5.1 Criminal Liability and Prohibition of Immunity

Criminal liability is an important aspect of justice. Without criminal liability, accountability cannot be ensured. The old concept of 'King can do no wrong' is not accepted in modern democracy. Sovereign immunity, or crown immunity, is a type of immunity that in common law jurisdictions, traces its origins from early English law. This doctrine envisages that the sovereign or state cannot commit a legal wrong and be immune from civil suit or criminal prosecution; hence the saying, 'the king (or queen) can do no wrong'. With the adoption of written constitutions and well defined legal system in many countries, sovereign power has been severally curtailed and became limited.

A bill of rights within the constitution forms the core of the enforcement mechanism for the contract counterpoising sovereign powers with the civil and political rights of the citizens. The process of enforcement of the terms of this contract and their outcome, as phenomena, can be viewed as the sum and substance of the 'rule of law'. Article 32 and 226 of the Indian Constitution, forming part of the guaranteed fundamental rights, empowers any person aggrieved by a law (or an action) on the ground that it violates his or her fundamental rights to move the Supreme Court and High Courts respectively seeking issuance of writs, order or direction and to receive justice. Justice is an
important aspect of human rights. John Rawls, for instance, claims that ‘justice is
the first virtue of social institutions, as truth is of systems of thought’\textsuperscript{4}. Wherever
there is a violation, justice must be ensured. In such a context, Latin maxim \textit{ubi jus
ibi remedium} finds place in any bill of rights worth its name\textsuperscript{5}.

In Naosem Ningol Chandam Ongbi vs. Rishang Keishing, Chief Minister
of Manipur\textsuperscript{6}, GHC observed in para 4 of the judgment that ‘law has generally
been considered to be a close ally of liberty. It constitutes meaning of fostering
personal freedom, safeguarding human rights; social goal of equality and general
welfare’. The preamble of Indian Constitution speaks about justice social,
economic and political. Manu, one of our ancient law givers stated ‘Justice being
destroyed will destroy, being preserved will preserve. It must never, therefore, be
violated’.

Sections 4 and 5 are the operative part of AFSPA while section 6 deals
with the criminal liability post operation under sections 4 and 5. Section 6 deals
with the post-operation scenario under the AFSPA and it has enormous influence
over section 4 and 5 as absence of criminal liability or accountability may give
absolute power to abuse the discretionary powers listed as ‘special powers’ under
section 4 and 5. It is examined in this chapter whether the mandatory pre requisite
‘prior sanction’ from competent authority of Central Government has the tendency
to block the justice delivery and encourage armed forces to commit extrajudicial
execution with guaranteed immunity. Such a situation, if exists, would mean total
exoneration for violation of human rights by armed forces and a culture of
impunity.
The amended Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Set of Principles to combat Impunity onwards), submitted to the United Nations Commission on Human Rights on February 8, 2005, defines impunity as: 'the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims'.

This First Principle of this amended Set stipulates that impunity arises primarily from a failure by states, i) to investigate violations, ii) to ensure prosecution iii) to provide effective remedies and iv) to take other preventive measures to stop recurrence of violations.

Over the years now, international law has taken into account the question of accountability in international and non-international armed conflicts. Subtracting the short comings, it is a fact that Nuremberg and Tokyo Tribunals has established the principle of individual’s criminal responsibility in international war crimes to combat impunity. In the 1990s, trials held under ICTR, ICTY and ICC has established that crimes committed by individuals in non-international armed conflict specially violation article 3 of Geneva conventions of 1949 is punishable under international law.

Article 2 (3) of the ICCPR has echoed the same holding that State parties to the Covenant have an obligation to provide an effective remedy in case of a violation of the human rights protected in the Covenant and that individuals have a concomitant right. This obligation includes three elements: (1) truth:
establishing the facts about violations of human rights that occurred in the past; (2) justice: investigating past violations and, if enough admissible evidence is gathered, prosecute the suspected perpetrators; and (3) reparation: providing full and effective reparation to the victims and their families, in its five forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The Theo van Boven/Bassiouni principles (2005), adopted by the UN General Assembly, do not limit the concept of reparation to monetary compensation but also provide for other forms of redress, such as restitution, rehabilitation, satisfaction and guarantees of non-repetition. The United Nations Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions lucidly summarised the impunity for extrajudicial executions, in the report to the 57th session of the United Nations Commission on Human Rights, in the following words, ‘impunity for human rights offenders seriously undermines the rule of law, and also widens the gap between those close to the power structures and others who are vulnerable to human rights abuses. In this way, human rights violations are perpetuated or sometimes even encouraged, as perpetrators feel that they are free to act in a climate of impunity.’

Right to justice cannot be separated from ‘rule of law’ as formulated by A.V Dicey that demands total absence of arbitrary power and supremacy of law, and equality before law. The basic postulate of the rule of law is that ‘justice should not only be done but it must also be seen to be done.’

If justice is to be seen as done, then, in cases of human rights, the state will have certain duties to be performed. These obligations are best reflected in
Inter-American Court of Human Rights judgment in the case of Velásquez Rodríguez vs. Honduras. The court found that all states have four fundamental obligations in the area of human rights. These are: (1) to take reasonable steps to prevent human rights violations; (2) to conduct a serious investigation of violations when they occur; (3) to impose suitable sanctions on those responsible for the violations; and (4) to ensure reparation for the victims of the violations. States have a duty to ensure reparation for the victims of human rights violations.

In the light of the above discussion section 6 of AFSPA can be analyzed under four aspects: investigation of the allegations, prosecution for infringement of human rights, reparation for the victims and prevention of recurrence.

5.2 Investigation of the allegations

Investigation into allegations of violation of human rights is a state responsibility. In NES, investigation into the allegations of human rights violation by armed forces is usually carried out by police or judiciary or by investigative agencies like CBI. In practice, investigation over the allegation of violations by armed forces is initiated mostly through the appointment of inquiry commission under Commissions of Inquiry Act, 1952. As per the Commissions of Inquiry Act, 1952, inquiry commissions are an investigation fact finding body and their reports are recommendatory in nature. The state is not bound to follow or take action on the commission's report.

The question of validity and competency of appointment of inquiry commission by State Government to investigate into allegations on armed forces whether amounts to legal proceeding without prior sanction was reviewed many times by the judiciary. On several instances, armed forces appeared before the
inquiry commissions and represented themselves. Still the matter is not well settled whether the appointment of inquiry commission constitutes a legal proceeding without prior sanction violating section 6 of AFSPA. Few important decisions in this regard are as follows.

The appointment of commission of inquiry by the state of Manipur under the Act 1952 in order to ascertain, among others, whether the army had picked up Y. Sanamacha Singh from his house in the mid night of February 12, 1993, was challenged on the ground that it was beyond the capacity of the State Government to appoint such commission having regard to the Entry 2 and 2-A of List 1 and Entry 1 of list I of the seventh schedule to the constitution of India. The terms of reference of the Inquiry Commission were (a) the sequence of events leading to the disappearance of Y. Sanamacha Singh; (b) to find out whether the Army picked up Y. Sanamacha Singh and if affirmative, to find out the whereabouts of Y. Sanamacha Singh since then; (c) to find out the persons who are responsible for the disappearance of Y. Sanamacha Singh; and (d) to recommend the corrective remedies and measures needed to be taken to prevent recurrence.

It was contended by the Union of India and others that the subject matter of the inquiry was located on Entry 2 and 2-A of the list 1 and that the Central Government was the only appropriate authority to constitute the commission of inquiry. The contextual facts reveal the stand of the State Government to the effect that the object and purpose of the commission was not to inquire into the powers, functions, liabilities and jurisdiction of the armed forces who are deployed to act...
in aid of civil administration but only to probe on the disappearance of Y. Sanamacha Singh and ascertain his whereabouts.

On a scrutiny of the terms and reference of the inquiry commission, the GHC concluded that the State Government didn’t intend the commission to make an inquiry about the powers and functions of the members of the armed forces of the Union or other jurisdictional privileges and therefore held that the decision impugned fell within the purview of public order as enumerated in Entry 1 of List II of the seventh schedule and the decision of the State Government to constitute the commission did not suffer from any illegality or error. The GHC held that the Commission of Inquiry is not a court, but a fact finding body that attempts to conduct its inquiry on the basis of the material and the evidence available even in the absence of either party or their advocates.

In this regard, it is relevant to draw reference to a one man inquiry commission, constituted by the State Government of Meghalaya following an incident of firing by Border Security Force (BSF) on a crowd in the West Garo Hills district. The commission was asked to report on the causes and nature of the disturbances and the circumstances leading to such armed intervention. BSF challenged the competence of the State Government to appoint such a commission. It was held that the firing was resorted not in the invitation of the civil authorities and was on the individual accord of the officer concerned. The challenge as in the instant appeal was founded on Entry 2 and 2-A of List 1 of Entry 1 of list II in the seventh schedule to the constitution of India.

In NPMHR vs. Union of India and others, a Nagaland based NGO, NPMHR prayed that inquiry be ordered by the GHC by an independent inquiry
commission to inquire into the alleged loss of lives, limb, torture, rape, destruction of movable and immovable properties and other damages suffered by the people of Oinam village and its neighboring areas at the hands of armed forces during operation Bluebird in July 1987. The court held that the court has power to appoint inquiry commission for making inquiry into facts relating to violations of fundamental rights and legal rights. However, the court didn’t exercise this power on the ground that the armed forces stated as in their affidavit that they have no objection to allow the aggrieved people of Oinam and its neighbouring areas to file FIRs or private complaints and Manipur State Government, too, stated before the court that an inquiry will be conducted by CBI. Considering these statements, the GHC didn’t order the constitution of an inquiry commission by itself.

After these decisions by the GHC, in 2004, Col. Jagmohan Singh, commandant of 17th Assam Rifles, filed WP 5817 of 2004, challenged the competence of the State Government in appointing a Commission of Inquiry to make ‘an inquiry into the alleged killing of Th. Monorama Devi’. The writ petitions were disposed of by the GHC with direction to the State of Manipur to hand over the report to the Union Government and ordered the Union Home Ministry to take an immediate decision about the publication of the report in tune with the citizens' right to information\(^{18}\).

Several writ appeals were filed against this judgment in the GHC and were decided together by the Court on August 31, 2011\(^{19}\). The principal applicant in these writ petitions has been against the competence and authority of the state of Manipur to appoint a commission under the Commissions of Inquiry Act, 1952 for making inquiry into the alleged killing of Manorama Devi in 2004 in Manipur.
The term of reference for the inquiry commission was: a) to inquire into the facts and circumstances leading to the death of Manorama Devi on July 11, 2004, b) to identify responsibilities on the person/persons responsible for the death of Manorama Devi, c) to find out any measure for preventing the recurrence of such incidents.

The Court applied the doctrine of pith and substance and held that the state of Manipur is within its prerogative authority to order to constitute the inquiry commission and it is held sustainable in law and facts. Union of India has appealed before the Supreme Court against this order and the further order is awaited in this regard.

As pointed out earlier that field data indicates that in certain cases members of the armed forces appear before the Inquiry Commissions appointed by the State Government and in certain cases, they didn’t appear citing that it’s an infringement into the functions of the armed forces and violation of section 6 of AFSPA. The terms of reference of both Sanamacha Inquiry Commission and that of Manorama Inquiry Commission are quite same. Thus armed forces applied discretionary opinion in deciding what constitutes ‘legal proceeding’ under section 6 of AFSPA and it varied from case to case.

Commission of Inquiry Act, 1952 requires that once the report is submitted by the commission, the findings must be presented before the legislature for discussion. However, in reality, many inquiry commission reports are still to see the light of the day.

Transparency in investigation and fact finding is an essential element for justice. Limited access to information on unlawful killings and other human rights
violations exacerbates the climate of impunity. In Manipur, any information sought through the Right to Information Act, 2005 related to the Manipur Police department including civil police, Manipur Police wireless, Manipur Rifles, Indian Reserved Battalions, Intelligence wings (Special Branch & Crime Branch of CID), Forensic Science laboratory, Jail department, State vigilance commission and its subordinate offices and all reports of any enquiry commission, magisterial enquiries and classified reports including those of the ministry of home affairs and the intelligence bureau (IB), are exempted from the purview of the RTI Act, 2005 since May 28, 2011.

In Assam, Special Branch, Assam Police, Criminal Investigation Department, Bureau of Investigation of Economic Offences (BIEO), Assam Police Battalions, Assam Police Task Force, Indian Reserve Battalions, Commando Battalions, Assam Home Guard Battalions, Assam State Police Border Organisations are exempted from the purview of Right to Information Act, 2005. Also, information relating to deployment and movement of force, security arrangements in respect of individuals/organisations/vital installations, information relating to operations against extremists/terrorists/insurgents/outfits and anti-national elements, information on details of ceasefire and negotiations, identity of informers giving information on extremists, terrorists, insurgents and anti-national elements, information as regards activities and movement of extremists, terrorists, insurgent and anti-national elements, identity of officers involved in operations against extremists, terrorists, insurgent and anti-national elements, are exempted from disclosure.
Wahebam Joykumar, a RTI activist from Manipur, used Right to Information Act, 2005 to extract the reports of the Inquiry Commissions constituted in the state of Manipur since 1980 and copies of their reports. State information commission ordered the Home Department of Manipur to furnish the copy of the reports. Chief Secretary and Home Department objected to it and appealed before the GHC, Imphal bench arguing that the Inquiry Commission reports falls under section 2 of RTI Act 2005. Under section 2 certain information related state security and sovereignty are exempted from the purview of the Act. After several appeals and counter appeals, the matter came for interpretation before the Supreme Court through a special leave application (SLP)\textsuperscript{23}. Supreme Court ruled that right to information is a part of fundamental rights and information related to human rights and corruption are not covered under any law. However the court found that appeal by the RTI activist should have been filed under section 19 of the RTI Act rather than under section 18 of the Act as done in the current case. Hence the applicant was asked to appeal under section 19 of Right to Information Act, 2005.

5.3 Prosecution

The very spirit of the constitution of India as reflected in the fundamental rights makes it absolutely clear that the guarantee of justice is one of the major obligations that the state of India is to ensure. Power without accountability cannot lead to establishment of rule of law\textsuperscript{24}.

Under the Constitution of India [article 136(2)] offences committed under the Army Act, 1950, Air Force Act, 1950 and Navy Act, 1957 are excluded from the jurisdiction of the High Courts and the Supreme Court. Similarly, the Indian
Penal Code and Criminal Procedure Code do not give criminal courts jurisdiction over defense personnel in respect to offences committed under these acts. Even if armed forces personnel are detained by local police, they must be handed over to the military authorities for court martial. The only way by which the decision arising from a court martial can be challenged in the ordinary courts is through the writ jurisdiction of the Supreme Court and High Courts under articles 32 and 226 of Indian Constitution.

For prosecution under AFSPA, ‘prior sanction’ from competent authority of the Central Government as stipulated by section 6 of AFSPA, is mandatory. Section 6 is not immunity or impunity clause per se. Plain text of section 6 of AFSPA doesn’t authorize official bar against legal proceedings of armed forces to fix the accountability for arbitrary deprivation of life. Section 6 of the Act says that ‘no prosecution, suit or other legal proceeding shall be instituted without the ‘prior sanction’ of the Central Government against any person for anything done in exercise of powers conferred by this Act’. It only requires ‘prior sanction’ from the Central Government to initiate legal proceeding, suit or prosecution.

Now two situations arise. One if prior sanction is routinely granted and criminal liability for extrajudicial execution is dealt as per the constitutional and legal provisions, then no situation of impunity arises. Secondly, if sanctions are rarely granted, this provision will in effect provide a shield of immunity for armed forces personnel implicated in serious abuses creating a culture of impunity. As a consequence, absence of accountability and criminal prosecution will encourage extrajudicial execution.
It is pertinent to state here that since section 197 Cr.P.C and Section 6 of the AFSPA are *pari materia*, the latter provision must necessarily be construed in the same manner as the former one. In other words, this provision, too, cannot be construed as an impunity provision, placing the offender outside the pale of the law. Yet, this is precisely the effect of the provision, despite protestations to the contrary by all concerned, including the Supreme Court.

The matter concerning the ‘prior sanction’ under section 6 of AFSPA arose before the judiciary but most of the time it was undecided by the judiciary. In Krishna Singh vs. the Union Territory of Mizoram, necessity of previous sanction of Central Government for instituting legal proceedings in respect of anything done or purported to be done in exercise of powers conferred by the Act [AFSPA] was not decided by the court.

Justice (retd.) C. Upendra, the Commissioner appointed by the Manipur Government to enquire into the killing of a young woman, Amina Devi in April 1996, articulated in his report that ‘if the person(s) responsible for indiscriminate firing resulting to the loss of the life of innocent people on mere pretext of self-defense or for apprehending a person or persons suspected to be extremists are left scot-free, it would amount to anarchy’.

Rate of prosecution of armed forces remained very low under AFSPA. It was reported in media that from 2007 to 15th November 2010, the Defence Ministry received 230 complaints against armed forces personnel for violation of human rights. The highest number of complaints was received in 2009 when 81 complaints were registered against the armed forces personnel.
According to the information that the then Defence Minister AK Antony gave in a written reply in Lok Sabha, is that in 2007, as many as 48 complaints were received and in 2008 and in 2009, it was 51 and 81 respectively and the number decreased sharply in 2010 as only 50 complaints were received till November 15, 2010. The minister also informed the House that investigation was initiated into all the complaints and in 175 cases complaints were found to be devoid of merit and in 4 cases, 8 armed forces personnel were found blameworthy and have been awarded punishments so far.

On this particular issue of prosecution sanction, the view expressed by Chief Justice Rajsoomer Lallah, Member of the UN Human Rights Committee, while considering India's Third Periodic Report under ICCPR, is relevant. He said: 'the choice here, and I take it from the answers given by the Attorney General, is between the harassment of officials and the vindication of right of a citizen. If a choice has to be made why not let the courts decide whether the action is vexatious or frivolous? To whom could the citizen turn if it is the executive which decides this? Suppose the executive says 'No, I am not going to authorise you under section 6' what does he do? Presumably he goes to the court. Can it be dealt with there, since no proceeding can be instituted there?'

The judiciary has elaborately interpreted section 6 of AFSPA in NPMHR 1997. In NPMHR 1997, the Supreme Court held that the protection given under section 6 cannot be regarded as conferment of immunity on the persons exercising the powers under the Central Act [AFSPA] as section 6 only gives protection in the form of previous sanction of the Central Government before a criminal prosecution of a suit or other civil proceeding is instituted against such person.
The court further observed that in so far as such protection against prosecution is concerned, the provision is similar to that contained in section 197 Cr.P.C which covers an offence alleged to have been committed by a public servant ‘while acting or purporting to act in the discharge of his official duty’ and section 6 only extends this protection in the matter of institution of a suit or other legal proceeding.

It was argued in NPMHR 1997, that the conferment of such a protection has been assailed on the ground that it virtually provides immunity to persons exercising the powers conferred under section 4 in as much as it extends the protection also to ‘anything purported to be done in exercise of the powers conferred by this Act’. It was also submitted that adequate protection for members of armed forces from arrest and prosecution is contained in sections 45 and 197 Cr.P.C. and that a separate provision giving further protection is not called for. It was also submitted that even if sanction for prosecution is granted, the person in question would be able to plead a statutory defense in criminal proceedings under Section 76 and 79 of the Indian Penal Code and hence ‘prior sanction’ should be granted [emphasis added].

Considering these submissions, the Court ruled, ‘We [judges] are of the view that since the order of the Central Government refusing or granting the sanction is subject to judicial review, the Central Government shall pass an order giving reasons’ and also cautioned that ‘list of 'Do’s and Don’ts' have to be treated as binding instructions and complaint containing an allegation, should be thoroughly inquired into and if it is found that there is substance in the allegation,
the victim should be suitably compensated by the state and the requisite sanction under Section 6 of the Central Act should be granted.\textsuperscript{34}

It was also held that 'prior sanction' is not required at the initial stage of legal proceeding. A FIR alleging cognizable offence is enough for police to initiate registration of FIR and investigation as held by GHC in Union of India and Others vs. State of Manipur and others\textsuperscript{35}. The same judgment also ruled that the sanction could be obtained at the time of filing the charge-sheet or at the time of taking the cognizance by the concerned Court. In another case, the Supreme Court held\textsuperscript{36} that the police have no option but to register a case on first information report if it discloses commission of a cognizable offence.

Despite these ruling by the Judiciary, case studies demonstrate a different picture. It is evident from the case studies that, in practice, these orders and judgments are not complied with due respect.

In a significant case of enforced disappearance of Y. Sanamacha (discussed briefly in Chapter III), the investigating police authority concluded that the arrest of personnel of 17 Raj Rifles involved in the crime is not feasible as they had already left the State of Manipur. The family, however, approached Manipur police to complete its investigation in the FIR No. 18(2)1998 YPK P.S. U/S 302/34 IPC to know the fate of Sanamacha and to punish the guilty.

The Manipur Human Rights Commission (MHRC) registered a case (MHRC Case No. 25 of 2003) and issued notice to police to report about the investigation. A report dated February 24, 2003 stated that the investigation of the case remains pending since the accused involved are the Army personnel of 17

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Raj Rifles of the Central Government and their arrest/examination are yet to be effected in the case.

The Manipur Human Rights Commission again asked the state police to submit further or final report. Accordingly, a report dated July 19, 2005 by the investigating authority stated that in the due course of investigation, the case was closed and returned in FIR. vide No. 31/2004 YPK P.S. dated June 13, 2004. This was due to insufficiency of evidence on the condition that the case would be revived as and when sufficient evidence comes to light. Investigating Police officer reported, ‘the investigation of this case remains pending for want of arrest of the personnel of 17 Raj Rifles and examination of them in this case since 1998 and the arrest of 17 Raj Rifles personnel is also not feasible as the 17-Raj Rifles personnel had already left the state’. The report ended with a note saying ‘case is true but no clue’.

In the present case the investigating authority did not try to obtain the required consent of the Central Government as provided under section 45 (1) Cr.P.C so as to make arrest of the personnel involved in the crime. There is no application filed by the investigating authority for seeking ‘prior sanction’ as informed by the advocate dealing with the case. On August 3, 2005, after perusing the report the Manipur Human Rights Commission closed its inquiry with an observation stating that it is up to the complainant to move the High Court in this regard if she so chooses.

The process of granting ‘prior sanction’ is prolonged unreasonably by the competent authority of the Central Government. Case of disappearance of Tayab Ali37 is a glaring example in this regard. CBI applied for ‘prior sanction’ under
section 6 of AFSPA in 2009 and the sanction is yet to be granted even after four years. Brief fact of the case is that, on the morning of July 25, 1999, Tayeb Ali, an inhabitant of Keirang Mamang Leikai, P.O. Pangei, P.S. Heingang, Imphal East, Manipur, left his house in a Luna Moped bearing No. MNP 9382 for Imphal Bazar, Manipur. He was reportedly picked up by armed persons in plain clothes who came in two vans without registration number from a place called Paomei Colony. His community members witnessed his detention and rushing towards the Assam Rifles (AR) Camp at Kangla, Imphal. When family contacted, AR authority informed that he will be handed over to police in 24 hours. Since then Tayab Ali disappeared and no one knows his whereabouts till date.

Later, on a complaint to NHRC, the family received 3 lakh rupees as compensation. Also an NGO, Families of the Involuntarily Disappeared Association Manipur (FIDAM), filed a Habeas Corpus petition No. 5 of 2000 to the GHC, Imphal Bench to fix the accountability for the disappearance of Tayab Ali. The GHC ordered CBI to make an inquiry on September 16, 2005. CBI registered an FIR No. RC-06(S)/2005-SIL and conducted an investigation. On June 5, 2009, CBI submitted a charge sheet against 5 personnel of 17 Assam Rifles and Assistant Commandant of 2nd Bn. IRB for abduction and subsequent murder of Md. Tayeb Ali as well as destroying the relevant evidence punishable under Section 120-B [read with 201, 364] and 302 IPC. The prosecution sanction in respect of the perpetrators from Assam Rifles, Captain P.S. Banafar, Captain Ashish, Hav. Babulal Pradhan, Hav. Ashok Kumar Singha and Rifleman Laxman, are not yet received from the competent authority.
Information about the status of the application for ‘prior sanction’, accessed through Right to Information Act, 2005 reveals no clarity on the time period for processing of this requirement. In a reply to a right to information (RTI) application, the Ministry of Home Affairs informed that 17th Assam Rifles was deployed in Manipur under the operational control of the Army and will be covered under the Army Act, 1950. Hence Ministry of Defence is the competent authority to grant prior sanction for prosecution.

The RTI reply further informed that there is not official procedure for dealing with the process of granting prior sanction and in this particular case, the Ministry of Defence has been intimated thrice with reminders since 2008 and their decision is still waiting. ‘There is no time limit for issue of the sanction for prosecution by the competent authority as the process involves consultation with multiple agencies like subordinates offices, Ministry of Law and other ministries and hence no one can be held responsible for wrongful delay in granting prior sanction.

Section 6 though doesn’t bar legal proceeding, but in practice it has created ‘virtual immunity’ resulting culture and a climate of impunity, observed by several human rights bodies. Amnesty International in its report on Oinam Massacre published in 1987 reported that ‘Amnesty’s experience, provisions like those in Section 6 of the Act granting immunity from prosecution are dangerous because they create the impression that the security forces can act with impunity. It facilitates grave abuses such as torture and extrajudicial executions’. Amnesty also reported that there was one case where court ruled that despite section 6 of the Act the armed forces were not immune from all prosecution.
In November, 1982, the chief judicial magistrate (Manipur East District) issued warrants of arrest against eight members of the 20th Assam Rifles charging them with illegal detention, torture and attempted murder of eight members of the village volunteers force from Poi. The magistrate held that armed forces were not immune from prosecution if they had committed criminal acts and in such cases could be prosecuted without the need to obtain prior sanction from the Central Government. Amnesty reported that it has no further information if the eight members of Assam Rifles were arrested or prosecuted.

Reporting on the practice of section 6 of AFSPA, Amnesty International raised its concern reporting that in several cases First Information Reports (FIRs) have been filed with police and forwarded to judicial magistrates for investigation to determine whether a trial can commence when advocates representing the security forces challenged the right of magistrates to investigate offences stalling the legal process by invoking section 197 Cr.P.C.41.

Again on June 17, 2011, the Supreme Court has asked the Centre to furnish its stand on the provisions of the AFSPA, while hearing case of two encounter killings42, applicable to the disturbed areas of the country. The ruling came in view of the government's divergent views on the issue of the immunity granted to army and para-military personnels from criminal prosecutions in certain conditions like fake encounter cases in such areas43. The Apex Court asked 'you (government) cannot say that an army man can enter any home, commit a rape and say he enjoys immunity as it has been done in discharge of the official duties'. The court ordered the Government to file an affidavit spelling out its stand on two issues: Firstly, whether the Army/para military personnel can enjoy immunity
from criminal prosecution for any penal offence committed in discharge of their official duties, including fake encounters and rapes vis-a-vis under AFSP Act, Section 197 Cr.P.C and Section 17 of the CRPF Act. Secondly, should the investigating agency like CBI conduct a preliminary inquiry into such killings before registering an FIR against accused army/para military personnel. Further decision is awaited.

The Supreme Court intervened in several instances to address the issue of criminal liability for arbitrary deprivation of citizen’s right to life by ordering initiation of legal proceedings by police. In Sebastian M. Hongray vs. Union of India\textsuperscript{44}, the Supreme Court ordered for criminal prosecution of the members of armed forces responsible for the disappearance of two men. The court ordered exemplary punishment in terms of payment of compensation for misleading the court and distorting the facts of the case causing contempt of the court. The Court directed that the papers related to the case be forwarded to the Superintendent of Police, Ukhrul, Manipur, with orders that the information be treated as a cognizable offence, and that an investigation be commenced under the Cr.P.C, 1973. The inquiry subsequently initiated in Manipur has yet to present its findings, and the alleged perpetrators have yet to be brought to justice\textsuperscript{45}. The fate of the two men remains unknown.

Apart from Supreme Court, GHC made interventions in several instances to initiate legal proceedings against the members of the armed forces for proven guilt in committing disappearances, killings, rapes, torture etc. Despite such interventions, the criminal liability remained elusive. A few exemplary cases are discussed below.
5.3.i Illustrative cases

a) In Thaneswar Nath vs. Union of India\textsuperscript{46}, GHC took strong step to establish the accountability for the disappearance of a youth. Padum Nath, a Hindi teacher at Pachim Darang Bidyajyoti High School in Darrang district, Assam was taken into custody, released and was asked to report back. Padum followed this instruction. Since then he disappeared. A FIR filed before the Darrang Police station against army didn’t yield fruitful result and later the family filed a writ of habeas corpus. On 06 January 1999, the High Court directed the District and Sessions' Judge of Darrang to hold an inquiry and it was found that Padum Nath was picked up from his house on 04 June 1998 afternoon and disappeared from the custody of army.

High Court directed the Superintendent Police, Darrang to register a case against Major Ram Singh Gujjar of army. Major ignored all summons from the SP to appear for his examination. The SP submitted his report to the GHC on 28 July 2005. The High Court came to the conclusion that the Padum Nath had been tortured to death in the army custody and hence ordered of Rs. 300,000. The High Court directed the SP Darrang to continue with the investigation and report to the Court. The court also instructed SP ‘to move the court of competent jurisdiction to obtain a non-bailable warrant against the Major for securing his presence’. Despite this judgment, no arrest was made as informed by the family and the police station.

b) In Hemadhar Hazarika vs. Union of India\textsuperscript{47}, the GHC held that the army authorities have violated the ‘Dos and Don'ts’ guidelines framed by the Supreme Court. The court while ordering compensation of Rs. 350,000, directed the Union
of India to fix accountability for custodial murder ‘as that the army personnel acted with impunity and the gravity of the crime committed by the armed forces in this case clearly amounts to murder’.

Brief fact of the case is that, on 23 August 1997, Bhupen Hazarika alias Binay Sarma, was arrested under Palibar police station in Jorhat district, Assam by a contingent of army personnel belonging to 1 Field Regiment and took him away to the army camp at Mariani. After two days, a mixed group of army and police handed over to the family, a container of human flesh wrapped in a polythene pouch which was the bodily remains of Bhupen Hazarika who had died in an explosion trigger inside a militant hideout, according to army’s version.

On April 11, 2001, the GHC ordered for inquiry. Army claimed that Bhupen Hazarika was taken into a militant hideout for the recovery of weapons etc. where a bomb exploded and Bhupen died. The army personnel claimed to have recovered a big box containing arms, ammunition, medicines, letter pads, political literature, tooth paste, etc. The GHC concluded that the story put forth by the army was absolutely concocted and false on its face. The Court based on the inquiry report suspected as how all the materials could be recovered intact if the explosions reduced Bhupen into pieces of flesh. Hence the Court awarded compensation and order for prosecution. The outcome of the order of prosecution is not known.

c) In another landmark case, Ranjan Gogoi vs. Union of India & Others48, the GHC’s judge expressed, ‘we hope and trust that the Union of India would take necessary action to ascertain and fix the responsibility of the individuals responsible. This must be done as expeditiously as possible and at any rate within
a period of six months'. The outcome of this judgment is not known. This case reveals custodial death. On April 3, 1993, Manik Gogoi and another were arrested by the army personnel in Guwahati, Assam. Acting on the petition for a writ of habeas corpus and the GHC directed the army authorities to produce the arrested before the police or a magistrate within 24 hours.

On April 5, 1993, the lawyer for the petitioner produced a copy of Daily Sentinel, dated April 5, 1993, reported the death of Manik Gogoi supposedly on falling down from a moving vehicle. The army authorities claimed that Manik Gogoi was arrested on April 3, 1993 as he was wanted by the Duliajan police station and was being transported when he jumped down from the army vehicle and sustained injuries and died. The postmortem report concluded that the injuries could not have been caused by a fall from a moving vehicle and that the death occurred from shock and hemorrhage resulting from the ante-mortem injury. The GHC concluded that the death of Malik Gogoi was caused by physical torture inflicted by the authority holding him in custody and directed the Ministry of defense to pay Rs. 250,000 in compensation.

d) In Fatema Begum vs. Union of India49, GHC ordered for complete investigation and prosecution. Brief fact of the case is that on August 22, 2000, officers of 15 Dogra Regiment arrested Kadir Ali and Md. Hafizuddin from their residence in a village under Thalemmara Police Station in Sonitpur district, Assam. On the way to the army camp at Dhekiajuli, the army personnel released Md. Hafizuddin who was found lying on the road in an unconscious state. On August 23, the family members of Kadir Ali went to Thalemmara police station where the officer in charge made inquiries and told them that he was in the
The custody of 15 Dogra Regiment stationed at Dhekiajuli. At 11 a.m., the police officials informed the family of Kadir Ali, that the army had shot dead a person, following a supposed encounter. It was Kadir Ali who had been shot and his dead body, lying on the road, was sent for the postmortem on August 24. Family lodged a complaint of faked encounter. Army denied the arrest. The GHC came to the conclusion that Kadir Ali had been killed in the army custody and that the story of encounter had been faked. The GHC ordered that the Union must compensate with Rs. 200,000 and also take the necessary steps to bring the culprits to book and to complete the investigation of the case within the next six months. Outcome of the order is not known to the researcher.

e) Shaikhui vs. Union of India, one namely Angring alias Ason of Burma camp, Dimapur, Nagaland was detained by army posted at headquarters of 3 Corps Rangpahar, Nagaland on February 26, 1996 at about 10 am and was taken away towards Rangapathar in a white gypsy. On filling of a petition of habeas corpus for the production of the detenue, the army handed over the dead body of the detenue. Army claimed that as a consequent of IED blast at Dimapur town army undertook patrolling of entire town and was fired upon and in the ensuing encounter one assailant was killed and one M21 rifle was recovered. Dead body was handed over to police on February 27, 1996. Post mortem report showed that multiple injuries in the body indicating torture including bullet injuries. Inquiry conducted by the ADC (J) revealed there was no antecedent precedence of such attack to security forces on the road within the town area by underground militants in last 52 years in Nagaland and ‘the FIR filed by the army is suspicious and could be a self invented story of security forces’. The ADC (J) opined that it was a
clear case of torture and shooting out after the arrest by security forces'. There was no evidence to show that firing took place from both sides as it should happen in an encounter. GHC awarded compensation of rupees 2 lakhs. The GHC also considered that it would be proper and just on the part of the concerned authorities of the law for taking penal action against those found responsible for the torture and death. Outcome of the order is not known to the researcher.

f) In Kangujam Ongbi Devi vs. State of Manipur & others\(^{51}\) (details discussed in Chapter III), a case of torture leading to death of Ojit, the GHC came to the conclusion that the army authorities were telling lies and that Ojit Singh had died from the torture inflicted on him in the army custody. The GHC also held that the State Government was at liberty to make the necessary investigation to fix the responsibility for the arrest and the death of Ojit Singh including the recovery of compensation amount from such person/ persons who is/ are found responsible. The court also directed the respondents to pay Rs. 300,000 in compensation. Outcome of the order is not known to the researcher.

g) In Viyikhu Sema vs. Union of India and others\(^{52}\), the petition relates to the missing of one Sri Viyikhu Sema, 70 years from the custody of the 4\(^{th}\) respondent, the Commanding officer 5/3 Gorkha Rifles, Rangapahar army cantonment, Dimapur, Nagaland, C/O 99 APO on April 11, 1994. On that day, the contingent of 5/3 Gorkha Rifles under Major Kartar Singh Sirohi searched the house of Viyikhu Sema, was placed him under arrest at gun point and taken away to the army cantonment at Rangapahar. The petitioner reported the matter to the officer in charge of police station (west) Dimapur on April 16, without any result. The respondent denied the arrest. On June 11, 1996, the court ordered the CBI to
investigate. The CBI submitted its report on January 12, 1998. The report since the village has many NSCN sympathizers and the statements of the witnesses cannot be believed in entirety. CBI completely ignored the statements of witnesses without giving any justifiable reasons. The Major admits to have searched the house and to have asked him to come to the post the next day. The Court observed that in the insurgency situation it is unlikely that the Major after discovering incriminating documents patted him on the back etc. and the speculation of the CBI that the detenu may have gone underground is also unbelievable. That is especially unbelievable because the Major claims to have treated him with respect and sympathy.

The HC held that the detenu was arrested by the personnel of the 4th respondent on April 11, 1994 at gunpoint and the army did not hand over the detenu to the police. There is no evidence that the detenu left the army camp on April 11, 1994. The GHC directed the respondent to pay a sum of Rs. 200,000 as compensation to the petitioner in the nature of palliative and expresses displeasure about the manner in which the present investigation has been conducted by the SP, CBI. It opined that an agency like the CBI is expected to investigate into any matter entrusted to them in a fair and impartial manner so as to build public confidence in the agency. In the instant case, the GHC was of the view that the investigation is completely one sided. The GHC directed CBI to make further effort to trace out the missing person Viyikhu Serna. Outcome of this order is not known to the researcher.

h) In Reba Kanta Deka vs. Union of India and others, the GHC found Army violated right to life under article 21 of the Indian Constitution by
committing custodial disappearance of Hari Chandra Deka@ Kiriti Kalita, a handicapped person. It was alleged that army personnel of Kalaigaon camp, Darrang, Assam picked up Hari Charan from his residence at Ganakpara on July 21, 2003 at 11 pm and took him away and he disappeared. Army personnel neither handed him over to the nearest police station. Army denied the arrest before the High court and however asserted that Hari Chandra was an active ULFA member and stopped working for the organization for last five years. Enquiry conducted by the district judge confirmed that the Hari Chandra was picked up by army on July 21, 2003. GHC found districts judge’s report convincing and held that the said individual might have been killed by the army while in custody as he was never produced before any police station as required under the provisions of AFSPA. The court ordered compensation of rupees 1.5 lakh as compensation. The court also considered whether an investigation by an independent authority like CBI is directed to be made to find out the person/s responsible for such disappearance of the individual concerned but because of long lapse of time of about three years from the date of occurrence, the court declined to pass such order as no fruitful result be achieved due to the lapse of time.

i) Kusum Kamini Singha vs. Union of India and others54, the petition was filed seeking a writ of mandamus for initiating a judicial enquiry relating to custodial death of Debajit Singh alias Kenny, 23 years of age, to fix the responsibility and for compensation. Debajit Singh died while being at the custody of the army authority on the intervening night of October 31, 1993 and November 1, 1993. On October 31, 1993, the family members, including Debajit Singha alias
Kenny were interrupted in their sleep at around 1:30 am as some military/ army personnel entered into the house and asked for hidden arms, assaulted family members and forcefully took away Debajit. After a while, the petitioner and her family members heard the sound of gun shots and cry of Debajit Singha. Later, the family found out that the Debajit was admitted by the army personnel in injured condition in Silchar Medical College where he died. The post mortem report concluded that Debajit succumbed to bullet injured. Debajit’s father lodged FIR in Silchar Police Station (Case No. 1202/93). Army too lodged FIR before the Ghungoor Police station that claiming that Kenny alias Kennedy is a hardcore PLA militant and he died as he slipped away from the roof and threw a grenade like object. In self defense the sentries fired and Debojit succumbed to his injuries, army claimed.

On November 6, 1997, the GHC ordered the CBI to make an enquiry. The CBI report concluded that during the raid, district magistrate, SP was not informed and no presence of civil police or magistrate was sought during the raid. The inquiry conducted by Additional District Magistrate, Cachar observed that ‘Kenny was not a fugitive and it was perhaps not difficult to apprehend him for interrogation’. The inquiry report also concluded that according to the version of army, the deceased had thrown a grenade like object which army did not seize and none of the army members has suffered any injury. This also raises serious doubts about their claim. Considering the age of the victim, woes and agonies of the family members of the deceased, the rash and negligent act of the respondents and gravity for the wrong committed, the court awarded a sum of Rs. 200,000 as compensation and ordered the concerned authority for initiating appropriate action.
under the law against the individuals responsible for the death of Debajit Singha alias Kenny.

After considering the above cases, it is important to point out that in D.K. Basu vs. State of West Bengal\textsuperscript{55}, the Supreme Court observed, ‘it needs no emphasis to say that when the crime goes unpunished, the criminals are encouraged and the society suffers and the victim of the crime or his kith and kin become frustrated and contempt of law develops’. The above cases stand in support of this observation in DK Basu, as the guidelines and different instructions meant for the armed forces to be followed during operation, issued by the judiciary and manual from time to time, have been blatantly violated in practice. The National Human Rights Commission has acknowledged this and supported the recommendation of the Law Commission in 1985, that section 197 Cr.P.C be amended to obviate the necessity for sanction\textsuperscript{56}.

As pointed out earlier, the judiciary did take cognizance of these violations as cognizable offence and ordered for legal proceeding for the fixing the accountability of the armed forces. Unfortunately the outcome of these orders is not known and even if any action is taken by the armed forces, it is not made public, if any. This negates the principle of ‘supremacy of the judiciary’.

Several international human rights experts raised concerns about the prevailing impunity over extrajudicial executions in India. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, reported to the UN Human Rights Council in 2007 that despite the government of Manipur ordering ‘numerous inquiries into the alleged extrajudicial executions, none of them ultimately reached any meaningful conclusions’\textsuperscript{57}.’ Philip Alston’s
successor, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, visited India in March 2012 and observed, ‘by the high level of impunity that the police and armed forces enjoy, due to the requirement that any prosecutions require sanction from the Central Government – something that is rarely granted. The main difficulty in my view has been these high levels of impunity’.

5.4 Reparation: Monetary compensation as a remedy

The writ jurisdiction under article 32 and article 226 of Indian constitution is a safeguard of the liberty of the citizen and persons. The writ of habeas corpus ad subjiciendum, unlike the other writs, is a prerogative writ, that is to say, it is an extraordinary remedy, which is issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate. The writ of habeas corpus is remedial and not punitive: It is a writ of remedial nature, and is not an instrument of punishment.

In India only monetary compensation is recognized as the only available remedy. ‘The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen’.

The Supreme Court in Nilabati Behera vs. State of Orissa observed, ‘A custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law…. monetary compensation for contravention of fundamental
rights guaranteed by the Constitution is sometime the only mode of redress available to the citizen and persons'.

On right to life the court held in the case that the precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interests in the limited liberty left to him are rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.

The doctrine of strict liability was invoked by the Supreme Court of India in 1993 in the Nilabati Behera. It was held that '...it is now well-accepted ... that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The compensation is in the nature of exemplary damages' awarded against the wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and persecute the offender under the penal law, ruled the Court.
The Supreme Court in several rulings like Sant Bin vs. state of Bihar, Veena Sethi vs. state of Bihar, Devaki Nanda Prasad vs. State of Bihar, Rudal Shah vs. State of Bihar, D.K Basu vs. State of West Bengal, established that it is the bounden duty of the state to protect the most precious right of right to life under fundamental rights guaranteed under the constitution of India and any violation invites compensation in addition to other remedies.

As discussed earlier, the apex court in the case of Sabastian Hongrey vs. Union of India awarded exemplary compensation of rupees 1 lakh each to the wives of the enforced disappeared persons. The apex court awarded compensation under the writ jurisdiction for the constitutional torts against the citizens. This concept of awarding compensation under writ jurisdiction became a trend later on and has been followed in number of cases later. E.g. Naosam Ningol Chandam Ongbi Nengshitombi Devi vs. Rishang Keishing, the apex court awarded compensation for the custodial death of the petitioner’s husband by the security forces.

5.5 Where 'guilt' was established and compensation was ordered

Armed forces acting under the AFSPA are protected except when prosecuted or sued with the previous sanction of the Central Government. But they are not immune under the writ jurisdiction and this provision has proved to be the only resort for remedial justice under AFSPA. It is observed that victims of human rights violations in north east India generally approach the judiciary under its writ jurisdiction and/or human rights commissions for 'adequate compensation'. In some cases 'compensation' or 'ex-gratia' is awarded by the Court or Human Rights Commission to the victims. The amount of


‘compensation’ as observed is probably an innovation by the judges taking into consideration of the minimum wages fixed by the state, victim’s age and life expectancy. Following cases stand as examples.

5.5.i Illustrative cases:

a) In Kinjinbou Liangmei vs. Union of India and others\textsuperscript{71}, it was complained that S. P. Philip, a class VII student of 13 yrs, was illegally arrested, tortured, interrogated and implicated in a criminal case by the 3 Assam Rifles posted at Kangpokpi who arrested him on May 7, 1992, from Kangpokpi bazaar, Manipur. On May 11, 1992, he was handed over to the Kangpokpi police station after four days of arrest. A case (FIR No. 37(5) of 1992, KPI PS), under sections 121, 121-A of IPC, 3(2) IDA (P) Act and 25(1) (a) Arms Act was registered but letter of the officiating commandant 3 Assam Rifles, dated May 12, 1992 stated that no weapon had been recovered from him. The court ordered the respondent to produce S. P. Philip before the learned Judicial Magistrate, Senapati within 24 hours and later Philip was granted bail who was rearrested on May 27, 1992. Philip could not appear for his examination scheduled on May 28. The Court held that the respondent defied the principles of law under Article 21 and the provisions of the AFSPA and ordered compensation of Rs. 100,000 to S. P. Philip.

b) Similarly the disappearance of Muleswar Moran\textsuperscript{72} in the custody of army, justice was delivered through monetary compensation. Muleswar Moran was picked up by the army on 24 July 2003 from a bazaar under Pengeree PS of Tinsukia district of Assam when he was accompanying his cousin sister Mrs. Okhi Chetia, alias Debolata Baruah, married to an ULFA underground leader. Okhi Chetia was apprehended and taken away and Muleswar Moran went missing. The
High Court directed the District and the Sessions' Judge of Tinsukia to carry out inquiry, which established that Muleswar and Okhi Chetia were together on 24 July and Muleswar was neither released nor handed over to the nearest police station. The GHC held the army authorities responsible for Muleswar’s disappearance accusing army’s failure to implement ‘Dos and Don’ts’ guidelines issued by the SC. The GHC ordered the payment of Rs. 300,000. No order for prosecution for disappearance was passed by the court.

c) Another important case of involuntary disappearance decided by the GHC is that of Uma Kanta Gayari and Others vs. State of Assam and Others. On 11 August 1999, a bomb exploded under an army vehicle on Gohpur-Rajgarh road near village Ambaiguri in Tezpur district, Assam killing 5 soldiers and injuring 10 others. The army carried out operations to nab the militants responsible and Shukhna Narzary was picked up on 12 August 1999 and later he disappeared. His brother Theparam Gayari was picked up subsequently on 24 October 1999 also disappeared. On 20 August 2000, the High Court directed an inquiry to be conducted by the District and Sessions' Judge. The authorities denied ever having taken Sukhana Narzary and claimed to have released Theparam Gayari after questioning. The inquiry report relied on eye-witness accounts to conclude that both of them had been arrested and taken away by the army and were never released. The report, in the course of conducting the inquiry, also discovered the enforced disappearance of Milson Brahma, arrested by the army on 26 August 1999. The GHC came to the conclusion that the arrested may have been tortured and killed in the custody and directed the authorities to pay the
compensation of Rs. 200,000 each. Any development in terms of prosecution is not known to the investigator.

d) This trend remains the same for cases of custodial death as well. In T. Joicy vs. Union of India\textsuperscript{74}, the GHC awarded compensation for custodial death of one T. Mahaimi @ Apam to meet the justice for violation under AFSPA. Apam was picked up by a combined unit of Assam Rifles and Mahar regiment on June 6\textsuperscript{th}, 1996 in North AOC, Imphal, Manipur without assigning any reason and was detained at Army headquarter at Leimakhong, Manipur. He was not handed over to the nearest police station with least possible delay and he was tortured in army custody. On denial of arrest by the respondent, the GHC ordered enquiry and it was found that the person was arrested and continues to be in the custody of the army. GHC directed the army to produce him before the court within two weeks and the respondent failed to produce him. Court on its judgment order on June 16, 1999 held that article 21, 22 of Indian Constitution was violated and the Court opined Apam must have died in the custody and ordered monetary compensation.

While awarding compensation the GHC ruled that ‘the cost of any commodity can be calculated and such cost can be paid for accurately in terms of money and it is not so in case of human life as the cost of human life is incalculable. Since there is no other mode of relief available except by way of monetary compensation to bring some solace and comfort to the members of the bereaved family’. It was held that for established breach of fundamental rights, compensation can be granted under public law by the Supreme Court and the High Court in addition to private law remedy for tortuous action and punishment to wrong doer under criminal law. The court ordered compensation of rupees two
lakh and fifty thousand as remedy for tortuous liability. Civil Liberties and Human Rights Organisation vs. I.G Assam Rifles which was a case of custodial death of two persons reflects similar value judgment where the court awarded compensation of rupees two lakh.

e) Monetary compensation was also awarded in several habeas corpus writs to meet the ends of justice. In Sanu Saikia vs. Union of India and others, a habeas corpus petition was filed by the brother of Prafulla Saikia@Manash Pratim Mech, aged 26 years, son of Gopal Saikia of village Charaibari, district Diburgarh, Assam, who was picked up by the army personnel on December 4, 1999. The detenu was neither produced before the court nor handed over to the nearest police station with least possible delay and his whereabouts are not known since then. Army denied the arrest. Court ordered enquiry by the district judge and found that the detenu was picked up by the army and was taken into their custody on December 4, 1999. The court in its judgment order dated June 21, 2001, held that the state has failed to protect life of its citizen and following the ration of law laid down in D.K Basu’s case the court ordered compensation of rupees one lakh twenty five thousand considering the age of the missing person and his economic condition.

f) In Khumanthen Ongbi Pangbam Ningol Ibemtal Devi vs. State of Manipur and others, one Khumanthen Jugindro Singh @ Jayendra Singh was arrested by the personnel of the 16th Sikh Regiment on January 27, 1998 and died due to torture in their custody. Respondents admitted the fact of arrest but denied that the arrestee was tortured. Court ordered inquiry by district judge and found that Jugindro was arrested and was tortured by the respondents. The court
awarded compensation of rupees 3 lakh and fifty thousand in the nature of ‘exemplary damages’ saying a suit can be instituted in a court and prosecute the offender under the penal law.

g) In Khundrankpam Ongbi Ibetombi Devi vs. Commanding Officer, 317 Field Regiment, Jiribam, Manipur and Others, the petitioner alleged that Kh. Yaima alias Boyai Singh, 20 years old student were arrested by the army personnel of 317 Field Regiment at Jiribam, Kadamtala, Manipur on the night between September 24, 1998 and September 25, 1998. M. Churchill Singh who was arrested with the petitioner’s son, was released on the next day. Kh. Yaima alias Boyai Singh was not released nor handed over to the civil police. The respondents denied the arrest and the custody of Boyai when police contacted them. On October 13, 1998, the GHC directed the respondents to hand over Boyai Singh to the officer-in-charge of the nearest police station and the personnel of the 317 Field Regiment, Jiribam failed to do so. On May 19, 1999, the court directed the District Judge, Manipur East to make an elaborate inquiry and he concluded that Boyai Singh was arrested and since then he has not been released from their custody. GHC held army personnel of 317 Field Regiment, Jiribam responsible for the arrest of Boyai Singh and failure to release him from their custody and ordered compensation of Rs. 350,000.

h) Violation of ‘Do’s and Don’ts’ guidelines was monetarily compensated. Case of Thangjam Binoy Singh is such an example. In the early morning of March 7, 2004 at around 1.30 a.m. a number of Assam Rifles Personnel took away Binoy for interrogation and locking his family members inside. No arrest memo was issued. Binoy was not handed over to the Thoubal
Police Station and. Later it was found that he had been killed and post mortem report stated the death is due to multiple bullet injuries. The Government of Manipur granted ex-gratia of Rs. 1 Lakh to the petitioner. Later in a response to a petition before the GHC, Imphal bench, W.P. (C RIL) NO. 15 of 2005, the court ordered Rs. 3 (Three) Lakhs as compensation for the death to meet the ends of justice.

i) In Chanambam Menjor Singh vs. Commandant / CO 61, CRPF and others80, the complaint was that on March 24, 1995, at about 3 p.m., the Lokendra Meitei was arrested by the CRPF personnel believed to be the members of 61 Bn CRPF posted at Mantripukhri North, Imphal, Manipur. He was neither produced before the nearest magistrate nor handed over to the nearest police station. Writ petition was filed on March 27, 1995 against the respondents for issuance of the writ of habeas corpus. The same day, the court passed an order that the respondents to hand over the detenue to the nearest police station. Respondents failed to do so. On 28 March 1995, the court again directed the respondents to produce the detenue before the court. The court also ordered the director General of Police to make an inquiry and to which both police and CRPF denied of arresting Lokendra. It was found that the detenue had been released by the CRPF and had been admitted to the RMC Hospital for medical treatment. According to Lokendra Meitei, during the period of custody from the evening of March 23, 1995 to March 29, 1995, he was tortured brutally. Respondents 1 and 2 claimed that Lokendra Meitei was a member of the outlawed PLA and was neither arrested nor detained by the CRPF. On July 30, 1996, the court directed the district judge
to hold an inquiry and found the facts of arrest and torture to be true and ordered compensation of Rs. 80,000.

j) In Uma Devi Upadhaya Boral and others vs. Union of India and others\textsuperscript{81}, GHC awarded compensation for the killing of five villagers by the security persons. On February 1, 2002 at about 8 pm, a group of army personnel of 2\textsuperscript{nd} Maratha Regiment camped at Patgaon of Kokrajhar district Assam entered into Salarpara village of Kokrajhar district bordering Bhutan and picked up five villagers and were taken to a nearby forest. They were tortured and sounds of gun firing were heard by villagers. Next day, army handed over five dead bodies to the Kokrajhar police station branding them hardcore NDFB cadres and reported to that they were killed in an encounter in Salapara. Later it was found before Gauhati Court that the villagers were killed in a cold head and were fired at point blank. GHC ordered compensation of rupees 5 lakh, one lakh each for five families to be paid by the army for violating right to life.

k) Adari Chaudhury and Others vs. Union of India and Others\textsuperscript{82} is another example of custodial death. In Adari Choudhury and others vs. Union of India and others\textsuperscript{83}, on September 13, 1997 at 4 pm, a group of army picked up Bhupen Choudhury and Krishnan Sarmah. Later family came to know from DC that they died in custody. Post mortem report confirmed that Bhupen died due to brutal inhumane torture at the hands of the army personnel while in their custody in the name of interrogation about the hideouts of NDFB militants of which he expressed ignorance. Court found the as a clear case of custodial death and ordered compensation of 2 lakh rupees.
1) In another development, the principle of vicarious liability for sexual violence committed by the armed forces was established in the case of Lilabati Baishya vs. State of Assam and others. On June 16, 1998, three army personnel belonging to 313 Field Regiment entered the house of Lilabati Baishya, assaulted her husband and two personnel raped her even as the third kept her husband down in the courtyard at a gunpoint. The next day, the husband lodged a complaint at Nalbari Police Station which was registered an FIR No. 181/98, U/S 448/325/376/324/34 of the IPC. Lilabati was medically examined on 17 June and the examination established injuries on her body as well as the rape. The police took up the case with the army authorities who cooperated and organized a test parade for the victim to identify the suspected culprits. Lilabati identified A. Ramalingam (No. 15124292) and Y. Gunner Rangiram (No. 14487667). Both were court martialed and held guilty of assault and rape and were stripped of their positions and sentenced to undergo imprisonment. However, the army authorities denied any vicarious responsibility for the actions of its personnel since they had not taken place in the course of performance of any official duty. The High Court held the higher authorities of the army strictly liable and directed the payment of Rs. 100,000 in compensation and Rs. 5,000 as the cost of the petition.

m) The Supreme Court also awarded compensation in cases of violation of fundamental rights under AFSPA. An important order was passed in Postasangbom Ningol Thokchom & another vs. General Officer Commanding & others where the Apex Court awarded compensation in the amount of Rs 1,25,000 following the judgment of Nilabati Behera vs. State of Orissa. In this case, three boys were picked up by the army at Imphal on September 23, 1980 one
of them was released and rest two were missing. A Habeas Corpus writ petition filed before the Court on April 9, 1981 was dismissed on the strength of averments made by the respondents that the said boys had left their custody. Appeals were also dismissed on the same ground. Reacting on the Special Leave Appeal filed on April 24, 1990, the Supreme Court directed District and Sessions Judge, Imphal to conduct an enquiry which held that there was no cogent evidence to show that the two boys had been released from the custody of the army and hence ordered compensation. No order was given for prosecution.

All the above cases demonstrates the existence of crime committed by armed forces that amounts to murder as defined under section 302 IPC. But the cases ended with compensation. Obviously this is because of section 6 of AFSPA along with section 197 and 45 of Cr.P.C. Thus it can be rightly concluded that section 6 though doesn’t bar prosecution, suit or legal proceedings against armed forces, in practice, it has created an atmosphere of ‘virtual immunity’ and this ‘virtual immunity’ in turn has encouraged more extrajudicial execution under section 4(a) of AFSPA. It has been said that severity of punishment is not the guarantee of deterrence, it’s the certainty of the punishment and section 6 of AFSPA failed to guarantee the certainty.

5.6 Prevention of human rights violations under AFSPA

One of the major steps undertaken to prevent human rights violations under AFSPA is the details guidelines in the form of ‘Do’s and Don’ts’ as reported in NPMHR 1997. These guidelines have been discussed in Chapter II. The Supreme Court declared these guidelines as mandatory and a complimentary part of AFSPA. Despite these the guidelines remained cosmetic. Case studies
discussed in this chapter and in previous chapters clearly prove that the guidelines are ineffective. In Masooda Parveen judgment\textsuperscript{87}, the Supreme Court further declared that this may not be practicable to follow the guidelines in all the times.

Expressing concern over continuous allegations of human rights violations under AFSPA, the GHC ordered, that the contents of its decision in two cases\textsuperscript{88}, be made known to all Commissioned officers, Non commissioned Officers, Warrant Officers and Havildars of the armed forces. It, also, ordered that the Central Government issue the following instructions to the above mentioned classes of officers:

a) Any person arrested by the army or other armed forces of the Union shall be handed over to the nearest police station with least possible delay and be produced before the nearest magistrate within twenty four hours from the time of arrest.

b) Only a person who has, either, committed a cognizable offence or against whom reasonable suspicion (of having committed such offence) exists should be arrested. Innocent persons should not be, first, subjected to arrest and, subsequently, released, declaring them to be 'white'.

There were appeals filed against these judgments by the both Central and State governments in the Supreme Court\textsuperscript{89}. In Peoples Union for Human Rights vs. Union of India and others\textsuperscript{90}, counsel referred an instruction issued by the Military Operations Directorate, Army head quarters, New Delhi dated March 31, 1982 that contain instructions related to 'aid to civil authorities' with reference to provisions under section 130 of Cr.P.C. The GHC held that those instructions cannot be considered for the purpose of construing or interpreting the Act as it
was issued by the Army headquarters and the same was not a contemporaneous document.

Human rights commissions in India, due to legal limitations, failed to prevent infringement of human rights by the armed forces while exercising powers under AFSPA. One of the core functions of Human Rights commissions in India are to (a) inquire, *suo motu* or on a petition presented to it by a victim or any person on his behalf, into complaint of (i) violation of human rights or abetment thereof or (ii) negligence in the prevention of such violation as per section 12(a) of Protection of Human Rights Act 1993 (PHRA onwards). As per section 2(d) of the same Act, 'human rights' means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

However, the human rights commissions are to follow a different mechanism in case violations by armed forces. While a state human rights commission has no jurisdiction over the armed forces of the Union, National Human Rights Commission is empowered to act as per the provisions laid down in section 19 of the PHRA to seek a 'report' from the Central Government.

National Human Rights Commission observed in the case of disappearance of Tayab Ali (case No. 32/14/1999-2000) that jurisdiction of the NHRC to deal with the complaints against armed forces is a restricted procedure, practically it cannot enforce its recommendation and hence its lacks teeth in establishing accountability for human rights violations. In few cases human rights commission could prove the 'guilt' and award compensation are given below.

5.6.1 Illustrated cases decided by NHRC
In case of disappearance of Tayab Ali\textsuperscript{92} (discussed earlier), NHRC ordered 3 lakh rupees as compensation and the army complied with the order.

Allen Kuki\textsuperscript{93} of Khoijang village, Manipur, died in the custody of the armed forces violating his human rights. Based on report appearing in The Statesman of 9 March 1994, the Commission called for a report from the Ministry of Defence for alleged custodial death of a Kuki rebel. The latter replied that during the night of 5-6 March 1994, an operation was carried out and Allen Kuki jumped into a nullah to evade capture and later succumbed to injuries. Commission held that timely medical care was not provided to the injured and hence responsible for his death and recommended compensation of Rs. 50,000/- to Rs. 1,00,000 and army compensated so.

In another cases, the Commission initiated a proceeding on the basis of a report from the Superintendent of Police, Dimapur, Nagaland indicating the custodial death of Kheshino Sumi. The NHRC observed that the Assam Rifles didn’t hand over the arrested person to police as they were not entitled to keep him in their custody for carrying out any investigation and hence recommended compensation of Rs. 100,000/ and the Ministry of Defence indicated that this recommendation has been complied with.

Kidnapping and killing of Harsinglhun Changsan by personnel of 32 Rashtriya Rifles on 7 March 1997 in Churachand District of Manipur\textsuperscript{94} is another case dealt by NHRC. The Commission ordered on 8 August 2002, that a sum of Rs. 1 lakh be paid to the next-of-kin and issued a directive to that effect.

In 1997, the UN Human Rights Committee, a body under ICCPR welcomed the setting up of human rights commissions as well as human rights
courts at State level. The Committee regretted that the NHRC is prevented from directly investigating complaints of human rights violations against the armed forces but must request a report from the Central Government, and that complaints to the Commission are subject to a one-year limit⁹⁵.

While examining the third periodic report of the Government of India, an expert of the United Nations Human Rights Committee stated 'Article 6 of the Armed Forces (Special Powers) Act, which prevented all legal proceedings against members of the armed forces, was extremely worrying; if the Government's fear was that citizens would bring vexatious or frivolous actions, that was a matter better left to the courts to resolve. It was inadmissible for citizens to be deprived of a remedy as was at present the case'. In its Concluding Observations, the United Nations Human Rights Committee noted 'with concern that criminal prosecutions or civil proceedings against members of the security and armed forces, acting under special powers, may not be commenced without the sanction of the Central Government. This contributes to a climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2, paragraph 3, of the Covenant'.

Special Rapporteurs have also brought to the attention of the Government concerns relating to reports of alleged impunity for criminal acts committed by officials. In some cases relating to reports of death or ill-treatment while in detention, it is alleged that the authorities had attempted to block the investigation, to destroy evidence, or had taken no steps to investigate the allegations⁹⁶.

5.7 To Sum up
It is mentioned earlier that armed forces are to be tried under court martial trials that are governed by the Army Act of 1950. The proceedings are totally closed for public scrutiny and the rules of conduct and instruction manuals for military personnel operating in ‘disturbed areas’ under AFSPA are being kept confidential.97

The Army Act of 1950 was a revision of the 1911 Indian Army Act. One of the goals of this revision was ‘to bridge the gap between the Army and civil laws as far as possible in the matter of punishments of offense’. The High Courts have limited right to interfere with the court-martial system. Court martial proceedings do not have to satisfy Article 21 of the Constitution. This means that soldiers operating under the AFSPA will, if tried at all for their criminal liability, be tried by court-martial, leaving no civil law remedy for the victims. Section 6 of the AFSPA only further reinforces the army's immunity.

In law, immunity is the status of a person or body that places them beyond the law and makes them free from legal obligations, such as liability for torts or damages or prosecution under criminal law98. Systemic and immunity from criminal liability legalized through legislation or through practice breeds culture of impunity99. In the international law of human rights, it refers to the failure to bring perpetrators of human rights violations to justice and, as such, itself constitutes a denial of the victims' right to justice and redress. Impunity is especially common in countries that lack a tradition of the rule of law, suffer from corruption or that have entrenched systems of patronage, or where the judiciary is weak or members of the security forces are protected by special jurisdictions or immunities100.
In the light of the above it can be concluded that section 6 of AFSPA though it is not an immunity or impunity clause but in practice, it has breed into virtual immunity and has produced a culture of impunity and thus encouraged extrajudicial execution under section 4 (a) of the same Act.
Notes and References:


3 *ibid*


5 *In search of Vanished Blood, op.cit*

6 (1988) 1 GLR 109, GHC Civil rule no. 923/81/18/82, decided on September 11, 1987


9 ACHR, *Lawless Law enforcement according to Law?*, *supra*


Please see Annexure C


Entry 2: Naval, military and air forces; any other armed forces of the Union. Entry 2A: Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of
the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.

15 Entry 1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof) in aid of the civil power.

16 Border Security Forces vs. State of Meghalaya and others, AIR (1989) Gau 81


18 Jagmohan Singh & Others vs. State of Manipur and others, 2005 (3) GLT 418, decided on June 23, 2005


21 Order no. PLA.38412005/54 Dated: March 8, 2006

22 Order No. PLA.384/2005/55 Dated: March 8, 2006
23 Chief Information Commissioner, Manipur and another vs. State of Manipur and another, Civil Appeal Nos. 10787-10788 of 2011 (Arising Out Of S.L.P(C) No. 32768-32769/2010)

24 Imphal Free Press, Editorial, December 29, 2004

25 This protection is also provided under section 45, 32, 197 of the Code of Criminal Procedure, Sections 125, 126 of the Army Act, 1950 and Section 45 of the Unlawful Activities (Prevention) Act etc.

26 Ashok Agarwal, *Law's Autonomy*, supra

27 *ibid*

28 (1983) 1 GLR (NOC) 35


30 TCN News, *In 4 years, 230 complaints against army personnel for human rights violation*,
http://twocircles.net/2010nov22/4_yrs_230_complaints_against_army_personnel_ human_rights_violation.html as on September 4, 2011

31 *ibid*

32 *ibid*


34 NPMHR, 1997

36 State of Haryana vs. Bhajanlal, AIR 1992 SC 604

37 Kangpokpi Police Station FIR No. 51(7)99 under section 307/34 IPC and 25(1-B) Arms Act


39 ibid

40 supra


42 CRPF killed six youths on April 2, 1983, at Golaghat in Assam allegedly in a fake encounter and another one in Chattisinghpora in Jammu and Kashmir. Cases were investigated by CBI and the killings were proved to be a fake encounter. The armed forces took shelter under section 17 of CR.P.C Act and section 197 of Cr.P.C.


44 AIR 1984 SC 1026

45 Family of the two disappeared informed the investigator that the case is still sub-judice. No further information is available.

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GHC case Ranjan Gogoi vs. Union of India, 1995 (2) GLT 384, Civil rule No 20 (HC) of 1993 decided on March 10, 1995


(2006) 2 GLT 861, Civil rule (HC) no.20 (K) of 1996 decided on March 10, 2006

1999 (2) GLT 202

1998(4) GLT 333, Decided on July 22, 1994

2006 (3) GLT 780, Writ Petition (Crl) no. 21 of 2003 decided on 31.7.2006


ibid
Though the obligations and principles of compensation the Supreme Court invoked under the strict liability doctrine are far cry from the international standards. Moreover, the 'right to compensation' as stipulated by Article 14 of the Convention against Torture is not recognized in India.

63 (1982) 3 SCC 131
64 (1982) 2 SCC 583
65 AIR 1983 SC 1134
66 AIR 1983 SC 1086
67 (1997) 1 SCC 416
68 AIR 1984 SC 1026
69 (1998) 1 GLR 109

70 1982 CriLJ 1675, Smt. Thokchom Ningol Kangujam ... vs. General Officer Commanding, decided on September 8, 1981


72 Source: GHC case, Naren Moran vs. State of Assam and Others, WPC (Crl) No 18/2003 decided on December 19, 2007


74 T. Joicy vs. Union of India, 2000 (1) GLT 120, Civil rule (HC) No 42 of 1996 decided on July 16, 1999

75 1997 (1) GLT 91

76 2002 (3) GLT 387, writ petition no 75 (Crl) of 1999 decided on 21.6.2002
2006 Cri LJ 1166, Writ Petition (Cril) No. 10 OF 2004


Source: Smt Thangjam Ongbi Ibempishak Devi vs. Union of India and others, W.P. (C RIL) no. 15 of 2005, date of judgment May 19, 2008

2006 (3) GLT 429, CR (HC) No 11 of 1995 decided on June 1, 2006

Writ Petition no 3402/2002, decided on August 24, 2006

1999 ACJ 1331, decided on May 20, 1998

(1999) ACJ 1331


Civil Rule 128/81 and Civil Rule 129/81, date of judgment September 16, 1997

(1993) 2 SCC 746

Masooda Parveen vs. Union of India, AIR 2007 SC 1840. Also discussed earlier.

Nungshi Tombi Devi vs. Rishang Keishang, 1982(1) GLR 756, and, The Civil Liberties and Human Rights Organisations (CLAHRO) V. PK Kukrety, 1988 (2) GLR 137. Both cases deal with gross violation of fundamental rights by the armed forces by the GHC.

Civil Appeals Nos. 2173--76 of 1991

(1991) 1 GLR, 456

Section 19. Procedure with respect to armed forces : (1 ) Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of the armed forces, the Commission shall adopt the
following procedure, namely: (a) it may, either on its own motion or on receipt of a petition, seek a report from the Central Government; (b) after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government. (2) The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow. (3) The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations. (4) The Commission shall provide a copy of the report published under subsection (3) to the petitioner or his representative.

92 NHRC Case No. 32/14/1999-2000 and Kangpokpi Police Station FIR No. 51(7)99 under section 307/34 IPC and 25(1-B) Arms Act.

93 Source NHRC website, www.nhrc.nic.in

94 Case No.19591/96-97/NHRC, source NHRC website

95 UN document CCPR/C/79/Add.81, paras. 7 and 22


97 SAHRDC, *A Study in National Security Tyranny*, supra


100 *ibid*