An Illusion of Justice

Supreme Court Judgement
on the
Armed Forces (Special Powers) Act

Yes, 'n' how many times can a man turn his head,
Pretending he just doesn't see?

– Bob Dylan

People's Union for Democratic Rights
Delhi
May 1998

For the past about fifty years or so, large parts of the North-East have been virtually under army rule. This rule by the army has had a drastic effect on the daily life of the average citizen residing in the seven states of the North-East. A state of de-facto abrogation of fundamental rights including the all important right to life and large scale encroachment by the army on the life and liberty of the citizens led the Naga Peoples' Movement for Human Rights, Peoples Union for Democratic Rights, Delhi, Human Rights Forum, Manipur among others to file writ petitions in the Supreme Court between 1980 and 1982 challenging the constitutional validity of the Armed Forces (Special Powers) Act, 1958. The Act was challenged on the grounds of being violative of the fundamental rights to life, liberty, equality, freedom of speech and expression, assemble peaceably, move freely, practice any profession, protection against arbitrary arrest and freedom of religion enshrined in Articles 21, 14, 19, 22 and 25 respectively of the Constitution. These petitions were kept pending by the Supreme Court for long fifteen years, during which period the violations of rights continued. The case was finally argued in August 1997. The judgement delivered in November 1997 upheld the Act and all its provisions as constitutional, save for some cosmetic changes. [Reported as Naga Peoples' Movement for Human Rights versus Union of India, (1997) 7 SCALE 210]. The first section of this report provides a critique of the judgement. The second section lists all changes and restrictions suggested by the Supreme Court in a form of a detailed guide for action for people in general and democratic rights activists in particular. An attempt can be made to utilise these restrictions to act as a minor check on the totally unbridled and arbitrary powers exercised by the army. Also, the attempts towards the implementation of these restrictions would highlight the inherent deficiencies in the proposed changes.

Ancestry

On 15 August 1942, at the height of the Quit India Movement, the British Government stating that it was necessary to confer special powers on certain officers of His Majesty's armed forces as an emergency had arisen, brought in the Armed Forces (Special Powers) Ordinance, 1942. This ordinance conferred power on a commissioned officer not below the rank of captain in the army, to use force if necessary to the extent of causing death of a person who fails to halt when challenged by a sentry or who attempts to destroy property which the officer has been deputed to protect. The power to arrest a person was also given along with a duty to hand over the arrested person to the police. Immunity was also provided to army personnel acting under the Ordinance. This Ordinance extended to the whole of British India.

Reflecting the policies of the erstwhile colonial rulers towards the north-eastern states, the Government of Independent India swiftly promulgated a series of legislations - the Assam Maintenance of Public Order (Autonomous districts) Act, 1953, Assam Disturbed Areas Act, 1955 - which concluded in the Armed Forces (Assam & Manipur) Special Powers Act in 1958. This latest Act enhanced the powers given to army personnel under the 1942 ordinance. A non-commissioned officer could now shoot to kill a person violating an order prohibiting the assembly of persons or the carrying of things capable of being used as weapons.

The subsequent division of states in the North-East led to amendments in 1972 and 1986 extending the Act to all the newly created states. The amendment additionally gave powers to the Central Government to apply the Act, a power which was hitherto a sole prerogative of State Government through the Governor. The title of the Act was also changed to the Armed Forces (Special Powers) Act, 1958

Provisions of the Act

There is a total of just six sections in the Act.
Section 1 defines the title of the Act.
Section 2 limits the jurisdiction of the Act to the seven states of the North-East.
(b) defines "disturbed area" as an area notified under section 3 to be a disturbed area.
Section 3 states that if the Governor of a State or the Central Government is of the opinion that an area is in such a disturbed or dangerous state that the use of armed forces in aid of civil power is necessary, then either of them can declare it to be "disturbed area" by notification in the Gazette.
Section 4 gives the following special powers to any commissioned officer, warrant officer or non-commissioned officer of the armed forces in a disturbed area:
(a) If in his opinion, it is necessary for maintenance for public order to fire even to the extent of causing death or otherwise use force against a person who is acting in contravention of an order prohibiting the assembly of five or more persons or the carrying of weapons or of 'things capable of being used as weapons'.
(b) If in his opinion, it is necessary to do so, then to destroy any arms dump or fortified position, any shelter from which armed attacks are made or are 'likely to be made', and any structure used as training camp for armed volunteers or as a hide out for armed gangs or absconders.
(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 likely to commit a cognizable offence and to use whatever force is necessary to affect the arrest.
(d) to enter and search without warrant any premises to make an arrest or to recover any person wrongfully confined or to recover any arms, ammunition, explosive substance or suspected stolen property.
Section 5 makes it mandatory for the army to hand over a person arrested under the Act to the nearest police station with least possible delay.
Section 6 lays down that prosecution, suit or other legal proceeding can be instituted against a person acting under the Act, only after getting previous sanction of the Central Government.

Critique

The hearing of the case starkly brought forth the basic difference of approach between those

pleading for the striking down of this legislation and that adopted by the court. It was the alarming rate of heinous crimes against the populace perpetrated by the army and the para-military personnel and the need to end it, the virtually non existent space for redressal of victims' grievances and the inaccessibility of people to the military courts where such crimes were to be tried, that prompted various democratic rights organisations and individuals to file cases before the court. Such concerns were, however, not shared by the highest court.

The court refused to go into the actual working of the Act and deemed it irrelevant for purposes of deciding its constitutionality. Proceeding on abstract constitutional principles divorced from life, about the permissible degree of infraction of the fundamental rights and presumption of bonafide exercise of power conferred, the court upheld the provisions of the Act with few caveats. But the issue of constitutionality of the Act is intrinsically linked with the actual working of the Act. For, if in total contradiction to reality, it is to be presumed that the power conferred is exercised with the utmost regard for human rights, as the court has done, then the most draconian of laws can be upheld. Therefore a critique based on the working of the Act is integral to a critique of the judgement.

The major portion of the judgement is devoted to an academic discussion about the competency of Parliament to enact a law like the Armed Forces (Special Powers) Act. As expected, Parliament has been held to be competent. The substantive issues were, however, obscured in the legal labyrinth. Whether the Act concerns 'defence of India' or 'public order', whether the situation in the North-East reflects 'external aggression', 'armed rebellion' or else 'insurgency' dominated the deliberations. Thereby concealing the basic fact that the Constitution does not envisage long term deployment of the armed forces in civilian areas and considers any armed forces deployment harmful to the democratic fabric. Therefore such deployment is either allowed for extremely brief intervals under the Criminal Procedure Code (Cr.P.C.) subject to the direct supervision of the District Magistrate, or else for longer intervals in case of Emergency. In the latter case, such decision has to be taken by a majority vote in both houses of Parliament within a month of such order, applicable for a period of six months. The Armed Forces (Special Powers) Act which stands in stark contrast to this constitutional position was nevertheless held to be constitutionally valid.

Similarly, a sizeable section is devoted to a discussion whether the power of the Central Government to declare an area as disturbed is violative of the federal structure of the Constitution and the power of the State Government to do so amounts to excessive delegation of power. Again, as expected, either of them has been held independently competent to declare an area as 'disturbed'. Hardly two pages have been devoted to baldly upholding section 4 which gives extraordinary powers to the army and forms the crux of the Act. No reasoning refuting the criticism of the powers exercised under the Act has been advanced by the court.

Therefore, the methodology followed in this section is to give a critique of the Act in view of its actual working. The judgement upholding the section, as well as the marginal restrictions imposed, are simultaneously discussed. The critique of the Act in operation is squarely applicable to the judgement as well. An academic critique of the judgement dissociated from its working serves no constructive purpose from the point of view of civil liberties and democratic rights.

DECLARATION OF 'DISTURBED AREA'

The large scale violation of fundamental rights in the North-East is a direct consequence of areas being declared as "disturbed areas" under section 3 and the simultaneous acquiring of wide powers by army personnel under section 4 of the Act.

The vague and circular definition of 'disturbed area' as being an area which is so 'disturbed or dangerous' as to require the aid of the armed forces ensures that any area can be declared as disturbed. The definition or the rest of the provisions of the Act offer no guidelines and lays down no objective criteria to adjudge an area as 'disturbed'. Thus with almost no application of mind, large geographical areas can be arbitrarily declared as 'disturbed ar-

eas '. There being no independent yardstick, the issuance of notification in even a peaceful area cannot be contested or challenged . Section 3 also does not contain any requirement of periodic review to assess, even on the basis of subjective criteria, whether an area continues to be in a disturbed or dangerous state and notifications having drastic effects on the citizens can routinely continue.

In fact, entire states were notified as disturbed under section 3 of the Act by the Central Government. These notifications have continued for years on end, sometimes extending to 10 or 15 years. Notifications declaring an area to be disturbed have also been issued by willing state governments. Reluctant state governments have been threatened by dismissal or otherwise coerced into issuing notifications. As section 3 does not specify any time limit, the notifications have not been time bound and continued till withdrawn. For example the Central Government notification declaring the whole of the State of Assam as "disturbed area" continued from 1990 to 1995. Similarly, the notification in Manipur issued in 1980 continued for a period of 18 years.

The Supreme Court judgement has held the definition of "disturbed area" to be precise and held that section 3 does not confer an arbitrary power to declare an area as a 'disturbed area'. The judgement simply states ". . . we do not find any substance in this contention. Section 2(b) has to be read with Section 3 which contains the power to declare an area to be a disturbed area." Section 3 merely states that the Governor or the Central government, if they are of the opinion that the area is in a disturbed or dangerous situation, can declare it to be disturbed. The circularity of the argument continues. The repealed Article 257A was then employed to impart some meaning to the term 'disturbed'. Notwithstanding the facts that this Article was brought in during the hoodlum years of the Emergency and that the amendments and legislations of that period are far from glowing expressions of the spirit of liberty, freedom and democracy. The Court has held the power of the Central Government or the Governor to independently declare an area to be disturbed as constitutional. Along with the court has observed that it is desirable that the State Government be consulted before a declaration by the Central Government.

However on the lack of any time duration of notifications under section 3, the Court has held that a declaration of an area as a 'disturbed area' has to be for a limited duration and periodic review of the declaration before the expiry of six months has to be undertaken by the executive. The basis for this change, the judgement argues, flows from the constitutional provisions of Articles 352 and 356. But it fails to even mention that these provisions stipulate a review by both houses of the legislature.

In the upholding of section 3, the requirement of a six monthly review laid down by the court is one slightly positive feature of the judgement. This to a limited extent can be used to see that notifications do not continue indefinitely and there is a fresh application of mind by the government at least every six months.

IN AID OF CIVIL POWER

Under section 3 of the Act the Governor or the Central Government has to form an opinion that the use of armed forces "in aid of civil power" is necessary in an area and then notify it as a disturbed area. However army personnel acquire wide powers, under section 4, immediately on notification of an area as a disturbed area.

Thus declaration of an area as a disturbed area results in the virtual handing over of the civil administration to the army . The Act does not lay down any procedure for the aid to be provided by the armed forces to the civil power. In the absence of a concrete method, the army hierarchy and chain of command has no place for co-ordination with a civil administration. A soldier is to obey only his own commanding officer. An army soldier is under no obligation to carry out orders of the collector/magistrate or the Superintendent of Police of an area. Thus, except for the formation of a one-time opinion that the aid of the army is necessary and subsequent notification of a disturbed area under section 3, the civil power has no further role to play.

The fact of the army supplanting and superseding the civil administration in a notified disturbed area is established by dozens of incidents of collec-

tors, superintendents of police, ministers and other high officials of the civil administration being themselves stopped at gun point from entering area falling within their own work jurisdiction. A couple of examples should suffice to establish the point :

1. One of the findings of the Justice D. M. Sen Commission of Enquiry into the mortar shelling and firing by the army on 5th March 1995 in Kohima, Nagaland has been that the Superintendent of Police, Kohima was stopped at gun point by army personnel even though he identified himself as the superintendent of the district. In fact the Commission records that, " Here, the head of the civil police was being completely ignored and relegated into a non-entity. The DGPs also not treated with any more respect. "

   The treatment meted out to other officials representing civil authority can be imagined given the behaviour towards the highest police officials of the area.

2. The arrests of people deposing before courts to intimidate witnesses highlights the utter disregard for the judiciary, the other wing of civil authority.

   As per established law, a witness remains in the custody of the court till the examination is concluded and he is discharged. The total contempt for civil judicial authority becomes amply clear from such attempts at subverting the judicial process and obstructing justice.

   The prevalence of this practice of arresting witnesses has been recorded by the Sessions Judge, Manipur in Criminal Misc. Case No. 63 of 1988. The Sessions Judge has also noted the order of the Gauhati High Court in Naga Peoples Movement for Human Rights versus Union of India, Misc. Case No. 982 of 1988, wherein the Court has directed that witnesses are not to be arrested while examination is going on.

3. The treatment of the army meted out to the civil power of the State Government, which it is supposed to aid, is amply shown by the following excerpt from the Memorandum submitted to the Home Minister of India by the Chief Minister on behalf of the Council of Ministers of Manipur:

   "The Civil Law has, unfortunately ceased to operate in the Senapati district of Manipur due to excesses committed by the Assam rifles with complete disregard shown to the Civil Administration. The Assam Rifles are running a parallel administration in the area. The Deputy Commissioner and Suprt. of Police were wrongfully confined, humiliated and prevented from discharging their official duties by the Security Forces. The Chairman, Hill Autonomous District Council was forced to proceed on foot from the National highway upto Oinam village and confined during the night and thereby prevented from discharging his official functions. "

   Clearly the conferring of independent powers on the army on notification under section 3, leads to the supercession of the civil authority of the state and army rule, which is totally impermissible under the Constitution. The Act permitting such rule is clearly unconstitutional. The judgement, totally ignoring the reality, mechanically concludes that the word "aid" postulates the continued existence of the authority to be aided and therefore civil power continues to function even after the deployment of armed forces and upholds the validity of the Act.

POWERS OF THE ARMY

The exercise by the army of the unchecked powers to arrest, search, seize and even shoot to kill conferred under section 4 of the Act has resulted in large scale violation of the fundamental rights of citizens under Articles 14, 19, 21, 22 and 25 of the Constitution. The systematic and routine nature of violation of rights show the intrinsic link with the working of the Act. The scale and extent of violation take them totally out of the category of 'isolated instances of abuse of the Act' and show them to be integral to the working of the law.

The actual incidents of violations have been documented to a limited extent. The following categories of violations due to the exercise of powers under section 4 emerge from the available data:

a. Extra-judicial killings
b. Extra-judicial deprivation of the liberty of people, specially in villages including:
   (i) grouping.

(ii) illegal imposition of curfew.
(iii) long periods of detention at army posts and camps.
(iv) use of churches and schools as detention or interrogation centres.
(v) setting up of illegal interrogation centres.
(vi) rape, molestation and sexual harassment of women.
(vii) forced labour.
(viii) looting of homes.
(ix) desecration of places of worship specially churches.
(x) torture which is mainly carried out with a view to extract confessions which is a serious crime under sections 330 and 331 of the Indian Penal Code. The torture includes, beating with rifle butts, kicking with boots and hitting with blunt weapons, giving electric shocks, breaking limbs, depriving person of food and drinks and sleep, hanging a person upside down and beating on soles, burying a person alive, stripping, blindfolding and hooding, stuffing chilli powder into eyes, nose and private parts, tying of hands and feet and suspending the person over fire with a bamboo in between the hands and legs, threats to shoot, interrogation at gun point.

Summary descriptions of a few of the incidents are illustrative of the exercise of power by the army under section 4 of the Act:

1. The Justice D. M. Sen Commission of Enquiry into the Firing on 5th March 1995 at Kohima, Nagaland found that the tyre of one of the trucks of an army convoy accidentally burst, whereupon the army personnel under the imaginary apprehension that insurgents had fired, mortar shelled and fired on Kohima town. In addition, they entered houses and cold-bloodedly murdered innocent civilians.

Extracts from the Commission Report indicate the functioning of the Act :

"I now come to the evidence of Shri A. Kreho, Dr. W. Mero, Shri Shurho-o, Mrs. Kevitholie, Mrs. K. Kapesh, Mrs. Razouno, Mrs. Lhoulievino and Shri Chumdemo Lotha. Their evidence will show that besides indiscriminate firing and shelling, some 16 R.R. (Rashtriya Rifles) personnel had entered private houses, beaten up the inmates and even killed innocent persons inside their residence. There is evidence beyond any reasonable doubt that Bishnu Sonar of Fire Service, Kohima, was shot dead by 16 R.R. inside his residence in presence of his wife Mrs. Naya. A number of witnesses had deposed to that effect. This was a cold-blooded murder. Again, Mhathung Lotha, a peon in the Administrative Training Institute, was shot and killed by some 16 R.R. in presence of his father Chumdemo Lotha - another cold blooded murder.

"There are five other innocent civilians, who were killed as a result of the firing by 16 R.R. personnel, although there is no direct evidence that they were killed in the same cold-blooded and deliberate manner. The evidence of Shri Y. Vandhanshan Lotha is, however, most pathetic reading. At 1-30 p. m., one 2" mortar bomb has exploded in his house, causing injuries to several members of his family. His daughter Miss Soyingpeni, sustained head injury and died on the way to hospital. When this witness was trying to take the injured members of the family to the hospital they were stopped at three points by 16 R.R. rifles. He was threatened and abused by them and detained on the way to the hospital. His daughter Soyingpeni's life could, perhaps have been saved if he was not so detained. Another child of his had received injuries resulting in permanent disability.

"There were also several attempts to murder, e. g. in the cases of Mechimvo Rifse, Propa Lama, Kajamaor and Ketholalie, which are fully authenticated by direct evidence of eye witnesses. In addition to such deliberate assaults and killings, which took place inside private residences and which cannot be justified on any ground, a number of innocent civilians were forcibly taken out from their houses, made to stand up or lie down on the road for at least 2 hours and some of them were also beaten up, including one MLA, namely M. Sedam. Damages were also caused to house-hold properties.

"It is also in evidence that the S. P., Kohima was prevented from proceeding to Mohan Khola, al-

though he had identified himself to be the S. P. of the district to the JCO, namely, Subedar Harbans Lal. Later on, when he introduced himself to Col Soni, the latter did not pay heed to any of his inquiries, nor seek his help in controlling the situation. This will show utter disregard for civil authority on the part of the Commander of the 16 R.R. and amount to gross illegality, since under the Armed Forces (Special Powers) Act, the army is to operate only in aid of the civil power. Here, the head of the Civil Police was being completely ignored and relegated into a non-entity. The DGP was not treated with any more respect.

"I have no hesitation in finding that the 16 R. R. convoy personnel on that day had resorted to indiscriminate, unnecessary and uncontrolled firing and mortar shelling under the imaginary apprehension that insurgents had opened fire at them; that they had killed innocent civilians in a most cold blooded manner; that there were also attempts to murder; that they damaged houses and properties wilfully, when they had gone to search those houses; that they had illegally confined innocent civilians, having had forcibly taken them out from their residences and beaten up some of them; and that they had prevented patients from going to the hospital and even detained some hospital staff and not allowed its generator to function, making treatment of patients difficult. "

2. Similarly, the Commission of Enquiry into the Firing and Arson Incident on 27th December 1994 at Mokokchung, Nagaland concluded that: "The commission finds that arson was caused by the deliberate act of setting fire to the houses and shops by 3 or 4 jawans of the 16 M.L.I. (Maratha Light Infantry) Task Force. The commission rejects the testimony of the Army witnesses that the fire was caused either through snapping of high tension electric cables or by its spreading from the kutcha house by any act on the part of the NSCN (I/M) faction. This setting of fire was a most uncalled for act and cannot be justified on any ground. "

Again at paragraph 7, the Commission concludes: "I must now advert to the evidence relating to rape and molestation of four women. I find that their complaints of rape and molestation are fully substantiated. There can be no justification for such criminal misconduct on the part of our jawans."

3. The case of the picking up of C. Paul, as assistant Pastor and C. Daniel, Headmaster of Government Junior High School by the army formed part of the original petition challenging the Act. Subsequently, the Supreme Court in the decision reported as Sebastian Hongray versus Union of India, 1984 (3) SCC 82, directed the army to produce the two persons. The army failed to do so. The Court ordered criminal prosecution and awarded compensation to the wives on a finding that the army had presumably tortured the two to death and disposed of the bodies:

The present judgement has upheld sections 4(a) to 4(d) which form the basis of the army actions in the North-East. Certain limited restrictions have been read into the provisions, especially in section 4 (d) . Section-wise commentary follows:

Section 4(a)

. The power under section 4(a) to a non-commissioned officer and above of the army to use force to the extent of causing death is unconstitutional and bad in law. We find the section invalid for the following reasons, which also constitutes a critique of the judgement :

1. The judgement while upholding the power directs that while exercising power under section 4(a) the army officers should use minimum force required for effective action. However, this supposed restriction bringing the wide power to kill within the ambit of constitutionality does not amount to anything. The army of a nation is trained to kill the enemy. The giving of warning, the use of minimum necessary force which is essential when dealing with citizens of the country has no place in an army. In a war unless you shoot to kill, you are dead. Therefore, army personnel trained for war, deployed in a domestic situation dealing with citizens of the country, characteristically over-react leading to use of excessive force and violation of human rights. The innumerable incidents of atrocities demonstrate the conse-

quence of giving independent powers to the army. That is the reason, why the Constitution only permits the army to aid civil power. That is also the reason for the Criminal Procedure Code (CrPC) permitting the use of the army in aid of civil power under the directions of a civil magistrate.

2. The power to shoot to kill for violation of an order section 144 of the CrPC is totally disproportionate and violative of the right to life. Violation of an order under section 144 CrPC is a minor offence punishable with a months' imprisonment under the ordinary law of the land.
3. The power to shoot to kill if a person is carrying firearms, weapons or 'things capable of being used as weapons' is also bad in law as being too vague and broad. Any traditional agricultural implement like a dao or a hoe habitually carried in the North-East can be construed as a thing capable of being used as a weapon and the person carrying it killed for it.
4. The Act does not require the army personnel who shoots a person causing his death to give a report on the " circumstances under which he formed his opinion to shoot to kill. " There is thus no check or impartial application of mind as to whether there was any justification for the killing.
5. The Act does not provide for an inquest or investigation into the death of a person killed by the army. There is thus no check or accountability. For example, in cases of death in police custody, there is a mandatory requirement of a magisterial enquiry under section 176 of the CrPC.
6. The power under the section is far beyond the right of self defence permissible under the general law of the land under section 100 of the Indian Penal Code.
7. The powers of the police to use force are checked and guided by the provisions of the CrPC as well as the Police Acts and Manuals. The power under section 4 (a) has no such restrictions.

The judgement does not even attempt to answer such criticisms of the Act. It merely states "It has been urged that the confernment of such wide power is unreasonable and arbitrary. We are unable to agree."

Section 4(b)

The power under section 4(b) to destroy any arms dump, any shelter from which armed attacks are made or are 'likely to be made' or any structure used as training camp for armed volunteers or as a hide-out by armed gangs or absconders is unconstitutional for the following reasons:

1. That under this sub-section armed forces have destroyed homes, schools and churches.
2. Every home in the North-East is looked upon by the army with suspicion and as a place from where armed attacks can be made.
3. That the Supreme Court has laid down in judgements that absconding by itself is not conclusive of guilt. In the light of these judgements the power of the armed forces to destroy a home or structure used by an absconder is illegal.
4. That the officer destroying these structures or shelters is not required to report the destruction to the police or make a report in writing to the nearest police station. In fact there is no procedure laid down in the section.
5. That in the absence of any procedure laid down in the Act, there is no possibility of an enquiry or investigation into the legality of the action of the armed forces.
6. That a person aggrieved by the action of the armed forces is left without a forum for the redressal of grievances.

In this instance the judgement bypasses the provision for destruction of structures from which attacks are likely to be made. For, this can include any house or construction that may so arouse the suspicion of the armed forces. Similarly, on the provision for destruction of the hideout of an absconder, the judgement not only assumes that the absconder is guilty but that the crime for which the person is absconding is heinous. The Act, on the other hand, provides the power for any and every kind of absconder.

Section 4(c)

The power to arrest without warrant given under the section is bad in law for the following reasons:

1. Arrest without warrant is a serious encroach-

ment on the right to life and liberty of a person, therefore under the ordinary criminal law the power is checked by provisions laying down the conditions of exercise of such power by the police and the detailed procedure to be followed on arrest. These checks are absent in the Act.

2. The section confers powers on the armed forces to deprive a person of his or her liberty without any procedural safeguards and confers wide powers without any duty to exercise or restraint.
3. That there is no mechanism to check that in fact there was credible information or grounds for reasonable suspicion that the person arrested was likely to commit a cognizable offence. '
4. That a person arrested under section 4 (c) is deprived of his fundamental right under Article 22 of the Constitution to be informed of the grounds of arrest.
5. That a person arrested is deprived of his fundamental right under Article 22 to consult a lawyer of his or her choice.
6. That, in fact as observed by the Gauhati High Court in Peoples' Union for Human Rights versus Union of India, AIR 1992 Gau 23, the army follows the practice of routinely arresting innocent persons at a large scale and then giving them "clean chits" instead of first ascertaining whether there is credible information or ground for reasonable suspicion that a person has committed a cognizable offence and then arresting him.

The judgement does not give any serious thought to this provision. It considers such power as normal since it is vested in the police as well. That the police can arrest without a warrant only for a certain class of serious offences is overlooked. Then again, restrictions are imposed on the police on the amount of force that can be used to affect an arrest. The Act empowers the members of the armed forces to use "such force as may be necessary to affect the arrest". Through overlooking the problem, the provisions of this section are upheld.

Section 4(d)

The power of search and seizure under section 4(d) has been extensively used by the army in cordon and search operations leading to widespread violation of fundamental rights of citizens residing in areas declared as disturbed. In such operations large areas comprising a number of villages are surrounded. People are ordered out of their homes and grouped in one place and kept without food or water till the search operation lasts. Beating, torture and other forms of degrading treatment is meted out to them. Houses and household goods are destroyed and looted. Such operation may stretch from a few hours upto a week or more.

The judgement while upholding section 4(d) has directed that the provisions of the CrPC have to be followed in the course of search and seizure.

The CrPC provisions provide for search of a woman only by police woman with strict regard to decency, presence of two respectable inhabitants of the locality, preparation of seizure list with copy to the occupant. These provisions are now applicable

Beyond the Act
INTERROGATION

The Act does not give any power of interrogation to the army. The army can only arrest a person and then hand him over to the nearest police station with least possible delay. Yet, the army routinely interrogates along with use of third-degree methods of torture and in fact attaches interrogation reports while handing over a person to the police. Some of these interrogation reports have been filed by the Government of India in the Supreme Court as part of the case records in the present case. Similarly, the army follows the practice of routinely collecting certificates from the persons beaten up and tortured to the effect that they were treated nicely and have no complaint of 'maltreatment'. In addition the army gets certificates from the village headman that no loss or damage to property of the villagers has taken place. Some of these certificates have also been produced by the Government in court. The certificates clearly bring out the methodology followed by the army and nature of the terror of army rule prevalent in the areas declared disturbed.

to search and seizure by the army under section 4(d) . Similarly, the judgement has directed that the guidelines issued by the army which have to be followed while exercising powers under section 4(a) to 4(d) of the Act have to be brought in conformity with the other decisions of the Supreme Court with regard to arrest, interrogation and custody. How is it to be ensured that such guidelines are followed and what happens if they are flouted is nowhere discussed.

PERIOD OF DETENTION

Section 5 of the Act provides that a person arrested by the army is to be handed over to the nearest police station with least possible delay.

The army in reality has been arresting persons and keeping them in custody for days and in some cases for months and using third-degree methods of torture and interrogation (see box).

The judgement has directed that a person arrested under section 4(c) by the army should be handed over to the nearest police station with least possible delay, so that he can be produced before the nearest magistrate within 24 hours excluding the time of journey.

IMMUNITY

Section 6 of the Act provides that armed forces personnel cannot be prosecuted for acts done under the Act, except with the previous sanction of the Central Government. This has been upheld by the Supreme Court since such an immunity exists even in the Cr.P.C. The fact that the Cr.P.C. does not envisage prolonged deployment of the armed forces and neither does it envisage independent and enhanced powers to such forces is overlooked. As a sop, the judgement has directed that complaints against the army should be seriously investigated under the Army Act and compensation given in case of violation of rights by the army. The Court has also laid down that an order of the Central Government refusing or granting sanction should also give reasons and can be questioned in a court of law.

The difficulties faced by the victims of violations by the army, or their kith and kin, are numerous and probably insurmountable. Filing a complaint against the army carries the risk of further attacks. Those willing to testify in court also bear a similar risk. During the recording of evidence by the court into the Oinam incident (referred to earlier), the army arrested two members of the Naga People's Movement for Human Rights who had gone to inform the local people about the case in court. The Chief Judicial Magistrate was arrested. A school teacher was arrested for accompanying the rape victims to the court. Many witnesses were arrested. Even after the filing of a complaint, the prosecution of the accused personnel depends on prior sanction by the central government. This is normally impossible. In December 1996, PUDR tried to seek permission for prosecution into an incident of rape committed by Army personnel in Manipur. Repeated reminders and innumerable visits to the Home and Defence ministries were unable to provide such permission. The constitutional remedies to approach the High Court or the Supreme Court provided under Articles 226 and 32 respectively are technically available. Apart from the difficulty faced by people in far-flung villages in accessing such channels, the Army Act intervenes to create a more or less impenetrable barrier. Provisions of the Army Act stipulate that a complaint by a civilian concerning crime committed by an army personnel lies in the jurisdiction of the Military court and in case a dispute arises wherein a sessions court demands that the case be transferred to itself, the decision would be taken by the Central government. To add to this mass of discretionary power, and executive interference in the judiciary, the serving officers of the armed forces sit in judgement in the military courts, a characteristic of internal disciplinary mechanisms of an organisation, which in fact such courts are. Naturally one of the paramount concerns of an officer conducting a court martial is the morale of the army. Moreover, the citizen whose rights have been violated has no rights in a court martial proceedings of the army which remain secret and confidential to ordinary citizens. Therefore this cannot be treated as a substitute for the right of a victim of army atrocity to get justice. Through this winding process the judgement denies the right of citizens to seek justice for of crimes committed against them. And in essence violates the fundamental rights to life and liberty.

Conclusion

"No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of its grave exigencies of government"

– Justice K. Ramaswamy
Kartar Singh vs Union of India.

Such a doctrine seems to have been at work in justifying the continuation of a legislation which suspends every fundamental right for all citizens inhabiting the region comprising seven states of our country, denying citizens redress to the judiciary and shielding those guilty of committing heinous crimes against the people.

In essence the judgement assumes that an area is declared disturbed by the central or state governments since it must have been required. That the armed forces are deployed since no alternative must have existed. That enhanced powers have been given to such forces since the situation must have demanded the same. That those exercising such powers would not only be aware of the need to use the power judiciously, but would be doing so. In turn, those complaining about violations must surely be exaggerating. And therefore, such allegations need prior scrutiny by the executive before being admitted for judicial hearing.

Since the prevailing situation or the record of the last nearly 40 years of the implementation of this Act is not considered a determinant to test its validity, its polar opposite can be assumed. The Constitution can be made to stand on its head. For, if it can be assumed that fundamental rights of all citizens are effectively being ensured, the fundamental rights chapter of the Constitution can be done away with.

But those who found this Act objectionable and unconstitutional and filed petitions to challenge its validity, did so because they found the Act responsible for the violation of people's rights of life and liberty. If these violations can be wished away, then the basis for the petitions does not exist in any sense. An immensely more responsive, responsible, and rewarding method would have been to examine the kinds of violations of people's rights that have been occurring. And then to examine whether these violations can be attributed to any particular provisions of the Act or the Act as a whole. Accordingly the legislation, or its procedures could have been struck down or amended. But such a course was not even contemplated by the Supreme Court.

That such a law and procedure is sanctified by the Supreme Court found little protest in the media or in the society outside the North-East. It highlighted the power of the terms 'insurgency', 'terrorism' and 'militancy' commonly used to describe the political situation in the North-East. The power to make a legislation also includes the power to coin words and to give specific meanings to them. And these terms not only cloud the minds of the courts but also of people at large, pushing questions of justice, fundamental rights and democracy to the sidelines. The insignificant changes or petty restrictions read into the Act by the Supreme Court therefore come to be visualised as sufficient impediments to the abuse of power.

But for those who are to continue living in their homes in the seven states of the North-East, these checks may have little meaning. To the extent that the Act allows the armed forces to operate independently of local administration and to the extent the actions of the armed forces are to remain outside the jurisdiction of local judicial machinery, the Armed Forces (Special Powers) Act continues to supplant local government and suspend people's rights and shield those guilty of crimes against the people.

Therefore the struggle for the preservation of people's rights and for the repeal of this draconian Act must continue.

A Guide for Action

This section provides a short guide for activists of civil rights organisations as well as residents of the North-Eastern states to identify illegalities in the operation of the Act and search for channels of redressal. The points highlighted below are developed from a careful reading of the Act and some of the provisions incorporated into the Act through the present Supreme Court judgement. The list of Do's and Don'ts circulated by the army to its personnel was presented by the army to the Supreme Court to argue that such a list constitutes sufficient check to abuse of power. The same list was incorporated into the Act by the court.There is, however, no procedure devised by the Supreme Court to redress violations of these Do's and Don'ts or of the other judgements that have been incorporated.The list of Do's and Don'ts as well as citations of other earlier Supreme Court Judgements are annexed at the end of this section.

A: LIFE OF A NOTIFICATION UNDER SECTION 3 (DISTURBED AREA)

Every notification under Section 3 requires to be reviewed every six months. This applies to all notifications pending or existing, on the date of judgment and any future notifications. Therefore notifications issued prior to 27.5.97 required immediate review. Other notifications required review on their completing 6 months, from date of issue.

Possible Action

- ➔ Routine letters enquiring about action taken in respect of review of notifications addressed to the Central government and State governments;
- ➔ Securing a copy of each notification, its date of issue, date of review, further review, etc.; In case of difficulty in accessing such information, sending registered letters to State and Central Governments. If there is no response, the High Court may be moved, under Article 226 and/or Contempt petition may be moved in the Supreme Court.
- ➔ If any notification is reviewed and continued for same / substantially similar area more than two times, correspondence to be addressed to Central / State governments which reviewed the same, seeking information about why such review and extension of notification was necessary.

B. CONDITIONS FOR EXERCISE OF POWER TO FIRE, ETC., [SECTION 4(A)]

The power to shoot or use other force is **not available** merely because an area is declared "disturbed". In order to exercise such power in any area, *four conditions* are required to be satisfied:

(a) The area should fall within a region declared as 'disturbed' and such notification should have been promulgated/reviewed at most 6 months before the use of such force, and

(b) (i) either an order prohibiting the assembly of five or more persons is promulgated under Section 144, Cr.P.C. within the disturbed area; or,

(ii) an order prohibiting carrying of arms is promulgated under the Arms Act, within the disturbed area, and

(c) the officer ordering the use of force should form an opinion that such force is required and the persons against whom such force is used are contravening the prohibitory orders, and

(d) due warning should be given before the use of such force.

NOTE: (1) Under Section 144 Cr.P.C., prohibitory orders cannot exceed a period of six months,
(2) Under the Arms Act, the order prohibiting carrying of arms cannot exist for more than 90 days.

Possible Action

- ➔ Keeping track of prohibitory orders under Section 144, Cr.P.C. and under Arms Act in areas declared 'disturbed', their dates of promulgation and lapsing.
- ➔ If loss of life or injury results in armed forces operations, check if the above mentioned first two conditions are met. If not, the action would be illegal, and immediate petitions for compensation and prosecution should be addressed to Central government, failing which petitions should be filed in court.
- ➔ Even if prohibitory orders exist and the area is declared 'disturbed', petitions under Article 226 can be filed in the High Court depending on the facts of the case. In such petitions, the demand for compensation and proper inquiry to determine whether firing was necessary and whether other precautions were taken.

C. POWER OF ARMED FORCES TO ARREST [SECTION 4(C) & 5]

(1) The power of Armed Forces personnel, to arrest and detain a person, can be used only with, and **not outside** a declared disturbed area;

(2) A person detained by an Armed Forces personnel, has a right to be produced before a Magistrate within 24 hours (excluding time taken for travelling);

(3) Every Armed Forces personnel is prohibited from torturing any person in custody. [Do's and Don'ts: Annexure I, para 54, S.No. 12]

(4) The procedure to be followed by the armed forces personnel after affecting the arrest of a person which binds the Armed Forces in terms of the Judgment, is given in the list of "Do's and Don'ts" [Annexure I, para 53, Do's S.No. 3 (a) to (d); and Don'ts S.No. 1 to 5]

(5) Arrest of women should be in strict conformity with general law, i.e., as per Sections 47(2), 51(2) and 100(3) read with Section 160(1), Cr.P.C. Simply put, the above sections stipulate that any arrest/ detention of a woman can be made by or in the presence of a woman police. A woman can be searched only by a policewoman having strict regard to decency. This is also reiterated in the Do's and Don'ts [Annexure I, para 53, S.No. 2.(b)].

Each of the above conditions are now binding legal precepts.

Possible Action

- ➔ Try to widely publicise these provisions.
- ➔ In case of violation of any of the above, send complaints to army authorities; complaints to Central government with demands for compensation and seeking sanction to prosecute under Section 6 of the Act
- ➔ Habeas corpus petitions can be filed in the High Court / Supreme Court in case persons are detained beyond 24 hours.
- ➔ In case of unlawful detention, torture, or use of third degree methods, etc. petitions under Article 226 or 32 can be instituted in the High Court or Supreme Court respectively.

D. RIGHTS OF ARRESTED PERSONS

Conclusion 20, of the Supreme Court judgement has held that:

"The instructions contained in the list of Do's and Don'ts shall be suitably amended so as to bring them in conformity with the guidelines contained in the decisions of this Court and to incorporate the safeguards that are contained in clauses (a) to (d) of Section 4 and Section 5 of the Central Act as construed and also the direction contained in the order of this Court dated July 4, 1991 in Civil Appeal No. 2551 of 1991."

In the light of the declaration of law, and the direction to incorporate guidelines contained in other decisions of the Court, dealing with personal liberty, the following rights of a person arrested have been drawn up.

1. The members of armed forces can arrest / detain a person only in an area declared as 'disturbed' and possess no general power of arresting / detaining a person outside such area.
2. The arrest making authority, whether police or armed personnel, should carry or bear visible, accurate and clear identification and name tags, with designations [D.K.Basu judgement];
3. The authority affecting arrest should prepare a memo of arrest at the time of arrest. The memo should be attested by a witness, including a family member or a neighbour. The memo of arrest should contain the date and time of arrest, and should be countersigned by the person arrested. [D.K. Basu judgement]
4. In case the arrest is by a member of armed forces, the detained person has a right not to be interrogated. The power of interrogation is only with police. [D.K. Basu judgement & Do's and Don'ts, para 53 Don'ts S.No. 4]
5. An arrested or detained person has the right to insist that a relative or friend, is informed of the arrest, unless such relative or friend has witnessed and attested to the memo of arrest.
6. The time, place of arrest and venue of custody of an arrested person whose relative or next friend lives outside the town, should be notified through the nearest District Legal Aid Centre within 8-12 hours of the arrest.
7. A person arrested has the right to have a friend or relative informed within the time period of 8-12 hours after arrest.
8. An entry should be made in the diary at the place of detention regarding the arrest of the person, and also disclosing the name of the relative/friend of the person who has been informed of the arrest, and particulars of the authority which holds the person in custody.
10. An arrested person has the right to request for medical examination at the time of arrest, and recording of major and minor injuries on the body at that time. The "Inspection Memo" should be signed by the arrested person, and the arresting authority and a copy of it should be given to the arrested person.
11. Every arrested person, who is remanded to police custody, after production before a magistrate, has the right to be examined by a doctor every 48 hours during such detention.
12. A person arrested by an armed forces personnel has the right to be released at the earliest opportunity, and without any delay to the nearest available police. Once released to the police, he cannot be sent back to the custody of the armed force personnel.

Possible Action

- ➔ Petition the State or the Central government to provide a list of all armed forces camps and pickets or other such places where people could be illegally detained.
- ➔ In case recurrent instances of illegal detention by the armed forces come to light, such information can be utilized to petition the High Court / Supreme Court to appoint a committee empowered to inspect such centres on a routine basis.

D. POWER TO SEARCH AND SEIZE PROPERTY [SECTION 4(D)]

The power to make searches and seizures, of persons or property, contained in Section 4(d), has been interpreted by the Supreme Court to be subject to the condition that any arms, etc seized during search should be handed over to the officer in charge of the nearest police station together with a report of the circumstances, ocassioning the search/siezure. The Court has further ruled that the power under Section 4(d) should be used in accordance with the conditions enacted in the Cr.P.C. These conditions are:

1. If a woman lives / resides in the place where a search is to be conducted, the search can be conducted

with strict regard to decency [Section 100(3), Cr. P.C.];

2. Two local witnesses have to be present during any search or seizure of property.[Section 100 (4)];

3. A list of all objects seized during a search has to be prepared and countersigned by the witnesses present at the time . [Section 100 (5)]

4. The occupants / residents of the premises which are searched, have to be permitted to be present during the search and a copy of the seizure list should be handed over to them and the same is to be followed during the search of a person. [Section 100 (6) and (7)];

6. The information regarding seizure of any property has to be intimated to a suerior and the matter immediately reported to the area Magistrate. [Section 102]

The imposition of these conditions is designed to act as a check on the powers of the armed forces, which might not account for their actions, particularly in combing operations. Any violation of these guidelines, is supposed lead to action against the personnel responsible. Complaints of such violations should be registered and in case no action is forthcoming, judicial intervention under Article 226 of the Constitution for compensation and prosecution can be resorted to.

ANNEXURE - I

The Supreme Court judgement has concluded: "While exercising the powers conferred under clauses (a) to (d) of Section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of Do's and Don'ts issued by the army authorities which are binding and any disregard to the said instructions would entail suitable action under the Army Act, 1950."

Para 53: List of Do's and Don'ts while acting under the Armed Forces (Special Powers) Act.

Do's

1. Action before Operation

(a) Act only in the area declared 'Disturbed Area' under Section 3 of the Act.

(b) Power to open fire using force or arrest is to be exercised under this Act only by an officer /JCO/ WO and NCO.

(c) Before launching any raids/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 to law and order, ascertain first that it is essential for maintenance of public order. Open fire only after due warning.

(b) Arrest only those who have committed cognizable offence or who are about to commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit a cognizable offence.

(c) Ensure that troops under command do not harass innocent people, destroy property of the public or unnecessarily enter into the house/dwelling of people not connected with any unlawful activities.

(d) Ensure that women are not searched/arrested without the presence of female police. In fact women should be searched by female police only.

3. Action after Operation

(a) After arrest prepare a list of the persons so arrested.

(b) 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 suspect to the police must be justified and should be reasonable depending upon the place, time of arrest and 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 an 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 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 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.

Para 54: List of Do's and Don'ts While Providing Aid to Civil Authorities

Do's

1. Act in closest possible communication with civil authorities throughout.
2. Maintain inter-communication if possible by telephone/radio.
3. Get the permission/requisition from the Magistrate when present.
4. Use the little force and do as little injury to person and property as may be consistent with attainment of objective in view.
5. In case you decide to open fire --
   (a) give warning in local language that fire will be effective,
   (b) attract attention before firing by bugle or other means,
   (c) distribute your men in fire units with specified commanders,

(d) control fire by issuing personal orders,
(e) note number of rounds fired,
(f) aim at the front of crowd actually rioting and inciting to riot or as conspicuous ring-leaders, 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.

Dont's

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. No not accept presents, donations and rewards.
17. Avoid indiscriminate firing.

ANNEXURE - II

Some Useful References to Case law

- Cases where the Supreme Court/ Courts have granted compensation to the dependants of victims of custodial death/ persons dying on account of State's action, etc, on ground of violation of Article 21 of the Constitution
- Nilabati Behara -vs- State of Orissa, AIR 1993 SC 1960 = 1993 (2) SCC 746
- D.K. Basu -vs- State of West Bengal, AIR 1997 SC 610 = 1997 (1) SCC 416
- Sebastin Hongary -vs- Union of India, AIR 1984 SC 571 & 1026;
- Saheli -vs- Commissioner of Police, AIR 1990 SC 513 = 1990 (1) SCC 422
- Death of Sawinder Singh Grover, 1995 (Supp 4) SCC 450
- PUCL -vs- Union of India, AIR 1997 SC 1203 = 1997 (3) SCC 433
- Punjab & Haryana High Court Bar Assn Case, 1996 (4) SCC 742
- Postsangbam Ningol Thokchom -vs- GOC, 1997 (7) SCC 7250
- People's Union for Democratic Rights -vs- State of Bihar, AIR 1987 SC 355 = 1987 (1) SCC 265

- Cases where the Courts have granted compensation for illegal detention/ handcuffing, and so on
- Daulat Ram -vs- State of Haryana, 1996(11) SCC 711
- Thirath Ram Saini -vs- State of Punjab, 1997 (11) SCC 623
- Citizens for Democracy -vs- State of Assam 1995 (3) SCC 743 (Rights against handcuffing, chaining, etc.)
- Bhim Singh -vs- State of J & K AIR 1986 SC 494 = 1985 (4) SCC 677
- People's Union for Democratic Rights -vs- Police Commissioner, 1989 (4) SCC 730

PUNISH THE GUILTY IN THE BOMBAY RIOTS

Over 900 people were killed in two phases of the riots in December 1992 and January 1993 the worst riots following the demolition of the Babri Masjid. The majority of those killed were Muslims; many Hindus were also killed, and the poor in both communities suffered the most, as happens in all riots. It is widely known that the Shiv Sena was primarily responsible for the riots, and that the police aided and abetted the riots. The failure of the administration in quickly controlling the riots also imposed question marks on the role of the then ruling Congress party.

A total of 2267 RIRs were filed after the riots. Out of the 8600 persons accused in these FIRs, 8352 were chargesheeted in 892 cases. Sixty per cent of the cases were dropped because of shoddy investigations and insufficient evidence. Over five years later, only eight cases have resulted in convictions, mainly in TADA related matters. Such is the fate of the legal system of redressal.

The Srikrishna Commission of Enquiry was set up to probe the riots two months after they took place. It was disallowed an extension after the current Shiv Sena-BJP government came to power in Maharashtra. Following public pressure it was set up again. In five years, the commission examined over 500 witnesses and over 2,000 affidavits were filed. When the report was submitted in February 1998 the government postponed making it public on one pretext or another. Finally when the report was tables in the legislature, the chief minister, in a blatant attempt to shield the guilty, rejected the findings as "pro-Muslim, anti-Hindu, and biased". Contrary to the chief minister's accusation of bias, the report indicts both Hindus and Muslims for their role in the riots. However, it states that unlike the spontaneous riots by Muslim mobs in December following the destruction of the Babri Masjid, the January phase of the riots were thoroughly planned and executed, by the Shiv Sena.

The remote control chief minister, Bal Thackeray, himself an accused person, has hinted at further violence if any action is taken. And the BJP spokesperson, in a completely partisan manner, endorsed the state government's inaction and said that the business of setting up commission of enquiry itself should be reviewed! Commissions of enquiry are routinely appointed following communal riots for independent and impartial probes, as there is often a collapse or active collusion between the administration and police following riots. This is the first time that such an equiry on communal riots has been attacked as being communal, by the chief minister! And that too of a commission whose findings are regarded as credible, which worked with integrity and thoroughness, and was headed by a espected high court judge. Why then is the BJP-Shiv Sena government set on rejecting its findings? Because:

1. The findings have specifically named the guilty, including Shiv Sena leader Bal Thackeray, the current minister for home, Gajanan Kirtikar, the former MLA from Bandra (E) Madhukar Sarpotdar, and many other Sena leaders.

2. Besides leaders, the commission has named as rioters many Shiv Sena pramukhs, local members and others who constitute the mass base of the party currently in power.

3. The commission not only indicts the city police generally, but also fixes responsibility on 16 officers and 15 constables specifically.

The commission has held the police responsible for not intervening even as mobs were looting and killing, rse, they often themselves participated in the violence. Many victims actually died in police firing inside their mes. No action has been taken so far against even a single policeman. Instead all the government's Action Taken port has done is to approve the raising of seven companies of Rapid Action Police, and technological and weapon gradation. This is absurd; it is not that the police were helpless spectators, they often abetted the rioters.

By rejecting the substantial parts of the report, the government has failed in its responsibility of restoring the confidence of the people in institutions and the democratic and judicial process. It has denied justice to the families of the victims of this dreadful carnage.

We demand that:

1. Criminal cases be registered against Thackeray and other accused leaders and Shiv Sena activists.
2. Cases be registered against the named policemen, and that they be suspended while the investigation is on.
3. All ongoing cases be dealt with speedily.
4. The families of all the riot victims be fully compensated.
5. The entire investigation of all the cases be handed over to the CBI

Join the dharna at Maharashtra Sadan, Copernicus Marg, Mandi House on 21 August, from 2 pm

CITIZEN'S COMMITTEE FOR ACTION ON SRIKRISHNA COMMISSION REPORT

बम्बई दंगों के दोषियों को सज़ा दो

बाबरी मस्जिद तोड़े जाने के बाद हुए सबसे भयानक दंगों में दिसंबर जनवरी 1992 और 1993 में बम्बई में 900 से ज्यादा लोग मारे गए। मारे गए लोगों में काफी बड़ा प्रतिशत मुसलमानों का था। बहुत से हिन्दू भी मारे गए। हमेशा की तरह इस बार भी दोनों सम्प्रदायों में गरीबों ने ही दंगों की कीमत अपनी जान से चुकाई। यह सर्वविदित है कि शिव सेना-भाजपा और पुलिस ने इन दंगों में खुलकर भागीदारी की थी। साथ ही दंगों को रोक पाने में प्रशासन की असफलता ने सत्ताधारी कांग्रेस की भूमिका पर भी प्रश्न चिन्ह लगाए थे।

दंगों के बाद 2,267 एफ.आई.आर. दाखिल हुईं जिनमें 8,600 अभियुक्तों के नाम दर्ज थे। 892 मामलों में 8,352 लोगों के खिलाफ चालान दर्ज किए गए। 60% मामले अपर्याप्त सबूतों और निरर्थक जाँच के चलते खारिज कर दिए गए। अभी तक सिर्फ 8 मामलों में सजा हुई है जो टाडा से संबंधित थे। यह है न्याय प्रणाली द्वारा न्याय दिलाए जाने की असलियत!

दो महीने बाद, दंगों की जाँच के लिए श्रीकृष्ण कमीशन (जाँच आयोग) स्थापित किया गया। शिव सेना–भाजपा के महाराष्ट्र में सत्ता में आने पर जनवरी 1996 में आयोग पर जाँच आगे बढ़ाने की मनाही थोप दी गई। कारण समझना कोई मुश्किल नहीं है। बाद में सार्वजनिक दवाब के फलस्वरूप सरकार इसे फिर शुरू करने के लिए बाध्य हो गई। पिछले 5 सालों में कमीशन ने 500 गवाहों के बयान लिए व इसके समक्ष 2000 एफीडेविट दर्ज किए गए। पर जब इस साल फरवरी में आयोग ने अपनी रपट सरकार को पेश की तो सरकार ने उसे जनता के सामने लाने से इन्कार कर दिया। अंततः जब रिपोर्ट सदन में पेश की गई तो दोषियों को बचाने की अपनी भद्दी कोशिश में राज्य के मुख्यमंत्री ने कहा कि रपट 'हिन्दु विरोधी, मुसलमानों के पक्ष में और पक्षपाती है', और उसे अस्वीकार कर दिया। असल में रपट दोनों ही सम्प्रदायों के लोगों पर दोष लगाती है। हाँ, वह यह फर्क जरूर करती है कि दिसम्बर में मुस्लिमों का भड़कना व दंगे करना बाबरी मस्जिद तोड़े जाने पर एक भावुक प्रतिक्रिया थी, जबकि जनवरी के दंगे शिव सेना ने बहुत व्यवस्थित नियोजित तरीके से करवाए। हिन्दुत्व के प्रचारक, नेथप्य से मुख्यमंत्री पद नियंत्रित कर रहे और दंगों के एक अभियुक्त, बाल ठाकरे ने रिपोर्ट पर कुछ भी कार्यवाही होने पर दंगे भड़कने की धमकी दी। साथ ही साथ रिर्पोट प्रस्तुत किए जाने से पहले व बाद में प्रशासन द्वारा डर और आतंक का वातावरण तैयार किया गया जो आज भी जारी है। भाजपा सचिव ने राज्य सरकार के रिर्पोट को अस्वीकार करने के निर्णय को सही ठहराया और यहाँ तक कहा कि जाँच आयोग बिठाने की प्रक्रिया के बारे में ही नए सिरे से सोचना होगा।

दंगों की निष्पक्ष और स्वतन्त्र जाँच के लिए अक्सर जाँच आयोग नियुक्त किए जाते हैं। यह इसलिए जरूरी है क्योंकि अक्सर प्रशासन पर दंगों में शामिल होने या दंगों के समय प्रशासन के ठप्प हो जाने के आरोप होते हैं, ऐसे में पुलिस की जाँच के निष्पक्ष होने की संभावना कम हो जाती है। श्रीकृष्ण कमीशन भी इसी उद्देश्य से बना था। यह पहला मौका है कि दंगों की जाँच के लिए बैठे किसी जाँच आयोग को साम्प्रदायिक बताकर बदनाम किया गया है और वे भी राज्य के मुख्यमन्त्री द्वारा। जस्टिस श्रीकृष्ण के जाँच निष्कर्षों पर उगली उठाना सरासर शर्मनाक है क्योंकि वे हाई कोर्ट के एक प्रसिद्ध जज हैं जो अपनी निष्पक्षता और सत्यनिष्ठता के लिए प्रख्यात हैं। साथ ही उन्होंने बहुत समन जाँच के बाद ही अपनी रिर्पोट दी है। फिर भाजपा-सेना सरकार इसे अस्वीकार करने पर क्यों अड़ी है?

(1) क्योंकि कि जाँच परिणामों में दोषियों के नाम स्पष्ट रूप से दिए गए है। जिनमें बाल ठाकरे, मौजूद गृह मंत्री गजानन कीर्तिकर, बांद्रा (पूर्व) के शिव सेना विधायक, मधुकर सारपोतदार और अन्य कई शिव सेना नेता शामिल है।

(2) नेताओं के अलावा रपट में कई शिव सेना प्रमुखों, मौजूदा सत्तादल के स्थानीय सदस्यों और समर्थकों के नाम भी दंगाइयों के रूप में शामिल हैं।

(3) कमीशन ने न केवल पुलिस विभाग को दंगों के लिए जिम्मेदार ठहराया है। परन्तु 16 अफसरों व 15 कान्सटेबलों पर दंगों में भागीदारी के आरोप लगाए है।

कमीशन ने पुलिस पर अत्यंत सांप्रदायिक भूमिका निभाने के आरोप लगाए हैं। जाँच परिणाम बताते हैं पुलिस चुपचाप लूटमार और हत्याएँ होते देखती रही, और साथ ही बहुत से लोग अपने घरों में पुलिस की गोलियों से मारे गए या घायल हुए।

अभियुक्त पुलिस अधिकारियों के खिलाफ कार्यवाही शुरू करने की जगह, सरकार की कार्यवाही रपट में बम्बई के पुलिस बल को और सशक्त किए जाने का निर्णय शामिल किया गया है। यह वास्तव में एक मजाक है क्योंकि पुलिस दंगों के समय कमजोर या मजबूर नहीं हो गई थी, बल्कि असल में दंगों में भागीदारी कर रही थी।

सरकार ने रिपोर्ट को अस्वीकार करके इस भयानक नरसंहार के शिकार लोगों के परिवारों को न्याय से वंचित कर दिया है। वो जनतांत्रिक व न्यायिक प्रणाली में जनता के विश्वास की बहाली की अपनी जिम्मेदारी को भी पूरा नहीं कर पाई है।

हम माँग करते हैं–

1. बाल ठाकरे व अन्या दोषी शिव सेना नेताओं व कार्यकत्ताओं के खिलाफ नए मामले दर्ज हों।
2. दोषी पुलिस कार्मियों के खिलाफ कोस दर्ज हों और उन्हें निलम्बित किया जाए।
3. मौजूदा मामलों की कार्यवाही तेज की जाए।
4. सभी मामलों की जाँच सी.बी.आई. को सौंपी जाए।
5. दंगों के सभी हताहतों व मारे गए लोगों के परिवारों को मुआवजा दिया जाए।

इन माँगों के लिए धरने में शामिल हों।

स्थान–महाराष्ट्र सदन, कॉपरविकास मार्ग

दिन–समय 21 अगस्त दोपहर 2 बजे

सिटिजन्स कमेटी फॉर एक्शन ऑन श्रीकृष्ण कमीशन रिपोर्ट

Published by: Secretary, People's Union for Democratic Rights, Delhi (PUDR)
For Copies: Dr. Sudesh Vaid, D-2, Staff Quarters, I.P. College, Shamnath Marg, Delhi - 110054
Suggested Contribution: Rs. 4.00 (*please add postal charges*)
Printed at: Nagari Printers, Naveen Shahdara, Delhi - 110032