

SUPREME COURT OF INDIA

Nandini Sundar and Ors.

Vs.

State of Chattisgarh

W.P.(Civil)No.250 of 2007

(B.Sudershan Reddy and Surinder Singh Nijjar,JJ.,)

05.07.2011

ORDER

1. We, the people as a nation, constituted ourselves as a sovereign democratic republic to conduct our affairs within the four corners of the Constitution, its goals and values. We expect the benefits of democratic participation to flow to us - all of us -, so that we can take our rightful place, in the league of nations, befitting our heritage and collective genius. Consequently, we must also bear the discipline, and the rigour of constitutionalism, the essence of which is accountability of power, whereby the power of the people vested in any organ of the State, and its agents, can only be used for promotion of constitutional values and vision. This case represents a yawning gap between the promise of principled exercise of power in a constitutional democracy, and the reality of the situation in Chattisgarh, where the Respondent, the State of Chattisgarh, claims that it has a constitutional sanction to perpetrate, indefinitely, a regime of gross violation of human rights in a manner, and by adopting the same modes, as done by Maoist/Naxalite extremists.

2. The State of Chattisgarh also claims that it has the powers to arm, with guns, thousands of mostly illiterate or barely literate young men of the tribal tracts, who are appointed as temporary police officers, with little or no training, and even lesser clarity about the chain of command to control the activities of such a force, to fight the battles against alleged Maoist extremists. struggle for life and the sublime; (ii) the darkness of colonial expansion for resources; and finally (iii) the darkness, represented by inhumanity and evil, to which individual human beings are capable of descending, when supreme and unaccounted force is vested, rationalized by a warped world view that parades itself as pragmatic and inevitable, in each individual level of command. Set against the backdrop of resource rich darkness of the African tropical forests, the brutal ivory trade sought to be expanded by the imperialist-capitalist expansionary policy of European powers, Joseph Conrad describes the grisly, and the macabre states of mind and justifications advanced by men, who secure and wield force without reason, sans humanity, and any sense of balance. The main perpetrator in the novella, Kurtz, breathes his last with the words: "The horror! The horror!" Conrad characterized the actual circumstances in Congo between 1890 and 1910, based on his

personal experiences there, as "the vilest scramble for loot that ever disfigured the history of human conscience²."

3. As we heard more and more about the situation in Chattisgarh, and the justifications being sought to be pressed upon us by the respondents, it began to become clear to us that the respondents were envisioning modes of state action that would seriously undermine constitutional values. This may cause grievous harm to national interests, particularly its goals of assuring human dignity, with fraternity amongst groups, and the nations unity and integrity. Given humanity's collective experience with unchecked power, which becomes its own principle, and its practice its own *raison d'etre*, resulting in the eventual dehumanization of all the people, the scouring of the earth by the unquenchable thirst for natural resources by imperialist powers, and the horrors of two World Wars, modern constitutionalism posits that no wielder of power should be allowed to claim the right to perpetrate state's violence against any one, much less its own citizens, unchecked by law, and notions of innate human dignity of every individual. Through the course of these proceedings, as a hazy picture of events and circumstances in some districts of Chattisgarh emerged, we could not but arrive at the conclusion that the respondents were seeking to put us on a course of constitutional actions whereby we would also have to exclaim, at the end of it all: "the horror, the horror."

4. People do not take up arms, in an organized fashion, against the might of the State, or against fellow human beings without rhyme or reason. Guided by an instinct for survival, and according to Thomas Hobbes, a fear of lawlessness that is encoded in our collective conscience, we seek an order. However, when that order comes with the price of dehumanization, of manifest injustices of all forms perpetrated against the weak, the poor and the deprived, people revolt. That large tracts of the State of Chattisgarh have been affected by Maoist activities is widely known. It has also been widely reported that the people living in those regions of Chattisgarh have suffered grievously, on account of both the Maoist insurgency activities, and the counter insurgency unleashed by the State. The situation in Chattisgarh is undoubtedly deeply distressing to any reasonable person. What was doubly dismaying to us was the repeated insistence, by the respondents, that the only option for the State was to rule with an iron fist, establish a social order in which every person is to be treated as suspect, and any one speaking for human rights of citizens to be deemed as suspect, and a Maoist. In this bleak, and miasmic world view propounded by the respondents in the instant case, historian Ramchandra Guha, noted academic Nandini Sunder, civil society leader Swami Agnivesh, and a former and well reputed bureaucrat, E.A.S. Sarma, were all to be treated as Maoists, or supporters of Maoists. We must state that we were aghast at the blindness to constitutional limitations of the State of Chattisgarh, and some of its advocates, in claiming that any one who questions the conditions of inhumanity that are rampant in many parts of that state ought to necessarily be treated as Maoists, or their sympathizers, and yet in the same breath also claim that it needs the constitutional sanction, under our Constitution, to perpetrate its policies of ruthless violence against the people of Chattisgarh to establish a Constitutional order.

¹ Joseph Conrad – Heart of Darkness and Selected Short Fiction (Barnes and Noble Classics, 2003).

² Joseph Conrad "Geography and Some Explorers", National Geography magazine, Vol 45, 1924.

5. The problem, it is apparent to us, and would be so to most reasonable people, cannot be the people of Chattisgarh, whose human rights are widely acknowledged to being systemically, and on a vast scale, being violated by the Maoists/Naxalites on one side, and the State, and some of its agents, on the other. Nor is the problem with those well meaning, thoughtful and reasonable people who question those conditions. The problem rests in the amoral political economy that the State endorses, and the resultant revolutionary politics that it necessarily spawns. In a recent book titled "The Dark Side of Globalization" it has been observed that:

"[T]he persistence of "Naxalism", the Maoist revolutionary politics, in India after over six decades of parliamentary politics is a visible paradox in a democratic "socialist" India... India has come into the twenty-first century with a decade of departure from the Nehruvian socialism to a free-market, rapidly globalizing economy, which has created new dynamics (and pockets) of deprivation along with economic growth. Thus the same set of issues, particularly those related to land, continue to fuel protest politics, violent agitator politics, as well as armed rebellion.... Are governments and political parties in India able to grasp the socio-economic dynamics encouraging these politics or are they stuck with a security- oriented approach that further fuels them?"³

6. That violent agitator politics, and armed rebellion in many pockets of India have intimate linkages to socio-economic circumstances, endemic inequalities, and a corrupt social and state order that preys on such inequalities has been well recognized. In fact the Union of India has been repeatedly warned of the linkages. In a recent report titled "Development Challenges in Extremist Affected Areas"⁴ , an expert group constituted by the Planning Commission of India makes the following concluding observations:

"The development paradigm pursued since independence has aggravated the prevailing discontent among the marginalized sections of the society.... The development paradigm as conceived by policy makers has always imposed on these communities.... causing irreparable damage to these sections. The benefits of this paradigm have been disproportionately cornered by the dominant sections at the expense of the poor, who have borne most of the costs. Development which is insensitive to the needs of these communities has inevitably caused displacement and reduced them to a sub-human existence. In the case of tribes in particular it has ended up in destroying their social organization, cultural identity and resource base.... which cumulatively makes them increasingly vulnerable to exploitation.... The pattern of development and its implementation has increased corrupt practices of a rent seeking bureaucracy and rapacious exploitation by the contractors, middlemen, traders and the greedy sections of the larger society intent on grabbing their resources and violating their dignity." [paras 1. 18.1 and 1.18.2, emphasis supplied]

³ Ajay K. Mehra "Maoism in a globalizing India" in "The Dark Side of Globalization" eds. Jorge Heine & Ramesh Thakur (United Nations University Press, 2011)

⁴ Report of an Expert Group to Planning Commission, Government of India (New Delhi, April, 2008)

7. It is also a well known fact that Government reports understate, in staid prose, the actuality of circumstances. That an expert body constituted by the Planning Commission of India, Government of India, uses the word "rapacious", connoting predation for satisfaction of inordinate greed, and subsistence by capture of living prey, is revelatory of the degree of human suffering that is being visited on vast sections of our fellow citizens. It can only be concluded that the expert body, in characterizing the state of existence of large numbers of our fellow citizens, in large tracts of India, as "sub-human," is clearly indicating that such an existence is not merely on account of pre-existing conditions of significant material deprivation, but also that significant facets that are essential to human dignity have been systematically denied by the forces and mechanisms of the developmental paradigm unleashed by the State. Equally poignantly, and indeed tragically because the State in India seems to repeatedly insist on paying scant attention to such advice, the Expert Group further continues and advises:

"This concludes our brief review of various disturbing aspects of the socio-economic context that prevails in large parts of India today, and that may (and can) contribute to politics such as that of the Naxalite movement or erupt as other forms of violence. It should be recognized that there are different kinds of movements, and that calling and treating them generally as unrest, a disruption of law and order, is little more than a rationale for suppressing them by force. It is necessary to contextualize the tensions in terms of social, economic and political background and bring back on the agenda the issues of the people - the right to livelihood, the right to life and a dignified and honourable existence. The State itself should feel committed to the democratic and human rights and humane objectives that are inscribed in the Preamble, the Fundamental Rights and Directive Principles of the Constitution. The State has to adhere strictly to the Rule of Law. Indeed, the State has no other authority to rule.. It is critical for the Government to recognize that dissent or expression of dissatisfaction is a positive feature of democracy, that unrest is often the only thing that actually puts pressure on the government to make things work and for the government to live up to its own promises. However, the right to protest, even peacefully, is often not recognized by the authorities, and even non-violent agitations are met with severe repression.... What is surprising is not the fact of unrest, but the failure of the State to draw right conclusions from it. While the official policy documents recognize that there is a direct correlation between what is termed as extremism and poverty.... or point to the deep relationship between tribals and forests, or that the tribals suffer unduly from displacement, the governments have in practice treated unrest merely as a law and order problem. It is necessary to change this mindset and bring about congruence between policy and implementation. There will be peace, harmony and social progress only if there is equity, justice and dignity for everyone." [paras 1.18.3 and 1.18.4, emphasis supplied]

8. Rather than heeding such advice, which echoes the wisdom of our Constitution, what we have witnessed in the instant proceedings have been repeated assertions of inevitability of muscular and violent statecraft. Such an approach, informing the decisions of the

Government of Chattisgarh with respect to the situations in Dantewada, and its neighbouring districts, seemingly also blinds them to the fact that lawless violence, in response to violence by the Maoist/Naxalite insurgency, has not, and will not, solve the problems, and that instead it will only perpetuate the cycles of more violent, both intensive and extensive, insurgency and counter-insurgency. The death toll revealed by the Government of Chattisgarh is itself indicative of this. The fact that the cycles of violence and counter-violence have now lasted nearly a decade ought to lead a reasonable person to conclude that the prognosis given by the expert committee of the Planning Commission to be correct.

9. The root cause of the problem, and hence its solution, lies elsewhere. The culture of unrestrained selfishness and greed spawned by modern neo-liberal economic ideology, and the false promises of ever increasing spirals of consumption leading to economic growth that will lift everyone, under-gird this socially, politically and economically unsustainable set of circumstances in vast tracts of India in general, and Chattisgarh in particular. It has been reported that:

"Among the rapidly growing urban middle class, the corporate world is in a hurry to expand its manufacturing capacity. That means more land for manufacturing and trading. The peasants and tribals are the natural victims of acquisitions and displacements. The expanded mining activities encroach upon the forest domain.. Infrastructure development needs more steel, cement and energy.. Lacking public sector capacities, the income-poor but resource-rich states of eastern India are awarding mining and land rights to Indian and multinational companies.. Most of these deposits lie in territory inhabited by poor tribals and that is where Naxals operate. Chattisgarh, a state of eastern India, has 23 per cent of India's iron ore deposits and abundant coal. It has signed memoranda of understanding and other agreements worth billions with Tata Steel and ArcelorMittal, De Beers Consolidated Mines, BHP Billiton and Rio Tinto. Other states inviting big business and FDI have made similar deals.... The appearance of mining crews, construction workers and truckers in the forest has seriously alarmed the tribals who have lived in these regions from time immemorial."⁵

10. The justification often advanced, by advocates of the neo-liberal development paradigm, as historically followed, or newly emerging, in a more rapacious form, in India, is that unless development occurs, via rapid and vast exploitation of natural resources, the country would not be able to either compete on the global scale, nor accumulate the wealth necessary to tackle endemic and seemingly intractable problems of poverty, illiteracy, hunger and squalor. Whether such exploitation is occurring in a manner that is sustainable, by the environment and the existing social structures, is an oft debated topic, and yet hurriedly buried. Neither the policy makers nor the elite in India, who turn a blind eye to the gross and inhuman suffering of the displaced and the dispossessed, provide any credible answers. Worse still, they ignore historical evidence which indicates that a development paradigm depending largely on the plunder and loot of the natural resources more often than not leads to failure of

⁵ Ajay K. Mehra, *supra* note 1.

the State; and that on its way to such a fate, countless millions would have been condemned to lives of great misery and hopelessness.

11. The more responsible thinkers have written at length about "resource curse," a curious phenomenon wherein countries and regions well endowed with resources are often the worst performers when it comes to various human development indicia. In comparison with countries dependant on agricultural exports, or whose development paradigm is founded upon broad based development of human resources of all segments of the population, such countries and regions suffer from "unusually high poverty, poor health care, widespread malnutrition, high rates of child mortality, low life expectancy and poor educational performance." ⁶

12. Predatory forms of capitalism, supported and promoted by the State in direct contravention of constitutional norms and values, often take deep roots around the extractive industries. In India too, we find a great frequency of occurrence of more volatile incidents of social unrest, historically, and in the present, in resource rich regions, which paradoxically also suffer from low levels of human development. The argument that such a development paradigm is necessary, and its consequences inevitable, is untenable. The Constitution itself, in no uncertain terms, demands that the State shall strive, incessantly and consistently, to promote fraternity amongst all citizens such that dignity of every citizen is protected, nourished and promoted. The Directive Principles, though not justiciable, nevertheless

"fundamental in the governance of the Country", direct the State to utilize the material resources of the community for the common good of all, and not just of the rich and the powerful without any consideration of the human suffering that extraction of such resources impose on those who are sought to be dispossessed and disempowered. Complete justice - social, economic and political -, is what our Constitution promises to each and every citizen. Such a promise, even in its weakest form and content, cannot condone policies that turn a blind eye to deliberate infliction of misery on large segments of our population."

13. Policies of rapid exploitation of resources by the private sector, without credible commitments to equitable distribution of benefits and costs, and environmental sustainability, are necessarily violative of principles that are "fundamental to governance", and when such a violation occurs on a large scale, they necessarily also eviscerate the promise of equality before law, and equal protection of the laws, promised by Article 14, and the dignity of life assured by Article 21. Additionally, the collusion of the extractive industry, and in some places it is also called the mining mafia, and some agents of the State, necessarily leads to evisceration of the moral authority of the State, which further undermines both Article 14 and Article 21. As recognized by the Expert Committee of the Planning Commission, any steps taken by the State, within the paradigm of treating such volatile circumstances as simple law and order problems, to perpetrate large scale violence

⁶ Joseph E. Stiglitz, *Making Natural Resources into a Blessing rather than a Curse*, in "Covering Oil", eds., Svetlana Tsalik and Arya Schiffrin, Open Society Institute (2005).

against the local populace, would only breed more insurgency, and ever more violent protests. Some scholars have noted that complexities of varieties of political violence in India are rooted:

"as much in the economic relations of the country as in its stratified social structure.... [E]ntrenched feudal structures, emerging commercial interests, new alliances and the nexus between entrenched order, new interests, political elites and the bureaucracy, and deficient public infrastructure and facilities perpetuate exploitation. The resulting miseries have made these sections of the population vulnerable to calls for revolutionary politics....India's development dichotomy has also had a destabilizing impact on people's settled lives. For decades, the Indian state has failed to provide alternative livelihoods to those displaced by developmental projects. According to an estimate, between 1951 and 1990, 8.5 million members of ST's were displaced by developmental projects. Representing over 40 per cent of all the displaced people, only 25 per cent of them were rehabilitated.. Although there are no definitive data, Dalits and Adivasis have been reported to form a large proportion of the Maoists' foot soldiers.... A study of atrocities against these two sections of society reveals correspondence between the prevalence and spread of Naxalism and the geographic location of atrocities.... The susceptibility of the vulnerable continues under the new emerging context of the liberalization, marketization and globalization of the Indian economy, which have added new dominance structures to the existing ones."⁷

14. What is ominous, and forebodes grave danger to the security and unity of this nation, the welfare of all of our people, and the sanctity of our constitutional vision and goals, is that the State is drawing the wrong conclusions, as pointed out by the Expert Group of the Planning Commission cited earlier. Instead of locating the problem in the socio-economic matrix, and the sense of disempowerment wrought by the false developmental paradigm without a human face, the powers that be in India are instead propagating the view that this obsession with economic growth is our only path, and that the costs borne by the poor and the deprived, disproportionately, are necessary costs. Amit Bhaduri, a noted economist, has observed:

"If we are to look a little beyond our middle class noses, beyond the world painted by mainstream media, the picture is less comforting, less assuring.... Once you step outside the charmed circle of a privileged minority expounding on the virtues of globalization, liberalization and privatization, things appear less certain.. According to the estimate of the Ministry of Home Affairs, some 120 to 160 out of a total of 607 districts are "Naxal infested".

Supported by a disgruntled and dispossessed peasantry, the movement has spread to nearly one-fourth of Indian territory. And yet, all that this government does is not to face the causes of the rage and despair that nurture such movements; instead it considers it a menace, a law-and-order problem.... that is to be rooted out by the

⁷ Ajay K. Mehra, *supra* note 1

violence of the state, and congratulates itself when it uses violence effectively to crush the resistance of the angry poor.... For the sake of higher growth, the poor in growing numbers will be left out in the cold, undernourished, unskilled and illiterate, totally defenceless against the ruthless logic of a global market.. [T]his is not merely an iniquitous process. High growth brought about in this manner does not simply ignore the question of income distri-bution, its reality is far worse. It threatens the poor with a kind of brutal violence in the name of development, a sort of 'developmental terrorism', violence perpetrated on the poor in the name of development by the state primarily in the interest of corporate aristocracy, approved by the IMF and the World Bank, and a selfserving political class.... Academics and media persons have joined the political chorus of presenting the developmental terrorism as a sign of progress, an inevitable cost of development. The conventional wisdom of our time is that, There Is No Alternative.. And yet this so widely agreed upon model of development is fatally flawed. It has already been rejected and will be rejected again by the growing strength of our democratic polity, and by direct resistance of the poor threatened with 'developmental terrorism'".

15. As if the above were not bad enough, another dangerous strand of governmental action seems to have been evolved out of the darkness that has begun to envelope our policy makers, with increasing blindness to constitutional wisdom and values. On the one hand the State subsidises the private sector, giving it tax break after tax break, while simultaneously citing lack of revenues as the primary reason for not fulfilling its obligations to provide adequate cover to the poor through social welfare measures. On the other hand, the State seeks to arm the youngsters amongst the poor with guns to combat the anger, and unrest, amongst the poor.

16. Tax breaks for the rich, and guns for the youngsters amongst poor, so that they keep fighting amongst themselves, seems to be the new mantra from the mandarins of security and high economic policy of the State. This, apparently, is to be the grand vision for the development of a nation that has constituted itself as a sovereign, secular, socialist and democratic republic. Consequently, questions necessarily arise as to whether the policy makers, and the powers that be, are in any measure being guided by constitutional vision, values, and limitations that charge the State with the positive obligation of ensuring the dignity of all citizens.

17. What the mandarins of high policies forget is that a society is not a forest where one could combat an accidental forest fire by starting a counter forest fire that is allegedly controlled. Human beings are not individual blades of dry grass. As conscious beings, they exercise a free will. Armed, the very same groups can turn, and often have turned, against other citizens, and the State itself. Recent history is littered with examples of the dangers of armed vigilante groups that operate under the veneer of State patronage or support.

18. Such misguided policies, albeit vehemently and muscularly asserted by some policy makers, are necessarily contrary to the vision and imperatives of our constitution which demands that the power vested in the State, by the people, be only used for the welfare of the

people - all the people, both rich and the poor -, thereby assuring conditions of human dignity within the ambit of fraternity amongst groups of them. Neither Article 14, nor Article 21, can even remotely be conceived as being so bereft of substance as to be immune from such policies. They are necessarily tarnished, and violated in a primordial sense by such policies. The creation of such a miasmatic environment of dehumanization of youngsters of the deprived segments of our population, in which guns are given to them rather than books, to stand as guards for the rapine, plunder and loot in our forests, would be to lay the road to national destruction. It is necessary to note here that this Court had to intercede and order the Government of Chattisgarh to get the security forces to vacate the schools and hostels that they had occupied; and even after such orders, many schools and hostels still remain in the possession and occupancy of the security forces. Such is the degree of degeneration of life, and society. Facts speak for themselves.

19. Analyzing the causes for failure of many nation-states, in recent decades, Robert I. Rotberg, a professor of the Kennedy School, Harvard University, posits the view that "[N]ation- states exist to provide a decentralized method of delivering political (public) goods to persons living within designated parameters (borders)... They organize and channel the interests of their people, often but not exclusively in furtherance of national goals and values." Amongst the purposes that nation-states serve, that are normatively expected by citizenries, are included the task of buffering or manipulation of "external forces and influences," and mediation between "constraints and challenges" of the external and international forces and the dynamics of "internal economic, political, and social realities." In particular he notes:

"States succeed or fail across all or some of these dimensions. But it is according to their performance - according to the levels of their effective delivery of the most crucial political goods - that strong states may be distinguished from weak ones, and weak states from failed or collapsed states.... There is a hierarchy of political goods. None is as crucial as the supply of security, especially human security. Individuals alone, almost exclusively in special or particular circumstances, can attempt to secure themselves. Or groups of individuals can band together to organize and purchase goods or services that maximize their sense of security. Traditionally, and usually, however, individuals and groups cannot easily or effectively substitute private security for the full spectrum of public security. The state's prime function is to provide that political good of security - to prevent cross-border invasions and infiltrations, to eliminate domestic threats to or attacks upon the national order and social structure... and to stabilize citizens to resolve their disputes with the state and with their fellow human inhabitants without recourse to arms or other forms of physical coercion."⁸

8 “The Failure and Collapse of Nation-States – BREAKDOWN, PREVENTION AND FAILURE” in “WHEN STATES FAIL: CAUSES AND CONSEQUENCES” Robert I. Rotberg, Ed., Princeton University Press (2004).

20. The primary task of the State is the provision of security to all its citizens, without violating human dignity. This would necessarily imply the undertaking of tasks that would prevent the emergence of great dissatisfaction, and disaffection, on account of the manner and mode of extraction, and distribution, of natural resources and organization of social action, its benefits and costs. Our Directive Principles of State Policy explicitly recognize this. Our Constitution posits that unless we secure for our citizens conditions of social, economic and political justice for all who live in India, we would not have achieved human dignity for our citizens, nor would we be in a position to promote fraternity amongst groups of them. Policies that run counter to that essential truth are necessarily destructive of national unity and integrity. To pursue socio-economic policies that cause vast disaffection amongst the poor, creating conditions of violent politics is a proscribed feature of our Constitution. To arrive at such a situation, in actuality on account of such policies, and then claim that there are not enough resources to tackle the resulting socio-political unrest, and violence, within the framework of constitutional values amounts to an abdication of constitutional responsibilities. To claim that resource crunch prevents the State from developing appropriate capacity in ensuring security for its citizens through well trained formal police and security forces that are capable of working within the constitutional framework would be an abandonment of a primordial function of the State. To pursue policies whereby guns are distributed amongst barely literate youth amongst the poor to control the disaffection in such segments of the population would be tantamount to sowing of suicide pills that could divide and destroy society. Our youngsters are our most precious resource, to be nurtured for a better tomorrow. Given the endemic inequalities in our country, and the fact that we are increasingly, in a demographic sense, a young population, such a policy can necessarily be expected to lead to national disaster.

21. Our constitution is most certainly not a "pact for national suicide⁹." In the least, its vision does enable us, as constitutional adjudicators to recognize, and prevent, the emergence, and the institutionalization, of a policing paradigm, the end point of which can only mean that the entire nation, in short order, might have to gasp: "The horror! The horror!"

22. It is in light of the above that we necessarily have to examine the issues discussed below, and pass appropriate orders. We have heard at length the learned senior counsel, Shri. Ashok H. Desai, appearing on behalf of the petitioners, and learned senior counsel, Shri. Harish N. Salve and Shri. M.N. Krishnamani appearing for the State of Chattisgarh. We have also heard learned Solicitor General of India, Shri Gopal Subrahmanyam, appearing for the Union of India. II

Brief Facts and History of Instant Matters

23. The instant writ petition was filed, in 2007, by: (i) Dr. Nandini Sunder, a professor of Sociology at Delhi School of Economics, and the author of "Subalterns and Sovereigns: An Anthropological History of Bastar" (2nd Ed. 2007); (ii) Dr. Ramachandra Guha, a well

⁹ Aharon Barack, "The Judge in a Democracy" (Princeton University Press, 2006).

known historian, environmentalist and columnist, and author of several books, including "Savaging the Civilised: Verrier Elwin, His Tribals and India" (1999) and "India After Gandhi" (2007); and (iii) Mr. E.A.S. Sarma, former Secretary to Government of India, and former Commissioner, Tribal Welfare, Government of Andhra Pradesh. The petitioners have alleged, inter-alia, widespread violation of human rights of people of Dantewada District, and its neighboring areas in the State of Chhattisgarh, on account of the on going armed Maoist/Naxalite insurgency, and the counter-insurgency offensives launched by the Government of Chattisgarh. In this regard, it was also alleged that the State of Chattisgarh was actively promoting the activities of a group called "Salwa Judum", which was in fact an armed civilian vigilante group, thereby further exacerbating the ongoing struggle, and was leading to further widespread violation of human rights.

24. This Court, had previously passed various orders as appropriate at the particular stage of hearing. It had previously noted that it would be appropriate for the National Human Rights Commission ("NHRC") to verify the serious allegations made by the Petitioners, by constituting a committee for investigation, and make the report available to this Court. On 25-08-2008 the NHRC filed its report. This Court then directed that the Government of Chattisgarh consider the recommendations. This Court also directed that appropriate First Information Reports ("FIRs") be filed with respect to killings or other acts of violence and commission of crimes, where the FIRs had not been registered. The Government of Chattisgarh was further directed, in the case of finding the dead body of a person, to ensure that a magisterial enquiry follow, and file an "Action Taken Report." In the order dated 18-02-2010, this Court stated that "[I]t appears that about 3000 SPOs," (Special Police Officers) "have been appointed by the State Government to take care of the law and order situation, in addition to the regular police force. We make it clear that the appointment of SPOs shall be done in accordance with law." The Court also specifically recorded that "[I]t is also denied emphatically by the State that private citizens are provided with arms."

25. In the course of the continuing hearings, before us, a number of allegations have been made, certain of the findings of NHRC stressed, and some contested. Three aspects were particularly dealt by us, and they relate to:

“(i) the issue of schools and hostels in various districts of Chattisgarh being occupied by various security forces, in a manner that precludes the proper education of students of such schools; (ii) the issue of nature of employment of SPOs, also popularly known as Koya Commandos, the manner of their training, their status as police officers, the fact that they are provided with firearms, and the various allegations of the excessive violence perpetrated by such SPOs.; and (iii) fresh allegations made, this time by Swami Agnivesh, that some 300 houses were burnt down in the villages of Morpalli, Tadmetla and Timmapuram, of women raped and three men killed sometime in March, 2011. It was also alleged that when Swami Agnivesh, along with some other members of the civil society, tried to visit the said villages to distribute humanitarian aid, and gain firsthand knowledge of the situation, they were attacked by members of "Salwa Judum" in two separate incidents, and that, notwithstanding assurances by the Chief Minister of Chattisgarh that they will be provided all the security to be able to

undertake their journey and complete their tasks, and notwithstanding the presence of security forces, the attacks were allowed to be perpetrated. Swami Agnivesh, it is also reported, and prima facie appears, is a social activist, of some repute, advocating the path of peaceful resolution of social conflict. It also appears that Swami Agnivesh has actually worked towards the release of some police personnel who had been kidnapped by Naxalites in Chattisgarh, and the same has also been acknowledged by a person no less than the Chief Minister of Chattisgarh.”

26. With respect to the issue of the schools and hostels occupied by the security forces, it may be noted that the State of Chattisgarh had categorically denied that any schools, hospitals, ashrams and anganwadis were continuing to be occupied by security forces, and in fact all such facilities had been vacated. However, during the course of the hearings before this bench it has turned out that the facts asserted in the earlier affidavit were erroneous, and that in fact a large number of schools had continued to be occupied by security forces. It was only upon the intervention, and directions, of this Court did the State of Chattisgarh begin the process of releasing the schools and hostels from the occupation by the security forces. That process is, in fact, still on going. We express our reservations at the manner in which the State of Chattisgarh has conducted itself in the instant proceedings before us. It was because of the earlier submissions made to this Court that schools, hospitals, ashrams and anganwadis have already been vacated, this Court had passed earlier orders with respect to other aspects of the recommendations of the NHRC, and did not address itself to the issue of occupancy by security forces of such infrastructure and public facilities that are necessary and vital for public welfare. A separate affidavit has been filed by the State of Chattisgarh seeking an extension of time to comply with the directions of this Court. This is because a large number of schools and hostels still continue to be occupied by the security forces. We will deal with the said matter separately.

27. It is with respect to the other two matters, i.e., (i) appointment of SPOs; and (ii) incidents alleged by Swami Agnivesh which we shall deal with below.

28. At this point it is also necessary to note that the ongoing armed insurgency in Chattisgarh, and in various other parts of the country, have been referred to as both Maoist and Naxal or Naxalite activities, by the Petitioners as well as the Respondents. Such terms are used interchangeably, and refer to, broadly, armed uprisings of various groups of people against the State, as well as individual or groups of citizens. In this order, we refer to Maoist activities, and the Naxal or Naxalite activities interchangeably. III. Appointment and conditions of service of the SPOs.

29. A number of allegations with regard to functioning of "Koya Commandos" had been made by the Petitioners, and upon being asked by this Court to explain who or what Koya Commandos were, the State of Chattisgarh, through two separate affidavits, and one written note, stated, asserted and/or submitted:

“(i) that, between 2004 to 2010, 2298 attacks by Naxalites occurred in the State, and 538 police and para military personnel had been killed; that in addition 169 Special

Officers, 32 government employees (not police) and 1064 villagers had also been killed in such attacks; that the "SPOs form an integral part of the overall security apparatus in the naxal affected districts of the State;" and that the Chintalnar area of Dantewada District is the worst affected area, with 76 security personnel killed in one incident.

(ii) that, as stated previously, in other affidavits, by the State of Chattisgarh, Salwa Judum has run its course, and has ceased as a force, existing only symbolically; that the Petitioners' and Shri. Agnivesh's claim that Salwa Judum is still active in the form of SPOs and Koya Commandos is misconceived; that the phrase "Koya Commando" is not an official one, and no one is appointed as a Koya Commando; that some of the SPOs are from Koya tribe, and hence, loosely, the term "Koya Commando" is used; that previously SPOs used to be appointed by the District Magistrate under section 17 of the Indian Police Act 1861 ("IPA"); that the SPOs appointed under said statute drew their power, duties and accountability under Section 18 of the IPA; and that with the enactment of the Chattisgarh Police Act, 2007 ("CPA 2007"), SPOs are now appointed under Section 9 of CPA 2007; that SPOs are paid a monthly honourarium of Rs 3000, of which 80% is contributed by Government of India; that the SPOs are appointed to act as guides, spotters and translators, and work as a source of intelligence, and firearms are provided to them for their self defence; that many other states have also appointed SPOs, and Naxals oppose the SPOs because their familiarity with local people, dialect and terrain make them effective against them; that the total number of SPOs appointed in Chattisgarh, and approved by the Union of India, were 6500 as of 28-03-2011. (It may be noted that an year ago the State of Chattisgarh had informed this Court that the total number of SPOs appointed in Chattisgarh were 3000. The much higher figure of appointed SPOs, as revealed by the latest affidavit implies that the number been more than doubled in the span of one year.)

30. Upon the submission of the affidavit containing the above details, we pointed out a number of issues which had not been addressed by the State of Chattisgarh. Some of the important queries raised by us, with directions to State of Chattisgarh and Union of India to answer, inter alia, included: (i) the required qualifications for such an appointment; (ii) the manner and extent of their training, especially given the fact that they were to wield firearms; (iii) the mode of control of the activities of such SPOs by the State of Chattisgarh; (iv) what special provisions were made to protect the SPOs and their families in the event of serious injuries or death while performing their "duties"; and (v) what provisions and modalities were in place for discharge of an appointed SPO from duty and the retrieval of the firearms given to them in line of their duties, and also with regard to their safety and security after performing their duties as SPOs for a temporary period. In this regard, the State of Chattisgarh submitted an additional affidavit filed on 03-05-2011, and subsequently after we had reserved this matter for orders, submitted a Written Note dated 11-03-2011 on 16-05-2011. The same are summarized briefly below.

“(i) That the Union of India approves the upper limit of the number of SPOs for each state for the purposes of reimbursement of homourarium under the Security Rated Expenditure (SRE) Scheme.

(ii) That currently the State of Chattisgarh recruits the SPOs under Section 9(1) of the Chattisgarh Police Act, 2007 ("CPA 2007"), and that the SPOs, pursuant to Section 9(2) of the CPA 2007, enjoy the "same powers, privileges and perform same duties as coordinate constabulary and subordinate of the Chattisgarh Police;" that the SPOs are an integral part of the police force of Chattisgarh, and they are "under the same command, control and supervision of the Superintendant of Police as any other police officer. The SPOs are subjected to the same discipline and are regulated by the same legal framework as any other police officer.;" that 1200 SPOs have been suspended, and even their tenure not renewed or extended if found to be derelict in the performance of their duties. (However, in the Written Note it has been stated that SPOs "are" appointed under Section 17 of IPA 1861).

(iii) That SPOs serve as "auxiliary force and force multiplier;" that appointments of SPOs has been recommended by the Second Administrative Reforms Commission under the Chairmanship of Mr. M. Veerappa Moily.

(iv) That SPOs serve a critical role in mitigating the problem of inadequacy of regular police and other security forces in Chattisgarh; that a three man committee appointed by the Government of Chattisgarh, in 2007, to prepare an action plan to combat the Naxalite problem, had calculated the requirement to be seventy (70) battalions; as against this, at present the State only has a total of 40 battalions, of which 24 are Central Armed Police Force, 6 Indian Reserve, and 10 State battalions; that the shortfall is 30 battalions.

(v) That the appointment of SPOs is necessary because of the attacks against relief camps for displaced villagers by Naxals; that the total number of attacks by Maoists between 2005 to 2011 were 41, in which 47 persons were killed and 37 injured, with figures in Dantewada being 24 attacks, 37 persons killed and 26 injured; that tribal youth are joining the ranks of SPOs "motivated by the urge for self protection and to defend their family members/villages from violent attacks;" that "[T]he victims of naxal violence and youth from naxal affected areas having knowledge of the local terrain, dialects, naxalites and their sympathizers and who voluntarily come forward and expressed their willingness are recruited as SPOs after character verification;" and that such tribal youth are recruited as SPOs on a temporary basis, by the Superintendant of the Police on the recommendation of the concerned station in-charge and gazetted police officers.

(vi) That even though IPA 1861 and CPA 2007 do not prescribe any qualifications, "preference is given to those who have passed fifth standard" in the appointment of SPOs; that persons aged over 18 and aware of the local geography are appointed; and that the same is done in accordance with prescribed guidelines.

(vii) That a total training of two months is provided to such tribal youth appointed as SPOs, including: (a) musketry weapon handling, (b) first aid and medical care; (c) field and craft drill; (d) UAC and Yoga training; and that apart from the foregoing, "basic elementary knowledge" of various subjects are also included in the training curriculum - (e) Law (including IPC, CRPC, Evidence Act, Minor Act etc.) in 24 periods;

(f) Human Rights and other provisions of Constitution of India in 12 periods; (g) use of scientific & forensic aids in policing in 6 periods; (h) community policing in 6 periods; and (i) culture and customs of Bastar in 9 periods; that timetable of such training, in which each period was shown to be one hour of class room instruction, submitted to this Court, is evidence of the same.

(viii) That upon training, the SPOs are deployed in their local areas and work under police leadership, and that the District Superintendent of Police commands and controls these SPOs through SHO/SDOP/Addl SP; that in the past, 1200 SPOs have been discharged from service, for absence from duty and other indiscipline; that FIR's have been registered against 22 SPOs for criminal acts, and action taken as per law.

(ix) That "between the year 2005 to April 2011", 173 SPOs "have sacrificed their lives while performing their duties and 117 SPOs received injuries;" that certain provisions have been made to give relief and rehabilitation to SPOs next of kin in case of death and/or injuries, such as payment of ex-gratia.

(x) That in as much as most of the security personnel in Chattisgarh, engaged in fighting Naxalites, are from outside the State, lack of knowledge about local terrain, geography, culture and information regarding who is a Naxal sympathizer, a Naxal etc., is hampering the State; that local SPOs prove to be invaluable because of their local knowledge; and that as local officers on duty in relief camps etc., SPOs have been able to thwart more than a dozen Maoist attacks on relief camps and have also been instrumental in saving lives of regular troops.

(xi) That SPOs are "looked after as part of regular force and their welfare is taken care off by the State;" and that by way of examples and evidence of the same, may be cited the special relaxation given to victims of Naxal violence in recruitment of constables by Chattisgarh Government, and the fact that more than 700 SPOs who have passed the recruitment test have been appointed as constables.

(xii) That State of Chattisgarh has framed Special Police Officers (Appointment, Training & Conditions of Service) Regulatory Procedure 2011 dated 06-05-201. ("New Regulatory Procedures").

31. It should be noted at this stage itself that the said rules, in the New Regulatory Procedures, have been framed after this Court had heard the matter and reserved it for directions. It is claimed in the Written Note of May 16, 2011 that "the idea behind better

schedule of training for the SPOs is to make the SPOs more sensitized to the problems faced by local tribals. The SPOs also play a crucial role in bringing back alienated tribals back to the mainstream." It is also further argued in the written note that the "disbanding of SPOs as sought by the Petitioners would wreak havoc with law & order in the State of Chattisgarh" and that the State of Chattisgarh "intends to improve the training programme imparted to the SPOs so as to have an effective and efficient police force" and that the New Regulatory Procedures have been framed to achieve the same.

32. The State of Chattisgarh also placed great reliance on the affidavit submitted by the Union of India, dated 03-05-2011, with regard to the appointment, service and training of SPOs, and also the broad policy statements made by Union of India as to how the Left Wing Extremism ("LWE") ought to be tackled. To this effect, the affidavit of Union of India is briefly summarized below:

“(i) Police and Public order are State subjects, and the primary responsibility of State Government; however, in special cases the Central Government supplements the efforts of the State governments through the SRE scheme. The scheme it is said has been developed to help States facing acute security problems, including LWE, that at present it covers 83 districts in nine states, including Chattisgarh. Under the said SRE scheme, the Union of India reimburses certain security related activities by the State to enable "capacity building". It is also stated that the "honourarium" paid to SPOs varies from state to state, with varying percentages of reimbursement of actual paid honorarium. The highest amount reimbursed is Rs 3000 and the lower range is around Rs 1500.

(ii) The Union of India also categorically asserted, as far as appointment and functioning of SPOs are concerned, that its role is "limited to the approval of upper limit of the number of SPOs for each state for the purpose of reimbursement of the honourarium under the SRE scheme" and that the "appointment, training, deployment, role and responsibility" of the SPOs are determined by the State Governments concerned. The Union of India categorically states that the State Governments "may appoint SPOs in accordance with law irrespective of Government of India, Ministry of Home Affairs approval."

(iii) The Union of India asserted that "historically SPOs have played an important role in law and order and insurgency situations in different states". In this regard, in the context of Left Wing Extremism, the Union of India, in its affidavit also pointedly remarks that the "Peoples Liberation Guerilla Army... has raised and uses an auxiliary force known as 'Jan Militia' recruited from amongst the local people, who have knowledge of the local terrain, dialect, and also have the familiarity with the local population. The logic behind State Governments recruiting SPOs is to counter the advantage since the SPOs are also locally recruited and are familiar with the terrain, dialect and the local population" and that Government of India partially reimburses honorarium of around 70,046 SPOs appointed by different States under the SRE scheme.

33. It would be necessary to note at this stage that it is not clear from the affidavit of Union of India as to what stance it takes with respect to specific aspects of the use of SPOs in Chattisgarh - arming SPOs with arms, the nature of training provided to them, and the duties assigned to them. In a markedly vague manner, the Union of India's affidavit asserts that SPOs are "force multipliers" not explaining what is involved in such a concept, nor how "force" is multiplied, or not, depending on various duties of the SPOs, their training, and whether they carry arms or not. Without explaining that concept, the Union of India asserts that SPOs have played a useful role in collection of intelligence, protection of local inhabitants and ensuring security of property in disturbed areas. Giving examples of what Union of India claims to be indicia of the usefulness of SPOs, the Union of India makes three other assertions:

“(i) that the "assistance to District Police is crucial since they have a stable presence unlike Army/CPMFs which are withdrawn/relocated frequently”;

(ii) that the Union of India requires that the SPOs be treated, legally, "on par with ordinary Police officers in respect of matters such as powers, penalties, subordination etc;" and

(iii) that the "role of SPOs has great relevance in operational planning by the State Governments in counter insurgency and counter terrorism situations as well as in law and order situations."

34. In addition, it was also further asserted by the Union of India that "it is necessary to enhance the capacity of security forces in the affected States. Despite the many steps taken by the State Governments concerned, the CPI (Maoist) has indulged in indiscriminate and wanton violence." To this effect, the Union of India states that in the year 2010 a total of 1,003 people, comprising 718 civilians and 285 personnel of the security forces were killed by Naxalite groups all over India; and of the civilians killed, 323 were killed on being branded as "police informers."

35. For good measure, the Union of India ends its affidavit with the following:

"Government of India is committed to respecting the human rights of innocent citizens. The Government of India has always impressed upon the State Governments that while dealing with violence perpetrated by CPI (Maoist), the security forces should act with circumspection and restraint. The Government of India will issue advisories to the State Governments to recruit constables and SPOs after careful screening and verification, improve the standards of training, impart instruction on human rights; and direct the supervisory officers to enforce strict discipline and adherence to the law among constables and SPOs while conducting operations in affected areas."

Analysis:

36. At this stage it is necessary to note the main statutory provisions under which it is asserted that SPOs are appointed and which govern their role, duties etc. They are: Section 17 of Indian Police Act, 1861:

"Special Police-officers: When it shall appear that any unlawful assembly or riot or disturbance of the peace has taken place, or may be reasonably apprehended, and that the police force ordinarily employed for preventing the peace is not sufficient for its prevention and for the protection of the inhabitants and security of property in the place where such unlawful assembly or riot or disturbance of the peace has occurred, or it is apprehended, it shall be lawful for any police-officer, not below the rank of Inspector, to apply to the nearest Magistrate, to appoint so many of the residents of the neighborhood as such police-officer may require, to act as special police-officers for such time and within such limits as he shall deem necessary, and the Magistrate to whom such application is made shall, unless he sees cause to the contrary, comply with the application."

Section 18 of Indian Police Act, 1861:

"Powers of special police-officers: Every special police-officer so appointed shall have the same powers, privileges and protection and shall be liable to perform the same duties and shall be amenable to the same penalties and be subordinate to the same authorities as the ordinary officers of police."

Section 19 of Indian Police Act 1861:

"Refusal to serve as special police-officers: If any person, being appointed as special police-officers as aforesaid, shall without sufficient excuse, neglect or refuse to serve as such, or to obey such lawful order or direction as may be given to him for the performance of his duties, he shall be liable, upon conviction before a Magistrate, to a fine not exceeding fifty rupees for every such neglect, refusal or disobedience."

37. In the year 2007, the State of Chattisgarh enacted the Chattisgarh Police Act, 2007 and some relevant portions of the same are noted below. Section 1(2):

"It shall come into force from the date of its publication in the Official Gazette; Section 2(n): "Police Officer" means any member of the Police Force appointed under this Act or appointed before the commencement of this Act for the State and includes members of the Indian Police Service or members of any other police organization on deputation to the State Police, serving for the State and persons appointed under Section 9 or 10 of this Act; Section 2(k) "Prescribed means prescribed by rules; Section 2(o) "Rules" means the rules made under the Act; Section 9(1): Subject to Rules prescribed in this behalf, the Superintendent of Police may at any time, by an order in writing, appoint any person to act as a Special Police Officer for a period as

specified in the appointment order. Section 9(2): Every special police officer so appointed shall have the same powers, privileges and protection and shall be liable to perform the same duties and shall be amenable to the same penalties, and be subordinate to the same authorities, as the ordinary officers of the police.

Section 23: The following shall be the functions and responsibilities of a police officer:

(1) (a) To enforce the law, and to protect life, liberty, property, rights and dignity of the people;

(b)

(c)

(d)

To prevent crime and public nuisance;

To maintain public order;

To preserve internal security, prevent and control terrorist activities and to prevent breach of public peace;

(e)

(f)

(g)

To protect public property;

To detect offences and bring the offenders to justice;

To arrest persons whom he or she is legally authorized to arrest and for whose arrest sufficient grounds exist;

(h)

To help people in situations arising out of natural or man-made disasters, and to assist other agencies in relief measures;

(i) To facilitate orderly movement of people and vehicles, and to control and regulate traffic;

(j) To gather intelligence relating to matters affecting public peace and crime;

(k) To provide security to public authorities in discharging their functions;

(l) To perform all such duties and discharge such responsibilities as may be enjoined upon him by law or by an authority empowered to issue such directions under any law.

Section 24: Every police officer shall be considered to be always on duty, when employed as a police officer in the State or deployed outside the State.

Section 25: No police officer may engage in an employment or office whatsoever, other than his duties under this Act, unless expressly permitted to do so in writing by the State Government.

Section 50 (1) The State government may make rules for carrying out the purposes of this Act: Providing that existing State Police regulations shall continue to be in force till altered or repealed

Section 50(2) All rules made under this Act shall be laid before the State Legislature as soon as possible.

Section 53 (1) The Indian Police Act (no. 5 of 1861) in its applicability to the State of Chattisgarh is hereby repealed.

38. It is noted that neither Section 9(1) nor Section 9(2) specify the conditions or circumstances under which the Superintendent of Police may appoint "any person" as a "Special Police Officer". That would be a grant of discretion without any indicia or specification of limits, either as to the number of SPOs who could be appointed, their qualifications, their training or their duties. Conferment of such unguided & uncanalised power, by itself, would clearly be in the teeth of Article 14, unless the provisions are read down so as to save them from the vice of unconstitutionality. The provisions of Section 9(1) and 9(2) of CPA 2007 may be contrasted with Section 17 of IPA, a British era legislation, which sets forth the circumstances under which such appointments could be made, and the conditions to be fulfilled. No such description of circumstances has been made in Section 9(1) or Section 9(2) of CPA 2007. In the same manner, the functions and responsibilities as provided in Section 23 of CPA 2007, so far as they are construed as being the responsibilities that may be undertaken by SPOs, except those contained in Section 23(1)(a)(h) and Section 23(1)(a)(i) have also to be read down.

39. Even though the State of Chattisgarh has submitted its New Regulatory Procedures, notified, after this Court had heard the matter at length, we have reviewed the same. We are neither impressed by the contents of the New Regulatory Procedures, nor have such New Regulatory Procedures inspired any confidence that they will make the situation any better.

40. Some of the features of these new rules are summarized as follows. The circumstances specified for appointment of SPOs include the occurrence of "terrorist/extremist" incidents or apprehension that they may occur. With regard to eligibility, the rules state that, if other qualifications are same, "person having passed 5th class shall be given preference." Furthermore, the rules specify that the SPO should be "capable of assisting the police in prevention and control of the particular problem of the area." In as much as "terrorist/extremist" incidents and activities are included in the circumstances, i.e., the particular problem of the area, it is clear that SPOs are intended to be appointed with

the responsibilities of engaging in counter-insurgency activities. In point of fact, the language of the rules now indicate that their role need not be limited only to being spotters, and guides and the like, but may also include direct combat role with terrorists/extremists. Furthermore, training is to be given to those appointed as SPOs if and only if the Superintendent of the Police is "of the opinion that training is essential for him," and in any case training will be imparted only if the appointed person has been appointed for a minimum period of one year and is to be given firearms for self defence. Such training will be in "Arms, Human Rights and Law" for a minimum period of three months. The appointment is to be "totally temporary in nature", and the appointment may be terminated, "without giving any reason" by the Superintendent of Police. The SPOs are to only receive an honorarium and other benefits as "sanctioned by the State Government from time to time."

41. We must at this point also express our deepest dismay at the role of Union of India in these matters. Indeed it is true that policing, and law and order, are state subjects. However, for the Union of India to assert that its role, with respect to SPOs being appointed by the State of Chattisgarh, is limited only to approving the total number of SPOs, and the extent of reimbursement of "honourarium" paid to them, without issuing directions as to how those SPOs are to be recruited, trained and deployed for what purposes is an extremely erroneous interpretation of its constitutional responsibilities in these matters. Article 355 specifically states that "[I]t shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of the Constitution." The Constitution casts a positive obligation on the State to undertake all such necessary steps in order to protect the fundamental rights of all citizens, and in some cases even of non-citizens, and achieve for the people of India conditions in which their human dignity is protected and they are enabled to live in conditions of fraternity. Given the tasks and responsibilities that the Constitution places on the State, it is extremely dismaying that the Union of India, in response to a specific direction by this Court that it file an affidavit as to what its role is with respect to appointment of SPOs in Chattisgarh, claim that it only has the limited role as set forth in its affidavit. Even a cursory glance at the affidavit of the Union of India indicates that it was filed with the purpose of taking legal shelter of diminished responsibility, rather than exhibiting an appropriate degree of concern for the serious constitutional issues involved.

42. The fact of the matter is, it is the financial assistance being given by the Union that is enabling the State of Chattisgarh to appoint barely literate tribal youth as SPOs, and given firearms to undertake tasks that only members of the official and formal police force ought to be undertaking. Many thousands of them have been appointed, and they are being paid an "honourarium" of Rs 3000 per month, which the Union of India reimburses. That the Union of India has not seen it fit to evaluate the capacities of such tribal youth in undertaking such responsibilities in counter-insurgency activities against Maoists, the dangers that they will confront, and their other service conditions, such as the adequacy of their training, is clearly unconscionable. The stance of the Union of India, from its affidavit, has clearly been that it believes that its constitutional obligations extend only to the extent of fixing an upper limit on the number of SPOs engaged, on account of the impact on its purse, and that how such monies are used by the state governments, is not their concern. In its most recent statement to

this Court, much belated, the Union of India asserts that it will only issue "advisories to the State Governments to recruit constables and SPOs after careful screening and verification, improve the standards of training. Impart instruction on human rights." This leads us to conclude that the Union of India had abdicated its responsibilities in these matters previously. The fact that even now it sees its responsibilities as consisting of only issuing of advisories to the state governments does not lead to any confidence that the Union of India intends to take all the necessary steps in mitigating a vile social situation that it has, willy-nilly, played an important role in creating.

43. It is now clear to us, as alleged by the petitioners, that thousands of tribal youth are being appointed by the State of Chattisgarh, with the consent of the Union of India, to engage in armed conflict with the Maoists/Naxalites. The facts as stated in the affidavits of the State of Chattisgarh, and Union of India themselves reveal that, contrary to the assertions that the tribal SPOs are recruited only to engage in non-combatant roles such as those of spotters, guides, intelligence gatherers, and for maintenance of local law and order, they are actually involved in combat with the Maoists/Naxalites. The fact that both the State of Chattisgarh and the Union of India themselves acknowledge that the relief camps, and the remote villages, in which these SPOs are recruited and directed to work in, have been subject to thousands of attacks clearly indicates that in every such attack the SPOs may necessarily have to engage in pitched battles with the Maoists. This is also borne out by the fact that both the Union of India and State of Chattisgarh have acknowledged that many hundreds of civilians have been killed by Maoists/Naxalites by branding them as "police informants." This would obviously mean that SPOs would be amongst the first targets of the Maoists/Naxalites, and not be merely occasional incidental victims of violence or subject to Maoist/Naxalite attacks upon accidental or chance discovery or infrequent discovery of their true role. The new rules in fact make the situation even worse, for they specify that the person appointed as an SPO "should be capable of assisting the police in prevention and control of the particular problem of the area," which include terrorist/extremist activities. There is no specification that they will be used in only non-combatant roles or roles that do not place them in direct danger of attacks by extremists/terrorists.

44. It is also equally clear to us, as alleged by the petitioners, that the lives of thousands of tribal youth appointed as SPOs are placed in grave danger by virtue of the fact that they are employed in counter-insurgency activities against the Maoists/Naxalites in Chattisgarh. The fact that 173 of them have "sacrificed their lives" in this bloody battle, as cynically claimed by the State of Chattisgarh in its affidavit, is absolute proof of the same. It should be noted that while 538 police and CAPF personnel have been killed, out of a total strength of 40 battalions of regular security forces, in the operations against Maoists in Chattisgarh between 2004 and 2011, 173 SPOs i.e., young, and by and large functionally illiterate, tribals, have been killed in the same period. If one were to take, roughly, the strength of each battalion to be 1000 to 1200 personnel, the ratio of deaths of formal security personnel to total security personnel engaged is roughly 538 to about 45000 to 50000 personnel. That itself is a cause for concern, and a continuing tragedy. Given the fact that the strength of the SPOs till last year was only 3000 (and has now grown to 6500), the ratio of number of SPOs killed (173) to the strength of SPOs (3000 to 4000) is of a much higher order, and is unconscionable.

Such a higher rate of death, as opposed to what the formal security forces have suffered, can only imply that these SPOs are involved in front line battles, or that they are, by virtue of their roles as SPOs, being placed in much more dangerous circumstances, without adequate safety of numbers and strength that formal security forces would possess.

45. It is also equally clear to us that in this policy, of using local youth, jointly devised by the Union and the States facing Maoist insurgency, as implemented in the State of Chattisgarh, the young tribals have literally become cannon fodder in the killing fields of Dantewada and other districts of Chattisgarh. The training, that the State of Chattisgarh claims it is providing those youngsters with, in order to be a part of the counter-insurgency against one of the longest lasting insurgencies mounted internally, and indeed may also be the bloodiest, is clearly insufficient. Modern counter-insurgency requires use of sophisticated analytical tools, analysis of data, surveillance etc. According to various reports, and indeed the claims of the State itself, Maoists have been preparing themselves on more scientific lines, and gained access to sophisticated weaponry. That the State of Chattisgarh claims that these youngsters, with little or no formal education, are expected to learn the requisite range of analytical skills, legal concepts and other sophisticated aspects of knowledge, within a span of two months, and that such a training is sufficient for them to take part in counter-insurgency against the Maoists, is shocking.

46. The State of Chattisgarh has itself stated that in recruiting these tribal youths as SPOs "preference for those who have passed the fifth" standard has been given. This clearly implies that some, or many, who have been recruited as SPOs may not have even passed the fifth standard. Under the new rules, it is clear that the State of Chattisgarh would continue to recruit youngsters with such limited schooling. It is shocking that the State of Chattisgarh then turns around and states that it had expected such youngsters to learn, adequately, subjects such as IPC, CRPC, Evidence Act, Minors Act etc. Even more shockingly the State of Chattisgarh claims that the same was achieved in a matter of 24 periods of instruction of one hour each. Further, the State of Chattisgarh also claims that in an additional 12 periods, both the concepts of Human Rights and "other provisions of Indian Constitution" had been taught. Even more astoundingly, it claims that it also taught them scientific and forensic aids in policing in 6 periods. The State of Chattisgarh also claims, with regard to the new rules, that "the idea behind better schedule of training for SPOs is to make them more sensitized to the problems faced by local tribes." This supposed to be achieved by increasing the total duration of training by an extra month, for youngsters who may or may not have passed the fifth class.

47. We hold that these claims are simply lacking in any credibility. Even if one were to assume, for the sake of argument, that such lessons are actually imparted, it would be impossible for any reasonable person to accept that tribal youngsters, who may, or may not, have passed the fifth standard, would possess the necessary scholastic abilities to read, appreciate and understand the subjects being taught to them, and gain the appropriate skills to be engaged in counter-insurgency movements against the Maoists.

48. The State of Chattisgarh accepts the fact that many, and for all we know most, of these young tribals being appointed as SPOs have been provided firearms and other accoutrements necessary to bear and use such firearms, and will continue to be so provided in the future under the new rules. While the State of Chattisgarh claims that they are being provided such arms only for self-defence, it is clear that given the levels of education that these tribal youth are expected to have had, and the training they are being provided, they would simply not possess the analytical and cognitive skills to read and understand the complex socio-legal dimensions that inform the concept of self-defence, and the potential legal liabilities, including serious criminal charges, in the event that the firearms are used in a manner that is not consonant with the concept of self-defence. Even if we were to assume, purely for the sake of argument, that these youngsters were being engaged as gatherers of intelligence or secret informants, the fact that by assuming such a role they are potentially placed in an endangered position vis-a-vis attacks by Maoists, they are obviously being put in volatile situations in which the distinctions between self-defence and unwarranted firing of a firearm may be very thin and requiring a high level of discretionary judgment. Given their educational levels it is obvious that they simply will not have the skills to make such judgments; and further because of low educational levels, the training being provided to them will not develop such skills.

49. The State of Chattisgarh claims that they are only employing those tribal youth who volunteer for such responsibilities. It also claims that many of the youth who are coming forward are motivated to do so because they or their families have been victims of Naxal violence or want to defend their hearth and home from attacks by Naxals. We simply fail to see how, even assuming that the claims by State of Chattisgarh to be true, such factors would lessen the moral culpability of the State of Chattisgarh, or make the situation less problematic in terms of human rights violations of the youngsters being so appointed as SPOs.

50. First and foremost given that their educational levels are so low, we cannot, under any conditions of reasonableness, assume that they even understand the implications of engaging in counter-insurgency activities bearing arms, ostensibly for self-defence, and being subject to all the disciplinary codes and criminal liabilities that may arise on account of their actions. Under modern jurisprudence, we would have to estimate the degree of free will and volition, with due respect to, and in the context of, the complex concepts they are being expected to grasp, including whether the training they are being provided is adequate or not for the tasks they are to perform. We do not find appropriate conditions to infer informed consent by such youngsters being appointed as SPOs. Consequently we will not assume that these youngsters, assuming that they are over the age of eighteen, have decided to join as SPOs of their own free will and volition.

51. Furthermore, the fact that many of those youngsters maybe actuated by feelings of revenge, and reasonably expected to have a lot of anger, would militate against using such youngsters in counter-insurgency activities, and entrusted with the responsibilities that they are being expected to discharge. In the first instance, it can be easily appreciated that given the increasing sophistication of methods used by the Maoists, counter-insurgency activities

would require a cool and dispassionate head, and demeanour to be able to analyze the current and future course of actions by them. Feelings of rage, and of hatred would hinder the development of such a dispassionate analysis. Secondly, it can also be easily appreciated that such feelings of rage, and hatred, can easily make an individual highly suspicious of everyone. If one of the essential tasks of such tribal youth as SPOs is the identification of Maoists, or their sympathizers, their own mental make up, in all probability would or could affect the degree of accuracy with which they could make such identification. Local enmities, normal social conflict, and even assertion of individuality by others against over-bearing attitude of such SPOs, could be cause to brand persons unrelated to Maoist activities as Maoists, or Maoist sympathizers. This in turn would almost certainly vitiate the atmosphere in those villages, lead to situations of grave violation of human rights of innocent people, driving even more to take up arms against the state.

52. Many of these tribal youngsters, on account of the violence perpetrated against them, or their kith and kin and others in the society in which they live, have already been dehumanized. To have feelings of deep rage, and hatred, and to suffer from the same is a continuation of the condition of dehumanization. The role of a responsible society, and those who claim to be concerned of their welfare, which the State is expected to under our Constitution, ought to be one of creating circumstances in which they could come back or at least tread the path towards normalcy, and a mitigation of their rage, hurt, and desires for vengeance. To use such feelings, and to direct them into counter-insurgency activities, in which those youngsters are placed in grave danger of their lives, runs contrary to the norms of a nurturing society. That some misguided policy makers strenuously advocate this as an opportunity to use such dehumanised sensibilities in the fight against Maoists ought to be a matter of gravest constitutional concerns and deserving of the severest constitutional opprobrium.

53. It is abundantly clear, from the affidavits submitted by the State of Chattisgarh, and by the Union of India, that one of the primary motives in employing tribal youth as SPOs is to make up for the lack of adequate formal security forces on the ground. The situation, as we have said before, has been created, in large part by the socioeconomic policies followed by the State. The policy of privatization has also meant that the State has incapacitated itself, actually and ideologically, from devoting adequate financial resources in building the capacity to control the social unrest that has been unleashed. To use those tribal youngsters, as SPOs to participate in counter-insurgency actions against Maoists, even though they do not have the necessary levels of education and capacities to learn the necessary skills, analytical tools and gain knowledge to engage in the such activities and the dangers that they are subjected to, clearly indicates that issues of finance have overridden other considerations such as effectiveness of such SPOs and of constitutional values.

54. The State of Chattisgarh claims that in providing such "employment" they are creating livelihoods, and consequently promoting the values enshrined in Article 21. We simply cannot comprehend how involving ill equipped, barely literate youngsters in counter insurgency activities, wherein their lives are placed in danger could be conceived under the rubric of livelihood. Such a conception, and the acts of using such youngsters in counter-

insurgency activities, is necessarily revelatory of disrespect for the lives of the tribal youth, and defiling of their human dignity.

55. It is clear to us, and indeed as asserted by the State of Chattisgarh, that these tribal youngsters, appointed as SPOs, are being given firearms on the ground that SPOs are treated "legally" as full fledged members of the police force, and are expected to perform the duties, bear the liabilities, and be subject to the same disciplinary code. These duties and responsibilities includes the duty of putting their lives on the line. Yet, the Union of India, and the State of Chattisgarh, believe that all that they need to be paid is an "honorarium," and this they claim is a part of their endeavour to promote livelihoods amongst tribal youth, pursuant to Article 21. We simply fail to see how Article 14 is not violated in as much as these SPOs are expected to perform all the duties of police officers, be subject to all the liabilities and disciplinary codes, as members of the regular police force, and in fact place their lives on the line, plausibly even to a greater extent than the members of the regular security forces, and yet be paid only an "honorarium".

56. The appointment of these tribal youngsters as SPOs to engage in counter-insurgency activities is temporary in nature. In fact the appointment for one year, and extendable only in increments of a year at a time, can only be described as of short duration. Under the new rules, freshly minted by the State of Chattisgarh, they can be dismissed by the Superintendent of Police without giving any reasons whatsoever. The temporary nature of such appointments immediately raises serious concerns. As acknowledged by the State of Chattisgarh, and the Union of India, the Maoist activities in Chattisgarh have been going on from 1980's, and it seems have become more intense over the past one decade. The State of Chattisgarh also acknowledges that it has to give fire-arms to these tribal youngsters appointed as SPOs because they face grave danger, to their lives, from the Maoists. In fact, Maoists are said to kill even ordinary civilians after branding them as "police informants". Obviously, in such circumstances, it would only be reasonable to conclude that these tribal youth appointed as SPOs, and known to work as informants about who is a Maoist or a Maoist supporter, spotters, guides and providers of terrain knowledge, would become special targets of the Maoists. The State of Chattisgarh reveals no ideas as to how it expects these youngsters to protect themselves, or what special protections it offers, after serving as SPOs in the counter-insurgency efforts against the Maoists. Obviously, these youngsters would have to hand back their firearms to the police upon the expiry of their term. This would mean that these youngsters would become sitting ducks, to be picked off by Maoists or whoever may find them inconvenient. The State of Chattisgarh has also revealed that 1200 of SPOs appointed so far have been dismissed for indiscipline or dereliction of duties. That is an extraordinarily high number, given that the total SPOs appointed in the State of Chattisgarh until last year were only 3000, and the number now stands at 6500. The fact that such indiscipline, or dereliction of duties, has been the cause for dismissal from service of anywhere from 20% to 40% of the recruits has to be taken as a clear testimony of the fact that the entire selection policies, practices, and in fact the criteria for selection are themselves wrong. The consequence of continuation of such policies would be that an inordinate number of such tribal youth, after becoming marked for death by Maoists/Naxalites the very instant they are

appointed as SPOs, would be left out in the lurch, with their lives endangered, after their temporary appointment as SPOs is over.

57. The above cannot be treated as idle speculations. The very facts and circumstances revealed by the State of Chattisgarh leads us to the above as an inescapable conclusion. However, this tragic story does not end here either. It begins to get far worse, because it implicates grave danger to the social fabric in those regions in which these SPOs are engaged to work in anti-Maoist counter insurgency activities.

58. We specifically, and repeatedly, asked the State of Chattisgarh, and the Union of India as to how, and in what manner they would take back the firearms given to thousands of youngsters. No answer has been given so far. If force is used to collect such firearms back, without those youngsters being given a credible answer with respect to their questions regarding their safety, in terms of their lives, after their appointment ends, it is entirely conceivable that those youngsters refuse to return them. Consequently, we would then have a large number of armed youngsters, running scared for their lives, and in violation of the law. It is entirely conceivable that they would then turn against the State, or at least defend themselves using those firearms, against the security forces themselves; and for their livelihood, and subsistence, they could become roving groups of armed men endangering the society, and the people in those areas, as a third front.

59. Given the number of civil society groups, and human rights activists, who have repeatedly been claiming that the appointment of tribal youths as SPOs, sometimes called Koya Commandos, or the Salwa Judum, has led to increasing human rights violations, and further given that NHRC itself has found that many instances of looting, arson, and violence can be attributed to the SPOs and the security forces, we cannot but apprehend that such incidents are on account of the lack of control, and in fact the lack of ability and moral authority to control, the activities of the SPOs. The appointment of tribal youth as SPOs, who are barely literate, for temporary periods, and armed with firearms, has endangered and will necessarily endanger the human rights of others in the society.

60. In light of the above, we hold that both Article 21 and Article 14 of the Constitution of India have been violated, and will continue to be violated, by the appointment of tribal youth, with very little education, as SPOs engaged in counter-insurgency activities. The lack of adequate prior education incapacitates them with respect to acquisition of skills, knowledge and analytical tools to function effectively as SPOs engaged in any manner in counter-insurgency activities against the Maoists.

61. Article 14 is violated because subjecting such youngsters to the same levels of dangers as members of the regular force who have better educational backgrounds, receive better training, and because of better educational backgrounds possess a better capacity to benefit from training that is appropriate for the duties to be performed in counter insurgency activities, would be to treat unequal as equals. Moreover, in as much as such youngsters, with such low educational qualifications and the consequent scholastic inabilities to benefit from appropriate training, can also not be expected to be effective in engaging in counter-

insurgency activities, the policy of employing such youngsters as SPOs engaged in counter-insurgency activities is irrational, arbitrary and capricious.

62. Article 21 is violated because, notwithstanding the claimed volition on the part of these youngsters to appointment as SPOs engaged in counter-insurgency activities, youngsters with such low educational qualifications cannot be expected to understand the dangers that they are likely to face, the skills needed to face such dangers, and the requirements of the necessary judgment while discharging such responsibilities. Further, because of their low levels of educational achievements, they will also not be in a position to benefit from an appropriately designed training program, that is commensurate with the kinds of duties, liabilities, disciplinary code and dangers that they face, to their lives and health. Consequently, appointing such youngsters as SPOs with duties, that would involve any counter-insurgency activities against the Maoists, even if it were claimed that they have been put through rigorous training, would be to endanger their lives. This Court has observed in *Olga Tellis v. Bombay Municipal Corporation* ¹⁰that:

" "Life", as observed by Field J., in *Munn v. Illinois* means something more than mere animal existence, and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed."

63. Certainly, within the ambit of all those "limits and faculties by which life is enjoyed" also lies respect for dignity of a human being, irrespective of whether he or she is poor, illiterate, less educated, and less capable of exercising proper choice. The State, has been found to have the positive obligation, pursuant to Article 21, to necessarily undertake those steps that would enhance human dignity, and enable the individual to lead a life of at least some dignity. The Preamble of our Constitution affirms as the goal of our nation, the promotion of human dignity. The actions of the State, in appointing barely literate youngsters, as SPOs engaged in counter-insurgency activities, of any kind, against the Maoists, who are incapable, on account of low educational achievements, of learning all the skills, knowledge and analytical tools to perform such a role, and thereby endangering their lives, is necessarily a denigration of their dignity as human beings.

64. To employ such ill equipped youngsters as SPOs engaged in counterinsurgency activities, including the tasks of identifying Maoists and non-Maoists, and equipping them with firearms, would endanger the lives of others in the society. That would be a violation of Article 21 rights of a vast number of people in the society.

65. That they are paid only an "honorarium", and appointed only for temporary periods, are further violations of Article 14 and Article 21. We have already discussed above, as to how payment of honorarium to these youngsters, even though they are expected to perform the all of the duties of regular police officers, and place themselves in dangerous situations, equal to or even worse than what regular police officers face, would be a violation of Article 14. To pay only an honorarium to those youngsters, even though they place themselves in equal danger, and in fact even more, than regular police officers, is to denigrate the value of their lives. It can only be justified by a cynical, and indeed an inhuman attitude, that places little or

no value on the lives of such youngsters. Further, given the poverty of those youngsters, and the feelings of rage, and desire for revenge that many suffer from, on account of their previous victimization, in a brutal social order, to engage them in activities that endanger their lives, and exploit their dehumanized sensibilities, is to violate the dignity of human life, and humanity.

66. It has also been analysed above as to how the temporary nature of employment of these youngsters, as SPOs engaged in counter-insurgency activities of any kind, endangers their lives, subjects them to dangers from Maoists even after they have been disengaged from duties of such appointment, and further places the entire society, and individuals and groups in the society, at risk. They are all clearly violations of Article 21.

67. It is in light of the above, that we proceed to pass appropriate orders. However, there are a few important matters that we necessarily have to address ourselves to at this stage. This necessity arises on account of the fact that the State of Chattisgarh, and the Union of India, claim that employing such youngsters as SPOs engaged in counter-insurgency activities is vital, and necessary to provide security to the people affected by Maoist violence, and to fight the threat of Maoist extremism.

68. Indeed, we recognize that the State faces many serious problems on account of Maoist/Naxalite violence. Notwithstanding the fact that there may be social and economic circumstances, and certain policies followed by the State itself, leading to emergence of extremist violence, we cannot condone it. The attempt to overthrow the State itself and kill its agents, and perpetrate violence against innocent civilians, is destructive of an ordered life. The State necessarily has the obligation, moral and constitutional, to combat such extremism, and provide security to the people of the country. This, as we explained is a primordial necessity. When the judiciary strikes down state policies, designed to combat terrorism and extremism, we do not seek to interfere in security considerations, for which the expertise and responsibility lie with the executive, directed and controlled by the legislature. Judiciary intervenes in such matters in order to safeguard constitutional values and goals, and fundamental rights such as equality, and right to life. Indeed, such expertise and responsibilities vest in the judiciary. In a recent judgment by a constitutional bench, *G.V.K Industries v. ITO*¹¹ this Court observed:

"Our Constitution charges the various organs of the state with affirmative responsibilities of protecting the interests of, the welfare of and the security of the nation.... powers are granted to enable the accomplishment of the goals of the nation. The powers of judicial review are granted in order to ensure that such power is being used within the bounds specified in the Constitution. Consequently, it is imperative that the powers so granted to various organs of the state are not restricted impermissibly by judicial fiat such that it leads to inabilities of the organs of the government in discharging their constitutional responsibilities. Powers that have been granted, and implied by, and borne by the Constitutional text have to be perforce admitted. Nevertheless, the very essence of constitutionalism is also that no organ of the state may arrogate to itself powers beyond what is specified in the Constitution.

Walking on that razors edge is the duty of the judiciary. Judicial restraint is necessary in dealing with the powers of another coordinate branch of the government; but restraint cannot imply abdication of the responsibility of walking on that edge."

69. As we heard the instant matters, we were acutely aware of the need to walk on that razors edge. In arriving at the conclusions we have, we were guided by the facts, and constitutional values. The primordial value is that it is the responsibility of every organ of the State to function within the four corners of constitutional responsibility. That is the ultimate rule of law.

70. It is true that terrorism and/or extremism plagues many countries, and India, unfortunately and tragically, has been subject to it for many decades. The fight against terrorism and/or extremism cannot be effectuated by constitutional democracies by whatever means that are deemed to be efficient. Efficiency is not the sole arbiter of all values, and goals that constitutional democracies seek to be guided by, and achieve. Means which may be deemed to be efficient in combating some immediate or specific problem, may cause damage to other constitutional goals, and indeed may also be detrimental to the quest to solve the issues that led to the problems themselves. Consequently, all efficient means, if indeed they are efficient, are not legal means, supported by constitutional frameworks. As Aharon Barak, the former President of the Supreme Court of Israel, while discussing the war on terrorism, wrote in his opinion in the case of *Almadani v. Ministry of Defense* ¹²opinion:

"....This combat is not taking place in a normative void.... The saying, "When the canons roar, the Muses are silent," is incorrect. Cicero's aphorism that laws are silent during war does not reflect modern reality. The foundations of this approach is not only pragmatic consequence of a political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the aggression of terrorists rising up against it. The state fights in the name of the law, and in the name of upholding the law. The terrorists fight against the law, and exploit its violation. The war against terror is also the law's war against those who rise up against it."

71. As we remarked earlier, the fight against Maoist/Naxalite violence cannot be conducted purely as a mere law and order problem to be confronted by whatever means the State can muster. The primordial problem lies deep within the socio-economic policies pursued by the State on a society that was already endemically, and horrifically, suffering from gross inequalities. Consequently, the fight against Maoists/Naxalites is no less a fight for moral, constitutional and legal authority over the minds and hearts of our people. Our constitution provides the gridlines within which the State is to act, both to assert such authority, and also to initiate, nurture and sustain such authority. To transgress those gridlines is to act unlawfully, imperiling the moral and legal authority of the State and the Constitution. We, in this Court, are not unaware of the gravity that extremist activities pose

¹² H.C. 3451/02, 56(3) P.D., also cited in Aharon Barak: "The Judge in a Democracy" (Princeton University

Press, 2003). to the citizens, and to the State. However, our Constitution, encoding eons of human wisdom, also warns us that ends do not justify all means, and that an essential and integral part of the ends to which the collective power of the people may be used to achieve has to necessarily keep the means of exercise of State power within check and constitutional bounds. To act otherwise is to act unlawfully, and as Philip Bobbitt warns, in "Terror and Consent - *The Wars for the Twenty First Century*¹³" , "if we act lawlessly, we throw away the gains of effective action." Laws cannot remain silent when the canon's roar.

72. The response of law, to unlawful activities such as those indulged in by extremists, especially where they find their genesis in social disaffection on account of socio-economic and political conditions has to be rational within the borders of constitutional permissibility. This necessarily implies a two-fold path: (i) undertaking all those necessary socially, economically and politically remedial policies that lessen social disaffection giving rise to such extremist violence; and (ii) developing a well trained, and professional law enforcement capacities and forces that function within the limits of constitutional action.

73. The creation of a cadre like groups of SPOs, temporarily employed and paid an honorarium, out of uneducated or undereducated tribal youth, many of who are also informed by feelings of rage, hatred and a desire for revenge, to combat Maoist/Naxalite activities runs counter to both those prescriptions. We have dealt with the same extensively hereinabove. We need to add one more necessary observation. It is obvious that the State is using the engagement of SPOs, on allegedly temporary basis and by paying "honoraria", to overcome the shortages and shortcomings of currently available capacities and forces within the formal policing structures. The need itself is clearly a long-run need. Consequently, such actions of the State may be an abdication of constitutional responsibilities to provide appropriate security to citizens, by having an appropriately trained professional police force of sufficient numbers and properly equipped on a permanent basis. These are essential state functions, and cannot be divested or discharged through the creation of temporary cadres with varying degrees of state control. They necessarily have to be delivered by forces that are and personnel who are completely under the control of the State, permanent in nature, and appropriately trained to discharge their duties within the four corners of constitutional permissibility. The conditions of employment of such personnel also have to hew to constitutional limitations. The instant matters, in the case of SPOs in Chattisgarh, represent an extreme form of transgression of constitutional boundaries.

74. Both the Union of India, and the State of Chattisgarh, have sought to rationalize the use of SPOs in Chattisgarh, in the mode and manner discussed at length above, on the ground that they are effective in combating Maoist/Naxalite activities and violence, and that they are "force multipliers." As we have pointed out hereinabove, the adverse effects on society, both current and prospective, are horrific. Such policies by the State violate both Article 14 and Article 21, of those being employed as SPOs in Chattisgarh and used in counter-insurgency measures against Maoists/Naxalites, as well as of citizenry living in those areas. The effectiveness of the force ought not to be, and cannot be, the sole yardstick to judge

¹³ *Penguin Books (Allen Lane) (2008).*

constitutional permissibility. Whether SPOs have been "effective" against Maoist/Naxalite activities in Chattisgarh it would seem to be a dubious, if not a debunked, proposition given the state of affairs in Chattisgarh. Even if we were to grant, for the sake of argument, that indeed the SPOs were effective against Maoists/Naxalites, the doubtful gains are accruing only by the incurrance of a massive loss of fealty to the Constitution, and damage to the social order. The "force" as claimed by the State, in the instant matters, is inexorably leading to the loss of the force of the Constitution. Constitutional fealty does not, cannot and ought not to permit either the use of such a force or its multiplication. Constitutional propriety is not a matter of throwing around arbitrarily selected, and inanely used, phrases such as "force multipliers." Constitutional adjudication, and protection of civil liberties, by this Court is a far, far more sacred a duty to be swayed by such arguments and justifications. Order:

75. We order that:

“(i) The State of Chattisgarh immediately cease and desist from using SPOs in any manner or form in any activities, directly or indirectly, aimed at controlling, countering, mitigating or otherwise eliminating Maoist/Naxalite activities in the State of Chattisgarh;

(ii) The Union of India to cease and desist, forthwith, from using any of its funds in supporting, directly or indirectly the recruitment of SPOs for the purposes of engaging in any form of counter-insurgency activities against Maoist/Naxalite groups;

(iii) The State of Chattisgarh shall forthwith make every effort to recall all firearms issued to any of the SPOs, whether current or former, along with any and all accoutrements and accessories issued to use such firearms. The word firearm as used shall include any and all forms of guns, rifles, launchers etc., of whatever caliber;

(iv) The State of Chattisgarh shall forthwith make arrangements to provide appropriate security, and undertake such measures as are necessary, and within bounds of constitutional permissibility, to protect the lives of those who had been employed as SPOs previously, or who had been given any initial orders of selection or appointment, from any and all forces, including but not limited to Maoists/Naxalites; and

(v) The State of Chattisgarh shall take all appropriate measures to prevent the operation of any group, including but not limited to Salwa Judum and Koya Commandos, that in any manner or form seek to take law into private hands, act unconstitutionally or otherwise violate the human rights of any person. The measures to be taken by the State of Chattisgarh shall include, but not be limited to, investigation of all previously inappropriately or incompletely investigated instances of alleged criminal activities of Salwa Judum, or those popularly known as Koya Commandos, filing of appropriate FIR's and diligent prosecution.”

76. In addition to the above, we hold that appointment of SPOs to perform any of the duties of regular police officers, other than those specified in Section 23(1)(h) and Section 23(1)(i) of Chattisgarh Police Act, 2007, to be unconstitutional. We further hold that tribal youth, who had been previously engaged as SPOs in counter-insurgency activities, in whatever form, against Maoists/Naxalites may be employed as SPOs to perform duties limited to those enumerated in Sections 23(1)(h) and 23(1)(i) of CPA 2007, provided that they have not engaged in any activities, whether as a part of their duties as SPOs engaged in any form of counter-insurgency activities against Maoists/Naxalites, and Left Wing Extremism or in their own individual or private capacities, that may be deemed to be violations of human rights of other individuals or violations of any disciplinary code or criminal laws that they were lawfully subject to. IV Matters relating to allegations by Swami Agnivesh, and alleged incidents in March 2011.

77. We now turn our attention to the allegations made by Swami Agnivesh, with regard to the incidents of violence perpetrated against and in the villages of Morpalli, Tadmetla and Timmapuram, as well as incidents of violence allegedly perpetrated by people, including SPOs, Koya Commandos, and/or members of Salwa Judum, against Swami Agnivesh and others travelling with him in March 2011 to provide humanitarian aid to victims of violence in the said villages.

78. In this regard we note the affidavit filed by the State of Chattisgarh in response to the above. We note with dismay that the affidavit appears to be nothing more than an attempt at self-justification and rationalization, rather than an acknowledgment of the constitutional responsibility to take such instances of violence seriously. The affidavit of the State of Chattisgarh is itself an admission that violent incidents had occurred in the above named three villages, and also that incidents of violence had been perpetrated by various people against Swami Agnivesh and his companions. We note that the State of Chattisgarh has offered to constitute an inquiry commission, headed by a sitting or a retired judge of the High Court. However, we are of the opinion that these measures are inadequate, and given the situation in Chattisgarh, as extensively discussed by us, unlikely to lead to any satisfactory result under the law. This Court had previously noted that inquiry commissions, such as the one offered by the State of Chattisgarh, may at best lead to prevention of such incidents in the future. They however do not fulfill the requirement of the law: that crimes against citizens be fully investigated and those engaging in criminal activities be punished by law. (See Sanjiv Kumar v State of Haryana Consequently, we are constrained to order as below.
Order:

79. We order the Central Bureau of Investigation to immediately take over the investigation of, and taking appropriate legal actions against all individuals responsible for:

“(i) The incidents of violence alleged to have occurred, in March 2011, in the three villages, Morpalli, Tadmetla and Timmapuram, all located in the Dantewada District or its neighboring areas;

(ii) The incidents of violence alleged to have been committed against Swami Agnivesh, and his companions, during their visit to State of Chattisgarh in March 2011.”

80. We further direct the Central Bureau of Investigation to submit its preliminary status report within six weeks from today.

We also further direct, the State of Chattisgarh and the Union of India, to submit compliance reports with respect to all the orders and directions issued today within six weeks from today.

81. List for further directions in the first week of September 2011.

Judgment Referred.

¹⁰ (1985) 3 SCC 545

¹¹ (2011) 4 SCC 0036