

AFSPA, Army Act and the Police: The (Im)Possibility of Justice for the Citizen Victim?

Report of the Fact Finding Team on Sexual Assault in Dolopa, July 2012



Map of Assam, source: Indian Army website

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Background

The seven states in the North-Eastern region of India, Assam, Manipur, Tripura, Meghalaya, Arunachal Pradesh, Mizoram and Nagaland, also known as the 'Seven Sisters' have bridged South, South-East, and Central Asia. Even the pre colonial dynasties that reigned over the Indian sub-continent did not extend east of the Brahmaputra River.

India's British colonizers were the first to break this barrier. In the early 19th century they moved in to check Burmese expansion into today's Manipur and Assam. It was during the Second World War, when the Japanese tried to enter the Indian sub-continent through this narrow corridor, that the strategic significance of the region to the Indian armed forces was realized. With the end of the war, the global political map was changed overnight. As the British were preparing to leave Asia, the Political Department of the British Government planned to carve out a buffer state consisting of the Naga Hills, Mikir Hills, Sadiya Area, Balipara Tract, Manipur, Lushai Hills, Khasi Hills, and hills in Assam. Compromises were made, and issues

were finally settled in distant capitals, to the satisfaction of the new rulers. The people who had been dwelling in these hills and valleys for thousands of years were systematically excluded from the consultation process. Discontentment with the political resolution of these states was evident specially in Manipur and Nagaland in the early years after 1947 when the sub-continent was partitioned and India became independent.

The local government may make use of the army if it so chooses in this manner provided in this Bill and can use the army only for this limited purpose and thereafter the ordinary processes of the law are to be followed

(G.B.Pant, Union Home Minister to the Lok Sabha, while introducing the AFSP Bill in August 1958)

A series of repressive laws were passed by the Government of India in order to deal with the rising national liberation aspirations of the people of North-East. In 1953, the Assam Maintenance of Public Order

(Autonomous District) Regulation Act was passed. It was applicable to the then Naga Hills and Tuensang district. It empowered the Governor to impose collective fines, prohibit public meetings, and detain anybody without a warrant. This was followed by the following Acts:

Assam Disturbed Areas Act, 1955

Assam Disturbed Areas Act, 1955 was passed by the Assam Assembly to meet the exigencies of the Naga insurgency. This State Act was followed three years later

by the Armed Forces (Assam and Manipur) Special Powers Act, 1958, a piece of Central legislation, identical to the State legislation in all essential respects, ostensibly to deal with the disturbed conditions in the Naga-inhabited areas of Manipur, then a Union Territory. Incidentally, the Assam Disturbed Areas Act, 1955, is very much a 'living' piece of legislation, with the required notifications designating the 'disturbed areas (in this case, the reserve forests on the Assam-Nagaland border) renewed every six months and duly published in the Assam Gazette. Assam Disturbed Areas Act, 1955 followed the 'guidelines' set by an ordinance passed by the colonial government in August 1942, to counter the opposition to the war effort by the Congress, then leading the freedom movement.

Government gives more unfettered powers to the armed forces through various special acts (e.g, the Assam Maintenance of Public Order Act, 1953, the Assam Disturbed Areas Act, 1955, Regulation 5 of the Nagaland Security Regulations, 1962, etc), which increasingly encroached on the fundamental rights of the citizens in the North-east and deprived them of the normal channels for redressal of their grievances.

The Army Act

The Indian Army Act, 1911 was replaced by the Army Act, 1950. The Army Bill was passed by both houses of Parliament and received assent of the President on 20th May 1950, and it came into force on 22nd July 1950 as the Army Act 1950 (46 of 1950).

The civil offences subject to the provisions of section 70 of the Army Act, any person subject to this act who at any place in or beyond India commits any civil offences, shall be deemed to be guilty of an offence against this Act and if charged therewith under this section shall be liable to be tried by court-martial. However, the Act also says that if a person commits a civil offence of rape, shall not be deemed to be guilty of an offence against this Act and shall not be tried by court martial, unless he commits this offence while on active service.

These Acts provide a background for how the AFSPA came into existence and became a subject of contention till today in Assam and elsewhere in India. Initially it was applicable to certain parts of Assam, which was declared disturbed in 1955.

Since then the Army has ostensibly been used by the state to combat the so called secessionist insurgency. Currently there are an estimated 86 companies of para military and 2 lakh army personnel in Assam. In 1990, after imposition of president's rule, the Army started operation Bajrang with the stated objective of curbing insurgency. Operation Bajrang which lasted for one year resulted in the Central Government notifying the whole of Assam as a disturbed area coming under the AFPSA in 1990 .

In this backdrop the fate of the ordinary citizens was left to the

mercy of the armed forces. It is not surprising that people of Assam, being in a 'border state' and also regarded as 'backward', were totally excluded from the decision making process with regard to legislation of Acts and Laws.

Enough instances are there to show that civilians in a 'disturbed area' are inherent targets under the Act, particularly women, indigenous community people and poorest of poor. It is not surprising that we keep hearing incidents of molestation, rape and other kinds of sexual assault in the areas where Army has a continuous presence. The Army has a record of sexual violence, sexualised torture including rape and gang-rape, with almost no record of inquiry, court martial or conviction.

THE INCIDENT

On 13.7.2012, at about 5 p.m., the accused, Lance-Naik, Anil Kumar Upadhyaya, of the 287 Field Regiment of the Indian Army, attempted to rape a 19 year old woman of the Mishing community. The incident occurred while an Army unit of 14 jawans camped at Nawjan from their base. From around 3.30/4 pm, some women from the nearest village, Dolopa, were collecting firewood and broom-sticks from the trees and branches felled and left by the trail of the receding flood waters. This is a semi-open wooded area on

the banks of the dead stream, Suti, while visibility is limited due to the bushes and thickets. The women were within calling distance of each other.

The accused came upon the victim collecting wood alone, touched her inappropriately and attempted to force himself upon her. Hearing her cries the young woman's mother called for help and soon villagers gathered around.

By this time, a village defence committee member had also phoned the local Nitaipukhuri Police Station and Inspector-in-charge, Pritam Das. After getting a preliminary account of the incident over phone, he immediately informed the Superintendent of Police, Executive Magistrate Anupam Deka and the local Army Officer and then arrived at the scene at around 6 pm. Additional Superintendent of Police, S.K. Dutta, also came by in a while, as did a Magistrate and the Circle Officer and some media people.

Because of the people's vigil the accused could not be taken away into any one of the two Army vehicles that were now at the scene. In the meantime the jawan's unit members had also informed the Commanding Officer, Col. C.S. Sharma, who came by and started talking to the villagers, assuring them of justice. The Additional Superintendent also assured the villagers that suitable action would be taken and that a case

would be filed. The Commanding Officer of the unit then left the spot with all 14 jawans including the accused, even as the villagers, the police and the Magistrate watched. The police did not challenge or prevent the Army's taking over of the accused into their protection. The name plate of the accused which was snatched by the victim while scuffling with the accused had provided enough proof establishing his involvement in the incident.

A complaint was lodged by the mother of the girl to the police on the same night at around 11.45 pm. At around midnight the Superintendent of Sibsagar, Akhilesh Singh discussed the case with the Deputy Commissioner and decided that the accused was to be arrested. He called Col. Sharma and asked for an immediate meeting at the Demow block police station. A verbal agreement was made that the accused would be produced before the police at 10am, next morning, i.e. 14th July.

On 14th July, the Army did not produce the jawan before the police, upon which a written requisition was issued to the Army by the Nitaipukhuri police station. Later that day the accused was brought to the police station and was detained in the police lock up for the night.

On the same day, i.e., on 14th July the survivor was sent for a medical examination to Demow; she

was not actually examined there and referred to Joysagar instead. Even in Joysagar the medical examination was however not conducted. The survivor was put through much harassment being shunted from one place to another with no consideration for her emotional condition.

In the meantime, the news about this heinous incident spread widely and newspapers also started reporting the case. The media reports also drew attention to the Army's attempt to shield the accused and the failure of the police to intervene effectively and arrest the jawan. Women's organisations and civil rights organisations, along with students, had also started demonstrating against the incident and the perceived inaction by the authorities.

On 15th morning, the Commanding Officer and the Deputy Commandant of the Brigade Army claimed that a jawan cannot be kept in police custody and was to be tried only by the Army courts citing legal documents to the Superintendent,. An army team led by the commanding officer sitting in the office of the S.P. demanded that he concede the case to a court of inquiry to be conducted by the army and give up the jawan into their custody.

The survivor and her mother were also called to the Superintendent's office and the survivor was interrogated by the Army in the

presence of the senior police officials. However, the Superintendent refused the Army's claim and the accused was arrested thereafter. From here police proceeded with their investigation of the case.

On 16th July, The accused was sent for medical examination. The accused was produced before the court of the Chief Judicial Magistrate, who upon an application from the Army was 'pleased' to allow the accused to be released to the army and transfer the case for a Court of Inquiry set up by the Army. After that Court of Inquiry was instituted by the Army.

The statement of the survivor was taken in the Nitaipukhuri Police station and she was again sent to Joysagar for medical examination where only x-ray was taken. As she was very weak saline and tonic were administered to her at Demow by her mother and expenses were borne by her only. Late at night, they were served with the summons by the Police to appear before the Army's Court of Inquiry next day

On 17th July, The survivor and her mother, the complainant, were summoned by the Army to the Court of Inquiry at Rangpur Chariali, Sibsagar. They were taken in an army vehicle accompanied by two plain clothed army personnel to the Army camp. The complainant was questioned for 2 hours and her daughter for 4.5 hours. They were in effect detained

for 6.5 hours. It must be noted that no counsellor was provided to the survivor both after the incident and even after the interrogation by the army, which is doubly traumatic. The survivor was asked to recount the incident of assault what she had gone through. And secondly, repeated questioning in an alien and threatening environment isolated from her mother thereby increasing her trauma. This extended detention triggered civil society protests outside the Army camp for their release by representatives of 22 organisations including local student unions. One student's organisation even warned the Army of a nude demonstration.

On 18th July, another summons was served by Army to the survivor and her mother to go to the Joypur Army Camp, Naharkatia, in Dibrugarh district. But the Deputy Commissioner refused to permit it and stuck to the decision to conduct the trial in Sibsagar only. A Bandh, protesting the harassment of the victim by the Army, was also called for on the same day.

On 19th July, there were demonstrations before the office of the deputy commissioner of Sibsagar. The demonstrators demanded punishment for the accused jawan, 10 lakh as compensation for the survivor, removal of the army from Sibsagar and repeal of the AFSPA.

On 21st July, the complainant

and the survivors' statements were again taken on by the Chief Judicial Magistrate. The same day section 144 of the Cr. PC was imposed in Sibsagar to prevent the gathering of the people.

On 22nd July, the survivor and her mother were interrogated for the third time by the army officials, but the venue was shifted to the Circuit House on account of public outrage. Since no further action is seen to have been taken by the army or the police there was a semi-nude rally in Sibsagar on the same day by men of the community who marched topless to protest the inaction against the accused..

On 24th July, three members of the Assam State Women's Commission conducted a fact-finding in Sibsagar.

On 25th July, three members of Assam State Women's Commission visited the survivor's house and there they held a press meet.

On 28th July, several organisations blocked National highway 37 at Demow in protest.

On 3rd August, the army issued a press statement claiming that their court of inquiry had finished on 23.07.2012 but that they are awaiting sanction for prosecution.

On 8th August, member secretary of State Women

Commission informed a delegation that they had submitted their report to Chief Minister on 3rd August. However, they refused to give a copy of their report by saying that it was confidential. They informed that the report will be made public only after being placed in the state assembly.

On 16th August, SP, Sibsagar informed the members of fact finding team that the chargesheet was not submitted yet and assured that they would submit it shortly. According to him the delay in the submission of charge sheet was because of their engagement in other important cases!

On 23rd August, the survivor and the four witnesses had received summons from Army for giving evidence on 31st August under court-martial procedure.

On 29th August, the inspector in charge Pritam Das announced that the charge sheet would be filed in another ten days since since the necessary supervision orders permitting the filing of the charge sheet had not been received from the Additional SP. However the law mandates that even in cases where the Army conducts its own inquiry through the process of a court of inquiry, the police has to conclude its investigation and file a charge sheet in the court of the magistrate; despite the court martial having started the police has failed to file a charge sheet till now.

On 31st August, evidence was taken by Commanding officer Colonel CK Sharma from the survivor and witnesses from 10 am to 3 Pm. An identification parade was held where 3 army men were kept in a line in uniform. The survivor and the witnesses could not identify the person as they were terrified to see the men in uniform in the Army camp.

Test Identification Parade is normally conducted by a judicial Magistrate to ensure that the rights of the complainant are protected. It is not conducted by the prosecution. A test identification parade conducted by the Army does not have the same sanctity as no one can ascertain whether the accused was in fact part of the line up.

The District Commissioner had promised a job for the young woman and a compensation of Rs 1.5 lakh from the ST/SC fund before 15th August. An amount of Rs 50,000 was deposited into her account from the Chief Minister's Relief Fund. On 3rd September the survivor and her family members were informed that they still have to receive further communication from Deputy Commissioner for her job as well as for the compensation from the ST/SC fund.

On 4th September, Deputy Commissioner informed the members of the Fact Finding team that there was no need of charge sheet submission by the police since the

court martial procedure was already in progress. He also said that now the case is totally in the control of Army and civil procedures do not have any further role to play.

On 7th September, a women's delegation met Col. Sharma seeking the details on the case where they were told that now the Army is dealing with the case and the verdict is expected by the month of October. Col. Sharma made it clear that now onwards there is no role for police and civil court as well.

Mr Sharma told the delegation that since the victim and the witnesses did not identify the accused hence to prove the guilt will be difficult. When the delegation mentioned the possession of the badge of the accused, Mr Sharma opined that such badges could be manufactured by anyone. He also did not deny the possibility of calling the victim in the upper Army Court for her statement.

Col. Sharma alleged that the media and local activists exaggerated the case out of proportion.

FACT FINDING TEAM

An on the spot fact-finding into the case was conducted from 1st August, 2012 to 3rd August, 2012 and a follow up was done until 15th September by an country level independent women's team. The Team reached Guwahati on the morning

of 1st august 2012. In the course of investigation we met senior police officials, members of civil society, Assam Human Rights Commission, Assam Women's Rights Commission, Police Accountability Commission, Academicians, lawyers, journalists from electronic and print media and the survivor along with her family and villagers in Guwahati, Sibsagar, Demow respectively. A request for appointment sought from the Colonel of the Army, deployed in Sibsagar, was declined.

The schedule is indicative of the limitations of this investigation in two major ways:

- People met in groups, especially the press and members of the survivor's community, could have needed more time to express themselves fully and qualitatively, particularly in their views on security personnel.
- No member of the Army, especially the accused, has his views represented since they chose not to meet the team

INVESTIGATION

On 1st of August, on reaching Guwahati we met a group of women activists who had been trying to bring this case to public attention and get justice; they briefed us about the incident and the public sentiments. We proceeded to meet members of the

Police Accountability Commission. We met, D.K. Saikia (IAS), Minoti Choudhary (woman social worker), S.P. Ram (I.P.S., retd.), the members of the Police Accountability Commission.

The members of the Police Accountability commission confirmed that they were investigating the failure of the police to act adequately in cases where army personnel had been involved in sexual offences against civilians. However since the matter were sub-judice they were unable to share the details with us. The members informed us that in cases of sexual assault even if the accused is an army personnel the police is duty-bound to arrest the accused, lodge an FIR, arrest the accused, complete the investigation and file a charge sheet. They also confirmed that while the Army had the right to conduct a Court of Inquiry and seek trial by Court Martial, the police could contest this request before the concerned Magistrate and were duty bound to file a charge sheet.

Later in the afternoon we met Anuradha Dutta (Author and Retd. Professor of Guwahati University) who spoke of an entrenched patriarchy in Assam in the establishment at large including the media and the political class. In the context of the Guwahati molestation case, she also shared a bizarre piece of information that the Assam Chief Minister's initial reaction was that 'because

there is no insurgency boys have to do something'. She opined that insurgency has also contributed to the creation of a nouveau rich class which reduces the space for democratic freedom and personal space for women.

Another academic, Xonzoi Borbora who is an Associate Professor, TISS, Guwahati, attributed the increase of crimes against women in the state, to multiple factors (1) insensitive police force (2) migration on account of insurgency and counter-insurgency (3) widening gap between the rich and the poor which has resulted in lumpenisation, (4) sense of outrage against the abuse of the people by the army. According to him, the army has recently stopped contesting cases of disappearances and has simply started offering compensation. This, in itself, is extremely degrading.

Monisha Behal of the North East Network put this case in a historical context for us. She said that historically, women in Assam, have had greater social mobility than other parts of India because of the absence of the pardah systems (including segregation). The literature and poetry of the region that also project women as empowered. A reading of news report of the past decade seems to suggest that the harassment by the army has lessened. The army's excesses were more frequent in the late 1990s and are currently relatively low.

Prashant N. Choudhary (Sr. Retainer Counsel CBI, Guwahati, High Court) Former Army Counsel in the Manorama Devi Case, felt that the protection given to the army under the AFSPA had been extended to the ranks lower than the Captain such as Lance-Naiks, which are 13 ranks lower, and that ranks lower than that of Captain may not have the discretion to distinguish a militant from a villager and this results in Human rights violations. He also stated that procedurally the police have power to lodge an FIR, investigate and arrest an army officer committing a civil offence including sexual offences against women and the Army could seek inquiry by Court Martial at the time of filing of charges. The Army was free to have a simultaneous inquiry but that this in no way prevented the police from fulfilling their obligations to file a charge sheet. He informed us that he had deposed in the Jeevan Reddy Commission and suggested dilution of the immunity given under AFSPA.

Jayanta N. Choudhary, D.I.G., Guwahati, Assam, seemed a little unsure of the facts cited in the case and in the course of the interview gave four versions, and also called in an aide to assist. The aide too was unaware of the facts and had to make some calls to ascertain and provide facts, which were also unrealisable. He then offered to procure the report for the discussion but was unable to do so since the clerical staff had

left the Police Headquarters office at 4.30 pm. The DIG then thought it was better for us to meet with the SP, Sibsagar, Akhilesh Singh who he said, to his knowledge, had stood his ground under Army pressure and had arrested the accused.

When asked why the Police had handed over the investigation to the Army he said that this question should be directed to the CJM, who, according to him, allowed the army to take over the investigation. However he refused to offer any explanation to the question why police had not appealed against that order.

We travelled to Jorhat, Sibsagar, Demow and Dolopa next day to meet the local officials and the survivor. At Sibsagar district the Superintendent of Police Akhilesh Singh informed us that on the evening of 13.7.2012, he got news that an army personnel tried to rape a local tribal woman in a village at Demow block. The District magistrate, the IC, Nitaipukhuri were there and later the Additional S.P. joined the investigation. However Commanding officer of the unit of the accused army officer reached the spot and took the accused away with them, so 'we could not arrest the accused' (immediately after the incident) he said. Accordingly the S.P. requested the Commanding officer to hand over the accused to the police on the next day i.e. on 14.7.2012; however this was not done by the army, until a summons was issued to them. Later on

14.7.2012 the accused was produced after getting the summon and kept in the police lock up for interrogation and arrested at the office of the S.P on 15th July. The army was informed that he would be produced before the CJM the next day on 16.7.2012. The army officers appeared with a large number of books, judgments and impressed upon the CJM that the accused be handed over to them. The CJM passed an order handing over the inquiry to the army and handed over the accused to the army.

The S.P. was of the view that since the police investigation was almost over, the CJM should have waited till the stage of framing of charges to consider this issue of army trial. He said that Sibsagar was the one of the worst insurgency affected districts of Assam, the police was the nodal agency and standard operating procedure that had been developed on account of the complaints of human rights violations against the Army. These procedures provided that the Army inform the police of any patrolling activity and one police personnel accompany the army operations.

On 13.7.2012, the police was not informed of any patrolling and no police officer had accompanied the army on this patrolling. He strongly felt that the army avoids trial before the regular judiciary and tried to keep everything in-house. When asked if he felt pressurised he said

that, 'if 5 army officers come and sit in your office for 3 hours and repeat the same thing, would you not feel pressurised?' He said that he had asked the Women's Commission, whose fact-finding committee had visited him, to demand that in cases of sexual offences the victim's choice of whether the trial should be by the criminal courts or court martial should be taken into consideration.

We then proceeded to the Dolopa village, where the survivor resides with her family and the incident took place in the adjoining forests.

Dolopa village is placed at one end of a winding, kutcha road, about 35 km off the National Highway from the Nitai Road that cuts through Nitaipukhuri town.

The narrow road leading to Dolopa from Nitaipukhuri is mostly on a stretch of embankment with villages and huge stretches of paddy fields on one side. Hugging the other side of this road/embankment is a dead stream/suti of the Brahmaputra and Dihing rivers. In the monsoons, water from the Dining river and the Brahmaputra fills this suti and causes flooding; its overflow reaches the Dishang river. This monsoon too, the suti's waters had risen and over-flown the embankment into the villages in July, 2012. Further down, the embankment had been breached closest to Dolopa, with access made even more difficult for the villagers;

it was being repaired and a bund has been laid to stem the water-flow.

Houses- chang ghar- in villages along the way are built of wood, bamboo and thatch and are on bamboo stilts which shelter livestock below. All villages along the road bear evidence of water-logging and slush; some are yet marsh. The flooding and ebbing is an annual feature that brings water-borne diseases, while stagnation brings malaria. When the road and the villages are flooded over, people are more or less isolated from the town. Health and the public health facilities remain a problem through the year. A doctor is supposed to come in on Wednesdays to the sub-centre at Samukjan; the villages depend on the Asha workers. The public distribution system is barely functioning. There is a cooperative for ration supplies, amongst four panchayats, located at Ban Rajabari, from where the agents collect the ration; agents are temporary and generally don't have their name plates. Supply is very irregular and consists mainly of rice and kerosene.

The primary schools, though, were evidently functioning as were the tribal school at Tengapani and the junior college at Bam Razabari. The area has 16 Lower Primary Schools, four Middle Education Schools and two High Schools. However, female literacy is low (and many girls and women work in agriculture, livestock rearing, wood collection and the

weaving of traditional garments). Although school or college-going girls are seen in Mekhala-Chadar uniforms, married women wear the traditional garments that use double wraps at hip and below the shoulder, and headscarves; the sindoor and the bindi are prominent.

The panchayat of Paschim Panidihing- for ten villages in the area- functions at Kokilamari Deuri Gaon. Besides the Mishing, most villages are of the Deuri, Nepali and some Adivasi families of the plains tribes/communities. Dolopa is a village of the Mishing and Deuri communities, with about 284 families. Mishings were notified as Scheduled Tribe in 1972. Their settlements in upper Assam are on the banks of the rivers and they are primarily found in the districts of Jorhat, Sibsagar, Dibrugarh, Golaghat, Dhemaji and North Lakhimpur. In Dolopa, 97% of the inhabitants are engaged in agriculture and livestock rearing and a few, about 3 %, are employed in salaried jobs. A family engaged in agriculture has an average annual income of Rs 12000-13000/-.

The victim of this sexual assault lives with her family of parents and siblings. She has extended family in the village and they belong to the Teye division of Mishing. She is enrolled at Hemchandra Development Goswami College at Nitaipukhuri and is studying for her first year, Bachelor of Arts. Her family works primarily in agriculture and livestock rearing.

Her home, like that of the others, is on stilts and built of wooden planks, with a small balcony as one climbs up the stairs. It has two small rooms on one side and a large room, where the central pole supporting the roof is. With its large hearth, this room serves as both a kitchen and as a common family space. The village has individual houses built within an area of about ½ sq km radius; the houses are interspersed with some open spaces and water bodies.

The nearest small shop is on the embankment road, access to which has been breached by the flood waters in July. Some of these small shops there also stock some food and some rice-liquor (apong). The women collecting firewood on 13th July were working a short distance away from the line of these shops and on the low-lying land below the embankment where the flood waters had receded. Some working on the river bank would have been visible from the embankment; those hidden by the trees would not have been seen.

From Dolopa village to Nitaipukhuri Teen Raasta takes about forty minutes by jeep and two to two and a half hours by foot. About fourteen km from Dolopa, on the embankment/road, is the camp of the 287 Field Regiment, at Nawjan. According to unverified sources, it houses about 110 personnel and has been in this spot since 2005. Sibsagar is among the most affected by

insurgency and counter-insurgency operations in Assam. A little beyond on the road towards the Teen Raasta, at Paruliguri, are the eight graves of 6 ULFA and 2 school students (of the 4th and 9th standard) shot by the BSF, Assam Police and SULFA in 1993, in Operation Rhino and Operation Bajrang. Reaching the Teen Rasta, it takes another five minutes by jeep to reach the Netai Police Station.

In the village we met the survivor's mother and other family members. They belong to the indigenous Mishing Community and work in the fields in most parts of the year. The mother narrated the entire incident to us.

INCIDENT AS NARRATED BY THE FAMILY

The survivor's mother who is an eye witness to the incident informed us that she and her daughter had gone to the forest to collect fire wood. Some other women were also collecting wood in the forest. The accused came up to her daughter and pulled her cheek, when her daughter protested, he began beating her with his gun. Then he dragged her daughter some distance and tore her clothes and began to attempt to rape her. The mother informed us that when she heard her daughter shouting for help she ran and fell at the feet of the accused pleading with him to leave her daughter, the accused beat the

mother with his gun. Then the mother raised an alarm and the accused was accosted by the other women and the men who were working on the road. The village defence committee called the police. However, when the IC and the Additional S.P. came they handed over the accused to the Army who left the spot. This led to a hue and cry and eventually after two days the army handed over the accused to the police and he was arrested. She also informed us that her daughter and she were taken by two plain clothes army personnel to the army camp and detained there for 6 and 1/2 hours. They were interrogated and intimidated and repeatedly told that they should tell the truth every time they narrated the events as they occurred. Finally after there was a huge demonstration outside the camp they were released.

We also met the survivor and found that the young woman was in a traumatised state and unable to talk. She has not received counselling or other forms of emotional support from the state human/women rights agencies. The incident has affected the young woman's community and family in that it has brought in much fright and trauma, and, in the wake of the news spreading, unwanted attention, media glare and visits from many unknown people. Representatives of groups from various organisations holding protests against this incident have also been coordinating with them, at

various levels. The recounting of the incident with all its details and the constant pressure of having to do so without apparent choice is telling on the family.

The survivor, a student of the local college, Hemchandra Dev Goswami College, Nitaipukhuri has also stopped going to study post the assault by the jawan.

We later proceeded to the Nitaipukhuri, Police Station and met Pritam Das the I.C. The police station Nitaipukhuri is more than 2 hours walking distance from the place of incident and we were informed it has jurisdiction of 92 villages. The police officers have a barrack in the police station and most of the police officers were roaming around half dressed when our team reached. After about 20 minutes the IC met us and seemed very harassed. He gave us a copy of the FIR in the case and when asked why the accused was not arrested he said that two army vehicles took him away. He informed us that he had asked the FIR to be lodged and it was lodged at 11.45 on 13th night, he had not made any delay in investigation and the investigation was done by 16.7.2012. He also showed us the medical examination papers and we observed that it said that the victim was examined twice on 14.7.2012 and 16.7.2012.

However, according to the information we gathered the

accused was medically examined only on 16.7.2012 and had not been examined for 3 days after the incident, thus making it impossible to ascertain, for example, whether the accused was under the influence of alcohol at the time of the incident or whether he had any injuries or marks.

In the evening we met members of the press at Sibsagar press club and had a free and frank sharing from their side. The Assamese press had been very supportive to the survivor and critical of the role of the police and the Army.

We returned to Guwahati on 3rd August and met Mr. J.P. Chaliha (Member, Assam Human Rights Commission). He informed us that the State Human Rights Commission did not have power to investigate into any violations of human rights by the army. He said that only the NHRC had the power to take cognisance of such a case. When asked on what basis he had restricted the jurisdiction of the Assam Human Rights Commission, he said that it was on account of section 17 (i) of the act. When confronted with the fact that the Commission did have jurisdiction under Section 12 and 17 (ii) of the Act he said that he was not able to provide an answer but as a matter of practice, they were not taking up matters related to violation of human rights by the Army. He also very vehemently stated that he was not duty-bound to report any cases to the NHRC and did not feel any

moral responsibility to do so either. He also admitted that the SHRC had not conducted any study or enquiry into the number of incidents of sexual abuse perpetrated by the army. When asked what was nature of the majority of the cases being investigated by the commission he said that 30 % of the cases related to dowry cases.

The team later met members of the State Commission for Women Assam, including Hiranmoyi Phukan, who was part of the fact finding team of Women Commission. Members informed us that they had sent a fact finding committee to Sibsagar on 24.7.2012. They had submitted a report to the chairperson and their final recommendations were under consideration, therefore they could not share the findings with us in detail. However they said that they had sought an opinion from the Advocate General who suggested that an appeal can be made questioning the order of the CJM handing over the investigation of the inquiry to the Army.

On 3.8.2012, the fact-finding team held a press conference at the Press Club, Guwahati.. The press release is attached as Appendix 2

THE FAILURE OF THE POLICE

The Fact finding team felt that the police had failed to play its

role as an impartial investigator of offences committed in its purview. In the present case the fact that the accused was an Army Jawan had both intimidated the police and made them compliant to the demands of the Army in violation to their statutory duty under the Code of Criminal Procedure.

It was observed that the police did not arrest the accused despite him being handed over to their custody by the local villagers at the time of the incident and lodging of an FIR u/s 376/511 IPC on 13.7.2012. The accused was allowed to leave with the Commanding officer in the full view of the complainant and the local villagers and witnesses resulting in a deep sense of helplessness among the people.

The police claimed that it was not possible to arrest the jawan in the group of 14 without the Commanding Officer's consent and cooperation.

The army intimidated the police and the judiciary to exceed the protection accorded under the Army Act and AFSPA and on 16.7.2012, one day after the accused was arrested and prior to the filing of the charge sheet when the police was still investigating the case, the accused was handed over back to the army by an unwarranted order (see discussion in the section below) of the CJM dated 16.7.2012, which has to date not been challenged by the police.

The police have had no opportunity to interrogate the accused and the Army has protected the accused by not getting him medically examined on 13.7.2012 when they obstructed his arrest. In cases of sexual offences the police concede mechanically to the demand by the Army for court martial when there is no reason why the jawans of the Army cannot be tried by the ordinary criminal courts, the cases do not involve any confidential material which is the basic reason for conceiving the idea of a court martial.

The fact finding team also observed that the Nitaipukhuri, Police Station had jurisdiction over 92 villages and did not have any lady police personnel. It was also observed that the residential quarters of the police were in the police station itself and when the team visited the police station, most of the police personnel were in a state of undress, with loud Assamese popular music playing. The atmosphere was not conducive to a woman complainant, especially the victim of a sexual crime, to make a report of such an offence.

All police officers interviewed complained of being overworked and understaffed. It is most unfortunate that in a state where the law and order situation is bad enough for the Government of the State and Centre to consider it disturbed the police authorities are both understaffed and lacking in resources. It can be

concluded that if the police authorities were better staffed and equipped they may be better able to deal with the law and order situation thus not requiring the presence of the Army, which in general ought to be an exception and emergency measure to control a sudden or unexpected situation of unrest.

The Army Act 1950 and AFPSA: A case of security v/s repression

Several independent and government committees have reviewed the application of the Armed Forces Special Powers Act including the Jeevan Reddy Commission set up in 2005 in the wake of the rape and death of Manorama Devi in the custody of Assam Rifles in 2004. By and large, both the independent and government committee's have made extensive findings on the fact that the provisions of the Armed Forces Special Powers Act are in violation of the Constitution of India and specifically in violation of the Fundamental Rights guaranteed to the citizens of India under the Constitution, such as the right to life, right to liberty, freedom of speech. The various reports and studies have also exposed the widespread misuse of the Act and the brutal violence being perpetrated against the people of the North East including Assam under the immunity granted under Section 4 and 6 of the Act. The universal

recommendation of both government and citizens committee's has been the repeal of the Armed Forces Special Powers Act.

The analysis of the Armed Forces Special Powers Act in this report is being done specifically in the context of the Sibsagar attempt to rape incident, allegedly committed by an Army jawan, as the Fact Finding team was set up to investigate this incident in particular.

The analysis is focussed on

- (a) Impact of the conflict of jurisdiction between the police and the Army to investigate and try civil offences (i.e. offences perpetrated by Army Personnel which are triable by criminal courts and court marital proceedings created by the implementation of AFSPA 1958 and the Army Act 1950 ('Two Acts' hereinafter)
- (b) the protection and agency of survivors of sexual violence at the hands of army officers in the process of trial where these two Acts apply
- (c) whether the process of investigation and trial under these two Acts is in keeping with the best practices of natural justice and in consonance to the constitutional guarantees given to women under the Constitution of India.

The Armed Forces Special Powers Act is an Act which accords

protection to Army personnel who are deployed in parts of the country that are notified by the government as being disturbed.

Section 4 of the Armed Forces Special Powers Act provides that;

4 (1) Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area :

(a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;

(b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders

wanted for any offence;

(c) arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;

(d) enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary.

However since the premise of the Act is that the armed forces are working in the aid of the civil administration and not as an occupying force it is mandatory under this Act for the armed forces under section 5 to hand over the arrested person to the police: “Any person arrested and taken into custody under this Act shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest. In case of arrest of any person, army authority is duty bound to hand over to the

officer-in-charge of the nearest police station with least possible delay.

Section 6 of the AFSPA protects the personnel of the Army against any prosecution without prior sanction from the central government for any of the acts done in para 4 above.

The Army Act 1950 on the other hand grants certain protection to all Army Personnel who are described as being on active service.

Active service:

The relevant sections of the Army Act 1950 are being reproduced below:

Section 3- “active service”, as applied to a person subject to this Act, means the time during which such person –

- a. is attached to, or forms part of, a force which is engaged in operations against an enemy, or
- b. is engaged in military operations in, or is on the line of march to a country or place wholly or partly occupied by an enemy, or
- c. is attached to or forms part of a force which is in military occupation of a foreign country

The Army Act provides that if any Army Personnel on active service as defined above commits a civil offence which is defined as an

offense that can be tried by a criminal court and is better defined in section 70 of the Act as below:

Section 70: Civil offences not triable by Court- Martial – A person subject to this Act who commits an offence of murder against a person not subject to military, naval, or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court martial, unless he commits any of the said offences –

- a. while on active service, or
- b. at any place outside India, or
- c. at a frontier post specified by the Central Government by notification in this behalf.

In the event that an army officer on active service commits a civil offence such as rape, he can be tried by both a criminal court and or a court martial. The procedure of determining which court will try the offence is provided under Section 125 and 126 of the Army Act 1960;-

Section 125: Choice between criminal courts and court martial

When a criminal court and a court- martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding

the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court- martial, to direct that the accused person shall be detained in military custody.

Section 126: Power of criminal court to require delivery of offender

(1) When a criminal court having jurisdiction is of the opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in section 125 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government.

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon reference shall be final.

In addition to this the Central Government has framed the

Adjustment of Jurisdiction Rules in exercise of powers under Section 475 CrPc.

The Adjustment of Jurisdiction Rules do not create a bar for the competent military authority to proceed against the accused and take him into military custody if the accused is not already in the custody of the Criminal Court or under the control of the Criminal Court. Where, however, such an accused is in the custody of the Criminal Court or in the custody of the police and the competent military authority decides to proceed against such an accused, Section 475 and the Adjustment of Jurisdiction Rules do get attracted. In this regard, it needs to be noted that in *Som Datt Datta* 1969 Cri LJ 663 the Supreme Court has held that Rule 3 of the Adjustment of Jurisdiction Rules applies to such a case, where the police have, on complaint, laid charge-sheet and the accused has been brought before the Magistrate after the charge-sheet has already been submitted against him. The Constitution Bench, in *Som Datt Datta* (supra), had further held that Rule 3 cannot be invoked in a case, where the police had merely started investigation against a person subject to the Army Act and had not submitted charge-sheet against him and when the accused had not been brought before the Magistrate upon submission of such a charge-sheet. The relevant observations, made in this regard, in *Som Datt Datta* (supra), read. “...It is manifest that Rule

3 only applies to a case where the police had completed investigation and the accused is brought before the Magistrate after submission of a charge-sheet. The provisions of this rule cannot be invoked in a case where the police had merely started investigation against a person subject to military, naval or air force law.”

With the insertion of Clause (d) into rule 4, the scope of Rule 3 has expanded and what Rule 4, now, reflects is that even when a Chief Judicial Magistrate receives a complaint, or any other Magistrate empowered in this regard, by the Chief Judicial Magistrate, receives a complaint, and decides, at that stage, not to send the complaint to the police for investigation in exercise of his powers under Section 156(3). of the Code, but decides to proceed further with the complaint as a complaint case, takes cognizance and makes over the case for enquiry or trial under Section 192 of the Code, Rule 4 gets attracted and at this stage the army can exercise its rights under Article 125 of the Army Act 1950.

To put it simply, the stage at which the procedure provided under section 125 – 126 is to be implemented therefore in an FIR case, is after the completion of investigation by the police, when the charge sheet is filed before the Magistrate and before the Magistrate takes cognizance.

In the case under investigation

the Fact finding team found that, Colonel Chandrasekhar Sharma, the Commanding officer of the unit, in his wisdom, despite the clear demarcation of jurisdiction between the police and the army, chose to exercise his power under Section 125 of the Army Act *before* the stage of filing of the charge sheet. This application was not opposed by the police and the Chief Judicial Magistrate, Sibsagar, by way of an order dated 16.7.2012 he was pleased to hand over the accused to Army custody and the investigation to an Army court of inquiry in contravention to the law as laid down by the Hon'ble Supreme Court. It is further worth noting that the CJM before passing the order dated 16.7.2012 didn't ascertain that the accused Jawan was on active service so as to entitle him to the protection of the army act.

Unfortunately both the DIG and the S.P. seemed a little uncertain about the extent of the police power when it came to civil offences being perpetrated by the Army. In general they gave us the impression that where the Army opted to try a matter by court martial, irrespective of the heinous nature of the crime, the police and civil administration *as a matter of policy and not law* would not oppose this. This suggests a kind of complicity against the general citizenry in areas where AFSPA is implemented.

The Fact Finding team is therefore constrained to observe that

in areas where the Armed Forces Special Powers Act is notified, the army considers itself immune from any and every kind of investigation by the police. Despite the unequivocal assertion in the Act and in numerous judgments that have upheld the validity of the Act, it has been stated that the army in AFSPA areas is to act in the aid of the civil administration. However in fact the civil administration and even statutory bodies, whose mandate it is to protect the human rights of citizens consider themselves subordinate to the army and bound by the *ipsi dixits* of the army. The predominant consideration of commanding officers appears to be to protect their jawans under all circumstances even where the jawans are accused of heinous offences by stretching the protection of AFSPA beyond its legal mandate by exercising coercive and intimidatory tactics over the police and civil administration.

The statutory and the constitutional rights of citizens to protection of their life, liberty, dignity and to a fair trial are victims to this mindset of domination prevalent within the Army and **thereby** overwhelming the civil administration.

The Fact Finding team with deep sadness took note of the trauma suffered by the victim, a young woman of 19 years. The team found it unconscionable and unjustifiable that after having suffered the extreme trauma of nearly suffering rape, the

complainant was interrogated by the army on three different occasions: on 15.7.2012 at the S.P.'s office for over an hour, on 17.7.2012 under the garb of a Court of Inquiry at the Army camp for 6 and a half hours and in the circuit house on 22.7.2012. During the course of these interrogations she was questioned by officers who did not speak her language, and who repeatedly told her that she should 'tell the truth'. When public protest broke out, and hundreds of people demonstrated outside the camp she was finally released and the Civil Administration, to quell the protest, asked the army to shift the court of inquiry to the Circuit House and ensured the presence of a Magistrate. Why these steps were not taken in advance, exposes the harsh reality that if it is not for the vigilance by civil society the Army will simply protect its personnel whatever the crime; it is clear that under the garb of AFSPA and far and beyond its scope, the basic human rights of citizens are being usurped by the Army in collusion with the police.

The fact finding team also observed that it is an age old adage that justice must not just be done but must also be seen to be done to inspire the confidence of the people in the criminal justice system, so as to ensure that they don't feel compelled to take the law into their own hands to settle scores. The committee was very conscious of the fact that the comfort and sense of confidence of the victim

was not taken into consideration at all by the Army, the CJM, or the civil administration. The victim was not provided with any counselling and 3 days after she was sexually assaulted by an army Jawan she was taken to an army camp for interrogation on the pretext of inquiry subjecting her to further trauma. The investigation and trial by court martial was allowed, without considering the fact that a victim of sexual abuse by a personnel of the Army, when subjected to a prosecution by the Army where the prosecution, judge, defence and accused are all Army officers can never have any confidence in such a court and the purpose of conducting such a court is defeated at the outset.

THE ROLE OF THE ARMY

The fact finding committee felt that the Army was not acting in aid of the civil administration; in fact the Army prioritized the so called morale of its jawans over the due process of law. In spite of the fact that in the incident under investigation, the jawan in question could not, by any stretch of imagination, be considered in 'active' service, as he was not part of any special operation and it is not clear what he was doing in the area at the time of the incident, the Army has chosen to extend the protection of the Army Act to the said jawan and has not even considered it appropriate to justify this decision to the civil administration by a reasoned

application. The Commanding officer of the unit, despite reaching the spot on 13.7.2012 and hearing the eye witness and victims accounts, chose to protect his Jawan from arrest and only conceded to the arrest after the S.P. was forced to issue written summons. The Commanding Officer then proceeded to have the accused released on 16.7.2012 by prematurely exercising his option under section 125 of the Army Act. The commanding officer has made no effort to ensure the fair investigation of the case, the accused had not been medically examined urgently despite

being in the Army custody for over 2 days after the incidents and the victim was intimidated and interrogated for over 6 and a half hours in the army camp, which is against all tenets of criminal prosecution.

The Commanding officer also refused to meet the Fact Finding Committee which further reinforces the sense of self given entitlement and lack of accountability of the Army in areas where AFSPA is imposed, because they do not consider themselves answerable to either the civil administration or civil society.

Putting a Wall Around Army Officers: The AFSPA the Army Act and Subverting the Criminal Justice System of India

The most substantive issue that emerges from the way the Dolopa case unfolded immediately after the jawan molested a young woman, but was prevented from raping her by women and men who collected at the spot, is that of a conflict of interest between the civil administration and the Army over jurisdiction, and the procedure to be followed when the accused is a personnel of the Army. In this case the Army desperately sought to obstruct the arrest of the accused by the police and ultimately succeeded in preventing his trial by the civil administration; equally the civil administration sought to prevent

the “takeover” of the accused by the Army and attempted to establish their jurisdiction over him. Ultimately the Army succeeded in retaining real control over the accused; however, the tussle between the two over a three day period appeared to give the impression that the civil administration was responding to public opinion but it in actual fact gave in otherwise. And even as the question of jurisdiction was being settled, the survivor was interrogated by the Army within the offices of the police administration thereby implicitly conceding the authority of the army to conduct its investigation.

It is thus clear that while the Army obstructs civil control over its personnel even when the AFSPA cannot apply because of the nature and circumstances of the crime committed, the police allowed a civilian victim of assault to be put into the 'custody' of the Army, conceding jurisdiction to them too easily. Soon after the fact finding team conducted its inquiry the Army claimed to have completed its investigation and announced that it was waiting for sanction from the union government to proceed against the accused. This appears to have been a ruse to delay matters so that public opinion could subside as the Army requires no sanction to initiate a court martial conducted by itself.

It is necessary to recall that the Army has been trying to obfuscate questions of jurisdiction and procedure for many decades now as is evident from four sample cases out of many more: the Sikh Regiment's onslaught upon Ukhrul District of Manipur in 1982 when two men disappeared and the matter went to the Supreme Court in the Sebastian Hongray Vs Union of India case in 1983; the 21 Assam Rifles reign of terror in Oinam as part of Operation Bluebird, including acts of sexual violence against women between July and October 1987; the Manorama case in Manipur in 2004 and the

Pathribal fake encounter case in J&K in 2000.

The Sebastian Hongray case was a test case in pinning wrongdoing by the Army as the widows of the missing men, last seen in the custody of the Army were awarded compensation. This important judgement also tested the waters on the civil administration's effective capacity to proceed against the Army since the Supreme Court had directed that the material before the court was to be converted into an FIR and investigation be commenced against the guilty officers. This never happened; Sebastian Hongray has never received a reply to his application for the Union Government's sanction to proceed against the officers.¹ Again in the Oinam case that went before the Gauhati High Court the petition focussed on human rights violations but also argued that the civil authorities had ceased to function and the army had in effect taken over civil administration.² As part of the proceedings of the court an NPMHR petition asked for the appointment of a commission

1 Nandita Haksar & Sebastian Hongray, *The Judgement that Never came: Army Rule in North-East India*, Delhi, Chicken Neck, 2011, p. 93.

2 Ibid., p. 98.

of enquiry into the violations as the Army was making it difficult to enter certain areas to collect evidence. In November 1987 the High Court turned down the plea for the Enquiry Commission even as it conceded that the right to “not be raped and not be tortured” was an intrinsic part of the right to life, as the reverse had been argued by the Attorney General of Manipur.³ Another case was filed by the Women’s Union of the Manipur Baptist Church alleging sexual assault of women. Early on in the proceedings the Army sent a telegram to the Hon. Chief Justice that vested interests were tarnishing the image of the security forces and also achieving their aim of diverting the attention of the security forces from their task of combating insurgency.⁴ The MBC case still awaits a judgment; it is a case involving allegations of sexual assault and the forced labour of 300 women.⁵

The incident of the killing and alleged rape of Manorama by security forces in 2004 led to massive public unrest against the specific incident but also against the AFSPA, the nude protest by

women which shamed the nation, and a self immolation by a young student. Faced with the unrest the union government appointed the Jeevan Reddy Commission to review the AFSPA. At the same time the state government, faced with the task of bringing back ‘normalcy’, appointed a Judicial Commission to inquire into the Manorama incident, bringing the Army directly into the scrutiny of the civil administration. Immediately, the Army challenged the validity of the appointment of the Commission to stall its workings and achieved an impugment of the order appointing the Judicial Commission. The criminal investigation in the case also remained stalled as the Assam Rifles moved out of Imphal. But, finally, in its judgment delivered on 31.8.2010, the High Court bench at Gauhati hearing the case upheld the appointment of the Judicial Commission as valid and within the powers of the state government. In the course of the judgment the court also took note of the great public disorder that followed the incident and upheld the state government’s basic responsibility to uphold public order.⁶ Most

3 Ibid., pp.367; 355.

4 Ibid. P. 113.

5 Ibid., p. 115.

6 Col. Jagmohan and others vs. State of Manipur and others: Writ Appeal 135 of 2005, High Court of Gauhati, Judgment delivered 31.8. 2010, p. 18.

notably the judgment referred to the charges of alleged rape and murder of Manorama stating that the same ‘if established can by no means be within the scope and deployment of the armed forces in the state of Manipur on any count’.⁷ Despite this unambiguous judgment on civil governance and implied endorsement of criminal proceedings in cases of rape and murder the report of the judicial commission is not public and the criminal case which should deliver justice to Manorama is incomplete. Given that the Assam rifles did not testify before the Judicial Commission, though invited to do so, appearing before an ‘ordinary’ court of law and justice is unlikely to happen in the Manorama case.

In the Pathribal case-- a blatant case of fake encounter if ever there was one—the position of the Army has been even more incredible: they have argued that even for the Army to proceed with a court martial conducted by itself sanction from the union government is required. (This is what the Army is saying in the Dolopa Case too!) The J&K High Court as well as the Supreme Court has held that no such sanction is required for a court martial under the provisions of the Army Act

7 Ibid., p.19

but we still await action by the Army in the Pathribal case. As a young lawyer from Kashmir has argued abdicating jurisdiction in a fake encounter case to a court martial is itself unacceptable as the procedures and outcome of a court martial are not transparent and do little to meet the ends of justice for civilian victims.⁸ In cases of sexual molestation, rape, and murder a court martial, even if it punishes the odd armyman, is a mockery of the principle of equality before the law. The Dolopa case shows us how the Army continues to subvert its own provisions where a trial by a civil court is provided for by the Army Act in the law but is obstructed by browbeating the civil administration in practice. Equally we can see that aggrieved citizens are challenging the Army’s insidious attempts to claim total jurisdiction over its personnel even where the provisions of the AFSPA cannot be formally invoked. As the Supreme Court itself acknowledged ‘you cannot rape and murder and then claim immunity!’⁹

8 Gazala Peer, ‘In Pursuit of Justice: Pathribal Fake Encounter Case’, in *Economic and Political Weekly*, Vol. XLVII No. 30, July 28, 2012, p.31.

9 Krishnadas Rajagopal, ‘Cannot Invoke AFSPA in Rape, murder: SC to Army’ *Indian Express*, Feb. 4, 2012

ROLE OF CIVIL SOCIETY ORGANISATIONS

Assam, specially Guwahati's civil society, still hasn't come out of the shock from a broad daylight gang assault on a 17 year old girl in a crowded street of Guwahati on July 9th, 2012, where media supposedly played a dubious role. Many people whom we spoke to randomly were not aware of the Dolopa assault case, it was only after the press conference held in Guwahati on 3rd August by a group of women's activists that the case was highlighted more in terms of an Army excess. The middle class Guwahatian has been given an impression that the Army is there for 'their own good'. The vulnerable indigenous communities don't seem to matter much to the drawing room populace even in Assam.

The local media people have been reporting about the attempt to rape of the survivor of the Mishing community beginning from the 14th July onwards but somehow their newspapers did not give importance to the news. Almost all major newspapers have their correspondents in Sibsagar, but initially only Assamese dailies

covered the incident. The village of the victim is in the remote Dolopa village. After an initiative of 22 local organizations including Nari Mukti Sangram Samiti, the journalists became aware of the assault and verified the news with the local police. However, only a couple of electronic media channels carried a strip line (or what they call Breaking News) about the incident. English newspapers and national newspapers were reluctant to publish the news.

It was only after the local students organisations' protest and intervention by a women's group, English newspapers started taking interest in the case; Telegraph and Assam Tribune published the story with the headlines of students' threat to hold a bare body demonstration if the guilty was not booked under the law, almost after 4 days of the incident.

The media reluctance also seemed to be a result of the contradictory statements made by different police officers irrespective of their rank from ASI to the DGP of the state. These contradictory statements made it look like the police was using the case to settle

their own scores with the army who has the upper hand under AFPSA.

But on the other hand the statements suggested that the police was being subjected to pressure not to create any awkward situation for the army so that the army operations in the North-East can continue to be justified in the larger scheme of the Indian state and the Government of India.

The Fact Finding team communicated with the media people in both Sibsagar and Guwahati, and found that individual journalists were very enthusiastic and supportive towards anti assault campaigns on the common people including women living in forests and remote areas of the state. Some journalists confirmed that the Army personnel were encroaching upon people's liberty of living in peace as they bang the doors of villagers any time of the day and night without respect for the people's privacy and dignity. The army calls such intrusions as part of the regular search operation for the extremists though the majority of the people do not accept this claim of the Army.

ROLE OF THE STATE AGENCIES

1. State Human Rights Commission

We met Assam Human Rights Commission members and were aghast by their callous approach about their perspective and operational mechanism to defend human rights of the citizens of Assam. The member designate told us that they simply cannot take such cases up because the Army is involved in them; they claim that only the National Human Rights Commission has the power to look into cases involving the Army. The member designate's references to legal provision pertaining to Human rights defence mechanism was so inaccurate that he didn't even realize that it was State Human Rights Commission's ethical duty to inform the National Human Rights Commission about the violation of a woman's right to liberty and dignity.

2. State Commission of Women

We were informed that the State Women's Commission had gone to meet the senior police officials and are putting up some recommendations which we still await. We met the commission on 3rd August and it was evident to us that in 21 days (the assault occurred on 13th July) the women's commission had not been able to send a counsellor to the victim who is in acute trauma. They

were not in a position to provide us any concrete information or tell us about what steps they would be taking for the future. In view of the fact that the Army was proceeding with top speed, and could possibly acquit the accused, this delay is fatal. The State Commission for Women is empowered to approach the High Court of Assam if it observes that any act that is discriminatory to a woman or is in violation of her fundamental rights has been committed. The State Commission of Women, upon finding the refusal of the police to stand up to the Army and appeal against the order of the District Magistrate could have approached the High Court by way of a Writ Petition, challenging the Army's right to usurp a police investigation in a sexual crime, which could not be considered as part of its actionable service. The inability of Commissions to uphold the rights of citizens in states where there is heavy presence of the armed forces makes these institutions appear tooth less and reduces the Institutional checks and balances that should exist in a democracy.

3. Police Accountability Commission

The Assam Police Accountability Commission is the first of its kind and has come into being after the judgement of the Supreme Court in Prakash Singh vs Union of India, W.P.(C) 310/96. It is formed under the Assam Police Act, 2007. Its Chair is

mandated to be a retired High Court Judge, while the other members include a retired police officer, retired person from the civil services, and one woman social worker. The Commission takes cognisance of cases through public complaints and also through suo moto powers that are vested in it, initially calling for a report from the concerned police department, and, if dissatisfied, they conduct an inquiry by meeting the parties personally and having the incident investigated through their in-house investigative officer. They are empowered to direct the police to take the action they decide upon after the investigation and to recommend disciplinary action against errant police officers.

We met the members of the Police Accountability Commission; we found that the lady member was aware of and expressed deep concern about this incident to us. The other members also agreed that the Police Accountability Commission had the power to investigate into the role of the police in this case, suo moto. Despite our presenting before them the press clippings and information gathered by us, they did not show the initiative to take suo moto note of the incident. However they did openly express their views that the police had the exclusive power of investigation and till the stage of filing of the charge sheet, the Army ought not to intervene in the matter.

Recommendations of the Fact Finding Team

1. Adequate attention needs to be given for trauma counselling for the survivors. Psychological trauma counselling, retreat centres should be established at the district level.
 2. Special court/PS should be established for the trial of sexual violence cases. Effective measures like women police stations, trial of sexual crimes by a female judge must be adopted.
 3. We demand that in cases of sexual offences the law should clearly state that the Army has no jurisdiction in these cases. In the interim the police must follow existing procedures and file charges against the accused; and the aggrieved victim must choose whether the trial should be by the criminal courts or by an army court martial.
 4. There is a need of proper documentation of sexual violence cases.
 5. Need to maintain a database of cases of violence against women at the village panchayat level.
 6. Government should direct State Women Commission and State Human Rights Commission to take immediate account on sexual violence cases.
 7. Immediate appointment of adequate women police in all police outposts.
 8. The culture of impunity created by AFSPA and other security acts should be addressed at the national level in the context of sexual violence against women and women's security.
 9. Civil authorities should be given the primary responsibility for law enforcement and that includes the conduct of military and para military personnel as well.
 10. Civil authorities cannot be allowed to plead inability to deal with the misdeeds of the army.
 11. The army should not be allowed to behave/act as if it is in a foreign and hostile territory.
 12. The government must draw a plan for withdrawal of armed forces.
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Annexure I

Press Release

Press Club, Guwahati, 3rd August, 2012:

The contradictions in the statements of the Army, Police and the agitating locals leads to a nowhere situation for a young woman who narrowly survived an attempt to rape by a Jawan of the Armed forces in Dolopa village, block Demow, Sibsagar District of upper Assam.

An independent fact-finding team comprising members of the legal fraternity, media, activists and academia from across the country visited the said village and met the victim and her family. The team also met senior state officials. An appointment sought with the Colonel of the Army deployed in Sibsagar through the office of the D.C. was refused. The team represents Women against State Repression and Sexual Violence (WSS) while the investigation is initiated by the Assam Chapter of Women in Governance (WinG)

The team found discrepancies:

- in the interpretations of incident,
- in the procedures followed by the various agencies,
- in lack of agency given to the complainants in cases of offences by Army officers
- in transparency of procedures, and, in accountability of officials.

Summary

On 13.7.2012 at about 5 p.m., the accused, an army jawan of the 596 Field Regiment, attempted to rape a 19 year old woman of the Mishing community while she was collecting firewood. Upon the girl and her mother making a hue and cry, other women working in and around the forest reached the spot, the accused was nabbed by them and handed over to the IC, Nitaipukhuri.

A complaint was lodged by the mother of the girl to the police on 13th itself. The local police, however, instead of arresting the accused allowed him to leave the spot, upon the insistence of the commanding officer of the Army Unit, Colonel Chandrasekhar Sharma who arrived at the spot. Only on 15.7.2012,

after protests began, the accused was handed over to the police and arrested. On 15.7.2012, army personnel also arrived and interrogated the survivor at the office of the S.P.Sibsagar. By 16.7.2012, the police had completed their investigation. However upon application by the army, the JCM FT, Sibsagar handed over the investigation to the army.

The army again summoned the complainant on 17.7.2012 to the Joysagar army camp where she was interrogated- the second time- for 4 hours while her mother was interrogated for 2.5 hours. The complainant was detained for 6. 5 hours; there was no medical or psychological counselling of the survivor after her trauma and before the interrogations. Only after the local media and 22 women's organisations staged protests outside the Joysagar army camp were the complainant and her mother released.

However, the complainant and her daughter- the survivor's- statements were again taken on 21.7.2012 by the D.C. and Magistrate. On 22.7.2012, the survivor and her mother were interrogated for the third time by the army in a court of enquiry, but the venue was shifted to the Circuit House on account of public outrage. Since 22.7.2012 no further action has been taken by the army or the police, although the accused is in lock-up.

Today, the army has given a press statement claiming that their court of inquiry finished on 23.07.2012 but they are awaiting sanction for prosecution.

Our preliminary concerns on this incident and its aftermath are grave, which details we will release in our fact-finding report. The following are the main points:

1. In the press statement issued by the Army in the Shillong Times on 3.8.2012, it is mentioned that they are waiting for a sanction for prosecution. If the inquiry was finished in a week, why it is taking more than 10 days to get the sanction? The Army should also specify, who they need to take the sanction from so that the complainants are not left in doubt of the procedure.
2. The survivor and her mother were interrogated by Army thrice- 1st time at SP office on 15th, 2nd time at Joysagar Army Camp for about 6 and half hours, 3rd time at the Circuit house, Sibsagar. Statement of the witness (complainants) are being taken repeatedly subjecting them to harassment and mental stress. Why is this repeated interrogation required and what was the nature of Inquiry?
3. Why is the army repeating the inquiry to delay the process of submitting the chargesheet, when the police has already completed the investigation?

4. On 13th July 2012 why didn't the army hand over the accused to the police? Why did Colonel Chandrashekhar Sharma protect the accused from arrest on 13th July 2012 and why has he chosen to interfere with investigation and ask for trial by court martial in his capacity as commanding officer in such a case ?
5. Why was the medical examination of the accused not done when he was in Army custody? Why did it take 2 days for the medical to be conducted by the police once he was handed over to their custody ?
6. Why was the police not informed about the patrolling by the Army on 13th July 2012? As per rules the Army needs to be accompanied by the Police during operations.
7. If the particular patrolling is not for anti insurgency operation why is the Army trying to protect the accused under Army Act 1950?
8. The prosecutor of this case is an Army officer, the judges in the court martial are also army officers and there is no transparency in the process of court martial. Given that the accused is an army jawan, it is in violation of the process of natural justice that the army should be its own judge and jury. We would like to know so far how many cases of sexual violence have been inquired and tried by the Army under Court Martial proceedings and for how many cases judgement have been given ordering convictions ?
9. The JCM Ft while conceding to the application of the Army for enquiry through an Army Court of enquiry and trial by court martial has not sought any explanation from the Army, as to how the jawan can be accorded protection when he was not on active service.

Annexure II

INTERNATIONAL RESOLUTIONS ON GENDER AND CONFLICT

Prohibition of sexual violence against women in armed conflict situations

Although sexual violence during armed conflict has only recently been the focus of international attention, international legal prohibitions on sexual assault in times of conflict are well-defined. There are several international treaties and resolutions to protect women in armed conflict situation. Some of the important laws in this regards are as follows.

1. International Humanitarian Laws: The 1949 Fourth Geneva Convention III states that women are to be “protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.” (Article 27). Two 1977 protocols to the Geneva Conventions further define that rape carried out by combatants is a crime against international humanitarian law. Protocol II states that the “humane treatment” of civilians and those who have ceased to take part in hostilities includes an absolute prohibition on “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault... [as well as] slavery and the slave trade in all their forms.” (Article 4(e), (f)).

Since the Beijing World Conference on Women 1995, there have been important developments at the international level in the treatment of crimes committed against women in situations of armed conflict.

- Rape is explicitly incorporated as a crime against humanity in the statutes of the Ad Hoc Tribunals created by the UN Security Council to address crimes committed in the Former Yugoslavia and Rwanda. Both Tribunals have issued several indictments relating to sexual violence, and the Rwanda Tribunal has convicted one defendant of genocide, including as a result of sexual violence.
- At the regional level, inter-American and European human rights bodies have found sexual violence and rape in conflict situations to constitute violations of human rights treaties. Several have initiated criminal and civil proceedings against individuals alleged to have perpetuated gender-based violence against women in conflict situations.

- The International Statute establishing the International Criminal Court, with jurisdiction over individuals responsible for the most serious international crimes, was adopted in June 1998. The definitions of the crimes under the Court's jurisdiction take gender concerns into account: Genocide is defined to include measures intended to prevent births within a national, ethnical, racial or religious group.
- Crimes against humanity include rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization.
- War crimes include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence constituting a grave breach of the Geneva Conventions.

2. Human Rights law: Several UN human rights treaties deals with protection of all persons whether in armed conflict situation or in peace time. Apart from these treaties, specific convention to deal with Women's rights is Convention on Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW defines¹⁰ that gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence. It is further defined by CEDAW that Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;

10 See general comment 19 of CEDAW. Available at- <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> as on August 13, 2012

- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health;
- (h) The right to just and favourable conditions of work.

3. Security Council resolutions: With the adoption of resolution 1325 (UNSCR 1325 hereafter) by the UN Security Council in October 2000, women and issues affecting them have been placed firmly on the international agenda. UNSCR 1325 have four pillars.

The UNSCR 1325 has four “pillars” that support the goals of the Resolution, which are: Participation, Protection, Prevention, and Relief Recovery. The resolution 1325 calls all UN bodies, Governments and all parties to conflict to take special measures in order to:

- protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, in situations of armed conflict
- respect the rights of women and girls in conflict and post-conflict;
- increase women participation and gender perspectives in all conflict resolution, peacekeeping and peace-building, planning of refugee camps and reconstruction.
- end impunity by prosecuting perpetrators of sexual and other violence on women and girls;

Building on this momentum generated by the resolution, the Security Council adopted Resolution 1820 in June 2008 which focuses specifically on sexual violence in situations of armed conflict. Resolution 1820 “demands the immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians,” urges Member States and the UN system to strengthen their efforts in providing protection and facilitating equal and full participation of women at decision-making levels, and requests the Secretary-General to submit a report to the Council in June 2009 on the implementation

of the resolution. 25 countries around the world have adopted National Action Plan (NAP) to implement UNSCR 1325. Government of India is still one of those countries which have not adopted any NAP.

During the subsequent decade, UNSC has reaffirmed its commitment to the protection and empowerment of women in conflict with resolutions 1674 (2006), 1882 (2009), 1888 (2009) and 1889 (2009), while the United Nations has enhanced its architecture for women, peace and security by appointing Special Representatives and Special Envoys, and establishing the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women).

Government of India has signed several international human rights treaties. Among the above important human right treaties CEDAW, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on Rights of the Child (CRC) and Geneva Conventions 1949 is signed and ratified by government of India. Signing a ratification of a treaty implies legal obligation to follow the standards in domestic level. Hence government of India is bound to follow the international norms of human rights standards protecting women from violence.

In recent years there have been further developments in international jurisprudence in the context of sexual violence spearheaded by feminist jurists leading to the inclusion of sexual violence as a crime that can be taken to the International Criminal Court. The mass scale sexual violence of the Bosnian war was the ground from which feminists expanded the meaning of the Geneva Protocols and the institutional framework required to allow expanded legal remedies. The international attention received by the Bosnian war defined a moment in which feminists challenged the international community to recognize sexual violence against women in war as a specific form of torture and they pushed for the setting up of an International Tribunal to bring perpetrators of sexual violence to justice. And while there have been many problems and obstructions to the working of the Tribunal, as of now, it does exist as a measure to deal with sexual violence, to demand action based on the principle of command responsibility, and reparation for the survivors. This framework of institutional remedy in an international court was used effectively in the Akayesu case that also acknowledged the principle of command responsibility in the context of sexual violence.ⁱⁱ And finally, after a long struggle a UN resolution has now classified rape as a weapon of war and as a threat to international security. Sexual violence has been recognized as a tactic of war, used to humiliate and dominate, instil fear in and disperse and/ or forcibly relocate civilian members

of communities or ethnic groups. Further it acknowledges that sexual violence can exacerbate situations of armed conflict and impede the restoration of international peace. But most importantly it states that in order to respond to the silent war against women and girls requires leadership at the national level. ⁱⁱⁱ

ⁱⁱ According to Usha Ramanathan who was part of the process of discussions on the formation of the International Criminal Court a women's caucus that included the feminist legal jurist Rhonda Copelon worked on sexual and gender based aspects of crimes; as a component in the statutes of the ICC and these moves were complemented by the presence of Judge Navaneetham Pillai who was a member of the ICCTR, the tribunal on Rwanda; the Akeyesu judgment was an outcome of this process.

ⁱⁱⁱ <http://news.bbc.co.uk/2/hi/americass/746664462>