AFSPA: A HUMANITARIAN CRISIS

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INTRODUCTION
It is hard to believe that in a country like ours where the rights and liberties of its citizens are respected, exists a law which makes the derision of human rights. The objective of the act was to control the internal disturbance and to ensure peace and security in the region, but on the contrary, it has led to extensive human rights violations ever since it was enacted due to which it has garnered widespread criticism from national as well as international human rights agencies. Yet the Act persists till date in its original form as it draws its legitimacy from Article 355 of the Constitution which bestows a duty upon the union to protect every state against external aggression and internal disturbance.2 The act was also granted legitimacy when its constitutional validity was upheld by the Supreme Court in Naga People’s Movement for Human Rights v. Union of India.3

The Armed Forces (Special Powers) Act empowers the armed forces to deal with internal conflict situations in an area declared “disturbed” under the Disturbed Areas (Special Courts) Act, 1976 by the central government or the governor of a state. After an area comes under the purview of AFSPA, any commissioned officer, warrant officer, non-commissioned officer or another person of equivalent rank can use force for a variety of reasons while still being immune to the prosecution. Those who are in favour of AFSPA they argue that it is an indispensable tool to counter insurgency in “disturbed areas”. The absence of such a legal statute would be detrimental to the security of the state and it would also render the armed forces incapable of performing their task. Hence, the minimum legislation is a necessity for security forces to ensure effective utilisation of combat capability. However, the act is anti-people and gives wide discretion to security forces to commit gross human right violation without any accountability. Ever since it was enacted it is adversely affecting the lives of people living in north-eastern states and in Jammu and Kashmir.

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HISTORICAL BACKGROUND

The Armed Forces Special Powers Act, 1958 was originated from the Armed Forces (Special Powers) Act, 1948 which in turn was modelled on the Armed Forces Special Powers Ordinance of 1942, promulgated by the British on August 15, 1942, to suppress the ‘Quit India’ movement. The Armed Forces (Special Powers) Act, 1948 was enacted to replace the Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance; the Bengal 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. In 1957 the Armed Forces (Special Powers) Act, 1948 was repealed but the central government in the wake of deteriorating internal security in the Assam due to Nagas, enacted Armed Forces (Assam and Manipur) Act, 1958.

The Nagas who were settled in the Naga Hills of Assam and Manipur were against the unification of their area with that of India, they wanted an autonomous state where their culture and socio-political rights were respected. They even refused to accept Indian Constitution and started showing belligerence against the Indian state. The Assam government in order to curb the rebellious situation imposed Assam Maintenance of Public Order (Autonomous District) Act in the Naga Hills in 1953. When the situation worsened, Assam deployed the Assam Rifles in the Naga Hills and enacted the Assam Disturbed Area 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.

All the efforts were taken by Assam government to contain the Naga rebellion went in vain and the Naga Nationalist Council formed the parallel government – the Federal Government of Nagaland in 1956 which aggravated and escalated the extensive violence in the region. In order to restore normalcy, 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 with the legal framework to function in the ‘disturbed

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areas’ of Assam and the Union Territory of Manipur. The ordinance was then replaced by the Armed Forces (Special Powers) Act, 1958. Later in 1972 the scope of this act was extended to the whole of the north-eastern region. Similarly, in Jammu and Kashmir, the defeat of the leaders of MUF (Muslim United Front) at the hands of mainstream political parties, resulted in the turbulent struggle for secession from India. The massive militant uprising coupled with large scale infiltration of cross-border militants turned the situation volatile. In order to suppress the movement, the central government imposed AFSPA in 1990.

AGAINST THE CONSTITUTIONAL OBLIGATIONS

The procedure established by law which curtails or takes away the personal liberty guaranteed by Article 21 must be fair, just and reasonable and it must not only be tested on the anvil of Article 21 but it should also meet the requirements of Article 14 and 19. The AFSPA is a direct assault on the above-mentioned rights which forms the basic structure of the Constitution. The unbridled powers vested with the armed forces are neither fair nor just and reasonable but rather oppressive and arbitrary. Instead of facilitating peace it has always triggered violent public protests and proved to be ineffective in tackling security challenge. The act on the face of it violates Article 21 and 22 of the Constitution.

i. RIGHT TO LIFE

Section 4(a) of the Act which grants armed forces personnel the unrestricted power to shoot and kill violates Article 21 of the Constitution. 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. But the absolute and unfettered power vested with the Armed Forces to shoot on sight based on mere suspicion or on contravention of any law or order prohibiting the

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8 Maneka Gandhi v. Union of India, AIR 1978 SC 597.
9 S. 4(a), *The Armed Forces (Special Powers) Act, 1958*.
assembly of five persons or the carrying of weapons or of things capable of being used as weapons\textsuperscript{11} violates the sanctity of the right to life and personal liberty.

Fair, just and reasonable procedure also includes the right to the speedy trial\textsuperscript{12} which in turn includes proper investigation, enquiry, trial, appeal, revision and retrial but the immunity given to armed forces against prosecution under section 6 of the act renders impossible for the affected persons to seek remedy. The basic premise of such blanket immunity is to prevent the filings frivolous charges against security forces, as held in the \textit{Indrajit Barua v. State of Assam} case. The court even said that the adequate safeguards exist to prevent misuse of the law.\textsuperscript{13}

\textbf{ii. Right Against Punitive and Preventive Detention}

Article 22 of the Indian Constitution lays down a handful of safeguards on preventive and punitive detention including, right to be apprised of the grounds of arrest; right to consult and to be defended by a legal practitioner 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.\textsuperscript{14} In addition to that Code of Criminal Procedure, 1973 prescribes several safeguards to lessen the possibility for arbitrary arrest and detention by the state. Section 54 provides for the mandatory medical examination of the arrested person and Section 129 provides for magisterial inquiry of every case of death in police custody.\textsuperscript{15} But unfortunately, AFSPA does not provide any of the above-mentioned safeguards to detainee rather it is a tool in the hands of armed forces to inflict torture and cause wilful killings.

Under CrPC the Police is prohibited from causing death of a person who is not accused of an offence punishable with death or with imprisonment for life\textsuperscript{16} but section 4(c) of AFSPA authorizes the armed forces to may use such force as may be necessary to effect the arrest\textsuperscript{17} without any limitations to prevent the causing of death of a person.

\begin{itemize}
\item \textsuperscript{11} Supra 9.
\item \textsuperscript{12} Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, AIR 1979 SC 1360.
\item \textsuperscript{13} Indrajit Barua v. State of Assam, AIR 1983 Delhi 513.
\item \textsuperscript{14} Art. 22, the Constitution of India.
\item \textsuperscript{15} Ss. 54 & 129, The Code of Criminal Procedure, 1973.
\item \textsuperscript{17} S. 4(c), The Armed Forces (Special Powers ) Act, 1958.
\end{itemize}
AFSPA IN LIGHT OF INTERNATIONAL LAWS

The AFSPA is not justified under any relevant International human rights and humanitarian law standards. The AFSPA also 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-judicial, arbitrary and summary executions.\textsuperscript{18}

International laws time and again advocated the paramountcy of the right to life from which no derogation is permitted even in times of crisis which threatens the peace and security of a nation.\textsuperscript{19} International law prescribes a comprehensive framework that requires that lethal force should be justified by self-defence and governed by principles of proportionality, necessity and last resort.\textsuperscript{20} In regard to preventive detention the UN Human Rights Committee stated that this should be used for reasons of public security, it must not be arbitrary, and must be based on procedures established by law, reasonable justification must be given, and court control of the detention must be available, as well as compensation in the case of damages must be provided.\textsuperscript{21} UN Human Rights Council stated that the immunity clause in the act deprives people of remedies to which they may be entitled in accordance with Article 2, Paragraph 3, of the ICCPR.\textsuperscript{22} None of these safeguards is available to the detainee under AFSPA.

\textsuperscript{19} Article 4, International Covenant on Civil and Political Rights, 1966.
\textsuperscript{20} 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.
\textsuperscript{21} United Nations, General Comment No. 8.
\textsuperscript{22} United Nations (1997), Human Rights Council, Concluding observations CCPR/C/79/Add.81 4 August. Article 2 Para 3 of ICCPR
(a) To 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;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.
NEED FOR A HUMANE LAW

If power corrupts, power without constraint and accountability can create havoc. Former Prime Minister Manmohan Singh’s assurance to make this law humane was the anticipation of future situations. However, nothing has been done to humanise the act. The Justice Jeevan Reddy Committee report has also recommended the replacement of AFSPA by appropriate amendments in the Unlawful Activities Prevention Act, 2008, but the present situation broadly highlights the poor progress made, in this regard. No concluding decision has so far been taken to either repeal the law or to bring about necessary changes. Repealing the AFSPA altogether would not be a feasible alternative as it gives elevated protection to armed forces, without which it would be impossible from them to operate in a disturbed area but a number of changes can be made to give the Act a humane face which can gradually bring normalcy to a disturbed area. Some of them are listed below:

- Certain provisions which relate to the accountability of armed forces if they use excessive force can be included in Armed Forces Special Powers Acts, 1958 and 1990.
- Filing of a FIR must be made mandatory for the armed force instantly after an operation which has caused death or serious injuries or damage to public or private property.
- Initiate full and independent investigations into all human rights violations, including sexual violence and extrajudicial executions, allegedly committed by security forces in areas where the AFSPA is in force; where sufficient admissible evidence is found, prosecute suspects – including those with command responsibility - in fair and speedy trials in civilian courts, without recourse to the death penalty.\(^{23}\)
- A committee or a forum should be established in each district or if possible at the sub-divisional level of the disturbed area which would listen to the grievances of the civilians and would report, track or assess the complaints.
- All security legislations must comply fully with India’s international legal obligations and must be in conformity with international humanitarian and human rights laws.

• Power given to armed forces to shoot on sight should be revoked and the clause which gives blanket immunity to security forces should be amended so that people can have access to remedies in case of violation.

• Ensure that the provisions of the act should adhere to the guidelines laid down in CrPC and *DK Basu*\textsuperscript{24} Judgment and the arrestee should be produced before the magistrate within 24 hours.

• Protection of human rights must be the basis of any security strategy.

**CONCLUSION**
For many years, North-Eastern states and Jammu and Kashmir have lived with internal aggression, public protests and fake encounters. The pain and sufferings of civilians have so far been lost under the sounds of bullets. AFSPA has created more problems than solutions; it has oppressed people of north-eastern states for more than six decades, embittered everyone within its purview and has created terror instead of confidence. It has achieved nothing except more violence and turmoil. It is a law that overrules the Constitution of India and denies due process to the civilians. The common people have suffered immeasurably due to the existence of this law. Unfortunately, they have no voice and not anyone to support during distressing times. It is high time that the government should understand clearly that law and order cannot be maintained with brutal laws, nothing justifies the suppression and terrorisation of Indian citizens by its own government there is a need to put an end to the culture of violence, alienation and injustice.