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A Revisit to AFSPA: Tracing the Constitutional Conflict

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ABSTRACT

The Armed Forces (Special Powers) Act, commonly referred to as AFSPA has been a major tool for government to supress insurgencies and uprisings in the so called 'Disturbed Areas' areas of the nations which comprises different states and areas of North East such that presently, it remains operational in Assam, Nagaland, Manipur (except Imphal Municipal area), three districts namely Tirap, Changlang and Longding of Arunachal Pradesh and the areas falling within the jurisdiction of the eight police stations in the districts of Arunachal Pradesh and bordering the State of Assam.[3] It is undenied that such a legislation advances the need of maintaining the integrity of the nation which is of utmost importance in country as diverse as India. However, maintenance of integrity ought not be seen as an excuse to enact laws which are in blatant breach of legal principles of rule of law, Proportionality and natural justice which have also been given a Constitutional ratification as of today. It is highlighted that the Supreme court had an opportunity to take into consideration the legalities of the said act in the case of Naga People's Movement of Human Rights v. Union of India but it proved to be a failed opportunity. Hence, in line with the same, the authors would deal with those provisions of AFSPA which seems to contravene to the above said principles along with taking into consideration the judgement of Supreme Court in Naga People's Movement case to analyse the way supreme court failed to look at such provisions from a conflicting angle while upholding their validity. Furthermore, the Authors will also quote the various national and international committees which has analysed the act to understand their viewpoint as well.

Keywords: *Constitution, Disturbed Area, Rule of Law, Doctrine of proportionality, Human rights.*

I. BACKGROUND

While India found independence in 1947 from the Britishers, the country was ushered to a strain of challenges. One of the challenges was the demand of the Naga leaders for an

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[3]Repeal of AFPSA, Ministry of Home Affairs, Government of India (Jan. 8, 2019) https://pib.gov.in/newsite/PrintRelease.aspx?relid=187330

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independent state of Nagaland, separate from the Indian Dominion. The demand of the Naga leaders was deliberated upon for a long time before India's Independence, with leaders like Mahatma Gandhi even having theoretically considered the possible realization of the same.[4] However, none of these deliberations could materialise and the Government of India(hereinafter, GOI) nullified all the claims of the Naga leaders. Subsequently, the 'Naga National Council' (hereinafter, NNC), apolitical organisation developed for securing independence from the GOI became a prominent face in all these deliberations. A. Z. Phizo one of the most popular Naga leaders took over the presidency of the NNC in December 1950 and helped the objective of the organisation become more specified, determined, and stringent. He publicly declared the aim of NNC to establish a sovereign Naga state comprising of all Naga dominated areas of the Northeast. With the deliberation bearing no results, the NNC decided to conduct a referendum for the independence of Nagaland which reported 99.9 percent of votes in favour of the Independence.[5] Nevertheless, the GOI refused to accept any such referendum.[6]As a retaliation to the refusal, the Naga people launched a Non-Cooperation Movement and boycotted the elections for District Council, Assam State Legislative Assembly, and Parliament in 1952. The GOI enacted the Assam Maintenance of Public Order (Autonomous Districts) Act, 1953[7]to deal with the law and order situation in the area. The government thereupon introduced another legislation i.e. the Assam Disturbed Areas Act, 1955[8]to provide the Assam Armed Police and Assam Rifles wider powers and liberty to execute their plans more freely and with lesser legal constraints.[9] The conditions were far from normal before such legislations, but the incidents of violence begun rising exponentially, and the atmosphere of terror and lawlessness became the new normal. The insurgent groups developed a strong grip in the then Naga Hills District of the State of Assam and the authorities being overwhelmed by the insurgency decided to employ the army to restore the normalcy with the imposition of the Armed Forces (Special Powers) Regulation in April 1958. The regulation was further converted to Armed Forces (Assam and Manipur) Special Powers Act on 11th September 1958, which was subsequently amended on 5th April 1972[10], and henceforth came to be known as the Armed Forces (Special Powers) Act 1958. The division of the North eastern India establishing newer states in the area led to further amendments in 1972 and 1986. The

[4]Nibedonnirmal, nagaland the night of the guerrillas 33 (1983)
[5] B. N. Mullick, My Years with Nehru: 1948-1964, Allied Publishers 372 (1972)
[6]Chandrika Singh, Political Evolution of Nagaland, 48 (1981)
[7]Assam Maintenance of Public Order (Autonomous Districts) Act, 1953, Act no. 16 of 1953
[8] Assam Disturbed Areas Act, 1955, Act no. 19 of 1955
[9]Luingam Luithui & Haksar Nandita, Nagaland File: A Question of Human Rights 26 (1984)
[10](Amendment) R Vashum, Nagas Right To Self Determination 226-231 (2000)

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amendment also extended the power of the applying the Act to the Central Government, a power which was earlier exclusive to the discretion of the State government through the Governor.[11]

II. INTRODUCTION

The AFSPA is the first legislation that authorises the use of the army against political upsurging within the country and is arguably the most controversial, and the most powerful piece of legislation drawn up by the Indian Parliament ever. Initially, the act was a short-term measure conferring special powers upon the armed forces, in the then state of Assam.[12] However subsequently its jurisdiction widened and even 60 years after its promulgation, it continues to subside in various states of the country.

During the introduction of the Armed Forces Special Powers bill (1958), the then Home Minister Govind Ballabh Pant cited its need to deal with the increasing militancy and lawlessness efficiently. However, ever since its enactment, the act has been maligned with the charges of Human Rights violations by the armed forces on numerous occasions which have led to a demand for repealment of such draconian legislation as is apparent from reports of various committees. The act comprises of many controversial provisions that are criticized as being ambiguous and arbitrary and thus seen in stark contravention to the Fundamentals Rights enshrined in part III of the Indian Constitution. Given its widespread criticism, the act has been put under the process of review many times. However, the apex court of India in 1997 in its unanimous judgement by the constitutional bench of Five Judges had upheld the constitutionality of the AFSPA, refuting all the claims of Fundamental Rights violation by the impugned Act.[13] The judgement came as a huge disappointment for many of the Human right activist and legal scholars who strongly felt that the judgement failed in considering the arbitrary nature of the legislation. However, eight years later in 2005, a committee headed by Retd. Supreme Court justice B.P. Jeevan Reddy had recommended to repeal the act altogether.[14]The committee set up by the central government to review the provisions of the act admitted the fact that the AFSPA had become a 'symbol of oppression, an object of hate and an instrument of discrimination and highhandedness'.[15]

[11] § 3, Armed Forces (Special Powers) Act, No. 28 of 1958.

[12]Ramchandra Guha, India After Gandhi: the History of World's Largest Democracy 326 (2007). (AFSPA was intended as an immediate response to curb the movements of Naga rebels prevalent in the southern hills of the State of Assam.)

[13]Naga People's Movement of Human Rights v. Union of India, (1998) 2 SCC 109 (India)

[14]Report of the Committee to review the Armed Forces (Special powers) Act, 1958, Government of India, Ministry of Home Affairs (2005)

[15]*Id.*

The authors in this article will try to critically analyse this controversial act establishing how a sweeping act such as AFSPA that authorises the implementation of martial law on civil establishments, violates the very notion of a nation like India which establishes itself on the pedestal of rule of law and social justice. The authors will critically appreciate all the controversial provisions of Act, the Supreme Court judgement that failed to embark on the principles of constitutional morality and various comments by the Human rights organisations as well as appreciating the true objective of the Act along with commenting on why a restructured legislation with a better approach towards the Human rights will be far more equipped in attaining the true objectives of the Act.

III. THE RULE OF LAW AND SECTION 3

Dicey's idea of rule of law envisages "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness of prerogative, or even wide discretionary authority on the part of the government."[16] Rule of law is one of the basic tenets of the constitutional morality that has been appreciated as one of the basic structures of the Indian Constitution by the Hon'ble Supreme Court in the case of Kesavananda Bharti v UOI.[17] The basis of this principle insists that the government must be operating within a fabric of an established scheme of law, and it should be held accountable for discharging any unauthorized action within that framework. The very concept of rights in Dworkin's works is primarily the way in which absolute, unbridled, and arbitrary powers are meant to be checked. Locke's natural law theory of background rights is also translated into the rights, which flow from democratic constitutionalism as described by Dworkin.[18] Thus absolute, unbridled, and arbitrary power in government may itself constitute a betrayal of the trust of the people by those who govern.[19]

Another major aspect of rule of law which though had not been expressly drawn out by Dicey, but can be easily constructed through his idea of elimination of arbitrariness is the principle of Due process. Its roots can be traced back to as early as section 39 of the Magna Carta 1215 that expresses the idea of due process as: "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land"[20] The principle of due process has

[16]Albert Venn Dicey, Introduction to the Study of the Law of Constitution 120 (8th ed. 1915)
[17] Kesavanda Bharti v. State of Kerala (1973) 4 SCC 225 (India).
[18]Gopal Subramanium, Constitutional Morality – Is It a Dilemma for the State, Courts and Citizens? (1st ed. 2016)
[19]Stuart Hopkins, *Locke's Theory of Resistance*, Philosophy Pathways, assessed at https://philosophypathways.com/essays/hopkins4.html
[20] Rodney L. Mott, Due Process of Law 3(1973)

evolved in the legal paradigm through the transformation of American constitutional developments that had interpreted the word ‘due’ as being 'reasonable’, ‘just’, and ‘proper.[21] The idea of the due process dwells upon every individual equally and justly and hence it aims to judge the procedure of such treatment in line with justice and fairness.

When analysing AFSPA through the perspective of the principles endowed under rule of law the provisions seem to be making the mockery of the obligations endowed under the constitution. The committee set up by the government for the review of AFSPA has also called for the repealing of the act,and terming it as “..a symbol of oppression, an object of hate and an instrument of discrimination and highhandedness.”[22] The committee strictly resented that the security forces should not be given the leeway of hiding behind the cloak of provisions that empower them to conduct themselves as they wished in violation of the basic tenets of justice and the rule of law.[23]

(A) Analysis of the power of declaration of the disturbed area:

Section 3 of the Act[24] which empowers the Central Government to unilaterally declare an area as “disturbed area” seems to be too wide and arbitrary. This declaration can be made despite the contrary opinion by the State government which puts the efficiency of the objective of the act in question. The objective of the Act, that is to restore the peace and order, cannot be attained without coherence between both the tier of the government as the assistance and cooperation of the local civil authorities is very vital in achieving the public order. It can’t be ignored that the state government is more well-versed with the ground situation than the central government, thus though the unilateral steps by the union government can quell instantaneous disturbances the same approach will not work in providing relief in situations where such disturbances are chronic.[25] Further, there doesnot exist any objective standards or guidelines laid down in the act or outside, to hold a geographical area disturbed area. The absence of any formal framework provides an opportunity for the decision-making authority to escape scrutiny. Furthermore, the power being kept out of the ambit of judicial review[26]makes it unfettered and absolute.

Thus, the above provision of the Act is highly arbitrary as there is no check and balance on

[21] M.P. Jain, Indian Constitutional Law 1080 (5th edn. 2005)

[22] Report of the Committee to review the Armed Forces (Special powers) Act, 1958, Government of India, Ministry of Home Affairs (2005)

[23] Charles Chasie and Sanjoy Hazarika, *The State Strikes Back: India and the Naga Insurgency*, East-West Center (2009) assessed at https://www.jstor.org/stable/resrep06512

[24] § 3, Armed Forces (Special Powers) Act, 1958, Act no. 28 of 1958.

[25] Fadia, Babulal, and Rajendra Menaria. Sarkaria Commission Report and Centre-State Relations. Agra: Sahitya Bhawan, 1990

[26] Indrajit barau v. State of Assam AIR 1983 Delhi 513 (India).

such wide powers of the Union even keeping it bereft from the judicial review. While reading this provision, one has to also take into consideration the fact that there is no such unilateral mechanism for the state to employ army, as it is the discretion of the central government concerning the request of the state, whether the deployment of forces to aid the civil forces is necessary in such a situation or not. This puts a check on the power of the state to not unilaterally declare any area disturbed, but a similar check on the power of the Union is missing.

(B) Unconstitutional vagueness and ambiguity in the expression 'Disturbed Area'

An equally important facet of the principle of Due process is the doctrine of void-for-vagueness.[27] The doctrine has been of substantial significance in the American jurisprudence as well as of universal application under the common law signifying the non-enforcement of legislations which are too ambiguous in its application.[28] J Marshall had substantiated the need for the doctrine in the judgment of Grayned v. City of Rockford,[29] '…It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.' Thus, for any legislation to be formally enforced, it must be devoid of any ambiguity and vagueness in its implementation to avoid its arbitrary enforcement in the hands of the authorities. The doctrine has also been incorporated impliedly in the Indian legal jurisprudence by the Supreme Court in its various judgement[30]before it stuck down section 66A of the Information Technology Act, 2000 on the grounds of being vague and overbreadth in its recent judgement of Shreya Singhal vs Union of India[31]. The court held provision unconstitutional for its vagueness of the words "grossly offensive" and "menacing".

Section 3 of the Act also violates the doctrine of Void-for-vagueness as the mere requirement of an opinion of the governor or the central government to consider an area as 'disturbed area', in the absence of any standards to consider an area as disturbed makes the section vague. It makes the power given under Section 3 subject to the absolute discretion of the decision-

[27] Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932) (U.S.A.) (the court observed that "words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law)

[28] Ralph W. Aigler, *Legislation in Vague or General Terms*, 8 Mich. L. Rev. 21(1923)

[29]Grayned v. City of Rockford, 408 U.S. 104 (1972) (U.S.A.).

[30] State of Madhya Pradesh v. Baldeo Prasad, (1961) 1 S.C.R. 970 (India) (The court held section 4A of the act criminalising 'Goondas' as being unconstitutional for the court observed that the word 'goonda' was vaguely defined); See Also, HarakchandRatanch and Banthia & Ors. v. Union of India & Ors., 1969 (2) SCC 166 (India)(Section 27 of the Gold Control Act was struck down as conditions imposed by it for the grant of renewal of licences are uncertain, vague and unintelligible); See Also, A.K. Roy v. Union of India., (1982) 2 S.C.R. 272 (India) (the apex court struck down a part of Section 3 of the National Security Ordinance for vaguness of the expression which was held to be capable of wanton abuse if it was allowed to exist). See Also, Kartar Singh v. State of Punjab, (1994) 3 SCC 569 (India).

[31] Shreya Singhal vs Union of India, AIR 2015 SC 1523 (India).

making authority as to what constitutes a 'disturbed area', thereby making the power monarchic.

IV. THE DOCTRINE OF PROPORTIONALITY AND SECTION 4(A)

The doctrine of proportionality is essentially derived from the rule of law and due process but the same has come to be identified as one of the most important principles in itself. It embraces the idea that the administrative measures must not be more than what is required for achieving the desired result.[32] The idea can be traced in the quotation of Lord Diplock, as he stated that '…you must not use a steam-hammer to crack a nut if a nutcracker would do'[33]. He also identified it as a basis of judicial review thereby widening the scope of review by incorporating grounds such as 'irrationality', 'illegality', an 'impropriety (Procedural)'.[34]Thereafter, Lord Clive also propounded a three-stage test of proportionality, such that an executive decision or legislation is not proportionate if: a) Objective of legislation or decision of an executive is reasonable enough to validate limitation on a fundamental right, b) The method so created to meet such an objective is reasonably connected to it, and c) The means used to impair the right or freedoms are no more than necessary to accomplish the objective.[35] The principle of Proportionality has been accepted in India in the judgement of Omkumar v. Union of India[36] in which the Supreme Court held that '…the principle that legislation relating to restrictions on fundamental freedoms could be tested on the anvil of 'proportionality' has never been doubted in India'. The Court held the said principle as the 'primary' review by the Courts of the validity of legislation which offended fundamental freedoms[37]

The principle of proportionality is violated by Section 4(a)[38] of the Act which grants the power to certain officers to take actions against a person/s for the offence of being part of an unlawful assembly or violating any prohibitory order in force such that the officer is empowered to use such force as it deems necessary i.e. even to the degree of causing the death of a person. Punishment of death is in contravention of the right to life of a person safeguarded under Article 21 of the Indian Constitution[39] and the said contravention is not justified because the punishment sought to be imposed is highly disproportionate with the punishment such offences usually attract under a penal scheme. Furthermore, Both the municipal as well as the

[32] Justice Anand Byrareddy, *Proportionality vis-à-vis irrationality in administrative law*, 7 SCC J29 (2008), See Also, Omkumar v. Union of India, AIR 2000 SC 3689 (India).
[33] R v. Goldsmith (1983) 1 WLR 151 (UK)
[34] Council of Civil Service Unions. v. Minister for the Civil Services, (1984) 3 All ER 935(U.K.)
[35] de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing, (1999) 1 A.C. 69
[36]*See* Omkumar AIR 2000 SC 3689
[37]*Id*
[38] §4(a), Armed Forces (Special Powers) Act, 1958, No. 28 of 1958.
[39]India Const. art. 21

international legislations have already established the ascendancy of the right to life such that no exception can be allowed even in the times of public emergency which threatens the life of a nation.[40]The extraordinary sweeping power given to use fatal force has prompted one of the respected legal commentator A G Noorani termed it as a license to kill, 'so wide in its sweep, so shorn as it is of any curb on excess or any sense of proportion.'[41]

(A) Tracing the (Dis) proportionalit

1. The absence of Accountability in exercising the power to open fire

A major cause of disproportionality in the given section is the absence of accountability of the armed officials who may use the power specified in section 4(a) without any restraint. The absence of accountability can be understood better by comparing the scheme concerning the power to fire upon a person laid down under AFSPA and that under the Police manuals of different states.

The Model Police Manual[42]provides for a detailed process prior to the use of firearms on unlawful assembly. It is noticeable that the rule specifies that the minimum force should be used for dispersal of an assembly. Furthermore, the decision to use force as provided under section129 of the Cr. P. C, can be taken by an officer only through a hierarchy of permissions and conditions. Nevertheless, it must be satisfied that warnings and persuasion have failed before the use of force can be allowed, and the firearms remain as the last recourse to be used only after less grave methods such as water cannons, Tear Smoke, or Cane charges are proved as useless. Furthermore, the blows are not to be made to head or other vulnerable areas while using cane charges.[43]

As can be seen from the manual, the use of firearms is permitted only in extraordinary circumstances where there is extreme and imminent danger to life or property. Moreover, even if the use of firearms is permitted, it remains extremely regulated such that the rounds fired by the police are to be recorded. Thereafter, the same are to be sealed immediately followed by submission of a full report stating the circumstances under which firing was taken recourse, the number of casualties, and the total number of rounds fired. Furthermore, the blank ammunition is to be used prior to the use of live ammunition such that lower parts of the body

[40] International Covenant on Civil and Political Rights, art. 4, Dec. 12, 1966, 999 U.N.T.S. 171

[41] A. G. Noorani, *Draconian Statute - Armed Forces (Special Powers) Act, 1958, 32* ECON. & POL. WKLY. 1578, 1578 (1997); See also A. G. Noorani, *Supreme Court on Armed Forces Act*, 33 ECON. & POL. WKLY. 1682, 1682 (1998); See also A. G. Noorani, *Armed Forces (Special Powers) Act: Urgency of Review*, 44 ECON. & POL. WKLY. 8, 9(2009)

[42]Model Police Manual Vol. II, Bureau of Police Research and Development at 187-190, https://bprd.nic.in/WriteReadData/userfiles/file/6798203243-Volume%202.pdf

[43]*Id.*

such as the legs are to be aimed and firing should be done on the hostile section of the crowd thereby safeguarding the innocent people in the crowd. Thus, a high level of care is provided to prevent any grave injury or death and that too for dispersing an assembly which may be unlawful or in contravention of an order.[44]

However, section 4(a) of AFSPA is devoid of any such detailed procedure concerning the use of force. The only similarity is that a warning has to be given before the use of force such that even the phrase which provides for the use of warning states that warning may be given by an officer if 'he may consider it necessary' which shows that the same is not obligatory. Hence, in the absence of procedures, the power to open fire is disproportional to the offense as the unregulated use of firearms does not seem like an appropriate measure for the maintenance of public order.

2. The mere requirement of 'Disobedience' to cause death

Section 4(a) grants power to deal with a person with force and that also to an extreme extent of causing death merely for acting in contravention of any prohibitory order passed by the state authorities. It leads to disproportionality on two grounds. Firstly, It must be kept in mind that under the CrPC, which embodies the procedures and principles to maintain law and order in an area, not every disobedience or contravention to a prohibitory order made under the code leads to a punishment for the disobedient person such that punishment can be attracted only if such contravention tends to cause injury, annoyance or obstruction, or risk thereof, to any person employed lawfully, or if such disobedience has a tendency to cause danger to health or safety, human life, or causes or tends to cause an affray or a riot[45] and thus mere disobedience of orders does not make an assembly unlawful and attract action to disperse it[46] unless the said condition is being fulfilled as a result of such disobedience. However, the armed official may cause the death of the disobedient even if such disobedience was not causing any of the mentioned results as being a special act it overrides the CrPC. Therefore, in the absence of specific requirements to deal with law and order situations such as those embodied under CrPC with, the power under section 4(a)has been made excessive.

Secondly, it causes a classification which is over-inclusive[47] by permitting the military to punish people who are not acting unlawfully or in disobedience to an order in the view of CrPC. A classification that is over-inclusive may be allowed only in a situation of emergency which must be imminent and grave, and the same must be in good faith to deal with such a

[44] *Id.*
[45] §188, Code. Crim. Proc. See also, Pradip Chowdhury v. The State (1960) Cri LJ 215(India).
[46] Sh. P.P.S Sidhu, IPS (Retd.), Précison Crowd CONTROL (2016) at 43
[47] Jospeh Tussman, *The Equal Protection of the Laws*, 37(3) Calif. L Rev.341-81 (September 1949)

situation.[48]However, in India mere internal disturbance is not considered as a situation of emergency as the same was specifically omitted from the Chapter of Emergency in the Constitution.[49]Therefore, section 4(a) has the potential to cause innocent people to be subjected to incidental death punishment on the mere ground of internal disturbance in an area. Hence, the number of people who are potentially being covered under the said section is disproportional to the mischief aimed to be eliminated.

(B) An Unsuccessful Attempt to restore proportionality

The Supreme Court in Naga People[50]attempted to restore proportionality so absent in section 4(a) as it held that there shall use of minimum force so required for effective action against person/s acting in contravention of a prohibitory order[51].However, the reasoning seems to be erroneous as the quantum of force to be used cannot be quantified by the words such as 'minimal' or 'maximal' as long as a clear demarcation is not laid down between different kinds of force as has been provided under the Police Manual.

Furthermore, a fallacy in the logic can also be traced to the Aristotelian idea of categories where he has talked about the relatives. Relatives always exist in pairs and not on their own[52] and are convertible[53] or capable of made convertible that is, they can be defined in relation to each other. For example, right (in direction) has no independent meaning unless it is related to the 'left' such that right is right of left and left is the left of right. Similarly, 'ruler' has no meaning unless related to 'ruled' such that a ruler is the ruler of the ruled, and ruled being ruled by a ruler[54].In line with the same 'minimal' is a relative term and can exist only in a pair with 'maximal' such that minimal has no meaning of its own but only in relation to maximal. Hence, 'minimal' can be defined as minimal of something maximal, and 'maximal' can be defined as maximal of something minimal but not independent of each other. But court just referred to the term 'minimal' without defining or referring the term 'maximal' and without knowing what is maximal, it is illogical to assume the minimal.

Furthermore, even the context in which force was to be defined or quantified as minimal was not clarified. For example, if the force was to be defined in terms of injury caused to a person, an implied meaning could have been construed that a maximal force would mean force which can cause the death of a person and a minimal force would mean force which cannot cause any

[48]*Id*
[49] India Const. art 352, *amended by* The Constitution (Forty Fourth Amendment) Act,1978.
[50]*See* Naga People's Movement of Human Rights v. Union of India, (1998) 2 SCC 109 (India)
[51]*Id* at ¶ 32
[52]S. Marc Cohen, Gareth B. Matthews, Ammonius: On Aristotle Categories (1991)
[53]*Id*, At 86
[54]*Id*, at 78 (other examples can be taken such as a father has no existence separate from his child)

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injury at all. But the court described minimal force with reference to 'effectiveness' does not bring objectivity to the said section. Hence, the attempt of the court led to mere reinstatement of section 4(a) as even in the definition of the Court, the officer is left with a huge description to decide about what ought to be the minimal force required for effective action in a given situation irrespective of the fact that his idea of minimal force can be de-facto maximal degree of force.

V. PRINCIPLE OF NATURAL JUSTICE AND SECTION 6

The doctrine of Natural Justice means fairness in action. If adverse action is taken by the State against a citizen, any breach of principles of natural justice, the Court would step in and correct the wrong done.[55] It is pertinent to take note of the observation made by Justice V. Krishna Iyyer in Mohinder Singh Gill v. Chief Election Commissioner[56],"It [natural justice] has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of Authority". He further added that "Indeed, from the legendary days of Adam and of Kautilya's Arthasastra, the rule of law has had this stamp of natural justice which makes it social justice...."More importantly, the Principles of Natural justice has been read under Article 14 of the constitution of India such that the Supreme Court held in the case of Union of India v Tulsiram[57] that the principles or rules of natural justice have become an integral part of Art. 14 and violation of a principle of natural justice lead to arbitrariness which is the same as discrimination and thereby leading to a violation of Art. 14.[58]Therefore, any state action which violates the principle of natural justice is violative of Art. 14 as well.[59]One of the three principles of natural justice is reflected by the Latin maxim of, 'Nemo debet esse judex in propria causa', i.e., no man shall be a judge in his cause, or a suitor or the deciding authority must be impartial and without bias. It is also known as the 'rule against bias'.

AFSPA is in violative of the rule against bias which lies in the immunity provided under section 6[60] to the officers of the armed forces such that any legal proceedings, prosecution or suit cannot be instituted against any officer of the armed forces for anything done or purported to be done by him in the exercise of the powers conferred on him by the act. This provision bestows a de facto as well as de jure impunity on all transgressors along with restricting the

[55] Syndicate Bank v. Wilfred D' Souza, AIR 2003 Kant 337(India); See also, Jyoti Ben Pathak v. Rafigsa Chammansa Fakir, AIR 2000 Guj 129 (India).
[56] Mohinder Singh Gill v. Chief Election Commissioner, 1978 AIR 851(India).
[57] U.O.I. v. Tulsiram, AIR 1985 SC 1416 (India); See also, Aplha Engineer, Jaipur v. State of Rajasthan, AIR 2004 Raj 23 (India).
[58] *Id.*
[59] *Id.*
[60] §6, Armed Forces (Special Powers) Act, 1958, No. 28 of 1958.

courts to take cognizance of any offense which is alleged against the armed officer who acted under the act.[61] It can be observed that the central government which is given the task of deciding over to the issuance of a sanction to approach a court for prosecution of an armed officer is the same authority as the one deploying the armed forces. It was held in A. K. Kraipak v Union of India,[62] that in deciding the question of bias human probabilities and ordinary course of conduct must be taken into consideration. In line with the same it is only reasonable to think that the central government would not decide upon the issuance of sanction neutrally or potentially decide in favour of such officer of armed forces as the prosecution of an officer deployed by the government itself would bring embarrassment and condemnation of the government from people generally as well as political groups.

Furthermore, there is no procedure or rules laid down concerning the process of issuance of sanction which poses three important problems. First, the word 'government' includes a number of people working as a collective whole, and hence it cannot be taken as a fixed authority who has been given the task of looking into the issuance of sanction. Second, the absence of a time limit in which the sanction is to be issued or rejection is to be communicated gives the power to avoid taking any decision under section 6 altogether. Third, if the process of issuance of sanction is subject to internal rules and procedure of the government, then it again raises the question that if the person seeking the sanction is getting an opportunity to present his case in favor of the sanction, or if the government is unanimously taking decision with respect to the same. Hence, the absence of such details from the act makes the case of violation of the rule against bias even stronger as the Central government by omitting such details would be saving itself from any possible analysis and scrutiny of a decision taken by it.

VI. AFSPA - A DEFACTO MARTIAL LAW?

The constitution of India had put maintenance of law and order in the state list of the seventh schedule as per the general perception that the local administration is better aware of the local problems and thus better equipped to solve them.[63] The interference of the military in the local insurgencies can only be allowed when the local authorities are overwhelmed by the prevailing circumstances and are not able to curb the same. However, in such a situation the military has to act in aid of the civil authorities and the same cannot be said to be the proclamation of martial

[61] General Officer Commanding v. CBI, (2012) 5 S.C.R. 599 (India); (The Supreme Court while commenting upon Section 7 of J & K (Special Powers) Act, 1990 which is identical to Section 6 of the AFSPA, held that the conjoint reading of the relevant statutory provisions and rules make it clear that the term "institution" contained in Section 7 of the Act of 1990 means taking cognizance of the offence)

[62] A. K. Kraipak v. Union of India, AIR 1970 SC 150 (India).

[63] *Riot Control and the use of Federal Troops*, 81(3) Harv. L. Rev. 638, 640 (1968).

law.[64] Moreover, in such a situation the military has to work in furtherance to the directive of the civil administration.[65] However, the deployment of the military without the any say of the local authority in the deployment as provided in AFSPA, thereby making the military a parallel administrative authority independent of the civil authorities or the courts is a classic case of the proclamation of martial law under the veil of 'acting in aid' of the civil authorities.[66]

Moreover, the military or armed forces is responsible for the external security of the state that is for protecting it from the external enemies across the border. Hence, the military personnel is essentially trained for working in troops to eliminate the enemy and win the wars[67]. Given the training and primary duty of the military, it is only reasonable for an officer of the armed force to use the maximum force in situations that require versatility and minimum force approach. This has also been classified in the report of the committee that reviewed the act.[68] However, policing in a locality or an area requires a community-based approach involving patrols in small groups, versatility in different situations and above all working closely to the community for prevention and control of criminal activities.[69] Therefore, wherein the military focusses on the use of maximum force, the local police focus on the use of minimum force. Hence, it would be unreasonable to assign to the military, the role of maintaining public order or perform law enforcement activities. Moreover, the police having a better tuning with the community would be much more persuasive in their approach that helps in preventing situations where using the force becomes inevitable. On the other hand, the military which is deployed from the center is not well-tuned with the local community which makes them weaker in their persuasive tactics.[70]

VII. HUMAN RIGHTS VIOLATION: GLOBAL AND DOMESTIC CONCERNS

Despite the constitutional bench ruling upholding the Act constitutionally valid, there are still many questions unanswered which calls for a strong reconsideration on the basis of the

[64] David E. Engdahl, Soldiers, *Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1, 16 (1971).

[65]Bishop v. Vandercook, 200 N.W. 278, 280 (Mich. 1924) (USA); see also State v. McPhail, 180 So.387, 390 (Miss. 1938) (USA); see also Herlihy v. Donohue, 161 P. 164, 167 (Mont. 1916) (USA)

[66] Michael Head, *Calling out the Troops - Disturbing Trends and Unanswered Questions*, 28 UNSW L.J.479, 480(2005)**(**The definition of Martial Law in a 1967Michigan statute also supports this point. Here Martial Law is defined as, "exercise of partial or complete military control over domestic territory in time of emergency because of public necessity." See Also, Campbell &Connolly)

[67]M. Easton, & R. Moelker, *Police and military: two worlds apart? current challenges in the process of constabularisation of the armed forces and militarisation of the civilian police* in Blurring Military and Police Roles (M. Easton et al eds. 2010) at 14

[68] Justice Sanjay Hegde Committee, Report of the Committee on AFSPA, (2013)

[69] Marten, K. (2007). *Statebuilding and Force: The Proper Role of Foreign Militaries*. 1(2) Journal of Intervention and Statebuilding 231-247 at 242

[70] C. Friesendorf, International intervention and the use of force: Military and police roles 23(2012).

decision. Several human rights groups, renowned jurists, review committees as well as international organisation had widely criticised AFSPA seeking for its repealment for its stark violation of the constitutional ethos.

The United Nations Human Rights Committee while monitoring the compliance of the parties to the International Covenant on Civil and Political Rights (ICCPR) in its 3rd Periodic Report of the Government of India concluded that AFSPA is derogating from its obligation under ICCPR by conferring such sweeping powers to the armed forces bearing a huge blunt on the fundamental Human rights.[71] The United Nations Committee on the Elimination of Racial Discrimination[72] had also called for the repealment of the legislation. The committee had called the Indian government to work on the recommendation within a period of a year time.

In addition to these international condemnations, there are several committees formed by the Government of India that have strongly suggested annulment of the act. In 2004, the B. P. Jeevan Reddy Committee was appointed by the Government of India after instigation in Manipur against the Act. The committee called for the repeal of the act, describing it as "too sketchy, too bald and quite inadequate."[73] The Justice Hegde Commission was also in agreement with the report of the Reddy's committee calling for a more humane law replacing the current legislation. The committee called out for the investigation of the encounters causing death by a special court citing many discrepancies in the mechanism of the armed forces. The committee also pointed out that the recommendation of "Do's and Don'ts" issued by the court was also flouted by the army. The committee held that continuous use of AFSPA has evidently had little or no effect on the situation and thus the continuance of the same is futile.[74]

On June 25, 2007, the Administrative Reforms Commission (ARC), a statutory body set up by the president of India, M. Veerappa Moily, endorsed the Reddy committee report for the repealment of the act. It recommended having an additional chapter in the UAPA for the case of extreme public order.[75] The Moily report was preceded by another government committee which was appointed by the then prime minister of India as the "Working Group on Confidence- Building Measures in Jammu and Kashmir." In its report, the committee headed by Mohammad Hamid Ansari, in April 2007, also called for the repeal of AFSPA.

[71] UN Human Rights Committee (HRC), UN Human Rights Committee: Addendum to the Third Periodic Reports of States Parties Due in 1992, India, 17 June 1996, CCPR/C/76/Add.6, available at: https://www.refworld.org/docid/3ae6b02f3.html

[72] United Nations Committee on the Elimination of Racial Discrimination, Sixty-second session Supplement No. 18 (A/62/18) (2007)

[73] Justice B. P. Jeevan Reddy Committee, Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958, (2005)

[74] Supra Note 66 at 93.

[75] "Public Order", Second Administrative Reforms Commission, Fifth Report, Government of India, June 2007, available at http://darpg.nic.in/darpgwebsite_cms/Document/file/public_order5.pdf

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Though despite such a clear stand by so many review committees, nothing had happened the statute is still in place. The non-implementation of the committee recommendations proves states the government does not want to give away the Act for the sheer control that it brings to the central government even if that would mean keeping the human rights of its citizens at bay.

VIII. CONCLUSION

AFSPA is a harsh reminder of the brutish colonial statues made to dismantle voices of the innocent peoples for decades before independence. Recurrence of any such statues that encourages the infringement of the basic tenets of the rule of law and other constitutional ethos cannot be legitimised under the garb of maintaining any situation of public order or chaos. Thus, there is an urgent need of reconsidering the continued use of the Act. The very imposition of the legislation for such an extended period which was meant as a temporary measure had perpetuated the atmosphere of alienation and victimisation among the people of the north-eastern states. The various review committees while acknowledging the same fact had called the act counterproductive and inefficient in achieving the objective for which it was framed.

India has to necessarily review its stance on solving the confrontations from the local insurgent group with the help of a more sensitive approach. Thus, when the AFSPA have evidently failed in reaching even close to its objectives, it would be strange to prolong a reminiscent of colonial-era legislation which is enacted with the aim to instil fear in the mind of the people and forcefully dilute any form of dissents. It is an opposite time to revert to all the possible opportunities of having a dialogue with the local leaders of the insurgent groups so as reach to a position of harmony. Even if the dialogue fails to substantiate, there is a dire need to have a more sensitive approach towards the local people of the affected areas to win their confidence. The act should provide for more elaborate provisions for the declaration of any area as the disturbed area and the immunity granted to the army personnel need to be limited. The recommendation of the Reddy committee and other commitments with the constitutional and fundamental rights should also be met with the strict application.

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