Law & Social Inquiry
Volume 44, Issue 3, 555–585, August 2019

Law& Social Inquiry

Judging the Troops: Exceptional Security Measures and Judicial Impact in India

Surabhi Chopra

This Article examines a controversial national security measure: the use of the armed forces within domestic borders. Military policing blurs the boundaries between crime and war, and tends to entail greater use of force against individuals. It has received relatively little academic attention but deserves to be better understood. No democratic state has relied on military policing for longer than India. And within India, no region has been subject to military policing for as long as the northeastern state of Manipur. I analyze how military policing in Manipur has fostered abuse by the armed forces, which in turn has prompted litigation and judicial innovation. Based on my analysis, I critique dominant theories about the state's exceptional security powers. I advance two main claims. First, exceptional powers rarely remain exceptional; they eventually become the norm. Once deployed, these powers persist, and the license they provide seeps into broader habits of governance. Second, once normalized, exceptional powers become more vulnerable to judicial intervention. Judges become unwilling to accept the government's argument that these powers are always and only used to fight pressing threats. These powers eventually become a routine subject of judicial review. Even once judicial review becomes routine, however, judges tend to be more willing to help victims of abuse than to punish abusers.

INTRODUCTION

Terrorist violence has prompted many democratic governments to use exceptional security measures that go beyond ordinary law-and-order mechanisms. These measures pose a conundrum that has motivated considerable scholarly debate. On the one hand, these exceptional powers are often deemed necessary to secure peace and maintain public safety; on the other hand, they typically curtail fundamental rights, and blur the boundary between crime and war.

This Article looks at one such exceptional security measure: the use of armed forces within domestic borders. Military policing receives relatively little attention in academic and policy debates but it deserves to be better understood. Australia, Canada, Germany, Italy, Japan, the United Kingdom, and the United States of America have each enhanced their powers to deploy armed forces on home soil over the past two decades, often quite significantly (Head and Mann 2009, 5–17). Other democratic states might follow suit. When a government adopts a war framework rather

Surabhi Chopra is an Associate Professor at the Faculty of Law, Chinese University of Hong Kong (surabhic@cuhk.edu.hk). She is grateful to the Chinese University of Hong Kong for financially supporting the early stages of this research through a Direct Research Grant. She would also like to thank Swati Jhaveri, G.B. Reddy, Arun K. Thiruvengadam, Kirsten Sellars, Manoj Mate, Terry Halliday, Simon Cox, Shruti Chopra, and the anonymous reviewers for their comments, and Ria Singh Sawhney and Rakshanda Deka for their excellent research assistance.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

than a crime framework to confront terrorist violence, using the military to maintain domestic law and order is likely to seem less alien.

Military policing generates systemic as well as individual risks. In addition to weakening the traditional separation between the police and armed forces, it can also distort the federal division of labor by centralizing decisions that were previously made at the state and local levels. More worryingly, it tends to entail greater use of force against citizens. The armed forces are often granted greater formal powers to use force than the police. They are also trained to combat external threats in situations of conflict, and military policing brings this fiercer orientation to the maintenance of domestic law and order.

No democratic state has relied on military policing for longer than India. And within India, no region has been subject to military policing for as long as Manipur and its neighbor, Assam. Manipur's sixty-year experience with military policing shows how the various risks associated with this exceptional security measure might manifest, and how they might be moderated. It offers a case study that challenges prevailing scholarly assumptions about exceptional powers.

I analyze how military policing permeates public life, fosters abuse, and elicits judicial intervention in Manipur. Based on my analysis, I critique proposals by positivist legal theorists about how the law should structure exceptional security powers so that the state is sufficiently unencumbered without being dangerously unchecked. I then critique deconstructive theorists who doubt whether a defensible, discernible boundary exists between exceptional coercive power and state abuse.

Drawing upon my study of military policing in Manipur, this Article advances two central claims. First, exceptional powers rarely remain exceptional; they eventually become the norm. Second, once normalized, exceptional powers become more vulnerable to judicial intervention, gradually losing the deference they initially enjoy from the courts. The first, somewhat familiar claim contradicts the positivist presumption that the law can keep exceptional powers contained—to be deployed only for strictly limited periods and purposes. In practice, these powers persist, becoming a semi-permanent, open-ended fact of life. The license these powers provide seeps into broader habits of governance. The second claim runs counter to the deconstructive view that the law is merely a cover for the state's determination to exercise coercion as it pleases. As these exceptional powers become a routine part of executive action, they lose their mystique. Judges become unwilling to accept the government's argument that these powers are always and only used to fight pressing threats, and that judicial intervention would endanger the nation. These powers eventually become a routine subject of judicial review. However, Manipur's experience also suggests that courts provide only a modest check on the exercise of exceptional powers, even after judges shed their initial deference. In Manipur, at least, judges have been more willing to help the victims of abuse than to punish the abusers.

THEORIZING EXCEPTIONAL SECURITY MEASURES

Tackling violence by nonstate actors presents governments with complex challenges. To this end, national security measures in many countries grant the government

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

more power to investigate, detain, prosecute, punish, and use force against individuals than it can ordinarily exercise. Such measures raise anxieties about the restrictions they place on individual rights, whether through formal legal provisions or, more troublingly, through the unlawful abuse of formal powers. The resulting dilemma prompts very different analyses from scholars who have a positivist approach to law and those who have a deconstructive, critical view of the state.

Positivist legal theorists tend to assume that the right institutional architecture will make exceptional security powers compatible with constitutional checks and balances, while disagreeing, sometimes deeply, over what those arrangements should be. After 9/11, the "ticking bomb scenario" emerged as the primary hypothetical case through which legal positivists explored what the constitutional-democratic state should be permitted to do in response to violent challenge. Scholars debated whether torturing a suspect who can reveal where a ticking bomb is hidden should be lawful, *un*lawful but accommodated politically, or absolutely *verboten*. Some argued that the government should have standing emergency powers under the law that are wider than the law-and-order powers it ordinarily enjoys, extending even as far as permission to torture (Dershowitz 2004, 257–80; Ignatieff 2005, 25–53). A harder-edged version of this argument held that the executive branch inherently holds the power to bypass established constraints on force in an extreme situation (Yoo 2001, 12). Other scholars, such as Bruce Ackerman, proposed a constitutionally enshrined emergency regime that lifts restraints on the executive in times of extreme danger, but is authorized and, to some degree, checked by the legislature (Ackerman 2004, 1045–62). Once crisis abates, according to this view, ordinary norms, with the attendant limits and scrutiny on government power, would recommence. By contrast, Oren Gross argued that bedrock liberal norms, such as the prohibition on torture, should not be formally diluted, but that extralegal violence in a ticking-bomb scenario could be pardoned after the fact, through a process of careful, transparent deliberation (Gross 2008).

While positivists debate different permutations of power and constraint, deconstructionist scholars fundamentally question constitutional democracy's ability to regulate state violence. Giorgio Agamben adopts the view of the conservative Weimar-era legal theorist Carl Schmitt that rulers transcend juridical control. Schmitt saw "deciding the exception"—the suspension of law and ordinary restraints on state power in an emergency—as the hallmark of sovereignty (Schmitt 1922). Agamben argues it is both a hallmark and stratagem of modern democracy (Agamben 2005, 2–31). A state of exception enables democratic governments to act with unbridled force, argues Agamben, and is as essential to democratic regimes as the respect they profess for rule of law and individual rights.

This argument is echoed by many political anthropologists and sociologists who argue that security and emergency are political devices, used to socially segregate groups regarded as problematic by the state, and to produce public support for persecuting these marked populations (Gordon 2006; Sanford 2003; Duschinski 2009, 2010). Avery Gordon, a sociologist who examines state control, notes that long-running conflict and marginalization are means by which states corral dissenting or recalcitrant groups "to a remote and closed place where they are civilly disabled and socially dead" (Gordon 2006, 52). The legal system, with its rhetoric of individual rights and rule of law, facilitates and legitimizes unbounded state violence against marginalized groups, according

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

to these analyses (Duschinski 2010, 112). Whether in the detention facilities of the United States' war on terror, or in regions policed by the military in India, the law smooths the brutal "necropolitics" of earmarking particular people as disposable (ibid., 112; Gordon 2006, 49–54; Mbembé and Meintjes 2003).

Both bodies of scholarship have weaknesses, as my case study will show. Positivist analyses attempt to develop principles and frameworks for grappling with organized nonstate violence. However, sociolegal scholars point out that the compressed, cataclysmic, total emergency around which much legal positivist theorizing clusters has scant relation to the lived experience of political violence and crises. Kim Lane Scheppele and Nomi Lazar, for example, argue that the norm/exception framework is empirically shaky and, therefore, normatively unsound (Scheppele 2008, 174; Lazar 2006, 267). Lazar calls for more nuanced analyses of norms, formal as well as informal, surrounding crisis government (Lazar 2006, 267). The political scientist Leonard Feldman advocates setting aside abstract schematization and analyzing instead the "prosaic politics" of emergency powers (Feldman 2010, 138).

Deconstructive perspectives usefully reveal how concepts like "state of emergency" or "national security threat" channel deep anxieties about who belongs within a political community. But while deconstructionists' radical state skepticism illuminates, it also seems reductive. In particular, it might oversimplify the role of the law in relation to exceptional security powers. As sociolegal scholar Richard Abel has pointed out in relation to South Africa under apartheid, the legal system is relatively autonomous, and there is much to be learned from how this autonomy is manifested (Abel 1995, 523). Therefore, it is worth considering how the use of exceptional security measures fares in the courtroom.

In this Article, I follow the cues of Feldman and Abel. I explore the prosaic politics of military policing in India, trying to understand the effects that the statutory framework for military policing has on the ground. I then analyze the potential of the legal system, closely examining cases and judgments to see how judges have responded to the abuse of military policing powers by the armed forces.

METHODOLOGY

Within India, military policing has been applied the longest in the turbulent, northeastern states of Assam and Manipur,[1] which is why I chose to focus on one of these states. Between 1970 and 2004, districts containing approximately two-thirds of Manipur's population were designated as "disturbed" by the government, and policed by the armed forces as a result.[2] Since 2004, armed forces have been deployed in a

1. India is a federal country, divided into twenty-nine states and seven union territories. Union territories are administered by the national government. Each state has its own government, legislature, and judiciary. The Indian Constitution divides executive powers and duties between the national and state governments.

2. Government of Manipur, Home Department. 1980. Notification No. 7/20/67-POL 1 (Pt), 8 September 1980. *Manipur Gazette Extraordinary* No. 183, 10 September 1980 [designating Manipur Central District as a disturbed area under the AFSPA]; Response by Minister of State for Home Affairs, Response of the Minister of State for Home Affairs to Unstarred Question No. 224 Regarding the Scope of the AFSPA in Manipur during Proceedings of the Monsoon Session of the Sixteenth Lok

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

slightly reduced area (Government of Manipur 1980; Response by Minister of State for Home Affairs, Lok Sabha 2015). To explore the prosaic politics of military policing, as well as the litigation and jurisprudence it has prompted, I conducted field research in Manipur and analyzed case law.

I conducted semi-structured interviews during a two-week visit to Imphal, the capital of Manipur and a week-long visit to Delhi, the national capital, in January 2013, supplemented with exchanges over email and telephonic interviews in 2015, 2016, and 2018.[3] Starting with a few existing contacts in the human rights community in Imphal, I met a wider circle of people engaged in advocacy related to military policing through "snowball" recommendations from interviewees. I interviewed four lawyers, two litigants, three nongovernmental organization (NGO) activists based in Manipur, two NGO activists based in New Delhi, two academics, two members of the armed forces, and two civil servants who had worked in Manipur for several years. The bureaucrats, armed forces members, and one litigant agreed to speak off-the-record on the condition that I did not draw directly on these conversations in anything I write. Two other interviewees asked that I anonymize them. My requests to interview officials in the national Ministry of Home Affairs and Ministry of Defence were declined. All of my interviews were conducted in English, and my interviewees were generous with their time and opinions. Some shared material with me that is not publicly available, including constitutional petitions filed before the High Court and reports from court-ordered inquiries into violence by soldiers. This material has also influenced my analysis and I cite to it where appropriate.

To examine how exceptional powers fare in the courtroom, I looked at jurisprudence on abuses by troops in Manipur from 1958, when military policing was first introduced, to 2015. I analyzed all the reported decisions by the state High Court in response to petitions challenging unlawful violence by the armed forces in Manipur, as well as unreported decisions available on the High Court website.[4] I focus on final, dispositive judgments rather than delving into interim orders that might have been issued in some long-running cases. While I have attempted to be comprehensive, I should note that many judgments are not reported on commercial databases or the High Court website.[5] I also discuss a milestone decision by the Supreme Court where it treated abuse associated with military policing in Manipur as a constitutional tort, deserving of monetary damages.

Twelve decisions on abuse by troops in Manipur are publicly reported. In relation to these decisions, I tracked how long each case took from initial filing to final judgment; what abuse was alleged by the petitioner; whether the petitioner was directly

Sabha (lower house of Parliament), Lok Sabha, 21 July 2015 [explaining that the AFSPA ceased to apply to the Imphal Municipal Area from August 2004].

3. I sought informed consent from interviewees according to the research protocol at my university.

4. Each Indian state falls under the jurisdiction of a High Court (India Const. Art. 215), which has the powers of a court of record. High Courts and the apex Supreme Court have appellate as well as original jurisdiction under the Constitution. Appeals from any High Court's decision lie with the Supreme Court, situated in New Delhi, the national capital. Manipur shared a High Court with four other states in northeast India until 2013. In 2013, it acquired the dedicated Manipur High Court.

5. Thiruvengadam notes in relation to the Indian Supreme Court that reported decisions comprise only a small subset of total decisions (Thiruvengadam 2013, 523). Reporting of High Court decisions is similarly partial.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

affected or litigating in the public interest; who the alleged culprits were; and who the respondents were (national and state government entities, the armed forces, the police). I noted the type of evidence offered by both the applicants and respondents, the nature of fact-finding, the ultimate factual determination, and arguments and findings on points of law. I also noted what remedies were requested, and what, if any, were granted. I noted any opinions expressed by judges on military policing. Finally, I checked whether case reports revealed other measures by petitioners, such as lobbying local legislators or government officials, demonstrating in public, or approaching national and state human rights commissions.

In all twelve cases that have been conclusively decided, the petitioner alleged the violation of a constitutional right by members of the armed forces. Seven petitions raised allegations of torture, seven of arbitrary detention, four of forced disappearances, one of injurious shooting, and five of extrajudicial execution. Nine cases concerned the violation of one person's rights to life and liberty. Three concerned at least two victims, with the *Kiutaliu* case concerning the killing of eight men (Kiutaliu v. India (2011) 6 GLR 87[6]). Eight cases highlighted multiple types of abuse against the victim. Five cases also disclosed unlawful violence against people other than the primary victim, including drawn-out torture, beating, and using people as human shields. In all but one early decision, the court accepted the account of the petitioner as true.

MILITARY POLICING IN INDIA: FRAMEWORK AND FALLOUT

The framework for military policing in India is laid down in the Armed Forces (Special Powers) Act (AFSPA). The AFSPA has its roots in a Second World War British policy, administered when colonial troops were fighting the Japanese on British India's eastern border. In 1949, Manipur, a small monarchy transitioning to democracy at the time, was hastily corralled into recently independent India (Chandhoke 2006, 14–16). Over the next few years, groups in Manipur and neighboring Assam sought to separate from India. To counter these burgeoning separatist sentiments, the colonial military policing framework was dusted off in 1958 and adapted first into an ordinance, or short-term executive order, and then into legislation (Ministry of Home Affairs 2005, 10).

Since then, military policing has been a recurring tactic in the Indian government's fight against separatism. The armed forces have been deployed at various points in response to militant separatist groups in Punjab in the northwest (from 1983 to 1997),[7] Jammu and Kashmir in the north (from 1990 onward),[8] and all seven states in northeast India. Below, I discuss how military policing is structured under the AFSPA. I argue that the AFSPA is framed in terms that facilitate abuse, and this statutory leeway is reinforced by the government's staunch refusal to punish soldiers who transgress their wide powers.

6. Hereinafter, *Kiutaliu*.

7. The Armed Forces (Punjab and Chandigarh) Special Powers Act 1983, Act No. 34 of 1983 (INDIA CODE). This state-specific iteration has the same provisions as the AFSPA.

8. The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, Act No. 21 of 1990 (INDIA CODE). This state-specific iteration has the same provisions as the AFSPA.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

Declaring Disturbances

The AFSPA empowers state governments as well as the national government to declare that a part of the country is "disturbed." The power to do so is unconstrained by threshold conditions, guiding criteria, preliminary steps, or geographical limits (entire states can and have been designated as disturbed). The AFSPA requires only that the deciding authority be "of the opinion" that the area in question is "in such a disturbed or dangerous condition that the use of armed forces in aid of civil power is necessary" (AFSPA § 3).

Under the Indian constitution, declarations of emergency are time-bound and must be endorsed by the legislature (India Const. Art. 359, § 1). By contrast, the legislature does not mediate the executive's power to impose military policing under the AFSPA. The AFSPA's focus on "disturbances" allows the government to circumvent constitutional checks on declarations of emergency and impose extraordinary military force on civilians, not for short periods of time, but on an extended, quotidian basis with barely any scrutiny.

The executive branch's declaratory power was moderated marginally in 1997, forty years after the AFSPA came into force, when the Indian Supreme Court held that "disturbed area" declarations had to be reviewed every six months (Naga People's Movement of Human Rights v. India, AIR 1998 SC 432, para. 43[9]). Such reviews notwithstanding, "disturbed area" declarations can be renewed with little ado. As a result, some areas have been subject, fairly seamlessly, to military policing for years at a stretch.[10]

Policing Powers

Within a disturbed area, the AFSPA allows the armed forces to exercise far greater power than they would be allowed under ordinary law. Under India's national Code of Criminal Procedure, government officials can request help from the armed forces if the civilian police are struggling to cope with a particular incident of public unrest (Code Crim. Proc. § 130). Senior military officers can act on their own initiative only in extremis, very briefly, when a crowd is "manifestly dangerous" and the ranking civilian administrator cannot be contacted (ibid. § 131).

The AFSPA alters these arrangements. Once an area is designated as disturbed, the armed forces can act independently, without waiting for the civilian authorities to request their aid. Within the AFSPA's security-focused remit, soldiers[11] are allowed to make arrests, conduct searches, seize property, and use force autonomously. Moreover, soldiers acting under the AFSPA have more leeway to assert these powers than the civilian police do in comparable circumstances.

Soldiers are required to hand the people they arrest and property they seize to the civilian police (AFSPA § 6). But in a crucial omission, the AFSPA imposes no deadline

9. Hereinafter, *Naga People's Movement*.

10. See note 2 above.

11. For brevity, I use the term "soldier" to refer to members of the Indian army, of all ranks, as well as members of paramilitary forces under the command of the central government, of all ranks.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

for this handover, requiring only that the transfer take place "with the least possible delay" (ibid. § 5). By omitting a deadline on military custody, the AFSPA evades the express constitutional injunction that individuals be presented before a court within twenty-four hours of being arrested (India Const. Art. 22, § 2). In 1997, the Indian Supreme Court held that military arrests had to comply with this constitutional deadline, but preserved wriggle-room for soldiers by adding that travel time be excluded when calculating hours after arrest (*Naga People's Movement*, para. 54).

Soldiers acting under the AFSPA are also permitted to use as much force as they consider necessary when making arrests or searching and seizing property (AFSPA §§ 4(d)w2–(e)). Further, a soldier can also use force "even to the causing of death" in more passive situations, against anyone he suspects is disobeying official orders that bar gathering in public or carrying weapons (ibid. § 4). This power is particularly treacherous. Local government officials have the power to ban gatherings in public of groups of five or more. They can also ban the carrying of "weapons, ammunition or explosives" as well as "things capable of being used" as such (ibid. § 4(a)).

These dovetailing powers of prohibition and force potentially endanger a wide swathe of people. Ad hoc banning orders could be short-lived, publicized in municipal buildings and local newspapers, and easily missed by the ordinary person, but would still trigger the AFSPA's license to use fatal force. Small groups of family and friends might unwittingly contravene a ban on public gatherings. A teenager walking to school with a cricket bat could violate a prohibition on carrying objects capable of being used as weapons, as might the fishmonger making her way home with the knives she uses to scale and gut.

Despite their extent, powers to use force under the AFSPA are not tempered by any requirements that force should be proportionate, preceded by ample prior warning, or in response to an imminent threat. Moreover, these powers are granted not only to experienced and highly-trained soldiers—"commissioned officers" within the Indian military hierarchy—but also to relatively junior "non-commissioned" officers as well as "any other person of equivalent rank" (ibid. § 4). Thus, there is a wide, and potentially extendable, class of actors who enjoy generous powers of search, seizure, arrest and lawful aggression when an area is designated as disturbed. Even as it expands their coercive powers, the AFSPA also shields these troops from legal liability.

Protecting the Troops

No legal proceedings, criminal or civil, can be launched against a member of the armed forces operating in a disturbed area, unless the national government permits such proceedings (AFSPA § 7). This centralizes decisions that would ordinarily be made at the state or local level. In order to try a soldier suspected of a crime within a disturbed area, the prosecutor on the ground would have to ask the state government to request the national Ministry of Home Affairs in New Delhi for permission to proceed. An individual seeking to sue a soldier in tort would have to make the same convoluted entreaty.

The national government does not disclose information about how often such requests are made and granted. However, nongovernment research suggests that very

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

few soldiers have been prosecuted for unlawful violence in disturbed areas (Srivastava 2012, 72). A civil society "shadow report" before the United Nations Human Rights Committee indicated that no soldiers had been prosecuted up to that point in any of the northeastern regions that had been policed by the military for decades (South Asia Human Rights Documentation Centre 1995). More recent research from the northern state of Jammu and Kashmir indicated that the central government did not grant even one out of fifty applications for permission to prosecute between 1989 and 2011, expressly declining twenty-six and leaving the rest pending (Manecksha 2011). Similarly, human rights groups from Manipur also state that prosecution is exceedingly rare (Civil Society Coalition on Human Rights in Manipur and the UN 2012, 11). While these figures are not official, they strongly suggest that state governments fail to apply for permission to prosecute soldiers, and if they do, the national government refuses to grant it.

The AFSPA is not unique in insulating state actors from liability. India's ordinary criminal law similarly insists upon government permission before an official belonging to any of the national civil services can be prosecuted (CODE CRIM. PROC. § 197). But legal immunity bestowed by the AFSPA goes further. First, it extends to proceedings in both public and private law, and protects even very junior soldiers. Second, even if the government permits criminal charges, a soldier acting under the AFSPA can be prosecuted either under criminal law or military law,[12] with law and tradition tilting toward the latter, far more opaque route.[13]

The Fallout of Military Policing

When confronting insurgent groups in areas populated by religious or ethnic minorities, where many desire independence from India, soldiers may be tempted to conflate peaceful majorities with the few who have adopted armed violence. The AFSPA's framework gives a lot of room for fear, strain, and prejudice to curdle into abuse. Over the years, unlawful arrest, sexual assault, arbitrary detention, disappearances, torture, and summary killing have been commonplace in AFSPA-regulated "disturbed areas" (Amnesty International 1997, 2015; Chopra 2016, 328–33; Civil Society Coalition on Human Rights in Manipur and the UN 2012; Human Rights Watch 2008a; Redress et al. 2011; South Asia Human Rights Documentation Centre 1995).

Manipur's experience echoes this wider pattern of serious violations by the armed forces (Human Rights Watch 2008b). Civil society groups estimate that 1,528 people have been extrajudicially killed by security forces in Manipur since 1979 (Extra Judicial

12. If a member of the armed forces is accused of violent crimes while on active duty, jurisdiction over these allegations is shared by ordinary criminal courts and the military court martial. It falls to the commanding officer of the accused person to opt for the civilian or the military system (The Army Act, 1950, Act No. 46 of 1950 (INDIA CODE), §§ 70, 125). Experience so far in cases involving human rights abuses by soldiers acting under the AFSPA indicates that the usual choice is the court martial system. See for example, General Officer Commanding v. Central Bureau of Investigation, AIR 2012 SC 1890. See also SAHRDC 1995.

13. In a recent interim order, the Supreme Court stopped the police from acting on a complaint against an army officer for opening fire against civilians in Shopian, Jammu and Kashmir, leading to the deaths of three people. Lt. Col. Karamveer Singh v. Jammu and Kashmir, W.P. (Cri) 42/2018 (Sup. Ct. India Feb. 12, 2018).

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

Execution Victim Families Association v. India, WP (Civil) No. 250/07 (Sup. Ct. India July 8, 2016[14]). Many people picked up by the security forces in the 1980s and 1990s remain missing even today (Human Rights Watch 2008b, 55–58, 76). Disappearances declined after the Manipur government began systemically tracking arrests in 2000, but torture, extrajudicial killing, and assault by soldiers continued to occur (ibid., 6–11, 38–56). Particularly through the 1980s and 1990s when separatist groups were very active, daily life could be laced with jeopardy for ordinary people. Many Manipuri communities faced extortion, conscription, and arbitrary decrees from militants on the hand, and "retaliatory" attacks by the military on the other (ibid., 9–10).

People targeted by soldiers typically receive little help from the local police. My interviewees indicated that complaints by victims or their families are often not registered at all by the police (interview with Meihoubam Rakesh and Laimayum Shivananda, lawyers, Human Rights Law Network, Imphal, Manipur, January 8, 2013; interview with Babloo Loitongbam, Human Rights Alert, Imphal, Manipur, January 9, 2013, notes on file with author). Instead, when families of people killed by soldiers in Manipur complain to the police, the usual response, according to an experienced human rights lawyer, is to file a case of attempted homicide *against* the deceased on behalf of the armed forces (interview with Meihoubam Rakesh, lawyer, Human Rights Law Network, Imphal, Manipur, January 8, 2013):

> "The FIR" [first information report] has a fairly standard account. It says the army got information from an unnamed source about militant activity. In response, the army officials rushed to the area, and found the deceased behaving "in a suspicious manner." As they approached him, he ran away and began firing at them. They took "retaliatory action" and killed him. The FIR will typically list the findings of a "thorough search," which include arms, but do not include the empty cartridges of shots fired by the army."

Thus, police records tend to exclude even the possibility of abuse by soldiers. So routinized is this obfuscation that even registering an allegation of unlawful violence takes special effort. To have a complaint recorded, the victim's lawyer typically needs to approach the senior-most police officer in the district, and sometimes go further and petition the judiciary (ibid.). So, although the AFSPA formally insulates troops only from *prosecution*, the institutional culture that has developed around it also shields them from the earlier stages of complaint and investigation. For years, civil society groups in Manipur have lobbied the state government for safeguards against abuse by soldiers, pressed the national government for repeal, highlighted abuse before the United Nations, and protested on the street (Human Rights Watch 2008b, 30–31, 56–57; Ministry of Home Affairs 2005, 42–46; Civil Society Coalition on Human Rights in Manipur and the UN 2012). In addition, victims of AFSPA-related abuse have sought legal redress. In the next section, I examine the litigation that resulted.

14. Hereinafter, *EEVFAM*.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

MILITARY POLICING IN THE COURTROOM

The AFSPA's focus on "disturbances" allows the government to dodge constitutionally mandated legislative scrutiny over "emergency" powers. But this statutory maneuver exposes the government and armed forces to another type of constitutional check. The Indian Constitution gives individuals the right to petition the national Supreme Court and state High Courts for a remedy if they suffer a breach of their constitutionally recognized fundamental rights (INDIA CONST. Arts. 32, 226). Only during a formally declared emergency can this right to move the Supreme Court or High Court to enforce a fundamental right be partially suspended (ibid.).[15]

By contrast, in a disturbed area under the AFSPA, the full catalogue of fundamental rights remains intact, and so does the judiciary's constitutional jurisdiction to enforce these rights. While the AFSPA makes it difficult to prosecute or sue soldiers, it does not, and constitutionally *cannot*, limit the right to move the courts in order to assert a fundamental right. Over the years, many Manipuris have relied upon these procedural "access-to-justice" rights to seek relief for the violation of their substantive fundamental rights by soldiers. The AFSPA might render criminal and civil proceedings inaccessible, but victims have turned instead to the judiciary's constitutional writ jurisdiction.

A Late Start

This turn to constitutional litigation, however, was a long time coming. The first decision related to abuse by the armed forces in Manipur was decided in 1981, twenty-two years after military policing was first introduced in Manipur in 1958 (United Nations Human Rights Committee 1997, 4–5). While earlier constitutional writ decisions related to the AFSPA might simply not be reported, it appears that Manipuris rarely petitioned the High Court about abuse by soldiers for the first two decades of the Act's tenure. One reason it took so long might be the rarefied nature of this type of petition. For most Manipuris, the High Court was physically remote. It was not until 1992 that the High Court for all the northeastern states had a permanent bench in Imphal, the state capital of Manipur (High Court of Manipur website).[16] High Courts are also likely to be perceived primarily as appellate forums. An ordinary Manipuri adversely affected by the AFSPA would simply not have known, without the benefit of professional advice, that the constitution allowed direct recourse to the High Court in order to enforce a fundamental right. Thus, for a long time, the AFSPA's barriers to legal action *did* ensure total legal immunity for the government as well as individual soldiers. Things shifted in the 1980s. Political tumult in Manipur likely contributed to this. An activist turn at the Indian Supreme Court also helped.

Manipur experienced rising unemployment, as well as separatist violence and intra-ethnic clashes in the 1980s, fueled by guns, drugs, and money trafficked across the state's porous border with Myanmar. Ethnic frictions within the state manifested

15. The right to enforce certain crucial fundamental rights, including the rights to life and personal liberty, is protected even in a constitutional emergency.

16. Available at http://hcmimphal.nic.in/history.html.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

in fragmented electoral politics and fragile governments (Hassan 2006, 16–17). Increased violence by insurgents triggered recurring attacks on civilians by the armed forces.[17] This heightened exposure to violence, and the lack of other reliable state institutions might have led individuals as well as NGOs to approach the judiciary in greater numbers.

Extreme Deference

The High Court's initial response to petitions for redress was timid. In 1981, Thoibi Devi petitioned the High Court for a writ of habeas corpus when her sons, Loken and Logendra Singh, disappeared after being picked up by the army on September 23, 1980. Thoibi Devi had an eyewitness in Iboyaima Singh, who testified that he, Loken, and Logendra had been tortured by soldiers, and his companions kept captive when he was released. The army responded with internal records documenting Loken and Logendra Singh's release. This sufficed. Even though both men were still missing a year after being picked up, the High Court refused to issue a writ of habeas corpus, stating, "there is no room for believing that the two boys are still in army custody" (Thokchom Ningol Kangujam Ongbi Thoibi Devi v. General Officer Commanding, 1983 Cri LJ 574, para. 35[18]).

The High Court's stance in *Thoibi Devi* is startling. Courts, whether in India or elsewhere, are often tentative in the national security arena. Because of the potential, grave dangers involved, judges are wary about second-guessing security policies or operations. In *Thoibi Devi*, however, the High Court veered beyond security-related deference into complete cravenness, ignoring compelling evidence of torture and disappearance.

Acknowledging Abuse, Creating a Remedy

But after this unpromising start, the High Court was more muscular in the cases that followed. In a habeas corpus decision a year later, in 1982, it queried the armed forces much more closely. Nungshitombi Devi alleged that her husband, Chaoba Singh, had disappeared after paramilitary personnel arrested him in January 1981 (Naosam Ningol Chandam Ongbi Nungshitombi Devi v. Rishang Keishing, Chief Minister of Manipur, 1983 Cri LJ 574[19]). As in *Thoibi Devi*, the armed forces argued that paperwork documenting Singh's release "merit[ed] full acceptance by the court" (*Nungshitombi Devi*, para. 3).

The High Court disagreed. It noted that the armed forces had not aired the supposedly conclusive release records when the Manipur legislature discussed Chaoba Singh's disappearance some months previously (ibid., para. 8). Unpersuaded by the armed forces' argument that Singh, a middle-aged husband and father, had simply

17. It is difficult to say with confidence that abuse by the armed forces *increased* in the early 1980s because documentation of human rights violations prior to the late 1980s is very limited.

18. Hereinafter, *Thoibi Devi*.

19. Hereinafter, *Nungshitombi Devi*.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

abandoned his family, the High Court issued a writ of habeas corpus (ibid., para. 10). Given that Chaoba Singh had almost certainly been killed, an order to release him from detention was largely a symbolic victory. But it communicated greater willingness by the High Court to scrutinize the armed forces.

A year later, a decision by the Supreme Court not only reinforced the High Court's resolve, it also offered a new remedy for victims of abuse. On March 6, 1982, a "combing" operation in Manipur's Huining village degenerated into an outright attack on local residents. Ostensibly searching for insurgents, troops killed one person and rounded up and tortured several more. They picked up a few people, including the village pastor, Mr. Paul, and schoolteacher, Mr. Daniel, who were never released. Sebastian Hongray, an experienced human rights advocate, circumvented the High Court and went directly to the Supreme Court about these disappearances. As they had done before the High Court, the armed forces submitted records showing the men had been released. Replete with internal contradictions and signs of doctoring, these records left the Supreme Court "cold and unconvinced" (Sebastian M. Hongray v. India, AIR 1984 SC 571, para. 19). It noted circumstantial evidence about the attacks in Huining, and the fact that soldiers had pressured village leaders to certify that they had "no claims" against the regiment. In August 1983, the Supreme Court issued a writ of habeas corpus, ordering the pastor and schoolteacher's immediate release.

The two men had still not been released a few months later. Sebastian Hongray returned to the Supreme Court, pressing for the army be held in contempt, and for the wives of the two missing men to be compensated. The Court agreed. It declared the army in contempt of court, but chose not to punish the relevant personnel. In addition, it ordered the national government to pay damages to the two widows because arbitrary detention by the army had violated their husbands' fundamental right to life (Sebastian M. Hongray v. India, 1984 SCR (3) 544, para. 549B–E[20]).

The damages remedy in *Hongray* was deeply unorthodox. Its only precedent was the Supreme Court's decision eight months previously in the habeas corpus case of *Rudul Sah* in the state of Bihar (Rudul Sah v. Bihar, AIR1983 SC 1086, para. 11). Underlying this new remedy were the Supreme Court's robust remedial powers under the Indian constitution (INDIA CONST. Arts. 32, 142). The timing of Sebastian Hongray's petition was also important.

In the early 1980s, a few judges on the Supreme Court were adopting an ambitious, activist approach to cases involving the rights of the underprivileged. A few years prior in 1975, the Indian government, led by the democratically elected but increasingly peremptory Indira Gandhi, proclaimed a self-serving state of emergency under the constitution (Brass 1990, 40–43). In the eighteen-month period of national emergency that followed, the Supreme Court upheld the flagrant and frequent arbitrary detention of political critics by the government (Omar 2002, 100; ADM Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521 [SC], paras. 35, 44–45).

After the emergency, a considerably discredited Supreme Court seemed to welcome fundamental rights litigation. It relaxed procedural rules to allow NGOs and third-party "concerned citizens" (like Sebastian Hongray) to initiate "public

20. Hereinafter, *Hongray*.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

interest" petitions concerning the violation of fundamental rights (Forster and Jivan 2008, 4–6). Whether it was seeking to rebuild its reputation, as some scholars have suggested, or responding to citizens' demands for greater accountability, or driven merely by the desire of individual judges to burnish their reputations, the Supreme Court was quick to find violations of rights, and ordered government bodies in detailed terms to remedy them (Sathe 2002, 102).

Sebastian Hongray harnessed this very particular constitutional moment, when the Supreme Court was willing to forge new tools to enforce fundamental rights, especially the rights to life and personal liberty. Through *Hongray*, the Supreme Court applied to the military policing context the recently minted constitutional damages remedy.

Expanding Constitutional Torts

Since the *Hongray* decision, other victims in Manipur have drawn upon this precedent to press the High Court for redress. In response, the High Court has expanded upon *Hongray* in important ways, and simultaneously resisted attempts to expand the ambit of the AFSPA. Habeas corpus petitions subsequent to *Hongray* have, not surprisingly, sought damages for arbitrary detention in addition to release. However, in *Hongray*'s wake, victims of *other* types of unlawful violence, including torture, wounding, sexual assault, and killing by AFSPA-empowered soldiers, have also petitioned the High Court for damages. These cases are, in effect, stand-alone constitutional tort claims.

In admitting these petitions, and acceding to many of them, the High Court has ranged further than the precedent set by the Supreme Court. In *Hongray*, the Supreme Court granted the two widows damages for the unlawful *detention* rather than unlawful *killing* of their husbands. The High Court, by contrast, extended constitutional damages beyond arbitrary detention, to other violations of the constitutional rights to life and liberty by the armed forces.

In addition, the High Court has expanded the scope of constitutional tort petitions by considering factually contested claims. By contrast, the Supreme Court had said that public law damages might not be appropriate when facts were controversial (*Rudul Sah*, para. 10). Had the High Court been squeamish about petitions that involved disputed facts, AFSPA-related claims would almost certainly have gone unheard in any judicial forum. As already discussed, the national government has repeatedly withheld permission to criminally prosecute soldiers. Private litigation is also contingent upon agreement from the Ministry of Home Affairs, the odds of which are vanishingly small.

Given the alarming allegations in these petitions, the High Court's openness is fitting. But as a consequence, it has to deal with fact-finding in an expanded range of claims. In most cases, the High Court manages this by delegating the factual inquiry, frequently time-consuming and complex, to a judge from the appropriate local or district court. These inquiries are regulated by the national Code of Civil Procedure, and the judges conducting them have the power to summon witnesses, requisition evidence, conduct site visits, and hear live testimony. While inquisitorial in form,

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

the proceedings are adversarial in substance.[21] The parties are represented by lawyers, and cross-examination of witnesses is the norm, not the exception. Evidence is evaluated on the balance of probabilities. The final reports of judicial inquiries suggest that judges place particular emphasis on government records, such as medical and post-mortem reports from public hospitals, complaints to the police, and reports by civilian administrators.[22] The High Court, in turn, trusts the district judge's conclusions; it has not questioned or rejected the findings of delegated inquiries any reported case so far. Fact-finding in a few especially serious cases—onslaughts on entire villages for example—has been allocated to the national Central Bureau of Investigation (Kusumkamini Singha v. India, 1999 (2) GLT 361[23]).

Regardless of whether factual determination is delegated or done directly by the High Court, establishing the facts in these cases can be arduous. AFSPA-related petitions subsequent to the *Hongray* decision have lingered in the High Court from anywhere between four[24] to twelve years.[25] In the *Kusumkamini Singha* case, when the national Central Bureau of Investigation was tasked with fact-finding, it examined fifty-six people before submitting its report to the High Court (*Kusumkamini Singha*, para. 8). Most inquiries are not quite so sprawling. However, even the smaller inquiries are vulnerable to delays. Judges conducting these inquiries are likely to be stretched thin managing the hefty case load typically processed by trial courts in India.

This litigation is also prolonged by the grudging attitude of the respondents. The armed forces have tended to cooperate pro forma with High Court proceedings, but punctuated them with unexplained absences and applications for adjournment (interview with Imphal-based academic, identity anonymized upon request, January 30, 2018, notes on file with author). In a notorious case about the murder of Manorama Devi, a young woman from Imphal, armed forces' representatives repeatedly failed to appear before the judge conducting an inquiry until arrest warrants were issued to secure the attendance of the accused personnel (C. Upendra Singh 2004, paras. 8–10, 15[26]). In other instances, accused soldiers have been transferred out of Manipur in order to thwart the judicial inquiry against them.

Despite these challenges, the High Court has overseen many cases to their conclusion. It has found the petitioners credible in every publicly reported decision so far and ordered constitutional damages in each instance, routinizing what was once a novel remedy.

Strict Construction

The High Court has also resisted expansive interpretations of AFSPA powers advanced by the national government and armed forces. For example, in *Nungshitombi*

21. For brevity, reports of judicial inquiries that I relied upon are listed in the list of references.
22. Note 13 above.
23. Hereinafter, *Kusumkamini Singha*.
24. *Kusumkamini Singha*.
25. Khungdom Manisana Singh v. India, MANU/MN/0078/20.
26. The report of an official commission of inquiry set up by the government of Manipur.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

Devi in 1982, the Court rejected the armed forces' argument that the AFSPA allows soldiers to interrogate suspects before handing them over to the police (*Nungshitombi Devi*, paras. 5–6). The armed forces' interpretation would, in effect, have legitimized detention without charge in military facilities, exacerbating the potential for torture and custodial killing.

Soldiers' power to use force has also been strictly construed. The violence at issue in some constitutional tort petitions is so flagrant—sexual assault or using people as human shields—that its legality needs no parsing. But cases that involve shooting at suspected insurgents are not quite so straightforward. As discussed earlier, certain shoot-to-kill powers under the AFSPA are tied to local government orders about public gatherings. The High Court has been careful to confirm whether these orders were actually in place when soldiers shot civilians. Absent the necessary orders, the Court has found shooting by soldiers to be offensive and therefore inherently unlawful, despite arguments to the contrary by the armed forces (*Kiutaliu*; S. Kahaowon v. India, 2007 (1) GLT 26). In the *Zemei* decision, the High Court has suggested that even defensive force should escalate gradually, preceded by warnings in the local language (Gaingamliu Zemei v. India, 2010 (4) GLT 215[27]). In *Kusumkamini Singha*, the Court found the army's fatal, impulsive violence against Debajit Singha, shot in his own home during a late-night raid, unlawful. Criticizing the army for "wanton, reckless, over enthusiasm," the High Court underlined the failure to check Singha's antecedents and coordinate with the civilian police before descending on his house (*Kusumkamini Singha*, paras. 18–19). In *Zemei*, too, the Court emphasized that the army should have acted in concert with the civilian administration, so someone on the team could have administered the appropriate warnings before fatal force was used (*Zemei*, para. 8). Through these decisions, the High Court has read "reasonable suspicion," "reasonable preparation," and "gradual escalation" standards into the AFSPA's lavish "shoot-to-kill" powers.

Attempts to enlarge legal immunity for soldiers have also been also rebuffed by the High Court. In 2008, the national government argued that the police could not legally register Ongbi Devi's complaint that her son was tortured to death by the Assam Rifles. This would mean, in effect, that the AFSPA immunized soldiers not just from criminal *prosecution* but also criminal *complaint* and *investigation*. In response, the High Court interpreted the AFSPA's protective buffer for soldiers literally, insisting that the law restricted criminal prosecution, but left preceding police powers untrammeled (Union of India v. State of Manipur, 2008 Cri LJ 32, para. 9).

Judicial Inadequacies

Thus, the High Court has been steadfast in maintaining statutory boundaries and determining whether and how soldiers committed abuse. However, it has not been as assertive in the remedies that it grants.

27. Hereinafter *Zemei*.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

Constitutional Damages: Modest and Cryptic

While the High Court has ordered constitutional damages in every reported decision about unlawful violence by soldiers after 1984, it continues to adopt a rough and ready approach when deciding the amount due to victims. It has typically ordered the state to give a lump sum of money, without breaking down how that person's losses have been evaluated. Additionally, the amount of damages awarded in constitutional tort cases is low. While damages have risen fourfold over twenty-five years—for example, damages for unlawful killing by the armed forces rose from Rupees 100,000 to Rupees 500,000 between 1984 and 2011—they remain nominal. The victim's past and future loss of earnings, legal fees, and medical expenses are not factored in, and would in many cases far exceed the amount awarded. For example, when Khundongbam Singh was brutally beaten by the Assam Rifles, he estimated that the mental and physical disabilities he sustained caused him loss amounting to Rupees 1.8 million (*Manisana* Singh, para. 2). The High Court only granted Singh Rupees 75,000, noting that public law damages were not meant to mimic private remedies (ibid., para. 10).

In the *Zemei* case, the Court admitted that the quantum of damages was based on "a certain amount of guesswork," rather than tailored to the specificities of the case at hand (*Zemei*, para. 11). This ad hoc approach leads to puzzling variance. Gaingamliu Zemei, widowed when her husband was shot by soldiers on his way home from work in 2000, was granted Rupees 100,000 less by the High Court than the widows of eight men killed the same year during a retaliatory attack on Tabanglong village after insurgents fired upon soldiers at the bus depot nearby. Similarly, Kusumkamini Singha was given Rupees 100,000 less in damages in 1999 after her son was picked up from his home and shot, than Thoibi Devi was given in 1998 when her son died in custody after being beaten by soldiers.

The High Court also neglects certain issues that deserve to be considered when deciding damages. For example, it has never imposed higher damages on respondents whose prevarication and stonewalling lengthened the course of litigation. Nor, when victims of abuse have been minors, has it treated their youth and relative vulnerability as an aggravating factor. Thus, in *Liangmei*, the High Court granted compensation to S.P. Philip, but paid no attention to the fact that he was only thirteen when he was brutally tortured by the army (Kinjinbou Liangmei v. India, 1999 ACJ 1236[28]). Similarly, in *Thoibi Devi*, the Court neglected the fact that the petitioner's son was fifteen years old when he was tortured to death.

Criminal Justice: Allowing Immunity

The High Court has also been hesitant to go beyond constitutional damages and order measures that would promote criminal justice for the grave violence committed by soldiers. Three of the publicly reported decisions indicate that the petitioners' pleas for criminal investigations were ignored by the High Court (Khumanthem Ongbi Pangabam Ningol Ibemhal Devi v. Manipur, 2006 Cri LJ 1166; *Kiutaliu*; *Zemei*). A

28. Hereinafter *Kinjinbou Liangmei*.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

lawyer I interviewed noted that many petitioners stop litigating once they are granted damages because they feel the court is unlikely to order criminal proceedings (interview with Basantakumar Wareppa, Imphal, Manipur, February 3, 2018, notes on file with author).

From the High Court's perspective, damages are an easier remedy. They impose a cost on the government, but do not usurp any administrative powers. By contrast, if the High Court orders criminal proceedings, it impinges upon discretion—whether to prosecute or not—that ordinarily rests with the executive branch. Within an AFSPA-regulated disturbed zone, however, the High Court has compelling reasons to intrude upon prosecutorial discretion. A High Court determination in the petitioner's favor is made on the balance of probabilities. It demonstrates that there is ample evidence to frame criminal charges and try the accused. It also indicates that credible witnesses, who have already testified in factually contested constitutional tort proceedings, will be willing to come forward. If individual victims of violence have managed to present cogent evidence in the High Court, a public prosecutor could make at least as persuasive a case before a trial court, given the state's far greater wherewithal. Additionally, the case for judicial deference is weaker in a disturbed area, where the AFSPA has already diluted prosecutorial autonomy. As discussed previously, failure to prosecute errant soldiers flows not from occasional oversight, but from obstruction and neglect at every level of government. In this context, a judicial writ requiring criminal proceedings would serve as a warranted and proportionate corrective.

The High Court seems to be inching toward this view. Lawyers in Imphal noted that the reported decisions understate how frequently petitioners press for prosecution. A prominent advocate said that he requests investigation and prosecution, in addition to compensation, in any petition about AFSPA-related abuse (interview with Meihoubam Rakesh, Human Rights Law Network, Imphal, Manipur, January 8, 2013, notes on file with author). He also noted that, in recent years, the High Court has occasionally ordered the police to investigate unlawful violence, asking for updates during the course of litigation. Such interventions would typically be interim orders and might not be captured in the final decision that concludes a long-running case.

For petitioners and their lawyers, judicial willingness to push the police is long overdue. Constitutional tort petitions require victims to do the work that the state would do if it took abuse by the armed forces seriously. In order to present a credible petition, victims must gather evidence, present it effectively, and persuade witnesses to testify on their behalf. This last hurdle can be particularly difficult. Potential witnesses tended to fear retaliation by troops (interview with Babloo Loitongbam, Human Rights Alert, Imphal, Manipur, January 9, 2013, notes on file with author; interview with Meihoubam Rakesh and Laimayum Shivananda, Human Rights Law Network, Imphal, Manipur, January 8, 2013, notes on file with author), though these apprehensions arose less often as constitutional tort litigation became more common (interview with Basantakumar Wareppa, Imphal, Manipur, February 3, 2018, notes on file with author). A petitioner whose husband was killed by the military recounted how the only person who witnessed soldiers picking him up avoided her for weeks on learning that she was petitioning the High Court, fearful that she would ask him to testify (interview with Neena Ningombam, member of the Extrajudicial Execution Victim Families Association,

Imphal, Manipur, January 10, 2013, notes on file with author). Faced with these hurdles, many victims flag before the finish line, and many are too daunted to litigate at all.

CONSIDERING THE POSITIVISTS: THE PROSAIC POLITICS OF EXCEPTIONAL POWERS

Given how military policing has fared on the ground and in court, what light does it shed on positivist and deconstructive theorizing about exceptional security powers? In this section, I draw upon Manipur's experience to reflect on some positivist proposals regarding exceptional powers. In the next section, I consider deconstructive arguments.

The AFSPA is characteristic of exceptional security laws in granting state actors wide coercive powers, as well as ample discretion over when to wield these powers. Defending this model of generous, statutorily licensed coercive power, scholars such as Dershowitz and Ignatieff argue that extreme force wielded legitimately, in defined circumstances, with the appropriate checks and scrutiny, is far better than clandestine torture inflicted in the shadows (Dershowitz 2004, 257–80; Ignatieff 2005, 25–53). While seemingly cautious and pragmatic, this approach neglects the ways in which expansive power to use force disinhibits those who wield it. It also underestimates the challenges of monitoring how force is used.

Manipur's case suggests that easy access to lawful force is likely to facilitate excessive violence by state functionaries. When formal coercive powers are very wide, impulsive violence is not difficult to justify. The AFSPA's powers to use fatal force, for example, provide room for a hair-trigger response to even fleeting apprehension on the part of a soldier. Because rash or unwarranted shooting potentially falls within the scope of what is statutorily permitted, such violence gains legitimacy. Military policing in Manipur also shows how those who hold these wide powers are likely to become accustomed to using violence, and frequent resort to violence will, in turn, coarsen their attitudes and methods. When power is wielded in the service of national security, transgressions can be rationalized as promoting the greater good, and victims dismissed as enemies. Generous discretion to use force also provides plausible cover for outright, offensive attack, for premeditated criminality rather than reckless loss of control. The corrupting effects of this are evident in Manipur: although the AFSPA gives soldiers a great deal of latitude, their conduct has breached even these broad legal parameters.

While expansive coercive powers are easy to abuse, they are difficult to monitor. Dershowitz suggests that requiring advance authorization from a court before using heightened coercion would check the potential for abuse. But judicial authorization could only minimally regulate harsh interrogation techniques or the treatment of persons detained without charge. A court might control *when* these measures are used. But it would struggle to supervise *how* they are used, given the isolation and secrecy in which a national security suspect would typically be interrogated or detained. Moreover, as soon as a state adopts a militarized response to nonstate violence, it is preemptively permitting extraordinary force across a range of situations. A court would not be able to authorize specific acts of violence by troops on the ground. Judicial permission as a solution to the risks inherent in loosening the reins on force is optimistic even in

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

relation to violent interrogation. As far as military policing is concerned, it has little to offer.

Manipur's experience also throws doubt on Oren Gross's preference for political pardons. Gross argues against weakening longstanding restrictions on extreme force. Instead, he suggests that retroactive pardons by the government for unlawful but morally justified violence by a government official during an emergency might better preserve the rule of law than formally authorizing heightened force (Gross 2008, 64–69). He emphasizes that pardons must be publicly deliberated, after the official responsible discloses their transgression (ibid., 81–85). He also argues that uncertainty about whether forgiveness will ensue in any particular instance would ensure that state functionaries resort to torture or other grave violence only in extremis.

It follows from Gross's argument that he would regard military policing as a wrong-headed departure from established constitutional-democratic norms on the use of force by the state. Even so, Manipur's experience of military policing highlights problems in the model he proposes. By giving the national government complete discretion over whether soldiers can be prosecuted, the AFSPA institutionalizes a retroactive pardon mechanism for forgiving unlawful violence. The way this has played out in Manipur suggests that Gross, too, neglects how institutional practices are likely to shape security-related violence.

In national security matters, covert decision making is common (and often necessary), and a strong presumption prevails that disclosure will endanger lives. The culture of concealment fostered as a result tends to lead toward covering up human rights abuse (Chesterman 2008, 317–27). In Manipur, assault, arbitrary detention, torture, and unlawful killing by troops were routine, but rarely admitted. Soldiers denied their transgressions at an individual level, and so did the armed forces as an institution. In case after case before the High Court, the armed forces rejected allegations that one of their members had committed serious crimes, however persuasive the evidence. On some occasions, they fabricated evidence in order to protect soldiers. They even moved soldiers under suspicion out of Manipur to stymie proceedings against them.

The civilian administration in India has also concealed and excused abuse by troops, rather than serving as a neutral, external counterweight. It is not simply that senior decision makers assume, without genuine inquiry, that abusive violence was lawful force or forgivable error made under pressure (*EEVFAM*, para. 37[29]). The national government views any attempt to hold soldiers accountable as endangering India's security. As recently as 2016, it argued in court that allegations about killings and disappearances against soldiers in Manipur must not be investigated, in order to protect the military's morale (ibid., para. 109).

This attitude seeps down to state and local officials. As discussed earlier, the police in Manipur resist recording or investigating complaints against the armed forces. The Manipur government has sought permission to prosecute troops only when particularly shocking abuse has sparked widespread public protest (interview with Babloo Loitongbam and Basantakumar Wareppa, Human Rights Alert, Imphal, Manipur,

29. The Indian government argued that the deceased in over 1,500 cases of alleged extrajudicial killing raised by the petitioners were enemies or "persons waging war" against the state.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

January 9, 2013, notes on file with author; Chopra 2016, 328–33). More typically, it has gone along with the national government's protection of troops.

These institutional patterns suggest that state functionaries are very unlikely to acknowledge that they were abusive, and their political masters equally unlikely to hold them accountable or to justify why they deserve to be forgiven. These patterns also indicate that the executive branch will try to retain control over political pardons. Were a pardon subject to more open, participatory deliberation, as Gross recommends, the government is likely to sway any debate that ensues by stressing that the public at large will be imperiled if officials are held to account.

The dangers attendant upon strong coercive powers are magnified by the fact that governments will seek to sustain these powers for extended periods. In India, the armed forces' "special" powers have persisted for a conspicuously long time. Manipur has existed in a state of exception for far longer than it has enjoyed unexceptional legal normality. A large part of the state has been designated a disturbed region for sixty-one out of its seventy years as part of independent India, even as separatist insurgency has fluctuated in intensity during that time.

Temporary exceptional measures tend to become entrenched because they are useful to governments. They allow a tough response to thorny challenges. Developing a competent, rights-respecting police force is slower, harder work, as is negotiating lasting political compromise with separatist groups. Exceptional measures also tend to stick because, having been positioned as *essential* for security, they might garner considerable public support (Loader and Walker 2007, 84–85), or at a minimum, fail to arouse widespread concern.

Geographically targeted measures are particularly intractable in this regard: military policing ostensibly helps to keep India intact, while burdening only the residents of a few regions. For much of its tenure, its costs have been easy to ignore outside AFSPA-regulated disturbed areas. By its nature, military policing within a democratic state is concentrated in a few areas. (Country-wide deployment of the armed forces would surely signal the failure of civilian, democratic government.) Like drone strikes overseas or a jurisdictionally ambiguous zone of preventive detention such as Guantánamo Bay, a spatially segregated exceptional measure such as military policing is even more likely to persist than exceptional security measures that apply, at least in a formal sense, to the public in general.

The longevity of exceptional powers means that they become thoroughly enmeshed in practices of governance (Singh 2007, 19–20; Feldman 2010, 139–40). In Manipur, military logic and methods have significantly influenced civilian policing. The police have often accompanied soldiers during counterinsurgency operations, absorbing and participating in the AFSPA's culture of abuse, and widening its reach (interview with Meihoubam Rakesh and Laimayum Shivananda, Human Rights Law Network, Imphal, Manipur, January 8, 2013, notes on file with author; interview with Babloo Loitongbam, Human Rights Alert, Imphal, Manipur, January 9, 2013, notes on file with author). Two of my interviewees expressed the view that the police had inflicted more injury in recent years than soldiers. Moreover, they thought the Manipur government was mimicking the harmful incentives that the armed forces had for many years offered soldiers in disturbed areas, rewarding abusive officers with promotions and honors (interview with Meihoubam Rakesh and Laimayum

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

Shivananda, Human Rights Law Network, Imphal, Manipur, January 8, 2013, notes on file with author). This suggests that the Manipur government's failure to pursue criminal proceedings against soldiers is not mere inertia. Instead, the government has come to view the legal and extra-legal violence of military policing as normal practice, to be tolerated and even encouraged in civilian police work.

Manipur's experience strongly suggests that exceptional security powers will seep beyond their formal remit, and will significantly influence regular policing over the long term. Because of this, the toggling between exceptional and normal legal frameworks that Ackerman proposes is unviable. When exceptional measures are withdrawn, they leave a residue. "Ordinary" modes of governance are shaped by the exceptional powers and methods to which state actors become habituated.

Thus, positivist prescriptions would fail to constrain state abuse, because they neglect how exceptional security measures operate in practice. They overlook how wide coercive power shapes the attitudes and methods of those who wield it. Faced with the complex dangers of nonstate violence, many governments try to resist disclosure and accountability, indulging and even encouraging abusive violence by frontline personnel. Over time, this has wider constitutive effects. Even decision makers at a remove, who have not imbibed the hardening effects of inflicting easy violence or developed the personal loyalties that members of the armed forces might have toward one another, come to regard impunity as useful and necessary. They accommodate and defend abuse rather than clamping down on it. This muddy, gradual prosaic politics influences the trajectory and impact of a measure like military policing.

The insights of deconstructive scholars such as Avery Gordon or Giorgio Agamben are better able to explain the experience of military policing in Manipur. The AFSPA allows the government to create a literal, spatial state of exception. Exceptional powers concentrated on particular regions or populations become, in practice, a particularly potent vector for extreme violence. Residents of AFSPA-regulated disturbed regions, monitored both by the police and the armed forces, subject to heightened coercive power, have reduced rights to freedom of movement, bodily integrity, and life itself. For many years, military policing in Manipur generated what Begonia Aretxaga describes as a "terrible ambiguity" (Aretxaga 2000, 44): residents of a disturbed area could vote, attend public schools, receive subsidized food grains; they could also be killed with impunity. As Haley Duschinski has argued in relation to Kashmir, the law, in the form of the AFSPA, helps to create and sustain the impunity that the armed forces enjoy (Duschinski 2010, 112).

CONSIDERING THE DECONSTRUCTIVISTS: THE AUTONOMY OF THE COURTROOM

However, while deconstructive scholars discern keenly the law's complicity in security-related abuse, Manipur's experience suggests they underestimate the autonomy of the legal system, and the degree to which courts can help to confront abuse. Litigation about military policing in Manipur indicates that as exceptional powers become normalized, they gradually lose some of the deference they enjoyed from the courts. If, as in Manipur, courts encounter the violent fallout of exceptional powers

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

repeatedly, almost routinely, judicial limits on exceptional powers can accumulate. Initial, tentative decisions to constrain exceptional powers can be built upon in subsequent cases, including by lower courts.

At first, Manipur's experience seemed to confirm deconstructive perspectives. In an early decision the High Court tacitly endorsed the government's stance that soldiers wielding exceptional powers must be completely unfettered, and refused to acknowledge evidence of torture and killing. As discussed earlier, this did not last long; robust scrutiny in the habeas corpus case of *Nungshitombi Devi* was followed by *Hongray* and the development of constitutional tort jurisprudence.

The erosion of judicial deference comes through in the High Court's rhetoric over time. In the early years of adjudicating AFSPA-related petitions, the High Court seemed in thrall to the armed forces, despite finding them responsible for serious violations. Even in cases dealing with systematic, extended abuse, it worried about hindering soldiers from exercising their powers.

In its second reported habeas corpus decision in 1983, the High Court rejected the army's denial of arbitrary detention. It commented that India was "free and democratic," "a signatory to the International Covenant on Civil and Political Rights" and that the armed forces had to "undergo the discipline of fundamental rights … when operating against their own countrymen" (*Nungshitombi Devi*, para. 7). But it was careful to emphasize that "the entire nation is indebted to the armed forces for their assistance … there can be no two opinions about their contribution in quelling … internal disorders" (ibid., para. 7A). In 1988, while finding the armed forces responsible for "sexually exploiting" women in a community that troops had harassed for weeks, it noted, "the members of the armed forces while … preserving the unity … of the nation perform a solemn task and the law has to permit them to take all such actions which are reasonably necessary to meet the insurgency and they cannot be made ineffective in this regard" (Manipur Baptist Convention v. India, (1988) 1 GLR 433, para. 9). This admiring, almost apologetic, tone in a case dealing with systematic sexual assault, betrays the deep hold of security-related deference even thirty years after the armed forces were first deployed in Manipur. The High Court's perspective echoes Carl Schmitt: during an emergency, the survival of the state might be threatened if "the sovereign" is hampered by the law.

As it continued to review the actions of troops, however, the High Court's tone shifted. By the late 1990s, reverence for the troops had given way to exasperation. Adjudicating a petition about the torture of a thirteen-year-old, the High Court wondered why personnel who "should have the greatest respect for the personal liberty of citizens" were "stooping to such bizarre acts of lawlessness" (*Kinjinbou Liangmei*, para. 10). In another decision, it cautioned the army that the "indiscriminate exercise of powers will only generate a feeling of alienation amongst the people" (*Kusumkamini Singha*, para. 21). A decade later, it remonstrated that "an internal disturbance involving the local population" required "a different approach" (*Zemei*, para. 5). Thus, over time the High Court began to situate specific instances of abuse within a wider context of recurring, needless aggression by troops. It has not criticized the entire edifice of military policing. But it does recognize abuse as caused by the misplaced "approach" of the armed forces, and to that extent, as systematic.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

This scope for courts to evolve is neglected by deconstructivists. By contrast, many scholars who study judicial impact would caution against dismissing too hastily the effects of litigation, courts, and legal frameworks. In his foundational work, socio-legal scholar Marc Galanter argues that judicial pronouncements can percolate into societal understandings of fairness and justice. He urges attention to these "radiating effects," that go beyond judgment and compliance in individual cases, and shape state behavior, civil society advocacy, and personal perception (Galanter 1983). Courts achieve these constitutive socio-political impacts through "enculturation," i.e. inspiring shifts in values, behavior and discourse, and "normative validation," i.e. reinforcing or legitimizing existing values and behavior, beliefs and practices (ibid., 125–27). This is not to say that fundamental rights litigation will necessarily or unambiguously benefit those who are vulnerable (McCann 1992, 740–41). But we need to trace its enculturating and norm-validating effects in assessing whether courts have helped to dislodge abuse.

Reflecting on how the impact of landmark rights-focused judgments should be evaluated, some legal scholars emphasize the need to examine how such decisions influence lower courts. They note that lower courts can weaken the impact of ostensibly groundbreaking precedents by declining to hear cases on procedural grounds, distinguishing cases on the facts or limiting the remedies they offer (Schultz and Gottlieb 1996). By contrast, innovation, extension and "precedential evolution" in lower courts can amplify the impact of judicial decisions (Sanders 1995, 733). How closely inferior courts followed a superior court decision, how often they drew upon it, how far they extended it and admitted claims based upon it also influence its impact (Schultz and Gottlieb 1998, 77–79).

Applying these insights to the Manipur case, it is evident that the judiciary remained meaningfully independent from the government and armed forces, despite decades of military policing. Judicial decisions contributed in important ways to challenging abuse by troops. It is worth noting that adjudicating these cases would not have been an easy endeavor. Evaluating the actions of the armed forces is not as routine for judges as reviewing civilian institutions and officials. In post-colonial India, flanked by military dictatorships in neighboring Pakistan and Bangladesh, regionally resonant precedent for adjudicating human rights abuse by the military was very scarce.[30] For judges hearing the early petitions discussed in this Article, at a time when separatist movements were gathering steam in Punjab and the northeast, adjudicating these cases would no doubt have felt deeply freighted.

But particularly after the Supreme Court recognized that arbitrary detention by the armed forces was a serious enough violation to merit damages, the High Court steadily and repeatedly reviewed allegations of AFSPA-related abuse. The High Court not only followed *Hongray* consistently, it also built upon this precedent. If Sebastian Hongray was a "norm entrepreneur," seizing the opportunity offered by the *Rudul Sah* decision to develop a remedy for violence by soldiers, the High Court was the gatekeeper determining whether constitutional damages had any prospect of bedding down in relation to military policing. It expanded the constitutional damages remedy beyond what the Supreme Court considered appropriate in *Hongray*. It has also taken very seriously the constitutional right to access the higher judiciary in order to enforce fundamental rights,

30. I am grateful to Arun Thiruvengadam for raising this point.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

grappled with onerous fact-finding, and rebuffed government attempts to commandeer even more power for the armed forces through strategic statutory interpretation.

When adjudicating these cases, some judges on the High Court, particularly those who were themselves from northeast India, likely understood quite well the insecurity fostered by military policing. One interviewee felt that High Court judges during the 1980s and 1990s "waited [for opportunities] to do what they could" in response to abuse by troops (interview with Imphal-based academic, identity anonymized upon request, January 30, 2018, notes on file with author). Their exertions have made a difference. In *Hongray*, the Supreme Court implicitly renounced the stance that courts must accede to the executive's preferences in situations of political violence. The ways in which *Hongray* has been developed by the High Court has routinized and normatively validated the principle that judicial scrutiny of the armed forces is both appropriate and necessary.

The High Court has contributed to enculturation by making it possible to cross-examine soldiers. During constitutional tort proceedings, the armed forces not only have to explain why they committed particular acts of violence, but their explanations can, very directly, be assailed. Victims have a formal forum where they can label publicly as violations what the Indian government has long written off as necessary, justified defense of the nation. Similarly, *Hongray* helped to enculturate the position that victims of abuse by the armed forces deserve recompense. Previously, in *Nungshitombi Devi*, even though the High Court ruled in favor of the petitioners it had nothing to offer the family of a man who had almost certainly been killed at an armed forces facility. Today, if the petitioners prevail, as they did in all the reported decisions about abuse by soldiers in Manipur after *Hongray*, they will reliably be awarded damages.

The predictability of damages shapes the expectations of victims and their lawyers. A plea for damages is included routinely in petitions alleging abuse by soldiers (interview with Meihoubam Rakesh, Human Rights Law Network, Imphal, Manipur, January 8, 2013, notes on file with author). Even before legal proceedings are launched, when someone is attacked by a soldier, community groups and local legislators often demand damages from the government on their behalf (interview with Babloo Loitongbam and Basantakumar Wareppa, Human Rights Alert, Imphal, Manipur, January 9, 2013, notes on file with author). In some cases, the Manipur government as well as the armed forces pay money to victims after homicides and torture by soldiers without being ordered to by a judge (interview with Meihoubam Rakesh, Human Rights Law Network, Imphal, Manipur, January 8, 2013, notes on file with author). These payments are described as "ex gratia," i.e. they are positioned as voluntary assistance rather than an admission of legal liability.[31] Even so, such payments demonstrate that monetary damages have become so established that the government and armed forces view them as inevitable in many cases.

Less concrete than monetary damages, but as significant, is the validation that petitioners have received. Official acknowledgment is often profoundly important to victims of state violence (Cohen 1995, 18). In Manipur, the government and armed forces flatly deny unlawful violence by soldiers or claim that it was justified. The High Court offers a public forum where the state's denial and victims' grievances can

31. See for example, Imphal Free Press, 2015.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

be tested. It has offered victims the relief of formal, authoritative recognition that the violence they faced was unlawful and infringed their fundamental rights.

One indication that the jurisprudence on AFSPA-related constitutional torts has influenced expectations of justice is that these cases tend to be initiated by individual victims rather than elite interlocutors. Public interest litigation in India has been criticized for failing to empower ordinary people to claim rights and remedies (Bhuwania 2016, 137), and therefore remaining primarily a policy negotiation between judges, senior bureaucrats and civil society stalwarts. The *Hongray* case, while itself initiated by an activist on behalf of bereaved families, radiated more widely through communities policed by the military. Individuals have drawn on the precedent to seek redress for their own, personal losses. The High Court, in turn, has welcomed and strengthened their access.

This litigation has created an official, evidence-based record of the criminality that accompanies military policing. It not only undermines the official narrative that soldiers policing disturbed areas are irreproachable, but potentially provides a basis for investigating allegations and prosecuting culprits in the future. Thus, while the law structures and legitimizes the extreme coercion characteristic of exceptional security measures, litigation challenging AFSPA-related abuse in Manipur shows how courts in constitutional democracies also have the capacity to confront some of the harm that results.

However, it is important to note the limits of judicial assertion. Manipur's experience suggests that courts are more ready to help victims of abuse than to punish abusers. The High Court has remained reticent about ordering criminal proceedings. When it has held that individual victims suffered a violation of their fundamental right to life, it has not tried to ensure that the actual perpetrators are investigated and put on trial. This leaves largely intact the national government's practice of granting soldiers immunity for crimes committed in disturbed areas. Paradoxically, it positions the AFSPA-empowered soldier as a Schmittian "micro-sovereign," who is personally unscathed even by judicial discovery that he has committed grave abuse.

Damages are granted to anyone whose allegations against the armed forces are found to be credible, but seem intended to help families in need rather than punish or deter abuse. This has its roots in the *Hongray* decision. The Indian Supreme Court was innovative in granting damages to the widowed petitioners, but followed the convention that public law damages should be modest to avoid burdening the taxpayer. This convention, developed to address breaches of duties owed by public institutions to society at large, has been criticized as discordant when applied to violations of fundamental rights (Varuhas 2016, 170, 208). A breach of the state's duty to refrain from torture or extrajudicial killing has direct, corporeal, devastating effects on individuals. The quantum of damages for such a breach should not follow defaults developed around breaches of a different, non-individuated, generally oriented sort of duty, such as, for example, a public authority's duty to be financially prudent. However, despite repeatedly encountering grave abuse by the armed forces, the High Court continues to grant modest damages. The sums it has ordered have been too low to vindicate the practical and emotional losses sustained by victims. Not surprisingly, despite accumulating steadily, these constitutional tort decisions against the state have not driven the government or armed forces to prosecute perpetrators or develop alternatives to military policing.

But given the judiciary's past trajectory, we can imagine it attempting to address this paradox in the future. The High Court could, for example, factor the systemic nature of abuse into damages, and order sums large enough to prompt the government and armed forces to recover damages from individual culprits, prosecute them, or improve training for troops. It could also insist that the local police investigate complaints by victims any time a constitutional tort case discloses criminality by soldiers. The Manipur government could be similarly pushed to ask the national government for permission to charge soldiers with the appropriate criminal offenses. Finally, the High Court could ask the national government to justify why it will not permit the prosecution of soldiers who have been found during constitutional tort litigation to be responsible for grave crimes. Confronted in this way, the government would have to appeal the High Court's judgment or admit that it was shrugging off serious offenses to protect the armed forces' morale. Over time, such exposure might push the national government toward more considered responses to AFSPA-related abuse rather than protecting troops indiscriminately.

In a case currently before the Supreme Court, two civil society groups from Manipur have challenged the failure to pursue criminal proceedings against soldiers who have abused their powers under the AFSPA.[32] Just as *Hongray* inspired litigation by many people in Manipur, which in turn elicited judicial attempts to help victims of AFSPA-related abuse, this case might spur jurisprudence that holds abusers to account.

CONCLUSION

Two generations of Manipuris have been policed by the military for much of their lives, noted a rights activist I interviewed in Imphal. He described government officials in Manipur as "the children of AFSPA," their attitudes fundamentally shaped by the power and presence of the military (interview with Laifungbam Debabrata Roy, Civil Society Coalition on Human Rights in Manipur and the UN, Imphal, Manipur, January 11, 2013, notes on file with author).

Exceptional security powers tend to be influential, enduring, and corrosive. Laws like the AFSPA liberalize force and constrain oversight, as if the coercive powers they contain will be used in extremely rare, highly compressed circumstances. However, once exceptional measures are in place, governments become habituated to them and resist relinquishing them. Military policing has been used in large parts of Manipur for six decades. Over time, the armed forces' lavish statutory powers to use force have facilitated grievous abuse. Rather than taking these violations seriously, the government has misused its statutory veto to protect soldiers from accountability, thereby validating their transgressions. The informal norms that have developed around inflicting violence and subverting justice are as much a part of military policing as the formal rules encoded in the AFSPA.

However, Manipur's experience also reveals how crucial constitutional-democratic checks, and judicial scrutiny in particular, can be in moderating exceptional security powers. Human rights advocates in Manipur recall a time when senior military officials

32. Extra Judicial Execution Victim Families Association v. India, WP (Civil) No. 250/07.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

would come to court flanked by orderlies carrying a sofa for them to sit on (interview with Babloo Loitongbam, Human Rights Alert, Imphal, Manipur, January 9, 2013, notes on file with author). Such condescension would be anachronistic today. As a result of constitutional tort litigation, it is now firmly established that courts can scrutinize the actions of soldiers and rule against the armed forces. Confronted repeatedly with violations by troops, the judiciary has become more assertive, and subjected military policing to at least some measure of constraint.

AUTHOR ORCID

Surabhi Chopra 0000-0002-5368-5969

REFERENCES

Abel, Richard L. *Politics by Other Means: Law in the Struggle Against Apartheid, 1980–1994*. New York: Routledge, 1995.

Ackerman, Bruce. "The Emergency Constitution." *Yale Law Journal* 113, no. 4 (2004):1029–91.

Agamben, Giorgio. *State of Exception*. Chicago: University of Chicago Press, 2005.

Amnesty International. *India: Official Sanction for Killings in Manipur*. London: Amnesty International, 1997.

Amnesty International. Denied: Failures in Accountability for Human Rights Violations by Security Force Personnel in Jammu and Kashmir. London: Amnesty International, 2015.

Aretxaga, Begonia. "Playing Terrorist: Ghastly Plots and Ghostly State." *Journal of Spanish Cultural Studies* 1, no. 1 (2000): 43–58.

Bhuwania, Anuj. Courting the People: Public Interest Litigation in Post-Emergency India. Cambridge, UK: Cambridge University Press, 2016.

Brass, Paul R. *The Politics of India since Independence*. Cambridge, UK: Cambridge University Press, 1990.

Chandhoke, Neera. "A State of One's Own: Secessionism and Federalism in India." Crisis States Programme Working Papers Series No. 80. London: Development Studies Institute, London School of Economics and Political Science, 2006.

Chesterman, Simon. "Deny Everything: Intelligence Activities and the Rule of Law in Times of Crisis." In *Emergencies and the Limits of Legality*. Edited by Victor. V. Ramraj, 314–34. New York: Cambridge University Press, 2008.

Chopra, Surabhi. "Dealing with Dangerous Women: Sexual Assault Under Cover of National Security Laws in India." *Boston University Law Journal* 34, no. 2 (2016): 319–54.

Civil Society Coalition on Human Rights in Manipur and the United Nations. Manipur: A Memorandum of Extrajudicial, Arbitrary or Summary Executions [submitted to Christof Heyns, United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions]. Imphal, Manipur, 2012.

Cohen, Stanley. "State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past." *Law & Social Inquiry* 20, no. 1 (1995): 7–50.

Dershowitz, Alan. "Tortured Reasoning". In *Torture: A Collection*. Edited by Sanford Levinson, 257–80. Oxford, UK: Oxford University Press, 2004.

Duschinski, Haley. "Reproducing Regimes of Impunity: Fake Encounters and the Informalization of Everyday Violence in Kashmir Valley." *Cultural Studies* 24, no. 1 (2010): 110–32.

Duschinski, Haley. "Destiny Effects: Militarization, State Power, and Punitive Containment in Kashmir Valley." *Anthropological Quarterly* 82, no. 2 (2009): 691–717.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

Feldman, Leonard. "The Banality of Emergency: On the Time and Space of 'Political Necessity.'" In *Sovereignty, Emergency, Legality*. Edited by Austin Sarat, 136–64. Cambridge, UK: Cambridge University Press, 2010.

Forster, Christine M., and Vedna Jivan. "Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience." *Asian Journal of Comparative Law* 3, no. 1 (2008): 1–32.

Galanter, Marc. "The Radiating Effects of Courts." In *Empirical Theories About Courts*. Edited by Keith O. Boyum and Lynn Mather, 121–45. New Orleans: Quid Pro Books, 1983.

Government of Manipur, Home Department. Notification No. 7/20/67-POL 1 (Pt), September 8, 1980. Manipur Gazette Extraordinary No. 183, September 10, 1980. Imphal: Government of Manipur, 1980.

Gordon, Avery F. "Abu Ghraib: Imprisonment and the War on Terror." *Race & Class* 48, no. 1 (2006): 42–59.

Gross, Oren. "Extra-Legality and the Ethic of Political Responsibility." In *Emergencies and the Limits of Legality*. Edited by Victor V. Ramraj, 60–94. Cambridge, UK: Cambridge University Press, 2008.

Hassan, M. Sajjad. "Explaining Manipur's Breakdown and Mizoram's Peace: The State and Identities in North East India." Crisis States Programme Working Papers Series No. 79. London: Development Studies Institute, London School of Economics and Political Science, 2006.

Head, Michael, and Scott Mann. *Domestic Deployment of the Armed Forces: Military Powers, Law and Human Rights*. Abingdon, VA: Routledge, Taylor and Francis, 2009.

Human Rights Watch. *Getting Away with Murder 50 Years of the Armed Forces (Special Powers) Act*. New York: Human Rights Watch, 2008a.

Human Rights Watch. *"These Fellows Must Be Eliminated": Relentless Violence and Impunity in Manipur*. New York: Human Rights Watch, 2008b.

Ignatieff, Michael. *Political Ethics in an Age of Terror: The Lesser Evil*. Princeton, NJ: Princeton University Press, 2005.

Imphal Free Press. "Government Announces 'Ex Gratia Payment' Money Released to Gauhati High Court." *March* 13, 2015. https://www.ifp.co.in/page/items/25690/defence-ministry-releases-rs-10-lakhs-ex-gratia-for-manoramas-mother-as-per-supreme-court-order.

Lazar, Nomi Claire. "Must Exceptionalism Prove the Rule? An Angle on Emergency Government in the History of Political Thought." *Politics and Society*, 34, no. 2 (2006): 245–75.

Loader, Ian, and Neil Walker. *Civilizing Security*. Cambridge, UK: Cambridge University Press, 2007.

Manecksha, Freny. "Shroud of Impunity." India Together. December 10, 2011. Oorvani Media, http://www.indiatogether.org/afspa-human-rights.

Mbembé, Achille, and Libby Meintjes. "Necropolitics." *Public Culture* 15, no. 1 (2003): 11–40.

McCann, Michael W. "Reform Litigation in Trial." *Law & Social Inquiry*. 17, no. 4 (1992): 740–41.

Ministry of Home Affairs. *Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958*. New Delhi: Government of India, 2005.

Omar, Imtiaz. *Emergency Powers and the Courts in India and Pakistan*. Leiden, Netherlands: Martinus Nijhoff Publishers, 2002.

REDRESS, Asian Human Rights Commission, and Human Rights Alert. The Armed Forces (Special Powers) Act, 1958 in Manipur and Other States of the Northeast of India: Sanctioning Repression in Violation of India's Human Rights Obligations. London; Hong Kong; Imphal, India: REDRESS; Asian Human Rights Commission; Human Rights Alert, 2011.

Response by Minister of State for Home Affairs. Response of the Minister of State for Home Affairs to Unstarred Question No. 224 Regarding the Scope of the AFSPA in Manipur During Proceedings of the Monsoon Session of the Sixteenth Lok Sabha. July 21, 2015. New Delhi: Lok Sabha, 2015.

Sanders, Francine. "*Brown v. Board of Education*: An Empirical Reexamination of Its Effects on Federal District Courts." *Law & Society Review* 29, no. 4 (1995): 731–56.

Sanford, Victoria. "The 'Grey Zone' of Justice: NGOs and Rule of Law in Postwar Guatemala." *Journal of Human Rights* 2, no. 3 (2003): 393–405.

Sathe, S.P. *Judicial Activism in India: Transgressing Borders and Enforcing Limits*. New Delhi: Oxford University Press, 2002.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

Scheppele, Kim Lane. "Legal and Extralegal Emergencies." In *The Oxford Handbook of Law and Politics*. Edited by Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington, 165–86. Oxford, UK: Oxford University Press, 2008.
Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. Chicago: University of Chicago Press, 1922, 2005.
Schultz, David, and Stephen E. Gottlieb. "Legal Functionalism and Social Change: A Reassessment of Rosenberg's 'The Hollow Hope: Can Courts Bring About Social Change?'" *Journal of Law and Politics* 12, no. 63 (1996): 63–91.
Singh, Ujjwal Kumar. *The State, Democracy and Anti-Terror Laws in India*. New Delhi: Routledge, 2007.
Singh, C. Upendra. 2004. 2004 Report of the Commission of the Judicial Inquiry (Manorama Death Inquiry Commission). http://www.hrln.org/hrln/images/stories/pdf/report-of-commission-of-the-judicial-inquiry-manorama-death.pdf.
South Asia Human Rights Documentation Centre. *Armed Forces Special Powers Act: A Study in National Security Tyranny*. New Delhi: South Asia Human Rights Documentation Centre, 1995.
Srivastava, Devyani. "Rights-Based Critique of AFSPA." In *Armed Forces Special Powers Act: The Debate*. Edited by Vivek Chadha, 64–78. New Delhi: Institute for Defence Studies and Analyses, 2012.
Thiruvengadam, Arun K. "Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India." In *Transformative Constitutionalism: Comparing the APEX Courts in Brazil, India and South Africa*. Edited by Oscar Vilhena, Upendra Baxi, and Frans Viljoen, 519–31. Pretoria, South Africa: Pretoria University Press, 2013.
United Nations Human Rights Committee. Concluding Observations of the Human Rights Committee: India, Considerations of Reports Submitted by State Parties under Article 40 of the Covenant. CCPR/C/79/Add.81. Geneva: United Nations, August, 4, 1997.
Varuhas, Jason N.E. *Damages and Human Rights*. Oxford, UK: Hart Publishing, 2016.
Yoo, John. Memorandum for Alberto R. Gonzales Re: Authority for Use of Military Force to Combat Terrorist Activities within the United States. Washington D.C.: U.S. Department of Justice, October 23, 2001.

CASES CITED

ADM Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521 [SC].
Extra Judicial Execution Victim Families Association v. India, WP (Civil) No. 250/07 (Sup. Ct. India July 8, 2016).
Gaingamliu Zemei v. India, 2010 (4) GLT 215.
General Officer Commanding v. Central Bureau of Investigation, AIR 2012 SC 1890.
Kangujam Ongbi Thoibi Devi v. Manipur, 1999 Cri LJ 3584.
Khumanthem Ongbi Pangabam Ningol Ibemhal Devi v. Manipur, 2006 Cri LJ 1166.
Khungdom Manisana Singh v. India, MANU/MN/0078/20.
Kinjinbou Liangmei v. India, 1999 ACJ 1236.
Kiutaliu. v. India, (2011) 6 GLR 87.
Kusumkamini Singha v. India, 1999 (2) GLT 361.
Lt. Col. Karamveer Singh v. Jammu and Kashmir, W.P. (Cri) 42/2018 (Sup. Ct. India Feb. 12, 2018.
Manipur Baptist Convention v. India, (1988) 1 GLR 433.
Naga People's Movement of Human Rights v. India, AIR 1998 SC 432 (1997) (India).
Naosam Ningol Chandam Ongbi Nungshitombi Devi v. Rishang Keishing, Chief Minister of Manipur, 1983 Cri LJ 574.
Rudul Sah v. Bihar, AIR1983 SC 1086.
S. Kahaowon v. India, 2007 (1) GLT 26.
Sebastian M. Hongray v. India, AIR 1984 SC 571.
Sebastian M. Hongray v. India, 1984 SCR (3) 544.
Thokchom Ningol Kangujam Ongbi Thoibi Devi v. General Officer Commanding, 1983 Cri LJ 574.
Union of India v. State of Manipur, 2008 Cri LJ 32.

https://doi.org/10.1017/lsi.2019.3 Published online by Cambridge University Press

STATUTES CITED

The Army Act 1950, Act No. 46 of 1950 (INDIA CODE)
Armed Forces (Special Powers) Act, 1958, Act No. 28 of 1958 (INDIA CODE).
The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983, Act No. 34 of 1983 (INDIA CODE).
The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, Act No. 21 of 1990 (INDIA CODE).
Armed Forces (Special Powers) Ordinance, No. 41 of 1942.
Code of Civil Procedure Act, 1908, Act No. 5 of 1908 (INDIA CODE).
Code of Criminal Procedure Act, 1973, Act No. 2 of 1973 (INDIA CODE).

JUDICIAL INQUIRIES CITED

Ningthoujam Ongbi Sunibala Devi v. Government of India, Judicial Enquiry No. 12 of 2011, Writ Petition (C) No. 75 of 2008, Gauhati High Court, May 14, 2012.
Ngangbam Ongbi Kamalini Devi v. Government of Manipur, Judicial Enquiry No. 10 of 2010, Writ Petition (Criminal) No. 27 of 2010, Gauhati High Court, May 28, 2012.
Mutum Ongbi Ibecha Devi v. Government of Manipur, Judicial Enquiry No. 3 of 2010, Writ Petition (Criminal) No.27 of 2009, Gauhati High Court, June 8, 2012.
Mutum Ongbi Roni Devi v. Government of Manipur, Judicial Enquiry No. 4 of 2010, Writ Petition (Criminal) No. 26 of 2009, Gauhati High Court, June 8, 2012.
Garamjan Bibi v. Government of Manipur, Judicial Inquiry No. 4 of 2010, Writ Petition (Criminal) No. 49 of 2009, Gauhati High Court, July 31, 2012.