Armed Forces Special Powers Act- A Draconian Legislation

sampark jenamani
PERSONAL DETAILS

NAME- SAMPARK JENAMANI

2\textsuperscript{nd} Semester,

B.A.L.L.B.(Hons.),

NATIONAL UNIVERSITY OF STUDY AND RESEARCH IN LAW, RANCHI (NUSRL RANCHI)

Polytechnic Campus, BIT Mesra,

Ranchi – 835215 (Jharkhand).

TITLE SUBMISSION-

Armed Forces Special Powers Act: ‘‘A DRACONIAN LEGISLATION’’

CONTACT DETAILS- Email- samparknusrlranchi@gmail.com

Contact No. - +917209932115

NATIONAL UNIVERSITY OF STUDY AND RESEARCH IN LAW, (NUSRL RANCHI)

RANCHI, Polytechnic Campus, BIT Mesra, Ranchi – 835215 (Jharkhand).
ABSTRACT

Endless violations of Human rights, mass killings, unseen violence, had in fact invoked in masses an irrevocable perception of pessimism for the termination of the AFSPA Act. Concerted failure efforts by the successive governments about the AFSPA had also enraged the crowd all over the country. Speculations floating around that if something is not done to curb the nuances of the AFSPA at the earliest, then it would be too late to repeal AFSPA thereafter.

Amidst such speculations, the writer had vividly tried to present an overview of the various loopholes of the Draconian AFSPA Act. Being personally visited to four of the seven AFSPA affected states Assam, Mizoram, Nagaland and Tripura, the writer very much acknowledges the need to repeal this very Act.

The writer had tried to give a lucid presentation on the historical background, Acts and Provisions backed by the legal analysis, conclusions and most importantly recommendations for the Act.

Through this article, the writer being an ardent follower of various socio problems happening in the country, took this opportunity as an initiative towards the ongoing voice being raised against the repeal of AFSPA Act.
INTRODUCTION

““It is a class of 2015, the teacher asks a student about the total number of states constituting the Union of India, the student confidently replied, 30, the teacher corrects the perplexed one stating that the number had decreased to 22…””

Frankly speaking, if the prevailing situation persists in the controversial areas of the north-eastern states including Jammu and Kashmir, this kind of situation is not entirely hypothetical. The use of the AFSPA pushes the demand for more autonomy, giving the peoples of the North East more reason to want to secede from a state which enacts such powers and the agitation which ensues continues to justify the use of the AFSPA from the point of view of the Indian Government. Back in late 1950s, the Union Government had opened the ‘Pandora Box’ in form of the most draconian legislations ever passed by our Parliamentary mechanism the Armed Forces (Special Powers) Act of 1958 (AFSPA). Under this Act, all security forces are given unrestricted and unaccounted power to carry out their operations, once an area is declared disturbed. The present scenario is that even a non-commissioned officer is granted the right to shoot to kill based on mere suspicion that it is necessary to do so in order to "maintain the public order". However, on the contrary, this legislation is sought to be justified by the Government of India, on the plea that it is required to stop the North East states from seceding from the Indian Union. Does a normal Indian could able to perceive the above clearance by the Government without any hiccups…………for that the historical
background of the commencement of the act needs to be understood.

First applied to the North Eastern states of Assam and Manipur and amended in 1972 then extending to all the seven states in the north-eastern region of India (Assam, Manipur, Tripura, Meghalaya, Arunachal Pradesh, Mizoram and Nagaland, also known as the "seven sisters"), AFSPA in the name of "aiding civil power” gives access to unlimited and wide powers to the armed forces to shoot, arrest and search, and all. The enforcement of the AFSPA has resulted in innumerable incidents of arbitrary detention, torture, rape, and looting by security personnel, for which there is a strong wave of consensus going on against this Act.

HISTORICAL BACKGROUND

As the great Himalayan range dividing South and Central Asia runs down the east, it takes a southward curve and splits into lower hill ranges. The hills are punctuated by valleys and the valleys are washed by the rivers that drain into the Bay of Bengal. Waves of people are settled in these blue hills and green valleys since times immemorial.

Through the centuries, these hills and valleys have bridged South, South East, and Central Asia. On today's geo-political map, a large part of the original region constitutes the seven states of the Republic of India, but its political, economic and socio-cultural systems have always been linked with South East Asia.

However, in the early 19th century, the British moved in to check the Burmese expansion into today's Manipur and Assam, thus, Assam became a part of British India and the British continued to influence the political affairs of the region.

This undue interference eventually led to the bloody Anglo- Manipuri conflict of 1891. The British reaffirmed their position but were cognizant of the ferocious spirit of independence of these people and did not administer directly but only through the King.

With the end of the war, the global political map was changed overnight. The impending departure of the British created confusion and turmoil over how to fill the political vacuum they would leave behind. Ultimately, the various territories of the north-eastern states were parceled out to Nehru's
India, Jinnah's Pakistan.²

Compromises were made, and issues were finally settled in distant capitals, to the satisfaction of the new rulers. The people who had been dwelling in these hills and valleys for thousands of years were systematically excluded from the consultation process. The Indian share of the British colonial cake in this region constitutes the present "Seven Sisters" states of the North-East.

Elections were held under the new constitution. A legislative assembly was formed. **In 1949, Mr. V P Menon, a senior representative of the Government of India, invited the King to a meeting on the pretext of discussing the deteriorating law and order situation in the state at Shillong.** Upon his arrival, the King was allegedly forced to sign under duress the merger agreement. The agreement was never ratified in the Manipur Legislative Assembly. Amidst all protests, the assembly was dissolved and Manipur was kept under the charge of a Chief Commissioner and the carrot-and-stick policy launched by the Indian Government successfully suppressed any opposition.

**The Naga Movement**

At the beginning of the century, the inhabitants of the Naga Hills, which extend across the Indo-Burmese border, came together under the single banner of **Naga National Council (NNC)**, aspiring for a common homeland and self-governance. The Naga leaders were adamantly against Indian rule over their people once the British pulled out of the region. Mahatma Gandhi publicly announced that the Nagas had every right to be independent, as he did not believe in the use of force or an unwilling union.

Under the Hydari Agreement signed between NNC and British administration, Nagaland was granted protected status for ten years, after which the Nagas would decide whether they should stay in the Union or not.³ However, shortly after the British withdrew, independent India proclaimed the Naga Territory as part and parcel of the new Republic.

---

The NNC proclaimed Nagaland's independence. In retaliation, Indian authorities arrested the Naga leaders. An armed struggle ensued and there were large casualties on either side. The Armed Forces Special Powers Act is the product of this tension.4

**Problems of Integration**

Much of this historical bloodshed could have been avoided if the new India had lived up to the democratic principles enshrined in its Constitution and respected the rights of the nationalities it had taken within its borders.

Culturally, the highly caste ridden, feudal society became totally incompatible with the ethics of North-East cultures which are by and large egalitarian. To make matters even worse, the Indian leaders found it useful to club these ethnic groups with the adivasis (indigenous peoples) of the sub-continent, dubbing them "scheduled tribes" leading these indigenous peoples to be stigmatized by higher castes.

Politically dependent, but economically undermined; the traditional trade routes of the North-eastern states with South East Asia and Bangladesh were kept closed. **It was kept out of the Government of India's massive infrastructural development in the first few five-year-plans.** Gradually, the region became the Indian capitalist's hinterland, where local industries have been reduced to nothing and the same with the peoples.

All the North-Eastern states are connected to India by the "chicken's neck", a narrow corridor between Bangladesh and Bhutan. Excitingly, India freely exploits the natural resources of these North-Eastern states in vast majority with Assam producing one-fourth of all the petroleum for India, yet it is processed outside of Assam so the state does not receive the revenues. With Manipur 22% behind the national average for infrastructural development, **the entire North-Eastern region is 30% behind the rest of India.**

So, this is the way of governance foothold in the North-eastern states, where we all shamelessly

trust on the shameless governance of the Union of India….

**Mizoram**

In February 1966, when armed militant groups captured the town of Aizawl and took possession of all government offices. It took the Indian army one week to recapture the town. The army responded viciously with air raids. The armed forces compelled people to leave their homes and dumped them on the roadside to set up new villages, so that the armed forces would be able to better control them. This devastated the structure of Mizo society. In 1986, the **Mizo Accord** was signed between the MNF and the Government of India.\(^5\) This accord was identical to the Shilong Accord made with the Nagas earlier. The MNF agreed to work within the Indian Constitution and to renounce violence.

Similarly, in 1953, the **Assam Maintenance of Public Order (Autonomous District) Regulation Act** was passed, which was applicable to the then Naga Hills and Tuensang districts. It empowered the Governor to impose collective fines, prohibit public meetings and and detain anybody without a warrant.\(^6\)

**On 22 May 1958,** a mere 12 days after the Budget Session of Parliament was over, the Armed Forces (Assam-Manipur) Special Powers Ordinance was passed. A bill was introduced in the Monsoon session of Parliament that year.. In a brief discussion that lasted for three hours in the Lok Sabha and for four hours in the Rajya Sabha, Parliament approved the **Armed Forces (Assam-Manipur) Special Powers Act** with retrospective from 22 May 1958.\(^7\)

**THE ACT AND ITS PROVISIONS**

**Section 1:** This section states the name of the Act and the areas to which it extends (Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram).

**Section 2:** This section sets out the definition of the Act, but leaves much un-defined. Under part (a) in the 1972 version, the armed forces were defined as "the military and Air Force of the Union so

---


\(^6\) [www.pudr.org/sites/default/files/pdfs/endless_war.pdf](http://www.pudr.org/sites/default/files/pdfs/endless_war.pdf)

\(^7\) [http://stormingthewinterpalace.blogspot.in/](http://stormingthewinterpalace.blogspot.in/)
operating”. In the 1958 version of the Act the definition was of the "military forces and the air forces operating as land forces".

Section 2(c) states that all other words not defined in the AFSPA have the meanings assigned to them in the Army Act of 1950.

**Section 3:** This section defines "disturbed area" by stating how an area can be declared disturbed. It grants the power to declare an area disturbed to the Central Government and the Governor of the State, but does not describe the circumstances under which the authority would be justified in making such a declaration. The vagueness of this definition was challenged in *Indrajit Barua v. State of Assam* case. 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. In the Disturbed Areas (Special Courts) Act, 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 tranquility, 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.

The 1972 amendments to the AFSPA extended the power to declare an area disturbed to the Central Government where as in the 1958 version of the AFSPA only the state governments had this power. In the 1972 Lok Sabha debates it was argued that extending this power to the Central Government would take away the State's authority. In the 1958 debates the authority and power of the states in applying the AFSPA was a key issue. It was argued that the AFSPA broadened states' power because they could call in the military whenever they chose. The 1972 amendment shows that the Central Government is no longer concerned with the state's power. Rather, the Central Government now has the ability to overrule the opinion of a state governor and declare an area disturbed. This

---

8 Indrajit Barua v. State of Assam, AIR 1983 Del 513 at p. 525
happened in Tripura, when the Central Government declared Tripura a disturbed area, over the opposition of the State Government.\footnote{http://youngsocialworker.wordpress.com/social-issues/}

Section 4: This section sets out the powers granted to the military stationed in a disturbed area. These powers are granted to the commissioned officer, warrant officer, or non-commissioned officer, but a jawan (private) does not have these powers. The Section allows the armed forces personnel to use force for a variety of reasons.

The army can shoot to kill, under the powers of section 4(a), for the commission or suspicion of the commission of the following offenses that is-1) acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons, 2) carrying weapons, or 3) carrying anything which is capable of being used as a fire-arm or ammunition.

The army can destroy property under section 4(b) if it is an arms dump, a fortified position or shelter from where armed attacks are made or are suspected of being made, if the structure is used as a training camp, or as a hide-out by armed gangs or absconders.

The army can arrest anyone without a warrant under section 4(c) who has committed, is suspected of having committed or of being about to commit, a cognisable offense and use any amount of force "necessary to effect the arrest".

Under section 4(d), the army can enter and search without a warrant to make an arrest or to recover any property, arms, ammunition or explosives which are believed to be unlawfully kept on the premises. This section also allows the use of force necessary for the search.

Section 5: This section states that after the military has arrested someone under the AFSPA, they must hand that person over to the nearest police station with the "least possible delay". There is no definition in the act of what constitutes the least possible delay.

Section 6: This section establishes that no legal proceeding can be brought against any member of the armed forces acting under the AFSPA, without the permission of the Central Government.
section leaves the victims of the armed forces abuses without a remedy.⁰¹²

**LEGAL ANALYSIS**

The Armed Forces Special Powers Act contravenes both Indian and International law standards. This was exemplified when India presented its second periodic report to the United Nations Human Rights Committee in 1991.⁰¹³

Members of the UNHRC asked numerous questions about the validity of the AFSPA, questioning how the AFSPA could be deemed constitutional under Indian law. However, India relied on the sole argument that the AFSPA is a necessary measure to prevent the secession of the North Eastern states.

This reasoning exemplifies the vicious cycle which has been instituted in the North East due to the AFSPA. The use of the AFSPA pushes the demand for more autonomy, giving the peoples of the North East more reason to want to secede from a state which enacts such powers and the agitation which ensues continues to justify the use of the AFSPA from the point of view of the Indian Government.

**A) INDIAN LAW PERSPECTIVE**

There are several cases pending before the Indian Supreme Court challenging the constitutionality of the AFSPA. It is extremely surprising that the Delhi High Court found the AFSPA constitutional in the case of *Indrajit Barua* allowing the only judicial way to repeal the act is for the Supreme Court to declare the AFSPA unconstitutional. The AFSPA is unconstitutional and should be repealed by the judiciary or the legislature to end army rule in the North East.

- **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 procedure established by law.*" Judicial interpretation that "procedure established by law means a

---

¹² http://www.mightylaws.in/689/afspa-mockery-human-rights
¹³ http://www.npmhr.org/a-brief-paper-presentation-in-a-seminar-on-armed-forces-special-powers-act-&catid
"fair, just and reasonable law" has been part of Indian jurisprudence since the 1978 case of *Maneka Gandhi*. This decision overrules the 1950 Gopalan case which had found that any law enacted by Parliament met the requirement of "procedure established by law".

- **Section 4(a) of the AFSPA, grants armed forces personnel the power to shoot to kill,** thereby vehemently violating the constitutional right to life. This law is just arbitrary, unjust, unfair, unreasonable because it allows the armed forces to use an excessive amount of force.

  The offenses under section 4(a) are: "acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or fire-arms, ammunition or 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 requires that the use of force be justified by a need for self-defense and a minimum level of proportionality. **As pointed out by the UN Human Rights Commission, since "assembly" is not defined, it could well be a lawful assembly, such as a family gathering, and since "weapon" is not defined it could include a stone. This shows how wide the interpretation of the offences may be, illustrating that the use of force is disproportionate and irrational.**

- **Article 14 of the Indian Constitution** "guarantees equality before the law". This article guarantees that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." The AFSPA is in place in limited parts of India. Since the people residing in areas declared "disturbed" they are therefore **being denied the protection of the right to life, denied the protections of the Criminal Procedure Code and prohibited from seeking judicial redress, they are also denied equality before the law.**

- **Article 22 of the Indian Constitution** states that "(1) No person who is arrested shall be

---

14 Maneka Gandhi v. Union of India, 978 AIR 597, 1978 SCR (2) 621
15 [www.legalservicesindia.com/articles/sc_c.htm](http://www.legalservicesindia.com/articles/sc_c.htm)
detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, 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 within 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 sections of the Article deal with limits on these first two sections in the case of preventive detention laws. On its face, the AFSPA is not a preventive detention law therefore the safeguards of sections (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. 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 the person being held for the 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.

In its application, the AFSPA does lead to arbitrary detention. If the AFSPA were defended on the grounds that it is a preventive detention law, it would still violate Article 22 of the Constitution.

Preventive detention laws can allow the detention of the arrested person for up to three months. Under 22(4) any detention longer than three months must be reviewed by an Advisory Board. Moreover, under 22(5) the person must be told the grounds of their arrest. Under section 4(c) of the AFSPA a person can be arrested by the armed forces without a warrant and on the mere suspicion that they are going to commit an offence. The armed

---

forces are not obliged to communicate the grounds for the arrest. There is also no advisory board in place to review arrests made under the AFSPA. Since the arrest is without a warrant it violates the preventive detention sections of article 22.

The case of *Luithukla v. Rishang Keishing*, 18 a habeas corpus case, exemplifies the total lack of restraint on the armed forces when carrying out arrests. The case was brought to ascertain the whereabouts of a man who had been arrested five years previously by the army. The court found that the man had been detained by the army and that the forces had mistaken their role of "aiding civil power". The court said that the army may not act independently of the district administration.

In the habeas corpus case of *Bacha Bora v. State of Assam*, 19 the petition was denied because a later arrest by the civil police was found to be legal. However, in a discussion of the AFSPA, the court analyzed Section 5 (that is of turning the arrested person over to the nearest magistrate "with least possible delay"). The court did not use Article 22 of the Constitution to find that this should be less than twenty-four hours, but rather said that "least possible delay" is defined by the particular circumstances of each case. In this case, the army had provided no justification for the two week delay, when a police station was nearby, so section 5 was violated. Nevertheless, this leaves open the interpretation that circumstances could justify a delay of 5 days or more.

➢ The CrPC establishes the procedure police officers are to follow for arrests, searches and seizures, a procedure which the army and other para-military are not trained to follow. Therefore when the armed forces personnel act in aid 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. 20

In explaining the AFSPA bill in the Lok Sabha in 1958, the then Union Home Minister stated that the Act was subject to the provisions of the Constitution and the CrPC. He said *these*

---

18 Luithukla v. Rishang Keishing, (1988) 2 GLR 159
20http://assamconnect.blogspot.in/
persons [military personnel] have the authority to act only within the limits that have been prescribed generally in the CrPC or in the Constitution." If this is the case, then why was the AFSPA not drafted to say "use of minimum force" as done in the CrPC? If the government truly means to have the armed forces comply with criminal procedure, then the AFSPA should have a specific clause enunciating this compliance. Further it should also train the armed forces in this procedure.

- **Chapter X, Sections 130 and 131 of the CrPC** sets out the conditions under which the armed forces may be called in to disperse an assembly. These two sections have several safeguards which are lacking in the Act. Under section 130, the armed forces officers are to follow the directives of the Magistrate and use as little force as necessary in doing so. Under 131, when no Executive Magistrate can be contacted, the armed forces may disperse the assembly but if it becomes possible to contact an Executive Magistrate at any point, the armed forces must do so. Section 131 only gives the armed forces the power to arrest and confine. Moreover, it is only commissioned or gazetted officers who may give the command to disperse such an assembly, whereas in the AFSPA even non-commissioned officers are given this power. The AFSPA grants wider powers than the CrPC for dispersal of an assembly.

- **Chapter V of the CrPC sets out the arrest procedure the police are to follow.** Section 46 establishes the way in which arrests are to be made. It is only if the person attempts to evade arrest that the police officer may use "all means necessary to effect the arrest." However, subsection (3) limits this use of force by stipulating that this does not give the officer the right to cause the death of the person, unless they are accused of an offence punishable by death or life imprisonment. Section 4(a) lets the armed forces kill a person who is not suspected of an offence punishable by death or life imprisonment.

- **Under the Indian Penal Code, at Section 302, only murder is punishable with death. Murder is not one of the offenses listed in section 4(a) of the AFSPA.** Moreover the 4(a) offences are assembly of five or more persons, the carrying of weapons, ammunition or explosive substances, none of which are punishable with life imprisonment under the Indian Penal Code.  

---

Penal Code.

- **Under section 143 of the Penal Code**, being a member of an unlawful assembly is punishable with imprisonment of up to six months and/or a fine. Even if the person has joined such unlawful assembly armed with a deadly weapon, the maximum penalty is imprisonment for two years and a fine. **The same offence committed by someone in a disturbed area under the AFSPA is punishable with death.** This again violates the Constitutional right to equality before the law.

- **Section 45 of the CrPC** protect the members of the Armed Forces in the whole of the Indian territory from arrest for anything done within the line of official duty. Section 6 of the AFSPA provides them with absolute immunity for all atrocities committed under the AFSPA. A person wishing to file suit against a member of the armed forces for abuses under the AFSPA must first seek the permission of the Central Government.

- In a report on the AFSPA to the UN Human Rights Committee in 1991, Nandita Haksar, a lawyer who has often petitioned the Guwahati High Court in cases related to the AFSPA, explains how in practice this leaves the military's victims without a remedy.\(^22\)

  **Firstly**, there has not been a single case of any one seeking such permission to file a case in the North East. Given that the armed forces personnel **conduct themselves as being above the law and the people are alienated from the state government**, it is hardly surprising that no one would approach Delhi for such permission.

  **Secondly**, when the armed forces are tried in army courts, **the public is not informed of the proceedings and the court martial judgments are not published.**

- **Habeas corpus cases have been the only remedy available** for those arrested under the AFSPA. A habeas corpus case forces the military or police to hand the person over to the court. This gives the arrested person some protection. **However, a habeas corpus case will not lead to the repeal of the act nor will it punish particular officers who committed the abuses.** Also, only people who have access to lawyers will be able to file such a case.

\(^22\) [www.hrdc.net/sahrdc/resources/armed_forces.htm](http://www.hrdc.net/sahrdc/resources/armed_forces.htm)
It was contended that **Section 6 of the AFSPA** "immediately takes away, abrogates, pinches, frustrates the right to constitutional remedy which has been given in **article 32(1) of the Constitution.**" thereby suspending the Constitutional right to file suit. This further shows that the AFSPA is **more than an emergency provision because it is only in states of emergency that these rights can be constitutionally suspended.**

**Section 32(1) of the Constitution** states that "the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed." In the Constitutional Assembly debates, Dr B R Ambedkar said, "If I was asked to name any particular article of the Constitution as the most important - an article without which this Constitution would be a nullity. I would not refer to any other article except this one (Article 32). It is the very soul of the Constitution and the very heart of it."23

During the emergency in 1975 the right to file for writs of habeas corpus was suspended as ruled by the Supreme Court in **A.D.M. v. Shivakant Shukla.**24 The Emergency had been declared under Article 359 of the Constitution. This section has now been amended, stating that the fundamental rights of Articles 20 and 21 cannot be suspended, even in a state of emergency. Therefore, should an emergency be declared today, the right to file habeas corpus on the grounds that the fundamental right to life has been denied should be allowed.

In a state of emergency, fundamental rights may be suspended under Article 359, since the 1978 amendment to this article, rights under Articles 20 and 21 may not be suspended. As shown above, the AFSPA results in the suspension of Article 21 right to life, therefore **AFSPA is more draconian than emergency rule.** Emergency rule can only be declared for a specified period of time, and the President's proclamation of emergency must be reviewed by Parliament. **The AFSPA is in place for an indefinite period of time and there is no legislative review.** The AFSPA grants state of emergency powers without declaring an

---


24 A.D.M. v. Shivakant Shukla, (1976) 2 SCC 521
emergency as prescribed in the Constitution.

B) INTERNATIONAL LAW PERSPECTIVE

Under relevant international human rights and humanitarian law standards there is no justification for such an act as the AFSPA. The AFSPA, by its form and in its application, violates the Universal Declaration of Human Rights (the "UDHR"), the International Covenant on Civil and Political Rights (the "ICCPR"), 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, and the UN Principles on Effective Prevention and Investigation of Extra-legal and summary executions.  

- International Covenant on Civil and Political Rights ("ICCPR")

India signed the ICCPR in 1978, taking on the responsibility of securing the rights guaranteed by the Covenant to all its citizens. The rights enunciated by the ICCPR are those which must be guaranteed during times of peace by the member states. In times of public emergency, the ICCPR foresees that some rights may have to be suspended. However, the ICCPR remains operative even under such circumstances since certain rights are non-derogable. The AFSPA violates both derogable and non-derogable rights.

Article 1 of the ICCPR states that all people have the right to self-determination. As discussed previously, the AFSPA is a tool in stifling the self-determination aspirations of the indigenous peoples of the North East.

Article 2 imposes an obligation on the states to ensure that all individuals enjoy the rights guaranteed by the Covenant. This includes an obligation to provide a remedy for those whose rights are violated. When India gave its second periodic report to the UN Human Rights Committee in March 1991, members of the Committee pointed out that the AFSPA

---

25 http://www.timesofassam.com/headlines/anti-corruption-protestors-don%E2%80%99t-comment-on-irom-sharmila-if-you-don%E2%80%99t-know-afspa/

26 www.hrdc.net/sahrdc/resources/armed_forces.html
violates this right because article 2 foresees more than just a legal system which provides such remedies, but requires that such a system work on the practical level.27

The greatest outrage of the AFSPA under both Indian and international law is the violation of the right to life. This comes under Article 6 of the ICCPR, and it is a non-derogable right. This means no situation, or state of emergency, or internal disturbance, can justify the suspension of this right.

The armed forces in the North East have systemically tortured the people they arrested under the AFSPA. Article 7 of the ICCPR prohibits torture and this also is a non-derogable right.

**During Operation Bluebird**, the Assam Rifles committed gross abuses of this right. The Operation was launched in the wake of an attack on an Assam Rifles outpost in Oinam, a village in Manipur.28

**Under similar circumstances in "Operation Rhino",** Rajputana Rifles surrounded the village of Bodhakors on October 4, 1991. An extensive house to house searched was conducted during which women were sexually harassed and men were taken to interrogation camps.29 They were beaten up and kept without food or water. During this combing operation not a single insurgent was found. The People's Union for Civil Liberties (PUCL) noted, "It is very difficult to understand the logic such useless raids, mass torture and interrogations, unless the purpose is taken to be the creation of pure terror for some sinister and ulterior motives."30

**Article 26 of the ICCPR, like article 14 of the Indian Constitution guarantees equal protection for all persons before the law.**31 The AFSPA violates this right because the inhabitants of the North East do not have equal protection before the law. They live under a

28 www.amnesty.org/en/library/asset/
virtual but undeclared state of emergency and are given no remedy for the injustices they suffer at the hands of the military.

- **International Humanitarian Law**

  The four Geneva Conventions of 1949 along with the two optional protocols, constitute the body of international humanitarian law. These provisions are suited to human rights protection in times of armed conflict. **Under these conventions the International Committee of the Red Cross (ICRC) is given access to all international conflicts. In non-international armed conflicts, the ICRC can only offer its services.**³²

  The ICRC's mandate in the context of non-international armed struggle is based on **Protocol II to the Geneva Conventions.** However, India has not signed either protocol to the Geneva Conventions.³³ Nevertheless, the ICRC can offer its services in such a conflict. Hence, when the ICRC offers its services in such a situation, a state should not consider it an interference in its internal affairs. **Basically in the long run, with respect to the working mechanism of ICRC, it well may be thought as an alternative to AFSPA Act.**

  **C) COMPARATIVE LAW STANDARDS**

  **The British armed forces presence in Northern Ireland** is an apt comparison to the Indian military presence in the North East.³⁴ The British carry out arrests under the Northern Ireland (Emergency Provisions) Act or the Prevention of Terrorism (Temporary Provisions) Act. When detainees were held for seven days without charge the European Court of Human Rights found this to be in violation of the European Human Rights Covenant.³⁵

---

³⁵ [www.hrdc.net/sahrdc/resources/armed_forces.html](www.hrdc.net/sahrdc/resources/armed_forces.html)
CONCLUSIONS

The Supreme Court of India reached a low for its lack of enforcement of fundamental rights in the Jabalpur case of 1975. The country was in a state of emergency and the high courts had concluded that although the executive could restrict certain rights, people could still file habeas corpus claims. The Supreme Court rejected this conclusion and said the high court judges had substituted their suspicion of the executive for "frank and unreserved acception of the proclamation of emergency."36 Noted Legal luminary, H M Seervai notes that this shows the lack of judicial detachment. Indeed, it exemplifies a deference to the executive which leaves the people with no enforcement of their constitutional rights.37 Jabalpur has since been deemed an incorrect decision, but it remains an apt example of the judiciary's submission to the executive.

The Supreme Court has avoided a Constitutional review for over 9 years, the amount of time the principal case has been pending. The Court is not displaying any judicial activism on this Act. The Lok Sabha in the 1958 debate acknowledged that if the AFSPA were unconstitutional, it would be for the Supreme Court to determine. The deference of the Delhi High Court to the legislature in the Indrajit case also demonstrates a lack of judicial independence.

Moreover, there is an absence of creative legal thinking. When the Guwahati High Court was presented with international law argument in People's Union for Democratic Rights, the court ignored it. Justice Raghuvir said in a personal interview that the court could not use international law. If the government has signed an international convention like the ICCPR which requires the government to guarantee rights to its citizens, how can these be enforced if the judiciary does not turn to the text of the convention in its rendering of decisions? The courts are not turning to the spirit of the law which guarantees the fundamental right to life to all people and as a result violations of human rights go unchecked.

RECOMMENDATIONS

Palpably enough, amidst speculations what I strongly believe is that the only way to guarantee that the human rights abuses perpetrated by the armed forces in the North Eastern states is **by repealing the AFSPA** and **removing the military from playing a civil role in the area**.

Secondly, the present scenario with the military forces in India is that 50% of the military forces are acting in a domestic role through internal security duties, thereby posing a serious question as to whether the civil authority's role is being usurped or not. The fact is that as long as the local police are not relied on they will not be able to assume their proper role in law enforcement which is the need of the hour. The continued presence of the military forces prevents the police force from carrying out its functions. **This also recommends for the termination of the AFSPA**.

Thirdly, the very issue of AFSPA have now forced **The National Human Rights Commission (NHRC)** to review it. However, the NHRC has a very limited role. And the prospect of NHRC involvement in declaring AFSPA unconstitutional and thereby influencing the Supreme Court to review its pending cases may not be an welcome note by the Supreme Court. **This was evident when the NHRC attempted to intervene in the hearing against the Terrorist and Disruptive Activities (Prevention) Act (TADA)**. 38

Fourthly, If the AFSPA is not repealed, it would be at a bare minimum comply with international law and Indian law standards. This means the powers to shoot to kill under section 4(a) must be unequivocally revoked. Arrests must be made with warrants and no force should be allowed in the search and seizure procedures. Moreover, **Section 5** should clearly mention that persons arrested under the Act are to be handed over to the police within twenty-four hours. **Section 6** should be completely repealed so that individuals who suffer abuses at the hands of the security forces may prosecute their abusers. Basing on mere suspicion alone, Armed forces should not be allowed to arrest or carry out any procedure. All their actions should have an objective basis so that they are judicially reviewable. **This will also assist those who file suit against the security forces**.

Fifthly, the definition of key phrases, especially "disturbed area" must be well defined with the declaration that an area is disturbed should not be left to the subjective opinion of the Central or State Government. It should have an objective standard which is judicially reviewable. Moreover,

---

38 www.nhrc.nic.in/Publications/NHRCIndia.pdf
the declaration that an area is disturbed should be for a specified amount of time amounting no longer than six months. **Importantly such a declaration should not persist without legislative review.**

Sixthly, the instructions and training given to the armed forces should be available to the public. **Complete transparency** should be established so that a public accountability is rendered possible.

Next, **there have been much debating going around of complying the armed forces mechanisms with the Indian CrPC.** However, only complying the statutes and acts of the armed forces, itself does not solve the purpose. The CrPC itself does not fully comply with international human rights standards, so making the AFSPA comply on its face with the CrPC provisions for the use of minimal force, arrest, search and seizure would only be a rudimentary step in reducing the abuses committed under the AFSPA.

Lastly, I strongly recommend that if the Indian Government truly believes that the only way to handle the governance of the North Eastern states is through force, **then it must allow the ICRC to intervene.** Actually, this can only have a calming influence on the scenario of endless strife, violence and so on. Acceptance of ICRC services would demonstrate that the fighting parties want to bring an end to the violence. **The ICRC’s involvement could help protect the residents of the North East who are currently trapped in the middle between Political egos and the military.**