there is evidence that the agencies responsible have shown scant regard for the principles of necessity or proportionality"(Iyer 2000:334).These are all clear indications of legal practices extraordinary in nature and essence yet working under the garb of normalized procedures ordinarily.

2.6 Landmark Judgments on the AFSPA and the Writ of *Habeas Corpus* in the Indian Legal Jurisprudence

To make connections between constitutional law, the writ of *habeas corpus*, the AFSPA and the state of emergency or exception concept, it would be helpful to look at some landmark judgments in the history of Indian jurisprudence to see whether there has been any significant shifts in the suspension of the important rights such as the Right to Life and Liberty in a state of emergency or exception, which are very well breached through the AFSPA and other extraordinary security legislations. It would be relevant to, once again, cite Iyer who argues that:

> Despite the wide derogations that the special security laws represent from the constitutional guarantees on fundamental rights, the Indian courts have consistently upheld their validity, the time has come to introduce more effective safeguards in the Constitution against the abridgement of fundamental rights by such laws (Iyer, 2000: 334)

2.6.1 *ADM Jabalpur Vs Shivkant Shukla*[17]

In this regard, one of the landmark judgments to be heard was the *ADM Jabalpur Vs Shivkant Shukla*,[18] better known as the *Habeas Corpus Case*. Although the case was related to detentions under Maintenance of Internal Security Act (MISA) during the Emergency regime of Indira Gandhi and not under the AFSPA, this case is deemed necessary to be looked at so as to see how judicial interpretations have influenced and shaped fundamental rights such as the right to life and liberty guaranteed under Article 21 and 22, particularly when the Constitutional law is restricted from its normal functions during some Emergency situations. More importantly, it is to see how the writ of *habeas corpus* has been interpreted during an emergency situation.

This judgment created much hue and cry among the legal fraternity, the intellectuals, the politicians, and the citizens around that time. The main question that revolved in this case was whether a detenue could claim the remedies provided for in the fundamental rights to challenge the legality of the order of detention under the MISA during the Emergency. It was held that "while a proclamation of emergency is in operation the Presidential order under Art. 359(1) can suspend the enforcement of any or all Fundamental Rights."[19]This judgment was seen as a blatant attack on the fundamental rights and personal liberty of citizens.

An important reference in the judgment made to emergency powers was, "if extraordinary powers are given, they are given because the emergency is extraordinary and are limited to the period of emergency."[20] From here, it can be understood that the extraordinary powers are used and conferred upon only during emergency and crisis situations. Also the fact that these extraordinary powers cease to be exercised once the emergency period ceases to exist. Hence, extraordinary powers and emergency situations go hand in hand. However, in the case of the AFSPA, this cannot be said to be true since the extraordinary powers have been entrenched and instituted, although in an informal fashion, despite the absence of any Presidentially

[17] 1975 Cr LJ 1809
[18] 1975 Cr LJ 1809
[19] *ADM Jabalpur v Shivkant Shukla (1975 Cr LJ 1809)*
[20] *ADM Jabalpur v Shivkant Shukla (1975 Cr LJ 1809)* at para [477E-F].

proclaimed Emergency. This, then, provides us a hint that the emergency situation still has not ceased to operate in the region.

The stand on the issue of challenging the legality of a detention order by a detenue through the writ of *habeas corpus* changed in the post-*ADM Jabalpur Vs. Shivkant Shukla* [21] period. It was amended that the Fundamental Rights under Articles 20 and 21 cannot be suspended even in a state of emergency.

2.6.2 *NPMHR Vs Union of India* [22]

Any discussion on the AFSPA and *habeas corpus* would be incomplete if one were to neglect the *NPMHR Vs Union of India* [23] judgment in the year 1997. This is a landmark judgment since it was one of the first cases in which the legality of the AFSPA had been challenged in the apex Court since its inception.

The main points of challenge against the Act made by the counsels in this case were that it is beyond the legislative competence of Parliament to enact the law. They have also challenged the validity of the various provisions of the Act on the ground that the same are violative of the provisions of Articles 14, 19 and 21 of the Constitution.

The petitioners have also attacked the constitutionality of the Act by stating that the Central Act by-passes Article 352 and 356 of the Constitution which provides for Proclamation of Presidential Emergency particularly during times of armed rebellion or breakdown of constitutional machinery, and hence, unconstitutional. The counsels were of the opinion that the AFSPA is was enacted to deal with a situation which is no less than armed rebellion, and since "armed rebellion" fall within the ambit of Article 352, it was a fraud on the Constitution to enable another monitoring mechanism such as the AFSPA to tackle it.[24] The following paragraph depicts very well the tactics used by the state through the instrumentality of law and legal devices:

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[21] *ADM Jabalpur v Shivkant Shukla (1975 Cr LJ 1809)*
[22] *NPMHR V. UoI, INDLAW SC 1720, 1997*
[23] *NPMHR V. UoI, INDLAW SC 1720, 1997*
[24] *NPMHR V. UoI, INDLAW SC 1720, 1997,at para 28.*

> The intention underlying the substitution of the word "internal disturbance" by the word "armed rebellion" in Article 352 is to limit the invocation of the emergency powers under Article 352 only to more serious situations where there is a threat to the security of the country or a part thereof on account of war or external aggression or armed rebellion and to exclude the invocation of emergency powers in situations of internal disturbance which are of lesser gravity.[25]

Another issue found problematic by the counsels of the case was regarding Parliament's powers in legislating on matters not mentioned in either the State List or the Concurrent List, the AFSPA being a product of one such extraordinary legislation. Yet another major point of attack on the Act was that the disturbed conditions in the "disturbed areas" are due to an armed rebellion, and that the Central Act could not be enacted to deal with a situation which can only be dealt with by issuing a proclamation of emergency under Article 352.[26] The validity of the Act was also criticized on the ground that the term "disturbed area" was too "vague". However, this contention did not find any "substance" with the Supreme Court.[27]

2.6.2.1 Post-NPMHR and the AFSPA Scenario

The post-*NPMHR Vs. UoI* saw the re-definition of the quite ambiguous term "least possible delay" to be understood as "soon enough as to enable him or her to be produced before a magistrate within 24 hours of arrest, as requires by art 22 of the Constitution."[28] The judgment is considered significant as the Supreme Court upheld the Constitutional validity of the AFSPA. However, it redefined the time frame for reviewing the imposition of the Act in an area by laying out a periodic review before the lapse of six months after the declaration has been made.[29] The judgment also reiterated that the provisions in Sections 130 and 131 of the CrPC cannot be treated as comparable with Section 4 of the Central Act, and adequate to deal with the situation requiring the continuous use of armed forces in aid of civil power.[30] The latter part of the judgment, addressing to the question of human rights infringements under the

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[25] *NPMHR V. UoI, INDLAW SC 1720, 1997, at para 29..*
[26] See *NPMHR V. UoI, INDLAW SC 1720, 1997, at para 31.*
[27] *NPMHR V. UoI, INDLAW SC 1720, 1997, at para 36.*
[28] In, Iyer, Venkat (2000: 254).
[29] *NPMHR V. UoI, INDLAW SC 1720, 1997, para 38.*
[30] *NPMHR V. UoI, INDLAW SC 1720, 1997, para 42.*

AFSPA, makes reference to the timely issuance of "Dos and Don'ts" issued by the Army Headquarters for the armed personnel while operating under the Act. It also stipulates that any person found to have suffered any abuse from the armed personnel ought to be "suitably compensated" if the allegation is found to be true. The significance of the judgment is evident from the way it served as a precedent for other many similar cases related to illegal detention and compensation.

2.6.3 *Maneka Gandhi Vs. Union of India* [31]

Maneka Gandhi Vs. Union of India [32] case heard on 25th January, 1978 is another significant judgment when it comes to question of redefining "personal liberty" and preventive detention related to "procedure established by law" as provided for in the Constitution. This case is primarily about challenging the action of the Government by the petitioner for impounding her passport and declining to give reasons for the same besides saying that it was done "in the interest of the general public".[33] However, the major outcome of the judgment was the re-definition or expansion of Article 21 as the majority of the Judges ruled in favor of the view that:

> 'personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the personal liberties of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue.[34]

The judgment also made it amply clear that whatever procedure is prescribed by the statute "cannot be arbitrary, unfair or unreasonable". If the procedure is arbitrary or so, the court would invalidate laws which prescribed an unjust, unfair or unreasonable procedure. This is a clear indication that a writ of *habeas corpus* would now lie if the law depriving a person of his liberty is not fair or reasonable.

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[31] (1978) 1 SCC 248
[32] (1978) 1 SCC 248
[33] (1978) 1 SCC 248, Headnote at p.4
[34] (1978) 1 SCC 248 at 669)

Another significant constitutional move effecting change to Fundamental Rights during emergencies is the Forty-fourth Constitutional Amendment Act of 1978, which provides that "the right to personal liberty under Article 21 cannot be suspended even during an Emergency, therefore the writ of *habeas corpus* will be available to people against any wrongful detention during emergency proclaimed under Article 352 of the Constitution" (Massey 2005:345). This amendment marks a major shift in the Supreme Court's ruling during the 1975 Emergency thereby overruling its own decision in the judgment of *A.D.M.Japalpur Vs.Shivkant Shukla.* [35]

2.7 A Re-Reading of the AFSPA through the Lens of the *Habeas Corpus* Cases from Nagaland

In this section, the analysis of *habeas corpus* judgments gathered from the Kohima Bench of the Gauhati High Court will be brought in to explore the draconian nature of the AFSPA.

The number of judgments and cases from the Kohima Bench of the Gauhati High Court between the years 1995 to 1999 and 1 case in 2006, shows that **96.88%** of the detentions happened to be apprehensions under the AFSPA, while only a marginal **3.22%** fell under the National Security Act. It is also seen that the two cases of custodial deaths from amongst these cases were related to arrests under the AFSPA. Also, what could be inferred from those judgments was that in none of the cases the apprehension followed any of the guidelines clearly set up in the *D.K. Basu Vs. State of West Bengal*[36] judgment. These guidelines included:

> (1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee insist be recorded in a register.
> (2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.
> (3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or

[35] 1975 Cr LJ 1809
[36] (1997) 1 SCC 416

relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her bed, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9)Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on conspicuous notice board.[37]

If one were to see the application of these guidelines, whether any, in the Nagaland situation from the cases gathered, it is surprising since these guidelines do not even feature in any of the cases. Infact, in many of the cases, the petition had been filed without knowing the whereabouts of the detenue, the military unit responsible for arrest and so on. The question of recording the name(s) of witness does not arise in such a situation. Again, in many of these cases, the petitions mention the way security force personnel come with their faces masked,

[37] In, *D.K. Basu Vs. State of West Bengal*, (1997) 1 SCC 416; this is a very significant case on custodial deaths and compensation heard in the Supreme Court after the matter was raised by the then Executive Chairman, Legal Services Aid, West Bengal, to the then Chief Justice of India, as a writ petition under the Public Interest Litigation category. This judgment is taken as a major reference particularly in cases of illegal detention and custodial violence exercised by the state agencies, and its rectification.

wearing civilian clothes and whisk away the detenue to conceal the identity of their units or whatsoever. Hence, the state is illegible and it is near impossible to ascribe culpability to the captor. Even the procedure on medical examination to be undergone by a detenue is not followed under the cases of AFSPA in Nagaland; same with the provision for a lawyer with whom the detenue is to be consulted during interrogation. Hence, all these reflect how steps such as these guidelines remain just on paper and not complied with by the security forces when faced with the situation of illegal detention.

2.8 Relational Classification of the Cases

In this section, I look at the information provided in the judgments about the social background of the detenus. In most cases, it is the family which move the court to find a missing relative. As is evident from the following table, the detenus' family files the *habeas corpus* writ in 71 cases out of 77 cases. Only in four cases we find a public leader or village elder moving the court.

Relation of the detenue with the petitioner	**No. of cases**
Family/next of kin	71
Head *gaon burras*(village elders)	2
Public leader from the detenue's village	2
Family friend	1
Friend	1

Table 1: Relational Classification of the Detenue with the Petitioner

No. of cases involved in	**Tribe**
29	Sumi
11	Lotha

7	Tangkhul
5	Ao
2	Angami
2	Chang
2	Chakesang

Table 2: The Tribal Affiliation of Detenus.

From the analysis of the disposed cases of *habeas corpus* undertaken in this study, we find that in 29 cases, the detenus involved belonged to the Sumi tribe of Nagaland. Next in the descending order comes the Lotha detenus with 11 cases in which they were involved; Tangkhuls in 7 cases; Aos in 5 cases; followed by the Angamis, Changs and Chakesangs with 2 cases each. The purpose of such tribe-wise classification is deemed necessary to study whether there is any tribal politics inherent in illegal detention in Nagaland, considering the inherent tribal politics even prior to the statehood of Nagaland, which still continues.[38] The fact that 22.33% of the detenus belonged to the Sumi tribe and 8.47% to the Lotha tribe could lead us to two very important pointers:

i. tribal politics in Nagaland is a predominant factor affecting these two tribes; and/or
ii. That this distinct tribal projection is analogous to the collectivized criminalization of tribes in India since the colonial times; that state policing is directed not at individual bodies but at particular communities.[39]

Most of the men were detained by the 3rd Corps, Rangapahar, as depicted in the following table:

[38] It would be interesting to look at the recent formation (in early 2008) of the NSCN-Unification faction under the leadership of one Azheto Chopy, from the Sumi tribe, a former home minister (kilo kilonser) with the NSCN-IM group who broke away from the latter group with the intention to bring about more unity among Naga militant groups.

[39] These two pointers could be important to pursue further research in, since it cannot be established as of now.

DETAINING UNIT	NO. OF CASES
3rd Corps, Rangapahar	52
Assam Rifles	20
Rashtriya Rifles	3
Rajputana Rifles	1
Where no particular unit is alleged for detention since the detenue deserted the army on his own	1
TOTAL CASES	**77 cases**

Table 3: A Tabular Presentation of Detaining Units of the Army

The following table and the bar diagram depicts the period of detention underwent by specific number of detenus during the period for which this study has been taken, i.e within the years 1994 to 2006:

No. of Days detained	Number of detenus
2	7
3	3
4	20
5	9
6	13
7	8
8	6
9	5
10	4
11	3

12	5
13	3
17	3
21	2
22	2
34	2

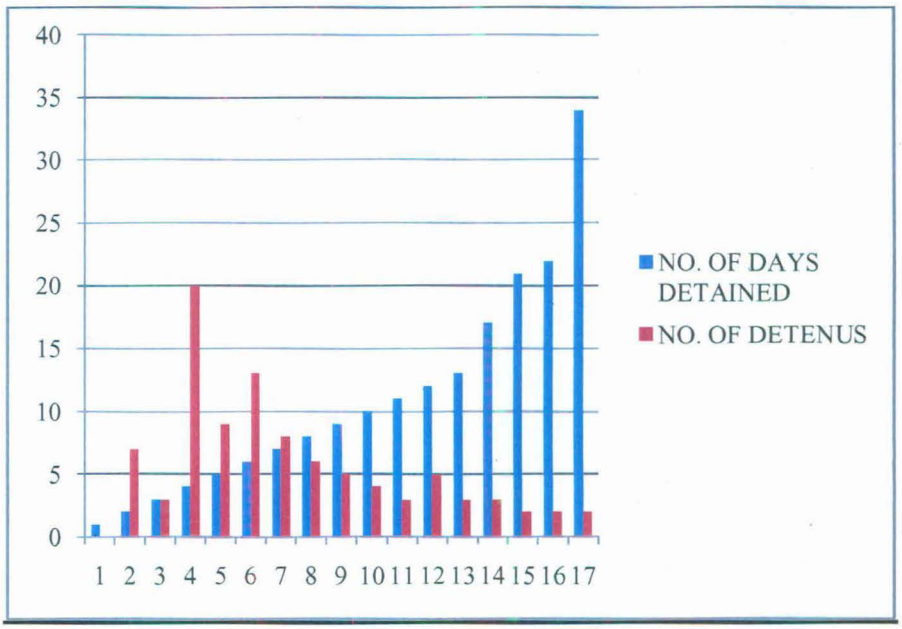

Fig: Table 4 and Bar Chart 1 Showing the Period of Detention

From the above bar diagram, it can be deduced that there has been no specific number of days for which the detenus have been detained; one can notice the variation in the number of days detained. Somehow, it appears that with the increase in the number of days, the number of detenus seems to reduce. However, that does not lessen the chance of torture or abuse on the detained by the security forces. Even a single minute under detention matters since it involves the "life" of a person in the hands of the security forces.

The extraordinarily excessive nature of AFSPA is reflected in the nature of *habeas corpus* petitions which are not devoid of the word "torture", the manner in which it goes unpunished and invisible for its practice, and the way in which it is effaced in the whole process. For instance, of the 77 cases I collected, two detenus were killed in detention. Of the remaining cases, in ten (10) cases torture was established. (see table)

No. of Detenus	**Outcome of Detention**
2	Custodial death
10	Tortured

4	Feared torture
5	Hospitalised

Table 5: Representation on Outcome of Detention on Detenus.

From the analysis, it can be deduced that 100% of the detenus were male, directly or indirectly involved with the NSCN, more so with the IM faction (apart from those detenus graded "white"). Women, seemingly, are more indirectly involved in insurgency, but directly affected by the same. However, it does not mean that they were spared from being tortured. Infact, the kind of torture they had to face was such that they had to live with its scars for the rest of their lives, while some even lost their lives to it. There has been no prosecution in public till date of any officer of the army who had been guilty of rape or other thousands of sexual abuses committed on the women in the north-east.[40]

2.9 Army Guidelines to Be Followed Under the AFSPA

A significant directive related to the procedure to be followed by the security forces, after an arrest has been made, in the form of "Do's and Don'ts" issued by the Justice and Advocate General (JAG) Department of the Army Headquarters which is supposed to be issued from time to time to personnel acting under the AFSPA. The amendment of this 'aide-memoire' has been brought about as a result of the Gauhati High Court's direction through a judgment. In brief, we can look at the important points mentioned in the same directive:

List of Dos and Don'ts while acting under the Armed Forces (Special Powers) Act, 1958
DOs
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
(d) As far as possible co-opt representative of local civil administration during the raid
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 of law and order, ascertain first

[40] This could lead us to question the *gendered exceptions* in a state of exception, and further study the position of women in such situations.

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
(c) Ensure that troops under command do not harass innocent a 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) Hand over 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 a 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 station along with the seizure memo
(g) Obtain receipt of persons and 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
4. Dealing with civil court
(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 a 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 a person after he is handed over to civil police."
54. The instructions in the List of 'Dos and Don'ts" which must be followed while providing aid to the civil authority are as under

List of Dos and Don'ts while providing aid to civil authority

DOs

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 ringleaders, i.e., do not fire into the thick of the crowd at the back
(g) Aim low and shoot for effect
(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 paramilitary 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 anyone, in particular, women and children
11. No harassment of civilians
12. No torture
13. No communal bias while dealing with civilians
14. No meddling in civilian administration affairs
15. No Military disgrace by loss/surrender of weapons
16. Do not accept presents, donations and rewards
17. Avoid indiscriminate firing. [41]

[41] Excerpted from *NPMHR Vs. UoI & Ors*, 1997 INDLAW SC 1720, paras. 53 and 54

Most of the directives are hardly complied with by the security forces operating under the AFSPA in Nagaland.[42]This can be substantiated through the cases analyzed from the Kohima bench of the Gauhati High Court. It is only when all interrogation process has been completed that the detenue is handed over to the local police. Appallingly, there has been no questioning into this short-circuiting in the whole process. It is only in a handful of cases that a Joint Interrogation Team comprising of the Army, the Police and the District Administration was formed for the interrogation. It has been mentioned in the *NPMHR vs. UoI* judgment that failure to comply with these instructions by the armed forces exercising powers conferred under the AFSPA "would entail suitable action under the Army Act, 1950."[43] However, it is not clear so far as to how these instructions have been enforced by the agency, the Army Headquarters, itself.

2.10 Conclusion

The extraordinariness of AFSPA is proved by the many excesses committed by the army in Nagaland as well as in other states living under the AFSPA. No amount of justification given by the state and its main terror machinery, the security forces, can correct and justify the loss of lives and property, constant fear and threat experienced by the general innocent public, not to forget the situation undergone by women and children. It would be an understatement as well as offensive for the people who had to go through so much turmoil to call this Act an exercise in "aiding civil power." It is confounding when it is argued that this Act has been of any help in a so-called "disturbed area", rather, it is time to question as to whether it has brought about more disturbances instead.

[42] The case might be the same in the other states where AFSPA is deployed; however, this study is solely intended and aimed at Nagaland, as mentioned earlier.
[43] *NPMHR Vs. UoI & Ors*, 1997 INDLAW SC 1720, Para 74(19).

CHAPTER THREE

Vocabularies of War in Legal Discourse: The Specific Case of Torture and Custodial Death

3.1 Introduction

The chapter will be built mainly upon specific cases of *habeas corpus* cases gathered from the Gauhati High Court, Kohima Bench in Nagaland. It will be an attempt at providing a connecting thread between the *habeas corpus* judgments and its discursive details with the notion of the "body". It will take a close look at the various documents that make up a *habeas corpus* petition, how a detenue is constituted and defined through these documents and records; and how these documents are used and relied upon without any qualms by the courts to define the legality or illegality of detentions done by the security forces operating under the AFSPA.

I focus on how the discourse of the army which classifies insurgents into 'white', 'black' and 'grey' intersects with legal discourse on the legality of the detention of those classified as "insurgents". Furthermore, I examine whether there is a relationship between longer detention, torture or custodial death in relation to those detenus who are classified as "black". The chapter would attempt to use the judgments on *habeas corpus* to see whether and, if so, how torture is turned into something evasive through its erasure in the documents and in its course of proceedings. This happens when there is certain informal suspension with the norms of the "due process of law" in place, i.e., even when the legal framework is very well in place.

This discursive analysis emphasizes on judgments related to torture and custodial deaths, and see how any connection can be drawn between those detenus graded "Black" and those tortured; which will lead on to the representation of torture in the legal discourse, both in the national as well as the international arena.

3.2 Concept of torture

It is in a state of emergency, that torture and violence during custody is made possible. Instances and cases of torture usually happen when state agencies such as the security forces and the police make the best use of "interrogation" powers. Torture is used here to mean any kind of physical (both internal and external), mental and emotional agony inflicted on someone.

In one of the most thought-provoking works on torture, Talal Asad relates torture to "understanding what it is to be truly human" (1996). He expands the understanding of torture to include, apart from physical pain, "psychological coercion in which disorientation, isolation, and brainwashing are employed" and goes on to state that "torture in our day functions not only to denote behavior actually prohibited by law, but also desired to be so prohibited in accordance with changing concepts of "inhumane" treatment"(Asad 1996:1090). In another wider definition of torture, Michael Ignatieff understands it to not only to mean exertion of physical harm but states that "threatening a subject with the imminent death or torture of those dearest to him may not leave any physical marks, but it rightly can constitute torture, not just coercion" (Ignatieff 2006).[1] Today, the practice of torture is deployed implicitly by the state, through its forces such as the police and its para-military forces, in its technique of "governmentality"[2], in the extraction of knowledge and information from "suspects" while under their custody and/or detention.

The practice of torture leads to an extraordinary situation in which the established "due process of law" is trampled upon. If one were to look at the international norms against torture, much has been said and worked upon.[3] However, they relate mostly to the post-9/11 period. Coming back to the situation closer home, it is surprising to find that there is hardly

[1] Ignateiff mentions the risks involved in taking a stand against torture while seeming to point to the fact that individual liberty should not be compromised with anything else.

[2] The term has been espoused by Michel Foucault in his lectures of 1978 and 1979 to mean tactics or techniques by which the state governs its citizens indirectly, thereby enabling itself to exert its power and influence over its population.

[3] For instance, reference could be made to the work of Judith Butler. 2004. *Precarious Life: The Powers of Mourning and Violence.* London, Verso.

any definite definition given on "torture" in the Indian Constitution. Infact, recourse has been taken to those existing in the international context in situations such as these.

India is a signatory of international bans against torture such as the Universal Declaration of Human Rights and the UN Convention Against Torture, signed on 14th October 1997, though India is yet to ratify the CAT which has serious implications on the implementation of deterrents in the form of law against torture, since it remains only in letter.

According to Article 1 of the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, torture is:

> . . . Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[4]

One of the most important factors that occasion to torture, generally under the state agencies such as the police, the armed forces, other paramilitary forces and so on, is during detentions. Since we are particularly dealing with cases under the AFSPA, we refer to detentions under the said Act while we talk about detentions here. Although the period of detention varies from one case to another it is not fixed and cannot be specified in advance since the term "least possible delay" under section 5 of the AFSPA is quite ambiguous and cannot be specifically defined. This may lead to what Judith Butler calls "indefinite detention"[5] by which she means "an illegitimate exercise of power...significantly, part of a broader tactic to neutralize the rule of law in the name of security."[6]She goes on to explain that:

> "Indefinite detention" does not signify an exceptional circumstance, but rather, the means by which the exceptional becomes established as a neutralized norm. It becomes

[4] Available online at: http://www.unhchr.ch/html/menu3/b/h_cat39.htm.
[5] Butler uses this term in the context of detenus detained in Guantánamo Bay, in her work *Precarious Life: The Powers of Mourning and Violence.* Verso Books, London. (2004)
[6] i.b.i.d.. p.67

> the occasion and the means by which the extra-legal exercise of state power justifies itself indefinitely, installing itself as a potentially permanent feature of political life (Butler, 2004:67).

Whatever the crime perpetrated by the person, unless he/she is proved guilty by the law, the person cannot be even detained, not to mention treatment without being tortured. In a very important work on violence and the body, Anupama Rao and Steven Pierce says "the right not to be tortured is the one absolute human right that is not susceptible to the laws of sovereign states"(2006:29). No kind of situation or exigency can justify the practice of resorting to torture under any circumstance.

3.3 Torture as a Technique of the Contemporary State's Governmentality

Torture has more to it than merely inflicting pain to secure confession and extract information about insurgent movements and terror activities. It can and has been deployed over the years in many so-called liberal democratic contemporary states as a response to and confront internal threats. It has been used successfully to demoralize the psyche of a secessionist or non-conformist group of people, and dampen their spirits and morale.

In their work on *State Torture in the Contemporary World*, Cohen and Corrado (2005:103) looks at how torture is used by the state under the guise of national security. Their work mainly enquires into how the state, through its instruments of violence focuses on non-conformities such as insurgency, terrorism etc to justify torture and its usage. Talal Asad's argument also corroborates to this fact when he says, "the use of torture by liberal-democratic states relates to their attempt to control populations that are not citizens. In such cases, torture cannot be attributed to "primitive urges"... It is to be understood as a practical logic integral to the maintenance of the nation state's sovereignty. Like warfare." (Asad, 1996: 1090)

Torture also aids the contemporary state in exerting the supremacy and paternalism supposedly possessed by the sovereign state over a dissenting group of people from within its power and ambit. If one were to bring in Agamben's idea of 'bare life' in juxtaposition to the sovereign as "one who decides on the exception" in a state of exception, with torture as an

extraordinary situation, the sovereign is represented by the security forces interrogating the detenue, and the latter as the bare life.[7]

Taking the context of Nagaland into consideration, where the state agencies perpetrate mass violence in the name of state security and aiding civil administration, one of the case studies show that "the security forces came and surrounded the village and herded all the villagers for hours together and beaten up several men folk mercilessly. One of the village elders is bed-ridden due to excessive torture meted out during the operation."[8] Such is the torment and violence that even innocent men have to go through in the hands of the armed forces.

In India, torture still continues to exist in a rampant manner although most of them go unreported for. An article in the *Social Science Research Network* on torture in India from a legal perspective is of the view that although torture was extensively practiced in India during the Emergency period, the condition has not changed much today.[9]It further goes on to say that "in India the main perpetrators of torture have been police officers and other law enforcement officials, such as paramilitary forces and those authorities having the power to detain and interrogate persons"[10]Until and unless alternative techniques to extract confession from suspects are devised, torture will continue to be an inherent necessary evil for even democratic, liberal states today.

3.4 Interrogation as Different from Torture

We would now proceed to look at whether and, if so, how torture and interrogation are different from each other, or whether torture is a corollary of interrogation. This is necessary to be delved into since all purposes of detention that has happened in Nagaland during the 1990s were for interrogation, at a time when the internal security of the Indian state was at a point of turmoil and challenge from within. The question that reverberates is: how was that

[7] I would like to acknowledge the views shared by Bimol Akoijam, Centre for the Study of Social Systems, Jawaharlal Nehru University, and this part has been borrowed extensively from a conversation I had with him during this research.
[8] In, *Atomu Vs. UoI & Ors*, 1997. p. 3 of writ petition.
[9] See, Deva Prasad M. 2007.
[10] i.b.i.d.,p.6

interrogation to extract valuable information possible through simple "voluntary confessions" from the detenus maximum of whom were hard-core underground members? These questions were mainly related to the hide-outs of important personalities in the underground movement, their operations carried out and the individual personnel involved and so on. This definitely involved serious security issues for the detenue as well as his accomplices. The point is, how is it possible that such risky information were given out "voluntarily" by the detenus? This obviously leads one on to re-question the fact that those indefinite detentions were solely for interrogations, and that those information were "voluntarily given" as maintained by the security forces.

The fact that interrogation does and need not necessarily entail torture and the usage of third degree methods is firmly established by the Supreme Court in *Kartar Singh Vs State of Punjab*[11].This is a very significant judgment when it comes to looking at the close relation between interrogation and torture in the Indian legal jurisprudence and detentions.

3.5 Effacing of State-Perpetrated Violence in a State of Emergency

The practice of torture during interrogation of suspects has become a public secret today particularly with the increasing banning of "illegal" or "outlawed" groups threatening the state. The manner of maiming is however mostly internal, such as renal failure, for instance, as a result of injections administered to the person during "interrogation" and prolonged detention.[12] What is interesting is the way this kind of violence is totally effaced from the judicial discourse through the usage of terms such as "voluntary confession", which further enhances the suspicion on the "interrogators" and techniques they deploy in gathering such supposedly "voluntary" confessions without having to inflict or exert torture on the detainee.
In post-colonial India, we can say that torture and other techniques of regulation and control over the body population is very much an inheritance of the colonial rule. In a very insightful work on torture in colonial India, Anupama Rao unravels the relationship between torture and

[11] (1994) 3 SCC 569
[12] This point was mentioned during an interview with Mr. Ashipro, a lawyer with the Gauhati High Court, Kohima Bench, in December 2008, at Kohima.

colonial law for a better understanding of the nexus "between the tortured body and the silence surrounding the practice of torture" (2001:4125). She reckons and acknowledges the fact that the colonial regime practiced torture while at the same time attempting to efface it. In the same work, she also throws light on how the colonial state often demanded "the imposition of forms of physical and symbolic violence" which was deemed necessary over the "racially inferior and culturally backward" subjects of their colonies.[13] We still see a similar paternalism running along the same lines in the country even centuries after the colonialists are long gone.

Anupama Rao, while exploring the "secret" nature of torture, opines very explicitly that "neither war nor political instability nor a public emergency can justify the resort to torture" and views that this very right is not subservient even to "the laws of sovereign state" (2004:2347). Talking about the secrecy of torture in the modern state of policing, Asad very aptly puts that it is so due to its "uncivilized" nature, which makes it illegal.[14] Herein lays the paradoxical nature inherent in the so-called "modern" techniques of disciplining, one which projects a humane face through the garb of modernity, while concealing at the same time the very method which goes against this modernizing project. He goes on to say that "the effectiveness of certain kinds of knowledge depends upon its secrecy" (1996:1084). Knowledge is power, and knowledge, particularly those rendered crucial for the security of the state, is not so easy to extract.

3.6 Grading of Detenus into "Black", "Grey" And "White"

Now I turn to how the security forces use categories of war to classify the body population into different categories of suspicion. The suspect community is divided into three categories by the security forces – these categories belong to the vernacular of war rather than the vocabulary of policing. Once a person is apprehended under the AFSPA, he is interrogated by the security forces. Based on this interrogation and other reports about the person from

[13] i.b.i.d., p.4128.
[14] Asad Talal. 1996. On Torture, or Cruel, Inhuman and Degrading Treatment. *Social Research*, 63, No.4. (Winter, 1996): p.1084

sources known to the security forces, he is classified under a specific category which could be black, grey or white. It is also determined depending on the nature of his activity, or inactivity, mainly with the underground forces operating in various parts of the state. This classification is mentioned clearly in either the Interrogation Report or the First Information Report or even both.

Grading of a detenue in a *habeas corpus* case into either "Black", "Grey", or "White" is supposedly a system of categorization followed under the AFSPA deployed areas all over the country. However, in my knowledge, there is hardly any literature on this kind of gradation so far.[15] It can be mentioned here that such gradation evokes vocabularies of war in the legal discourses of everyday contexts, which, as seen from the case analysis, appear only in the dossiers of the detenus and which do not find their way into the judgments.

Let us now turn to how each of these categories is defined. A person described as "white" is someone

> who either had committed a cognizable offence or against whom reasonable suspicion exists such persons alone are to be arrested, innocent persons are not to be arrested and later to give a clean chit to them as is being "white."[16]

Whereas when a detenue is described as "grey", in the rare case, it is found that he is described as someone who was forced to support "anti-national activity". For instance we find that in *Shri. Vikhato Sumi Vs. UoI & Ors*[17], the judgment held the following: "For his voluntary confession of the activities (of) senior ranking functionaries of anti-national elements. Reveals individual may have been forced to provide lodging etc. He is graded GREY."

A conversation with Col. (Retd.) M.S.Thakur, who had served in the security force stationed in Nagaland during the 1960s as well as the time around 1996 and 1997, helped me to understand the classification of an individual detained by the security forces operating under the AFSPA into black, grey or white after interrogation. He explained to me that the necessity

[15] It would be insightful to find out whether such categorization even applies to other extraordinary laws such as the POTA and the TADA; whether it has a genealogy that would lead us to the colonial archive.
[16] In *NPMHR Vs. UoI INDLAW SC 1720, 1997, at para* 6 (b)
[17] *37(K), 1996*

of a joint interrogation team comprising the intelligence team of security forces and the local police were constituted in Nagaland to carry out any kind of interrogation which is meant to extract information from the detenue. In another telephonic interview with the same interviewee,[18] I got to learn how the elders from the villages are used as sources for validating the activity of a person "suspected" by the army, and how it helps the army in preparing the list of suspects from an area. This list is used in conjunction with the information gathered by intelligence sources working with the army in determining whether the person arrested falls under "black", "grey" or "white" after the interrogation. A more detailed description of the gradation follows:

3.6.1 Black

A detenue is graded as black when there is concrete evidence or proof against him for his involvement in anti-national activities such as his involvement in killings, ambushes etc carried out by outfits declared "illegal" or "anti-national" by the State, possession of illegal arms or any other ammunition, and such other acts of a suspicious nature, which are considered a threat to the security of the state and the people. This evidence is arrived at through the interrogations carried out once the person is arrested as well as through "incriminating" documents or any other arms recovered from his residence during the search conducted by the security forces.

3.6.2 Grey

The detenus classified under this category are more of an in-between sort, in the sense that they are apprehended and graded on more of a suspicious nature, their involvement being of an indirect kind in acts which are seen to be equally threatening to the security of the state. However, for any prolonged detention of such individuals, there should be specific information and evidence against him for his actions. Some examples of activities which could let a detenue be labelled as grey are: providing shelter or food to people involved in anti-lawful activities and being sympathetic to their actions, providing information to aid unlawful activities which are a threat to the state. Here, one might question the discrepancies

[18] Telephonic conversation on June 30th, 2009.

in such gradation that might arise in a situation where the security force and the police involved in carrying out the interrogation confuses voluntary provision of shelter, food, information and others to one provided involuntarily, under force or threat.

Apart from the earlier mentioned case where the detenue was graded "grey," in another case, nine men were "apprehended" as "suspects" by the personnel of 3rd Corps, Rangapahar, during an "ambush combing operation" from a village named Midzephema, right after an ambush on a convoy of the security forces. After interrogation, the security forces found out that "all (other) detenus had assisted the undergrounds in carrying out the ambush on the convoy of security forces. They had not only provided shelter and food to the undergrounds but also assisted them in selecting the ambush site..."[19] Thereafter, five of them were graded "Grey", while the other four were graded "Black." However, it is not clear as to what criterion has been used to ascertain such categorization in this case since all of them had been involved some way or the other in the said ambush.

3.6.3 White

If a detenue is found innocent, without any suspicion against him, he is handed over to the police graded as white. For example, in *Lhokeyi Sumi Vs. Union of India & Ors*[20], two detenus detained for seven days were graded "White" with the recommendation that:

> On investigation it was found that both the above mentioned individuals do not belong to any underground organisation nor are they involved in any anti-national activities. However, their relatives are believed to be in the underground organization. However, detailed investigation revealed that they are innocent. They are declared as "WHITE" and handed over to West Police Station to be released[21]

There was another case in which two detenus graded white were detained for four days continuously. This automatically evokes questions about the manner and the pattern in which the gradation has been done. In both cases, no reasons were stated for the delay in handing over the innocent detenus to the local police station.

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[19] In, *Atomu Sumi Vs. Union of India & Ors.* 76(K)1997. GHC, Kohima Bench.p.4 of counter-affidavit.
[20] *Lhokeyi Sumi Vs. UoI & Ors*, 125 (K) 1996.
[21] *Lhokeyi Sumi Vs. UoI & Ors*, 125 (K) 1996. Mentioned in the FIR

Details of the classification of gradation done are given below:

	Grade	No. of Cases	No. of Detenus
1.	Black	44	69
2.	White	2	4
3.	Grey	2	6

Table 6: Classification of Gradation of the Detenus

There were five cases involving seven detenus whose gradation could not be ascertained owing to factors such as missing FIRs and other documents where such specification has been done although they are highly probable to be "Black" since they are also categorized as involved in "anti-national" activities as indicated by documents such as the counter-affidavit.

3.7 Techniques of Torture Used in Extracting "Confessions"

In this section I briefly point out the torture techniques used against the detenus as documented in the judgments which I collected. It is possible to argue that the vocabulary of war has become so normalised that not only does it inhabits judgments but also the way in which lawyers craft their arguments against custodial torture. For instance, from the interviews I conducted in December 2008 in Kohima amongst some lawyers from the Kohima Bench, I learnt from a lawyer, Shri. Lanu Jamir, who stated that:

> it (*referring to the AFSPA*) does not give the security forces the right to detain and torture a detenue although he may be graded as "black" since the constitutional provision under the ASFPA, is to hand him over to the local police station with the least possible delay.[22]

The above discussion makes it manifest that the exceptional powers granted to the army have been 'expanded' through the production of suspect communities. The army officials interpret and determine 'degrees' of 'suspicion' by detaining people who they think help and support 'insurgents', for example, by coding such population as 'grey'. Hence, young Naga men, especially policed by the army are vulnerable to illegal detention. All these are made possible

[22] Personal Interview held on 15th of December, 2008 at the Gauhati High Court, Kohima Bench.

through the instrument of law and its enabling power. Law acts as an instrument of power by providing those acting on behalf of it, empowering them with provisions that create space for a regime of terror, which is then exerted on those found to be in non-conformity to its ideals and principles.

From the 44 cases of "Black", torture had been alleged clearly in seven (7) cases. The two cases of custodial deaths were ungraded however. Also, it might be necessary to mention that the only three cases where the detenus developed complications after their apprehension and had to be hospitalized in the army hospital were graded "Black." This leads us on to the discussion of the various forms of torture seen to have been mentioned in the *habeas corpus* petitions from Nagaland.

From the judgments I collected, the following kinds of torture techniques were used on detenus for extracting "confession" by the security forces:

1. Blindfolding the person(s) during apprehension from one's residence in the presence and witness of his family members;
2. Electric shocks or electrocution;
3. Administering drugged injections and thereafter operating upon the person's body;
4. Tying the person by hanging him upside down and mocking at him;
5. Pouring water through (the) nostrils; and
6. Beating with blunt objects.

The above mentioned techniques are, however, are just a few found to have been used, through the externally visible marks left on the bodies of the detenus post-detention. Mr. Ashipri Poumai, another senior lawyer with the Gauhati High Court Kohima Bench, mentioned "the systematic way of killing or elimination deployed by the army, which ensures that no externally visible injuries are made on the body of the detenue, and opines that "the security forces in this way projects itself to the people as a disciplined institution/body,

therefore Constitutional."[23] In this process of ensuring that no externally visible or indelible marks are left on the bodies, recourse could be taken to other more internally effective and externally invisible methods of torture practiced by the security forces.

3.8 A Typical Case of *Habeas Corpus*

The documentation of the disposed cases from the Kohima Bench reveals that a *habeas corpus* petition is filed mostly after all efforts in searching for the missing person has been futile, by either the relatives, local *gaon burra* (village elder) from the locality of the detenue, public leader from the detenue's village or family friend. My research reveals that in the sample of 77 cases, 71 cases were filed by the next of kin of the detenue(s); 2 cases each by the head *gaonburras* of villages and public leaders from the detenus' area; and one case each by a friend and a family friend. The petitioner then approaches the local police station by filing a missing complaint to the Officer-in-Charge from whom the "missing" evidence is procured through a written statement to be produced before the High Court thereafter. Although this is the official route, what has been found to be practiced in Nagaland is that the petitioners first inquire from the local administration, either the Deputy Commissioner or his subordinate, on whether the detenue is detained by the security forces stationed in the area, and only when it turns futile they turn to the courts.

The High Court hears the petition the very same day or the next day it is filed. It directs the respondents, generally the Home Ministry or the Defence Ministry, to produce the detenue at the nearest police station and the notice is made returnable within six weeks or so from the day it is issued. Turning to the 77 cases of *habeas corpus* gathered from the field of study, there was only *one* instance in which the security forces handed over the body to the police station one day prior to the court's order directing the same, as the following table shows:

[23] Personal interview held on 17th of December, 2008 at the residence of Mr. Ashipri Poumai at Kohima.

Day on which detenue was handed over after the court's order	No. of cases
Before the court order	1
Same day as the court order	5
Next day	11
Second day	14
Third day	6
Fourth day	7
Fifth day	4
Sixth day	5
Seventh day	1
Eighth day	1
Ninth day	5
Tenth day	2
Eleventh day	1
Fifteenth day	1
Nineteenth day	1
Twenty-first day	1
TOTAL CASES	**66**

Table 7: No. of Days Taken by the Security Forces to Produce the Detenue Following a Court Order.

However, in ten cases the number of days could not be ascertained due to missing documents in the case file. The security forces have not handed over the detenue for upto 21 days after the court order to produce the body. The table shows that even a High Court order to release a detenue is met with resistance by the security forces when illegal detention is the zone of indistinction wherein law is suspended. Is this what Hussain calls hyper-legality? It can be inferred from here that the security forces are hardly concerned about handing over the detenue even after the court has directed them. This kind of a situation places them over and above the law, giving them an upper hand over the lives of the detenus and the law of the land. This renders the writ of *habeas corpus* ineffective, although not under any kind of formal suspension since it abrogates the principle of immediacy defining the writ.

This situation is despite the fact that even during a situation of declared/formal Emergency under the purview of the Indian Constitution, the President, under Articles 358 and 359, cannot interfere with the fundamental rights under Articles 20 and 21 of the Constitution, which are the main contentions/claims mentioned in the cases of habeas corpus under the AFSPA. Citizens under the AFSPA declared areas are deprived of this condition when such laws are superseded by extraordinary laws and Acts making it complicated for normal legal processes to take place.

Petitions relating to claim of compensation are generally filed a few months or even after a year of the petition being disposed. However, in the cases collected, there were only two cases in which the details of the compensation, such as the amount payable, were furnished and followed up by the court. These were in the cases of custodial deaths. This further raises the question of whether torture or harassment alone constitutes and qualifies the criterion for claiming compensation. Or whether the life has to be deprived of for fulfilling that condition? What if life has been paralyzed or maimed internally, falling short of dead, to be compensated for?

Let us now examine what a typical case file includes. The following documents comprise the core:

1. Writ petition

2. Counter-affidavit
3. Reply to counter-affidavit
4. Vankalatnama
5. Annexure
    i. No claim/Harassment Certificate
    ii. Medical Fitness Certificate
    iii. First Information Report (FIR)
    iv. Handing/Taking over Certificate
    v. Joint Interrogation Report

3.8.1 Writ petition

A *habeas corpus* petition is largely the summary of the person(s) arrested; date, time, and place of arrest; unit of security forces responsible for the detention if known and so on. It explains in detail the circumstances which occasioned the illegal detention. This is done through the lawyer for the petitioner who pleads for producing the body. Anyone can file the writ of *habeas corpus* for a missing person. It also includes the various laws or Acts conjured up by some action or inaction of the state or any of its agencies. In particular, the writ petition brings into the fore the Constitutional provisions provided for in relation to illegal detentions. It gives the details of the petitioner as well as the detenue, their social background and other relevant information concerning the person apprehended. It invokes the action of the court by bringing into their attention the illegal nature of the detention, as well as the usual purpose of that kind of detention as mainly for torture and ill-treatment. It also draws the court's attention to the mental agony and torture the relatives of the detenue have to go through during such indefinite detention.

3.8.2 Counter affidavit

This is filed by the respondent(s) or party responsible for the apprehension and/or detention. Once the court directs the respondents to produce the detenue, the former party files counter (or, reply) to the statements made in the petition one after the other serially. In it the adjutant of an army unit affirms what is true to his knowledge and the facts of the arrest.

3.8.3 Reply to the Counter-Affidavit

This is filed in reply to the statements procured from the counter-affidavit by the petitioners if necessary; this happens if and when the counter-affidavit and the "facts" solemnly affirmed to by the security forces do not satisfy the petitioner and the party. This happens usually in cases where detention has been denied, and (or) whether torture or ill treatment has been falsified or denied as baseless, and as an attempt to malign the armed forces.

3.8.4 Vankalatnama

A Vankalatnama is an important document through which the petitioner places upon the lawyer the whole responsibility to appear on his behalf in the suit, "to conduct and prosecute or (defend) the same and all proceedings that may be taken..."[24] Simply put, the petitioner places the responsibility upon the lawyer to act in his stead in the court through this document.

3.8.5 Annexure in the Form of Various Certificates

3.8.5.1 No Claim/Harassment Certificate

It is a certificate which the detenue is made to sign before the handing and taking over of the person detained takes place. In it, he/she signs in the usually ready-made format stating that during the apprehension no harassment, ill-treatment, beatings etc had been exerted on him/her by the security forces. In some case, the detenue had been made to sign a blank paper, which is later filled in to suit the case of the security forces. The No Claim/Harassment Certificate also ensures that the detenue does not make any allegation against anybody (meaning the security forces) so as to claim any compensation at any later stage through any agency or court of law.

3.8.5.2 The Medical Fitness Certificate

This certificate is a very important document in a *habeas corpus* case since the court relies on this to ascertain any instances of torture or ill-treatment of the detenue while under detention. This is signed by the Medical Officer examining the detenue at the time of handing over to the local police station. However, a lot of discrepancies arise when the medical examiner does not

[24] From Vankalatnama in, *Keheilhoubeiu Solo Vs UoI & Ors*, 36 (K), 1997.

enter the right records for reasons convenient to the security forces. This is particularly so when the detenue is hospitalized at the Army Hospital during the detention. For instance, in the case of *Mr. Mhathung Vs. Union of India & Ors*[25], the detenue, whose Medical Certificate declared him fit for discharge, was directly admitted to the local civil hospital on being handed over to the local police station, since his condition was still critical.

Also, one could mention the case where external injury was clearly mentioned in the Medical Certificate yet no further action or proceeding was carried forth in the case nor any mention of torture found in the court-room discourse. This reflects the attitude of mildness towards the subject of torture rendered by the court.

3.8.5.3 First Information Report

The First Information Report (or the FIR) is primarily the document which explains in detail the circumstances occasioning the arrest. It includes the manner in which the detenue was arrested and for which offence he was arrested. It also provides details found out on further interrogation about the person arrested, weapons/items or any incriminating documents found with him either at his residence or on his body during the time of arrest, and also furnishes recommendations made to the local police on how the person should he detained. Gradation of a detenue is generally mentioned in the FIR.

3.8.5.4 Handing/Taking Over Certificate

This document keeps record of the date, time and place from where the detenue was apprehended, at which police station he/she is handed over and at what time and date. It specifies the grade - Black, Grey, or White- given to the detenue according to the findings of the interrogation. It also mentions the items/documents if any, from the detenue during the time of arrest and any other details if necessary.

[25] 30 (K), 1996. Gauhati High Court, Kohima Bench.

3.8.5.5 Joint Interrogation Report

It includes the preliminary joint interrogation report of the army, the police and the local administration conducted on the detenue in a much organized manner. Infact, there is a format followed in which everything about the detenue is noted beginning with his familial and socio-economic background, and his political ideologies. In cases where the detenue happens to be involved with the underground movement, details such as the circumstances leading to his joining, the place of his training and his rank are asked for and recorded. Even details of whether and if he had been involved in activities such as ambushes on any person are clearly recorded to ascertain and establish the illegality of his involvement.

3.9 Documents[26]: For Evidence or Erasing Torture?

This section of the chapter will look at the usage of documents that are invoked by a *habeas corpus* petition, how these are used as data for evidence and fact-finding or whether they serve as documents for erasing traces of torture by the court in its judgment order. This is necessary since the court relies solely on written documents as a Court of Record, and nothing without a written proof can be taken as legal or factual.

The application of the AFSPA has inaugurated a new apparatus which includes a vocabulary for classifying suspects as well as bureaucratic apparatus that produces what Emma Tarlo has called "paper truths" (2003). Here, she takes us back to the Emergency period of Indira Gandhi and very closely looks at the manner in which intricacies in documents related to sterilization, under the more humane name of "family planning" and housing allotments in Delhi are detailed, and relates it to her unofficial interactions with officials to bring out the unbridgeable gap between official records and implicit knowledge during the Emergency period. Thereby, she views the capacity of the state as an instrument of violence. This violence is enabled to be perpetrated through the implementation of various laws. The vocabulary of classification inflects everyday legal discourse, yet, there is little research on the genealogy of the terms used to classify 'suspects'.

[26] The format of documents varies from unit to unit of the security forces; however, they all serve the same desired purpose.

Coming to the situation of Nagaland and the importance of written records in establishing evidence, it would be important to mention here a statement made by one of the lawyers, Mr Ashipri, from the Gauhati High Court, Kohima Bench that "cases of false certificates produced by the Security Forces were rampant. However, the court was helpless in this matter since its power ends with the body being handed over to the nearest police station, that it had no control over the "false" affidavits."[27] Herein lays the irony of the writ and the helplessness of the court, over its jurisdictional and operational limits.

Another interesting insight into the usage of documents as "reliable" sources to gather evidence could be seen in the doubtful manner in which one of the lawyers from the High Court in Kohima, Mr. T.B.Jamir responded by saying, "their validity was "questionable" since in many cases the detenus were made to sign those certificates "under duress" which are then used as "evidence" to prove the legality of the detention."[28] All these raises many questions and serious implications on the validity of documents used in a *habeas corpus* petition which legitimizes many otherwise illegal actions on bodies of persons apprehended and detained in the name of state security and "law and order" problems.

Mr. Lanu Jamir, another lawyer who had been interviewed, also pointed to how the affidavits could not be taken on its face value since it was "a tool used by the security forces to: a) avoid giving compensation for illegal detention; b) to show that there was no harassment on the detenue; and c) to show absence of any external injury on the detenue." He was also critical of how the High Court as a Court of Records was handicapped by the fact that it had to go only by those records, "which works against the detenus in many cases."[29]

The following part of this chapter has been devoted to detailed discussion of judgments analyzed from the field of study particularly those dealing with custodial deaths and torture while under the custody of the security forces.

[27] Personal interview held on 17th of December, 2008 at the residence of Mr. Ashipri Poumai at Kohima.
[28] Personal interview held on 18th of December, 2009 at the Gauhati High Court, Kohima Bench.
[29] Personal interview held on 15th of December, 2009 at the Gauhati High Court, Kohima Bench.

3.10 Judgments on Custodial Deaths from the Gauhati High Court, Kohima Bench

Case Study I

On the morning of 3rd February, 1996, Momo Maring and Ng. Sharp Stone, aged 29 and 30 years, were "arrested" by the personnel of the 64 Mountain Brigade under the 3rd Corps, stationed at Rangapahar in Dimapur, along with their Maruti Car in which they were travelling. In the presence of their family members the two men were taken blindfolded with one of the army personnel driving their car. The next morning, the worried family members began their frantic search for the two by first approaching the Additional Deputy Commissioner of Dimapur district, followed by the Officer-in-Charge of the East Police Station of the locality which however, turned out to be in vain. This led to the filing of the *habeas corpus* petition by Benjamin Maring, the 17 year old younger brother of Momo Maring on the 6th of February. The petition stated, "the respondents had failed to make over the detenus before the police or the magistrate even after a lapse of about ninety-six hours despite the fact that the police station locates hardly kilometers away from the Army Headquarters."[30]

On response of the illegal detention, the army denied by saying, "no such persons have been arrested by the Security forces on the said date and place."[31]However, Momo Maring's dead body was handed over to the police by the security forces on 27-02-96, the 21st day after the alleged arrest at around 4:30 p.m. after he had been clearly illegally detained. This petition also sheds us some light on the operation of the security forces in Nagaland. It would be noteworthy to mention here some statements contained therein:

> that since the invocation of the Disturbed Areas Act in the state of Nagaland in April 1995 the security forces had arrested more than five hundred (500) persons and many are being kept in the detention camp without being produced before the police or the magistrate. Therefore, it is submitted that the present detenus are one of the detenus who

[30] *Benjamin Marin Vs. Union of India & Ors*, 12(K), 96. p.4, para 8. of writ petition.
[31] *Benjamin Marin Vs. Union of India & Ors*, 12(K), 96. p.2, para 3 of counter-affidavit.

> are kept in the custody of the Security Forces without making over before the police or the civil authorities.[32]

It also brings out the way in which the security forces conceal their identities in the operation of their duties of aiding civil power. By hiding themselves under civilian garb instead of donning their uniform the security forces render themselves unrecognizable and illegible. This way, it becomes difficult for the civilians to distinguish between the different units of the army, as well as between the army (acting on behalf of the state) and the different underground factions operating in the state. Infact, the state becomes totally undistinguishable at times such as these:

> that to avoid the identification of the real culprits, the security forces are operating in civil dress by using numberless vehicles and in most of the time, their faces are covered up with pieces of clothes though there is specific direction from the government of India that the security forces should wear uniform and insignia while operating in aid of civil authorities.[33]

However, it is surprising to say that in the court order regarding claim of compensation there has been no mention of custodial death, nor any amount for compensation fixed. It is quite apparent that the court simply uses the same format of order for all cases of *habeas corpus* although the cases vary. This case exemplifies the way in which security forces get away scot-free with impunity even for taking lives in the process of carrying out their Constitutional duties. It also clearly exemplifies the manner in which compensation is directed and meant to be for those whose lives are taken and not those who come out alive yet maimed internally.

Case Study II

Another case of custodial violence leading to death happened in the year 1996 when 25 year old Angam Zimik's dead body was handed over on the fourth day after his arrest by the security forces. It was around 11:30 in the night, the 26th of March 1996, that Angam was "apprehended" by the armed personnel posted at Rangapahar from his residence. A *habeas corpus* petition was filed by the younger brother of the detenue on the 28th of March regarding

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[32] *Benjamin Marin Vs. UoI & Ors, 12(K) 1996.* p.3, para 4 of Rejoinder affidavit

[33] *Benjamin Marin Vs. UoI & Ors, 1996.* p.3, para 5 of Rejoinder affidavit

the same. The court's directive to hand over the detenue to the local police station was unheeded by the army, and the dead body of the detenue was handed over to the police on the fourth day after the arrest, two days after the court's direction. This shows that the army in its operations even by-passed the order of the court.

The petition clearly stated what the detenue had to go through during the detention. It says, "...the detenue/deceased was tortured for four days inside the Army Headquarters at Rangapahar from 26th to 29th March, 1996 by hanging upside down, pouring water through nostrils, electrocution, blindfold, administering injection and beating with blunt objects."[34]

The petition also alleges that the detenue after such torture was taken to Intangki Forest and shot dead, and while handing over, the deceased body was fully dressed in army uniform. At the time of handing over, the body bore bullet shots and marks of blunt injuries all over. As alleged, the identity of the detenue was completely distorted beyond recognition; its skull was smashed and had bruises all over the body.

In this case, the security forces points the cause of death to a heavy volume of fire from the undergrounds during the encounter killing the detenue when the latter "voluntarily" led them to Intangki Forest Reserve where the Special Task Force Battalion of the banned NSCN (IM) faction was camped. Their counter-affidavit denies the alleged torture of the detenue for four days. Mention has been made that the detenue "voluntarily facilitated conduct of operations by the security forces..."[35] It also states that the detenue had to be made to wear army uniform to "conceal his identity from the underground outfits lest they kill him for his role in assisting the army."[36] The counter-affidavit also affirms that no compensation should be paid to the detenue's kin who was a Self-Styled Sergeant in the banned outfit. However, a later petition from the petitioner on 15-01-99, claimed compensation for "illegal detention and tortured to death while in army custody."[37]

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[34] *Apam Sigmai Vs. Union Of India & Ors,* 44(K), 96,p.3, para 4 of Misc. Application, dated 15-01-99.
[35] *Apam Sigmai Vs. Union Of India & Ors,* 44(K), 96, p.3 of Counter-affidavit.
[36] *Apam Sigmai Vs. Union Of India & Ors,* 44(K), 96, p.3 of counter-affidavit.
[37] *Apam Sigmai Vs. Union Of India & Ors,* 44(K), 96, p.2 of Misc. application.

The judgment order clearly states the doubt of the court over whether the detenue died as claimed by the security forces in their counter-affidavit. It firmly views that the detenue should not have been taken to the forest and instead should have first handed over the detenue to the police station.

However, the court, in its judgment order, directed the respondents to give compensation of Rs. 2 lakhs to the kin of the deceased finding it to be an "eminently fit case for grant of compensation." It further stated that:

> we have got our doubts whether the detenue died in the manner as has been stated in the Affidavit-in-Opposition. Even if we are to believe the stand of the respondents, we are of the view that the detenue should not have been taken to the forest. He should have been produced before the nearest police station or before a Magistrate and proceed with in accordance with the law.[38]

Although it was established that the detenue/deceased was actively involved in the underground movement, this case points to the fact that nothing can justify torture and custodial deaths since it is illegal, and that there is a legal and procedural manner in which it works. Being "anti-national" or a "hard-core insurgent" alone should not serve as the lone criteria for justification of any form of violence perpetrated by the state on any individual.

3.11 Judgments on Torture from the Gauhati High Court, Kohima Bench

We shall now look at some significant cases from the Kohima Bench of the Gauhati High Court in which torture has been mentioned, especially the way in which the subject has been addressed and responded to by the court.

On 15th June, 1997 the security personnel of 14 Assam Rifles "apprehended" Mr. Achan Shishak and Mr. Arangba Zeliang. In the writ petition filed by the father of Mr. Arangba Zeliang, allegation has been made that the two detenus were illegally detained for 34 days by the said unit of the security forces. In reply, the security forces denied arresting the second detenue. Para 5 of the petition alleges the detenue was "subjected to inhuman torture during

[38] *Apam Singmai Vs. UoI & Ors, 1996*; p.3 of Judgment Order dated 28-07-99

interrogation in Army custody." The counter-affidavit retorts to this allegation by merely denying any such torture being meted out. The Medical Certificate surprisingly, under the "Details of External Injury" column, said: "(a). one black bruise under the rt. (*right*) eye; (b). Two superficial bruises on *(the)* back."[39] This had been signed by the Medical Officer in the certificate on the day and time the handing and taking over of the detenue took place. The detenue was graded "Black" in the FIR. Although torture of the detenue was clearly established through the documents, it is not clear as to why the security forces went scot-free. The petitioner in this case had filed for compensation for the illegal detention after about three months, and the petition was disposed.

Mr. Petenei-o Solo was "apprehended... and taken away...blindfolded" on the 6th of March 1997 from his residence after it was raided by the security personnel of 29th Assam Rifles, Kohima. He was detained for six days thereafter. The writ petition in para 6 states:

> ...the detenue was shivering due to inhuman torture meted out with electric shock on the body of the detenue in the custody of 29 Assam Rifles during the detention. The detenue was detained for about two hours in his residence blind-folded where he narrated to his family members in local dialect how he was subjected to torture with third-degree methods in their custody.[40]

The security forces in their counter-affidavit have denied such treatment however. The allegation of torture has not been denied; infact, the denial has not been established firmly. Instead, mention has been made of the detenue developing hypertension being one such patient, and being treated for the same. The Medical Certificate mentions "under hypertensive drug." The unanswered question remains: what were the situations leading to the increased hypertension of the patient? The counter-affidavit, like in all other cases, "solemnly affirms" that the detenue himself "voluntarily" led the security forces to the underground hide-outs, stressing that no kind of force was used in attaining that objective, which in turn raises more questions and suspicion.

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[39] In, *N.A. Shishak Vs. Union of India & Ors*, 90 (K),1997. Mentioned in the Medical Certificate.
[40] In, *Keheilhoubeiu Solo Vs. Union of India & Ors, 36 (K), 1997*

In another case where torture was alleged, the petition filed by the father of one of the detenus Mr. K. Kaihe alias Dominic, stated that "the detenus have been subjected to third-degree methods at the time of arrest from their residence, and continues to inflict upon the detenus inhuman torture to extract information through intimidation and coercion without a least human compunction is barbarous and illegal."[41] However, the question of torture did not arise once the security force adjutant denies the same in their counter-affidavit. This happens despite the fact that is it within the powers and jurisdiction of the court to enquire into whether the alleged torture ever happened.

The case of *Mr. Mhathung Vs. UoI & Ors* is however, the most appalling amongst the instances of torture meted out by the security forces to a detenue during detention. The detenue, Mr. Misamo Lotha, was "apprehended" by personnel of 3rd Corps, Ranagapahar on 15/3/96 and taken blindfolded from his house. It was in the re-cast application put up by the petitioner, the detenue's uncle, that the details of the torture were brought before the court, apart from claiming for a compensation of Rs. three lakhs for torture and illegal detention. The later application by the petitioner explains how the detenue had to be directly admitted to the civil hospital after his release owing to the critical condition he was handed over in. Since then he had been hospitalized for about three months. The application describes how during custody the detenue was "electrocuted all over his body, tied and hung upside down mocking at him that even Jesus Christ suffered in the similar manner, drug injection was administered to become unconscious" and how his neck was cut and abdomen operated upon while he was unconscious.

On the other hand, the security forces in its affidavit-in-opposition retorted by saying the detenue had inflicted the wounds himself during the detention and that it was their personnel who provided him timely help by admitting him to the military hospital.
The petition mentions how the certificates handed over by the security forces such as the No Claim/Harassment Certificate, Handing/Taking over Certificate, Discharge Certificate form Military Hospital and the Medical Certificate go to show that there was no ill-treatment or

[41] In, *Mr. Kodai Vs. UoI & Ors*, 144 (K),1996. p. 4 of writ petition.

harassment by the security forces during detention, that the detenue undertook not to claim compensation through the court of law and that the injuries were self-inflicted.

3.12 Conclusion

By way of conclusion, I evoke the argument that the body has been, since monarchial times, an entity within the juridico-legal realm of *habeas corpus* (Cohen 2008).Talking about the relational aspect of the body with the monarch, Cohen states, "'the body' enters politics, then, not as a vital or biological phenomenon, but as a legal fiction that stands opposite the corporate body of the monarch" (Cohen, 2008:112). This still continues to exist even in a post-colonial situation in many countries where extraordinary laws exists in a parallel fashion with ordinary ones. It may be apt to bring in the writing of Akoijam (2007) here once again, when he says the body, through the AFSPA, is turned into a legal fiction in a state of exception. Torture and a state of exception are quite inter-linked since torture aids in the creation of the state of exception by ritually enacting power on the bodies of others. Because of this extraordinary situation, torture can be perpetrated with impunity by those in exercise of such powers. Even when the body is produced, the "tortured body" is made to disappear.

CONCLUSION

4.1 Constitutional Law and the Socio-Legal Context

Going back to where this dissertation began, we can construe the fact that the Emergency Powers under Article 352 to 356 can also be evoked not only through a Presidential Emergency but also through an amendment made by the Parliament, courtesy the Article 248 of the Indian Constitution, which provides for exclusive power to the Parliament to make "any" law with respect to any matter not enumerated in the Concurrent List or State List. (Bakshi, 2005:217) In the case of the AFSPA, we can say that such a proclamation by the Parliament was done keeping in mind the socio-legal context of the North-East as well other AFSPA-declared areas in the country.

The ongoing political restlessness in Nagaland, thus, has its unhealed wounds in the constitutional arrangements embedded in the Indian constitution which existed even before the state of Nagaland was born. Infact, it was conceived with the same problem at hand. Initially, the status of autonomy demanded for Nagaland ended with the special status for the state under article 371(A), through small amendments in the Constitution.

Although no substantial conclusion could be reached at in the present situation, and even if one could say that the political climate in Nagaland is more serene than it was a decade ago, one never know what lies ahead once the ceasefire conditions are lifted. One can never say whether "normalcy" can ever be regained in the conflict-torn region. Infact, it will be even more difficult to define "normalcy".

We have also seen, in Chapter two specifically, how in Nagaland, as a state of exception, there has been a suspension of the constitution whereby the normally illegal actions of the military arm are otherwise legalized. This is exemplified through the *habeas corpus* cases in which actions such as illegal detention and torture were normalized in the everyday context. Harsh interrogations of normal citizens became the order of the day, and the ironical part of it was that the people became quite used to the idea that the army was just carrying out their duty,

totally oblivious to the fact that their fundamental human rights were being seriously infringed and abrogated.

Kasibathla's writing on *Constituting the Exception* would be essential to connect the state of exception to the "disturbed areas" of the North-East. Here, she talks about the unpredictable pattern of the state's entry and recession from everyday life. She says, "right and technique cannot be distinguished from one another, as the weapons of paramilitary forces cannot be distinguished from those of the police." (Kasibathla 2005:125) This clearly depicts the everyday life of people in the region, who prefer to have nothing to do with the paramilitary or the armed forces deployed there.

The present situation of relative peace after the ceasefire is not normal since it is only due to the declaration of ceasefire. Ceasefire then becomes a temporary situation. The implication is that it still acts as a sort of deterrent as well as some kind of sovereign control being exerted over these areas, creating some imaginary control or rather, in Foucault's terms, a technique of "governmentality." This, I believe, is a tactic used by the Indian state in continuously re-asserting its sovereignty and control over a secessionist area within its dominion.

4.2 Marker of Emergency in Nagaland

A significant indicator of the unending emergency situation in Nagaland has been the informal suspension of the writ of *habeas corpus* through detentions under the AFSPA. This suspension could be achieved by rendering the writ infractuous through: Firstly, the failure of the army to hand over the detenue to the nearest police station in due time owing to "operational constraints"; Secondly, by not following the court's order in handing over the body, even days after the directive had been issued to them (the details of which have been dealt with in Chapter Two); and thirdly, by not following directives and guidelines provided by the AFSPA in connection to instituting a Joint Interrogation Team in carrying out the interrogation in many cases, thereby committing torture and other harsh methods of interrogating a suspect, which are otherwise not permissible under ordinary law. Nasser Hussain is thus, right in saying that *habeas corpus* is one legal provision in which the state

"claims sovereign immunity by law" (Hussain 2007: 83). Through the suspension of this writ the sovereign power of the state is continuously re-asserted and exercised upon the people of the "disturbed areas".

4.3 Rule of Law, Torture and Impunity in a State of Exception

Agamben is quite correct in saying that the modern state of exception is an attempt to include the exception itself within the juridical order through the creation of an indistinct zone in which fact and law coincide (Agamben, 2005:26). We clearly see this blurring and indistinctiveness between law and fact in the case under study, where the exception has become the norm. This blurring is also quite apparent in the way in which the so-called "rule of law" has lost its essence in the AFSPA- declared areas. As we see from the North-East exception, the principle of "Rule of Law" and its possibility of enabling the state to render itself lawless are deeply inbuilt and entrenched in the politico-legal framework under which it operates. Rule of law has been totally breached upon in these areas of the country.

It is through the enactment of a law like the AFSPA that the lawlessness of the state is revealed. We see the close relation between rule of law and the state of exception whereby extraordinary laws are embedded in rule of law and the latter providing the space for the possibility of the former. This very principle makes possible the creation or constitution of a state of exception in which "norms" (such as rule of law and equality before the law) and "facts" (such as the extraordinariness of everyday laws) coincide. Here, the very exception becomes the rule with the rule of law cloaked by a force of law. A very visible trace of lawlessness and the subsequent denial of a rule of law for citizens in the "disturbed areas" could be the powers of impunity and immunity enjoyed by the armed forces, as empowered by the Act. Excesses of the state and mushrooming of militancy in the north-east has become a vicious circle, quite inter-woven into and interlinked with each other.

The intent of my work is not to see whether the detenus were members of the numerous underground factions, but to examine whether and how the security forces in carrying out their powers and functions conferred by the AFSPA, went beyond what was empowered and

intended by the Act thereby infringing deeply on the fundamental rights of citizens. For instance, a detenue by virtue of being an underground member is not warranted to be tortured and illegally detained by the security forces. The same has not been mandated by the Act. A pointer towards further research could be looking at whether the classification and categorization of "suspects" used under the AFSPA into "black", "grey" and "white" as has been found in Nagaland, also applies to other extraordinary laws such as the POTA and the TADA; whether it has a genealogy that would lead us to the colonial archive.

4.4 Revisiting the AFSPA- As a Principle of Necessity

Reviewing, if not repealing, the AFSPA particularly in the wake of the cease fire has been one major voice echoing amongst many organizations and groups in Nagaland as well as in the other parts of the country wherever it has been deployed. One could question the politics behind non-implementation of the Jeevan Reddy Committee Report although strong recommendations were made by the Committee to repeal the Act. It was not even reviewed or amended. Infact, why has the Indian state been ignoring the various recommendations of special review committees and various other concerned groups in the country exhorting to revoke or repeal the Act? Why is the state instead being driven by the voices of the armed forces favoring for the continuity and prolonged imposition of the Act?

What are the implications of the decrease in the number of *habeas corpus* cases coming to the high court on the state of exception with the ceasefire, although the AFSPA is still deployed? Does it imply that illegal detentions have stopped altogether? Or does it imply that they are still happening albeit outside the public realm?

AFSPA can be called the 'principle of necessity' through which the Indian state can constitute a permanent state of exception in areas where it has been declared. Through this Act, emergency and extraordinary excesses of the state are given an alibi under the broad banner of "law and order problem". Hence, its continued existence is deemed essential for the state. This could only provide the rationale behind the non-implementation of countless

recommendations to the Government of India for repealing the Act. Leave alone repealing the Act, it has not been even taking steps for amending it to a more humane Act. Moreover, if it were to be repealed or amended one day, the same principle of necessity will probably continue to dominate the basic idea behind any law replacing it although, maybe, with a more humane face.

4.5 In Lieu of a Conclusion

Talking about the socio-legal aspect in constitutional law and its exercise, any legal research in law on Nagaland cannot escape looking into the legal pluralism running parallel between the predominant state law and customary law that have been provided for in the Indian Constitution and practiced in the area.

Having indicated the documentary practices around the production of the body in court and how the production of circulation of documents 'absents' the tortured body, I attend to the difficulties in mapping the field of power that bind the legal subject to the law. One such realm is of the way in which women as suspects are victims of sexual violence without being "captured" in the way named by law. Neither customary law nor criminal or constitutional law have been able to redeem the normalization of sexualized violence against Naga women in the states of exception. I would like to pursue the question of legal pluralism and how one may understand the theoretical provocations of the state of exception viz. pluralistic legal orders which simultaneously act as subjection on women and children.

I wish to conclude by just raising a rhetorical question- "Is the creation of the state of exception or undeclared emergency in the North-East the result of a crisis inherent in constitutional law, between law and politics"? Kathleen M. Sullivan raises a similar problem, when, talking about the American Constitution without its general emergency provisions, comments that the theory of written constitutionalism is incompatible with emergency exceptions. (Sullivan, 2006:30)

APPENDICES

APPENDIX-I: THE ARMED FORCES (SPECIAL POWERS) ACT, 1958

INTRODUCTION

Violence became the way of life in north-eastern States of India. State administration became incapable to maintain its internal disturbance. Armed Forces (Assam and Manipur) Special Powers Ordinance was promulgated by the President on 22nd May of 1958. In which some special powers have been given to the members of the armed forces in disturbed areas in the State of Assam and Union Territory of Manipur. Later the Ordinance was replaced by the armed Forces Special Powers Bill.

STATEMENT OF OBJECTS AND REASONS

An ordinance entitled the Armed forces (Assam and Manipur) Special Powers Ordinance, 1958, was promulgated by the President on the 22nd May, 1958. Section 3 of the Ordinance powers the Governor of Assam and the Chief Commissioner of Manipur to declare the whole or any part of Assam or the Union territory of Manipur, as the case may be, to be a disturbed area. On such a declaration being made in the Official Gazette, any Commissioned Officer, Warrant Officer, non-commissioned officer or any other person of equivalent rank in the armed forces may exercise, in the disturbed area, the powers conferred by section 4 and 5 of the Ordinance. The Bill seeks to replace the Ordinance –See Gazette of India, 11-8-1958, Pt. II-Sec. 2, Ext. p.714 (No.26).

ACT 28 OF 1958

The Armed Forces (Special Powers) Bill was passed by both the Houses of Parliament and it received the assent of the President on 11th September, 1958. It came on the Statute Book as THE ARMED FORCES (SPECIAL POWERS) ACT, 1958 (28 of 1958).

LIST OF AMENDING ACTS

1. The State of Mizoram Act, 1986 (34 of 1986).
2. The State of Arunachal Pradesh Act, 1986 (69 of 1986).

3. The Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972 (7 of 1972).

4. The Armed Forces Special Powers (Extension to Union Territory of Tripura) Act, 1970.

5. The Repealing and Amending Act, 1960 (58 of 1960).

THE ARMED FORCES (SPECIAL POWERS) ACT, 1958

(28 of 1958)

[11th September, 1958]

*An Act to enable certain special powers to be conferred upon members of the armed forces in disturbed areas in the State of *[Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura].*

Be it enacted by Parliament in Ninth Year of the republic of India as follows:-

1.Short title and extent –

(1) This act may be called **[The armed Forces (Special Powers) Act, 1958].

[(2)] It extends to the whole of the State of *[Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura].

2. Definitions: In this Act, unless the context otherwise requires-

(a) "armed forces' means the military forces and the air forces operating as land forces, and includes other armed forces of the Union so operating;

(b) 'disturbed area' means an area which is for the time being declared by notification under section 3 to be a disturbed area';

(c) all other words and expressions used herein, but not defined and defined in the Air Force Act, 1950 (45 of 1950), or the army Act, 1950 (46 of 1950) shall have the meanings respectively to them in those Acts.

3.Powers to declare areas to be disturbed areas – If, in relation to any state or Union Territory to which this act extends, the Governor of that State or the administrator of that Union Territory or the Central Government, in either case, if of the opinion that the whole or any part of such State of Union territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the

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

*Subs. By Act 69 of 1986,sec.43 for "Assam, Manipur, Megahalya, Mizoram, Nagaland and Tripura and the Union territory of Arunachal Pradesh" (w.e.f. 20.2.1987.)

**Subs by Act 7 of 1973, sec. 3 for 'the armed forces (Assam and Manipur) special Powers Act, 1958" (w.e.f 5.4.1972).

***Subs by Act 7 of 1972, sec. 4 (w.e.f 5.4.1972).

*****Subs by Act.69 of 1986,sec. 43 for 'Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura and the Union Territory of Arunachal Pradesh'(w.e.f 20.2.1987). Sec 5] The Armed Forces (Special Powers) Act, 1958.

COMMENTS

(i) The Governor is empowered to declare any area of the State as "disturbed area'. It could not be arbitrary on ground of absence of legislative guidelines; *Inderjit Barua v.State of Assam,* AIR 1983 Del. 514.

(ii) Section 3 cannot be construed as conferring a power to issue a declaration without any time limit. There should be periodic review of the declaration before the expiry of six months; *Naga People's Movement of Human Rights v. Union of India,* AIR 1998 SC 431.

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 move persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;

(b) if he is of opinion that it is necessary so to do, destroy any 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 a training camp for armed volunteers or utilized as a hide-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.

COMMENTS

(i) Conferment of power on non-commissioned officers like a Havaldar cannot be said to be bad and unjustified : *Inderjit Barua v .State of Assam,* AIR, 1983 Del 514.

(ii) The armed forces must act in cooperation with the district administration and not as an Independent body. Armed Forces could work in harmony when they deployed in disturbed area: *Luithukia v.Rishang Keishing,* (1988) 2 Gau LR 159.

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. In case of arrest of any person, army authority is duty bound to handover to the officer-in-charge of the nearest police station with least possible delay: *Horendi Gogoi v. Union of India,* (1991) Gau CR 3081.

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.

7. Repeal and Saving - [*Repealed by Amending and Repealing Act, 1960 (58 of 1960),First Schedule, sec.2* (26.12.1960]

(Source: http://mha.nic.in/pdfs/armed_forces_special_powers_act1958.)

APPENDIX-II: CLASSIFICATION OF HABEAS CORPUS PETITIONS FROM THE GAUHATI HIGH COURT, KOHIMA BENCH

SL. No.	Name of Case	Relation of petitioner to detenue	Tribe of detenue	Date of arrest	Court order	Handed over on	Duration of detention, gradation	Unit of army responsible for detention
1	1 (K), 1995. Shri N.Kaisu Vs. UoI & Ors.			6/12/94	10/01/95	14/02/95	Illegal detention and torture for 35 days; Detention denied by the SFs in the counter-affidavit, instead the detenue approached the former for surrendering.	Para regiment, 3rd Corps, Rangapahar
2	5 (K), 1996. Mrs. Ayimla Chang Vs. UoI & Ors.	Sister	Chang	05/01/96	23/01/96	01/02/96	Illegal detention for 18 days. (i.e petition filed on the 18th day after arrest, handed over on the 34th day to the police)	8th Battalion, Assam Rifles, Tuensang
3	12 (K), 1996. Benjamin Marin Vs. UoI	Younger brother		03/02/96	06/02/96	27/02/96	Torture and detention of 2 detenus; body of 1 deceased handed over to the local police on the 21st day after arrest.**(custodial death, mentioned in rejoinder affidavit although the SFs denied arrest in their counter-affidavit)**	64 Mountain Brigade, Under 3rd Corps, Rangapahar
4	27(K), 1996. Mrs. Auching Chang Vs. UoI & Ors.	wife	Chang	13/03/96	15/03/96	20/03/96	Illegal detention and torture for 7 days (Operational constraint as reason for delay)	3rd Corps, Rangapahar
5	29 (K), 1996. Adam Rongmei Vs. UoI & Ors.	brother	Rongmei	11/03/96	18/03/96	No counter-affidavit	Illegal detention and torture for 160 hours (6/7 days)	16th Assam Rifles, Jalukie.
6	30 (K), 1996.Mr. Mhathung Vs. UoI & Ors.	uncle	Lotha	15/03/96	18/03/96	28/03/96	Illegal detention, torture (drugged, electrocuted, operated upon), for 13 days; court directed to pay compensation; detenue graded **"Black."** Torture mentioned in re-cast application by petitioner. Interrogation report attached in this case.	3rd Corps, Rangapahar

SL. No.	Name of Case	Relation of petitioner to detenue	Tribe of detenue	Date of arrest	Court order	Handed over on	Duration of detention, gradation	Unit of army responsible for detention
7	35 (K), 1996. Shri. H. Asheto Vs. UoI & Ors.	Elder brother of one detenue, cousin of the other	Sumi	16/03/96	20/03/96	20/03/96 and 23/03/96	Illegal detention of the two detenus for upto 4 days and 7 days respectively; both detenus graded "White"	3rd Corps, Rangapahar
8	36 (K), 1996. Shri. Phushito Ayemi Vs. UoI and Ors.	Elder brother	Sumi	19/03/96	20/03/96	25/03/96	Illegal detention for 6 days. Detenue graded as **"Black."**	3rd Corps, Rangapahar
9	37 (K), 1996. Shri Vihato Sumi Vs. UoI and Ors.	Nephew of detenue	Sumi	18/03/96	20/03/96	20/03/96	Illegal detention for 2 days, detenue graded as "Grey."(grey defined in this case in one of the annexure)	3rd Corps, Rangapahar
10	38 (K), 1996. Theimila Vs. UoI & Ors.	wife	Tanghkul	11/03/96	22/03/96	28/03/96	Illegal detention for 17 days, hospitalized owing to TB complications during custody, detenue graded as **"Black."**	29th Battalion, Assam Rifles Ihar
11	44(K), 1996. Mr. Apam Singmai Vs. UoI & Ors.	Younger brother	Tangkhul	26/03/96	28/03/96	Dead body handed over on 30/03/96	Illegal detention, torture, and **death of a detenue while in army custody** (within two days); compensation of Rs. 2 lakhs paid to the family of the deceased. In the court order, this case is taken as an eminently fit case for compensation.	3rd Corps, Rangapahar
12	47 (K), 1996. Shri. K.A. Zimik Vs. State of Nagaland.	Elder brother	Tangkhul	21/08/95			Illegal detention under **NSA**	29 Assam Rifles, Kohima
13	51 (K), 1996. Smti. Kemozole Vs. UoI & Ors.	wife	Lotha	08/04/96	10/04/96	No counter-affidavit	Illegal detention for two days and (expected) torture.	29 Assam Rifles, Kohima
14	66(K), 1996. Mr. Lhokeyi Yepthomi Vs. State of Nagaland	Not mentioned	Sumi	19/08/95	28-29/08/96		Illegal detention and torture **under NSA** for ten days, graded as **"Black." Torture alleged in Annexure-C by the detenue.**	26th Battalion, Assam Rifles

SL. No.	Name of Case	Relation of petitioner to detenue	Tribe of detenue	Date of arrest	Court order	Handed over on	Duration of detention, gradation	Unit of army responsible for detention
15	72 (K), 1996. Mr.James Poumai Vs. UoI & Ors	Brother	Poumai	20/04/96	08/05/96	12/05/96	Illegal detention for 22 days of two detenus both graded as **"Black."** Surrendered from the UG	3rd Corps, Rangapahar
16	76 (K), 1996. Mr. R.S.Abel Vs. UoI& Ors.	Brother-in-law of one detenue		18/05/96	20/05/96	Counter-affidavit missing	Illegal detention of 3 detenus for 2 days, i.e.thirty-five hours. (army guideline for non-interrogation of detenue attached)	3rd Corps, Rangapahar
17	86 (K), 1996. Shri Y. Patton Vs. UoI & Ors	Uncle	Lotha	04/06/96	10/06/96	29/06/96	Illegal detention after shooting the detenue (while trying to flee); graded as **"Black."** Detained for 6 days. Hospitalized for 26 days in the army hospital	3rd Corps, Rangapahar
18	90 (K), 1996. Mrs. Zubeni Vs. UoI & Ors.	Wife	Tangkhul	08/06/96	12/06/96	18/06/96	Illegal detention of 2 detenus for 10 days, both graded as **"Black."**	3rd Corps, Rangapahar
19	91 (K), 1996. Mrs. Akala Vs. UoI & Ors.	Wife	Ao	05/06/96	13/06/96	17/06/96	Illegal detention of a detenue for about 12 days	Brigade Command, Mokokchung.
20	95 (K), 1996. Smti. Thanpui Pamei Vs. UoI & Ors.	Wife		09/06/96	17/06/96	20/06/96	Illegal detention for 11 days, detenue graded as **"Black."**	3rd Corps, Rangapahar
21	97(K), 1996. Smti. Aseu Tase Vs. UoI & Ors	Wife		16/06/96	24/06/96	Denied arrest in counter-affidavit	Petitioner alleged the personnel of 26 Bn. Of Assam Rifles for holding the detenue in custody; respondents denied the allegations in seriatim. Court dismissed the petition on 26/07/99, directing the petitioner to approach them if he finds more information. **Torture alleged** in the petition.	12 Rajputana Rifles, Niuland
22	101 (K), 1996. Shri. Tapibon Zeliang Vs. UoI & Ors.	Uncle	Zeliang	27/06/96	05/07/96	01/07/96	Illegal detention for 4 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
23	106(K), 1996. Smti. Alima Vs. UoI & Ors	Wife		02/07/06	09/07/96	12/07/96	Illegal detention for 10 days. Gradation not given.	16 Assam Rifles, Peren.

SL. No.	Name of Case	Relation of petitioner to detenue	Tribe of detenue	Date of arrest	Court order	Handed over on	Duration of detention, gradation	Unit of army responsible for detention
24	107 (K), 1996. M. Gonmei Vs. UoI & Ors	Cousin brother	Gonmei	02/07/96	09/07/96	11/07/96	Illegal detention for 9 days. Gradation not given.	27 Bn. Assam Rifles, New Jalukie.
25	109 (K), 1996. T. Akumba Sangtam Vs UoI & Ors.	Cousin brother	Sangtam	15/07/96	23/07/96	20/07/96	Illegal detention for 5 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
26	110 (K), 1996. Khetoshe Swu Vs. UoI & Ors.	Relative	Sumi	22/07/96	23/07/96	27/07/96	Illegal detention for 5 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
27	111 (K), 1996. Shri. Hetoi Swu Vs. UoI & Ors.	Father	Sumi	21/07/96	24/07/96	27/07/96	Illegal detention for 6 days; (handing and taking over certificate missing,)	3rd Corps, Rangapahar
28	116 (K), 1996. Shri. Sahoto Sumi Vs. UoI & Ors.	Relative	Sumi	19/07/96	29/07/96	31/07/96	Illegal detention for 12 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
29	121 (K), 1996. Shri. Yehoto Watsa s. UoI & Ors.	Elder brother		01/08/96	08/08/96	Counter-affidavit missing	Illegal detention for upto 7 days.	12 Assam Rifles, Wokha
30	125 (K), 1996. Mr. Lokheyi Sumi Vs. UoI & Ors.	Friend.	Sumi	10/08/96	16/08/96	17/08/96	Illegal detention of two detenus for 7 days; both handed over as innocent and "White." (white explained in this case)	3rd Corps, Rangapahar
31	127 (K), 1996. Shri. R. Hoping Vs. UoI & Ors.	Cousin brother	manipuri	28/07/96	20/08/96	Arrest denied.	Alleged detention by the SFs denied in counter affidavit, although compensation claimed on 29/10/97	3rd Corps, Rangapahar
32	129(K), 1996. Smti. Mhalo Ezung Vs. UoI & Ors.	Wife	Lotha	17/08/96	22/08/96	23/08/96	Illegal detention for 5 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
33	130 (K), 1996. Shri. Enchembemo Lotha Vs. UoI & Ors.	Elder brother	Lotha	02/08/96	22/08/96	24/08/96	Illegal detention for 21 days; detenue graded as **"Black." (detenue developed malaria during detention)**	12 Assam Rifles, Wokha
34	133 (K), 1996. Shri. M. Reisang Vs. UoI & Ors.	Cousin brother	Tangkhul	06/08/96	28/08/96	02/09/96	Illegal detention for 21 days; detenue graded as **"Black." (detenue developed malaria during detention)**	12 Assam Rifles, Wokha

SL. No.	Name of Case	Relation of petitioner to detenue	Tribe of detenue	Date of arrest	Court order	Handed over on	Duration of detention, gradation	Unit of army responsible for detention
35	136 (K), 1996. Mr. Mhonchan Vs. UoI & Ors.	Cousin brother	Lotha	26/08/96	30/08/96	Arrest denied	Alleged detention by the SFs denied in counter affidavit.	3rd Corps, Rangapahar
36	144 (K), 1996. Mr. Kodai Vs. UoI & Ors.	Father		03/09/96	06/09/96	06/09/96	Detention for 3 days; both detenus graded as **"Black." Torture alleged**	29 Assam Rifles, Kohima.
37	149 (K), 1996. Shri. E. Kikon Vs. UoI & Ors	Relative	Lotha	10/09/96	12/09/96	16/09/96	Illegal detention of two detenus for 6 days; both graded as **"Black." Fear of torture mentioned.**	12 Assam Rifles, Wokha.
38	150 (K), 1996. Shri. Lokheyi Yepthomi Vs. UoI & Ors.	Relative	Sumi	10/09/96	12/09/96	14/09/96	Illegal detention for 4 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
39	161 (K), 1996. Akato Chophi Vs. UoI & Ors.	Head Gaon Bura of the detenus' village	Sumi	18/09/96	19/09/96	19/09/96	Detention for 2 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
40	171 (K), 1996. Mr. Niktiba Vs. UoI & Ors.	Father	Ao	04/10/96	08/10/96	16/10/96	Illegal detention for 12 days; detenue is graded as **"Black"** recommended to be booked under NSA.	64 Mountain Brigade, 3rd Corps, Rangapahar
41	176 (K), 1996. Mrs. Sarimongla Vs. UoI & Ors.	Wife	Ao	06/10/96	09/10/96	16/10/96	Illegal detention for 10 days; handed over as **"Black." Recommended to be booked under NSA**	64 Mountain Brigade, 3rd Corps, Rangapahar
42	180 (K), 1996. Mr. Ningkhan Vs. UoI & Ors.	Cousin brother	Tangkhul	05/10/96	10/10/96	Arrest denied	Alleged detention by the SFs denied in counter affidavit. **Torture alleged** in petition.	15 Garhwal Rifles, Mountain Brigade, Chakabama.
43	181 (K), 1996. Shri. Imnakba Vs. UoI & Ors	Father of 1st detenue	Ao	04/10/96	10/10/96	15/10/96	Illegal detention of 2 detenus for 11 days; both graded as **"Black."** (details of ban on NSCN-IM given)	3rd Corps, Rangapahar

SL. No.	Name of Case	Relation of petitioner to detenue	Tribe of detenue	Date of arrest	Court order	Handed over on	Duration of detention, gradation	Unit of army responsible for detention
44	186 (K), 1996. Smti. Hukali Shohe Vs. UoI & Ors.	Wife	Sumi	28/10/96	31/10/96	03/11/96	Illegal detention for 5 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
45	187(K), 1996. Smti. Lhosheli Yepthomi Vs. UoI & Ors.	Employer of the detenus	Sumi	29/10/96	Court order missing	31/10/96	Detained for 2 days; both detenus graded as **"Black."**	3rd Corps, Rangapahar
46	190 (K), 1996. Shri. Tokuho Neho Yeptho Vs. UoI & Ors.	Brother of 1 detenue	Sumi	16/11/96	19/11/96	20,25,28/11/96	Illegal detention of 3 detenus for 4, 9 and 12 days respectively; all 3 graded as **"Black." Fear of torture mentioned in court order**	3rd Corps, Rangapahar
47	193 (K), 1996. Pishito Ayemi. Vs. UoI & Ors.	Uncle	Sumi	20/11/96	21/11/96	22/11/96	Illegal detention for 3 days; detenue graded as **"Black." Torture feared**	3rd Corps, Rangapahar
48	204(K), 1996. Vitoshe Rochill Vs. UoI & Ors.	Relative	Sumi	30/11/96	02/11/96	01/12/96	Detained for 2 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
49	210(K), 1996. Dozhuhou Vs. UoI & Ors.	Relative	Chakesang	28/11/96	05/12/96	07/12/96	Illegal detention for 8 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
50	211 (K), 1996. Shri. Hillo Rengma Vs. UoI & Ors.	Relative	Rengma	01/10/96	06/12/96	07/12/96	Illegal detention for 7 days; detenue graded as **"Black." Recommended to be booked under NSA.**	3rd Corps, Rangapahar
51	9 (K), 1997. Shri. G. Hokighu Sema Vs. UoI & Ors.	Younger brother	Sumi	20/01/97	27/01/97	28/01/97	Illegal detention and torture for 8 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
52	11 (K), 1997. Hokeyi Sumi Vs. UoI & Ors	Relative	Sumi	22/01/97	27/01/97	29/01/97	Illegal detention for 7 days; detenue graded as **"Black." Torture alleged**	64 Mountain Brigade.
53	16 (K), 1996. Shri. Vihozhe ZHimomi Vs. UoI & Ors.	Father	Sumi	08/02/97	19/02/97	Arrest denied	Alleged detention by the SFs denied in counter affidavit as he was absconding. Graded as **"Black"**	15 Garhwal Rifles, 3rd Corps, Rangapahar
54	17 (K), 1997. Shri Inushe G.B Vs. UoI & Ors.	Gaon bura of the detenus' village	Sumi	16/02/97	19/02/97	21/02/97	Illegal detention of four detenus for 5 days; detenus graded as **"Black."**	15 Garhwal Regiment, Chakabama.
55	23 (K), 1997. Shri Khutovi Sema Vs. UoI & Ors.	Relative	Sumi	19/02/97	24/02/97	25/02/97	Illegal detention for 7 days; detenue graded as **"Black."** (long term prison recommended)	3rd Corps, Rangapahar

SL. No.	Name of Case	Relation of petitioner to detenue	Tribe of detenue	Date of arrest	Court order	Handed over on	Duration of detention, gradation	Unit of army responsible for detention
56	24 (K), 1997. Mr. Mudovoyo Vs. UoI & Ors.	Cousin brother	Chakesang	22/02/97	24/02/97	26/02 and 05/03/97	Illegal detention of 2 detenus for 4 and 13 days respectively; both graded as **"Black."** Torture alleged in petition.	29 Assam Rifles, Kohima
57	31(K), 1997. Shri. D. Vihoto Sumi Vs. UoI & Ors.	Friend	Sumi	21/02/97	25/02/97	Counter-affidavit missing	Illegal detention of 3 detenus for 4 days; both graded as **"Black."**	3rd Corps, Rangapahar
58	33 (K), 1997. Shri. Renbeni Lotha Vs. UoI & Ors.	Wife	Lotha	01/03/97	04/03/97	07/03/97	Illegal detention for 6 days; detenue graded as **"Black."**	3rd Corps, Rangapahar
59	34 (K), 1997. Mongthro Yimchunger Vs. UoI & Ors.	Paternal uncle	Yimchunger	15/02/97	06/03/97	Counter-affidavit missing	Petition filed on the 21st day after arrest; counter affidavit filed but missing here	17th Madras Regiment, Changki.
60	36 (K), 1997. Keheilhoubeiu Solo Vs. UoI & Ors.	Wife	Angami	06/03/97	10/03/97	11/03/97	Illegal detention and alleged torture for 5 days; detenue graded as **"Black." (torture through electric shock alleged in the petition).** Detenue kept in constant supervision being a patient of hypertension (as mentioned in the counter-affidavit)	29th Assam Rifles, Kohima
61	37 (K), 1997. Merebeni Patton Vs.UoI & Ors.	Wife	Lotha	09/02/97	10/03/97	Arrest denied	Petition filed on the 28th day after the detenue went missing; SFs denied the arrest or detention of such person in their counter-affidavit. (however, petition for compensation was filed on 29/10/97)	24th Rashtriya Rifles, Wokha.
62	41 (K), 1997. Ivishe Chishi Vs. UoI & Ors.	Friend	Sumi	17/03/97	21/03/97	21/03/97	Illegal detention for 4 days; no grading mentioned in the Handing and taking over although the detenue was possibly involved with the underground. No FIR or seizure memo etc included.	33 Rashtriya Rifles, Zunheboto.

SL. No.	Name of Case	Relation of petitioner to detenue	Tribe of detenue	Date of arrest	Court order	Handed over on	Duration of detention, gradation	Unit of army responsible for detention
63	56 (K), 1997. V.S. Newlandso Vs. UoI & Ors.	Brother-in-law	Lotha	26/01/97	23/04/97	Disposed as not pressed	Illegal detention for almost three months alleged in the petition; no counter-affidavit. However, the petition was disposed as "not pressed" after 43 days of filing the petition.	12 Assam Rifles, Wokha
64	57(K),1997. Shri Ahoto Sumi Vs. UoI & Ors.	Son	Sumi	21/04/97	24/04/97	25/04/97	Illegal detention of 2 detenus, father and son duo, for 4 days; not graded although alleged to be linked to the NSCN-IM in the counter affidavit. Petition disposed as "not pressed on 05/06/97)	3rd Corps, Rangapahar
65	61 (K), 1997. Shri. Honito Vs. UoI & Ors.	Younger brother	Sumi	24/04/97	28/04/97	30/04/97	Illegal detention of 3 detenus for 6 days; detenus graded as **"Black."**	33 Rashtriya Rifles, Zunheboto
66	65(K), 1997. Smti. Kavili Sumi Vs. UoI & Ors.	Sister	Sumi	28/04/97	30/04/97	01/05/97	Illegal detention of detenue for 2 days; (handing and taking over certificate missing)	3rd Corps, Rangapahar
67	66(K), 1997. Smti. Vihono Zhimomi Vs. UoI & Ors.	Wife	Sumi	29/04/97	01/05/97	02/06/97 as not pressed	Illegal detention for two days alleged in the petition; no counter-affidavit. However, the petition was disposed as "not pressed" after 34 days of filing the petition.	3rd Corps, Rangapahar
68	75(K), 1997. Khehoi Sumi Vs. UoI & Ors.	Public leader from the detenus' locality.	Sumi	16/05/97	14/05/97	18, 19/05/97	Illegal detention of 3 detenus for 12 to 13 days respectively; all three detenus graded as **"Black."** No mention of four other detenus made although petition states arrest of 7 persons.	Brigadier regiment, Mountain brigade, Chakabama.
69	76(K), 1997. Atomu Sumi Vs. UoI & Ors.	Relative	Sumi	14/05/97	16/05/97	18, 20, 21/05/97	Illegal detention of 9 detenus for 4 days (6 detenus), 6 days (2 detenus) and 7 days (1 detenue) respectively; 4 detenus graded as **"Black"**, 5 detenus graded as "Grey."	3rd Corps, Rangapahar
70	77(K), 1997. Mr. Amendo Napen Vs. UoI & Ors.	Relative	Assamese	14/05/97	22/05/97	31/05/97	Illegal detention of 2 detenus for 17 days; both detenus graded as **"Black."** (recommended to be charged under the IPC, CRPC and Indian Arms and Explosives Act, relevant sections)	3rd Corps, Rangapahar

SL. No.	Name of Case	Relation of petitioner to detenue	Tribe of detenue	Date of arrest	Court order	Handed over on	Duration of detention, gradation	Unit of army responsible for detention
71	78(K), 1997.Vitozalie Solo Vs. UoI & Ors.	Family friend	Angami	22/05/97	26/05/97	28/05/97	Illegal detention of a detenue for 6 days; detenue graded as **"Black."**	29 Assam Rifles, Kohima.
72	82(K), 1997. Y. P. Jami Vs. UoI & Ors.	Nephew	Lotha	01/06/97	05/06/97	07/06/97	Illegal detention for 6 days; detenue graded as **"Black." (hospitalized for complains of back ache)**	12 Assam Rifles, Wokha
73	90 (K), 1997. N. A. Shishak Vs. UoI & Ors.	Father	Tangkhul and Zeliang	15/06/97	09/07/97	19/07/97	Illegal detention of 2 detenus for 34 days; detenue graded as **"Black." Inhuman torture alleged in petition; SFs denied arrest of second detenue; external injury specified in Medical Certificate.**	14 Assam Rifles, Meluri.
74	134(K), 1997. Shri. Viselie Pochury Vs. UoI & Ors.	Brother	Pochury	22/05/97	13/12/97	31/05/97	Illegal detention and torture for 9 days under the army; handed over to police and since then detained under the **National Security Act**	14 Assam Rifles, Meluri and Later the govt. of Nagaland
75	44(K), 1998. Shri. Alemzungba Vs. UoI.	Brother-in-law	Ao	09/04/97	15/05/97	Counter-affidavit missing;	Illegal detention for 9 days. Torture through electric shock alleged in the petition. The detenue was detained in the Phek district jail since 01/06/97. case disposed as infructuous on 09/03/98 since the order of detention was cancelled by the government.	3rd Corps, Rangapahar.
76	10(K), 1999. Smti. Lalremkin Vs. UoI & Ors.	Wife of 1 of the detenus		19/02/97	25/02/97	27/02/97	Illegal detention of 4 detenus for 8 days under the **National security Act**; all graded as **"Black",**	16, Assam Rifles
77	1(K), 2006. Mrs. Neikhetsu-U-Kanuoh Vs. UoI & Ors.	Mother	Pochury	Missing since 26/07/07			Deserted the Army on his own.	

- The blank spaces denotes that the specific information was not provided anywhere in the petition, including the documents and certificates. Mostly, it could not be ascertained mainly due to missing counter-affidavits and other certificates.

APPENDIX-III: NUMBER OF DETENUS AND THE PERIOD OF THEIR DETENTION

No. of Days detained	Number of cases	Number of detenus
2	6	7
3	2	3
4	11	20
5	6	9
6	9	13
7	7	8
8	3	6
9	5	5
10	3	4
11	2	3
12	6	5
13	3	3
17	2	3
21	1	2
22	1	2
34	1	2

APPENDIX-IV: QUESTIONNAIRE FOR LAWYERS ON *HABEAS CORPUS* IN KOHIMA, NAGALAND

1. Name:
2. Gender:
3. Age:
4. Community:
5. University from where LLB was completed:
6. When did you start your practice? Which court?
7. Which areas of law do you usually deal with?
8. How you ever handled any cases related to habeas corpus? If yes,
   i. How many?
   ii. What was it related to? (Nature of case): disappearance/ detention?
   iii. Who usually files habeas cases?
   iv. What is the procedure generally followed?
9. Whether or how is the person produced in court? Summon/warrant?
10. Do you have any idea on issues of compensation in habeas cases claimed by the detenus/ the petitioner? How does the court vis-à-vis the lawyers and judges ensure that they are duly compensated if the law permit?
11. What is/are the importance of certificates (e.g. No Claim/Harassment, handing and taking over etc) as "evidence" to prove illegal detention?
12. How and whether the court ensures through any means (say decisions in the form of court orders) that the detenue is produced in the nearest police station with the least possible delay as mandated by law, considering that it might/would determine the fate of a life in a person?
13. What is your personal view of the AFSPA operating in the state?

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