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THE ARMED FORCES SPECIAL POWERS ACT, 1958 – A CRITICAL ANALYSIS

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Abstract

In the wake of serious disturbances following partition of the country in 1947, the government of India issued four Ordinances¹ which were later replaced by the Armed Forces (Special Powers) Act, 1948 but this was a temporary statute enacted for one year. Due to the violence and secessionist tendencies prevailing in some parts of the country including the northeast, the government drafted this legislation for maintenance of internal security of the country. The Armed Forces (Special Powers) Act, 1958, has been validly enacted by the Parliament. This Act was initially known as Armed Forces (Assam and Manipur) Special Powers Act, 1958.² The Act applied to the entire State of Assam and the Union territory of Manipur. After sometimes, the Act was made applicable to North-Eastern States and Jammu and Kashmir. As justified ever since by Parliamentarians that this Act is an effective counter terrorism law in this country.³

Disaster relief and internal security are the primary responsibility of governments with their integral State police. Internal security is the activity by the State to guarantee order, security and public tranquillity, to protect people, to prevent criminality and contribute to ensure the normal functioning of the democratic institutions, the exercise of fundamental freedoms by the citizens and the respect for democratic system. Usually, the internal security of the State is maintained by police forces, but when State's civil administration fails, then armed forces are deployed to restore peace and harmony in that State.⁴

¹ The Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (Act 11 of 1947); the Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (Act 14 of 1947); the East Punjab and Delhi Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (Act 22 of 1947), and the united Provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (Act 22 of 1947).

² Available at: https://www.mha.gov.in/sites/default/files/armed_forces_special_powers_act1958.pdf

³ Suvrokanal Dutta, "On the Issue of Repeal of AFSPA", Mainstream 19 (2006).

⁴ S.G.Vombatkere, "Armed Forces Special Powers Act Governance by Ballot or Bullet", Mainstream, December 21 (2006).

INTRODUCTION

The Army is trained and equipped for its primary role of defence of national boundaries against external threat or aggression. However, governments can deploy the Army in a secondary role in aid of civil power for disaster relief, internal security and countering insurgency. The centre has power to deploy its armed forces or any other force under its control in aid of the civil power in a State to maintain public order. The expression “in aid of the civil power” implies that deployment of the armed forces of the Union shall be for the purpose of enabling the civil power in the State to deal with the situation affecting maintenance of public order which has necessitated the deployment of the armed forces in the State.⁵

Governments have political power of the people’s vote and it is misuse of political power that leads to a situation beyond the limits of civil administration, which ultimately leads causing it to be declared a “disturbed area”.⁶ Armed forces are deployed to establish peace in that disturbed area. For this purpose, armed forces are provided with extra powers to tackle such situations successfully. Unless the armed forces are provided with such special powers, they cannot be able to restore and maintain civil administration efficiently in such areas. In a deteriorated civic-political situation with the State the Army has the undesirable task of maintaining peace by the threat or use of force to prevent violence against the State machinery.⁷

The state government intends to revoke the ‘disturbed areas’ status of parts of the state that have largely returned to normalcy. The north-east is a strategically vulnerable region. Northeast of India has a peculiar historical problem of its own, which it does not share with the rest of India. These include its implications for centre-state relations, its impact on the fundamental rights of citizens, the tacit political message sent to areas singled out for such laws, such as the Northeast and J&K, as being ‘different’ from the rest of India, the possible empowering of the military to an extent of skewing the ‘civil military’ balance, the strategic costs of the Act in terms of losing ‘hearts and minds’ etc. The truth remains that, this piece of law still stands out unaltered, even though provisions under this law give the security forces power to go against the basic principles of ‘rules of law’.

⁵ Entry 2A of List-I.

⁶ Section 3, the Armed Forces (Special Powers) Act, 1958.

⁷ Supra note 1 at 22.

Under the shadow of such laws the acts of omission and commission by security forces allegedly result in mass killings, rape, disappearances, torture etc. Indian armed forces have been accused of violating human rights. From 1995 to 2010, 1400 cases of violation of human rights were reported against the military. Only 54 of these got sanctions from the central government for prosecution. This resulted in innumerable court-martials, where punishments ranged from life imprisonment to termination of services. More than 37 officers were punished.⁸ But one thing is quite clear that the broad masses of the Indian people in the rest of India are now more aware about what is going on in the North-Eastern States and Jammu and Kashmir under the name of maintaining unity and integrity of the country and they are also trying their level best to ensure that the struggle for liberty, justice and human dignity of the people there gets strengthened.

AFSPA & CONSTITUTION OF INDIA

Article 21 of the Indian Constitution guarantees the right to life to all people. It reads, “No person shall be deprived of his life or personal liberty except according to the procedure established by law.” Judicial interpretation that “procedure established by law means a “fair, just and reasonable law” has been part of Indian jurisprudence since the 1978 case of Maneka Gandhi.⁹ This decision overrules the 1950’s Gopalan case¹⁰ which had found that any law enacted by parliament meet the requirement of “procedure established by law.” Since Maneka Gandhi’s¹¹ case, the court has consistently ruled that the procedure prescribed by the law must be fair and reasonable and the law in turn, must conform to the other fundamental rights, especially those embodied in article 19(1) concerning all aspects of civil liberties; that “personal liberty” means more than mere absence of physical restraint and “life” means more than mere existence. Under section 4(a) of the AFSPA, which Grants armed forces personnel the power to shoot to kill, the constitutional right to life is violated. This law is not fair, just or reasonable because it allows the armed forces to use an excessive amount of force.

The offence under section 4(a) are: “acting in contravention of any law or order of the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapon or of things capable of being used as weapons fire-arms, ammunition or

⁸ Lt. Gen. Harwant Singh (retd), “Withdrawing AFSPA: It Will Affect Army’s Functioning in J&K”, the Tribune, November 3, 2011 p.6.

⁹ Maneka Gandhi v. UOI, AIR 1978 SC 853.

¹⁰ A.K Gopalan v. State of Madras, AIR 1950 SC 27

¹¹ Supra note 9.

explosive substances.” None of these offences necessarily involve the use of force. The armed forces are thus allowed to retaliate with powers which are grossly out of proportion with the offence.

Justice required the use of force be justified by a need for self-defence and the minimum level of proportionality. As pointed by the UN Human Rights Commission, since “assembly” is not defined, it could well be lawful assembly, such as a family gathering, and since “weapon” is not defined it could include a stone. These shows how wide the interpretation of the offences may be, illustration the law of use of force is disproportionate and irrational.¹²

Several incidents¹³ show how the Border Security Forces (BSF) and army personnel abuse their powers in the North East. In April 1995, a villager in west Tripura was riding near the border out post when a soldier asked him to stop. The villager did not stop and the soldier shot him dead. Even more grotesque were the killings in Kohima on 5 March 1995. The Rashtriya Rifles (National Rifles) mistook the sound of a tyre burst from their own convoy as a bomb attack and began firing indiscriminately in the town. The Assam Rifles and the CRPF who were camped two kilometres away heard a gun shots and also began firing. The firing last for more than one hour, resulting in the death of seven innocent civilians, 22 were also seriously injured. Among those killed were two girls aged 3 ½ and 8 years old. The injured also included 7 minors. Motars were used even though using mortars in a civilian area is prohibited under army rules.

Article 22 of the Indian Constitution states that “(1) No person who is arrested shall be detained in custody without being informed the grounds for such arrest, nor shall be denied the right to insult, and to be defended by, a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate with in a period of twenty- four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.” The remaining section of the Article deal with limits of these first two sections in the case of preventive detention laws. On its face, the AFSPA is not a preventive detention law therefore

¹² Available at: http://www.hrdc.net/sahrdc/resources/armed_forces.htm>accessed on 12.12.2011.

¹³ S. Bhaumik, “India targets North-east Rebels,” BBC News 29th Oct 1995 as available at http://news.bbc.co.uk/2/hi/south_asia/43881 accessed on 2.12.2011.

the safeguards of section (1) and (2) must be guaranteed to people arrested under the AFSPA. Section (2) of Article 22 was the subject of much debate during the framing of the Indian Constitution.¹⁴ There was argument over whether the time limit should be specified or whether the words “with the least possible delay” should be used. Dr. Ambedkar, one of the principal framers of the Indian Constitution argued that “with the least possible delay” would actually result in the person being held for a shorter period of time, whereas “twenty- four hours” would result in person being held for maximum time of twenty- four hours. The application of these terms has since shown that a specified time period constitutes a greater safeguard. Under the AFSPA, the use of “least possible delay’ language has allowed the security forces to hold people for days and months at a time.

AFSPA & 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,

“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, provide 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.”

Under the ICCPR, states may, “in times of emergency which threatens the life of the nation,” take measure which derogate from certain obligation, they may only do so “to the extent strictly required by the exigencies of the situation.”¹⁵ Under Article 4(3) of the ICCPR, “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.”

Declaring an area, a “disturbed area” and granting the military extensive powers is in practice

¹⁴ M.P. Jain, Indian Constitutional Law, 6th edn., 98 (1998).

¹⁵ Article 4(1) and 4(3) of ICCPR.

imposing an undeclared emergency regime. In its ruling, the Supreme Court refused this, claiming that the “Act does not displace the civil power of the State by the armed forces” and does not amount to a “proclamation of emergency under Article 352 or a proclamation under Article 356 of the Constitution.”¹⁶ However, the Human Rights committee stated in its concluding observations on India’s third periodic report:

“The Committee regrets that some parts of India have remained subject to declaration as disturbed areas over many years – for example, the Armed Forces (Special Power) Act has been applied throughout Manipur since 1980 and in some areas of that state for much longer – and that in those areas, the State party is in effect using emergency powers without resorting to article 4, paragraph 3, of the Covenant. The committee recommends that the application of the emergency power be closely monitored so as to ensure its strict compliance with the provisions of the Covenant.”¹⁷

Violation of the right to remedy

The AFSPA and other legislation relevant to the armed forces – requires the “sanction” (i.e. permission) from the central government before prosecutions can be initiated against members of the security forces for acts committed, or purported to be committed, under the legislation. Section 6 of the AFSPA specifies that:

“no prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done for purported to be done in exercise of the powers conferred by this Act.”

Article 2(3) of the ICCPR provides that state parties must:

“...ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

The right to an effective remedy is implicit in Article 32 of the Indian Constitution. The fundamental rights in the Constitution of India include a right to enforceability of these rights. However, even during the first debate in the Lok Sabha at the time the AFSPA was being considered, one member reportedly stated that Section 6 of the Act “immediately take away, interrogates, pinches, frustrates the right to constitutional remedy which has been given

¹⁶ Code of Conduct for law enforcement Officials adopted by General Assembly Resolution 34/169 of 17 Dec, 1979, available at <http://www2.ohchr.org/english/law/codeofconduct.htm> accessed on 21.12.2011.

¹⁷ Concluding observations of the Human Rights Committee: India, Report of the Human Rights Committee, UN Doc. A/52/40 (1997), p 434.

in Article 32(1) of the constitution.”¹⁸

The importance of avoiding impunity has been articulated by the Supreme Court: In order that the people may feel assured that there is an effective check against misuse and abuse of powers by the members of the armed forces it is necessary that a complaint maintaining an allegation about misuse or abuse of the powers conferred under the Central Act should be thoroughly inquired into and, if it is found that there is substance in the allegation, the victim should be suitably compensated by the state and the requisite sanction under Section 6 of the Central Act should be granted for institution of prosecution and /or civil suit or other proceeding against the person/persons responsible for such violation.”¹⁹

This direction has been supplemented in Paragraph 52 of the judgement, where the court stated: “...we are of the view that since the order of the Central Government refusing or granting the sanction under Section 6 is subject to judicial review, the Central Government shall pass an order giving reasons.”²⁰

Torture ill-treatment and “disappearances”

The sweeping powers bestowed upon security forces upon the AFSPA have fostered a climate in which security forces, and other agents of law enforcement, commit human rights abuses with impunity. Article 7 of the ICCPR provides that: “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Like the right to life, this right is non-degradable, namely it must be fully adhered to in times of emergency, including war and internal strife. Moreover, the prohibition against torture is a “norm of customary law.”

Amnesty International has received reports that the AFSPA has in practice facilitated the torture all ill-treatment of people while in custody. In 1991, Supreme Court Advocate Nandita Haksar recorded the use of torture by armed forces and police in the Northeast to include: beating with rifles butt, kicking with boots and hitting with blunt weapon, ii) giving electric shocks, iii) depriving persons of food and drink and beating on soles of the feet, iv) threat to shoot, interrogation with gun pointed at forehead or inside the mouth.”²¹

Torture and ill-treatment are strictly prohibited in all circumstances, and are not permitted under the AFSPA. Amnesty International is concerned that torture and ill-treatment are

¹⁸ South Asia Human Rights Documentation Centre. “Armed Forces Special Powers Act- A study in National Security tyranny:” 93 (1995).

¹⁹ Supra note 16.

²⁰ Ibid.

²¹ Nandita Haksar, Submission to the International Covenant on Civil and Political Human Rights Committee: Armed Forces (Special Powers) Act, 1958: A report on Human Rights Violations in North East India (New York, 1991) available at www.amnesty.org accessed on 20.04.2011.

routinely in areas where the AFSPA is in force on account of the wide powers given to security forces deployed in “disturbed areas” and the expectation of impunity which it generates soldiers and which, unfortunately, is often fulfilled.

Violation of the rights to liberty and security of person

Several provisions of the AFSPA violate the protection against arbitrary detention contained in the ICCPR and other international instruments. Section 4(c) and Section 5 of the AFSPA do not conform to Article 9 of the ICCPR. Section 4(c) provides:

“any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the Armed Forces may in a disturbed area,

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

Article 9 of the ICCPR provides that “...No one shall be subjected to arbitrary arrest or detention...” the HRC has explained this provision as follow: “...the Committee recalls that the notion of “arbitrariness” must not be equated with “against the law” but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.”²²

There are reported breaches of the ICCPR even when the AFSPA is followed. Article 9 of the ICCPR further provides that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power...” The Supreme Court of India in 1997 ruled that arrested persons be produced before a magistrate within 24 hours of arrest, excluding journey time.²³ While section 5 of the AFSPA provides for the arrested person to be handed over to the nearest police station “with the least possible delay” and despite the fact that the courts – and in the late 1990s the National Human Rights Commission (NHRC) – have issued directives that this provision should be interpreted as meaning “within 24 hours.”

The key provisions of AFSPA contravene international human rights law and have led to gross and systematic violations of indigenous peoples. Under relevant international human rights and humanitarian law standards there is no justification for such an act as the AFSPA, by its form

²² A. v. Australia, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (30 April 1997), para. 9.2.

²³ Naga People's Movement of Human rights v. Union of India, AIR 1998 SC 431.

and in its application, violates the Universal Declaration of Human Rights²⁴, the international convention on civil and political rights, the Convention Against Torture, the UN Code of Conduct for Law Enforcement Officials, the UN Body of Principles for Protection of All Persons Under any form of Detention etc.

AFSPA violates the following provisions of UDHR, as follows; Article 1 – Free and Equal Dignity,²⁵ Article 2 – Non-discrimination,²⁶ Article 3 – Life, Liberty, Security of person,²⁷ Article- 5 – No torture,²⁸ Article 7 – Equality before the law,²⁹ Article 8 – Effective remedy,³⁰ Article 9 – No Arbitrary arrest.³¹

Violation of the rights to life

The greatest outrage of the AFSPA under both Indian and international law is the violation of the right to life. This comes under Article 6³² of the ICCPR, and it is a non-derogable right. This bans no situation, or state of emergency, or internal disturbance, can justify the suspension of its right. Section 4 of the AFSPA empowers officers (both commissioned and non-commissioned) in cases of self-defence, but against any person contravening laws or orders “prohibiting the assembly of five or more person.” Article 6 of the ICCPR provides for a non-derogable right to life, encapsulated in the provision that “No one shall be arbitrarily deprived of his life.” In its general comment the Human Rights Committee³³ has stressed that “it is a right which should not be interpreted narrowly.”³⁴ It went on to state: “The Committee considers that States parties should take measures not only to prevent and punish deprivation of criminal acts, but also to prevent arbitrary killing by their own security

²⁴ Hereinafter UDHR.

²⁵ All human being are born free and equal in dignity and rights.

²⁶ Everyone is entitled to all rights and freedoms set forth in this declaration, without distinction of any kind, such as race, color, sex, language, religion, political other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self governing or under any other limitation of sovereignty.

²⁷ Everyone has the right to life, liberty and security of persons.

²⁸ No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

²⁹ All are equal before the law and entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

³⁰ Everyone has the right to an effective remedy by the component national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.

³¹ No one shall be subjected to arbitrary arrest detention or exile.

³² Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

³³ Hereinafter the HRC.

³⁴ Human Rights Committee, General Comment No. 6: The right to life, art. 6 (sixteenth session, treaty Bodies, UN Doc. HRI\GEN\1\Rev. 1 at 6 (1994, para.1).

forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”³⁵

The United Nations has developed other standards which elaborate upon this provision. For example, Article 3 of the UN Code of Conduct for Law Enforcement Officials, adopted by the General Assembly in 1979, and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the UN Congress on the Prevention of crime and Treatment of Offenders in 1990.

The core principles require law enforcement officials to:

- “As far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remains ineffective or without any promise of achieving the intended result.”³⁶
- Use the firearms only “when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.”³⁷

Indian human rights groups point out the excessive powers this section of the AFSPA bestows upon the armed forces as under ordinary criminal law the violation of an order under Section 144 which prohibits the assembly of 5 or more persons is punishable with a month’s imprisonment. A person can be killed for the same act under the AFSPA.

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 Power) 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 3,³⁸ of the

³⁵ *Ibid.*

³⁶ Principle 4 of the UN basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

³⁷ Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly resolution 34/169 of 17 December 1979, Article 3

³⁸ Any State party to the present Covenant availing itself of the right of the right of derogation shall

Covenant.”

The Code of Criminal Procedure (“CrPC”)

The CrPC establishes the procedure police officers are to follow for arrests, searches and seizures, a procedure which the army and the other Para- military are not trained to follow. Therefore, when the armed forces personnel act of civil power, it should be clarified that they may not act with broader power than the police and that these troops must receive specific training in criminal procedure.

The CrPC has the section on the maintenance of public order, chapter X, which provides more safeguards than the AFSPA. Section 129 in that chapter allows for the disposal of an assembly by use of civil force. The section empowers an Executive Magistrate, officer-in-charge of a police station or any police officer not below the rank of sub-inspector to disperse such an assembly. It is interesting to compare this section with the power of the army has to disperse assemblies under section 4(a) of the Act. The CrPC clearly delineates the ranks which can disperse such an assembly, whereas the Act grants the power to use maximum force to even to non-commissioned officers. Moreover, the CrPC does not state that force to the extent of causing death can be used to disperse an assembly.

Moreover, dispersal of assemblies under chapter X of CrPC is slightly more justifiable than dispersal under section 4 (a) of the AFSPA. Section 129-131 of CrPC refer to the unlawful assemblies as ones which “manifestly endanger” public security. Under the AFSPA the assembly is only classified as “unlawful” leaving open the possibility that peaceful assemblies can be dispersed by use of force.

Chapter V of the CrPC sets about the procedure of police are to follow. Section 46 of CrPC establish the way in which arrest are to be made. It is only if the person attempts to evade arrest that police officer may be use “all means necessary to make the arrest.” However sub-section (3) of section 46 of CrPC limits this force of use by stipulating that this does not give the officer right to cause the death of the person, unless they are accused of an offence punishable by death and life imprisonment. This power is already too broad. It allows the

immediately inform the other State 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.

police to use more force than stipulated in the UN Code of Conduct for Law Enforcement officials¹⁹. Yet the AFSPA is even more excessive. Section 4(a) of AFSPA lets the armed forces kill a person who is not suspected of an offence punishable by death or life imprisonment.

An undeclared state of emergency for undefined reasons and for unlimited periods

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,

“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, provide 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.”

Under the ICCPR, states may, “in times of emergency which threatens the life of the nation,” take measure which derogate from certain obligation, they may only do so “to the extent strictly required by the exigencies of the situation.”³⁹ Under Article 4(3) of the ICCPR,

“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.”

Declaring an area, a “disturbed area” and granting the military extensive powers is in practice imposing an undeclared emergency regime. In its ruling, the Supreme Court refused this, claiming that the “Act does not displace the civil power of the State by the armed forces” and does not amount to a “proclamation of emergency under Article 352 or a proclamation under Article 356 of the Constitution.”⁴⁰ However, the Human Rights committee stated in its concluding observations on India’s third periodic report:

“The Committee regrets that some parts of India have remained subject to declaration as disturbed areas over many years – for example, the Armed Forces (Special Power) Act has been applied throughout Manipur since 1980 and in some areas of that state for much longer –

³⁹ Article 4(1) and 4(3) of ICCPR.

⁴⁰ Supra note 16.

and that in those areas, the State party is in effect using emergency powers without resorting to article 4, paragraph 3, of the Covenant. The committee recommends that the application of the emergency power be closely monitored so as to ensure its strict compliance with the provisions of the Covenant.”⁴¹

The Jeevan Reddy Committee Review of AFSPA⁴²

While the campaign against the Armed Forces (Special Powers) Act, 1958 in North-Eastern States and Jammu and Kashmir has been going on for many years, it was the alleged rape of a young Manipuri woman, named Manorama Devi, in 2004 that sparked off a more intense movement. Since that incident Manipur and other areas of the North-East States have been simmering. Prime Minister Manmohan Singh promised, later that year, to set up a Committee to make recommendations for a more humane law. A Committee headed by former Chief Justice, B.P. Jeevan Reddy J. was appointed by Prime Minister in the year 2005. It submitted its 147-page report in 2005 which made three main recommendations:

- i. To amend the provisions of the Act to bring them in consonance with the obligations of the government towards protection of human rights;
- ii. To replace the existing Armed Forces (Special Powers) Act, 1958 by a more humane Act.
- iii. Recommended insertion of appropriate provisions in the Unlawful Activities (Prevention) Act, 1967 (as amended in the year 2004) which is a cognate enactment as pointed out in Chapter III Part II of this Report instead of suggesting a new piece of legislation.

The reason that the Committee made for the third recommendation was that the Unlawful Activities (Prevention) Act, 1967, is applicable to entire territory of India including the North-Eastern States, and is more comprehensive in terms of dealing with terrorism. Besides this, the Committee also pointed out that the deployment of armed forces for the said purposes should be undertaken with great care and circumspection. Unless it is absolutely essential for the aforesaid purposes, the armed forces of the Union should not be so deployed, since too frequent a deployment, and that too for long periods of time, carries with it the danger of such forces losing their moorings and becoming, in effective, another police force, a prey to all the temptations and weaknesses such exposures involve. Such exposure for long periods of time may well lead to the brutalization of such forces, which is a danger to be

⁴¹ Supra note 17.

⁴² The Jeevan Committee Report, Ministry of Home Affairs 73 (2005).

particularly guarded against.⁴³ Unfortunately, the Committee did not discuss the human rights abuse and the ill-treatment meted out with the people, comprehensively.

Second Administrative Reforms Commission⁴⁴

Nevertheless, the Jeevan Reddy Committee Report clearly stated that the Armed Forces (Special Powers) Act, 1958, “has become a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness,” and should be withdrawn”. The Central Government ignored the judgment of its own Committee, with the Armed Forces (Special Powers) Act, 1958, still in continuance in the Northeast and now in Jammu and Kashmir too. In June 2007, the Second Administrative Reforms Commission, chaired by Mr.

M. Veerappa Moily, published its Fifth Report on Public Order. The Commission of Inquiry was set up by the President to prepare a detailed blue print for revamping the public administration system. A review of the Armed Forces (Special Powers) Act, 1958, was included as part of the Report’s Chapter entitled “Constitutional Issues and Special Laws”. The Second Administrative Reforms Commission’s Report relied heavily on the findings of the Review Committee chaired by Justice Reddy so that ultimately the Armed Forces (Special Powers) Act, 1958, should be repealed and appropriate provisions should be inserted into the Unlawful Activities (Prevention) Act, 1967. The Second Administrative Reforms Commission’s recommendations support those of the Review Committee with the exception that the proposed addition made to the Unlawful Activities (Prevention) Act, 1967, incorporating the provisions governing the deployment of the armed forces of the Union in aid of civil power would only apply to the North-Eastern States. The Commission’s recommendation was submitted to the Government of India on 1 June 2007 and met with immediate resistance stating the time had not come to scrap the law, adding, “But there is always scope for improvement.”⁴⁵

The Armed Forces (Special Powers) Amendment Bill, 2011⁴⁶

Recently the Amendment Bill of AFSPA was introduced in Rajya Sabha on 5th August, 2011. For Section 6 of the Armed Forces (Special Powers) Act, 1958, the following Section shall be substituted, namely “No prosecution, suit or other legal proceedings shall be instituted

⁴³ Available at: <http://www.hindu.com/nic/afa/afa-part-i.pdf> (accessed on Dec. 10, 2011).

⁴⁴ Second Administrative Reforms Commission, Government of India, 5th Report 235 (2007).

⁴⁵ Available at http://corecommittee.cgg.gov.in/pdf2/public_order5.pdf (accessed on Jan. 5, 2012).

⁴⁶ Available at <http://164.100.24.219/BillsTexts/RSBillTexts/asintroduced/armd.pdf> (accessed on Jan. 10, 2012)

against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act where the Central Government provides reasons in writing and the competent court upholds the legal validity of these reasons.” For Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, the following Section shall be substituted, namely “No prosecution, suit or other legal proceedings shall be instituted against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act where the Central Government provides reasons in writing and the competent court upholds the legal validity of these reasons.”

Under Section 6 of the Armed Forces Special Powers Act, 1958 and Section 7 in Armed Forces Special Powers (Jammu and Kashmir) Act, 1990 says "no prosecution suits or other legal proceedings shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act." This requirement confers de facto impunity on all personnel of Armed Forces violating the Act. The Central Bureau of Investigation had indicted army officers for the murder of innocent civilians at Pathribal in 2000 but their trial could not take place because the Central Government refused to give sanction for prosecution. The government even do not have to give any reasons for denying the permission for prosecution. It is, therefore, long over that this provision should be amended by providing that while denying the permission for prosecution, the Central Government must give reasons in writing and the competent court upholds the legal validity of these reasons.

IJLRA