AFSPA (ARMED FORCES SPECIAL POWER ACT): ITS UTILITY AND FUTILITY IN THE 21ST CENTURY

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CERTIFICATE

This is to certify that the research work entitled "**AFSPA (ARMED FORCES SPECIAL POWER ACT): ITS UTILITY AND FUTILITY IN THE 21ST CENTURY**" is the work done by **RACHIT GUPTA** under my guidance and supervision for the partial fulfillment of the requirement of B.A., LL.B. (Hons) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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DECLARATION

I declare that the dissertation entitled **"AFSPA (ARMED FORCES SPECIAL POWER ACT): ITS UTILITY AND FUTILITY IN THE 21ST CENTURY"** is the outcome of my own work conducted under the supervision of **Dr. MAMTA RANA** at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Signature

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ABBREVIATION

1. **AFSPA- ARMED FORCES SPECIAL POWER ACT**
2. **NGO- NON GOVERNMENT ORGANISATION**
3. **UNO- UNITED NATION ORGANISATION**
4. **POK- PAKITAN OCCUPIED KASHMIR**
5. **ICCPR- INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**
6. **UN- UNITED NATION**
7. **MoD- MINISTRY OF DEFENCE**
8. **IHRL- INTERNATIONAL HUMAN RIGHTS LAW**
9. **IHL- INTERNTIONAL HUMINITARIAN LAW**
10. **INIAC- INTERNATIONALIZED NON-INTERNATIONAL ARMED CONFLICT**
11. **CIA- CENTRAL INTELLIGENCE AGENCY**
12. **ISI- INTER-SERVICES-INTELLIGENCE**
13. **LeT- LASHKAR-e-TAIBA**
14. **UAPA- UNLAWFUL ACTIVITIES PREVENTION ACT**

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TABLE OF CONTENTS

CONTENTS

CHAPTER 1

INTRODUCTION

Armed Forces Special Powers Act (AFSPA), is an Act which has just six sections and was enacted to bestow certain special powers on the Armed Forces operating in the areas declared as 'disturbed', under the provisions of Article 355 of the Constitution, among other things, to protect every State against internal disturbance.

Many NGOs, human rights organizations and non-state bodies like the UNO find the AFSPA grossly violating the international laws on human rights and its enforcement is considered to resulting in arbitrary killings, torture, and cruel, inhuman and degrading treatment of the subjects[1].

However, the commanders of the troops deployed on the ground feel that the Act is highly essential for the proper conduct of operations to counter the menace of terrorism and feel that by providing the necessary flexibility to operate and adequate legal immunity and safeguards, the efficacy of the counter-terror operations is enhanced[2].

In post-independence era, the Indian state has witnessed many secessionist movements and has long suffered from extremist attacks. The very notion of secessionism disturbs the territorial integrity and unity of a country. India is one such country. In order to curb the secessionist activities of the militants, the Armed Forces Special Powers Act (AFSPA) was implemented by Indian government in 1958. AFSPA is active in the disturbed areas of North- East India and Jammu and Kashmir.

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[1] Rajat Pandit, *Machil Fake Encounter: 5 Armymen Sentenced to Life Imprisonment*, (Nov 14, 2014, 04.21AM) , http://timesofindia.indiatimes.com/india/Machil-fake-encounter-5-armymen-sentenced-to-life-imprisonment/articleshow/45142081.cms

[2] Aparna Sundar and Nandini Sundar, *Civil War and Sovereignty in South Asia : Regional and Political Economy Perspectives*, SAGE PUBLICATIONS ,(2014), New Delhi

The Act was passed in the context of separatist movements and the violence caused by them. It has received mixed reactions from across the country and has always been a debatable issue. Overwhelming presence of insurgents causes grave insecurity to the common people. It creates a situation where people have to live under constant fear and anxiety. Frequent declaration of closure, forcible extortion and shelter by militants are sources of insecurity to the people. On the other hand, widespread protest by people against the Act clearly shows their discontent towards it. The antagonists argue that the increased militarization of the area creates an unhealthy atmosphere which results into people's protest against the State. Sate is a security provider and it has failed in its job to provide security to its citizens. While on the other hand, the protagonists of the Act believes that extraordinary conditions demand extraordinary measures. There is no denying in the fact, that AFSPA gives special powers to the security forces but it, also, has to be understood that there's no other simple way to fight the insurgents. When the enemy penetrates within the civilian population it is them who have curbed the liberty of the people and not the security forces which are, in fact, trying to ensure that the right to life and dignity of the civilian population is not compromised with. Hence AFSPA is the need of the hour[3].

The battle against terrorism cannot be equated with normal law and order problem and therefore AFSPA comes into the picture. The Indian Army strongly opposes any "major dilution" or "phased withdrawal" of AFSPA. Any such step will adversely affect the way military operates in militancy-hit areas. Amending AFSPA means compromising with the national security. No country has been able to fight anti-national forces using the normal law of the land. This is not to say that the army should be allowed a free run. But it is not always possible for the army to distinguish between terrorists and innocent civilians in extraordinary situations[4].

The disturbed areas of India are home to many insurgent groups. Of North-Eastern states, Manipur tops the list with 40 such rebel groups. These states are prone to intra-

[3] Lt. Gen. Harwant Singh, Former Deputy Chief of Staff for the Army, *AFSPA in J&K: Selective withdrawal may be harmful*, INDIAN DEFENCE REVIEW, (8th Jan. 2013), http://www.indiandefencereview .com/afspa-in-jk-selective-withdrawal-may-be-harmful/

[4] *Id.*

tribal clashes which results into straightforward conflict between insurgents groups. The repercussions have severely affected the human security in the region[5].

In the AFSPA controlled areas, human rights are being violated both by state and non-state actors. Counter- terrorism operations undertaken in good-faith, at times, lead to collateral damage. Proposals have been made to amend section 4 which gives Army powers to search premises and make arrests without warrants, use force, even to extent of causing death, destroy arms dumps, hideouts and to stop, search and seize any vehicle. Several high committee recommendations for repealing AFSPA have been rejected. Justice Jeevan Committee and Administrative Reforms Committee recommended that the Act should be write off.

Reactions to the Committee's recommendations have been mixed. The Army showed resentment while most civil and human rights organizations cautiously welcomed the recommendations. The point made by civil society groups are that the Act which has been in operation for the last 53 years has totally failed to tackle the situation and that a new approach to the problem is necessary. The Human Rights situation in the northeastern Indian state of Assam deteriorated rapidly after the Indian Army was deployed in November 1990 to fight against secessionist insurgents. To comprehend the insurgents and to diminish the support they enjoyed, especially in the rural areas, security forces have indulged in extra-judicial executions, custodial deaths, torture and rape. One the one hand, common villagers is intimidated and terrorized to divulge information about insurgents and on the other, insurgents are physically eliminated. The security operations, conducted under the Armed Forces (Special Powers) Act, 1958, give soldiers blanket immunity against any legal interference; have reduced the region to a killing field. And strangely, even though the security actions were initiated to reverse growing insurgency, the subsequent period saw an increase in insurgent activities and mushrooming of insurgent outfits[6].

The situation, especially the human rights conditions, is not well known outside the region. The national media, both government and non-government controlled, have

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[5] *supra n.1*

[6] Sandeep Joshi, *Army's stand makes it hard to amend AFSPA: Chidambaram*., (2013), The Hindu., http://www.thehindu.com/news/national/armys-stand-makes-it-hard-to-amendafspa chidambaram/article 4386754.ece

not given the region (Assam and the adjoining areas) the due coverage. In order to avoid a popular protest against the present policy by the more articulate urban population, the security operations have been confined mainly to the rural areas. Insurgency in the state of Assam rose in a political context, as has happened in the other adjoining states. But the government has chosen to view it solely as a security problem, and has adopted policies to root out insurgency militarily. Not only has it borne no fruit, but it has aggravated the human rights situation drastically. In these and other linked pages, an effort is made to paint a non-official picture of the human rights situation in the state of Assam, with information regarding human rights violations and the context in which this has been happening. Methods of Human Rights Violations Beginning of Security Operations Human rights violations in Assam and the adjoining region are due to a pre-meditated and systematic state policy to comprehend insurgency. Since Independence in 1947, regions of northeastern India, the most backward of all India, have seen uprisings and secessionist activities and as a remedy to that was born the Armed Forces Act (AFSPA) in 1958[7].

[7] Interview between (Retd.) Justice J.S. Verma and NDTV, (Jan.30 2013), http://www.ndtv.com/article/india/your-call-with-justice-retd-js-verma-full-transcript-324315

When the United Nations High Commissioner for Human Rights, Navaneethem Pillay, visited New Delhi in March 2009, she took up with Indian officials the case of the Armed Forces Special Powers Act (AFSPA), a law that in certain parts of the country governs the "use of armed forces in aid of the civil powers" during conditions regarded as "disturbed or dangerous."The AFSPA empowers the armed forces to make preventive arrests, to search premises without warrant, and to shoot and kill civilians. It also provides significant legal immunity to soldiers charged with misusing those powers: court proceedings are made contingent on the central government's prior approval (Government of India, 1958). While the AFSPA may be in effect in an entire state, its full force comes into play only in "disturbed areas," though sometimes an entire state can be declared "disturbed." An area can remain in that state for years on end. The AFSPA was adopted by the Indian parliament in 1958 to provide legal support for the army operations against independents Naga rebels.

Initially applied to the then state of Assam and the Union Territory of Manipur, the original law has been amended a number of times to accommodate changes in the names and the number of states in Northeast India. Two virtually identical laws were subsequently enacted: one in 1983 to apply to Punjab and Chandigarh, and the other in 1990 to apply to Jammu and Kashmir. In this paper the AFSPA refers to all three laws. Considering that the powers given to the armed forces by the AFSPA, in effect, suspend fundamental freedoms in an area, the AFSPA regime arguably amounts to a localized form of emergency rule. But it does not invoke the emergency powers of the Indian Constitution. The Indian Supreme Court has held the AFSPA 1958 to be constitutionally valid (Supreme Court of India, 1998).During the 1950s and 1960s, the ASFPA-enabled counterinsurgency operations against the Naga's and the Mizo's of Northeast India saw the use of some of the most repressive methods available in the repertoire of counterinsurgency, including "village regrouping" or the forced relocation of civilians in camps under close surveillance. Conventional accounts of the history of counterinsurgency in independent India are typically framed within a narrative of the gradual maturation of the state's counterinsurgency capacity. However, to civilians on the receiving end, the operations of today are unlikely to be any less nightmarish than those that occurred in the1950s and 1960s. Regarding the latter, Nandini Sundar has found that even decades later, Nagaand Mizo survivors of village regrouping remember the "search operations, the starvation, the regime of

curfews and the reduction of identity to a roll call and a piece of paper," and not the so-called campaigns for "hearts and minds." The Mizo word to describe the days of village regrouping is Khokhom: being driven helter-skelter, "a term that sums up a world of terror, like the Palestinian Nakbahor catastrophe to refer to the forcible evacuations of 1948." In Nagaland people mark time in terms of memories of regrouping with expressions like "the year we came back from the jungle". Sanitized accounts of that history, written from the point of view of the Indian state, claim that the campaign against the Mizos was a "success," and that India has not lost any domestic counterinsurgency campaign. Supposedly Indian counterinsurgency has been "successful" in another sense as well: in keeping the intensity of violence "low" and in maintaining a "certain level of normalcy . . . in political and civil life," India has allegedly avoided a 'strategy of barbarism' that would have been "morally abhorrent to democratic India"[8].

That surely is a matter of perspective. This view from the national capital - the bureaucratic calculus of the "success" or "failure" of counterinsurgency, as Sundar reminds us, says little about the experience of civilians - for the Naga and Mizo survivors of village regrouping 'there was no "success", only hardship'. The interventions by the Indian armed forces enabled by the AFSPA have not necessarily been responses of the last resort to powerful rebellions. Decisions to proclaim an area as "disturbed," are made rather casually. At least officials rarely offer much by way of justification. Consider for instance, the annual report of India's Home Ministry for 2008-09. It refers to areas being declared "disturbed" under the rubric "Steps taken by Government to deal with the situation in the North Eastern Region." The summary of the security situation that precedes that discussion merely states that "a number of States in the region have been witnessing various forms of insurgency, together with ethnic and communal violence/tensions in some cases." Among the "disturbed areas" that are listed, some are located in states that the same report describes as having had

[8] Under section 7 of the AFSPA, charges may be prepared during the course of police investigations, but the case cannot be committed in court without sanction from the central government. Hence, charges cannot be filed, and taken cognizance of by a court without sanction. In 2012 Supreme Court case, *General Officer Commanding vs. CBI*, concerning the infamous Pathribal "fake" encounter, the Supreme Court affirmed that charges may be prepared and presented in court, but that court may not take cognizance of the case until prior permission is sought.

either had ‘no violence’ or ‘very limited violence.’ The report lists the following areas as disturbed areas: “The whole of Manipur (except Imphal Municipal area), Nagaland and Assam, Tirap and Changlang districts of Arunachal Pradesh and 20 km. belt in the States of Arunachal Pradesh and Meghalaya having common border with Assam” and “the areas under 34 Police Stations in full and part of the area under 6 Police Stations” in Tripura. Yet in reviewing the overall security situation in North east India during the same period, the report says, “Mizoram and Sikkim have continued to remain peaceful. There was low intensity violence in some parts of Meghalaya. Though there was spurt in number of incidents of violence in some parts of Arunachal Pradesh in the year 2009 as compared to the previous year, the State largely remained peaceful. There has been significant improvement over the years in the security situation in Tripura with noticeable decline in the violence profile. The number of incidents of violence in Nagaland in year 2009 (upto 31st December) has also declined as compared to those last year” (Government of India, 2009: 10-13). There is nothing in the report to suggest that a ‘disturbed area’ declaration is a response to a serious challenge to the state’s authority. The goal appears to be to provide the utmost flexibility to the army in its operations against so-called “insurgent” groups – big and small. The idea of a mass-based rural insurgency--the focus of conventional counter-insurgency theory--bears no relationship to the actual world of “insurgency” in Northeast India. The sheer number of militias in this region, as I have said elsewhere, is extraordinary. “Indeed it might sometime appear that any determined young man of any of the numerous ethnic groups of the region can proclaim the birth of a new militia, raise funds to buy weapons or procure by them by aligning with another militia and become an important political player”. While independent and sovereign statehood may feature among their political demands, the challenge they pose has very little in common with the guerilla warfare envisaged in the canonical works on counterinsurgency. However, that is not to say that all armed groups of the region are weak--militarily and politically. Yet their resilience, as Bethany Lacina puts it, is not because of the advantages traditionally associated with guerilla groups. Instead, numerous small armed groups thrive by taking advantage of the imperfections in the rule of law: by maintain ignites with mainstream actors in politics and business, and engaging in violence. In other words, to a significant extent the resilience of armed groups in Northeast India is the story of “nested” and “outsourced” sovereignty. Armed groups may challenge the state’s monopoly of

violence, and in so far as they exercise control over life and death, they engage in sovereign practices, but these "localized forms of sovereignty" are "nested" within "higher sovereignties". Despite the alleged maturation of Indian counterinsurgency over time, the AFSPA-enabled military interventions of more recent years have by no means been uncontroversial. "Fake encounters" – deaths of "insurgents" in reported encounters with security forces that turn out to be cold-blooded murder of innocent civilians – have made the AFSPA, especially the legal cover it provides to soldiers, the focus of popular anger. At the same time, the armed forces are not the sole agent of coercion available in the Indian state's repertoire of counterinsurgency. The state police was the primary agent in the brutal campaign against Sikh militants in the Punjab from1984 to 1995. For the most part, the Indian army played only a supporting role[9].

There are hundreds of documented cases of enforced disappearances, extrajudicial executions, and "illegal cremations" that occurred during those operations (Kumar et al. 2003). "Resolving the Punjab insurgency largely through the use of the State's police force," says an admirer of those operations, was the "unique contribution to counterinsurgency warfare" of Punjab police official K.P. S. Gill, the architect of that campaign. The police in Punjab had the same kind of legal immunity against charges of misusing powers as that provided to the armed forces by the AFSPA. As one of the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 in force in Punjab at that time states: "No suit, prosecution or other legal proceeding shall lie against the Central Government or State Government or any other authority on whom powers have been conferred under this Act or any rules made there under, for anything which is in good faith done" (Government of India, 1987). For those seeking to stop the human rights abuses made possible by the AFSPA, it would be unproductive to focus exclusively on the AFSPA, and ignore other laws that overlap with the AFSPA, or have very similar effects.

[9] Alleged Perpetrators: Stories of Impunity. International People's Tribunal on Human Rights and Justice in Indian-Administered Kashmir [IPTK]. December 2012. Page 11

CHAPTER 2

ARMED FORCES SPECIAL POWER ACT

The AFSPA has been much demonized by civil society groups and the media in recent years. Two aspects need to be noted. Firstly, the AFSPA can be applied only after an area is declared a 'disturbed area' by the State/Centre. Secondly, it provides a legal cover for Army personnel in carrying out 'effective' counter militancy operations. Under the AFSPA, in a 'disturbed area', a commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces can:

- Arrest without warrant any person who has committed a cognizable offence and may use suitable force, if necessary to do so. Enter any premises without a warrant to arrest a terrorist/suspect, or to recover a wrongfully confined person, stolen property, or arms/explosives wrongfully kept.
- Fire upon/use force, even causing death, against any person contravening law and order or carrying weapons, ammunition or explosives, if in his opinion it is necessary for maintenance of law and order and after giving due warning.
- Destroy an armed dump or fortified position or a shelter from which armed attacks can be made or can be used for training by hostiles, if necessary to do so.

The Act lays down that the arrested persons will be handed over to the nearest police station 'with the least possible delay', and no prosecution, suit or other legal proceeding can be instituted against any person in respect of anything done under this Act except with the previous sanction of the Central Government[10].

The AFSPA may have been described as a 'special power'. But such situations have always looked upon it as a legal protection to conduct effective operations. On the flip side, whenever law and order situation improves in a 'disturbed area' and we have

[10] Lt Gen Mukesh Sabharwal, *Army: Management of Human Capital – I,* Vol. 26.4 Oct-Dec 2011

elected representatives governing the state, they find it difficult to continue with this Act. The reasons are:

- Democratic societies all over the world abhor large scale and extended deployment of troops in their midst.
- Human rightists and the media over the years have dubbed the AFSPA as a 'draconian' power given to the military against the civilians. It has become a convenient tool for the secessionist elements, and those in opposition, to embarrass the government and demand withdrawal of troops.
- Despite strict discipline and training, there are aberrations of human rights violations by troops. These aberrations can be reduced but seldom eliminated in the kind of operational duties which have to be performed[11].

2.1 AFSPA, HUMAN RIGHTS AND THE ARMY

Keeping in view the incidents of human rights (HR) violations by some personnel when AFSPA is applicable, the Army, over the years, has taken several preventive measures. These include setting up of human rights cells at Army, Command and Corps headquarters to monitor, seek factual details and take follow up action on all HR related cases (received from any source) and to maintain records. These Cells, after investigations, prepare a 'Detailed Investigation Reports' (investigation is conducted jointly with civil authorities sometimes) for submission to higher headquarters and preparation of affidavits to the National Human Rights Commission.

According to statistics in July 2011, 1,485 cases of human rights violations were reported in Kashmir Valley from 1990 to July 2011. Out of these, 1,439 cases (96.9 per cent) were proved false. In 43 cases proved true, 96 personnel were punished. As punishment, four officers were cashiered/awarded rigorous imprisonment (RI), 33 personnel dismissed from service, 17 personnel reduced in ranks/awarded imprisonment in military custody, one person forfeited seniority for promotion, and

[11] Lt Gen Mukesh Sabharwal, *Army: Management of Human Capital – I***,** Vol. 26.4 Oct-Dec 2011

14 personnel were awarded 'Severe Reprimand'. I doubt if any civil court would have acted faster or stricter on this issue[12].

There has also been a strong drive on continuous training and briefing of troops employed in such operations to respect human rights and avoid collateral damage. A 'Code of Conduct' (appreciated by the Supreme Court) is issued to every individual. The 'Rules of Engagement' have been modified. Wherever possible, operations are conducted jointly with the civil police and made accessible to the media. In the last year and a half, beside preventing infiltration and conducting only intelligence based joint operations. These include reducing visibility of personnel and convoys on roads during the day, 'Jee Janab' (cultural sensitivity) and 'Awam aur Jawan, Aman Hai Mukam' (the soldiers and populace want peace as their objective) and the Kashmir Premier League matches to engage the youth. These initiatives have made substantial contribution in improving civil military relations and ensuring peaceful summer.

Notwithstanding the above-mentioned civilized measures, there is still a need for the Army to become more transparent on human rights violation cases and where necessary, expedite sanction from the central government to prosecute personnel guilty of deliberate human rights violations. That would be in the interest of Army discipline as well as for creating confidence in public.

2.1.1 AFSPA IN J&K

There are various party leaders have made a strong pitch for revocation of AFSPA from selected districts in the State. The political view point is that these districts are no longer considered 'disturbed', our relations with Pakistan are improving, and the AFSPA-considered as 'an oppressive military regime' needs to be selectively revoked to provide the requisite atmospherics of bringing peace to the State. The leaders are

[12] Vivek Chadha**,** *ARMED FORCES SPECIAL POWERS ACT, The Debate,* IDSA Monograph Series No. 7, (Nov. ,2012)**,** Lancer's Books

justified in considering the issue although it is apparent that under the cover of this demand, there is also an element of political expediency to hijack the AFSPA agenda from opposition parties and separatists.

Unfortunately, there is considerable confused thinking about the AFSPA. A member of the Centre appointed interlocutors on J&K has stated publically that "in a free India, which attained freedom by practicing non-violence, laws like the AFSPA, which jeopardize democratic and human rights, have no relevance". The interlocutor stated further that "despite various suggestions made from time to time to the State government, there is no worthwhile monitoring mechanism to ensure effective implementation of recommendations for ameliorating the condition of the people." And yet, the same interlocutor opines that "programmers like Operation Sadbhavna, designed, managed and financed by the security forces for providing education and healthcare facilities, should be ideally left to the local bodies, as has been the practice in other states." In the current governance environment in J&K, it is difficult to see any linkage between implementation of State development programmers and the AFSPA[13].

The Army, opposed to selective revocation of the AFSPA, believes that Pakistan Army has not given up its efforts to support militancy and terrorism in the State. The current run of peace is, at best, fragile. The secessionist elements in the State have not been adequately neutralized. They continue to provide logistic support to anti-national elements and have used, or created, opportunities during many summers in the past—except last summer—to raise 'azadi' flags and slogans. Selective revocation of AFSPA will make its assets (including Srinagar Airfield) and convoys vulnerable. Selective revocation of AFSPA may also revive overt and covert militancy in these areas, as has been experienced in Imphal in the past. The Army feels that more time and effort is required to bring about normalcy in the State[14].

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[13] Lt Gen Mukesh Sabharwal, *Army: Management of Human Capital – I***,** Vol. 26.4 Oct-Dec 2011

[14] **The Armed Forces Special Powers Act: A Renewed Debate in India on Human Rights and National Security, AMNESTY INTERNATIONAL INDIA,** *(September 2013)*

Pakistan Army and the ISI have always been a major factor in the militancy swings of J&K. They treat and nurture Jehadi terrorist groups as a strategic asset and a hedge on Pakistan's Eastern and Western borders. The ISI continues to support these groups, their training and communication networks in POK despite its pre-occupation on the Afghan border. The Army believes that there is no change in Pakistan Army's strategic agenda. Continuing military-terrorists nexus in Pakistan has been confirmed in the latest 'Memo gate' exposure[15].

2.1.2 CHALLENGES TO AFSPA

There have been powerful public protests against the AFSPA in regions where the law is in force. The killing of unarmed civilians by security forces has provoked particularly intense public anger. During the past couple of years, there have been widespread anti-AFSPA protests in Kashmir following the murder of civilians in "fake encounters." In 2004, emotions against the AFSPA exploded in the Northeast Indian state of Manipur after the abduction, suspected rape and killing of a woman, Thangjam Manorama, by security forces. An act of exceptional courage and eloquence marked those protests. About a dozen middle-aged Manipuri women, standing naked in front of the Indian army's base in Manipur's capital city Imphal, held a banner that read, "Indian Army Rape Us." Through their nakedness and the bland and declarative banners, observes Ananya Vajpeyi, "the Manipuri women announced to the world: 'the raping of us Manipuri women is what the Indian Army does. We stand here to say this out loud and clear: this is the way it is. We embody resentment.'" Citizens may not be able "to resist the power of the Indian State," but "resent it they can." The political emotion of resentment, she writes, drawing on an essay by Jean Améry, "counter-acts the process of the social acceptance of historical wrongs" (Vajpeyi 2009: 28, 48). In response to those public protests, the Indian government appointed a committee to review AFSPA 1958, headed by a former Supreme Court Judge, B.P. Jeevan Reddy. Human Rights Watch includes this decision among the positive achievements of the first Manmohan Singh

[15] *Id.*

government that came to power in 2004 (Human Rights Watch 2005).The Reddy Committee submitted its report on June 6th 2005. I will discuss its recommendations later in the chapter. India is a signatory to the International Covenant on Civil and Political Rights [ICCPR]. As far back as 1997, the Human Rights Committee established under the Covenant, expressed its dismay that "some parts of India have remained subject to declaration as disturbed areas over many years." India, in effect, said the report, uses emergency powers for long periods without following procedures spelt out in a Covenant to which it is a signatory (United Nations 1997).The reference is to Articles 3 and 4 of the ICCPR. In Article 3 the state parties "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." But in times of "public emergency which threatens the life of the nation," they may "take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation." However, the right to life and the norms regarding the prohibition of torture, slavery and servitude are non-derivable. A state "availing itself of the right of derogation" is required to "immediately inform the other State Parties" through the intermediary of the UN Secretary General about "the provisions from which it has derogated and of the reasons by which it was actuated." The ICCPR assumes that such measures are exceptional and temporary. Governments therefore are required to communicate the date when such derogation is terminated (United Nations, 1966). The Human Rights Committee recommended that AFSPA and its use "be closely monitored so as to ensure its strict compliance with the provisions of the Covenant" (United Nations 1997).India has steadfastly opposed efforts by UN human rights institutions to monitor the AFSPA regime. But when officials of the Indian government and those of UN human rights bodies interact, they mostly talk past each other. India's position is that AFSPA does not invoke the emergency powers of the Indian Constitution, and the armed forces assist civil powers -- they do not supplant civil powers – and that it does not come under the jurisdiction of Article 4 of the ICCPR. Indian officials have never tried to argue that the particular challenges it faces in any part of India meet the Covenant's test of a "public emergency which threatens the life of the nation." They make a somewhat circular argument that AFSPA and the legal immunities for armed forces are necessary so long as there are situations that, in the government's judgment, require the "use of armed forces in aid of the civil powers." They argue that the

army's standard internal mechanisms are good enough to safeguard against human rights violations[16].

2.2 BRIEF History

In November 2011, the central government extended the Armed Forces Special Powers Act in J&K for another year. The Act was first imposed in the state in 1990 and since then its term has been extended every year by the unanimous agreement of all concerned agencies. This time around, however, the decision to extend the Act met with some opposition. The Intelligence Bureau opposed its extension citing the 'improved' security situation in the state where as both the state government and the Ministry of Defense (MoD) strongly supported its extension. Taking the cue from the state government and the army, the central government declared the whole of Assam a 'disturbed area' and extended the Act for another year. Similarly in March 2012, the Tripura government extended the AFSPA in the state for another six months. The Act, which was imposed in 1997, is presently fully enforced in 34 police stations and partially in six police stations of the state. In the case of Tripura too the state government opted for the extension of the Act despite clear improvement in the security situation[17].

Presently, the Act is in force in Assam, Nagaland, Manipur (except the Imphal municipal area); Tripura (40 police stations); the Tirap and Changlang districts of Arunachal Pradesh and a 20 km belt in the states with a common border with Assam. Apart from the Northeast, the AFSPA is also in force in Jammu and Kashmir, which came under its purview on July 6, 1990 as per the Armed Forces (Jammu and Kashmir) Special Powers Act of 1990. Earlier, Punjab was also brought under the Act through the Armed Forces (Punjab and Chandigarh) Special Powers Act of 1983.

The AFSPA is imposed in areas affected by internal rebellion, insurgency or militancy. Since it is a common practice in the country to deploy the armed forces to

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[16] **The Armed Forces Special Powers Act: A Renewed Debate in India on Human Rights and National Security, AMNESTY INTERNATIONAL INDIA,** *(September 2013)*

[17] *Id.*

quell such unrest, this Act provides the armed forces with an enabling environment to carry out their duties without fear of being prosecuted for their actions[18].

2.3 GENESIS OF THE ARMED FORCES (SPECIAL POWERS) ACT

The origins of the Armed Forces (Special Powers) Act, 1958 can be traced to the Armed Forces (Special Powers) Act of 1948. The latter in turn was enacted to replace four ordinances—the Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance; the Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance; the East Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance; the United provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance—invoked by the central government to deal with the internal security situation in the country in 1947[19].

The Armed Forces Special Powers Act of 1948, as a matter of fact, was modeled on the Armed Forces Special Powers Ordinance of 1942, promulgated by the British on August 15, 1942 to suppress the 'Quit India' movement. As the title itself indicates, 'special powers' were bestowed on 'certain officers' of the armed forces to deal with an 'emergency'. These 'special powers' included the use of force (even to cause death) on any person who does not stop when challenged by a sentry or causes damage to property or resists arrest. Most importantly, the Ordinance provided complete immunity to the officers; their acts could not be challenged by anyone in court except with the prior approval of the central government. Incidentally, the Armed Forces (Special Powers) Act of 1948 was repealed in 1957, only to be resurrected a year later in 1958. The context was the fast deteriorating internal security situation in the 'unified Assam'. The Nagas, who inhabited the Naga Hills of Assam and Manipur, had opposed the merger of their area with that of India on the

[18] Communication from the Ministry of Defence (Army) dated 22 December 2011. Right to Information Act, 2005.

[19] *Id.*

grounds that they were racially and socio-politically different from the Indians. They had even voted in favors of a referendum declaring independence in 1951 and raised the banner of revolt. They boycotted the first general election of 1952, thereby demonstrating their non-acceptance of the Indian Constitution and started committing violent acts against the Indian state[20].

In order to deal with this rebellion, the Assam government imposed the Assam Maintenance of Public Order (Autonomous District) Act in the Naga Hills in 1953 and and intensified police action against the rebels. When the situation worsened, Assam deployed the Assam Rifles in the Naga Hills and enacted the Assam Disturbed Areas Act of 1955, in order to provide a legal framework for the paramilitary forces as well as the armed state police to combat insurgency in the region[21].

The Assam Disturbed Areas Act of 1955 was a mirror image of the Armed Forces Special Powers Ordinance of 1942 as it gave 'special powers' to the armed forces engaged in counter insurgency. According to Sections 4 and 5 of the Act: "A magistrate or police officer not below the rank of sub-Inspector or havildar in case of the armed branch of the police or any officer of the Assam Rifles not below the rank of havildar/jamadar" had the power to arrest, shoot or kill any person on suspicion. Section 6 of the Act provided protection against any kind of prosecution without the consent of the central government. But the Assam Rifles and the state armed police could not comprehendthe Naga rebellion and the rebel Naga Nationalist Council (NNC) formed a parallel government—the Federal Government of Nagaland—on March 22, 1956. This intensified the widespread violence in the Naga Hills. The state administration found itself incapable of handling the situation and asked for central assistance. Responding to the appeal of the state government, the central government sent the army to quell the rebellion and restore normalcy in the region[22].

The President of India promulgated the Armed Forces (Assam and Manipur) Special Powers Ordinance on May 22, 1958 to confer 'special powers' on the armed forces as well as provide them the legal framework to function in the 'disturbed areas' of

[20] *Supra 6*
[21] *Id.*

Assam and the Union Territory of Manipur. A bill seeking to replace the ordinance was introduced in the monsoon session of the Parliament on August 18, 1958. The bill, however, faced some opposition. Several members of Parliament argued that giving such sweeping powers to the armed forces would lead to the violation of the fundamental rights of the people; that it would allow the government to circumvent the Constitution to impose an emergency—without actually declaring it and the armed forces would usurp all the powers of the civilian government; and that it would result in the armed forces committing excesses with impunity[23].

2.4 SIGNIFICANCE OF AFSPA IN KEEPING PEACE AND STABILITY

The history of the Armed Forces Special Powers Ordinance of 1942 goes back to the British era, when, on 15 August 1942, it was promulgated to suppress the Quit India Movement. Later, the United Provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance was invoked by the central government to deal with the internal security situation in the country in 1947 which arose out of Partition of India[24].

Prior to the creation of NE states, when 'greater Assam ' existed as an entity, and included the territory of present Nagaland; in 1951, Naga National Council conducted a unilateral 'free and fair' plebiscite and declared that 99% of the Naga people had opted for 'Free and Sovereign Naga Nation'. They boycotted 1952 general elections and also boycotted government schools and officials. To tackle the civil disturbance in the area, the Assam government imposed the Assam Maintenance of Public Order (Autonomous District) Act in the Naga Hills in 1953 and intensified police action against the rebels.

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[23] Hindustan Times. "*Pathribal Encounter: Court-Martial Proceedings Boycotted*, Peerzada Ashiq, (Jan. 30, 2013), http://www.hindustantimes.com/India-news/Srinagar/Pathribal-encounter-Court-martialproceedings-boycotted/Article1-1003957.aspx

[24] Communication from the Ministry of Defence (Army) dated 22 December 2011. Right to Information Act, 2005.

As the situation worsened, Assam Rifles was deployed and in the Naga Hills and Assam Disturbed Areas Act of 1955, was enacted to provide a legal framework for the paramilitary forces and the armed state police to combat insurgency in the region. But the Assam Rifles and the state armed police could not comprehendthe Naga rebellion and the rebel Naga Nationalist Council (NNC) formed a parallel government "The Federal Government of Nagaland" on 22 March 1956.Finally, the Armed Forces (Assam and Manipur) Special Powers Ordinance 1958 was promulgated by the President, Dr Rajendra Prasad on 22 May 1958. It was later replaced by Armed Forces (Assam and Manipur) Special Powers Act, 1958 on 11 September 1958. In 1972, the territorial scope of the Act was expanded to the five states of the North-East, - Assam, Manipur, Meghalaya, Nagaland, Tripura and to the Union Territories Arunachal Pradesh and Mizoram. In addition, the words, "The Armed Forces (Assam and Manipur) Special Powers Act, 1958" were substituted by **"Armed Forces (Special Powers) Act, 1958",** getting the acronym of **AFSPA, 1958.**

On 15 October 1983, the central government enacted the **Armed Forces (Punjab and Chandigarh) Special Powers Act,** to enable the central armed forces to operate in the state of Punjab and the union territory of Chandigarh. Once the situation in Punjab stabilised, the Act was withdrawn in 1997, roughly after 14 years of its enforcement. On 05 July 1990, **Armed Forces (Jammu and Kashmir) Special Powers Act,** was enacted and was applicable to the whole state of J&K. The provisions of the Act are very similar to the ones which is applicable in the NE states.

In post-independence era, the Indian state has witnessed many secessionist movements and has long suffered from extremist attacks. The very notion of secessionism disturbs the territorial integrity and unity of a country. India is one such country. In order to curb the secessionist activities of the militants, the Armed Forces Special Powers Act (AFSPA) was implemented by Indian government in 1958. AFSPA is active in the disturbed areas of North- East India and Jammu and Kashmir[25].

The Act was passed in the context of separatist movements and the violence caused by them. It has received mixed reactions from across the country and has always been

[25] *Supra 14*

a debatable issue. Overwhelming presence of insurgents causes grave insecurity to the common people. It creates a situation where people have to live under constant fear and anxiety. Frequent declaration of bandh, forcible extortion and shelter by militants are sources of insecurity to the people. On the other hand, widespread protest by people against the Act clearly shows their discontent towards it.

The antagonists argue that the increased militarization of the area creates an unhealthy atmosphere which results into people's protest against the State. Sate is a security provider and it has failed in its job to provide security to its citizens. While on the other hand, the protagonists of the Act believes that extraordinary conditions demand extraordinary measures. There is no denying the fact that AFSPA gives special powers to the security forces but it, also, has to be understood that there's no other simple way to fight the insurgents. When the enemy penetrates within the civilian population it is he who has curbed the liberty of the people and not the security forces who are, in fact, trying to ensure that the right to life and dignity of the civilian population is not compromised by. AFSPA is the need of the hour[26].

The battle against terrorism cannot be equated with normal law and order problem and therefore AFSPA. The Indian Army strongly opposes any "major dilution" or "phased withdrawal" of AFSPA. Any such step will adversely affect the way military operates in militancy-hit areas. Amending AFSPA means compromising with the national security. No country has been able to fight anti-national forces using the normal law of the land. This is not to say that the army should be allowed a free run. But it is not always possible for the army to distinguish between terrorists and innocent civilians in extraordinary situations. Army excesses are exceptions rather than the norm.

The disturbed areas of India are home to many insurgent groups. Of North-Eastern states, Manipur tops the list with 40 such rebel groups. These states are prone to intra-tribal clashes which results into straightforward conflict between insurgents groups. The repercussions have severely affected the human security in the region.

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[26] *Id.*

In the AFSPA controlled areas, human rights are being violated both by state and non-state actors. Counter- terrorism operations undertaken in good-faith, at times, lead to collateral damage. Proposals have been made to amend section 4 which gives Army powers to search premises and make arrests without warrants, use force, even to extent of causing death, destroy arms dumps, hideouts and to stop, search and seize any vehicle. Several high committee recommendations for repealing AFSPA have been rejected. Justice Jeevan Committee and Administrative Reforms Committee recommended that the Act should be write off.

Reactions to the Committee's recommendations have been mixed. The Army showed resentment while most civil and human rights organizations cautiously welcomed the recommendations. The point made by civil society groups is that the Act which has been in operation for the last 53 years has totally failed to tackle the situation and that a new approach to the problem is necessary. The deployment of military takes place when the situation becomes worse and can no longer be handled by the government, police or CRPF. When the laws and rules that function in the normal situation become ineffective, military is called in. Now, under such circumstances, military cannot be expected to operate under the laws police force is subjected to. The use of Air Force by Indian government has been avoided. In that case, repeal or dilution of AFSPA will handicap the army. Security forces certainly need some powers to tackle the insurgency.

With the presence of anti-national sentiments and those who are trying to exploit the situation to fulfill their vested political interests, army is bound to take strict actions. . As a law, there is nothing wrong with AFSPA. It is its functioning that has given rise to resentment among the masses. The acts of a few soldiers bring disrepute to the Act as well as the army. The army authorities should adopt a policy of zero-tolerance to the misuse of the law by its men.

CHAPTER 3

GROUNDS TO EXTEND AFSPA JURISDICTION

The Act empowers the central government and the governor of a state to declare any area within their territory as 'disturbed' based on their judgment of "disturbed or dangerous situation" warranting use of armed forces. Upon such a declaration, the armed forces have the power to shoot on sight, even to kill, any person believed to be violating existing laws and order prohibiting assembly of more than five persons (Section 4(a)) after giving "such due warning," arrest any person without warrant, even on the basis of reasonable suspicion of having committed a cognizable offence (Section 4(c)), use such force as necessary to effect arrest, and enter and search any premise without warrant (Section 4(d)). Worse, these powers are provided without adequate safeguards and complete immunity is given to armed forces for the exercise of the powers (Section 6). Not a single offence is defined in the Act and yet such wide discretion is given to the armed forces in such areas. Each of the above provisions is at odds with democratic rights, as explained below. This is the main criticism against the Supreme Court judgment in the Naga People's Movement for Human Rights vs Union of India, 1997, which upheld the constitutionality of AFSPA against Article 14[27].

3.1 USE OF FORCE

The absolute authority vested in the armed forces to shoot on sight based on mere suspicion and for an offence as basic as violating an order is a brazen assault on the fundamental right to life. Both domestic and international law have established supremacy of the right to life from which no derogation is permitted even in times of public emergency which threatens the life of a nation. Terming the deprivation of life

[27] Vivek Chadha**,** *ARMED FORCES SPECIAL POWERS ACT, The Debate,* IDSA Monograph Series No. 7, (Nov. ,2012)**,** Lancer's Books

by state authorities as a matter of utmost gravity, international law has interpreted this right to include not just measures to prevent and punish deprivation of life by criminal acts, but to prevent arbitrary killings by the security forces. In other words, the "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures. The Supreme Court has interpreted the 'right to life' to include the right to live with human dignity whereas the term liberty, as used in the provision, as something more than mere freedom from physical restraint or the bounds of a prison. The power to shoot on sight violates the sanctity of the right to life, making the soldier on ground the judge of value of different lives and people the mere subjects of an officer's discretion. International law lays down a comprehensive framework that requires that lethal force be justified by self defense and governed by principles of proportionality, necessity and last resort. It imposes a positive duty on governments to prohibit by law all extra-legal, arbitrary and summary executions and ensure that any such executions are recognized as criminal offences punishable by Article 4, International Covenant on Civil and Political Rights, 1966.

Kharak Singh v. State of Uttar Pradesh[28] , Sunil Bhatra v. Delhi Administration[29], These include the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990; UN Code of Conduct for Law Enforcement Officials, 1979; and Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, 1989.

Armed Forces Special Powers Act: The Debate appropriate penalties. But under the Act, the powers of the armed forces are highly disproportionate to the offence: that of contravention of any law or order prohibiting the assembly of five persons or the carrying of weapons—or of things—capable of being used as weapons. Such a challenge and defiance of orders does not necessarily invoke the self-defence clause (for which the other party has to be in a position to inflict harm) nor do they require use of force to deal with, leaving too much to the discretion of the individual officer[30].

[28] AIR 1963 SC 1295
[29] AIR 1978 SC 1675
[30] THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 1990 No. 21 OF 1990 (With effect from Sept. 1, 2000)

Justice also requires that every accused be given all the protections of due process of law. Fair, just and reasonable procedure has been interpreted to include the right to speedy trial. This right encompasses all stages of trial: investigation, enquiry, trial, appeal, revision and retrial. Killing on the basis of suspicion deprives the victims (who are mere suspects) of all the protections of due process and leads to direct subversion of rule of law. These principles require that governments exercise strict control, including putting in place a clear chain of command for all officials responsible for apprehension, arrest, detention, custody and imprisonment; as well as those officials authorized by law to use force and firearms. As in the case of the right of self defence accorded to civilians, the onus of proof lies with the person operating under this clause. But the protection provided to armed forces against prosecution under Section 7 renders this impossible and thereby directly violates the protection of the right to life[31].

Powers of arrest and detention In order to protect and uphold the fundamental right to liberty, extensive safeguards have been placed on the power to arrest, both in international and domestic law. Article 22 of the Indian Constitution lays down several safeguards on preventive and punitive detention including, right to be informed of the grounds of Ralph Crashaw and Leif Holmstrom, Essential Cases on Human Rights for the Police, The Netherlands, 2006. This was first recognized in the Hussainara Khatoon & Othrs. vs. Home Secretary, State of Bihar, AIR 1979 SC 1360 case and subsequently upheld in various cases. Rights-based Critique of AFSPA arrest; right to consult; and to be defended by a lawyer of choice; the right to be produced before a magistrate within 24 hours; and freedom from detention beyond the said period except by order of the magistrate. In keeping with constitutional guarantees, CrPC 1973 lays down several checks and balances in order to reduce scope for arbitrary arrests and detention by the state, including the mandatory medical examination of the arrested person (Section 54) and a magisterial inquiry of every case of death in police custody (Section 176). Additional guidelines were further laid down in 1996 by the Supreme Court in the DK Basu case, in order to address the rampant arbitrary arrests and detention. Under international law, arbitrariness has

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[31] *Id.*

been defined as not just being against the law, but interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability[32].

Such an interpretation has also been upheld by the Indian Supreme Court, according to which "the existence of the power to arrest is one thing...the justification for the exercise of it is quite another..." Even in cases of preventive detention, the established legal norm remains the same. According to the Human Rights Committee, if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. "It must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given, and court control of the detention must be available, as well as compensation in the case of a breach."

None of these procedural safeguards are provided to the arrestee under AFSPA. Section 4 (c) of AFSPA allows the army to "use such force as may be necessary to effect the arrest" without laying down any restriction on force that can be used in order to prevent causing death of a person whereas under the CrPC, the police are prohibited from causing death of a person not accused of an offence punishable by death or life imprisonment. Then, Section 5 of the Act does not specify a time period within which an arrested person should be handed over to the police station but only requires them to do it with "the least possible delay." The main purpose of specifying 24 hours for production before magistrate, as mandated under the Constitution and the CrPC, was to avoid scope for torture in police custody and bring the police power of arrest under judicial scrutiny at the earliest. In practice, therefore the AFSPA is in violation of the right to be free from torture, and cruel and degrading treatment. Although subsequently, the courts have interpreted least possible delay to mean within 24 hours, this is hardly followed[33].

The term least possible delay has been used to detain people for several days, months—even years. In a number of habeas corpus petitions- recognized as the undeniable right of all individuals and one of the most effective remedies against challenging arbitrary detention —these excessive delays have been recorded. In

[32] *Id.*
[33] *Id.*

Jammu and Kashmir, patterns and factors for delay range from: blatant denial of arrest, claim that the arrested person has either been subsequently release or has escaped from custody, refusal by the armed forces to produce records and documents regarding arrests and detention[34].

The situation is arguably worse in the Northeast where till recently, only the Guwahati High Court was allowed to hear habeas corpus petitions from all seven states. The extent of delays and abuses across other states can only be imagined. In several cases, the court found excessive delay even under Section 5 of the Act. To cite just one example, in the Nungshitombi Devi v. Rishang Keishang, CM Manipur, (1982), case the petitioner's husband was arrested by the CRPF on January 10, 1981, and was still missing on February 22, 1981. He had been arrested under AFSPA Section 4(c). The court found this delay to have been too long and unjustified. Despite this, both the Supreme Court, while listing the Dos and Don'ts in the Naga People's judgment and the Justice Reddy Commission, in its proposed draft legislation to be inserted in the UAPA, following repeal of AFSPA, chose to provide these safeguards in a selective manner. For instance, while providing for the preparation of an arrest memo, the draft legislation does not require the memo to be countersigned by the arrested person and attested by one witness; it does not mandate the medical examination of the detainee and preparation of an inspection memo recording marks of injury, as mandated in the DK Basu case[35].

3.2 SPECIAL POWER OF THE ARMED FORCES

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

[34] *Id.*
[35] Supra n.1

contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;

(b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders wanted for any offence; (c) arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest; (d) enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises and may for that Purpose use such force as may be necessary.

CHAPTER 4

AFSPA AND HUMAN RIGHTS

The Act empowers the central government and the governor of a state to declare any area within their territory as ‘disturbed’ based on their judgment of “disturbed or dangerous situation” warranting use of armed forces. Upon such a declaration, the armed forces have the power to shoot on sight, even to kill, any person believed to be violating existing laws and order prohibiting assembly of more than five persons (Section 4(a)) after giving “such due warning,” arrest any person without warrant, even on the basis of reasonable suspicion of having committed a cognizable offence (Section 4(c)), use such force as necessary to effect arrest, and enter and search any premise without warrant (Section 4(d)). Worse, these powers are provided without adequate safeguards and complete immunity is given to armed forces for the exercise of the powers (Section 6). Not a single offence is defined in the Act and yet such wide discretion is given to the armed forces in such areas.

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.1 AFSPA AND HUMAN RIGHTS

A study of the Armed Forces Special Powers Act (AFSPA) can be undertaken in light of its consonance or divergence with International Human Rights Law (IHRL), International Humanitarian Law (IHL) and with domestic law. AFSPA has been examined extensively through the prism of human rights land in light of constitutional provisions. While the human rights perspective has been taken by the BP Jeevan Reddy committee, the Supreme Court has pronounced on its constitutional validity in its 1998 judgment on the Nagaland case. This paper restricts itself to undertaking a look at AFSPA from the IHL perspective. The paper first seeks to define IHL and then examines the scope for the applicability of IHL after which the situation obtaining in areas declared as ‘disturbed’ under the AFSPA is assessed to ascertain applicability of IHL. In Theory An ICRC opinion paper (2008) defines international armed conflicts (IAC) as existing whenever there is armed conflict between two or

more states. On the other hand, non-international armed conflicts (NIAC) are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising in the territory of a state. The definition goes on to say that: 'The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization.' There are two treaty sources for NIAC. The first is Common Article 3 of the Geneva Convention and the second is the Additional Protocol II. The latter is not relevant to India since India is not a signatory and as the provisions of the protocol are not part of customary international law, the protocol does not have significance for India. Additionally, in AP II the threshold for application of NIAC is pitched considerably high as those which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. AP II being ruled out, Common Article 3 therefore assumes significance. India is a signatory to the Geneva Conventions and these have been incorporated into domestic law by the Act of 1960.

Common Article 3 does not specify a threshold since it includes only the 'minimum provisions' envisaged in 'the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.' While it excludes internal disturbances and tensions, the threshold is generally equivalent to that given in Article 1(2) of APII. Internal disturbances, in contrast to armed conflicts, are marked by the serious disruption of domestic order through acts of violence. There are two criteria for the levels of violence that have to be reached for a situation to go beyond internal disturbance to qualify as an armed conflict for Common Article 3 applicability.

First is, that it must necessitate the employment of armed forces. The situation must be problematic enough to require the employment of the higher order of force available with the armed forces. This implies that the 'intensity criteria' must be sufficiently high. The indicators are the: number, duration and intensity of military engagements, the type of weapons and equipment used, numbers of persons and types of forces involved in the fighting, the number of casualties, the extent of destruction,

and the number of civilians fleeing etc. The second condition is that the non-governmental groups involved must possess organized armed forces. The 'organization' criterion includes the existence of a command structure and disciplinary rules and mechanisms within the armed group; the ability to procure, transport and distribute arms; the group's ability to plan, coordinate and carry out military operations—including troop movements and logistics; its ability to negotiate and conclude agreements such as cease-fire or peace accords etc.

4.2 APPLICABILITY OF IHL FOR 'DISTURBED AREAS'

From the above discussion it is evident that states have kept the threshold of for the applicability of IHL so high as to preserve their sovereignty. This has led to exclusion of internal disturbances from the scope of IHL. Such situations can then be tackled by states under domestic law. The security situation as envisaged for application of APII has seldom obtained in India. APII level thresholds can only obtain in case of armed rebellion, for which Emergency provisions of the Constitution (Article 352) would apply. At best the brief takeover of Mizo Hills by the Mizo National Front in 1966 can serve as an example of armed groups having taken territorial control.15 Currently, while Maoists exercise some territorial control in Naxal affected areas, the parameters of levels of capability and violence are, arguably, not satisfied, since the state has adopted a development first approach as against a security centric one.

Therefore, armed forces have not been deployed in central India, where the Central Armed Police Forces have taken charge. This may be a preliminary phase of operations with the state first building capacity, becoming situation ally aware and then taking on the Naxals in their forest bastions over time. In that case, there would be higher intensity insurgency and counter-insurgency operations that can lead to the situation being characterized as an armed conflict. It can be expected however that the state may vacate the areas under control of Naxals in the short term, but the protracted operations, of limited intensity, will follow from the horizontal spreading out of the Naxals, displaced from their strongholds. In other words, security situations have a propensity to move from being internal disturbances to armed conflicts and *vice*

versa. Consequently, there can be scope for movement in the characterization of the conflict and the applicability or otherwise of IHL.

Generally, the lower intensity of violence, even where addressed by armed forces, explains the imposing of AFSPA to address the 'internal disturbance' in 'disturbed areas'. The Supreme Court reflecting on the threshold stated: 'For an area to be declared as 'disturbed area' there had to exist a grave situation of law and order that the area was in such a disturbed *or* dangerous condition that the use of armed forces in aid of the civil power was necessary.' Article 355 of the Constitution, that legitimizes the Union's deployment of forces under AFSPA, enables such action in support of states as the Union's duty 'to protect every state against … internal disturbance'. Therefore, the AFSPA threshold is taken as 'internal disturbance', which manifestly does not amount to armed conflict. This places such situations outside the scope of IHL.

However, the AFSPA in respect of the J&K of 1990 appears to indicate a higher threshold in its Article 3, specifically, that the disturbed areas have a 'disturbed *and* dangerous condition' that makes: ... the use of armed forces in aid of the civil power (is) necessary to prevent: (a) activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people...; (b) activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India...

Where territorial sovereignty is threatened and terrorism is endemic, there is a case to regard the situation—in specific phases—as more than an internal disturbance amounting to an armed conflict. Additionally in J&K, there is the element of the Pakistani proxy war in which military support for the groups operating in J&K, comprises in part of Pakistani nationals. This interference seemingly 'internationalizes' the internal conflict, giving it the cadence of the non-official category of—'internationalized non-international armed conflict' (INIAC). However, even this term is not applicable since INIAC involves state actor interference in an NIAC, and not that of proxy non-state actors. For interference by a state actor, its role in the intervention through non-state actors must amount to being in 'overall control'

going beyond financing and equipping, to planning and supervising military action. In such a case, IHL for IAC will apply. Such a situation does not obtain in J&K since Pakistan has attempted 'plausible deniability' and India, for its part, has not chosen to formally identify Pakistan's action to be of such an order. India's preference has been to restrict the depiction of the situation in J&K, as an internal disturbance, even during phases of more pronounced violence as arguably obtaining from 1990-97 and 1998-2003 that warranted it to be characterized as an NIAC. Nevertheless, from a legal perspective, there have been phases of limited duration, such as at the end of the Kargil War when the situation that included 'fidayeen' attacks, can be said to have escalated to higher levels of intensity. But whether that phase can reasonably be described as an internal disturbance is to be considered. This would take it into the armed conflict domain making it an NIAC. The corresponding spike in Pakistani complicity also makes it possible to consider this as an IAC. This observation reinforces the point that a situation can transit from internal disturbance to armed conflict, with the nature of armed conflict being IAC or NIAC depending on levels of external complicity. In so far as the situation on the Line of Control (LC) is concerned, the relevant rules of IHL for IAC are applicable even in the absence of open hostilities. This was so prior to the ceasefire of November 2003.

The operation of the AFSPA for over half century in the Northeast and for two decades in J&K suggests that the armed groups have the capacity for 'protracted armed confrontations'. The intensity of violence has episodically been at a 'minimum level of intensity' along with a 'minimum of organization'. This implies that security situations warranting that areas be declared 'disturbed' sometimes temporarily are of levels that can be characterized as NIAC requiring the applicability of IHL under the Common Article 3 threshold. However, military action by the state in response, such as the better known Operation Bluestar in 1984 and the lesser known Operation Sarp Vinash in Surankot in 2003, speedily reduces the level of intensity. This negates the criteria of protraction and intensity at levels necessary to qualify as armed conflict. The situation thus can be better described as 'internal disturbance' than armed conflict. As for the other criterion, of use of armed forces that weighs in favors of a situation being characterized as armed conflict, India is moving away from deploying the military in such situations by enhancing the capability of the central police forces to undertake such operations. The definition of NIAC not having been attempted in

Common Article 3, the threshold of its applicability is pitched high by states. Governments are understandably reluctant because of sovereignty considerations to concede belligerency opportunities for the non state groups who they accuse of posing an armed challenge to the state. This reluctance is despite Common Article 3 stating that its application 'shall not affect the legal status of the Parties to the conflict.' Nevertheless, the treaty provisions of non-international armed conflict being somewhat less comprehensive than for IAC, the significance of customary international humanitarian law for NIAC goes up.

Therefore, the provisions of Common Article 3, that is widely accepted as a mini-Convention, applicable under both treaty and customary law, that then need implementing are:
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) Taking of hostages;
(c) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court. Finally, the Martens Clause of IHL, is embedded in all the four Geneva Conventions thus: 'Obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.' This serves as a 'catch all' clause, weighing normatively in favor of humanitarian concerns against military necessity in all circumstances.

As is a given in IHL, these humanitarian protections are to be weighed against military necessity. AFSPA powers to the armed forces under Section 4 reflect military necessity. However, their exercise has to be in 'good faith'. Since it is no one's case that the provisions of Common Article 3 can be ignored while countering insurgency and terrorism, if Common Article 3 applies, there is no obvious problem. The state's domestic law obligates respect for the provisions in any case. The advantage that accrues upon acknowledging the applicability of Common Article 3 is that the non-state party is also then duty bound to ensure that its provisions are not violated. In any

case, the non-state actors do not get additional legitimacy and can be proceeded against under domestic law. The other advantage is that legal deterrence against violations by both sides is enhanced with IHL reinforcing domestic law. This will prevent any permissive atmosphere from developing. Where IHL is operative, grave breaches of the Geneva Conventions are to be prevented by states. Article 3 of the Act of 1960 making Geneva Conventions domestic law dwells on penalties for grave breaches,: 'Where the offence involves the willful killing of a person protected by any of the Conventions, with death or with imprisonment for life,' then Articles 49 and 50 of the Geneva Conventions come into play. Article 50, significantly states:

Grave breaches are now included as war crimes in the Rome Statute of the International Criminal Court. Article 8 has it that 'The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.' Vide para 8 (c) these crimes include 'serious violations' of the Geneva Conventions, namely, '(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment.' This 'does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.' Article 8 describes NIAC as 'when there is protracted armed conflict between governmental authorities and organized armed groups.'

The Rome Statute is not relevant to India since India is not a signatory. Nevertheless, customary IHL is applicable. The normative framework for NIAC is more detailed in customary law. The trend is towards violations of customary IHL having universal jurisdiction. Under customary law, states increasingly have a right to universal jurisdiction in national courts for war crimes, even those committed in NIAC. This would apply equally to the non-state actor indulging in violations through terrorism. An advantage of having IHL cover is that war crimes committed by non-state actors, such as Pakistani groups, can be taken up for prosecution under international criminal law. Domestic law is applicable only to those within the power of the state. Those outside the state, such as master minds manipulating the proxy war from outside, can be prosecuted in case the threshold according Common Article 3 is seen to be, as indeed it does in proxy war. Though states can do without the external factor in

internal affairs, allowing for the application of IHL makes strategic sense. Violations lead to an alienation-suppression cycle, which according to counter insurgency literature a state can ill afford. Military effectiveness will not be compromised since military necessity is an acknowledged factor in IHL. This can be determined periodically by India in its six monthly consideration as mandated by the Supreme Court for extension of ‘disturbed‘ status for areas under AFSPA.

4.3 INCREASING OPPOSITION TO THE AFSPA

The Justice Verma Committee

The *Committee on Amendments to Criminal Law* (popularly referred to as the Justice Verma Committee) was a three-member committee headed by Jagdish Sharan Verma, a retired Supreme Court judge, set up by the central government in December 2012 to review laws against sexual assault. The committee was formed a week after the gang rape and murder of a 23 year-old woman on 16 December 2012. The incident was a flashpoint in India, causing thousands to protest in the streets, clashes with riot police, and backlash from the media and human rights groups against the government’s initial response to the incident, and the public’s anger. The committee’s 657-page report included a section on sexual violence in conflict zones, in which the committee said that the AFSPA legitimized impunity for sexual violence, and recommended immediate review of the continuance of the AFSPA in internal areas of conflict.

The committee’s report, released in January 2013, was welcomed by several rights groups and organizations, including the UN High Commissioner for Human Rights. The report noted that in conflict zones legal protection for women in conflict areas was often neglected, and emphasized that women in conflict areas were entitled to the security and dignity afforded to citizens elsewhere in the country. In its recommendations, the committee said that sexual violence against women by members of the armed forces or uniformed personnel should be brought under the purview of ordinary criminal law, and urged an immediate review of the continuance of the AFSPA. The committee also recommended an amendment to the AFSPA to remove the requirement of prior sanction from the central government for prosecuting

security personnel for certain crimes involving violence against women. In interviews to the media, J. S. Verma said that sexual violence could not in any way be associated with the performance of any official task, and therefore should not need prior sanction from the government. Following the committee's recommendations, new laws on violence against women were passed in April 2013. These included an amendment to the Code of Criminal Procedure which removed the need for prior sanction for prosecuting government officials for certain crimes involving violence against women, including rape, sexual assault, sexual harassment, voyeurism and stalking. However a similar amendment to the AFSPA that was proposed by the committee was ignored.

The Justice Hegde Commission

In January 2013, the Supreme Court appointed a three-member commission headed by Santosh Hegde, a retired Supreme Court judge, in response to a public interest litigation seeking investigation into 1,528 cases of alleged extrajudicial executions committed in the state of Manipur in northeast India between 1978 and 2010. The commission was established to determine whether six cases identified by the court were 'encounter' deaths – where security forces had fired in self-defence against members of armed groups – or extrajudicial executions. It was also mandated to evaluate the role of the security forces in Manipur. In its report submitted to the court in April 2013, the commission found that all seven deaths in the six cases it investigated were extrajudicial executions, and also said that the AFSPA was widely abused by security forces in Manipur. The commission said that the continued operation of the AFSPA in Manipur has made "a mockery of the law," and that security forces have been "transgressing the legal bounds for their counter-insurgency operations in the state of Manipur." The commission echoed a statement made by the Jeevan Reddy Committee, a committee formed to review the AFSPA in 2005, which said that the law had become "a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness."

The committee's report recorded how security forces in Manipur were disregarding procedural safeguards set out in Supreme Court rulings and army directives to ensure that AFSPA powers were used with exceptional caution and with the minimum force

necessary. Neither the Justice Verma Committee nor the Santosh Hegde Commission was expressly mandated to consider the role of the AFSPA in violence against women or extrajudicial executions, respectively. However, both pointed to the AFSPA as being a key cause of both past and ongoing human rights violations. The Santosh Hedge Commission primarily criticizes the lack of enforceable safeguards against abuse of the AFSPA's provisions. For example, "though the Act gives sweeping powers to the security forces even to the extent of killing a suspect with protection against prosecution, etc., the

Act does not provide any protection to the citizens against possible misuse of these extraordinary powers…normally, the greater the power, the greater the restraint and stricter the mechanism to prevent is misuse or abuse. But here in the case of the AFSPA in Manipur, this principle appears to have been reversed." Similarly, the Verma Committee concluded that the provision requiring sanction to prosecute allowed for crimes against women to be committed by security forces with impunity. The committee recommended that section 6 of the AFSPA, 1958 and section 7 of the AFSPA, 1990 be amended to waive the requirement for sanction if the armed force personnel were accused of crimes against women. The government and the armed forces rejected the recommendation.

CHAPTER 5

AFSPA IN INTERNATIONAL SCENARIO

5.1 DOMESTIC LAW

Under the AFSPA, the authorities only need to be "of the opinion that whole or parts of the area are in a dangerous or disturbed condition such that the use of the Armed Forces in aid of civil powers is necessary." There is no definition of what constitutes “dangerous or disturbed condition”.

The vagueness of this definition was challenged in Indrajit Barua v. State of Assam case (AIR 1983 Del 513). The court decided that the lack of precision to the definition of a disturbed area was not an issue because the government and people of India understand its meaning. However, since the declaration depends on the satisfaction of the Government official, it is not subject to judicial review.

The Disturbed Areas (Special Courts) Act, 1976, however, provides a clear definition. Under the Disturbed Areas (Special Courts) Act of 1976, an area may be declared disturbed when "a State Government is satisfied that (i) there was, or (ii) there is, in any area within a State extensive disturbance of the public peace and tranquillity, by reason of differences or disputes between members of different religions, racial, language, or regional groups or castes or communities, it may ... declare such area to be a disturbed area." The lack of precision in the definition of a disturbed area under the AFSPA demonstrates that the government is not interested in putting safeguards on its application of the AFSPA[36].

In the original version of the Armed Forces Special Powers Act of 1958, only the state governments had the power to declare an area as disturbed. This was consistent with Article 246 of the Constitution of India[3] to be read with the 7th Schedule of the Constitution of India which places “law and order” under the State’s list. The 1972 amendments to the AFSPA took away the power from the State government and its

[36] Supra n.17

legislative Assembly and handed it over to an appointee of the Central Government. This is despite the fact that President can proclaim emergency under Article 356 of the Constitution of India.

Therefore, under the Armed Forces Special Powers Act, the Central government subsumes the powers of the State governments to declare certain parts or whole of a State or Union Territory under emergency with having to resort to the strictness required under the Article 356 of the Constitution of India.

5.2 INTERNATIONAL LAW

India is party to the International Covenant on Civil and Political Rights (ICCPR). Article 4 of the ICCPR provides under what circumstances state of emergency can be declared. It states,

"1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

The United Nations Human Rights Committee, in its General Comment No 29 on Article 4, explains the circumstances under which measures derogating from the provisions of the Covenant may be taken. It states:

"Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency, which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers."[6]

Article 4(2) of the ICCPR requires that certain rights may not be derogated from under any circumstances. The Human Rights Committee in its General Comment No. 29 further states:

"Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). The rights enshrined in these provisions are non-derivable by the very fact that they are listed in article 4, paragraph 2. The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in article 6 of that Protocol. Conceptually, the qualification of a Covenant provision as a non-derivable one does not mean that no limitations or

restrictions would ever be justified. The reference in article 4, paragraph 2, to article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derivability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in article 18, paragraph 3. On several occasions the Committee has expressed its concern about rights that are non-derivable according to article 4, paragraph 2, being either derogated from or under a risk of derogation owing to inadequacies in the legal regime of the State party".

The Human Rights Committee in its General Comment No. 29 further states:

"The fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists. The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation".

In its General Comment No. 29, the Human Rights Committee developed a list of elements that cannot be subject to lawful derogation. These elements include the

following: all persons deprived of liberty must be treated with respect for their dignity; the prohibition against hostage taking, abduction, or unacknowledged detention; the protection of persons belonging to minorities; the prohibition of unlawful deportation or transfer of population; and that "no declaration of a state of emergency … may be invoked as justification for a State party to engage itself in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence."In any event, where derogation is invoked, there is an obligation under Article 4(3) to notify other States parties through the United Nations Secretary-General and to indicate the provisions from which a State has derogated and the reasons for such derogation.

Though Manipur has been under emergency since 1980, the government of India has not publicly declared a state of emergency but have taken emergency measures under the Armed Forces Special Powers Act, which derogate from treaty obligations in violation of the Article 4 of the ICCPR.

Not surprisingly, the United Nations Human Rights Committee while examining the third periodic report of India in 1997 held that India is in violation of Article 4.3 of the ICCPR. In its Concluding Observations after examination of India's third periodic report, Human Rights Committee regretted that "some parts of India have remained subject to declaration as disturbed areas over many years - for example the Armed Forces (Special Powers) Act has been applied throughout Manipur since 1980 and in some areas of that state for much longer - and that, in these areas, the State party is in effect using emergency powers without resorting to article 4, paragraph 3, of the Covenant". Therefore, the Committee recommended that the application of these emergency powers be closely monitored so as to ensure its strict compliance with the provisions of the Covenant.

5.3 OPERATION OF THE AFSPA

The operative clauses of the Armed Forces Special Powers Act, 1958 allow extrajudicial executions under section 4(a), destruction of properties and firing upon any absconder without any warning under section 4(b), arrest without warrant under section 4(c) and search and seizure without warrant under section 4(d).

A comparison with the relevant provisions of the Indian Criminal Procedure Code (CrPC) and Indian Penal Code (IPC) shows that the AFSPA violates the laws of the land.

5.4 INTERNATIONAL OPPOSITION

The AFSPA has also been subject recently to severe criticism by several UN experts, including the Special Reporters on violence against women, its causes and consequences; on extrajudicial, summary or arbitrary executions; and on the situation of human rights defenders. Rashida Manjoo, the UN Special Reporters on violence

against women, its causes and consequences, said after her visit to India in April 2013 that the AFSPA had "resulted in impunity for human rights violations broadly."

She called for the repeal of the law, saying, "the interpretation and implementation of this act, is eroding fundamental rights and freedoms – including freedom of movement, association and peaceful assembly, safety and security, dignity and bodily integrity rights, for women, in J&K and in states in north-east India. Unfortunately, in the interests of State Security, peaceful and legitimate protests often elicit a military response, which is resulting both in a culture of fear and of resistance within these societies." Cristof Heyns, the UN Special Reporters on extrajudicial, summary or arbitrary executions, visited India in March 2012. In his report to the UN Human Rights Council, he stated that "the powers granted under AFSPA are in reality broader than that allowable under a state of emergency as the right to life may effectively be suspended under the Act and the safeguards applicable in a state of emergency are absent. Moreover, the widespread deployment of the military creates an environment in which the exception becomes the rule, and the use of lethal force is seen as the primary response to conflict." Calling for the repeal of the law, he said that "retaining a law such as AFSPA runs counter to the principles of democracy and human rights."

Margaret Sekaggya, the UN Special Reporters on the situation of human rights defenders, who visited India in January 2011, also called for the AFSPA to be repealed in her report, and said that she was deeply disturbed by the large number of cases of defenders who claimed to have been targeted by the police and security forces under laws like the AFSPA. International and national human rights groups and activists, including Amnesty International, have called for the AFSPA's repeal for years, with little purposeful response or definitive action from the government. The central government, and state governments of J&K and states in northeast India, has also failed to engage in meaningful debate on the Act despite well documented evidence of abuses. Amnesty International India welcomes the national and international attention being brought to the AFSPA and the violations it facilitates.

5.2

Pakistan, being an 'Islamic state' and following the policy of the 'two nation- theory', refused to let Kashmir, which it claimed to be a Muslim state, coexist with India.

Movements for independence, or *azadi*, like the Kashmir Freedom Movement and Jammu and Kashmir Liberation Front gained massive support from the local people. In the late 1980s, Kashmir became a victim of state sponsored terrorism perpetrated by Pakistan. This was confirmed by the Central Intelligence Agency (CIA) in 1999. This was, and continues to be, a 'low cost option' for Pakistan by which it could 'bleed India by a thousand cuts'. This operation was named Operation Topac. Praveen Swami lists terrorist groups like the Lashkar-e-Omar, Lashkar-e-Tayyeba, Jaish-e-Mohammad, Harkat-ul-Mujahideen, Harkat-ul-Ansar, Harkat- ul-Jihad-Islami and al-Badr as Pakistan-based Islamic organisations; the Hizb-ul-Mujahideen, Jamaat-ul-Mujahideen, as Pakistan-based, but mainly under Kashmiri leadership; and Jammu and Kashmir Liberation Front as a Kashmiri Islamist group. Pakistan continues to encourage terrorism in Kashmir to engage the Indian armed forces in counter-terrorism or low intensity conflict, thereby degrading India's conventional force prowess by a process called "strategic fatigue". Thus, it not only makes India pay a military price but also an economic price. The *jihadis* were not just local insurgents following conspiratorial strategies but also Afghan *jihadis* also known as *mehman* (guests) militants who were ready to !ght the Indian Army. Their belief was that the Muslims comprise the oppressed sections of the world and the oppressors are the non-Muslims or the indwells. Terrorism was contacted with other forms of violence. While the Kashmiri *jihadis* would "open up from more than 100 meters away, the Afghans would come in as close as 30 meters". These religious *jihadis* would indulge in guerrilla warfare. Other tactics would include "bomb blasts, cutting lines of communication, attacks on patrols and the police".

5.5 GOVERNMENT'S REALISATION

It became essential for the Indian government to counter the long drawn cross-border terrorism and, hence, adoption of a comprehensive approach to terrorism was a desideratum. It was decided that attempts would be made to counter terrorism and not combat terrorism, and India would campaign against terrorism and not wage a war against it. The laws of armed conflict state that countries have the right to "resort to military action (*jus ad bellum*), provided that in the process, they can demonstrate just cause". The Government of India tried to put substantial military pressures as one of

the ‘three-pronged’ strategies to counter terrorism in Kashmir. In 1989, the security forces were given the task of “direct liquidation of the insurgents and their support base *within* Kashmir and the elimination of support of all kinds, especially of the influx of the armed insurgents, from sources *outside* the state”

The insurgency in Kashmir, the most notable one, has existed in various forms. Thousands of lives have been lost since 1989 due to the intensification of both the insurgency and the fight against it. A widespread armed insurgency started in Kashmir with the disputed 1987 election with some elements from the State's assembly forming militant wings which acted as a catalyst for the emergence of armed insurgency in the region.

The Inter-Services Intelligence of Pakistan has been accused by India of supporting and training mujahideen. to fight in Jammu and Kashmir. According to official figures released in Jammu and Kashmir assembly, there were 3,400disappearance cases and the conflict has left more than 47,000 people dead as of July 2009. However, the number of insurgency-related deaths in the state have fallen sharply since the start of a slow-moving peace process between India and Pakistan.

However, despite boycott calls by separatist leaders, 2014 Jammu and Kashmir Assembly elections saw highest voters turnout in last 25 years since insurgency has erupted. It recorded more than 65% of voters turnout which was more than usual voters turnout in other state assembly elections of India. It considered as increase in faith of Kashmiri people in democratic process of India.

5.6 THE SECURITY FORCES PERSPECTIVE

The army’s views, as one of the important stakeholders in the entire debate are based on its perception of the ground realities, particularly in the state of J&K. A number of arguments have been given *for* the retention of AFSPA.

First, India is fighting a proxy war in the state and, therefore, AFSPA enables the security forces to fight both external and externally-abetted forces that threaten not

only the security of the state but also of the country. The encounter on March 28, 2012 in Kupwara, in which five Lashkar-e-Taiba (LeT) terrorists were killed, testifies to this fact. *Second*, the army has its military establishments, intelligence set-up and even convoys that pass through areas where AFSPA is not operative. Therefore, the security of both men and material require the legal safeguards and operational powers of AFSPA. *Third*, cases of hot pursuit could well take troops from areas where the law is in force to where it may have been revoked, thus leading to legal complications, as well as allowing terrorists to create safe havens for themselves. *Fourth*, the army, in its security assessment, sees a rise in terrorist violence in the coming years, given the availability of trained and willing terrorist cadres in Pakistan, who are more over likely to increasingly turn their attention towards India after the de-induction of US-led forces in Afghanistan. Under these circumstances, the army feels that once AFSPA is revoked, political compulsions will not allow its re-introduction even if the situation in the state worsens. The example of Imphal, which has seen a spurt in militant activities since the lifting of the disturbed area status, is cited as proof. Maj Gen Umong Sethi,'s arguments are based on these premises. Lt Gen Satish Nambiar, while highlighting the need for review in view of the domestic perceptions, feels that "It is possible to state with some conviction that in 99 per cent, possibly 99.9 per cent, or maybe even 99.99 per cent cases, our forces take every precaution to ensure that there is no loss of life to innocent civilians or collateral damage to property." Maj Gen Nilendra Kumar, highlights the need for humanizing AFSPA. He recommends a number of measures, within the constitutional and legal framework of existing laws to build in the necessary checks and balances. A number of these measures stem from the experience of the author and his handling of the AFSPA debate within the army.

CHAPTER 6

THE FUTURE OF THE AFSPA

In March 2009 Jammu and Kashmir Chief Minister Omar Abdullah assured the people of his state that the AFSPA would be revoked or amended as the situation in the state improves. However, a Kashmiri commentator asked rhetorically: “since when does he or any establishment in Jammu and Kashmir have the autonomy to deal with something that Centre imposes”. Top Indian military generals and the opposition Bharatiya Janata Party [BJP] criticized Abdullah. Those calling for the AFSPA’s “dilution or withdrawal,” said India’s Army chief,

General V.K.Singh, “probably do so for narrow political gains." Any “dilution” of the law he warned, "will lead to constraining our operations". BJP leader L. K.Advani said that any step towards modifying the AFSPA, or withdrawing troops from J&K amounts to nothing less than "surrendering before Islamabad's strategy of breaking India's unity". In the face of such polarized opinion, it is unlikely that Abdullah would be able to deliver on his promise. In fact just three days after his announcement, the then Home Minister P. Chidambaram defended the AFSPA in his meeting with the UN High Commissioner for Human Rights, Pillay. The External Affairs Minister refused to give Pillay any assurance that the government would consider modifying the AFSPA regime. When Pillay raised the question of its misuse, according to a senior Home Ministry official, "she was politely but firmly told that the AFSPA is not applicable throughout the country. It is only effective in areas where terrorists operate." Pillay on her part confirmed that she had not received any assurance from the government regarding any modification to the AFSPA regime .Some form of modification of the AFSPA regime, however, has been on India’s policy agenda for some time. In September 2010, the Indian Cabinet’s Committee on Security considered whether the AFSPA should be withdrawn from Jammu and Kashmir or be modified. The same options were also considered when the top leadership of all major political parties met to discuss the situation in Kashmir. Even

though these meetings did not produce any agreement, the fact that such options were discussed at that level, is significant. When the Jeevan Reddy Committee was appointed to review the AFSPA 1958, according to its official terms of reference, it was asked to consider whether the law should be amended "to bring them in consonance" with the government's "obligations" vis-à-vis human rights or "to replace the Act by a more humane Act". Considering these developments, changes in the AFSPA regime in the foreseeable future cannot be ruled out. However, it is safe to predict that changes will not be substantive. Most of the powers under the AFSPA would probably be retained in one form or another, as has been the case with changes to other controversial security laws in India. ""The most visible and draconian laws – ostensibly enacted in most cases in response to particular crises --," observe Anil Kalhan and his colleagues, "have often been repealed when faced with strong political opposition, concerns about fundamental rights violations, or a perception that the crisis moment has passed." But the controversial aspects of those laws mostly remained in effect. New laws have put similar powers in the hands of the government. With fresh developments like a new crisis, or a change in government, "new comprehensive laws have been re-enacted along much the same lines as those previously repealed, sometimes with heightened sensitivity to fundamental rights, but sometimes in even more draconian form".The AFSPA has not gone through such a process so far. As I have said before, it has been in effect in Northeast India for half a century and in J & K for two decades. Even in the Northeast Indian state of Mizoram--often portrayed by Indian officials as a poster child of successful counterinsurgency, and a state that has been peaceful for more than two decades--the AFSP Are mains in force as a "sleeping act."

A major recommendation of the Reddy Committee was pretty much along the lines of what Kalhan and his colleagues describe as the cyclical pattern of enactment, repeal and reenactment. The Reddy Committee proposed the repeal of the AFSPA and the incorporation of some of its key provisions into another law, the Unlawful Activities Prevention Act (UAPA). The Committee to its credit, recognized that in parts of Northeast India, AFSPA "for whatever reason, has become a symbol of oppression, an object of hate and an instrument of discrimination and highhandedness" .However, it dealt with the finding that Northeast Indians see the AFSPA as an "instrument of discrimination" in a remarkable way. The Committee

concluded that incorporating the controversial provisions of the AFSPA into a law that applies to the country as a whole, instead of having a law that is specific to Northeast India, could change that perception. However, the Reddy Committee recommended significant modification of the AFSPA regime as well, most importantly, the creation of grievance cells in districts where the army operates, in order to "ensure public confidence in the process of detention and arrest" since "there have been a large number of cases where those taken away without warrants have 'disappeared,' or ended up dead or badly injured". Amnesty International was on the mark when it criticized the Reddy Committee for approaching the problems associated with the AFSPA with the goal of finding "an acceptable formula for continuing the powers . . . rather than addressing the questions of how the AFSPA facilitates human rights violations and foster simpunity". The Reddy Committee submitted its report in 2005, but the Indian government has not so far acted on its modest recommendations partly because of strong opposition from India's security establishment. Indeed the report itself may not have been in the public domain today except that it was leaked to a newspaper which posted it on its web.

6.1 OBSTACLES TO CHANGE

The AFSPA is almost a textbook case of the undeclared emergency that the International Covenant of Civil and Political Rights and other human rights treaties seek to prevent. The idea of derogation is designed with that purpose. It requires legislatures to "to act and deliberate before extraordinary powers are exercised," so that "unelected members of the executive" do not act as sovereigns and decide "when an emergency exists and what actions are required to respond to the emergency." By recognizing "the baseline set by existing rights, even as it departs from them," a formally announced derogation of rights is intended to ensure that the suspension of rights is temporary. It is also expected to trigger "international engagement and scrutiny of actions taken at the domestic level". All this is a far cry from the AFSPA. It was enacted to be in place more or less permanently in certain regions that the

government considers troubled, in order to enable the executive to declare an area as "disturbed" when it deems necessary and call on the armed forces to intervene. That the decision to declare an area as disturbed is made by civil authorities and not by the army under the AFSPA, does not change the fact that it entails the de facto suspension of fundamental freedoms including those that the ICCPR considers non-derivable. There is little doubt that the powers under the AFSPA and their effects, i.e., the suspension of freedoms, add up to a de facto emergency regime, as its critics charge. However, the fact that there is no decision or declaration of an emergency and that in Indian administrative practice the AFSPA is more or less a matter of routine public order policing are significant. The paradigm of the state of exception that has come to dominate the study of emergencies, and informs the model of derogation spelt out in human rights treaties, is clearly at odds with the institutional practices that shape the AFSPA. Two aspects of the norms and practices of the Indian state are particularly relevant: (a) the wider role of the armed forces in public order policing, and (b) the presumption of good faith extended in general to public officials in India protecting actions performed in their official capacity from judicial scrutiny. Efforts to reform the AFSPA regime are unlikely to succeed unless these general practices of the institutions of the postcolonial Indian state are addressed simultaneously.

6.2 ARMY IN AID OF CIVIL POWERS

The "use of armed forces in aid of the civil powers"—the formulation used in the AFSPA – has long been a part of public order policing in India. The doctrine is by no means unique to India. Countries like Canada and the United Kingdom also have some versions of that doctrine, though custom and common law place limits on it in all three countries. India resorts to the practice more often than the other two countries. Yet the relevant sections of the British Defense Doctrine would resonate with those familiar with the official Indian arguments in support of the AFSPA. At the core of the "legal doctrine governing the domestic use of military personnel" in the UK is said to be "the absolute primacy of civil authorities; when Armed Forces

personnel are used on domestic tasks they are only employed in support of relevant and legally responsible civil authorities" .

The roots of the AFSPA and of the doctrine of the army coming to the aid of civil power lie in the history of colonial policing. In British colonial India the army and the police were "complementary rather than alternative agencies of control". Internal security took up as much as one-third of the resources and manpower of the army . "In all countries the soldier when in barracks may be regarded as available in the last resort to deal with domestic disturbances with which the policeman cannot cope," observed the Simon Commission Report of 1929, "but the case of India is entirely different. Troops are employed many times a year to prevent internal disorder and, if necessary, to quell it". In his classic work on Imperial Policing published in 1934, Maj. Gen. Sir Charles Gwynne divided "the police duties of the army" into three categories (a) small wars with definite military objectives but ultimately aimed at establishing civil control; (b) situations where "normal civil control" breaks down and the army becomes "the main agent" for maintaining or restoring order, including martial law when military authority temporarily supersedes civil authority; and (c)situations where the police forces under the control of civil authorities are inadequate for the challenges at hand and the army is called upon to help. The three types of interventions differ in terms of the kinds of authority that the military exercises: the army exercises full authority in the first type of intervention, and different levels of shared authority with the civil officials in the latter two types of intervention. However, situations where such interventions occur are fluid: an incident "may pass from one category to the other" .In independent India, the army has been called upon to deal with internal security matters with remarkable frequency. An article published in 1992 provides some quantitative data. While that evidence is dated, it is quite telling. From 1951 to 1970, over a twenty-year period, there were476 occasions when the army was called upon to deal with matters of internal security. Such interventions became even more frequent after that. From June 1979 through December 1980 --an eighteen-month period – there were as many as 64 such occasions, and there were 369 such instances between 1981 and 1984. There is no reason to believe that the pattern would be very different for the years since then. Most of these interventions were in cases of communal riots. Because the state police forces are often seen as partisan, the need for the army and paramilitary forces under

the central government's control to step into such situations is widely accepted by officials and citizens alike. The practice is so well established that a commission inquiring into the Bombay riots of 1992-93 warned against local administrations delaying the decision to call upon the armed forces when the situation demands it. "The top officers and the State Administration," advised the Justice B N Srikrishna Commission, "should not treat the calling out of the army or any other force as a blow to their pride. In a contingency where it is required, after honest and self searching appraisement, the army authorities should at once be moved for operational duties for dispersal of unlawful assemblies". Most interventions by the Indian army in matters of internal security are quick "in and out" operations". Yet in terms of Indian policing practices those operations and the ones enabled by the AFSPA are sub-types of the same kind of public order policing: those that involve the army's aid to civil powers. Indian official arguments in support of AFSPA therefore rarely elaborate on the specifics of security challenges to make the case for the AFSPA. That the powers available to the army for controlling a riot are inadequate is seen as enough of an argument in favor of the AFSPA. As the Reddy Committee's report tries to explain, the relevant sections of the CPC are "meant to meet situations where an unlawful assembly endangers the public security," which is the case during a communal riot. In such a situation the authority of the state is not challenged, which is not the case with situations that the army faces in the Northeast. To the Reddy Committee, this difference makes the case for the AFSPA seem self-evident. The report spells out the difference between the two types of situations as follows: Such situations must be distinguished from those arising in the North Eastern States like Manipur, Nagaland or Assam where the militants not only challenge the authority of the State but by their composition, strength, aims and objectives present a problem which is spread over a large geographical area and is long term in nature. In situations of the latter kind, the provisions of the Criminal Procedure Code would not be adequate. A permanent legal provision would be required which permits the army and the other Central forces to operate over an extended area and time period -of course, consistent with the rights and interests of the citizens and the security of the State. The report does not say much by way of specifics to explain why the extraordinary powers given by the AFSPA and the suspension of freedoms are necessary. It simply asserts that the powers designed for the purpose of controlling a riot are insufficient. Since the situation that the army confronts in Northeast India is not a riot, from the Reddy

Committee's perspective, the case for "a permanent legal provision" permitting the army and the other Central forces "to operate over an extended area and time period" is self-evident. However, if one considers the peculiarities of the "insurgencies" of Northeast India, as I have described earlier in this paper, as a rationale for the AFSPA, this would hardly be convincing to anyone who does not accept what has become the official common sense of public order policing in postcolonial India.

6.3 CASE STUDY

The 2010 Kashmir unrest was a series of violent protests and riots in the Kashmir Valley which started in June 2010 after the Indian Army claimed to have killed three "Pakistani infiltrators" but it was later revealed to be a case of a fake encounter in which a soldier of the Territorial Army, a counter-insurgent and a former special police officer had lured three young men from their Nadihal village in Baramulla district and killed them in a staged encounter at Sona Pindi. The protests occurred in a movement launched by Hurriyat Conference led by Syed Ali Shah Geelani and Mirwaiz Umar Farooq in the Indian state of Jammu and Kashmir in June 2010, who called for the complete demilitarization of Jammu and Kashmir. The All Parties Hurriyat Conference made this call to a strike, citing human rights abuses by security forces. Rioters shouting pro-independence slogans, defied curfew,attacked riot police with stones and burnt vehicles and buildings. The protests started out as anti India protests but later were also targeted against the United States following the 2010 Qur'an-burning controversy. The riot police consisting of Jammu and Kashmir Police and Indian Para-military forces fired teargas shells rubber bullets and also live ammunition on the protesters, resulting in 112 deaths, including many teenagers and an 11 year old boy. The protests subsided after the Indian government announced a package of measures aimed at defusing the tensions in September 2010.

On April 30, 2010, the Indian Army claimed to have foiled an infiltration bid from across the Line of Control, at Machil Sector in Kupwara district of Jammu and Kashmir by killing three armed militants from Pakistan. However, it was subsequently established that the encounter had been staged and that the three alleged militants were in fact civilians of Rafiabad area, who had been lured to the army camp

by promising them jobs as “porters” for the Army, and then shot in cold blood, in order to claim a cash award[37].

On June 11, there were protests against these killings in the downtown area of Srinagar. Police used massive force to disperse the protesting youth during which a teargas bullet killed a seventeen-year-old Tufail Ahmad Mattoo who was playing cricket in Gani memorial Stadium.

Several protest marches were organized across the Valley in response to the killings which turned violent. Thereafter a vicious circle was set, killing of a boy was followed by protest demonstrations and clashes with police and CRPF in which another boy was killed which led to another protest by the boys till several youth lost their lives. Official figures reveal around 110 people have lost their lives and 537 civilians were injured during stone-pelting incidents from May to September 21, 2010. Around 1,274 CRPF men and 2,747 police personnel were injured during the same period across the valley[38].

Indian intelligence agencies claimed that these protests and demonstrations were part of covert operations of Pakistani intelligence agencies and were sponsored and supported from them. Media reports earlier in march had suggested that with the support of its intelligence agencies Pakistan has been once again 'boosting' Kashmir militants and recruitment of 'martyrs' in Pakistani state of Punjab. It was reported that in a meeting held in Muzaffarabad in mid January 2010 which was chaired by former Inter-Services Intelligence chief Hamid Gul, United Jihad Council called for reinvigorated jihad until Kashmir was free of "Indian occupation". In May 2010 increased activities of militants was reported from across the border in Neelum valley in Pakistani-administered Gilgit-Baltistan. The locals reported that large numbers of militants had set up camps in the area with plans of crossing into the Kashmir valley, and they did not appear to be Kashmiri.

RESULT OF MACHIL ENCOUNTER CASE

The Army has sentenced two officers and three soldiers to life imprisonment for gunning down three unemployed Kashmiri youths and then trying to pass them off as

[37] *Supra n.12*
[38] Supra n. 5

"Pakistani militants" in a stage-managed encounter in Machil sector along the Line of Control in April 2010. The general court martial (GCM) also held that Colonel Dinesh Pathania, Captain Upendra Singh, Havildar Devinder and Lance Naiks Lakhmi and Arun Kumar should be cashiered from service — stripped of their ranks and all pension benefits — for the fake encounter that triggered widespread outrage and violence in the Kashmirvalley over four years ago[39].

Operation Blue Bird (Oinam, Bishunpur District, Manipur) : Operation Blue Bird was launched in 11th July 1987 at Oinam of Manipur, where more than 30 naga villages covered and human rights violations including torture and even extrajudicial killings were done in addition to sexual harassment, theft and loot by security personals. In a petition filed by NPMHR, it was reported that many houses were burnt and dismantled, many women were tortured and people got killed in fake encounters. This operation was done for many days, whole area was kept isolated and in jailed condition where even civil administrative authorities were not permitted to move in. Cases were filed in courts, even registrar of a high court was denied to move in to record the statements, but so far nothing happened[40].

Kunan Poshpora (Kupwara District, J&K) : On 23 rd February 1991, a search operation was conducted by Indian army in Kunan Poshpora village of Kupwara district. During this search operation, around 100 women including pregnant women were allegedly raped by army persons in front of villagers. No clear inquiry was made by government. Later in the year 2014, the police officer who first visited the village to record testimony told that he was threatened many times to not to make report public. Government tried its best to make this case as ‘baseless' and on the other hand, Chief Justice of J&K high court in his findings told that he never saw such a case where even normal investigative procedures were ignored. A case is still running in Supreme Court of India on this issue.

Bijbehra firing (Anantnag district, J&K): On 22 October 1993, approximate 35 civilians got killed when BSF fired upon crowd during a protest. It was alleged that

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[39] *Supra n.1*

[40] http://www.amnesty.org/en/for-media/press-releases/india-pathribal-ruling-setback-justice-jammu-andkashmir-2012-05-01

firing was unprovoked and done while the protest was peaceful. Magistrate inquiry and NHRC findings marked that the firing was unprovoked. J&K High Court also accepted the reports and findings and ordered for compensation to victims and their families. It is not clear if the case against BSF personals was sent to grant sanction for prosecution, but till now no such prosecution was done[41].

Malom (Imphal District, Manipur) : It was 2nd November 2000, when at Malom, a place near Imphal, Assam Rifles fired upon 10 persons at a bus stand and they got killed. In these persons, even a 60 year old lady and 18 year old bravery award winner also got killed. This case sparked the anger in Manipur. Protest was organized. Irom Sharmila started her fast with demand to repeal the act AFSPA. However, still nothing happened[42].

Pathribal (Anantnag district, J&K) : On 25th March 2000, at Pathribal in J&K, 5 civilians were picked up by Rashtriya Rifles and allegedly made as ‘foreign militants' and as the main accused persons who were responsible for Chhatisinghpura case. Local people protest against this and claimed that these were civilians and were not involved in any such activity. Initially, no case was lodged as defined with the impunity granted under AFSPA but later when protest erupts, CBI was asked to investigate the case. CBI in its investigation submitted report and found guilty a Brigadier, a Lt Col, two majors and a subedar of 7 Rashtriya Rifles for a staged encounter where civilians were picked up from Anantnag district . These encounters were told as ‘cold blooded murders'. Supreme Court of India, with findings of CBI told Indian army in the year 2011 for court martial, (as sanction for prosecution under civilian law could not be provided under AFSPA) , however after two years army closed the case with no actions on accused personals[43].

Manorama Killing (Imphal Distrcit, Manipur) : It was the night of 10th July 2004, when Assam Rifles went to house of Manorama at Imphal, Manipur at night, tortured her at her house before her brother and mother, then picked her up. In the morning, dead body was found at Ngariyan Yairipok road with bullets injuries in her private parts. Massive protest was organized by people, even the infamous naked protest also

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[41] *Id.*
[42] *Id.*
[43] *Id.*

happened but case under criminal charges could not be lodged. A local judicial inquiry was done but report was not made public. A PIL in Supreme Court of India is still going on but no verdict has been awarded yet.

Shopian Case (Shopian district, J&K):: on 29 th May 2009 in Shopian (J&K), two women named Aasia (age approx 17) and Neelofar (age approx 22) went missing from their orchard on their way back to home. Their dead bodies found on next day morning. People alleged it as murder and rape by security forces who were camped nearby. Initially, no FIR was lodged and police told that postmortem report cleared injuries over private parts. However people believed that police report about postmortem is fake, protests were continued by people and later J&K govt. formed a judicial panel. Under judicial inquiry, Forensic lab report established the gang rape of both the women. Besides few suspension and transfers from police department, nothing has happened in this case[44].

Mass Graves in J&K: In the year 2008-09, mass graves of approximate 3000 unmarked persons were found in Bandipora, Baramulla, Kupwara and other districts. It was believed that most of these graves may belong to people who has been killed and buried by security personals without any accountability under AFSPA. It was also believed that there may be persons who are reported as ‘disappeared', as thousands of cases of disappearances are recorded. State Human Rights Commission confirmed that thousands of bullet ridden bodies buried in unmarked graves. Some 500 bodies are identified as ‘locals' and not the ‘foreign militants' as it was told by security agencies. In spite of all cry and hue by human rights organizations and local people, no concrete action has been taken yet from the side of government.

1528 cases of extra judicial killings: In a write petition filed in Supreme Court of India (SCI), it was told that during May 1979 to May 2012 , approximate 1528 cases belongs to extra judicial killings. Supreme Court picked 6 random cases from the list and formed a high power commission under Justice (retd) Santosh Hegde and two others members to inquire about these 6 cases. Commission submitted its report to

[44] *Id.*

SCI stated that all 6 cases are found cases of fake encounters where no criminal records found for these persons who got killed. Case is still in SCI[45].

[45] *Supra* n. 4

CHAPTER 7

CONCLUSION

While it is a fact that the Armed Forces Special Powers Act confers extraordinary powers which have been allegedly misused by the military, police and other paramilitary personnel to commit gross excesses without any fear of being punished, it is also a fact that despite numerous mass protests, legal challenges and review committees the Act has neither being reviewed nor repealed. However, following Supreme Court rulings, some safeguards have been introduced by the army[46].The "Dos and Don'ts" issued by the Army authorities have been suitably amended to conform to the Supreme Court guidelines, which the army personnel are required to strictly follow. For instance, minimum force is used by the armed forces under Section 4(a) against persons suspected of violating prohibitive orders. A person arrested and taken into custody under Section 4(c) is handed over to the nearest police station within 24 hours of such arrest. Any property, arms, ammunition seized by the armed forces is likewise handed over to the officer in charge of the nearest police station. Most importantly, the army has initiated a number of cases against its personnel accused of violating the basic human rights of the people. It is hoped that these safeguards would not only restrain the forces from perpetrating excesses but would also assuage the hurt sentiments of the people in the insurgency affected areas of the country.

The peace dividend has to be passed on to the people without delay to ensure that they become a part of the process, leading to prosperity and lasting peace. The people of J&K have suffered decades of sponsored violence that was alien to their cultural beliefs. The tangible benefits of peace in terms of lower visibility of troops, freedom from fear and opportunities for growth and prosperity are the immediate deliverables. The governments at the state and centre along with responsible stakeholders should formulate a strategy to get rid of the curse of terrorism and finally end their

[46] Supreme Court of India on Armed Forces Special Powers Act, 1958, *Naga People's Movement of Human rights, etc., vs. Union of India*, 27 November 1997, New Delhi, at http://www.upr-info.org/IMG/pdf/COHR_IND_UPR_
S1_2008 anx_Annex_XXIII_Supreme_Court_ruling_on_AFSPA.pdf, accessed on March 29, 2012.

manipulation by inimical powers. The steps will have to be taken in stages and the time is not far when security forces will not be required to provide a secure internal environment. However, knee jerk reactions may put the clock back. There is a need to exercise prudence and caution and take measured steps without playing for short-term gains.

By way of summing up, it is clear that the provisions of AFSPA, both individually and in totality, do not meet requirements of domestic and international law. The Act facilitates human rights violation and spawns a culture of impunity. To consider such powers and immunity as necessary to combat security challenges is a reflection of the continuance of the colonial mindset of subjugating the local population. The suggestion that human rights violations are permissible in certain circumstances is wrong.[47] The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by state or non-state actors, are never justified no matter what the ends.

Research elsewhere has established the negative impact of such special security legislations on both, the rule of law and the peace process.[48] Two lessons that support the arguments of this paper are of particular significance. First, that once civil liberties are eroded by statue, it is almost impossible to reinstate them leading in turn to normalisation of emergency legislations; second, that such legislations shatter the faith of people in the criminal justice system, making it difficult to regain trust. Both of these apply in the case of AFSPA. The fact that the Act is in place in the Northeast states since 1958, and that while reviewing the Act, both the Supreme Court (in upholding the law) and the Reddy Commission (in not ensuring adequate safeguards) do not match up to the established standards calls into question their impact on rule of law. It is important to note

[47] Legal Commentary to the ICJ Berlin Declaration Counter Terrorism, Human Rights and Rule of Law, Human Rights and Rule of Law Series No. 1, International Commission of Jurists, 2008.

[48] . Committee on the Administration of Justice (2008), War on Terror: Lessons from Northern Ireland, Northern Ireland, United Kingdom, available at http://www.caj.org.uk/contents/479

The IHL applies in areas where AFSPA operates depending on the intensity of violence in areas designated as ‘disturbed’. IHL in the form of Common Article 3 is applicable in ‘disturbed areas’ at levels of insecurity as once obtained in J&K and may obtain elsewhere in future, such as in central India. Provisions of Common Article 3, incorporated into domestic law in the Geneva Conventions related Act of 1960, need to be implemented in such instances. This will be additional cover against violations by the state and will likewise obligate non-state actors. This will mitigate the plight of the people in areas declared ‘disturbed’, who are otherwise subject to being buffeting about by the actions of security forces and the outright disregard of non-state actors. India will then be fulfilling its obligations as per Common Article 1 of the Geneva Conventions that reads: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’

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