

ARMED FORCED SPECIAL POWER ACT, (1990): A DRACOCIAN AND UNDEMOCRATIC LAW: AN OVERVIEW

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Abstract: The role of legal enforcement agencies is truly paramount in order to achieve utopia of smooth and unimpeded functioning of an effective justice system. In this research, taking note of the abysmal legal literacy, ablation of justice via dilapidated legal structures, coupled with iniquitous, morally and legally corrupt practices and a myriad host of gangrenous issues that plague the legal systems in Asia and threaten their stability, the researchers have observed that it is of utmost importance that steps must be taken at the earliest towards ensuring that legality of the law is not eroded to an irreversible and irreparable extent. While fighting terror is a grave and serious concern not only for the nation but the world, we cannot stand to sacrifice individual civil liberties in our war on terror.

It is essential to ensure that the forces wielded by the agents of law are not arbitrarily exercised and that the values of human rights, equality and personal liberty are not tarnished by rampant violation veiled by legitimacy. The research elaborates on how civil disorder becomes as an offshoot of the collateral damage suffered when law enforcement agencies and armed forces abuse powers leading to despondency and loss of faith in legal enforcement systems and legitimacy of the law. Civil disorder becomes an offshoot of the collateral damage suffered and the abuse powers leads to despondency and loss of faith in legal enforcement systems and legitimacy of the law. The researchers opine that the lack of an entrenched culture of rule of law and constitutionalism in successive governments desiring pecuniary benefits has brought us to dilapidation.

Keywords: Human Rights, AFSPA, Rule of Law, Constitution.

Introduction: India right from the day it achieved its Independence has been encountering a lot of exigencies in the democratic governance of its people. The Constitutional Framers were well aware with a number of such difficulties who because of their broader visionary approach developed by their reasoned experiences had beforehand sought out the mechanism to counter the same which can be gauged from the sacred document what we call the Constitution of India. But, problems aroused which albeit alien to the national spirit the country had achieved were the outcome of the pre-independence odyssey and obviously the need of reacting and responding to the critical situation was quite relevant. The Instruments devised and designed however evidently marked the same age old legacy of imitating the Colonial Rules the country was subject to during the era of tyranny. AFSPA as a tool to address the contemporary and one of the drastic problems of India- the Terrorism, is not a normal tool as to tackle a normal problem. As a deadly weapon against the dangerous problem it ought to be used in a more legitimate, careful, and proper manner. As a defense aiding mechanism it carries with it the duty to protect in view of the basic constitutional principles. What lead the interim reactant to catalyze the situation rather than to tranquillize it will be the area the paper is going to throw some light.

The AFSPA was extended to the state of J&K in 1990 as a counter insurgency measure that arose in 1989 and is continuing to possess the same power and spirit it used to have when militancy in J&K was at its helm. Now when the militancy is at low ebb the continuance of the act over the common people of J&K is posing a difficulty to the government be it at Centre or state in winning their faith, who are well aware about the political solution the state demands within the constitutional limits but over politicizing the matter poses a hurdle in the peaceful process the state has opted opposed to the military rule. Law has to prove itself against the touchstone of reasonability, social acceptance and conduciveness for the

peaceful atmosphere, so as to be the means to attain the common good in order to parallel the rule of life. Otherwise, the change is inevitable but the one adversely affecting the society where the law will not be acting as a regulator but a traitor.

It is important to make sure that the forces wielded by the agents of law are not arbitrarily and capriciously exercised their powers and that the values of human rights, equality and personal liberty are not tarnished by rampant violation veiled by legitimacy. This chapter would try to elaborate on how civil disorder becomes as an offshoot of the collateral damages suffered by the civilians when law enforcement agencies and security forces abuse their powers leading to hopelessness and loss of faith in legal enforcement systems and legitimacy of the law. The researcher opine and observed that the lack of an entrenched culture of rule of law and constitutionalism in successive governments desiring pecuniary benefits has brought us to collapse.

Judicial Interference and Compatibility of the Act with the Constitution:

Power Conferred Violates Article 14 of the Constitution: The Constitution does not contemplate absolute discretion, which leads to the possibility of arbitrariness.¹ If the discretion conferred is uncontrolled, the law conferring such discretion may be held invalid on the ground of its inconsistency with Article 14 of the Constitution.² Section 6 in the 1958 Act and section 7 in the J and K Act 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. The AFSPA (J and K) uses the terms “**acting in good faith**” but the terminology conferring this power in AFSPA (JK) is very broad and unguided conferring excessive and unfettered discretion on the government. The power is couched in broad phraseology leaving the officer free to exercise his discretion according to his judgment, making the power unrestricted and *permit arbitrary and capricious exercise of power*². It creates a danger of official arbitrariness which is subversive to what article 14 stands for³ since any law conferring upon the authority, unrestricted or unguided power is arbitrary,⁴ and it is violative of Article 14⁵.

The Supreme Court adopted the positivistic and pragmatic approach in *E.P. Royappa v. State of Tamil Nadu*.⁶ **Bhagwati, J. stated:**

“Equality is a dynamic concept with many aspects and it cannot be ‘cribbed, cabined and confined’ within the traditional and doctrinaire limits. From the positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies.... Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14....” And we can, therefore say AFSPA is violate of Article 14 and 21 of the part III of the Constitution because of the arbitrary powers given to the security forces.

Powers Conferred Under Section 4, 6 And 7 Are Too Wide, Sweeping, Unguided And Free Handed: If the power conferred is unconfined or vagrant, and unconfined and no standard or principles are laid down to control the exercise of the power then it would be arbitrary since it would permit arbitrary and capricious exercise of power which is the antithesis of equality clause⁷ which is subversive to what article 14 stands for⁸. Unfettered discretion leads to arbitrariness and thus violation of Article 14 of the Constitution.⁹ It is important that the courts not allow such arbitrary actions as non-arbitrariness is a necessary concomitant of the rule of law.¹⁰ The blanket immunity must be revoked. The blanket cover given to discretion *inheres the pernicious tendency to be arbitrary*¹¹ thereby violating article 14.

The ‘disturbed area’ declaration u/s 3 of the AF(JK)SPA 1990 on recommendation of the governor¹² 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.¹³ There should be periodic review of the declaration before the expiry of six months as was held in the case of *Naga People’s Movement of Human Rights v. Union of India*¹⁴ but the same is never enforced.

Under the constitution, judicial interference is available if there is *injury to public*¹⁵ or when there is a *direct and causal violation of a fundamental right* guaranteed by Part III of the Constitution¹⁶. Courts will

interfere only if there is a clear violation of Constitution¹⁷. The AFSPA is arbitrary and has no sufficient guidelines to exercise the discretion conferred by it and hence there is in violation of Article 14, 19 and 21 yet the courts do not interfere in any case arising from the same.

The courts cannot *interfere with the administrative policy*,¹⁸ or changes made thereof, *unless it appears to be plainly arbitrary¹⁹, irrational or mala fide²⁰*. In the instant case, the government has not acted in accordance with public policy²¹. The laws that give powers to the armed forces are outright arbitrary and excessive. However the court held that conferment of power on non-commissioned officers like a Havaldar cannot be said to be bad and unjustified in *Inderjit Barua v .State of Assam*.²²

Article 14, 21 and Sec 4 (a): This provision enumerates that any army personal even below the rank of non-commissioned officer as the term " any other person equivalent in rank" can open fire after giving such "due" warning as "he" considers "necessary", the yard stick to measure the same has been left to ultimate discretion of the armed personal. And the "due process" has no utility here. 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 "*fair, just and reasonable*" law has been part of Indian jurisprudence since the 1978 case of *Maneka Gandhi*²³ which overrules the decision given in *A K Gopalan's Case*²⁴ wherein court laid that any law enacted by the parliament meant the requirement of the "procedure established by law".

Any Army personal can shoot any person who he finds "carrying things capable of being used as weapons" justifies the unwarranted killing of the farmers who use to go to their fields along with their spades, skills and other agricultural equipment's (which have every tendency to be used as weapons) and returned with their dead bodies. The Delhi High Court in *Indrajit Buruah Case*²⁵ stated, "If to save hundred lives one life is put in peril or if a law ensures and protects the greater social interest then such law will be a wholesome and beneficial law although it may infringe the liberty of some individuals." This decision has been in clear violation of constitutional right as embodied in Article 14 which guarantees that "the state shall not deny to any person equality before the law and equal protection of the laws within the territory of India". Since AFSPA is in place in limited areas i.e. declared disturbed as per Sec 3 of the Act, this explains that the people residing in the declared disturbed areas are being treated discriminately as they are denied the protection of Article 21, protection under Criminal Procedure Code and Judicial redress thereby violating the basic principle of constitution Article 14 which enjoys the brooding omnipresence position within the grundnorm. It is totally unconstitutional to say something that has implications of sacrificing the people of the disturbed areas and their constitutional rights in the name of "greater good".

The word "assembly" has not been defined. 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 irrational²⁶.

Article 21 and Sec 4 (b): It gives enough power to a security personal to destroy any shelter from which armed attacks are made and were they are "likely to be made". It is the sole discretion of the army to ostracize any person's shelter as such because no guidelines are provided in exercising the unlimited discretion provided in the Act. The section gives enormous power to the army to violate the right to shelter and livelihood of an Individual which constitute his basic fundamental right²⁷.

Article 22 and Sec 4 (c): It empowers the armed forces to arrest "any person" which means that any Innocent Child, Old, Women or Infirmit or for that matter a Disable person who can be (as implied from the language) the serious threat to the society as it is advocated on a "reasonable suspicion". The right to liberty and security of person is violated by section 4(c) of the AFSPA, which fails to protect against arbitrary arrest by allowing soldiers to arrest anyone merely on suspicion that a "cognizable offence" has already taken place or is likely to take place in the future. Further, the AFSPA provides no specific time

limit for handing arrested persons to the nearest police station.²⁸ The section violates Article 22 clause (1) and (2) of the Indian constitution which makes it mandatory that any person arrested shall be produced before the magistrate within 24 hours of his arrest²⁹. Further, when the court says that the primary function of the army is to aid the civil authorities, then the guidelines the civil authorities are bound to follow mandates the army as well to adhere to same. Specific guidelines for the arrest procedure have been already enumerated by the honorable Supreme Court in *DK Basu v State of West Bengal*.³⁰ 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.

Article 21 and Sec 4 (d): This section gives unbridled and un-channelized power to enter and search into the house without any mandate not caring about the effect on the children and women of the families and whether privacy really survives meaningful in the constitution remains disputed. It clearly violates the right to privacy of a person that constitutes the fundamental right as interpreted by the honourable court in *Kharak Singh vs State of UP*³¹, stating that "the concept of liberty in Article 21 was comprehensive enough to include privacy and that a person's house, where he lives with his family is his „castle“ and that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy". The decision was later reiterated in *Gobind v. M.P.*³²

Article 21 and Sec 4 (e): This section legitimized the search of any person (women or old) in whatever manner the army deems fit regardless of the constitutional obligations and CrPC to secure the dignity of the individuals. This section is derogatory to the liberty of an individual. The CrPC³³ 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 as per criminal procedure.

Article 22 and Sec 5: of the act states that any person arrested and taken into custody under this Act shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest. The section even-though apparently seems good has greater implications and has led to serious consequences. 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. A few habeas corpus cases in which the court did find the delay to be excessive are indicative of the abuses which are occurring in practice. In *Nungshitombi Devi v. Rishang Keishang*³⁴, the petitioner's husband was arrested by CRPF on 10 January 1981, and was still missing on 22 February 1981. He had been arrested under AFSPA Section 4(c). The court found this delay to have been too long and unjustified, even under Section 5 of the AFSPA. In *Civil Liberties Organisation (CLAHRO) v. PL Kukreti*³⁵, people arrested in Oinam were held for five days before being handed over to magistrates. The court found this to be an unjustified delay. In the habeas corpus case of *Bacha Bora v. State of Assam*,³⁶ 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 (turn 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.

Article 32 and Sec (7): This states 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 or purported to be done in exercise of the powers conferred by this Act. The right to remedy is violated by section 6 (1958) of the AFSPA, which provides officers who abuse their powers under the AFSPA with immunity from legal accountability. This section of the AFSPA prohibits even state governments from initiating legal proceedings against the armed forces on behalf of their population without central government approval³⁷. The army men cannot be prosecuted irrespective of "anything"

done or "purported" to be done in exercise of the powers of the Act unless the Central Government gives a prior sanction for the same.

Sec (7) strikes against the very soul of Indian Constitution Art 32 as it suspends the Constitutional right to file suit.³⁸ It restricts the scope of Judicial Review of the military action that has achieved the status of constitutional basic structure in *L Chandar Kumar vs U.O.I.*³⁹ This further shows that the AFSPA is more than an emergency provision because it is only in state of emergency that these rights can be constitutionally suspended. 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."

Conclusion: Contrary to the Hohfeldon theory the AFSPA provides powers without responsibility. The present constitutional position of the AFSPA is that it violates right to life and liberty, right to privacy, right to equality, right to assembly, freedom from arbitrary arrest and right to constitutional remedy of the individuals residing in disturbed areas as in J&K. The implied connotation of AFSPA is One Law, Unlimited Power, No procedure, No trial, How and Where Justice? The situation in Kashmir has developed to a greater extent as people have shun the gun-culture and have expressed their conviction in political solution. There seems no fun of militarising the issue and spend millions of public money on the same which is also affecting the over-all economy of the country. It is not going to undermine the essence of army but army has its duty to protect the borders of the country in order to check the Infiltration where they can use a power more than AFSPA. But, their presence in the vicinity among the people is only going to reflect their inefficiency in monitoring the border areas. There is no doubt that States have legitimate reasons, right and duty to take all due measures to eliminate terrorism to protect their nationals, human rights, democracy and the rule of law and to bring the perpetrators of such acts to justice. But, in the situations of the misuse and abuse of the empowering law, the supremacy of the judiciary and the primacy of the rule of law (basic structure of constitution) need to be upheld. If the law enforcement personnel stoop to the same level as the non-state actors and perpetrate the same unlawful acts, there will be no difference between the law enforcement personnel and the non-state actors whom the government calls "terrorists". There are various provisions in the Indian Penal Code⁵⁰ and in the Criminal Procedure Code and they can easily deal with the law and order situation in these parts. So far the present structure of the AFSPA is concerned, it is unconstitutional in letter and spirit, however Supreme Court and the Legislature have the duty to further review the law and to initiate efforts of either repealing the law altogether or to make necessary amendments viz. scope of judicial review of the army action.

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3. *Ibid.*
4. *Naraindas v. state of Madhya Pradesh* AIR 1974 SC 1232: (1974) 4SCC 788.
5. MP Jain, *Indian Constitutional Law* 1030 (Wadhawa and Company Nagpur 5th ed. Reprint 2007).
6. *Ibid.*
7. Justice Bhagwati said in *Sheo Nandan Paswan v. State of Bihar* AIR 1987 SC 877, "the law frowns upon uncanalised and unfettered discretion conferred on any instrumentality of the state."
8. (1974) 4 SCC 3, 38.
9. *Naraindas v. State of Madhya Pradesh* AIR 1974 SC 1232: (1974) 4SCC 788.
10. MP Jain, *op.cit.* at 1030; *Shrilekha Vidyarthi v. State of U.P.*, (1991) 1 SCC 212; *Style (Dress Land) v. Union Territory, Chandigarh*, (1997) 7 SCC 89.
11. *State of W.B. v. Anwar Ali Sarkar*, AIR 1952 SC 75 (32); *Satwant Singh Sawhney v. A.P.O.*, AIR 1967 SC 1386 (1845); *Kaushal P.N. v. Union of India*, AIR 1978 SC 1457 (60-62); *Avinder Singh v. State of Punjab*, AIR 1979 SC 321 (9): 1979 1 SCC 137.

12. Style (Dress Land) v. Union Territory, Chandigarh, (1997) 7 SCC 89 (12); A.P. Aggarwal v. Govt. of NCT of Delhi, (2000) 1 SCC 600 (12).
13. Sudhir Chandra v. Tata Iron Steel Co. Ltd. AIR 1984 SC 1064
14. The Governor is empowered to declare any area of the State as 'disturbed area'. It could not be arbitrary on ground of absence of legislative guidelines; *Inderjit Barua v. State of Assam*, AIR 1983 Del. 514.
15. Wajahat Habibullah, *My Kashmir: conflict and the prospects for enduring peace* 144 (United State of institute Peace Press Books, May 2008).
16. AIR 1998 SC 431.
17. BALCO Employees Union (Regd) v. Union of India (2002) 2 SCC 333, held: *Judicial interference by way of PIL is available if there is injury to public because of dereliction of Constitutional or statutory obligations on the part of the government*
18. Hindi Hitrakshak Samiti v. Union of India, (1990) 1 SCJ 617 (7-8); AI; Ahmedabad Women Action Group (AWAG) v. Union of India, (1997) 3 SCC 573; Bhavesh D. Parish v. Union of India, (2000) 5 SCC 471 (23).
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21. Ramana Dayaram Shetty v. I.A.A.I., AIR 1979 SC 1628 (12, 14, 17, 21, 26); Kalra, A.L., v. P and E Corporation, AIR 1984 SC 1361 (18-19): (1984) 3 SCC 316; Express Newspapers (P) Ltd. v. Union of India, AIR 1986 SC 872 (71, 200): (1986) 1 SCC 133; Sriniketan v. Vikas Vihar, AIR 1989 SC 1673.
22. Kasturi Lal Lakshmi Reddy (M/s) v. State of Jammu and Kashmir, AIR 1980 SC 1992 (14): (1980) 4 SCC 1; Brij Bhushan v. State of Jammu and Kashmir, AIR 1986 SC 1003 (7); State of M.P. and Others vs. Nandlal Jaiswal and Others (1986) 4 SCC 566, (p. 605).
23. Premium Granites and Another vs. State of T.N. and Others, (1994) 2 SCC 691.
24. AIR, 1983 Del 514.
25. (1978) 1 SCC 248.
26. AIR 1950, SC 27.
27. AIR 1983 Del 514
28. Available at [http://www.scribd.com/doc/89376556/53/Indian Law](http://www.scribd.com/doc/89376556/53/Indian-Law), (accessed on 19-06-2017).
29. *Oliga tellis v Bombay Municipal Corporation*; [1985] 2 Supp SCR 51.
30. Ministry of Home Affairs, Armed Forces (Special Powers) Act 1958, (Section 4c) and (5); Amnesty International (AI), "India: Briefing on The Armed Forces (Special Powers) Act, 1958", pp 15-16. AI Index: ASA20/025/2005, (May 8, 2005). Available at <https://www.amnesty.org/en/documents/asa20/025/2005/en/> (accessed July 5, 2017).
31. 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 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.
32. AIR 1997 SC 610.
33. AIR 1963 SC 1295
34. (1975) 2 SCC 148.
35. Chapter V of the Cr.P.C. sets out the arrest procedure the police are to follow. Section 46 of Cr.P.C 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 affect the arrest." However, sub-section (3) of Section 46 of Cr.P.C 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. This power is already too broad. 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.
- 36. (1982) 1 GLR 756.
 - 37. (1988) 2 GLR 137.
 - 38. (1991) 2 GLR 119
 - 39. Human Rights Watch, "Concluding Observations of Human Rights Committee: India", para 21 (CCPR/79/Add.81, August 4, 1997). Available at <https://www.hrw.org/reports/1999/india/India994-21.htm> (accessed on 12-07-17).
 - 40. 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".
 - 41. Power of judicial review over legislative action vested in the High Courts and the Supreme Court under Articles 226 and 32 respectively is the basic structure of the Constitution; AIR 1997 SC 1125.
