
ARMED FORCES SPECIAL POWERS ACT, 1958: A NATIONAL NECESSITY OR A STAIN ON THE WORLD'S LARGEST DEMOCRACY?

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ABSTRACT

The Armed Forces Special Powers Act (AFSPA) provides unique and excessive powers to the Indian army in “disturbed areas” and justifies several actions taken by them as legal. The paper outlines the concerns faced by the North-Eastern states and Jammu and Kashmir in this respect, wherein AFSPA has invoked strong reactions. In a democracy, military forces must be deployed for a limited time and not indefinitely on the grounds of these states being “disturbed” for years. This also raises the issue of poor governance and consequent implications on the citizenry. In this light, the article provides the background to AFSPA and its application in North East India and Jammu and Kashmir. While the Supreme Court has endorsed the law’s constitutional validity, the article provides a critique of AFSPA in terms of its content, scope, and application from a constitutional

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and human rights perspective. Thereafter, it calls for necessary amendments and a democratic review of the law.

I. INTRODUCTION

India is close to completing 75 years of independence, and the journey so far has been nothing short of phenomenal.¹ In these years, India broke loose from the colonial chains, identified a self-governance system, built an infrastructure for growth and development, enhanced its foreign ties, and found its way to become one of the world's largest democracies. India's unique feature – its diversity – introduces vibrant cultures and thought processes. This brings in new ideas and, along with it, also generates differences in opinions. This difference in opinion is a prominent reason why the laws governing India treat everyone equally.² The application of laws remains bound within the vires of the Constitution, which acts as the binding document and reflects India's personality as a nation. Any law ultra vires³ the Constitution is deemed to be void at the preliminary instance itself.⁴ While the judiciary has, at times, tried to keep in place the primacy of these sacred principles, the democratic structure and the ethnic diversity of the country creates situations that demand extra-ordinary treatment.

A specimen of such a legislation is the Armed Forces (Special Powers) Act, 1958⁵ (“AFSPA” or the “Act”), which confers extra-ordinary treatment on certain areas within the Indian territory, designated as

¹Saurabh Trivedi, ‘India celebrates Independence Day with Social Distancing’ *The Hindu* (New Delhi, 15 August 2020).

²Constitution of India 1950, Art 14.

³Latin phrase to describe an act which requires legal authority but is done without it.

⁴*Chintaman Rao v. State of Madhya Pradesh* [1950] SCR 759.

⁵Armed Forces (Special Powers) Act, 1958 (AFSPA, 1958) & Armed Forces (Jammu and Kashmir) Special Powers Act 1990 (AFSPA, 1990).

“disturbed areas” under the Act.⁶ Observing the insurgency and ethnic conflict in these areas, the legislature intended to maintain civil surgency and security. However, the Act’s loosely drafted and ambiguously defined text has made the practical application of law questionable. Additionally, unchecked authority being vested in armed forces and the security from prosecution of such forces under AFSPA has led to the exploitation of various communities. The plight of people residing in disturbed areas, breach of their fundamental rights and the ill-treatment that they are subjected to has time and again made AFSPA a controversial law and a matter of national and international concern. The paper aims to assess AFSPA and its implementation critically.

After the introductory remarks, the paper provides a background to AFSPA. Thereafter, the paper deliberates on the causes of violence and insurgency in North-Eastern India and Jammu and Kashmir by studying its ethnic and political landscape. After a critique of the Act, the paper traverses through the constitutional and human rights perspectives surrounding the issue. It concludes with some suggestions, which include making certain amendments and introducing a process of democratic review.

II. HISTORICAL BACKGROUND OF AFSPA

AFSPA bestows special powers on the armed forces deployed in “disturbed areas”, designated in parts of North East India (“NEI”) and various districts of Jammu and Kashmir. It was also enforced in Punjab for 14 years, commencing October 15, 1983,⁷ and was ultimately repealed in 1997.⁸ The powers conferred on the army officers under the Act allow them to use all kinds of force, including ‘shoot at sight or

⁶ibid s. 3.

⁷Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983.

⁸Vivek Chadha (ed), *Armed Forces Special Powers Act: The Debate* (Institute for Defense Studies and Analysis, Monograph Series No. 7 2012) 19.

kill⁹, to arrest without warrant¹⁰, to enter and search any premises at any time and to act against any individual or group, if such officer believes that it is necessary to do so for the maintenance of public order.¹¹ While the Act may have been implemented for the national security and maintenance of civil peace, the unchecked vesting of powers in the armed forces has led to misuse of the legislation. Several civilians over time have lost lives, their loved ones, livelihoods and on top of everything else, their fundamental rights to live a peaceful and dignified life guaranteed by the Constitution. In addition to the arbitrary vesting of powers in the armed forces, the Act also provides that no proceeding can be facilitated even in case of violence or breach of law without prior permission of the Central Government.¹² There is no denial of the fact that the army has been defending the disturbed areas from infiltrators. In that process, however, the army has also been blamed for causing brutalities on the local populace in the name of safety and duty.

The history of AFSPA can be traced back to the Quit India Movement of 1942.¹³ The Japanese soldiers were advancing to India's eastern borders, and incidents of mass violence were becoming a recurring affair. The country was in chaos when the All-India Congress was declared illegal, and the then Viceroy of India, Lord Linlithgow, declared a nationwide emergency. He also passed the Armed Forces (Special Powers) Ordinance, 1942¹⁴, which vested similar powers in the army as the present-day AFSPA. The Act was once again re-enacted in Nagaland in 1958. The Naga National Council (NNC) caused rebellious uprisings against the Indian armed forces in the

⁹AFSPA, 1958, s. 4(a)

¹⁰AFSPA, 1958, s. 4 (c).

¹¹AFSPA, 1958, s. 4 (d).

¹²AFSPA, 1958 and AFSPA, 1990, s. 6.

¹³Sudha Ramachandran, 'India's Controversial Armed Forces (Special Powers) Act' (*The Diplomat*, 2 July 2015), <<https://thediplomat.com/2015/07/indias-controversial-armed-forces-special-powers-act/>> accessed 29 June 2021.

¹⁴Armed Forces (Special Powers) Ordinance, 1942 Ordinance No. XLI of 1942.

1950s, leading to disturbance and violence in the Naga Valley.¹⁵ AFSPA, although similar, was yet very different from its predecessor, the 1942 act. This time around, the Act restricted its application to disturbed areas and the powers vested in the armed forces were made more specific. Additionally, its applicability was confined to NEI, unlike the erstwhile legislation which was applicable throughout India.

While AFSPA managed to receive strong support from the then Home Minister, G.B. Pant, it also faced significant parliamentary opposition.¹⁶ It has been argued that the arbitrary vesting of powers in the armed forces and giving them the authority to shoot a person or inspect an area based merely on suspicion is contrary to the spirit of fundamental rights enshrined under the Indian Constitution. Much later, in the year 1990, due to the tension between India and Pakistan and the influx of militants and Islamist Jihadis in several parts of Jammu and the Kashmir Valley, AFSPA was also enacted in the territory of Jammu and Kashmir.¹⁷ This was followed by the designation of several districts of Kashmir as disturbed areas. Armed forces were consequently deployed in such areas for parallel governance.

III. ROOTS OF VIOLENCE AND INSURGENCY IN NORTH EAST INDIA AND JAMMU AND KASHMIR: AMBIVALENT ETHNIC LANDSCAPE AND POLITICS

Before analyzing the constitutionality of the AFSPA, it is imperative to briefly study how the AFSPA is applied across “disturbed areas”. This

¹⁵Dinesh Kotwal, ‘The Naga Insurgency: The Past and the Future’, (2000) 24 (4) Strategic Analysis 751.

¹⁶*The AFSPA: Lawless Law Enforcement According to the Law?* (New Delhi: Asian Centre For Human Rights, 2005) 3.

¹⁷Chadha (n 8) 20.

section will undertake that exercise and demonstrate how the AFSPA is implemented in North-Eastern India, and Jammu and Kashmir.

The seven states of NEI, i.e., Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland, and Tripura, collectively referred to as the “seven sisters”,¹⁸ is a region that is surrounded by an international border on all the sides, making it a landlocked area. However, it has a diverse demography and is marked by the presence of several tribes and communities.¹⁹ Many of these tribes are original inhabitants that have been given a distinct schedule in the Constitution of India, i.e., the Fifth Schedule, to specifically deal with the administration and control of the areas inhabited by them.²⁰ In the name of “protective discrimination”²¹, there is significant restriction on the non-tribal groups with respect to the ownership and exchange of land, business and trade, among other activities. This protective discrimination is also enunciated in the Sixth Schedule, also known as a constitution within the Constitution. It allows Autonomous District Councils (ADCs) to make laws restricting outsiders from buying tribal land and regulating their entry and trade. It, thereby, aims to protect the customs and identity of the people of these areas. Colonial in its origin, this segregation continues and has led to several issues between the tribal and non-tribal population of the region. Informal arrangements have been made for ownership of land and entrepreneurship which the local

¹⁸Lazar Jeyaseelan (ed), *Conflict Mapping And Peace Processes in North-East India* (North Eastern Social Research Centre 2008).

¹⁹Mandy Turner & Binalakshmi Nepram, ‘The Impact of Armed Violence in Northeast India: A Mini Case Study for the Armed Violence and Poverty Initiative’ (2004) Bradford, Centre of International Cooperation and Security, Department of Peace Studies, University of Bradford <https://bradscholars.brad.ac.uk/bitstream/handle/10454/995/AVPI_India.pdf?sequence=1&isAllowed=y> accessed 17 February 2021.

²⁰Fifth Schedule, Article 244(1) The Constitution of India, ‘Provisions as to the Administration and Control of Scheduled Areas and Scheduled Tribes’, <<https://www.mea.gov.in/Images/pdf1/S5.pdf>>, accessed 5 June 2021.

²¹Baruah S. ‘Protective Discrimination and Crisis of Citizenship in North-East India’ (Apr. 26 - May 2, 2003), 38 (17) *Economic and Political Weekly*, pp. 1624-1626.

authorities have failed to curtail and at times even authorized them. This means that the land that belonged to the tribals gets transferred to non-tribals.²² In addition, because of privatization, class differentiation has also emerged within the tribal communities themselves.²³ Therefore, such protective discrimination, coupled with unregulated land ownership arrangements, has furthered the class divide amongst the tribal communities and has fueled the tribal versus non-tribal feuds.²⁴ Thus, the politics is based on land distribution and ownership between ethnic and tribal groups and others.

In a study of the North Cachar region of Assam, it was concluded that coffee cultivation was encouraged by the local authorities.²⁵ However, when the price of coffee fell in the global market, such support was withdrawn, and the coffee plantations were shut down. No support was given to the coffee plantation owners, and they were left on their own. Thus, the local authorities neglected any consensus-based discussion with tribal communities on the use of land and generally promoted a specific produce but offered no support. Further, it is projected that there are over seventy armed opposition groups in the northeast region.²⁶ These groups have their own specific agendas, concerns, and demands, including safeguarding languages, tribal customs, control over natural resources, and local business. There is also a feeling of separation from mainland India among several of these groups, and hence, issues of migration and separation are also seen. Another significant issue in the region is the ease of access and provision of small and light weapons and significant contact amongst armed groups.

²²S. Baruah, 'Nationalizing Space: Cosmetic Federalism and the Politics of Development in Northeast India' (2003) 34 (5) *Development and Change* <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-7660.2003.00334.x>> accessed 5 June 2021.

²³Turner and Nepram (n 19) 9-10.

²⁴Turner and Nepram (n 19).

²⁵Sanjay Barbor, 'Ethnic Politics and Land Use: Genesis of conflicts in India's Northeast' (2002) 37 (13) *Economic and Political Weekly* 1285.

²⁶*Ibid.*

Both these factors contribute to the emergence of full-scale armed guerrilla groups. Sometimes, these insurgent groups have better arms and ammunition than the local police and armed forces.²⁷ While no official data exists on the scale of weaponry that exists in the region, a survey conducted in South Asian territory concludes that there has been a substantial increase in the number of AK-47 guns that are in control of the non-state actors – from 0 to over 8 million between 1980 and 2000.²⁸ There are no figures on gun possession in NEI particularly. However, this easy availability of small armed and light weapons has helped insurgent groups in NEI in their criminal activities and assisted them to usurp “political space in states like Manipur.”²⁹

In this light, the disturbed area situation and the acts inciting violence in the seven sisters require a critique. Assam came under the purview of AFSPA in 1958, and thereafter, in November of 1990, the entire state was declared a disturbed area.³⁰ Because of consistent acts of violence in the areas surrounding Assam, these have also been declared as disturbed areas. There is a lot of violence and stigma against the Chakma and Hajong³¹ - communities that had migrated from

²⁷Subhir Bahumik, ‘Insurgencies in India’s North East: Conflict, Co-option and Change’ (2007) East West Center Washington Working Paper 1/2007, <<https://scholarspace.manoa.hawaii.edu/bitstream/10125/3540/EWCWwp010.pdf>> accessed on 7 June 2021.

²⁸Jo Boyden, Jo de Berry, Thomas Feeny, and Jason Hart, ‘Children Affected by Armed Conflict in South Asia: A Review of Trends and Issues Identified through Secondary Research’ (2002) Refugee Studies Centre Working Paper No. 7/2002, University of Oxford < <https://www.rsc.ox.ac.uk/files/files-1/wp7-children-affected-conflict-south-asia-2002.pdf>> accessed on 5 June 2021.

²⁹B. P. Routray, ‘Southeast Asian Arms Trail to India’s Northeast’ *Asia Times* (15 Nov 2002).

³⁰Press Trust of India, ‘Govt declares entire Assam as ‘disturbed’ area under AFSPA for another month’ (*Hindustan Times*, 7 August 2017) <<https://www.hindustantimes.com/india-news/govt-declares-entire-assam-as-disturbed-area-under-afspa-for-another-month/story-xT2vgSgUkCUt2qAiNOzxYK.html>> accessed 1 February 2021.

³¹A Basu Ray Chaudhury & S. K. Das, ‘A report on the state of being stateless: A case study of the Chakmas of Arunachal Pradesh’ (Calcutta Research Group, 2011); See also, SAHRDC, ‘The Stateless Hajongs and Chakmas of the Indian State of

Bangladesh in the 1960s. In 1979, militancy broke out with the formation of the United Liberation Front of Assam (“ULFA”), which was established in reaction to the large-scale immigration from Bangladesh. ULFA continues to be a strong insurgent group in Assam and has now also seeped into Arunachal Pradesh, leading to the deployment of forces there as well. Bodo tribal groups of Assam also caused another insurgency led by the National Democratic Front of Bodoland in the 1980s when they called for their separate state.

Scholars and activists argue that the armed forces deployed in Assam have abused their powers in the name of counter-insurgency operations and are provided protection under the guise of discharging their duties under AFSPA.³² The Assam government recently extended the region’s existing “disturbed area” status for another six months from February 27, 2021.³³ Several parts of Manipur were also announced as disturbed areas before declaring the whole of Manipur as a disturbed area on September 8, 1980.³⁴ While the Naga tribes in Manipur support the Naga armed rebellion, the other ethnic groups initiated a separatist movement countering the amalgamation of their state with mainland India in 1949. Ever since then, the tension has been evolving and has led to the inclusion of several other tribal and ethnic groups in this rebellion in Manipur.³⁵ In Nagaland, when the British withdrew, the ethnic Nagas opposed the Indian rule, which led to the formation of the

Arunachal: A Study of Systematic Repression’ (South Asia Human Rights Documentation Centre, 1997).

³²Seema Kazi, ‘Rape, Impunity and Justice in Kashmir’ (2014) 10 Socio-Legal Rev 14.

³³‘Assam Govt Extends ‘Disturbed Area’ Tag for Six Months from February 27’, (*The Sentinel*, 24 February 2021) <<https://www.sentinelassam.com/north-east-india-news/assam-news/assam-govt-extends-disturbed-area-tag-for-six-months-from-february-27-525938>> accessed 5 July 2021; Press Trust of India, ‘Assam Government Extends AFSPA in State for Another 6 Months’ (*The Wire*, 25 February 2021) <<https://thewire.in/security/assam-government-extends-afspa-in-state-for-another-6-months>> accessed 18th May 2021.

³⁴‘The Armed Forces (Special Powers) Act- Repressive Law’ (2003) 2(1) *Combat Law: The Human Rights Magazine*.

³⁵Turner and Nepram (n 19) 13-15.

Naga National Council (“**NNC**”). NNC had constantly thwarted all attempts to merge with India, and even when India asserted its control over the territory, NNC protested and announced its separate and independent status. They furthered the armed struggle in the region, leading to violent protests. To deal with the situation, AFSPA was legislated in 1958 to end this armed struggle and violence. Subsequently, NNC was replaced by its successor, the National Socialist Council of Nagaland³⁶ which was the most active insurgency group in that region in the 1980s. Despite the presence of non-state actors and extremist groups, the civilians in Nagaland have complained about the abuse and misuse of AFSPA for the last five decades.³⁷

Similarly, the hostility in Meghalaya is the result of the conflict amongst the local tribes and Bangladeshi migrants that had moved to the region after partition in the year 1947. Later, in the 1980s, militancy erupted, and subsequently, a wide belt in Meghalaya bordering the neighboring state of Assam was notified as a disturbed area in November 1990.³⁸

There is also significant tribal insurgency in the state of Tripura. Thereafter, the state was brought within the fold of AFSPA in November 1970,³⁹ and parts of Tripura were tagged as “disturbed

³⁶B. P. Routray, ‘Guide to Indian Army (East)’ (*Indian Army*) <<https://indianarmy.nic.in/Site/FormTemplate/frmTempSimple.aspx?MnId=hGmY2Hq9HYifv/cxkek/QQ==&ParentID=4ovYkF95ozAu5QjjgDuBzQ==>> accessed 5 July 2021.

³⁷Getting Away with Murder: 50 years of the Armed Forces (Special Powers) Act’ (*Human Rights Watch*, August 2008) <https://www.hrw.org/legacy/backgrounder/2008/india0808/india0808.htm#_ftn66> accessed 17 February 2021.

³⁸ Ministry of Home Affairs, Government of India, ‘Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958’ (2005) 52 <<https://hrsjm.org/wp-content/uploads/2017/03/Report-of-Review-Committee-2005-on-ArmedForcesAct1958.pdf>>, accessed 5 July 2021.

³⁹The Armed Forces Special Powers (Extension to Union Territory of Tripura) Act, 1970.

areas”.⁴⁰ Like other states in the region, the non-state actors in Tripura also have conflicts and oppositions arising out of their outlook towards the Bangladeshi migrants. The All Tripura Tiger Force (ATTF) and the National Liberation Front of Tripura (NLFT) lead the tribal insurgency in this state. Likewise, although in January 1967, Mizoram was declared as a disturbed area, a peace accord was signed in the year 1986,⁴¹ which subsisted the application of AFSPA in the territory and AFSPA was left as a sleeping law. The conflict began with a famine which led to the formation of the Mizo National Front (MNF), which opposed the Government for its neglect and lack of support to the state during the famine. During the 20 long years of conflict, AFSPA was used to conduct widespread torture, rape, extra-judicial killings and arbitrary detention.⁴²

Lastly, under the Constitution of India, the state of Jammu and Kashmir had held a special status and limited autonomy via article 370 and article 35A, since the time of its contentious accession to India in 1947.⁴³ The provisions restricted non-Kashmiris from obtaining domicile status in the state, which meant they could neither apply for local government jobs nor own property in J&K.⁴⁴ Amidst the war between India and Pakistan, Jammu and Kashmir had witnessed conflict which remains unresolved and furthered the growth of

⁴⁰Sailjananda Saikia, ‘9/11 of India: A Critical Review on Armed Forces Special Power Act (AFSPA), and Human Right Violations in North East India’ (2014) 2 (1) *Journal of Social Welfare and Human Rights* <http://jswhr.com/journals/jswhr/Vol_2_No_1_March_2014/15.pdf> accessed March 12 2021.

⁴¹Memorandum of Settlement (Mizoram Accord), 1986.

⁴²South Asia Human Rights Documentation Centre, ‘Armed Forces Special Powers Act: A Study in National Security Tyranny’ (1995) <<https://themanipurpage.tripod.com/letters/humanrhts.html>> accessed 8 June 2021.

⁴³Erin Blakemore, ‘The Kashmir conflict: How did it start?’ (*National Geographic*, March 2, 2019), <<https://www.nationalgeographic.com/culture/2019/03/kashmir-conflict-how-did-it-start/>> accessed 5 July 2021.

⁴⁴Ayjaz Wani, ‘Life in Kashmir After Article 370’, (*Observer Research Foundation*, January 2020) <<https://www.orfonline.org/research/life-in-kashmir-after-article-370-60785/>> accessed 7 July 2021.

separatist movements in or around the year 1989. Pakistan's deep involvement in directing militants and Islamist Jihadis⁴⁵ to reclaim their rights over the Kashmir territory worsened the situation, ultimately leading to the enactment of the Jammu and Kashmir Disturbed Areas Act, 1992 for a limited period of two years.⁴⁶ The same was re-enacted as the President's Act, 1992 under Article 356⁴⁷ of the Constitution and later on as Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, which received presidential assent on September 10, 1990 and came into effect on July 5, 1990. The authority to announce an area as disturbed was given to the Governor of the state, who declared districts of Anantnag, Baramulla, Badgam, Kupwara, Pulwama and Srinagar as disturbed areas. Since then, the armed forces there have been significantly abusing their position of power.⁴⁸

Over the course of five decades and counting, the civilians in the disturbed areas have lived in a constant state of uncertainty - the uncertainty of being arrested, kidnapped, or abducted, losing a loved one, or being subjected to inhuman treatment. The Kashmir valley and the hilly terrains of the NEI have witnessed a large number of innocent civilians being abducted, raped, or murdered in plain sight on the pretext of protection under AFSPA. For instance, the Indian Army in Kashmir arrested a young man suspected of gun trading pursuant to a local tip and was accidentally killed on the spot due to a misfire by the Commander, and the accident was publicly designated as an encounter. This is said to be a routine affair in the valley.⁴⁹

⁴⁵Chadha (n 8).

⁴⁶Jammu & Kashmir Disturbed Areas Act 1992.

⁴⁷Constitution of India 1950, Art. 356.

⁴⁸Zahid Hussain, 'State Violence and Impunity in the Borderlands: The Case Study of Kashmir and Manipur' (2016) 21 (12) IOSR Journal Of Humanities And Social Science 14.

⁴⁹Kishalay Bhattacharjee, 'The emergency that continues: 25 years of AFSPA in Jammu and Kashmir' (*Scroll.in*, 5 July 2015) <<https://scroll.in/article/738707/the-emergency-that-continues-25-years-of-afspa-in-jammu-kashmir>> accessed 19 February 2020; Wajahat Habibullah, 'Armed Forces Special Powers Act, Jammu &

Along with young men, women and children in the valley are also subjected to confinement and inhumane behavior merely because they are related to insurgents or militants and are suspected to be “one of them”. Women especially have been subjected to grave misbehavior and treated like objects of war for political repression in Kashmir.⁵⁰ Due to a lack of transparency and clarity in data, no reliable statistics are found, but quite evidentially, the practice is frequent and widespread. Surprisingly, it is also a perspective that the number of rape cases in the militant areas is more in number, as rape is used as a tool of counter-insurgency measures to nullify the local opposition and annihilate the morale.⁵¹ Testimonies by women show that security forces target women for aiding the struggle and for dismantling the complete movement. For instance, Razina Begum, whose husband had joined militants, revealed that on 29 October 2000, she was detained by the army men of 15 Bihar Regiment and was sexually abused.⁵² In 2009, two women were raped and murdered in the district of Shopian, and to add to the atrocity, the state’s administrative machinery actively sabotaged the impartial inquiry. The *Shopian case* and *Razina Begum’s case* are just two among the many human rights violations that women in the Valley face due to the abuse of power that primarily arises from the AFSPA.⁵³

In light of this, the Committee on the Elimination of Discrimination against Women noted that sexual violence perpetrated by the members

Kashmir’ in Vivek Chadha (ed), *Armed Forces Special Powers Act: The Debate* (Institute for Defense Studies and Analysis, Monograph Series No. 7 2012) 19.

⁵⁰Kazi (n 32).

⁵¹Amit Ranjan, ‘A Gender Critique of AFSPA: Security for Whom?’ (2015) 45 (3) *Social Change* 440.

⁵²Inamul Haq and Sofi A. Sheeraz, ‘Displacement and Gendered Violence in the Kashmir Valley: An analysis’ (2020) 13 (1) *Вестник Санкт - Петербургского университета. Международные отношения* 82.

⁵³Asia Watch & Physicians for Human Rights, ‘Rape in Kashmir: A crime of War’ (*Human Rights Watch*, 1993) <<https://www.hrw.org/sites/default/files/reports/INDIA935.PDF>> accessed 6 June 2021; Ranjan (n 51).

of the armed forces should be brought under the purview of ordinary law and that the government must grant permission to enable prosecution in all such human rights violations.⁵⁴

IV. CRITIQUE OF THE AFSPA: COMPROMISED CONSTITUTIONALITY AND HUMAN RIGHTS CONSIDERATIONS

In light of the above situations, this part will now assess the fundamental issues with AFSPA and aim to critique the law. The provision that is generally the most contested is Section 4 of AFSPA, which provides for the special powers of the armed forces and provides that:

“Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area, —

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

⁵⁴Committee of the Elimination of Discrimination against Women, Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India (CEDAW/C/IND/CO/4-5) para 13.b.

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

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

(d) enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises and may for that purpose use such force as may be necessary.”⁵⁵

Article 14 of the Constitution of India guarantees equality before the law and the equal treatment of laws.⁵⁶ In *Ajay Hasia v. Khalid Mujib Sehravadi*,⁵⁷ the Supreme Court laid down that whenever there is arbitrariness in state action, Article 14 immediately comes into play and strikes down such actions of the state. The Court speaking through Justice Bhagwati, noted that:⁵⁸

⁵⁵AFSPA, 1958, s.4.

⁵⁶Constitution of India 1950, Art. 14.

⁵⁷1981 AIR 487.

⁵⁸*ibid* ¶16.

“Equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.”

This passage aims to connect the concept of “equality” and “non-arbitrariness” through ‘equality before the law’.⁵⁹ The right to ‘equality before the law’ within Article 14 of the Indian Constitution can be traced back to English Common Law.⁶⁰ British Jurist A.V. Dicey explained that the idea of “legal equality” requires that “every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen”.⁶¹ Section 6 of AFSPA contravenes this very basic tenet of ‘equality before the law’. The provision effectively prohibits the prosecution of security forces unless the Government of India grants a “sanction” to prosecute.⁶² The United Nations High Commissioner for Human Rights notes that up until 2018, the government had not granted permission to prosecute a single member of the armed forces.⁶³ It has been seen in the case of *General Officer Commanding v. Central Bureau of Investigation and Another*,⁶⁴ the sanction of the Central government is mandatory in order to

⁵⁹Tarunabh Khaitan, Equality: legislative review under article 14 in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of Indian Constitutional Law* (OUP 2016), 699-719.

⁶⁰*ibid*; *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75.

⁶¹Albert Dicey, *Introduction to the Study of the Law of the Constitution* (9th edn., Macmillan 1939) 193.

⁶²AFSPA 1958, s.7.

⁶³Office of the United Nations High Commissioner for Human Rights, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan* (14 June 2018) page 11.

⁶⁴AIR 2012 SC 1890.

proceed with a trial under Section 6. The provision was further reviewed in the case of *Indrajit Barua v. Union of India*,⁶⁵ where the Delhi High Court justified this section saying that it would abstain people from filing “frivolous claims” and is, therefore, valid.

In parts where the AFSPA is in force, the residents are denied the protection of the right to life, protection of the criminal law, and denied the normal judicial redressal mechanisms. For instance, under the Indian Penal Code, only murder is punishable by death. But, Section 4(a), AFSPA empowers the armed forces to fire upon any person, even causing their death, if they suspect that such person is carrying weapons and that the act of killing such person is necessary to maintain public order and security.⁶⁶

While the powers conferred upon the armed forces under AFSPA are wide, there is also a lack of clarity in the law. Various fundamental parts of the Act are left undefined by the legislators, thereby creating an ambiguity that could be misused. For example, the words “carrying on of weapons” are nowhere defined in the Act. The Act fails to define the term “weapons” or provide an annexure of weapons deemed dangerous to the extent that the armed forces have the authority to kill. In this regard, a weapon could be anything, namely, a knife, a gun etc. and therefore, the risk involved would vary in each case. However, due to the lack of definition of “weapon”, the armed forces can easily misuse their power to kill someone based on the mere possession of a knife.⁶⁷In respect of this concern, an incident dated 5 March 1995, requires special mention. On this day, the Rashtriya Rifles in Kohima assumed a blast was a bomb explosion when it was merely a tyre

⁶⁵AIR 1983 Del 513.

⁶⁶Habibullah (n 49).

⁶⁷Prasenjit Borkakoti, ‘A Critical Analysis of the Prospects of AFSPA with Reference to Insurgency Problem in North East India’ (2016) 7 Indian JL & Just 29.

bursting and shot people based on this suspicion. An hour of shooting led to the death of 7 people and caused injuries to 22 civilians.⁶⁸

The special status granted to disturbed areas and the deployment of armed forces is a gross violation of the concept of equality. Further, *Naga's* case did not delve into Article 14 of the Indian Constitution. Therefore, AFSPA needs a recheck in view of Article 14, which comes into play when the state's actions are arbitrary.⁶⁹

Article 20 of the Constitution⁷⁰ guarantees rights to convicted and accused persons and discusses protection in respect of conviction for offences. *Amnesty International* notes that those under custody are subjected to torture and there are reports of interrogations wherein, guns are pointed at forehead or inside the mouth of the accused.⁷¹ This implies that the right to not be a witness against oneself as provided under Article 20 of the Constitution is taken away. Quite naturally, the only trial a potential convict is subjected to is the arbitrary trial by an army officer, who is not even a competent authority to adjudicate. The case of *Luithukla v. Rishang Keishing*⁷² dealt with the whereabouts of a man arrested by the armed forces who went missing for five years. The court found that while the armed forces had detained him, they had mistaken their authority of "aiding civil power". Therefore, the court held that the army should act in consultation with the local administration.

⁶⁸Kuhoi K. Zhimomi *Politics and militancy in Nagaland* (Deep and Deep Publications 2004) 156; Sejal Nag and Tejimala Nag, 'Human Rights Violation in Naga Hills' (1995) 30 (14) *Economic and Political Weekly* 738.

⁶⁹*Ajay Hasia v. Khalid Mujeeb*, 1981 AIR 487.

⁷⁰Constitution of India 1950, Art. 20.

⁷¹Nandita Haksar, Submission to the International Covenant on Civil and Political Rights Human Rights Committee: Armed Forces (Special Powers) Act, 1958: A Report on Human Rights Violations in North East India (1991); Amnesty International, *India: Briefing on the Armed Forces (Special Powers) Act, 1958* (Report, Index: ASA 20/025/2005).

⁷²(1988) 2 GLR 159.

Additionally, any person accused is presumed innocent until proven guilty.⁷³ An accused is also provided with all reasonable legal protections including but not limited to legal representation to the extent deemed necessary. In contrast, AFSPA confers the power to kill someone based on mere suspicion or apprehension. Being a power executed predominantly on the basis of the subjective intention of the armed personnel, it becomes difficult to challenge an act committed by the armed forces merely on this ground. The AFSPA, therefore, takes away the right to liberty and security of the accused by denying a trial before a court of competent jurisdiction.⁷⁴

The Constitution also provides for the right to life, and that deprivation of the life or personal liberty of an individual in the absence of a procedure established by law would be a violation of Part III.⁷⁵ This is arguably the most violated fundamental right in disturbed areas. The mass killings in Kohima, the case of Razina Begum⁷⁶ and the shameful act at Shopian provide dreadful accounts of the breach of Article 21 and the unconstitutionality of AFSPA. The application of AFSPA in the disturbed areas has made it difficult for the civilians to even think about leading a dignified life, let alone live one. Further, the Constitution guarantees the right to legal representation and hearing before a magistrate within 24 hours to a person in arrest.⁷⁷ It is also provided that no extension of custody may be granted without the authority of a magistrate.⁷⁸ The Act, on the pretext of preventive detention, is found to be in gross violation of the rights of arrestees. The petition in *In Civil Liberties Organization v. P. L. Kukrety*,⁷⁹ where

⁷³*Noor Aga Khan v. State of Punjab* (2008) 16 SCC 417.

⁷⁴UN Human Rights Committee (HRC), *General comment No. 35, Article 9 (Liberty and security of person)* (16 December 2014, CCPR/C/GC/35) <<https://www.refworld.org/docid/553e0f984.html>> accessed 1 August 2021.

⁷⁵Constitution of India 1950, Art. 21.

⁷⁶Seema Kazi, *Between democracy and nation: Gender and militarisation in Kashmir* (London School of Economics and Political Science, London, 2008), ¶ 23.

⁷⁷Constitution of India 1950, Art. 22.

⁷⁸Constitution of India 1950, Art. 22 (2).

⁷⁹(1988) 2 GLR 137.

people were kept in custody for five days prior to their presentation before the magistrate, highlighted the obvious violation of Article 22. Preventive detention laws can allow the detention of the arrested person for up to three months. Any detention longer than three months must be reviewed by an Advisory Board.⁸⁰ However, under section 4(c) of the AFSPA, a person can be arrested by the armed forces without a warrant and on the mere suspicion that they are going to commit an offence. Further, the Act has no requirement for an officer to apprise the arrested person of the grounds of such arrest. Such a requirement is mandatory under ordinary law, as is provided under Section 50 of the Code of Criminal Procedure, 1973.⁸¹ Although the Act entails handing over of the arrested person by the officer to the nearest police station “with the least possible delay”, the term “with the least possible delay” is not defined anywhere in the Act. Neither is a fixed time prescribed that would suffice for the least possible delay, making the phrase extremely vague.⁸² This may keep the arrested person in the custody of the arresting officer for an indefinite amount of time, amounting to a breach of the arrestee’s civil and constitutional rights.

The question of AFSPA’s constitutional validity was brought to the Supreme Court of India in *Naga People’s Movement of Human Rights v. Union of India* (“*Naga People’s Movement judgment*”).⁸³ The Act was primarily challenged on the ‘arbitrary and unreasonable’ basis on which the control and supervision over a territory was vested in the military. The petitioner argued that the military cannot act independently, and that the final authority and directional control should rest with the civil authorities.⁸⁴ The court, however, rejected the arguments put forth by the petitioner while noting that the Armed Forces would in fact aid the civil power and that the civil power will

⁸⁰Constitution of India 1950, Art. 22(4).

⁸¹Code of Criminal Procedure 1973, s. 50.

⁸²*Nungshitombi Devi v. Rishang Keishang*, (1982) 2 Gauhati LR 137.

⁸³*Naga People’s Movement of Human Rights v. Union of India* AIR 1998 SC 431.

⁸⁴*ibid* 446.

continue to function in the State.⁸⁵ Therefore, the court unanimously held the AFSPA to be constitutionally valid. It is important to note that while determining the constitutionality of the AFSPA, the court did not delve into the issues of life and liberty guaranteed under the Indian Constitution.⁸⁶

Furthermore, there are also concerns that the law strains centre-state relations. Section 6 of AFSPA leads to a dichotomy between the central and state security forces. Essentially both the state and central forces operate in the same region, but the state forces do not get immunity under AFSPA. This leads to widespread discontent in the civil forces of the state and furthers the centre-state disputes. Additionally, the National Human Rights Commission of India has on several occasions made recommendations to criminalize torture under AFSPA.⁸⁷ The AFSPA framework makes the foundation of democracy in India questionable. The arbitrary power distribution ensures that the torture by forces undermines the spirit of democracy and the rule of law,⁸⁸ rendering democracy a mere textbook principle. The enforcement agencies use the power vested in them as an instrument of fear, and, often, this practice weakens criminal investigations and makes them into a confession-based charge.

The increasing number of human rights abuses by the armed forces is a reality check and proof of the draconian nature of AFSPA. The continued application of AFSPA has led to various protests by human rights activists all over the country demanding its repeal; needless to

⁸⁵ibid 447.

⁸⁶Khagesh Gautam, 'Martial Law in India: The Deployment of Military under the Armed Forces Special Powers Act, 1958' (2018) Sw. J. Int'l L. 24, 136.

⁸⁷Nehlauddin Ahmad and Gary Lilienthal, Proscribing torture: an analysis in Indian and ethical contexts: (The 2010 Indian Prevention of Torture Bill) (2016) Commonwealth Law Bulletin 42 (1) 38.

⁸⁸Asian Human Rights Commission, 'INDIA: Human Rights a utopia without justice' (*Reliefweb*, 2011) <https://reliefweb.int/sites/reliefweb.int/files/resources/Full%20Report_401.pdf> accessed 19 February 2021.

say, the long-standing hunger strike of Ms. Irom Chanu Sharmila is a remarkable representation of this. India has signed and ratified both the Universal Declaration of Human Rights (UDHR)⁸⁹ and the International Covenant on Civil and Political Rights (ICCPR).⁹⁰ ICCPR recognizes a number of fundamental human rights, including the right to life (article 6), the right not to be tortured or ill-treated (article 7), the right to liberty and security (article 9), fair-trial rights, the right to privacy, family and home (article 17) and the right to freedom of assembly (article 21), as well as article 2 (3), which provides the right to an effective remedy to anyone whose rights protected by the Covenant has been violated. However, wherever AFSPA is in force, these rights get affected; particularly, the right to protest and the right to legal redress remain suspended. AFSPA also violates the following provisions of UDHR, such as; free and equal dignity (Article 1), non-discrimination (Article 2), life, liberty, security of person (Article 3), prohibition on torture, (Article 5), equality before the law (Article 7), provision for effective remedy (Article 8), prohibition on arbitrary arrest (Article 9) and right to property (Article 17). AFSPA fails to comply with all these obligations.

The Human Rights Committee,⁹¹ back in 1997, examined India's periodic report and outlined several issues with the Act but abstained from making any adverse remarks, as the provisions of AFSPA were already under challenge before the Supreme Court. Neither were any remarks in relation to the international human rights made in the *Naga*

⁸⁹Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

⁹⁰International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171.

⁹¹Human Rights Committee, Office of the United Nations High Commissioner for Human Rights, *Concluding Observations of the Human Rights Committee: India* (Consideration of Reports, CCPR/C/79/Add.81) <<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhssZeM5yf4eKnXL2lLDRiS%2fRILZwDTA%2fo0y6zr1BnSFbkQVAP0OIxqeFu1%2fdfc2hh5%2bZgyN%2fJ7f76nY9dm17axBKTXj96sGFmlhFGUTWP95fc>> accessed 19 May 2021.

People's Movement judgment, nor were any further periodic reports submitted by India to the Human Rights Committee.

In 2004, a committee headed by Retired Justice B.P. Jeevan Reddy provided its report on the AFSPA.⁹² The committee stated that three basic factors would determine if AFSPA should be repealed. *Firstly*, the security of the Nation; *secondly*, the fundamental rights guaranteed by the Constitution; and *thirdly*, the duty of the armed forces to defend our borders. Keeping in mind these considerations, the report noted that the Act should be repealed as it is “too sketchy, too bald and quite inadequate in several particulars.”⁹³ Surprisingly, the recommendations provided by the committee were not implemented, and the Indian Government did not even publicly comment on the report. The Second Administrative Reforms Commission, headed by Veerappan Moily in its Fifth Report in June 2007, supported the conclusions in the report by Jeevan Reddy committee and pushed for the repeal of the AFSPA.⁹⁴

In *Extra-Judicial Executions v. Union of India*, almost a decade after the Jeevan Reddy Commission, more than 1,500 cases of extrajudicial killings were brought before the Supreme Court.⁹⁵ Consequently, a commission was appointed by the Supreme Court in 2013, and it found that out of the six random cases assigned to them, none of them had genuine conclusions, and the individuals that were killed had no established criminal records.⁹⁶ Therefore, the CBI was ordered to

⁹²Ministry of Home Affairs, Government of India, ‘Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958’ (2005) 52.

⁹³*ibid* 74.

⁹⁴Second Administrative Reforms Commission, Government of India, Public Order, (Fifth Report, June 2007) ch 8, p 239 <http://arc.gov.in/8threport/ARC_8thReport_Ch4.pdf> accessed 19 May 2021.

⁹⁵*Extra-Judicial Executions v. Union of India* (2013) 2 SCC 493.

⁹⁶Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and Special Rapporteur on the Situation of Human Rights Defenders, ‘India: UN experts call for urgent progress in investigation of hundreds of ‘fake encounter’ killings’ (*OHCHR*, 4 July 2018),

conduct investigations into a number of other cases.⁹⁷ Meanwhile, the Supreme Court further clarified that if an offense is committed by Army personnel, there is no concept of absolute immunity.⁹⁸ The Court further noted that “if members of our armed forces are deployed to kill citizens of our country on the mere allegation or suspicion that they are an ‘enemy’, not only the rule of law but our democracy would also be in grave danger.”⁹⁹ However, the investigations by the CBI that were ordered in 2013 had still not materialised. In light of this, the Court set a deadline of 31 December 2017 for completing the investigation into 89 cases, but by the revised deadline, the CBI managed to register only 12 cases. The United Nations noted that it was “unacceptable that the CBI is failing to meet these deadlines and it therefore appears to lack good faith”.¹⁰⁰

In 2018, the Special Rapporteur concluded its report on extra-judicial killings by stating that “the government of India has an obligation to ensure prompt, effective and thorough investigations into all allegations of potentially unlawful killings, and a failure to do so is a violation of its international obligations. Justice delayed is justice denied.”¹⁰¹

V. CONCLUDING REMARKS

AFSPA needs to undergo material changes in terms of the powers it vests in the army officials. There needs to be scrutiny of the officials, and rigorous punishments should be introduced for any offences committed by them in the course of performing their duty under

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23323&LangID=E>> accessed 23 May 2021.

⁹⁷ibid.

⁹⁸*Extra-Judicial Executions v. Union of India* [2016] 14 SCC 536.

⁹⁹ibid para 223.

¹⁰⁰Special Rapporteur (n 96).

¹⁰¹Special Rapporteur (n 96).

AFSPA. The paper analysed several provisions of AFSPA from a constitutional perspective and questioned the legal validity of the law. The Act also fails to adhere to several international obligations. It is suggested that Section 4(a) of AFSPA, being against the scope of international human rights protecting the right to life, should be significantly amended or repealed in its entirety. It also violates the basic principles of criminal law.

Further, the fundamental rights envisaged under Article 22 of the Constitution should be incorporated into Section 5 of AFSPA. Persons in custody should be brought before a magistrate within twenty-four hours of arrest. Mere suspicion should not be a ground for arrest. It is also suggested that Section 6 of AFSPA should be repealed to ease the prosecution of armed forces. It is also suggested that Section 3 of AFSPA should be amended so that states could also have a say in declaring any area as a “disturbed area”.

Scrutiny should be maintained to prevent the armed forces from committing inhumane activities in the disturbed areas. Further, the army should also engage with the civilians to clarify the scope of the law. It could enhance its reliability through information on the perils of separation through a detailed public information dissemination system. It is also important that the armed forces be provided human rights training before they are deployed in disturbed areas, and regular refreshment courses be conducted on the same. It is important to remember that AFSPA becomes operational in a state when the Central Government or the Governor of the State or administrator of the Union Territory declares the whole or part of the State or Union Territory as a disturbed area. Such declarations must be made for a reasonable amount of time and not indefinitely as has been happening in recent times. While the armed forces may be questioned here, poor governance is also an issue. Thus, it also becomes important that society’s opinion about the law is considered and a detailed fact-based review on the law is conducted to adjudge its efficacy. For a democratic

review, the local population must be consulted through questionnaires, feedback reports and meetings. It is very important to involve the stakeholders in policy making of these regions, when their rights are being curtailed to such an extent. In addition, regular surveys must be conducted to assess the efficacy of AFPSA. Absent a democratic review, AFSPA will continue to be called a draconian law. The ambiguous definitional contours of the law must be clarified to ensure a reasonable interpretation of the law. Finally, it is urged that AFSPA must be balanced with India's international law obligations, including protecting non-derogable human rights like the right to life and freedom from torture and other cruel, inhuman, or degrading treatment or punishments. AFSPA could become an important tool for curbing insurgency and terrorism, provided it is made reasonable, just, and humane.