



# LAW MANTRA THINK BEYOND OTHERS

(I.S.S.N 2321- 6417 (Online))

Ph: +918255090897 Website: [journal.lawmantra.co.in](http://journal.lawmantra.co.in)

E-mail: [info@lawmantra.co.in](mailto:info@lawmantra.co.in) [contact@lawmantra.co.in](mailto:contact@lawmantra.co.in)

## THE ARMED FORCES (SPECIAL POWERS) ACT, 1958: VIOLATION OF JUS COGENS OR NOT? \*

### INTRODUCTION

It was the time when our nation had newly attained the status of an Independent Republic country. But barring the mainland India, the North-Eastern States were still experiencing great turmoil due to the insurgent forces working there. Violence was something which became a part and parcel of the life of people of the North Eastern States. State authorities were not able to cope up with the internal disturbance so prevalent in these states. The President of India then promulgated Armed Forces (Assam and Manipur) Special Powers Ordinance on May 22<sup>nd</sup>, 1958. This Ordinance conferred special powers to the members of Armed forces deployed in the disturbed areas in state of Assam and Union Territory of Manipur. This Ordinance later was replaced by the Armed Forces Special Powers Bill. This Bill was further passed by both the Upper House and Lower House along with the consent of the President on September 11, 1958. Today it stands as a Statute with the name of THE ARMED FORCES (SPECIAL POWERS) ACT, 1958.<sup>1</sup> Lately, this act has been further amended five times from 1960-1986 to extend its application in other North Eastern States like Assam, Manipur, Mizoram, Arunachal Pradesh, Meghalaya, Nagaland and Tripura. The act was later made applicable to the state of Jammu and Kashmir In September 1990 when the Parliament passed the Armed Forces (Jammu and Kashmir) Special Powers Act, which was 'deemed to have come into force' retrospectively from July 5, 1990.<sup>2</sup>

### WHAT IS AFSPA?

AFSPA empowers the governor of the state, or the central government to declare any part of the state as a 'disturbed area', if in its opinion there exists a dangerous situation which might affect the public order and tranquillity in the said area which makes it necessary to deploy armed forces in

---

\* Ms. Neha Vijayvargi, B.com LLB (Corporate Hons.) & Ms. Arushi Maheshwari, B.com LLB (IPR Hons.), Institute of Law, Nirma University, S.G Road, Ahmedabad, Gujarat.

<sup>1</sup> THE ARMED FORCES (SPECIAL POWERS) ACT, 1958

<sup>2</sup> <http://scroll.in/article/738707/the-emergency-that-continues-25-years-of-afspa-in-jammu-kashmir>

the region and gives power to the personnel of armed forces to prosecute, arrest without warrant, detain and even use force to the extent of causing death of civilians or any other person on the mere suspicion of causing unrest or disturbance in the said area.

### **THE CONTROVERSY:**

This statute was enacted as a progenitor to the Maintenance of Internal Security Act, and was used extensively before and during Emergency. The Act though contains only six sections and prima facie would appear as a simple act but nevertheless it has been the most debatable hot topic in India as well as at International forums. This act has led to a brutal cycle of insurgency and counterinsurgency practices by government, claiming lives of people. In the year 1958, when this act was introduced in the Parliament, the then Minister of Home Affairs GB Pant explained the reason for this Bill in the following words:

“This is a very simple measure. It only seeks to protect the steps that the armed forces might have to take in disturbed areas.”<sup>3</sup>

The act through Section 6 gives a blanket provision to the individuals representing the state when they commit murder and also allows them to detain, harass and kill civilians based on mere suspicion or even sometimes on the whims of personnel in the forces. The words of this statute are so carefully drafted so as to even cover non-commissioned officers. Delhi High court in the case *Inderjit Barua v .State of Assam*<sup>4</sup> clearly held that the “*conferment of powers on non-commissioned officers like a Havaldar cannot be said to be bad and unjustified.*”<sup>5</sup>

The Act was highly criticised during the time it was being enacted as it contravened the provisions of the Indian Constitution by transferring the executive power to the Centre which can otherwise be done only by a Proclamation of Emergency under Article 352 of the Constitution. This Act has effect if not worse but then too equal to that of Emergency and whilst the 44<sup>th</sup> Amendment to the Indian Constitution ensured that those days of Emergency would not visit us, this act continues to be in place for 25 years in J&K and for more than half a century in the other North Eastern States.

### **WHETHER AFSPA, 1958 IS VIOLATIVE OF INDIAN CONSTITUTION?**

The North East States of Manipur, Nagaland are very closely situated and are the source of armed opposition groups. The Naga population demands independence of Naga inhabited areas in Assam, Arunachal Pradesh, Manipur and Nagaland. The Conflicts between Nagas and Kukis is major concern in the North Eastern States. Manipur was declared as a disturbed area in 1980 and

---

<sup>3</sup> Supra (Note 2)

<sup>4</sup> AIR, 1983 Del 514

<sup>5</sup> Ibid

according to Manipur Chief Minister Ibobi Singh over 8,000 innocent persons and over 12, 000 members of armed opposition groups and security forces have lost their lives.<sup>6</sup>

The constitutional Validity of the Act was challenged in 1997 in the case of *Naga People's Movement of Human Rights, etc. (Petitioner) vs. Union of India (Respondent)* before J. S Verma CJI and four other judges who on November 27<sup>th</sup>, 1997 held the act to be constitutionally valid. The Constitutional bench held that it is not a colourable legislation and not a fraud on the Indian Constitution and does not have the same object as proclaimed under Article 352. However, the SC also laid down some guidelines for the armed forces deployed in these areas under AFSPA. Court further decided that Act of 1958 in pith and substance is a law in respect of maintenance of public order and is not open to challenge and also in exercise of legislative power. To it, Court added a periodic review of the declaration of an area as disturbed area before the expiry of six months and also the powers given to officers mentioned in Section 3 is not arbitrary and is to be exercised in a situation of grave necessity.

Unfortunately, this judgement has been criticised by Amnesty International in its Report on the grounds that the Supreme Court failed to take into account India's international obligations under Int'l Humanitarian Law and ICCPR and other treaties to which India is a state party.<sup>7</sup>

#### **INTERNATIONAL CONVENTIONS AND AFSPA, 1958:**

AFSPA is alleged to be violative of various International treaties to which India is a state party. A few of them include Universal Declaration of Human Rights (UDHR), International Covenant on Civil and political Rights (ICCPR), Convention against Torture and many other customary Laws.

India became a party to ICCPR in 1978 by signing it and assumed the responsibility to secure the rights guaranteed by covenant to all its citizens. ICCPR lays down situations in which the rights may be suspended during times of public emergency but still their remains a whole lot of rights which are NON-DEROGABLE and cannot be done away with in conditions whatsoever. But AFSPA is found to be violative of both Derogable and Non- Derogable rights as it has since its enactment created a situation of artificial emergency. Article 4 of the Covenant governs the suspension of some rights which is "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" that states may derogate from their obligations under the ICCPR. Also, such derogation must be "strictly required by the exigencies of

---

<sup>6</sup> <http://www.pucl.org/Topics/Law/2005/afspa.htm>

<sup>7</sup> India: Briefing on the Armed Forces (Special Powers) Act, 1958, Amnesty International, Page No. 13, AI Index: ASA 20/025/2005

the situation” and cannot be inconsistent with other international law obligations nor “involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”<sup>8</sup>

AFSPA confers wide powers of search and arrest which are virtually unlimited to powers of detention and again a violation of Article 9 of ICCPR which under 9(3) lays down that there has to be a reasonable time afforded after arrest of a person to produce him before any judicial authority and for release but AFSPA has failed to give any such rights and generally situations are such that arrested persons are either encountered or they disappear under mysterious circumstances.

Evidences show that AFSPA has also violated provisions of Article 6 which guaranteed right to life, Article 7 which prohibits torture and Article 10 which calls for dignified treatment of everyone. All these provisions are not derogable in any circumstance but AFSPA through its provisions of granting permission to deployed armed persons to undertake acts of violence only on mere suspicion have violated these non-derogable provisions and are still doing so.

It can be said a fault on the part of Indian Judiciary that even after sixty years of Independence such a draconian law is yet not repealed lest being amended. Indian constitution was amended with respect to protection of Right to Life during Emergency but this is not the case with AFSPA. ICCPR also provides for a duty cast on the states to inform other states in case of violation of any of its provisions which is also not done by India.

### **ILLUSTRATIONS DEMONSTRATING THE MISUSE OF AFSPA:**

There have been strikingly numerous cases of gross human rights violations as a result of abuse of AFSPA ranging from murder, rape, disappearance and torture which are gone untried due to the protection available to officers deployed under AFSPA.

The most highlighted case which captured attention of people all over the country as well as world was the custodial rape and subsequent death of Thangjam Manorama, a 32 year old lady from Manipur<sup>9</sup>. She died due to the atrocities committed on her by soldiers of Assam Rifles who escaped due to AFSPA but this gave rise to a widespread movement on streets in the North East. Irom Sharmila, known as Iron Lady of Manipur has been fasting since last 15 years demanding to repeal the said draconian Law, AFSPA.<sup>10</sup> She began her fasting on November 2, 2000 and since then has been kept in solitary confinement under strict governmental Controls with release when her health

---

<sup>8</sup> [http://www.defendinternational.com/index.php?option=com\\_content&task=view&id=30&Itemid=127](http://www.defendinternational.com/index.php?option=com_content&task=view&id=30&Itemid=127)

<sup>9</sup> Thokchom Binarani Devi, *Women's Movement in Manipur*, (Concept Publishing Company New Delhi 2011) p. 31

<sup>10</sup> <http://indiatoday.intoday.in/story/irom-sharmila-the-iron-lady-of-manipur-continues-her-epic-battle/1/227788.html>

falls. Partial success of the protests was seen last year when AFSPA was removed from certain parts of J&K but for North East, it continues to be the same.

### **REACTIONS OF INTERNATIONAL ORGANISATIONS:**

Many Int'l organisations have strongly advocated for the repeal of this harsh law and even questioned India as to allowing this law to still prevail. Amnesty Int'l in its report of thirty-four pages have deeply criticised this Act and made certain recommendations:<sup>11</sup>

1. Repeal the Act unconditionally
2. Repeal or amend Unlawful Activities Prevention Act, 1967 and bring it in line with Int'l human rights Law
3. Protection of civilian population from heinous crimes by armed groups and prosecute them within criminal framework.
4. To ensure that personnel deployed under the Act conform to Standards laid down under UN Code of Conduct for Law Enforcement Officials, and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;
5. Amend the relevant section 19 of Protection of Human Rights to allow NHRC and SHRC to investigate into allegations of Human Rights.

### **GOVERNMENT INITIATIVES:**

The government in consultation with army has timely released statements justifying the the existence of AFSPA to ensure smooth functioning of army and protection of internal peace and security by defying even the principle of JUS COGENS. But under constant pressure after protests in Manipur as well as reports from International organisations Indian govt. Appointed a review committee under Justice Jeevan Reddy to spoke for repeal of the act along with same opinion from the Administrative Reforms Commission under Mr. Veerapa Moily. Ex-president Hamid Ansari also said to repeal the act. But in a latest news report the government has spoken of its intention of not reviewing AFSPA in near future.<sup>12</sup>

---

<sup>11</sup> India: Briefing on the Armed Forces (Special Powers) Act, 1958, Amnesty International, Page No. 23-24, AI Index: ASA 20/025/2005

<sup>12</sup> Lexis Nexis, No plans to review Armed Forces Special Powers Act: Government Dion Global Solutions Limited July 22, 2014 Tuesday

## **RECENT DEVELOPMENTS CONCERNING AFSPA:**

AFSPA was recently withdrawn in May 2015 by one of the North Eastern States i.e. Tripura after 18 years proving that correct follow of procedure could save humanity and sanity and showcased a good image and the decision was welcomed by the former Union Home Minister Mr. Chidambaram.

## **CONCLUSION:**

AFSPA in its historical background was enacted as a measure to curb the Quit India Movement by British India. Indian continued this act in the name preventing Public order due to internal disturbances which has led to India breaching its obligations at the International level. This act in essence violates ICCPR provisions which actually are non-derogable in any circumstances and thus can be called Jus Cogens. A clear conflict between a Domestic Law and International law is seen here where the Supreme Court has upheld the validity of the Domestic law without harmoniously construing it with the International standards. The day is not far when Int'l community would take up this matter before ICJ and due to the game of name and shame India would have take active steps in amending or repealing the said act which has yet remained passive. No doubts that internal security is of prime importance but the government should make adequate provisions to make the act people friendly and also a reasonable restriction on powers of army to maintain a check and balance on the situations of insurgence and counter insurgence.

