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A COMPARATIVE STUDY AND CRITICAL ANALYSIS OF ARMED FORCES (SPECIAL POWERS) ACT, 1958

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ABSTRACT

The Armed Forces (Special Powers) Act is a draconian act which not only gives indiscriminate power to the government to declare an area a "disturbed area" but also gives the armed forces the power to take the lives of innocent civilians on a mere doubt even without considering their human rights.

Armed Forces (Special Powers) Act is a collective term for Armed Forces (Jammu & Kashmir) Special Powers Act, 1990, Armed Forces (Punjab & Chandigarh) Special Power Act 1983 and Armed Forces (Special Powers) Act, 1958. This paper deals with the Armed Forces (Special Powers) Act, 1958 (hereinafter referred to as "AFSPA"), which was passed by the Indian Parliament to grant extraordinary authority to the armed forces as well as legal immunity for special army officers and jawans who act in unrest. The paper includes the historical background as to why the act was introduced and then brought into enforcement. To deny people their human rights is to challenge their very humanity and this is what AFSPA does as it violates not only art. 21 of the Constitution of India but also the overall human rights of an individual. A comparison between AFSPA and various other Indian legislations like Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and others show the tyranny of the provisions of AFSPA. It is also seen through this paper that AFSPA violates International humanitarian law too. However, constitutionality of AFSPA has been upheld by the Hon'ble Supreme Court in the case of Naga People's Movement of Human Rights v. Union of India¹ in which the Hon'ble Apex Court has laid certain instructions which need to be strictly followed by the armed forces while carrying out the provisions of AFSPA.

Keywords: AFSPA; Disturbed area; Armed forces; Indiscrimination; Human Rights.

COMPARATIVE STUDY AND CRITICAL ANALYSIS OF ARMED FORCES (SPECIAL POWERS) ACT, 1958

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INTRODUCTION

One of the harshest pieces of legislation the Indian Parliament has ever passed is the AFSPA. Once an area is deemed to be disturbed, it grants the security forces unlimited and unreported authority to carry out their actions. Even a non-commissioned officer has the authority to shoot someone to death if they have even the slightest suspicion that doing so is required to "maintain the public order".

The AFSPA grants the military broad authority to fire, make arrests, and conduct searches, all in name of "aiding civil power." In 1972, it was revised to include all seven states in India's north-eastern area. Assam and Manipur in the northeastern states were the only states to whom it first applied. Numerous incidences of arbitrary detention, torture, rape, and looting by security forces have occurred as a result of the application of the AFSPA. The Indian government is attempting to justify this legislation by arguing that it is necessary to prevent the North

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Eastern states from leaving the Indian Union.³ Prior to the creation of the Indian Union, there is a powerful self-determination movement. As the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990, it was expanded to include the state of Jammu & Kashmir in July 1990. The Armed Forces (Special Powers) Ordinance of 1942 has been expanded by this.

HISTORICAL BACKGROUND

South Asian countries, along with India saw a period of socio-economic restructuring after de-colonization. India declared herself to be a Democratic Secular Republic whence it sought development and economic progress. The result was a Nehruvian Welfare State. It was founded on an extremely security-focused strategy on its perimeter, where a population lived that was to be excluded from this vision and only to be included as the "other" on the terms of the "centres" when it saw appropriate. Thus, a severe militarization could be used to highlight the fundamental connection between advancement, modernity, and exclusion. This became clear with passing of the AFSPA.

One of the most contentious regions in South Asia is North-East India. Only a few of the many diverse types of conflicts that have taken place include armed opposition to the Indian state, movements for independent federal states and autonomous territories based on ethnicity, opposition to extractive industries, and demands for increased funding from the federal government.

Early in the 19th century, British colonists arrived to halt Burmese expansion into what are now Manipur and Assam. The Manipur King Gambhir Singh assisted the British in putting an end to Burmese imperialism, and the Treaty of Yandabo was signed in 1828 as a result.⁴ Assam joined British India as a result of this treaty, and the British then continued to have an influence on regional politics. This improper influence ultimately sparked the brutal Anglo-Manipur War of 1891⁵. Although they acknowledged the staunch independence of these people, the British repeated their position and continued to rule only through the King.

When the Japanese tried to invade the Indian subcontinent through this narrow corridor during the Second World War, the Indian military forces became aware of the area's strategic importance. The disgruntled Japanese were forced to withdraw from the Imphal and Kohima fronts after Hiroshima and Nagasaki were bombed, but the Government of India continued to place a high priority on maintaining control over the area. The end of the war resulted in a sudden change in the political climate of the world. A buffer state made up of the Naga Hills, Mikir Hills, Sandiya Area, Balipara Tract, Manipur, Lushai Hills, Khasi and Hills in Assam, as well as the Chin Hills and the hills in northern Burma, was to be established as the British prepared to leave Asia. There was uncertainty and turmoil regarding how to fill the political hole that the British would leave behind as they prepared to go. According to the strategic requirements, the different areas were ultimately partitioned among Nehru's India, Jinnah's Pakistan, Aung Sang's Burma, and Mao's China. As expected, there were considerable disagreements among the rising Asian powers regarding who should control certain territories: India and Burma over the Kabow Valley, India and East Pakistan over the Chittagong Hill Tracts, and India and China over the North-East Frontier Agency, also known as "NEFA" and the location of modern-day Arunachal Pradesh.⁶

The problems were ultimately resolved to the new rulers' satisfaction in far-off cities after compromise. Systematically left out of the consultation process were those who had lived in the hills and valleys for thousands

³ Aditi Jaiswal, "The Draconian AFSPA, 1958", *4 International Journal of Law Management and Humanities*, 2478 - 2493 (2021).

⁴ South Asian Human Rights Documentation Centre, "Armed Forces Special Powers Act: A study in National Security tyranny", (November, 1995).

⁵ *Ibid.*

⁶ *Ibid.*

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of years. The current "Seven sisters" state of the North-East is made up of the Indian portion of the British colonial cake in the area.

Over time, the British-introduced western education and fresh ideas made it clear that the traditional ways needed to make way for the modern. Native American movements got involved as the populace sought a new social and political structure. For instance, in the historic Kingdom of Manipur, a powerful populist democratic movement against feudalism and colonialism was raging under the charismatic leadership of Hajim Irabot.⁷ The Manipur Constitution Act of 1947 was passed after the British left, reestablishing the Kingdom of Manipur as a constitutional monarchy.⁸ In 1949, Manipur was placed under the control of a Chief Commissioner after the King was coerced into signing a merger. The Indian government's "carrot-and-stick" strategy was successful in quelling all dissent.⁹

In addition to this, the Naga Movement of 1929, where the Naga National Council (NNC) proclaimed Nagaland's independence led to the arrest of several Naga leaders because of which there was an armed conflict that resulted in numerous deaths on both sides. AFSPA was a result to this tension that was created.

Similar to this, the rigged elections of 1987 in the State of Jammu and Kashmir, where the leaders of the Muslim United Front (henceforth referred to as the "MUF") had to deal with a phoney defeat at the hands of major political parties, prompted violent tactics of secession from India. The situation became tense as a result of the significant militant insurrection and the widespread infiltration of militants across international borders. In order to suppress the movement, the central Government introduced Armed Forces (Jammu & Kashmir) Special Powers Act, 1990 in 1990.

CURRENT AREAS THAT COME UNDER AFSPA

Assam: The AFSPA was first implemented in Assam in 1958. On October 15, 2022 AFSPA was withdrawn from one district of Assam i.e. West Karbi Anglong. Thereafter, presently AFSPA is applicable in 8 districts and 1 sub-division – Lakhimpur of Cachher district in Assam.¹⁰

Meghalaya: AFSPA was completely withdrawn from Meghalaya in 2018 and is not applicable there now.

Arunachal Pradesh: The AFSPA is in effect in three districts and parts of Namsai and Mahadevpur in the state of Arunachal Pradesh.¹¹

Mizoram: AFSPA in Mizoram was withdrawn in 1980s and after that it has not been applied in the state.

Nagaland: AFSPA is applicable in 9 districts of Nagaland. Other than that it applies to certain areas of Khuzama, Kohima North, Kohima South, Zubza and others.¹²

Tripura: In 1997, Tripura came under the AFSPA. The law was repealed in the state in 2015.

Manipur: AFSPA extends to the whole state of Manipur except areas falling under jurisdiction of 15 Police Stations like Imphal, Patsoi, Lamlai, Jiribam and others.¹³

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Government of Assam, Political (A) Department: Dispur, No. HMA-19015/9/2019-Political (A) Pt. (1)/20, October 15, 2022.

¹¹ Government of India, Ministry of Home Affairs, S.O. 4046(E), October 1, 2021.

¹² Government of India, Ministry of Home Affairs, S.O. 1552(E), April 1, 2022.

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Jammu & Kashmir: Armed Forces (Jammu & Kashmir) Special Powers Act, 1990 is in force in Jammu & Kashmir since 1990.

Apart from this Armed Forces (Special Powers) Act was enforced in the **State of Punjab & the Union Territory of Chandigarh** on October 15, 1983 as The Armed Forces (Punjab & Chandigarh) Special Power Act 1983. However, this act was withdrawn in the year 1997 and now it is not prevalent in the state of Punjab & the Union Territory of Chandigarh.

KEY PROVISIONS OF AFSPA

The salient provisions of AFSPA are as follows:

- In order to prevent terrorist activity or any other activity that could undermine India's sovereignty or insult the national anthem, flag, or Constitution of India, the Governor of the State and the Central Government are authorized to declare any portion or the entirety of any state to be a disturbed area.¹⁴
- Armed Forces extraordinary Powers Act (AFSPA) gives army officers extraordinary authority to shoot (even if it kills) anyone who breaks the law or is suspected of breaking the law (this includes gatherings of five people or more, carrying weapons, etc.). The only requirement is that the officer must sound the alarm before firing.¹⁵
- Make any arrests without a warrant, and conduct searches without authorization.¹⁶
- As soon as a person is brought into custody, they must be brought before the nearest police station.¹⁷
- The Central Government must first give permission for any prosecution of the on-duty officer.¹⁸

ARMED FORCES AND THEIR POWERS UNDER AFSPA

In locations that the acts refer to as "disturbed areas," AFSPA permits the Indian Armed Forces to maintain a rigorous monitoring.

The Indian Armed Forces include military forces, air forces operating on ground as land forces and any other armed forces of the Union like the CRPF¹⁹, BSF²⁰, ITBP²¹, etc.²² AFSPA is not invoked in cases of civil unrest during elections. When a situation of militancy or insurgency occurs and India's international boundaries are in danger, the AFSPA is triggered.

According to AFSPA, an officer can exercise the following powers:

¹³ Government of Manipur, Home Department, No.2/8(6)/2022-H (AFSPA), March 31, 2022.

¹⁴ Armed Forces (Special Powers) Act, 1958 (28 of 1958), s. 3.

¹⁵ Armed Forces (Special Powers) Act, 1958 (28 of 1958), s. 4.

¹⁶ Armed Forces (Special Powers) Act, 1958 (28 of 1958), s. 4(b).

¹⁷ Armed Forces (Special Powers) Act, 1958 (28 of 1958), s. 5.

¹⁸ Armed Forces (Special Powers) Act, 1958 (28 of 1958), s. 6.

¹⁹ Central Reserve Police Force.

²⁰ Border Security Force.

²¹ Indo-Tibetan Border Police.

²² Armed Forces (Special Powers) Act, 1958 (28 of 1958), s. 2(a).

1. An officer has the right to use fire or use other forms of force after giving proper warning, even if it results in death.²³
2. Destroy any arms caches, hiding places, prepared or reinforced positions, shelters, or training grounds from which armed volunteers currently or potentially could launch attacks.²⁴
3. To detain without a warrant any individual who has committed a cognizable offence or who is logically suspected of having done so.²⁵
4. To enter and search a location in order to conduct the arrests, or to free anyone who has been unjustly detained or to seize any weapons, ammunition, or explosives.²⁶
5. Stop and search any automobile or boat that you have a good reason to believe is carrying such a person or weapons.
6. Army officers get complete legal immunity. Anyone operating in accordance with the AFSPA is immune from prosecution, suit, or any other type of legal action.²⁷
7. The government's assessment of the reasons why a location is considered disturbed is not susceptible to judicial review.

CRITICAL ANALYSIS OF AFSPA

Both Indian and international legal norms are broken by the Armed Forces Special Powers Act. This was demonstrated in 1991 when India gave the United Nations Human Rights Committee its second periodic report. Members of the UNHRC questioned the AFSPA's legality on a number of occasions, including how it could be justified in light of article 4 of the International Covenant on Civil and Political Rights (hence referred to as the "ICCPR") and how it could be judged constitutional under Indian law. The Attorney General of India's main defence was that the AFSPA is an essential safety measure to prevent the secession of Jammu and Kashmir and the North Eastern states. He asserted that secession is not required by international law and that Article 355 of the Indian Constitution compels the Central Government to protect the states from internal unrest.

This way of thinking is an illustration of the vicious circle that the AFSPA in the North East has produced. The application of the AFSPA fuels the call for greater autonomy and offers North East and Jammu and Kashmir citizens more justification to desire to secede from a state that grants such powers. The subsequent movement helps the Indian government's argument for invoking the AFSPA.

INDIAN LAW AND AFSPA

The Indian Supreme Court is now hearing various cases that question whether the AFSPA is constitutional. These lawsuits have been outstanding for more than nine years in some instances. Since the Delhi High Court found the AFSPA to be constitutional in the case of *Indrajit Barua v. The State of Assam*²⁸ (Hereinafter referred to as "Indrajit Barua Case") and the Guwahati High Court found this decision to be binding in *People's Union for*

²³ Armed Forces (Special Powers) Act, 1958 (28 of 1958), s. 4(a).

²⁴ Armed Forces (Special Powers) Act, 1958 (28 of 1958), s. 4(b).

²⁵ Armed Forces (Special Powers) Act, 1958 (28 of 1958), s. 4(c).

²⁶ Armed Forces (Special Powers) Act, 1958 (28 of 1958), s. 4(d).

²⁷ Armed Forces (Special Powers) Act, 1958 (28 of 1958), s. 6.

²⁸ AIR 1983 Delhi 513.

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*Democratic Rights v. Union of India*²⁹, the AFSPA can only be legally repealed if the Supreme Court rules that it is unconstitutional.

- **Constitution of India and AFSPA**

Art. 21 of the Indian Constitution guarantees the right to life to all people. Under s. 4 (a) of the AFSPA, which grants armed forces personnel the power to shoot to kill, the constitutional right to life is violated. This law is not fair, just or reasonable because it allows the armed forces to use an excessive amount of force.

None of the offences under s. 4(a) necessarily involve the use of force. The armed forces are thus allowed to retaliate with powers which are grossly out of proportion with the offence. Justice requires that the use of force be justified by a need for self-defense and a minimum level of proportionality.

In the *Indrajit Barua Case*³⁰, the Delhi High Court found that the state has the duty to assure the protection of rights under art. 21 of the Indian Constitution, to the largest number of people. Couched in the rhetoric of the need to protect the "greater good", it is clear that the Court did not feel art. 21 is a fundamental right for the people of Assam. The Court stated, "If to save hundred lives one life is put in peril or if a law ensures and protects the greater social interest then such law will be a wholesome and beneficial law although it may infringe the liberty of some individuals."³¹

This directly contradicts art. 14 of the India Constitution of which guarantees equality before the law. The AFSPA is in place in limited parts of India. Since the people residing in areas declared "disturbed" are denied the protection of the right to life, denied the protections of the Code of Criminal Procedure, 1973 and prohibited from seeking judicial redress, they are also denied equality before the law. Residents of non-disturbed areas enjoy the protections guaranteed under the Indian Constitution, whereas the residents of the Northeast and Jammu & Kashmir live under virtual army rule. Residents of the rest of the Union of India are not obliged to sacrifice their constitutional rights in the name of the "greater good".

Art. 22 of the Indian Constitution provides for preventive detention and the law related to it. On its face, the AFSPA is not a preventive detention law therefore the safeguards of cl. (1) and (2) of art. 22 must be guaranteed to people arrested under the AFSPA.

The security forces have been able to hold people for extended periods of time thanks to the AFSPA's "least possible delay" phrase. The abuses that are taking place in practice can be seen in the rare habeas corpus cases where the court did find the delay to be unreasonable.³² It should be highlighted that only people who have access to legal representation and the court may file a petition for habeas corpus. Only the Guwahati High Court bench in Assam has the authority to hear habeas corpus cases in any of the seven North Eastern states. In *Nungshitombi Devi v. Rishang Keishang, CM Manipur*³³, the CRPF detained the petitioner's husband on January 10, 1981, and he was still missing on February 22 of that same year. He had been arrested under AFSPA s. 4(c). The court found this delay to have been too long and unjustified, even under s. 5 of the AFSPA. In *Civil Liberties & Human Rights Organization (CLAHRO) v. P.L Kukrety*³⁴, even before being brought over before the magistrates, those

²⁹ (1991) 2 GLR 1.

³⁰ *Supra* note 29 at 8.

³¹ *Ibid.*

³² **JUSTICE (RETD) MADAN B LOKUR, "AFSPA: THE MISUSE OF POWER", 56 ECONOMIC & POLITICAL WEEKLY, DECEMBER 25, 2021.**

³³ (1982) 1 GLR 756.

³⁴ (1988) 2 GLR 137.

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who had been apprehended in Oinam were imprisoned for five days. This delay was deemed to be unwarranted by the court.

The AFSPA does cause arbitrary detention when it is used. The AFSPA would still be in violation of article 22 of the Indian Constitution even if it were justified on the basis that it is a preventive detention measure. Laws governing preventive detention permit the arrestee to be held for a maximum of 3 months. Any detention lasting more than 3 months must be evaluated by an advisory board, according to article 22 clause (4). Additionally, per article 22 clause (5), the person must be informed of the reason(s) for their arrest. Armed forces may detain a person without a warrant under section 4(c) of the AFSPA if they have reasonable grounds to believe that they would commit a crime. The justification for the arrest does not have to be disclosed by the military. Additionally, there isn't a board of advisors in place to examine AFSPA-related arrests. The preventative detention rules outlined in Article 22 of the Indian Constitution are violated by the arrest because it was made without a warrant. The case of *Luithukla v. Rishang Keishing*³⁵, a habeas corpus case, exemplifies the total lack of restraint on the armed forces when carrying out arrests.

However, in *Extra Judicial Execution of Victim Families Association v. Union of India*³⁶, popularly known as *Manipur Encounters Case*, the Hon'ble apex court diluted the provisions of AFSPA and directed for investigation of fake encounters under AFSPA.

Writ of Habeas Corpus

The only recourse accessible to those detained in accordance with the terms of the AFSPA has been through habeas corpus proceedings. The person is delivered to the court by the military or police under the authority of a habeas corpus case. This provides some protection for the individual who has been arrested, and it is in these circumstances that legal counsel has been able to protest to the AFSPA. The legislation will not be repealed as a result of a habeas corpus action, nor will specific officers who committed the acts be punished. Additionally, only those with access to solicitors will be able to submit such a lawsuit. S. 6 of the AFSPA suspends the constitutional right to sue since those acting under the AFSPA are protected.

State of Emergency & AFSPA

Declaring that a place is disturbed is akin to announcing a state of emergency. Except for rights under articles 20 and 21, fundamental rights may be suspended under article 359 in an emergency.³⁷ The AFSPA is more oppressive than the emergency rule because it causes the suspension of the right to life guaranteed by Article 21. Only a limited time period may be declared under emergency rule, and the President's declaration of emergency must be approved by Parliament. There is no legislative review of the AFSPA, which has been in effect indefinitely.

States of emergency frequently serve as a "fruitful source of arbitrary arrests," according to the UN Working Group on Arbitrary Detention's report.³⁸ In its report of December 21, 1994, the Working Group concluded that preventive detention is "facilitated and aggravated by several factors such as ... exercise of the powers specific to states of emergency without a formal declaration, non-observance of the principle of proportionality between the gravity of the measures taken and the situation concerned, too vague a definition of offenses against State security, and the existence of special or emergency jurisdictions."³⁹ It is a perfect description of how the AFSPA

³⁵ (1988) 2 GLR 159.

³⁶ 2016 SCC OnLine SC 685.

³⁷ Constitution (Thirty-eight) Amendment Act, 1975.

³⁸ UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, December 17, 1993.

³⁹ UN. Commission on Human Rights, Report of the Working Group on Arbitrary Detention, December 21, 1994.

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works. Without a declaration of emergency as required by the Indian Constitution, the AFSPA confers state of emergency powers. The offences are not clearly defined, since all of the s. 4 offences are judged subjectively by the military personnel and the AFSPA is a "special jurisdiction" provision.

Constitutional validity of AFSPA

In court, the AFSPA has been contested. A Manipuri organization by the name of the Human Rights Forum launched a public interest lawsuit in 1980 against the AFSPA's constitutionality. In 1982, the People's Union for Democratic Rights and the Naga People's Movement for Human Rights each filed a separate writ petition on the same subject. But it took 15 years for the Supreme Court to take action in the case. A five-member bench presided over by Chief Justice J.S. Verma made a decision on the petitions contesting the law in 1997. The various petitions were combined into the case of *Naga People's Movement of Human Rights v. Union of India*.⁴⁰ On November 27, 1997, the Supreme Court issued its final decision, which affirmed AFSPA. The judges nevertheless determined that parliament had the authority to enact such a law, but they also ordered measures to protect human rights, stating that the armed forces should "use minimal force required for effective action" and "strictly follow the instructions contained in the list of "Do's and Don'ts" issued by the army authorities which are binding."⁴¹ The court said that the army should not be deployed for long periods since the primary task of the armed forces "is to defend the country in the event of war or when it is faced with external aggression," and that an internal conflict puts the armed forces in a situation that "brings them in confrontation with their countrymen."⁴² The judges concluded that "prolonged or too frequent deployment of armed forces for handling such situation is likely to generate a feeling of alienation among the people against the armed forces."⁴³ The Supreme Court also said that any complaint alleging the misuse or abuse of powers conferred by the act "shall be thoroughly inquired into and, if on enquiry it is found that the allegations are correct, the victim should be suitably compensated and the necessary sanction for institution of prosecution and/or suit or other proceeding should be granted."⁴⁴ It has been shown to be insufficient and ineffective to rely on the armed forces to adhere to "Do's and Don'ts" provided by the army authority.⁴⁵

In reality, local police frequently advise victims against filing a complaint against the armed forces or outright decline to do so. In any case, attempts by the police to look into such accusations are typically fruitless since the armed forces invoke the AFSPA's immunity provisions to refuse to turn over the appropriate officials for questioning.

- **The Code of Criminal Procedure, 1973 (Cr.P.C.) and AFSPA**

The army and other paramilitary organizations are not educated to follow the procedures that police officers must adhere to when making arrests, conducting searches, and making seizures under the Cr.P.C. It should be made clear that when members of the military forces support civil authority, they are not allowed to operate with greater authority than the police and that they are required to acquire specialized training in criminal procedure.

When discussing the bill in the Lok Sabha in 1958, the Union Home Minister stated that the AFSPA Act was regulated by the provisions of the Indian Constitution and the Cr.P.C. The AFSPA should contain a particular clause outlining the military's cooperation with criminal procedure if the government is sincere about wanting it that way. Additionally, it ought to instruct the armed forces in this process.

⁴⁰ *Supra note 2 at 1.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

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Section 45 of the Criminal Procedure Code protects members of the armed forces from arrest for any actions taken while performing official duties, while Section 6 of the AFSPA grants them complete immunity for all crimes committed in accordance with the AFSPA. A person must first obtain the Central Government's approval before bringing legal action against an armed forces member for violations of the AFSPA.

The arrest process that the police must adhere to is outlined in Chapter V of the Cr.P.C. S. 46 specifies the procedure for making arrests; if the suspect tries to flee, the police officer may use whatever means are necessary to make the arrest, but they are not allowed to kill the suspect unless they are charged with a crime carrying a death or life sentence. Already, this power is too broad. The UN Code of Conduct for Law Enforcement Officials does not apply to the police, allowing them to use more force than is allowed. But the AFSPA goes even further. S. 4(a) permits the military to execute a person even if they are not suspected of committing a crime that carries a death or life sentence.

Chapter X of the Cr.P.C., which deals with maintaining public order, offers more protections than the AFSPA. S. 129 in that chapter permits the use of civil force to disperse an assembly. Comparing it to s. 4(a) of the AFSPA, we can observe that while this provision gives even non-commissioned officers the authority to employ the maximum amount of force, the Cr.P.C. clearly defines the ranks that can disperse such an assembly. Furthermore, the Cr.P.C. makes no mention of the use of deadly force to break up a gathering.

The circumstances under which the military forces may be called in to disperse a gathering are outlined in Ss. 130 and 131 of the same chapter of the Criminal Procedure Code. These two clauses contain a number of protections that the AFSPA does not. S. 131 solely grants the armed forces the ability to detain and make arrests. Additionally, under the AFSPA, even non-commissioned officers have this authority, whereas in the AFSPA, only commissioned or gazetted officers have this authority. Compared to the Cr.P.C., the AFSPA gives more authority to disperse a gathering.

Furthermore, dispersal under s. 4(a) of the AFSPA is somewhat less justified than dispersal under Chapter X of the Cr.P.C. According to S. 129–131, illegal gatherings "manifestly endanger" public safety. The AFSPA only designates an assembly as "illegal," which leaves open the possibility that peaceful assemblies could be broken up with physical force.

- **Indian Penal Code, 1860 (I.P.C.) and AFSPA**

Under the Indian Penal Code, murder is punishable with death under s. 302. Murder is not one of the offenses listed in s. 4(a) of AFSPA. Moreover s. 4(a) offences are assembly of five or more persons, the carrying of weapons, ammunition or explosive substances, none of which are punishable with life imprisonment under the I.P.C. Under s. 143 of the I.P.C., being a member of an unlawful assembly is punishable with imprisonment of up to six months and/or a fine. Even if the person has joined such unlawful assembly armed with a deadly weapon, the maximum penalty is imprisonment for two years and a fine. Moreover, persisting or joining in an unlawful assembly of five or more persons is also punishable with six months imprisonment, or a fine, or both. The same offence committed by someone in a disturbed area under the AFSPA is punishable with death. This again violates the constitutional right to equality before the law. Different standards of punishment are in place for the same act in different parts of the country, violating the equality standards set out in the Indian Constitution.

- **The Army Act, 1950 and AFSPA**

The 1950 Act was a revision of the Indian Army Act, 1911. One of the goals of this revision was "to bridge the gap between the Army and civil laws as far as possible in the matter of punishments of offenses." The High Courts of the country have a limited right to interfere with the court-martial system. Court-martial proceedings do not have to satisfy art. 21 of the Indian Constitution. In chapter V of the Army Act, the members of the services are granted privileges, including immunity from attachments and arrest for debt. The only civil acts committed by members of the army which are not triable by court-martial are murder or rape of a civilian, unless this was done

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while on active service⁴⁶. This means that soldiers operating under the AFSPA will, if tried at all, be tried by court-martial, leaving no civil law remedy for the victims. S. 6 of the AFSPA only further reinforces the army's immunity.

INTERNATIONAL LAW AND AFSPA

Under international human rights and humanitarian law rules, there is no excuse for an act like the AFSPA. The AFSPA violates the Universal Declaration of Human Rights (hereinafter referred to as the "UDHR"), the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture, the United Nations Code of Conduct for Law Enforcement Officials, the UN Body of Principles for Protection of All Persons Under Any Form of Detention, and the United Nations Principles on Effective Prevention and Investigation of Extra-Legal and Summary Executions.

UDHR articles which the AFSPA violates are art.1⁴⁷, art. 2⁴⁸, art.3⁴⁹, art.5⁵⁰, art.7⁵¹, art.8⁵², art.9⁵³, art.17⁵⁴.

In 1978, India ratified the ICCPR, accepting the duty to ensure that all of its inhabitants have access to the rights outlined in the Covenant. The ICCPR outlines the rights that must be upheld by the member states even during times of peace. The ICCPR anticipates that some rights may need to be suspended during times of national emergency. Even in these situations, the ICCPR is still in effect because some rights cannot be waived. Both derogable and non-derogable rights are violated by the AFSPA. Thus, AFSPA violates art. 2⁵⁵, art. 6⁵⁶, art. 7⁵⁷, art. 8⁵⁸ and art. 9⁵⁹ of ICCPR.

During "Operation Bluebird", held in 1987, the Assam Rifles committed gross abuses of art. 7 of ICCPR that prohibits torture. Following an assault on an Assam Rifles outpost in the village of Oinam in the Indian state of Manipur, the operation was started. The NSCN is thought to have carried out the assault. Armed forces committed atrocities against the residents of Oinam village as payback. The Amnesty International report found that more than 300 villagers claimed they were beaten, "some torture victims were left for dead ... others were reportedly subjected to other forms of torture including inserting chili powder into sensitive parts of the body, being given

⁴⁶ The Army Act, 1950 (46 of 1950), s. 70.

⁴⁷ All human beings are born free and equal.

⁴⁸ Everyone is equal regardless of race, color, sex, language, religion, politics, or where they were born.

⁴⁹ Everyone has the right to life and to live in freedom and safety.

⁵⁰ Everyone has the right to be free from torture.

⁵¹ We are all equal before the law.

⁵² Everyone has the right to seek justice if their rights are violated.

⁵³ Everyone has the right to freedom from arbitrary arrest, detention or exile.

⁵⁴ Everyone has the right to own property.

⁵⁵ The ability to take legal action when their rights are violated, even if the offender was operating on behalf of the government.

⁵⁶ The right to life and survival.

⁵⁷ The freedom from inhuman or degrading treatment or punishment.

⁵⁸ The freedom from slavery and servitude.

⁵⁹ The right to liberty and security of the person and freedom from arbitrary arrest or detention.

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electric shocks by means of a hand operated dynamo ... or being buried up to the neck in apparent mock executions."⁶⁰

On October 4, 1991, Rajputana Rifles encircled the village of Bodhakors in "Operation Rhino" under comparable conditions. Men were brought to questioning centres while women were sexually molested during a thorough house-to-house search. They were mistreated and deprived of food and water.⁶¹

Equal protection under the law is guaranteed by both article 14 of the Indian Constitution and article 26 of the ICCPR. Because residents of Jammu & Kashmir and the North East do not have equal protection under the law, the AFSPA breaches this right. They don't have an official state of emergency, but they practically do, and they have no recourse for the abuses the military has done to them.

INTERNATIONAL HUMANITARIAN LAW AND AFSPA

The body of international humanitarian law is made up of the four 1949 Geneva Conventions and its two optional protocols. These clauses are appropriate for safeguarding human rights during armed conflict. These accords grant access to all international wars to the International Committee of the Red Cross (hence referred to as the "ICRC"). The ICRC can only provide its services in military conflicts that are not international.

The Geneva Conventions' Protocol II is the foundation of the ICRC's role in cases of non-international armed conflict. India, however, has not ratified either Geneva Conventions convention. However, the Geneva Conventions of 1949's article 3, paragraph 2—which states that "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict"—allows the ICRC to provide its services in such a conflict. A state is under no obligation to accept the ICRC's services in such a situation or to view them as an intrusion into its internal affairs. The principles of international humanitarian law, however, "can only be invoked by analogy in situations of internal disturbance."

RECOMMENDATIONS

Repealing the AFSPA and barring the military from participating in local politics are the only ways to ensure an end to the human rights violations committed by the armed forces in the North East. There is a legitimate concern that the function of the civil authorities is being hijacked given that 50% of India's armed troops perform domestic tasks related to internal security. The neighborhood police won't be able to fulfil their legitimate duty in law enforcement as long as they are not trusted. The police force cannot perform its duties while the armed forces are still present. This also maintains the AFSPA's reasoning.

Among the recommendations made by the Working Group on Arbitrary Detention, from 1994 was the statement that "Governments which have been maintaining states of emergency in force for many years should lift them, limit their effects or review the custodial measures that affect many persons, and in particular should apply the principle of proportionality rigorously."⁶²

If the AFSPA is not repealed, it must at the very least abide by Indian and international legal requirements. Therefore, s. 4(a)'s authority to use lethal force must be explicitly rescinded. No force should be used throughout the search and seizure process, and warrants must be used to make arrests. S. 5 should clearly state that persons arrested under the Act are to be handed over to the police within twenty-four hours. S. 6 should be completely repealed so that individuals who suffer abuses at the hands of the security forces may prosecute their abusers.

⁶⁰ Amnesty International India Briefing, "The Armed Forces Special Powers Act: Time for A Renewed Debate in India on Human Rights and National Security", (2013).

⁶¹ *Ibid.*

⁶² *Supra* note 4 at 2.

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Additionally, it is important to define crucial terms, particularly "disturbed area." The subjective judgement of the Central or State Government should not be used to determine whether an area is affected. It ought to be held to an impartial standard that may be challenged in court. Additionally, the designation of a disturbed region should be made for a limited period of time, not to exceed six months. Without legislative scrutiny, such a pronouncement should not be allowed to stand. Armed forces shouldn't be permitted to make an arrest or do any other action based just on suspicion. All of their activities must have a rational foundation in order to be subject to judicial review. Additionally, this will help those who bring legal action against the security forces.

The UN Code of Conduct for Law Enforcement Personnel should be taught to everyone who works in law enforcement. The general public should have access to the orders and training provided to the armed services. Complete transparency should be provided in order to enable public accountability.

The Cr.P.C. must be followed by the armed forces as a minimum. Making the AFSPA compliant with the Cr.P.C. regulations for the use of minimal force, arrest, search, and seizure would only be a basic first step in lessening the abuses committed under the AFSPA because the Cr.P.C. itself does not completely conform to international human rights standards. The Indian government must permit the ICRC to get involved if it honestly believes that using force is the only option to deal with the administration of the North Eastern states and the situation in Jammu & Kashmir. This has just the potential to be relaxing. Accepting ICRC assistance would show that the combatants wish to put a stop to the hostilities. The presence of the ICRC could aid in defending the citizens of these states who are presently caught between militants and the military.

CONCLUSION

Since a long time ago, the Supreme Court has refrained from reviewing this Act's constitutionality. Regarding this Act, the Court is not exercising judicial activism. In the 1958 debate, the Lok Sabha acknowledged that the Supreme Court would decide if the AFSPA was unconstitutional. In the *Indrajit case*⁶³, the Delhi High Court showed its lack of judicial independence by giving the legislature the benefit of the doubt.

Mr. Param Kumaraswamy⁶⁴, stated that, "The power of judicial review is vital for the protection of the rule of law." He also quoted from Mr. L. M. Singhvi's 1985 report that "the strength of legal institutions is a form of insurance for the rule of law and for the observance of human rights and fundamental freedoms and for preventing the denial and miscarriage of justice."⁶⁵

The UN Human Rights Committee voiced concern in 1997 on the continued use of the AFSPA and human rights abuses committed by security forces in areas designated as "disturbed" as well as other issues. It voiced worry over the "climate of impunity" and lack of remedies brought on by the necessity of obtaining government authorization before bringing legal action against armed troops working in accordance with special authority. The Committee recommended that this requirement be abolished.⁶⁶

In 2000, Manipur activist Irom Sharmila began a hunger-strike against AFSPA, which lasted for almost 16 years. Thereafter, the Union Ministry of Home Affairs in 2004 set up a Committee chaired by retired Supreme Court Judge B.P. Jeevan Reddy⁶⁷. This committee's goal was to examine the AFSPA's provisions and advise the

⁶³ *Supra* note 29 at 8.

⁶⁴ UN Special Rapporteur on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers.

⁶⁵ 51st Session of the Commission on Human Rights on February 10, 1995, at the United Nations in Geneva.

⁶⁶ UN Human Rights Committee, "Concluding Observations of the Human Rights Committee: India," paras. 18, 19, 21.

⁶⁷ The Committee has its members-

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government whether it would be wise to change or replace the act. Having carried out in-depth research and discussions, the Committee declared in 2005 that it had “the firm view”⁶⁸ that the Act should be repealed as “too sketchy, too bald and quite inadequate in several particulars”.⁶⁹ It further emphasized that “recommending the continuation of [this] Act, with or without amendments, [did] not arise”.⁷⁰ Thus, as per the Jeevan Reddy Committee AFSPA should be repealed and adequate measures should be inserted in the Unlawful Activities (Prevention) Act, 1967.

The Committee found it necessary to provide the following details: “We must also mention the impression gathered by it during the course of its work that the Act, for whatever reason, has become a symbol of oppression, an object of hate and an instrument of discrimination and highhandedness”.⁷¹ The report itself was not formally made public, and these suggestions were never implemented.

In addition to this, the Second Administrative Reforms Commission (ARC) on public order, headed by Veerapa Moily, has in its 5th Report of 2007 also recommended the repeal of the AFSPA Act. The Commission stated that “after considering the views of various stakeholders came to the conclusion that AFSPA [Act] should be repealed”.⁷²

There is an absence of creative legal thinking. In a personal interview, Justice Raghuvir stated that the court was unable to apply international law. If the government has ratified an international convention like the ICCPR that requires it to protect the rights of its citizens, how can rights be upheld if the judiciary does not take the language of the treaty into consideration when rendering decisions? Because the courts do not uphold the spirit of the law, which guarantees everyone the fundamental right to life, human rights violations persist unabatedly.⁷³

Currently, being examined by the National Human Rights Commission is the AFSPA. The NHRC should conclude that the AFSPA is illegal and submit this conclusion to the Supreme Court in order to have an impact on how the Supreme Court decides to evaluate the ongoing cases. The NHRC's function is severely constrained, though. The Supreme Court has not previously supported such an intervention by the NHRC. Thus, it is high time that some action is taken either to amend the provisions of AFSPA or to repeal it altogether.

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