THE DRACONIAN ARMED FORCES (SPECIAL POWERS) ACT, 1958 – URGENCY OF REVIEW

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Abstract

The Armed Forces (Special Powers) Act of 1958 (AFSPA) is one of the more draconian legislations that gives the armed forces wide powers to shoot, arrest and search, all in the name of "aiding civil power." There has been allegedly great misuse of powers and privileges that are given in the hands of the military and the paramilitary forces for maintaining a state of law and order in the areas. It was first applied to the North Eastern states of Assam and Manipur and was amended in 1972 to extend to all the seven states in the north- eastern region of India. The Act even failed to meet with the International conventions and treaties that India has signed. The definitions under the Act is so vague that, it gives a huge ambit for the Armed Forces to interpret the definition according to their own whims and fancies and get spared even after committing gross violation of human rights, international treaties and conventions. This article has discussed about the Act's legal and constitutional validity and its compatibility to international human rights standards. Finally, it has been discussed what conclusion can be drawn along with some logical suggestions.

Introduction

The Armed Forces (Special Powers) Act of 1958 (AFSPA) is one of the more draconian legislations that the Indian Parliament has passed. It is a law with just six sections granting

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special powers to the armed forces in what the act terms as "disturbed areas”. 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". The AFSPA gives the armed forces wide powers to shoot, arrest and search, all in the name of "aiding civil power." It was first applied to the North Eastern states of Assam and Manipur and was amended in 1972 to extend to all the seven states in the north- eastern region of India. They are Assam, Manipur, Tripura, Meghalaya, Arunachal Pradesh, Mizoram and Nagaland, also known as the "seven sisters". The enforcement of the AFSPA has resulted in innumerable incidents of arbitrary detention, torture, rape, and looting by security personnel. Its continued application has led to numerous protests, notably the longstanding hunger strike by Ms. Irom Chanu Sharmila in Manipur. 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 Union of India.

Historical Background

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. 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. 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.

The origins of the Armed Forces (Special Powers) Act, 1958 can be traced to the Armed Forces (Special Powers) Act of 1948. To meet the situation arising in certain parts of India on account of the partition of the country in 1947, the Government of India issued these four Ordinances – 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 17 of 1947); and the United Provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (Act 22 of 1947). These Ordinances were replaced by the Armed Forces (Special Powers) Act, 1948 being Act 3 of 1948.

The present Act was enacted by the Parliament in 1958 and it was known initially as Armed Forces (Assam and Manipur) Special Powers Act, 1958. The Act was preceded by an Ordinance called Armed Forces (Assam and Manipur) Special Powers Ordinance, 1958 promulgated by the President of India. The Act applied to the entire State of Assam and the Union Territory of Manipur. After the new States of Arunachal Pradesh, Meghalaya, Mizoram, and Nagaland came into being, the Act was appropriately adapted to apply to these States. The Act has not been made applicable to any other State in the country.

Legal and Constitutional aspects of the Act

Initially, the Act was applicable to the states of Assam and Manipur to eradicate militancy amongst the Nagas. Subsequently, the Act was amended in 1972 in order to extend it to all the states lying in the Northeastern region of India. Then, it was extended to Punjab for a brief while. Currently, the Act is in force in the states of the Northeastern region of the country and Jammu and Kashmir. Purportedly aimed at fighting insurgency the Act has proved singularly ineffective. The provisions of the Act are discussed and analyzed below –

I. Section 2 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 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(b) defines a "disturbed area" as any area declared as such under section 3. 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.

II. Section 3 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 provision declares the authority of the centre, but does not clearly define a disturbed area nor does it state the conditions, circumstances or prudent grounds for the declaration of the part as disturbed.

The vagueness of this definition was challenged in *Indrajit Barua v. State of Assam*[2] 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. However, since the declaration depends on the satisfaction of the Government official, the declaration that an area is disturbed is not subject to judicial review. So in practice, it is only the government's understanding which classifies an area as disturbed.

Looking at a similar legislation i.e. the Disturbed Areas Act, 1976, it has been clearly stated that owing to the 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, the state government 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.[3]

Another important thing is that the time period for the lasting of the 'disturbed' status of the area is not stated in AFSPA. In the case *Naga People's Movement of Human Rights v. Union of India*[4], the Honorable Supreme Court held that the section 3 cannot be construed as conferring power without any time limitation. There should be a periodic review of the declaration before the expiry of six months. But it's a fact that in the state of Manipur the Act has been in enforcement since the year 1958, till date. Also, in 1980, the whole territory was declared as a disturbed area, which continues even after 50 years. All these limitations amount to the vagueness of the provision.

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

[2] AIR 1983 Del 513 at p. 525

[3] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1681499&download=yes, last visited on 01.05.2014

[4] AIR 1998 SC 431

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.[5] 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 happened in Tripura, when the Central Government declared Tripura a disturbed area, over the opposition of the State Government.[6]

III. Section 4 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.

Under Section (4) (a) of the Act, a military personnel or even a non-commissioned officer of the force can fire, shoot to the extent of killing a person who has acted against law, to maintain public order. As per this provision, assembly of five or more people is prohibited, prohibiting the carrying of weapons, explosives or any things capable of being used as the same. All these to be done just if the military personnel are of the opinion of such.

The provision is clearly violative of the Right to life and personal liberty granted under Article 21 of the constitution that states "*No person shall be deprived of his life or personal liberty except according to procedure established by law.*" If the military personnel shoot to kill just by the reason that they were of such an opinion, then the personal liberty of the people comes under great threat. This feature of the act is by no way a 'due process of law' which can be used as a defense against the deprivation of the right to life. The term 'procedure established by the law' is synonymous to 'a due process', since it was held in by the honorable supreme court in the case *Maneka*

[5] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1681499&download=yes, last visited on 01.05.2014
[6] Ibid.

Gandhi v. Union of India[7] that the procedure established by law has to be fair, just and reasonable, not arbitrary and fanciful; otherwise it's not a procedure at all and also not satisfying Article 21. Owing to this very inhumane clause, the army has allegedly acted in a very extrajudicial and unreasonable manner in the areas declared disturbed. Now, the provision also prohibits the assembly of five or more people in the area. But the kind of assembly has not been defined. What if the assembly is a lawful and a peaceful one? Under article 19(1)(b) all citizens of India have a right to hold meetings and take out processions, provided the assembly is unarmed and peaceful.

Under Section 4(c) the army can arrest anyone without a warrant, who has committed, is suspected of having committed or of being about to commit, a cognizable offense and use any amount of force "necessary to affect the arrest". While, the following section 4(d) states that 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. In both the clauses, no limitations are associated with the "amount of force". There has been a use of excessive force by the army for the execution of their duties, under this provision. It should not be ignored that the honorable Supreme Court, in the case *Joginder Kumar v. State of U.P*[8] and in *D.K. Basu v. State of West Bengal*[9] held that an arrest should not be made on mere suspicion of a person's complicity in the crime. The police officer must be satisfied about the necessity and justification of such arrest on the basis of investigation. It is to be noted that arrest without warrant, deciding the amount of force to be applied, reasoning the suspicion and all, is capable of being undertaken by anyone in the army from a commissioned officer to even the Hawaldar/ Jawan. This manifests nothing, but the arbitrariness of the law.

IV. Section 5 of the Act states that after the military has arrested someone under the AFSPA, they must hand over that person to the nearest police station with the "least

[7] AIR 1978 SC 597
[8] AIR 1994 SC1349
[9] AIR 1997 SC 610

possible delay". Again, the uncertainty and ambiguity has crippled into the section. Article 22(2) of the constitution demands that every person who is arrested and detained shall be produced before the nearest magistrate within period of 24 hours. The provision of the AFSPA mentions the time period as with 'least possible delay'. The application of Sec 5 certainly will and has in fact, resulted into arbitrary detention, since the time period is not specified at all. 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.

In the habeas corpus case of *Bacha Bora* v. *State of Assam*[10], 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, so section 5 was violated. Nevertheless, this leaves open the interpretation that circumstances could justify a delay of 5 days or more.

V. Section 6 provides impunity to the military officers. It 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. This section leaves the

[10] (1991) 2 GLR 119

victims of the armed forces abuses without a remedy, while assures safeguards for the military. Moreover, even if any armed forces member is ever tried for any kind of abuse or wrong, then they are tried in the martial courts, whose judgments are usually not published or made public. That is the reason why several cases of human rights abuses have went unheard. In fact, the NHRC even never got a chance review any. Section 19(b) of the Protection of Human Rights Act, 1993 exempts the armed forces from the purview of the National Human Rights Commission (NHRC), and even if human rights cases involving them are dealt with, they are done with after seeking a report from the central government.

The Delhi High Court found the AFSPA to be constitutional in the case of *Indrajit Barua v. State of Assam*[11] and the only judicial way to repeal the Act is for the Supreme Court to declare the AFSPA unconstitutional. It is extremely surprising that the Delhi High Court found the AFSPA constitutional given the wording and application of the AFSPA. The AFSPA is unconstitutional and should be repealed by the judiciary or the legislature to end army rule in the North East.

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 emergency as prescribed in the Constitution.

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. Members of the UNHRC asked numerous questions about the validity of the AFSPA, questioning how the AFSPA could be deemed constitutional under Indian law and how it could be justified in light of Article 4 of the ICCPR. The Attorney General of India relied on the sole argument that the AFSPA is a necessary measure to prevent the

[11] AIR 1983 Del 513

secession of the North Eastern states. He said that a response to this agitation for secession in the North East had to be done on a "war footing." He argued that the Indian Constitution, in Article 355, made it the duty of the Central Government to protect the states from internal disturbance and that there is no duty under international law to allow secession.

Criminal Procedure Code, Indian Penal Code and AFSP Act

The Criminal Procedure Code, 1973 (Cr.P.C.) 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.

Section 45 of the Cr.P.C. protects 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.

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. It allows the police to use more force than stipulated in the UN Code of Conduct for Law Enforcement Officials.[12] 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.

The Cr.P.C. has a section on the maintenance of public order, Chapter X, which provides more safeguards than the AFSPA. Section 129 in that chapter allows for the dispersal of an assembly by use of civil force. The section empowers an Executive Magistrate, officer-in-charge of a

[12] http://www.un.org/disarmament/convarms/ATTPrepCom/Background%20documents/CodeofConductforlawEnfOfficials-E.pdf, last visited on 02.05.2014

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 powers the army has to disperse assemblies under section 4(a) of the Act. The Cr.P.C. 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 Cr.P.C. 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 the Cr.P.C. is slightly more justifiable than dispersal under Section 4(a) of the AFSPA. Sections 129-131 of Cr.P.C. 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.

Sections 130 and 131 of Cr.P.C. 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 of the Cr.P.C, the armed forces officers are to follow the directives of the Magistrate and use as little force as necessary in doing so. Under Section 131 of Cr.P.C, 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 noncommissioned officers are given this power. The AFSPA grants wider powers than the Cr.P.C. for dispersal of an assembly.

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. Under section 143 of the Indian 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. Moreover, persisting or joining in an unlawful assembly of five or more persons is also punishable with six months imprisonment, or a fine, or both. 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. Different standards of punishment are in place for the same act in different parts of the country, violating the equality standards set out in the Constitution.

International Humanitarian Law and AFSP Act

The Armed Forces Special Powers Act, 1958 not only violates the national humanitarian standards of law, but even international. Under the relevant provisions of International Humanitarian Law the AFSPA was challenged several times. The AFSPA, by its form and in its application, violates the Universal Declaration of Human Rights (hereinafter referred as UDHR), the International Covenant on Civil and Political Rights (hereinafter referred as 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 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The Act violates both derogable and non-derogable provisions of international human rights law, including the right to life, the right to remedy and the rights to be free from arbitrary deprivation of liberty and from torture and cruel, inhuman or degrading treatment or punishment (ill-treatment) as enshrined in the International Covenant on Civil and Political Rights (ICCPR), to which India is a state party since 1979, and other treaties and standards. These include the right to life (Article 6), the prohibition of torture, cruel, inhuman and degrading treatment (Article 7), the right to liberty and security of the person (Article 9), the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence (Article 17), the right to freedom of assembly (Article 21), as well as Article 2 (3), which provides for the right to an effective remedy to anyone whose rights protected by the Covenant have been violated.

AFPSA also violates the following provisions of UDHR, such as; Free and Equal Dignity (Article 1), Non discrimination (Article 2), Life, Liberty, Security of person (Article 3), No torture (Article 5), Equality before the law(Article 7), Effective remedy (Article 8), No Arbitrary arrest (Article 9), Right property(Article 17).

The ASFP Act's provision that provides immunity for military officers from any prosecution, suit or any other legal proceeding in respect of anything done or purported to be done in exercise

of the powers conferred by the Act is incompatible with article 2(3) of the ICCPR. It is a well-established principle of international human rights law that violations of human rights, such as unjustified deprivation of life, torture, cruel, inhuman and degrading treatment and arbitrary arrest and detention entail a duty on the part of state authorities to conduct a prompt, impartial and effective investigation. This principle is reflected in article 2(3) which requires that individuals have accessible and effective remedies to vindicate their human rights.

The all-embracing immunity provision of the AFSP Act effectively precludes the possibility of redress for victims of serious human rights violations resulting from its application. The law itself is in breach of article 2(3) in relation to cases where substantive rights guaranteed by the ICCPR, including the right to life, to be free from torture, cruel, inhuman and degrading treatment, and not to be arbitrarily arrested and detained, have been violated, or there is a credible allegation that they have been violated.

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 authorization to use lethal force under the Act is incompatible with article 6. First, the authorization is extremely wide. It vests military officers with the power to use lethal weapons, such as firearms, in all circumstances where an officer deems it appropriate. The use of lethal force against anyone within the disturbed area therefore falls within the personal discretion of the military officer(s) concerned. Justification for the use of force – that is, maintenance of public order – is so vague and ill-defined that it effectively does not limit the scope of circumstances where it would be necessary. Individuals against whom force may be used include all those who – again, in the military officer's opinion – are acting in contravention not only of law but also any order, presumably including orders given by the military officer involved himself. The mere fact of five persons gathered together suffices to use lethal force against any of them even where there is no suspicion of a breach of the law or any order. The provision of the AFSP Act governing the use of lethal force effectively gives carte blanche to military officers within disturbed areas. The Act is silent on whether and how a warning should be given before lethal force is used and which measures should be taken by the military officers involved to satisfy themselves that those warnings are received and understood by all parties concerned.

Second, the Act, or any other applicable legislation, fails to ensure that prompt, independent, and effective investigations are conducted into all cases of the use of lethal force, especially those which led to death or severe injury. The immunity provision contained in section 6 of the Act makes any such investigation – even if it were conducted – meaningless as the officers concerned cannot be held accountable. This lack of adequate investigative mechanisms means that victims, their relatives and the broader public have no access to the truth about what has happened. This contributes to the climate of impunity that effectively places the military officers in the disturbed areas above the law, leads to the lack of public confidence in their actions, and, most importantly, facilitates arbitrary deprivations of life in violation of article 6.

The Code of Conduct for Law Enforcement Officials only foresees the use of deadly force when the officer is threatened with force.[13] Under Section 4(a) of the AFSPA, the officer can shoot when there is an unlawful assembly, not defined as threatening, or when the person has or is suspected of having a weapon. Since "weapon" is defined as anything "capable of being used as a weapon", so it can be said that this could even include a stone, further bringing out the lack of proportionality between the offence and the use of force by the army.

The AFSPA also violates Article 7 of the ICCPR, which is relating to the prohibition of torture, cruel, inhuman and degrading treatment. The AFSPA has in practice facilitated the torture and ill-treatment of people while in custody. The AFSP Act grants military officers broad power to detain individuals without providing any safeguards against arbitrary detention, contrary to the State's obligation to adopt legislative measures aimed at preventing torture. The Act is silent on any of the recognized safeguards, which are therefore not available to arrested or detained persons. A person arrested by the military is not only prohibited from having any contact with the outside world, there is also no procedure in place to have the very fact of his or her detention acknowledged. Prolonged detention of the arrested person under this Act may amount to inhuman treatment (or torture, depending on the circumstances) within the meaning of article 7 of the ICCPR. Besides, this type of detention also violates article 7 in relation to the detainee's close relatives who undergo mental suffering and anguish being deprived of information about the whereabouts and fate of their relative.

[13] http://www.un.org/disarmament/convarms/ATTPrepCom/Background%20documents/CodeofConductforlawEnfOfficials-E.pdf, last visited on 08.05.2014

There are so many reports of torture and ill-treatment, including sexual attacks, in areas where the AFSPA is in force. Glaring example is Manorama case. In the early hours of 11 July 2004 members of the Assam Rifles arrested Thangjam Manorama at her residence in Bamon Kampu reportedly under the AFSPA as a suspected member of the People's Liberation Army. An arrest memo was given to her family at the time. Later that day, her dead body was found a few kilometers from her residence. There were multiple gunshot wounds on her back and her body also allegedly showed signs of torture. Reports further suggest that Thangjam Manorama was sexually assaulted.

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 with Article 9 of the ICCPR. The provisions of the AFSPA allow for arbitrary detention as they provide for arrest without warrant, including when soldiers have a "*reasonable suspicion*" that a person is "*about to commit a cognizable offence*". This, in effect, constitutes preventative detention rather than detention of suspects. There is nothing in the text of the Act that would require the military officer concerned to assess the reasonableness and necessity of the arrest in the circumstances. The reasonable suspicion element is seemingly in line with international standards. However, no adequate legal procedures are in place to review that there were objective grounds to justify arrest or detention on these grounds. In addition, the preventive arrest envisaged under the Act and the lack of provisions to ensure the reasonableness of arrest and detention are incompatible with article 9 (1).

In addition, Article 9 of the ICCPR provides that a person must "*... be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*" Truly speaking, security forces rarely produce an arrest memo which explains the reasons for arrest. The arresting military officer is not obliged under the Act to inform the detainee of the reasons for his or her arrest and any charges brought against him or her at the moment of arrest or at any moment thereafter. The absence of any provision to this effect is in clear violation of article 9(2).

The lack of judicial review of the lawfulness of the detention up until the time the detainee is transferred to police custody, which may in practice take several weeks after the initial arrest, is incompatible with the requirements of article 9 (3)

The AFSP Act allows arbitrary arrest and detention, with no information provided to the arrestee or detainee, with no possibility of independent review of the lawfulness of such detention and no statutory right to receive compensation if the detention is unlawful, in violation of all paragraphs of article 9 of the ICCPR.

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

Since 1968 India is also a State Party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 1(1) of the ICERD defines “racial discrimination” widely as including “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms”. The ICERD further mandates States Parties “to amend, rescind or nullify all laws and regulations which have the effect of creating or perpetuating racial discrimination”.

India signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1997. Although it has not yet ratified it, the very act of signing entails an international obligation not to defeat the treaty’s object and purpose. This includes, pursuant to the Convention’s preamble, the effective struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world. The prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the prohibition of racial discrimination, the right to life, the right to liberty and security and the right to an effective remedy have also been recognized as customary international law.

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. 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.

These shows how wide the interpretation of the offences may be, illustrating that the use of force is disproportionate and irrational.

The UN Code of Conduct for Law Enforcement Officials was adopted by the UN General Assembly in resolution 34/169 of 17 December 1979.[14] This code applies to all security forces stationed in the North East since "law enforcement officials" are defined as all those who exercise police powers and it can include military officers. The first article requires that, "Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal act, consistent with the high degree of responsibility required by their profession." A high degree of responsibility is absent in the troops stationed in the North East. The BSF, CRPF and Assam Rifles are not concerned with the requirements of the law enforcement profession; rather they are operating on a "war footing".

The second article of the code requires that, "In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons." As mentioned above, multiple provisions of the basic human rights standards in the ICCPR are violated under the AFSPA. The AFSPA encourages the military officers to violate human rights because it allows the armed forces to base arrests, searches and seizures on their subjective suspicion. The armed forces know their actions will not be reviewed and that they will not be held accountable for their actions. They have neither the training nor the incentive to comply with this article of the Code.

Under Article 3 of the Code, "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." Subsections of Article 3 stipulate that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used. This provision aims at establishing proportionality between the use of force by an officer and the use of force by an offender. Under 4(a) of the AFSPA, the military personnel can use force against people who are not presenting any force. Under 4(c) they can use any amount of force necessary to arrest someone who is suspected of having committed, or being about to commit, an offence. Under 4(d), this same excessive use of force can be justified in entering and searching premises

[14] Ibid

without a warrant. Sub-section (c) of the code further clarifies that "in general, firearms should not be used except 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." When armed forces fire upon an unlawful assembly under Section 4(a) of AFSPA, they are violating this basic provision.

The Body of Principles on Detention or Imprisonment was passed by UN General Assembly resolution no. 43/173, on 9 December 1988.[15] This body of principles applies to all persons under any form of detention. It further strengthens several of the points raised under both Indian and international law. Principle 10 states that "Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of the charges against him." The armed forces are not obliged to provide this information under the AFSPA. Moreover, under principle 14, "A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive information promptly in a language which he understands." Since the armed forces stationed in the North East are foreign to the region they are unable to comply with this principle.

Jeevan Reddy Committee to review AFSPA

In 2004, in the wake of intense agitation that was launched by several civil society groups following the death of Manoram Devi, while in the custody of the Assam Rifles and the indefinite fast undertaken by Irom Chanu Sharmila, the Union Ministry of Home Affairs accordingly set up a five-member committee under the Chairmanship of Justice B P Jeevan Reddy, former judge of the Supreme Court with the remit to review the provisions of the Act and report to the Government on whether amendment or replacement of the Act would be advisable.[16]

[15] http://www.un.org/documents/ga/res/43/a43r173.htm, last visited on 09.05.2014

[16] Report of the Committee to review the Armed Forces (Special Powers) Act, 1958, Government of India, Ministry of Home Affairs (June 2005). http://notorture.ahrchk.net/profile/india/ArmedForcesAct1958.pdf, last visited on 10.05.2014

Having conducted extensive studies and consultations, the 147 page Report of the Committee recommended in 2005 that it had formed "the firm view" that the Act should be repealed as "too sketchy, too bald and quite inadequate in several particulars".[17]

During the course of its work, the committee members met several individuals, organizations, parties, institutions and NGOs, which resulted in the report stating that "the Act, for whatever reason, has become a symbol of oppression, an object of hate and an instrument of discrimination and high handedness."[18] The report clearly stated that "It is highly desirable and advisable to repeal the Act altogether, without of course, losing sight of the overwhelming desire of an overwhelming majority of the North East region that the Army should remain (though the Act should go)."[19] But activists say the Reddy panel despite its recommendation for the 'repeal of the Act' has nothing substantial for the people. The report recommends the incorporation of AFSPA in the Unlawful Activities (Prevention) Act, 1967, which will be operable all over India.[20] The reason for this recommendation was that the Unlawful Activities (Prevention) Act, 1967 is applicable to entire territory of India including the northeastern 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 effect, 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 particularly guarded against. Unfortunately, the committee did not discuss the human rights abuse and the ill-treatment meted out with the people, comprehensively.

The panel gave its report in June 2005 but the then Government has neither officially accepted nor rejected its findings with AFSPA still in continuance in the Northeast and now in Jammu & Kashmir too. Reason may be that with rapid rise in terrorism throughout the country in the past couple of months coupled with terrorist violence in many places, especially in the Northeast, the

[17] Ibid, p. 74
[18] Ibid, p. 75
[19] Ibid, p. 75
[20] Ibid, p. 75

government of India cannot take a hasty decision on the removal of this Act, as it could spell several dangers to the strategic security and territorial integrity of the country.

In addition to the Jeevan Reddy Committee, the Second Administrative Reforms Commission headed by Veerappan Moily in its Fifth Report in June, 2007 has also recommended the repeal of the AFSP Act. The Commission stated that "after considering the views of various stakeholders came to the conclusion that AFSP Act should be repealed".[21]

Conclusion and suggestions

The various provisions of the Act, under the light of the Constitution have been analyzed and the legal validity of the Act has been questioned. The Act even failed to meet with the International conventions and treaties that India has signed. Again here, the Part IV of the Constitution comes into picture, where under directive principles of state policy, the State has to foster respect to all the International treaties and conventions that it has signed. Moreover the provisions given under Cr.P.C have never been followed during arrest, search, seizure, and rationale behind applicability of force to disperse an unlawful crowd. The definitions under the Act is so vague that, it gives a huge ambit for the Armed Forces to interpret the definition according to their own whims and fancies and get spared even after committing gross violation of human rights, international treaties and conventions, and well established municipal law just saying that their acts committed are very well in their official course of duty and under procedure established by law, i.e. the AFSPA.

A comprehensive outlook and not mere force could solve the problems. But on the other hand, scrapping down the whole Act is not the most appropriate solution in present day situation where the whole country is combating the menace of terrorism. What can be effectively done is to make the Act more humane and reasonable in the eyes of the law. The Act must be made more humane by striking done all its unreasonable and unjust clauses. Some of the suggestions are given below to make the Act more effective –

[21] Second Administrative Reforms Commission, Government of India. (June 2007). *Public Order*, (Fifth Report, Chapter 7). p. 239. http://arc.gov.in/8threport/ARC_8thReport_Ch4.pdf, last visited on 11.05.2014

I. The section 3 of the Act must be amended in such a way that the declaration of areas as disturbed does not rest with the Center and only the centre. The state governments must have the sole right to declare certain areas or the whole of State as "disturbed" subject to the approval by the State legislative assembly. Therefore, Section 3 of the AFSPA be amended. It makes no distinction between a peaceful gathering of five or more people and a berserk mob. So, even innocents – who have no role in creating a situation that results in that region being called 'disturbed', also come under the purview of the law. So the term 'disturbed' is to be properly defined and explained and there shall be no room of ambiguity in this regard. The definition of "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, 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.

II. The section 4 should be made compatible with Article 21 and the Supreme Court's guidelines of Dos and Don'ts for the army, as held in the *Naga People's Movement of Human Rights v. Union of India.*[22] The excess empowerment given to the members of the armed forces must be cut down, making their duties reasonable and less discretionary in nature

III. Section 5 of the Act must be implied in a way that complies with Article 22 of the Constitution. The term 'least possible delay' should be clearly explained. If possible, the persons arrested under the Act are to be handed over to the police within twenty-four hours. The provisions of the Act must be such that they comply with the criminal procedure code so as to assure a fair trial system.

IV. 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.

Section 6 of the AFSPA has been overtaken section 197 of the Criminal Procedure Code. Since its amendment in 1991, permission from the concerned State or Central

[22] AIR 1998 SC 431

Government for prosecution is mandatory. If the Centre were to give permission under section 197, there is no reason as to why the same will not be accorded under AFSPA.

V. Amend section 19 of the Protection of Human Rights Act, 1993 which prohibits the NHRC and State Human Rights Commissions from independently investigating allegations of human rights violations by members of the armed or paramilitary forces.

VI. All the security laws must strictly abide to the international customary law. Some human rights, including the right to life (of which extrajudicial executions are a violation), freedom from subjugation, freedom from torture and other cruel, inhuman or degrading treatment or punishment, should not be derogated from even during extreme conflict situations, including wars.