GULPING THE SPIKE: RATIONALISING AFSPA

Deepanshu Poddar[*] and Vrinda Aggarwal[**]

Abstract

The scope of enquiry in this article is confined to the possibility of judicial review of actions undertaken by the armed forces under the aegis of the Armed Forces (Special Powers) Act, 1958 (AFSPA or Act). Ideologically, the article poses to be a liberal reading of the law since it suggests taming the Act by introducing judicial review as a safeguard against any action undertaken by the armed forces under Section.4 of the Act. Consequently, it presumes the constitutional validity of the Act. The word 'rationalising' is therefore aptly employed to describe the methodology of this article.

The article would commence with deconstructing the nature of the role played by the armed forces as defined under AFSPA, which is "to act in aid of civil authorities". Based upon this, it would be argued that the courts possess the jurisdiction to review the actions undertaken under Articles 32 and 226 of the Constitution. Lastly, the article would discuss a cogent standard of review which

[*]Deepanshu Poddar is a fourth-year student at Jindal Global Law School, Sonipat. The author may be reached at 15jgls-dpoddar@jgu.edu.in.

[**]Vrinda Aggarwal is a fourth-year student at Jindal Global Law School, Sonipat. The author may be reached at 15jgls-vaggarwal@jgu.edu.in.

could be effectively employed by the courts to review violations of a fundamental right.

I. INTRODUCTION

In an age which is increasingly fixated upon security, it has become exigent for the courts to adequately posture themselves in a manner which pre-empts it from bending its knees. Recently with the Supreme Court limiting its jurisdiction in the *Rafael Deal* case, its review power seems to be circumscribed, specifically in questions pertaining to 'national security'.[1] The article situates this concern in the context of internal security legislations, specifically, the Armed Forces (Special Powers) Acts, 1958 (hereinafter, "**AFSPA**" or "**Act**").[2]

At the very outset, it is essential to clarify that the article takes a rather benign view towards the law by ignoring a number of readings, which declare its invalidity with respect to international humanitarian law[3] as well as the Constitution.[4] Therefore, it merely 'gulps the spike'. Akin to most internal security regimes in India, AFSPA too

[1]Manohar Lal Sharma v. Narendra Damodardas Modi, 2018 (15) SCALE 956 ¶11.

[2]Collectively referring to Armed Forces Special Powers Acts (Manipur and Assam) 1958, Armed Forces Special Powers Act (Punjab and Chandigarh), 1983 and Armed Forces Special Powers Act (Jammu and Kashmir), 1990 [hereinafter AFSPA].

[3]Amnesty Int'l, *Denied' Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir*, ASA 20/1874/2015 (2015) [hereinafter Amnesty Report]; Human Rights Committee, Concluding Observations of India's Report, U.N. Doc No. CCPR/C/79/Add.81 (1997); Christof Heyns, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. No. A/HRC/29/37/Add.3 (2015).

[4]A. G. Noorani, *Draconian Statute - Armed Forces (Special Powers) Act, 1958*, 32 ECON. & POL. WKLY. 1578, 1578 (1997); A. G. Noorani, *Supreme Court on Armed Forces Act*, 33 ECON. & POL. WKLY. 1682, (1998); A. G. Noorani, *Armed Forces (Special Powers) Act: Urgency of Review*, 44 ECON. & POL. WKLY. 8, 9 (2009).

draws its legal form from a pre-independence statute, the Armed Forces Special Power Ordinance, 1942, which was promulgated only to suppress the Quit India Movement.[5] Post-independence, the said bill was passed to contain the insurgency in Assam and Manipur. Later, by way of executive action, the scope of the Act was expanded to include Punjab and Chandigarh (from 1983 to 1997), and then Jammu and Kashmir (from 1990 till date).

The text of AFSPA is fairly succinct. The definition provision has been kept neat with clarifications only on two terms, 'disturbed area' and 'armed forces'. Section 3 vests the power to territorially extend the application of the Act solely in the hands of the executive, allowing no scope for parliamentary or judicial review, or in-built provisions such as sunset clauses. Interestingly, such checks find a place even in the emergency provisions of the Constitution. Therefore, AFSPA poses a more lethal threat to democracy than the proclamation of emergency itself.

The powers of the armed forces, under Section 4 are far-reaching and extraordinary. It allows armed personnel to use force (up to the extent of causing death), on the basis of personal satisfaction as to its necessity with regards to the maintenance of public order. The armed personnel have also been empowered to destroy property,[6] search and make arrests without any warrant.[7]

The only safeguard provided is the 'handing over' provision[8] which requires that a person, once arrested, ought to be handed over to the police at the 'earliest possible time'. The Honourable High Court of

[5]Mustafa Haji, *Killing One Colonial Law at a Time – After Section 377, It's Time to Repeal AFSPA*, THE WIRE (Apr. 2, 2019), https://thewire.in/law/repealing-afspa-colonial-law-northeast-jammu-kashmir.
[6]§ 4(b), AFSPA.
[7]§ 4(c), AFSPA.
[8]§ 5, AFSPA.

Gauhati has only vaguely clarified the meaning of 'earliest possible time' to mean 'least possible delay'.[9]

Having laid out the broad contours of the powers enjoyed by the armed forces, the article aims to ideate certain checks and balances which could inform the personal satisfaction of the members of armed forces while they exercise such powers. However, a nasty impediment to this comes by way of Section 6, which bars courts to exercise jurisdiction to entertain any "*suit or other legal proceeding*" against or for prosecuting any member of the armed forces while they are acting under the guise of AFSPA without the sanction of the executive.

There are a few traditional procedures which may be adopted to address this stipulation. The first is a tenuous strategy which involves knocking the doors of the executive to seek government sanction. However, the executive discretion to grant sanctions often discounts principles of natural justice as it is marred by biases.

A more judicious tactic could be approaching the court for issuance of appropriate writs ordering the executive to grant sanctions to prosecute members of the armed forces. Recently, the Extra Judicial Execution Victim's Families Association adopted a similar tactic in order to move a CBI enquiry against members of the armed forces for alleged disappearances of thousands that were caused by them.[10] The matter is currently sub-judice and is being vehemently contested by the members of the armed forces.

This article suggests a third strategy which may prove useful to beat violations of human rights at the behest of the security of the State by allowing the constitutional courts of the country a leg in the matter. To substantiate the same, the article delves into the capacity in which the members of the armed forces act while they exercise power under

[9]Horendi Gogoi v. Union of India, (1991) Gau Cr 3081.

[10]Extra Judicial Execution Victim Families Association & Anr. v. Union of India And Anr., AIR 2016 SC 3400.

the aegis of AFSPA. In doing so, the article aims to discuss the meaning of "*acting in aid of civil authorities*", by employing external aids to statutory interpretation. Next, the article examines the powers of the constitutional courts in India under Articles 226 and 32 to review actions of the armed forces. Lastly, it suggests a standard of review which could be adopted to efficiently review violations of fundamental rights.

II. DETERMINING THE ROLE OF THE ARMED FORCES: AIDING CIVIL AUTHORITIES

The Constitution of India envisages the proclamation of martial law under Article 34 of Part III. The said provision provides for indemnification of servicemen for "*any act done...in connection with the maintenance or restoration of order in any area*" where martial law has been proclaimed. Yet, the Constitution omits using the term 'martial law' in Part XVIII (Emergency Provisions), where it truly belongs. The closest it comes to describing it, in Part XVIII, is in Article 355, while ascribing the Union the duty "*to protect the states from external aggression or internal disturbances*". Pursuant to this, the Union secures for itself, in Item 2 of List I, the power to deploy armed forces subject to the control of the Union, "*in any state in aid of civil power*". Therefore, the Constitution leaves us to wonder the true parentage of AFSPA– is it a proclamation of martial law or rather a mere deployment of military to act in aid of civil authority?

Legal scholarship suggests that there exists a stark difference between the two phenomena.[11] A condition precedent for the proclamation of martial law is the inability of the civilian authorities and the courts to maintain law and order.[12] Therefore, martial law necessarily replaces

[11]Frederick Pollock, *What is Martial Law?*, 18 L. Q. REV. 152 (1902); W. S. Holdsworth, *Martial Law Historically Considered*, 18 L. Q. REV. 117 (1902).
[12]*Id.*

civilian law, leaving no room for the courts to uphold rights.[13] Contrary to this, the phenomena of 'military acting in aid' recognises the supremacy of civilian authority over the military, where the military is called in for a pre-defined minimalistic intervention.[14]

AFSPA seems to be a 'hard case' in the Dworkinian sense. Section 3 defines the manner in which power is to be balanced between civilian authorities and the military forces in a disturbed area, requiring the later to 'act in aid' of the former. While upholding its constitutional validity, the Supreme Court held:[15]

"*In our opinion, what is contemplated by Entry 2-A of the Union List and Entry 1 of the State List is that in the event of deployment of the Armed Forces of the Union in aid of the civil power in a State, the said forces shall operate in the State concerned* ***in cooperation*** *with the civil administration so that the situation which has necessitated the deployment of the Armed Forces is effectively dealt with and normalcy is restored*."

However, contrary to this, scholars suggest that AFSPA is rather a *de facto* proclamation of martial law.[16] Khagesh Gautam explains that "*when the Supreme Court upheld the constitutionality of the AFSPA, it failed to realize the disturbed area notification for what it truly was–a de facto proclamation of martial law*".[17] The text of AFSPA indicates an altogether different possibility – military acting in aid of civil authority.

[13]Wing Commander U. Ch. Jha, *Military Justice in Difficult Circumstances: The South Asian Countries*, 54 MIL. L. & L. WAR REV. 301 (2015).
[14]Khagesh Gautam, *Martial Law In India: The Deployment Of Military Under The Armed Forces Special Powers Act, 1958*, 24 S.W. J. INT. L. 177 (2018).
[15]Naga People's Movement of Human Rights v. Union of India, (1998) 2 SCC 109 ¶ 28.
[16]Khagesh Gautam, *supra* note 10.
[17]*Id.*

Owing to this lack of understanding, the armed forces have been left with a *carte blanch*, subject only to the vague language of AFSPA. Where on the one hand the courts suggest a sense of parallelism between military and civilian authority, and on the other the possibility of the former displacing the latter has not been ruled out by scholarly readings on AFSPA, the statute itself has another story to tell.

To make some sense of this legalistic chaos, there is a need to delve deeper into the meaning of "*military acting in aid of civil authorities*", as used in the context of AFSPA itself. Only then will it be possible to determine the circumstances in which the court may intervene as harbingers of democracy and protectors of rule of law.

A. *Instances of usage of the term "in aid of"*

The phrase "in aid of" is not entirely new to the Indian legal system. Article 144 of the Constitution reads as, "*all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.*"[18] Owing to the inability of the court to enforce its own orders, this provision lends teeth to the decisions of the Supreme Court. In *M.C. Mehta v. Union of India*, it held that the executive had acted in contravention to Article 144 by not complying with the court's order to develop a policy for minimising vehicular pollution.[19] Therefore, just like the civil authorities, under AFPSA, the courts, too, seek assistance. If such an interpretation is to be borrowed, then there is a tilt in the balance of power in favour of the authority being aided.

Numerous other miscellaneous legislations adopt a similar phraseology:

1. Section 38 of the Code of Criminal Procedure, 1973 (hereinafter, "**CrPC**") provides, "*when a warrant is directed to a person other*

[18]INDIA CONST. art. 144.
[19]M.C. Mehta v. Union of India and Ors., (1998) 6 SCC 60.

than a police officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant."[20] Therefore individuals, who are not ordinarily vested with the rights or the duties of a police officer, may act in their capacities only to aid him or her. However, interpretation of this provision remains *res integra*.

2. Section 6(4) of the Bhopal Gas Leak Disaster (Process of Claims) Act envisages that "*all officers and authorities of the Government shall act in aid of the Commissioner.*"

3. Sections 74 and 97 of the Delhi Cooperatives Society Act, 1972 and Multi State Cooperative Society Act, 2002 respectively, vest the authority in the central registrar (or a person authorised by him) to act as a civil court for certain purposes. Other authorities are required to act *in aid of* the central registrar taking on such a role.

Apart from AFSPA, the term "*in aid of*" has been used in several instances specifically in the context of armed forces.[21]

1. Section 14 of the Special Protection Group Act, 1988 reads as "*it shall be the duty of ... military authority to act in aid of the Director or any member of the Group whenever called upon to do so in furtherance of the duties and responsibilities assigned to such Director or member*."

2. Section 25(b) of the Reserve and Auxiliary Air Forces Act, 1952 states that "*every member of an Air Force Reserve or the Auxiliary Air Force shall, during the period of his service, be liable to be called up for service in aid of the civil power.*" Interestingly, such requirement entails a duty that is distinct from

[20]§ 38, Criminal Procedure Code, 1973.
[21]For e.g., Assam Rifles Act, 2006.

his or her duty to be called up for military operations and for training and medical examination.

Two inferences could legitimately be drawn from the aforementioned illustrations – first, the authority aiding always does so at the behest of that getting aided and second, the authority aiding is being vested with certain special powers which it does not ordinarily possess in its truest institutional capacity (for instance, a person aiding the police in executing a warrant may even apprehend the said accused, which in normal circumstances would constitute wrongful confinement). However, these observations are only preliminary as they do not provide a conclusive explanation of the role played by the armed forces. Therefore, there is a need to delve deeper into this subject.

B. *"In aid of" as "to aid and advise"?*

Article 74(1) of the Constitution reads as "*there shall be a Council of Ministers to aid and advise the President*".[22] Interpretation of this phrase is settled by a myriad rich jurisprudence which concludes the existence of a cabinet form of government where the President exists only as a figurative head, acting in accordance with the decisions of the Cabinet.[23] The rationale behind such a determination was that the President will does not represent the people's mandate and therefore, the post lacks the democratic competence to call the shots. Therefore, owing to the element of unaccountability attached to the post of the President, it ought to be circumscribed with the aid and advice of the Cabinet. This was further clarified by a subsequent amendment to the Constitution.[24]

[22]INDIA CONST. art. 74(1).

[23]Rai Sahib Ram Jawaya Kapur And Ors. v. The State Of Punjab, AIR 1955 SC 549; U.N.R. Rao v. Smt. Indira Gandhi, AIR 1971 SC 1002; Shamsher Singh and Anr. v. State of Punjab and Ors., AIR 1974 SC 2192.

[24]Subs. by the Constitution (Forty-second Amendment) Act, 1976, § 13, for cl. (1) (w.e.f. 3-1-1977).

It would be absurd to borrow the meaning of "*in aid of*" from this settled understanding of "*in aid and advice*". It structurally conflicts with the position of the military in a democracy, which is to remain subservient to the civil and democratic authorities:

1. Article 53(2) of the Constitution clarifies that the President, who heads the executive, is also the supreme command of the defence forces.

2. Article 33(b) of the Constitution vests the right with the Parliament to limit the application of fundamental rights over armed personnel.

3. Article 72(1)(a) read with Article 72(2) of the Constitution allows the President to suspend, remit or commute any punishment or sentence by a court martial.

4. Pursuant to List I of the Constitution, the deployment of armed forces for any purpose is solely vested in the hands of the Union.[25]

Therefore, the Constitution clearly demarcates that the members of the armed forces ought to act within the confines of the democratic will.

However, the *Naga People's* case clarifies that the deployment of armed forces to aid the civil authorities does not amount to the complete absence of civilian authority, indicating some sense of parallelism between the two authorities.[26]

The distinction between "*in aid of*" and "*to aid and advise*" is intelligible. In the former, the authority aiding is subservient to that being aided, while in the latter, the authority aided is bound to follow the aid. If such an understanding were to be borrowed, the civil authorities during the course of a Section 3 proclamation under

[25]INDIA CONST. Entry 2A, List I.
[26]Naga People's case, *supra* note 11.

AFSPA, would be rendered to a position of ceremonial existence and would be bound to act solely in accordance with the aid of the military. Hence, it is clear from our discussion that an attempt to equate "*to aid and advise*" with "*in aid of*" can be immensely problematic.

C. *"Acting in aid" as 'stepping into the shoes'*

In the previous section, the possibility of military taking supremacy over the civilian authority was ruled out. However, would it also be incorrect to argue that the armed forces 'step into the shoes' of civilian authority, while acting in aid? A somewhat similar principle appears in common law – the '*de-facto officers*' doctrine. According to this, in the presence of a statutory stipulation, a person may act in the colour of another authority. However, while acting in the colour of another authority, the said person exercises the same rights and is bound by the same duties as that authority is. The said person cannot overstep the stipulated zone of authority.

The court has used this principle time and again to approve actions of people who are acting in the garb of official authority.[27] The court invoked this rational while upholding the validity of arrests made by private persons[28] under the guise of Section 43 of the CrPC, which allows private persons to arrest an individual who has committed a non-bailable and cognizable offence in his or her presence.

Having established this, a further question arises – whether such persons, who while acting in *de-facto* capacity, would incur liability if they exceed the mandate of their authority? The Supreme Court of Louisiana applied a public law doctrine (abuse of power) to nullify the actions undertaken by *de-facto* persons, which was beyond the

[27]P.S Menon v. State of Kerala, AIR 1970 Ker 165; Gokuraju Rangraju v. State of A.P., AIR 1981 SC 1473.
[28]K.K. Mohandas v. State of Kerala, (2006) 3 KLT 173.

scope of their mandate.[29] However, the court did not impose any personal tortious liability or criminal liability upon the individuals acting in *de-facto* authority. The actions of a *de-facto* official are therefore given the same force as the acts of a person acting in *de jure* authority.

Members of the armed forces have been authorised to act in such *de-facto* capacity in ordinary instances. A leading example could be Section 129(2) of the CrPC, which requires only a civil force to disperse an assembly which has been declared to be unlawful.[30] However, under Section 130 of the CrPC, an executive magistrate could call upon armed forces to disperse such an assembly only "*if any such assembly cannot be otherwise dispersed*".[31] Therefore, the duty of dispersing an unlawful meeting, which ordinarily vests with the civil authority and the armed forces merely facilitate or aid such a duty.

AFSPA co-exists with the procedures laid down in the CrPC. For instance, Section 4(b) of AFSPA enables the armed forces to destroy property if it is believed to be a structure being utilised as a "…*training camp for armed volunteers or utilized as a hide-out by armed gangs...*" These exist parallel to the procedures laid down in the CrPC to tackle offences mentioned under Sections 121, 121A and 122 of the Indian Penal Code, 1860 (hereinafter, "**IPC**"). Therefore, AFSPA exists as a parallel statute, which vests the power in the armed forces to deal with such offences in 'aggravated circumstances'. A theoretical understanding of these parallel procedures (one utilised during normalcy, the other in times of exception) lends evidence to the thesis that the army acts in *de-facto*

[29]THIBODEAUX et. Al. v. P. Frank COMEAUX et al, [145 So. 2d 1 (1962)] 243 La. 468.
[30]§ 129(2) CrPC [Dispersal of Assembly by Civil Force].
[31]§ 130, CrPC [Use of armed forces to disperse assembly].

authority under the aegis of AFSPA. Hence, the actions of the members of the armed forces must be amenable to review.

III. JURISDICTION OF THE COURTS TO REVIEW MILITARY ACTIONS

The next question which emerges is with respect to the plausibility for the courts to exercise jurisdiction over actions of the Armed Forces in the disturbed area. In order to establish the same, two questions need to be answered: first, whether the courts are institutionally competent to review actions which are informed by concerns of "national security" and, second, whether there exists a constitutional basis for exercising review jurisdiction over military actions.

A. *Institutional competence of the court to delve into matters of national security and internal disturbance*

The exercise of jurisdiction is meaningful only if the court has the institutional competence to delve into the merits of what informs the opinion of the members of the armed forces under Section 4 of AFSPA. Courts are very sceptical to adjudicate on matters which pertain to national security and unity of the country since they lack institutional competence.[32] Any attempt by the court to stifle the powers of the executive during security concern flies in the face of separation of powers. A closer look at the existing jurisprudence surrounding internal security laws will allow a peep into the court's position in this regard.

Immediately after independence, the court placed an undeniable trust in the powers of the executive. In *A.K. Gopalan v. State of Madras,*

[32]Manohar Lal Sharma v. Narendra Damodardas Modi, 2018 (15) SCALE 956 ¶33,34; GRAHAME ALDOUS & JOHN ALDER, APPLICATIONS FOR JUDICIAL REVIEW: LAW AND PRACTICE (Butterworths, 1985).

the court, while upholding the validity of preventive detention laws, held that it was incapable of entering into the question of what constituted the discretion of the detention authority.[33] Today this decision is bad in law and has been overruled by *R.C. Cooper v. Union of India*[34] and eventually by *Maneka Gandhi v. Union of India*.[35] In the latter, it was held that a violation of the right to life under Article 21 ought to be informed by a procedure established by law, which necessarily follows the tenants of due process.

Such checks and balances do not find adequate space when concerns of national security and internal peace kick in. The Supreme Court has lamented on this judicial void while discussing a need for a mechanism to review decisions of the armed forces tribunal and stated that, "*judicial approach by people well-versed in objective analysis of evidence trained by experience to look at facts and law objectively, fair play and justice cannot always be sacrificed at the altar of military discipline. The unjust decision would be subversive of discipline. There must be a judicious admixture of both*."[36] While observing this, the court placed reliance upon the United Kingdom's Court Martial (Appeals) Act, 1968 which has developed procedures to appeal court martial orders in front of an appellate body consisting of ordinary judges such as the judges of the Queen's Bench Division.[37]

In view of this, our justice delivery system in the context of a security concern does appear antiquated when juxtaposed with comparative jurisprudence. Consider the following examples:

1. The Israeli Supreme Court has established an advisory dialogue with the military in order to expeditiously review the validity of

[33]A.K. Gopalan v. Union of India, AIR 1950 SC 27.
[34]R.C. Cooper v. Union of India, (1970) 1 SCC 248.
[35]Maneka Gandhi v. Union of India, (1978) 2 SCC 52.
[36]Prithi Pal Singh Bedi and Ors. v. Union of India (UOI) and Ors., AIR 1982 SC 1413.
[37]Courts-Martial (Appeals) Act, 1968 (United Kingdom).

military actions in domains of counterterrorism campaigns as well as imminent targeted killing operations to ensure that rule of law prevails in all contexts.[38] Such a review is also well accepted within the Israeli armed forces.[39]

2. In the case of *Leghaei v Director General of Security,*[40] the Australian courts reviewed a decision of the immigration minister under the Australian Security and Intelligence Organisation Act of 1979. It was argued by the State that principles of natural justice get trumped in the face of a national security concern. However, the court, disregarding the said argument, rejected the cancellation of the petitioner's visa on the grounds that he was a threat to the national security of the country.

3. In a case involving deportation of an American reporter on the grounds of being involved in spying and publishing sensitive information concerning national security, the courts of United Kingdom did not shy away from reviewing executive action. Lord Denning observed that, "*there is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world, national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England.*"[41] It is now fathomable for courts to stretch its zone of checks into areas which have traditionally been out of its reach. Courts in other jurisdictions have made attempts at ideating innovative strategies to tackle human rights violations even when they occur in the garb of national security. Contrary to this, our Apex Court

[38]DAVID SCHARIA, JUDICIAL REVIEW OF NATIONAL SECURITY 296 (Oxford University Press, 2015).
[39]*Id.*
[40]Leghaei v Director General of Security, (2005) FCA 1576.
[41]R. v. Secretary of State, ex parte Hosenball, (1977) 1 W.L.R. 766, 783 (C.A.).

prefers to quietly step aside. It is time that the court now looks beyond the veil of separation of powers and restores the rule of law in 'disturbed areas'.

B. *Constitutional basis for exercising review jurisdiction over military actions*

Discretion of the executive is neither unfettered nor absolute. Judicial mechanisms ought to be in place to check the abuse of such power and prevent it from being used unconstitutionally.[42] Administrative discretion constitutes two elements – objective and subjective.[43] The courts have always tried to minimise subjective discretion by balancing administrative convenience with the principle of fairness. The reigns of administrative discretion lie in the hands of the courts. Both the High Courts and the Supreme Court exercise the power to review the legality of any administrative action. However, Section 6 of AFSPA states that "*no prosecution, suit or other legal proceeding shall be instituted*" against any member of the armed forces without prior permission of the Central Government. The question now arises whether this provision bars the right of individuals to seek judicial review against the actions of armed forces to secure their fundamental rights.

Article 226 of the Constitution lends sweeping powers to all the High Courts to review the legality of administrative actions. Under Article 227, the High Court has superintendence over all the tribunals in India, except those set up by the armed forces. However, no such bar exists in the language of Article 226 itself. The ability of the legislature to limit the scope of review jurisdiction of the High Court under Article 226 was discussed in *L. Chandra Kumar v. Union of India*.[44] The seven-judge bench of the Supreme Court unanimously

[42]Suman Gupta And Ors v. State of J & K, (1983) 4 SCC 339.
[43]State of Gujrat v. Jamnadas, AIR 1974 SC 2233.
[44]L. Chandra Kumar v. Union of India, AIR 1995 SC 1151.

held that the right to judicial review forms part of the basic structure of the Constitution and such powers cannot be taken in any circumstance from the High Court.

The Supreme Court, under Article 32 of the Constitution, enjoys similar powers. While exercising its jurisdiction under Article 32, it has gone to the extent of awarding extraordinary compensation as a constitutional remedy for a proven violation of a fundamental right. This is especially true in cases where custodial deaths and torture are involved.[45]

Article 33(b) stands to limit the scope of review under Article 32 in its "*application to members of the armed forces charged with the maintenance of public order*..." However, as stated earlier, the court has construed this bar strictly in order to balance the rights of armed personnel with the need for discipline in the army. It held that there should be an overt provision by the Parliament preventing such an exercise of the rights render Article 32 as inoperative.[46] Further, restrictions on jurisdiction should have a direct nexus with ensuring the proper discharge of duties by members of the armed forces.[47]

The constitutional courts of India have carved for themselves an untrammelled zone for review, the scope for which is ever expanding. This zone can certainly not be obstructed by a mere statutory impediment such as Section 6 of the AFSPA. In any case, the said bar is imposed upon implicating members of the armed forces in their personal capacity by way of civil or criminal charges (the usage of the terms 'suit' or 'proceedings' are illustrative to that regard). However, distinct from this is the power of review, which checks their discretion in an official capacity without holding them personally

[45]Nilabati Behra v. State of Orissa, AIR 1993 SC 1960; D.K. Basu v. State of West Bengal, AIR 2015 SC 2887.
[46]Prithi Pal Singh Bedi and Ors. v. Union of India, (1982) 3 SCC 140.
[47]R Vishwan and Ors. v. Union of India and Ors, (1983) 3 SCC 401.

liable. Hence, the said bar has no bearing on the court's constitutionally stipulated power of review.

IV. STANDARD OF REVIEW

In a democratic setup, the executive is bound to exercise discretion within the four confines of law.[48] Recognising this principle, it has been observed that "*there are no unreviewable discretions under the constitutional dispensation*."[49] In order to ensure this, the court while checking the legality of discretion, delves into its reasonableness. *Om Kumar v. Union of India*[50] is a landmark decision in this regard. The primary question facing the court was in respect of the standard of review, which is to be employed to check the legality of an administrative order. The court was mindful that such a standard ought not to stifle the executive's functioning by subjecting each and every action to strict scrutiny, while following basic tenants of fairness. In doing so, the court devised a twin strategy; it held that when a violation of a fundamental right is alleged, the test of proportionality is to be employed. However, in the rest of the cases, the principles of 'Wednesbury unreasonableness' would be sufficient to toe the line of the State. The issue at hand involves the question of national safety and unity. The circumstances call for the court to trudge carefully and diligently. Therefore, a closer look at both the tests is essential to propose a standard for review.

A. *Wednesbury unreasonableness*

The Wednesbury principles of reasonability originate from a United Kingdom case *Provincial Picture Houses v. Wednesbury*

[48]Ajay Hasia Etc v. Khalid Mujib Sehravardi & Ors., AIR 1981 SC 487.
[49]Election Commission of India v. Union of India and Ors, 1995 Supp (3) SCC 643 ¶8.
[50]Om Kumar v. Union of India, (2001) 2 SCC 386.

Corporation, where the court held that its scope for review is limited to the question of whether relevant facts were considered in reaching the decision.[51] While reviewing executive actions, the courts ought to sit in secondary review. According to *Om Kumar*, this test is to apply in circumstances when there is no violation of fundamental rights.[52]

Wednesbury principles were judiciously employed in *S.R. Bommai v. Union of India* to review the satisfaction of the President while proclaiming breakdown of constitutional machinery under Article 356. The court held that the power of review exists, but is limited to examining the existence and relevance of material which led to a particular proclamation. Furthermore, such a decision should also not be vitiated by *mala fide*, perverse or irrational exercise of power.[53] In *Bommai*, the countervailing public interest was federalism. Even though federalism forms part of the basic structure of the Constitution, it is not part of the fundamental rights under the Constitution. Therefore, the court gracefully toed the line for the State to act by employing the *Wednesbury* principles.

However, unlike *Bommai*, the enquiry at hand involves the pervading question of fundamental rights. Any stint of abuse of power may lead to the gross violation of such rights. Despite the fear of repetition, the provisions of AFSPA are herein produced only to make the obviousness of such violation more lucid.

According to Section 4 of AFSPA, a member of the armed forces, for the purposes of maintaining public order, could kill any person;[54] could arrest without a warrant only on suspicion of causing a cognizable offence;[55] and enter and search any premises on suspicion without any warrant.[56] Therefore, on the face of it, Section 4 of

[51]Provincial Picture Houses v. Wednesbury Corporation, (1948) 1 KB 223.
[52]Om Kumar, *supra* note 45, at ¶25.
[53]S.R. Bommai v. Union of India, AIR 1994 SCC 1918.
[54] § 4(a) AFSPA.
[55] § 4(c) AFSPA.
[56] § 4(d) AFSPA.

AFSPA takes away life and liberty as guaranteed in Article 21 of the Constitution.

In view of this, the application of Wednesbury principles to check the legality of such actions is thoroughly inconsistent with the existing jurisprudence. Such an application should, therefore, be negated.

B. *Test of proportionality*

The proportionality test subjects government actions to the rigorousness of a three-layered enquiry –

1. if the measure inflicted in achieving the objective is in nexus with the objective itself (the suitability test);
2. if the violation of a fundamental right was the only way in achieving the objective (the necessity test);
3. if the executive action was in proportion with the object ought to be achieved (proportionality test).

Combined, these three constitute the 'strict scrutiny' test, which the court may employ while sitting in primary review. The court has employed the proportionality test to check reasonability of actions undertaken in the name of public order and even security.

Section 144 of the CrPC empowers the executive to direct any person "*to abstain from a certain act or to take certain orders with respect to certain property*". According to Section 144(2), "*in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte*."

The Supreme Court reviewed the exercise of executive discretion under Section 144 in *Re Ramlila Maidan Incident*.[57] The court held that an order under Section 144 violates both Articles 19 and 21 and

[57]Ramlila Maidan Incident, In re., (2012) 5 SCC 1.

is therefore meant to be utilised in the most extraneous circumstances. It held that not only were the police orders *ultra vires* but also disproportionate. According to the facts of the case, the orders to disperse the assembly in Ramlila Maidan were passed in the midnight, when all the protesters were sleeping. The police used tear gas to evacuate protesters, who were caught by surprise. The court held that such actions had no reasonable nexus with the object of maintaining public order (suitability test failed),[58] there were alternative means of dealing with the same (necessity test failed)[59] and the actions were blown out of proportion (proportionality test failed).[60]

Section 41 of the CrPC vests the power in the police to arrest without a warrant when there is 'reasonable suspicion' of the commission of a cognisable offence. While interpreting the term 'reasonable suspicion', the court has held that it does not mean mere inclination or prima facie belief. Rather, the suspicion ought to be based upon material evidence and reasonableness. [61] Since Article 21 of the Constitution stands to be prejudiced in the exercise of such discretion as stipulated under Section 41, it ought to be utilised in the most heinous circumstances. Thereby, the proportionality test is applied to check the legality of the arrest. Post *A.K. Gopalan*, proportionality has also been applied liberally in cases concerning preventive detention.[62] The court has also delved into the question of the legality of a

[58]*Id.* at ¶177 [reads as, "provisions of Section 144 CrPC cannot be resorted to merely on imaginary or likely possibility or likelihood or tendency of a threat"].

[59]*Id.* at ¶179 [reads as "…I am also unable to understand as to why this enforcement could not even wait till early next morning"].

[60]*Id.* at ¶179 [reads as "another important facet of exercise of such power is that such restriction has to be enforced with least invasion."].

[61]Joginder Kumar v. State of Uttar Pradesh and Ors., (1994) 4 SCC 260.

[62]A.K. Roy v. Union of India, AIR 1982 SC 710; State of Gujarat v. Adam Kasam Bhaya, AIR 1981 SC 2005.

particular detention and eventually held such detention invalid in law, having no connection with questions of national security.[63]

A question now arises – is the proportionality test amenable to review military actions under AFSPA? The Gauhati High Court answered this question in the affirmative, when it courageously reviewed the validity of the disturbed area proclamation in the region and held that there existed no material to justify application of AFSPA in the concerned states (rendering the suitability test failed).[64]

The test of proportionality fits best for reviewing the discretion of the armed forces while they act in aid of the civil powers. As noted earlier, the forces are themselves vested with the rights to arrest and detain without a warrant, shoot to kill, etc. These powers are aggravated in nature, when compared with the powers which already subside with the civil authorities, owing to the countervailing public interest, which involves security and unity of the State. However, such powers are ought to be used only when there is an absolute necessity to do so, for reasons which are well founded in objective evidence. These measures ought to be used as a last resort. When these powers are used as shortcuts to justify a larger security interest, there occur gross violations of human rights. Therefore, the extension of the review power of the court over armed forces is necessary to check any abuse of power.

V. CONCLUSION

On August 20, 2018, more than 300 serving members of the armed forces petitioned in the Supreme Court to put an end to prosecution of

[63]G.M. Shah v. State of Jammu Kashmir, AIR 1980 SC 494, ¶9.
[64]Peoples Union for Human Rights v. Union of India and Ors., AIR 1992 Gau 23, ¶61.

armed personnel in fake encounters case.[65] This legal battle is replete with propaganda and symbolic nationalism. On one hand are those who are fiercely jolting against impunity and denial of basic human rights, whereas on the other hand are those who, in their maudlin stupor of jingoism, place blind faith in the judgment of the armed forces.

The approach of this article is to mollify this very acerbic debate by shifting its axis from the question on personal criminal liability to the liability of the State itself. It recognises the existence of two countervailing duties – ensuring security of the State as well as recognising fundamental rights of its citizens. The approach undertaken by the government to indicate its commitment towards both is to create laws which bind the armed forces by a strict code of conduct. In doing so, it vindicates itself from accountability.

This article argues that High Courts and the Apex Court possess the jurisdiction to review these by-laws along with the actions undertaken within such regimes. While acting in aid of civil authorities, the armed forces act in *de-facto* authority and are liable to the same checks and balances which all governmental authorities are subjected to. Since a breach of duty by armed personnel could lead to a gross violation of human rights, the standard of such review ought to be kept high. By doing so, the courts will be able to bring the disturbed areas within the fold of constitutionality.

This excerpt is an arduous plea for the restoration of rule of law in disturbed areas. The existence of AFSPA is a debauchment in its name. When questions of national security and human rights stand face to face, the principle of rule of law always trumps the debate

[65]Ankit Prasad, *UNPRECEDENTED: Over 300 Serving Army men, In Personal Capacity, To Ask Supreme Court If Soldier's Discretion Can Be Put Under Legal Scrutiny*, REPUBLIC TV (Aug. 14, 2018 10:48 AM), https://www.republicworld.com/india-news/general-news/unprecedented-over-300-serving-armymen-in-personal-capacity-to-ask-supreme-court-if-soldiers-discretion-can-be-put-under-legal-scrutiny.

trying to strike the perfect balance. This discussion can now be called off, but in the words of Justice H.R. Khanna – "*A state of negation of rule of law would not cease to be such a state because of the fact that such a state of negation of rule of law has been brought about by a statute. Absence of rule of law would nevertheless be absence of rule of law even though it is brought about by a law to repeal all laws*."