

ARMED FORCES SPECIAL POWERS ACT – PET SCAPEGOAT?

*Amitabh Hoskote, ** Vishakha A Hoskote

*School of Development Studies, Tata Institute of Social Sciences, Mumbai, India,

**Department of Political Science, Rani Durgavati University, Jabalpur, India,

ABSTRACT

The Armed Forces Special Powers Act continues to be used by the Indian government in insurgency ridden areas, gaining wide traction in the debate on conflict and its resolution. Civil society condemns the Act for issues relating to Human Rights, and the draconian powers it seemingly bestows on the armed forces. This research paper seeks to examine the debate in the larger context of its legality, its validity in the current scenario, and the artificial divide it creates in civil society discourse.

KEYWORDS

Jammu & Kashmir, Politics, Conflict, Armed Forces, Violence, Analyses, Civil Society, Human Rights, Special Powers

INTRODUCTION

The Armed Forces Special Powers Act has been used by the Government of India in insurgency areas since the 1950s. It has certain provisions which have been termed ‘draconian’ for their neglect of human rights and the powers given to the armed forces which can be interpreted as being against constitutional rights. The Act has played a major role in the spiralling of the conflict since its enactment in 1990. It becomes a catalyst for an artificial divide within civil society. Indian society has a burning issue for debate and it is all encompassing. Apart from the police and the armed forces which get dragged in to the debate, AFSPA has the attention of the sharpest legal minds of the country and the voices of the human rights groups. Politicians of all hues partake in the debate and contribute according to their political flavour of the day. There is little doubt that armed forces need some form of protection in insurgency operations; however prolonged or even indefinite employment of the act serves to create the impression that it is meant to cover up human rights violations. The Supreme Court has upheld the validity of the Act, but has also given out some very relevant guidelines in this regard¹. This section analyses the provisions of the Act, as well as what causes the debate. In doing so, the factual data has been ascertained from the texts of various documents in public domain. The debate is substantiated by the certain incidents which have caused the rising crescendo for the revocation of the Act. The paper is concluded by looking at what aspects of the current debate are not fully understood and hence need to be focussed upon.

DISTURBED AREAS AND THE ARMED FORCES SPECIAL POWERS ACT

If the President or the Governor of a state opine that an area is in such a disturbed or dangerous state that armed forces of the Union are required to aid civil authorities, they have the power to declare the areas as 'disturbed areas'. The power emanates from two Union Acts, namely the Armed Forces (Special Powers) Act 1958, and the Armed Forces (Jammu and Kashmir) Special Powers Act 1990. Certain specified categories of officers from the Union armed forces are allowed to exercise enhanced powers by virtue of being deployed in such 'disturbed areas'. The power to declare an area as 'disturbed area' has been used by the Indian government in areas facing insurgency such as the north-eastern states and J&K (Jha 2015: 22)

The Armed Forces Special Powers Act (AFSPA) owes its origins to an ordinance of the same name promulgated by the British in 1942 to suppress the Quit India movement. After Independence, the Indian government issued four ordinances to control the widespread communal rioting and breakdown of law and order post partition. These ordinances were issued for Bengal, Assam, East Punjab and Delhi, and the United Provinces. The ordinances were based on the British one of 1942. These four ordinances were replaced by the Armed Forces Special Powers Act 1947, temporarily for one year, and finally by the Act of 1958 in response to the deteriorating internal security situation in Assam at the behest of the Naga tribes.

The British ordinance had sweeping powers provided to officers to enable them to deal with violence in emergencies, such as powers to arrest any person who did not respond when challenged or found damaging property. It also enabled officers to use force including if it caused death. Finally the officers were afforded immunity from prosecution save with prior approval of the government. When the same were sought to be enshrined in the Indian Act of 1958, it was subjected to intense debate in Parliament. The argument was that such powers would result in violation of the rights of the people, as also allow the armed forces to use excessive force even when not required. However the Act was passed in Parliament (Das 2012). This Act has been enforced in the north-eastern states since the 1950s, in Punjab in the 1980s, and in J&K since 1990. The complete text of the Armed Forces Special Powers Act 1990 has been attached at Appendix 1 to this research.

As stated above, AFSPA enables the President or the Governor to declare the area 'disturbed' making the use of the armed forces in aid of civil authority possible. This is supposed to be within a time limit, with provisions for periodic review every six months. The definition of the term 'disturbed area' has been clarified by the Delhi High Court, wherein it states "the term 'disturbed area' defies any definition- it has to be adjudged according to the location, situation and circumstances of a particular case"ⁱⁱ (Jha 2015).

AFSPA gives special powers vide its section 4 to commissioned officers, warrant officers and non-commissioned officers, to fire or use force against any person causing disturbance in the given area, or carrying arms, ammunition and explosives. They can also destroy arms dumps, fortified positions or training camps in use by armed gangs. They can arrest people committing cognisable offences, or enter and search premises where arms or ammunition may be stored, without the requirement of a warrant. While these seem unduly excessive, the same powers are given to police officers under Criminal Procedure Code (Cr PC) 1973. It therefore raises the question as to why AFSPA should be required if the same provisions can be exercised by the police forces.

In terms of the provisions in section 5 of AFSPA arrested persons are to be handed over to the nearest police station at the earliest. This leads to the question of arbitrariness in deciding 'least possible delay'. The arresting authority cannot keep the arrested for interrogation and has to be satisfied that the person is involved in the matter before the arrest is made. Armed forces working in such 'disturbed areas' are provided protection under section 6 of AFSPA, and prosecution is possible with the sanction of the Central government. The government sanction or refusal thereof is subject to judicial scrutiny. In itself it nullifies any argument on the immunity afforded to armed forces, since the matter is subject to judicial review. Also, the same provisions apply to police forces under section 197 of Cr PC, as well as the Jammu and Kashmir Public Safety Act, 1978, amended in 1987 and 1990.

While questioning the deployment of AFSPA in disturbed areas, its inherent contradictions of constitutional rights of citizens as well as the duplicity of the same powers under it as under CrPC, most human rights activists and legal practitioners also agree that the Act must be recast in such a way that it meets the challenges thrown up by these questions. In the same instance, the final decision of redeployment must be done in consonance with the armed forces' requirements. Former Chairperson of National Minorities Commission Wajahat Habibullah writes the following:

This said, it must be clearly understood that the final decision on this must rest on the advice of the armed forces. It might be said that the idea of redeployment has in fact originated from amongst army officers that have served in the State, with a high sense of purpose. If, by mutual consultation it is agreed that the law must continue, this must then be subject to review and Rules carefully crafted for its enforcement, which must bring the law into the fullest conformity with the freedoms of every Indian citizen guaranteed to them by no less than the Constitution of India (Habibullah 2012).

DEBATE ON AFSPA

In the history of conflict in J&K, AFSPA became controversial after other Acts had laid a groundwork for challenging their enforcement owing legal loopholes and human rights violations. The J&K Public Safety Act 1978 has certain provisions that could be misinterpreted to suit the police. According to the Act, persons acting against the security of the state or law and order can be detained upto two years, and without charges for upto one year. The Act was further amended to exempt information about the arrest to the detainee. This has been commented upon by the International Court of Justice (ICJ) for its 'highly discretionary tone'. Similarly, the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) has found itself being challenged due to the very definition of disruptive activities which could be against the constitutional right to freedom of speech. AFSPA too faces a similar comment from the ICJ; the possible use of armed forces in the 'disturbed areas' to suppress political activity cannot be justified (Schoefield 2003). The points of contention surrounding the debate on AFSPA are being analysed in the larger context of conflict in J&K.

Commissions for Judicial Scrutiny. In the course of its long history, AFSPA has been subjected to judicial scrutiny as well as reviews carried out with an aim to bring it closer to ensuring protection of human rights. As a result the Act has been whetted thoroughly. These committees have

also suggested means to having increased transparency while ensuring that armed forces are not impeded in their functioning in such complex conflict environments.

- **Justice Reddy Committee 2005.** The committee was set up in the aftermath of the custodial death of Manorama Devi in July 2004 in Manipur. The committee was mandated to amend AFSPA to the extent of protection of human rights, and to replace with a more humane act if required. After extensive study and analyses of the problem in consultations with members of civil society such as individuals, groups, legal fraternity and tribal groups as also the army in the state as well at the central level, the committee submitted its report in June 2005. It reported that the overwhelming desire of the people was the retention of the army, but with suitable changes in the legal mechanisms; so as to create an environment for the operation of armed forces against militants without harming rights of the people. In doing so, the committee opined that the existing Unlawful Activities (Prevention) Act (UAPA) 1967 with some amendments could be utilised to give the armed forces the protection they needed. The reasons given by the committee were the fact that UAPA was designed to deal with terrorism, had defined activities and groups involved in terrorism, has inbuilt protection for armed forces and paramilitary, and is applicable pan-India. At the same time accused people would be afforded protection under section 45 of UAPA. It also suggested the setting up of grievance cells with members from the local administration, the army and the police. The Justice Reddy committee was criticised for being regressive in nature; although advocating the repeal of AFSPA, it was recommending special powers via the UAPA. It would be violating human rights yet again, albeit in the guise of another law. The report contained the guidelines of the Supreme Court which were an improvement on the Dos and Don'ts issued by the army for insurgency operations. The same have been attached at Appendix 2 of this research (Gonsalves 2005)
- **Justice Hegde Commission 2013.** The commission was appointed by the Supreme Court after investigations were sought against extrajudicial deaths in Manipur from 1978 to 2010. It was mandated to evaluate the role of the security forces in the state; apropos the commission consulted members of civil society publicly, collected documentary evidence and the testimony of various members of the security forces. It reported that investigations by the security forces were inadequate and use of force had been more than required. It also advocated the strengthening of the police forces which were found ill trained to deal with insurgency in the state, in order to remove the armed forces. It also pointed out to the disproportionate use of ammunition while not attempting to apprehend the accused (Justice Hegde Commission Report 30 March 2013)
The Justice Hegde Commission has been viewed as unrealistic in the context of insurgency operations. Such views are widely acknowledged amongst senior officers of the armed forces. The major flaw is to expect personnel operating in highly dangerous and life threatening environment to be able to use non-lethal force.
- **Justice Verma Committee 2013.** This particular report is being mentioned separately since it was not directly pertaining to AFSPA, but has commented on it. The government appointed Justice Verma Committee to review laws against sexual assault, in the aftermath of the gang-rape and murder of a girl in Delhi in December 2012ⁱⁱⁱ. The report included

comments on sexual offences committed in conflict zones. It said that sexual offences were legitimized by means of the AFSPA. It recommended that armed forces be tried under ordinary criminal law, and the training and monitoring of personnel be re-oriented to deal with the issue of sexual offences (Justice Verma Committee Report 2013).

The Justice Verma Committee report has been criticised for misstating facts as well as not taking cognisance of existing rules and regulations in the armed forces which take any form of sexual assault offences with utmost seriousness and the strictest disciplinary action is initiated against the offender. Similarly, incorrect factual knowledge of military deployment in insurgency operations, insufficient and factually incorrect knowledge of speedy legal process in the army has been criticised (Kadyan 2013).

Apart from the judicial review cited above, the Supreme Court has upheld the constitutional validity of the AFSPA, stating that powers given to armed forces are not 'arbitrary' or 'unreasonable' (Jha 2015). The same has been categorically repeated by senior hierarchy of the army with a view towards public opinion on the issue^{iv}.

Constitutional Contradictions. Certain provisions of the AFSPA have been regarded as being in direct contradiction to constitutional rights of the people. The argument is made that AFSPA actually violates these rights because it dilutes the very provisions of the Constitution. As a result, a counter-productive approach is being made to security challenges. Some of the issues that make this part of the debate are being analysed here with both sides of the argument in focus.

- **Disproportionate Use of Force.** One of the most hotly debated points is the use of force, and the use of force disproportionate to the offence. Detractors of AFSPA argue that use of force has been laid down in international law as justified by self-defence, or as a means of last resort (Srivastava 2012). However, anyone who has served in insurgency operations will realise that the question of self-defence is itself the answer to why use of force as per AFSPA is required. Functioning in an environment where there is no distinction between a normal citizen and an insurgent who will open fire at will, and with the intent of killing as many people as possible, requires such use of force. If this power is reduced, troops would not be safe to step out on patrolling duties or for cordon and search operations.
- **Arbitrariness of Arrest.** Critics argue that the provisions for arrest and detention under AFSPA overlook the due process of law including medical examination of the accused. In itself it may make sense, but in the context of the violence unleashed by terrorists, arrest is a bonus. It means that the operating force would be fortunate to make an arrest rather than be fired upon, or even worse, lose its personnel under hostile fire. Further, to counter arbitrariness the Act has, within its provisions, the additional clause that the arrested person needs to be handed over to the police. Also, no interrogation is allowed after the arrest; the onus of satisfying itself of the validity of the arrest is before the arrest for the forces. These safeguards ensure that no arbitrariness is exhibited in arresting or detaining anybody. The Supreme Court has also upheld the provisions of the AFSPA based on a realistic look at the ground situation during such operations^v.
- **Immunity Afforded against Prosecution.** The argument against the immunity clause of AFSPA is that since no prosecution is possible without prior central government sanction, no prosecution takes place. Victims therefore have no remedy with either the sanction not

coming through or just being used as an excuse to overlook excess on the part of the armed forces (Srivastava 2012). To this the response of the armed forces is that the provisions relate to frivolous charges which are natural in conflict areas such as J&K and which tie up the armed forces from doing their actual tasks. The second response pertains to the existing mechanism for prosecuting offenders under the Army Act. In fact, prosecution is much faster and efficient under the provisions of the Army Act. It is however also a fact that such cases are kept low profile with no undue publicity (Kadyan 2013). Further Court Martial proceedings are based on rule of law, with the army itself keen that offenders get punished to maintain the discipline required of a fighting force.

While the concerns voiced by various interest groups about excessive powers given under the provisions of AFSPA are correct in terms of the legal, constitutional and rights based arguments, it remains equally pertinent that armed forces working under such adverse circumstances need the protection they can be given. This has a direct bearing on troops' functioning and morale. In the absence of such safeguards, troops would suffer unnecessary casualties; it is akin to fighting with one arm tied behind the back. It is also in the interest of the armed forces that any cases of excessive or undue force, or of criminal offences such as sexual assault or rape be dealt with promptly under the law. Finally it becomes obvious that continuous efforts be made to educate officers and troops about the law, as well as a humane approach in such conflict zones. In the zeal to perform their given tasks, they must never overlook the fact that there are ordinary people also involved.

Emergency vs Human Rights. Established principles of human rights are usually sidelined in the violence of armed conflicts such as J&K. Peace becomes a term difficult to comprehend, especially in the vocabulary of violent strife which overcomes basic human decency and rule of law. The mechanisms of governance are used to bring semblance of order. It is this act of the government that initiates such requirements as declaring an emergency and bringing the region under the gambit of 'disturbed areas'. Where then do human rights figure in this discussion?

Critics of AFSPA argue that in international law, even during such violence in conflict zones, the rights to life and liberty remain paramount. Emergency laws too need to be utilised with certain inbuilt safeguards to ensure that they do not end up being despotic or dictatorial in nature. The other focus of international law is that the non-state actors would also have some manner of organised structure, firstly to be able to create conditions of conflict, and secondly to be able to pursue their aims. In the case of J&K, this structure emanates from Pakistan using its proxy apparatus. Lastly, the protections afforded in such laws as AFSPA need to be viewed in light of the military necessity of deploying forces (Ahmed 2012).

If AFSPA indeed creates conditions for the violation of basic human rights and rights enshrined in the Constitution, then the onus of rescinding such laws lies with the government. As is evident from the judicial reviews, the law recognises the requirement of such a law in disturbed areas. But the argument against the retention of such laws has given impetus to the thought process that these will invariably bring an erosion to civil liberties. In the long run, these will prove detrimental to any peace process.

View Point of Armed Forces. If the armed forces are to be part of any consultative mechanism in deciding the future of AFSPA, then their views bear weight (Habibullah 2012). The senior hierarchy of the armed forces have stressed upon the requirements of the intrinsic safeguards

of AFSPA in operating under duress in insurgency or internal security. Yet they also agree that the final call on restoring the rule of law in conflict zones lies with the government inasmuch as devising means to garner confidence in the people. It is the sheer compulsion of having run out of options that the armed forces have been called in. In that case why grudge the armed forces certain protection? In its defence the army reiterates that it accords the highest priority to upholding human rights, avoiding collateral damage and maintaining high moral standards (Jha 2015). Since 1994, 1517 cases of violations have been reported with only 54 found to be true. 38 Officers, 12 Junior Commissioned Officers and 79 soldiers have been punished, with punishments ranging from life imprisonment to dismissal from service.

CONCLUSION

Various interest groups have alleged the violation of human rights, constitutional rights to life and liberty, and heinous crimes which fall in the category of war crimes. All these allegations stem from the powers given to armed forces under provisions of Armed Forces Special Powers Act. On the one hand, insufficient research has gone into establishing links between some or all these groups and the insurgents or their proxy partners in Pakistan. Without empirical evidence, it remains a conjecture, but worth investigation. Similar investigation is required into Indian researchers being funded by overseas organisations to critique AFSPA. On the other hand, it is pertinent to understand that deployment of armed forces without protective mechanisms amounts to making them fight with one arm tied behind their backs; virtual cannon fodder. Hence the requirement of AFSPA is beyond reasonable doubt. The same has been upheld by the Supreme Court in terms of its constitutional validity. In the same breath, all possible avenues must be explored to amend the provisions of AFSPA in order to make it more humane in nature. The system of military justice also needs to be further strengthened. Finally for the man on the ground, strict rules of engagement must be laid down with no room for any deviation; if deviation happens, a speedy justice system must bring the deviant to book. The Armed Forces Special Powers Act has been examined as part of the narrative of conflict in J&K. In doing so, this research has relied on primary and secondary sources for its historical correctness and certain specific survey based interviews to ascertain opinions and viewpoints.

APPENDIX 1: ARMED FORCES SPECIAL POWERS ACT 1990

ARMED FORCES (SPECIAL POWERS) ACT, 1990

The Gazette of India EXTRAORDINARY

PART II-Section 1

PUBLISHED BY AUTHORITY

NEW DELHI, TUESDAY, SEPTEMBER 11, 1990/

BHADRA 20, 1912

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

New Delhi, the 11th September, 1990/Bhadra 20, 1912 (Saka)

The following Act of Parliament received the assent of the President on the 10th September 1990, and is hereby published for general information:

THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 1990

No. 21 of 1990

[10th September, 1990.]

An Act to enable certain special powers to be conferred upon members of the armed forces in the disturbed areas in the State of Jammu and Kashmir.

BE it enacted by Parliament in the Forty-first Year of the Republic of India as follows:

1. Short title, extent and commencement. (1) This Act may be called the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.

(2) It extends to the whole of the State of Jammu and Kashmir.

(3) It shall be deemed to have come into force on the 5th day of July, 1990.

2. Definitions. In this Act, unless the context otherwise requires,—

1. (a) “armed forces” means the military forces and the air forces operating as land forces and includes any other armed forces of the Union so operating
2. (b) “disturbed area” means an area which is for the time being declared by notification under section 3 to be a disturbed area;
3. (c) all other words and expressions ‘used herein, but not defined and defined in the Air Force Act, 1950,¹ or the Army Act, 1950,² shall have the meanings respectively assigned to them in those Acts.

3. Power to declare areas to be disturbed areas. If, in relation to the State of Jammu and Kashmir, the Governor of that State or the Central Government, is of opinion that the whole or any part of the

State is in such a disturbed and dangerous condition that the use of armed forces in aid of the civil power is necessary to prevent—

1. (a) activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people;
2. (b) activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution of India, the Governor of the State or the Central Government, may, by notification in the Official Gazette, declare the whole or any part of the State to be a disturbed area.

Explanation.—In this section, “terrorist act” has the same meaning as in Explanation to article 248 of the Constitution of India as applicable to the State of Jammu and Kashmir.

4. Special powers of the armed forces. Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,—

1. (a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of firearms, ammunition or explosive substances;
2. (b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders wanted for any offence;
3. (c) arrest, without warrant, any persons who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;
4. (d) enter and search, without warrant, any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawful kept in such premises, and may for that purpose use such force as may be necessary, and seize any such property, arms, ammunition or explosive substances;
5. (e) stop, search and seize any vehicle or vessel reasonably suspected to be carrying any person who is a proclaimed offender, or any persons who has committed a non-cognizable offence, or against whom a reasonable suspicion exists that he has committed or is about to

commit a non- cognizable offence, or any person who is carrying any arms, ammunition or explosive substance believed to be unlawfully held by him, and may, for that purpose, use such force as may be necessary to effect such stoppage, search or seizure, as the case may be.

5. Power of search to include powers to break open locks, etc.

Every person making a search under this Act shall have the power to break open the lock of any door, almirah, safe, box, cupboard, drawer, package or other thing, if the key thereof is withheld.

6. Arrested persons and seized property to be made over to the police. Any person arrested and taken into custody under this Act and every property, arms, ammunition or explosive substance or any vehicle or vessel seized under this Act, shall be made over to the officer-incharge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest, or as the case may be, occasioning the seizure of such property, arms, ammunition or explosive substance or any vehicle or vessel, as the case may be.

7. Protection of persons acting in good faith under this Act.

No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

8. Repeal and saving. (1) The Armed Forces (Jammu and Kashmir) Special Powers Ordinance, 1990,3 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

V.S. RAMA DEVI,

Secy. to the Govt. of India

CORRIGENDA

In the Constitution (Sixty-sixth Amendment) Act, 1990 as published in the Gazette of India, Extraordinary, Part II, Section 1, dated the 7th June, 1990 (Issue No.32),—

At page 1, in second line from the bottom, for “Regulation, 1963 (Andhra Pradesh Regulation 2 of” read “Regulation, 1970 (Andhra Pradesh Regulation 1 of”.

At page 2, in line 7, for “(Bihar Act 8 of 1985)” reads “(Bihar Act 8 of 1885)”.

EXTRAORDINARY

THE

JAMMU & KASHMIR GOVERNMENT GAZETTE

Vol. 103] Srinagar, Fri., the 6th July, 90/15th Asa., 1912. [No.14-1 PART I-B

Jammu and Kashmir Government—Notifications.

.....

GOVERNMENT OF JAMMU AND KASHMIR,
CIVIL SECRETARIAT—HOME DEPARTMENT.

SRO NO. SW 4

Dated 6-7, 1990

In exercise of the powers conferred under section 3 of the Armed Forces (Jammu and Kashmir) Special Powers Ordinance, 1990, the Governor of Jammu and Kashmir hereby notifies the areas given in the Schedule to this notification as Disturbed Areas.

(Sd.).....

Additional Chief Secretary (Home),
Jammu and Kashmir Government.

.....

SCHEDULE

1. Areas falling within 20 Kms. of the Line of Control in the Districts of Rajouri and Poonch.
2. Districts of Anangnag, Baramulla, Badgam, Kupwara, Pulwama and Srinagar.

(Sd.).....

Additional Chief Secretary (Home),
Jammu and Kashmir Government.

Government of Jammu and Kashmir

Civil Secretariat Home Department

NOTIFICATION

SRINAGAR, THE 10TH AUSUGT, 2001

SRO 351: Whereas the Governor is of the opinion that the State is in such a disturbed condition that the use of Armed Forces in the aid of civil power is necessary to prevent the activities involving terrorists acts directed towards striking terror in the people;

Now, therefore, in exercise of the powers conferred by section 3 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, the Governor hereby declares the districts of Jammu, Kathu,

Udhampur, Poonch, Rajouri and Doda to be disturbed areas in addition to districts, Srinagar, Budgam, Anantnag, Pulwama, Baramulla and Kupwara which stand already so declared.

By order of the Governor

Principal Secretary to Government
Home Department

NO: Home-219/97-ISA dated 10.8.2001. Copy for information to :

1. Chief Secretary, J&K, Srinagar.
2. Secretary, Ministry of Home Affairs, Govt. of India, New Delhi.
3. Secretary, Ministry of Defence, Govt. of India, New Delhi.
4. Joint Secretary (K-I), MHA (Deptt. of J&K Affairs), New Delhi.
5. Principal Secretary to HE the Governor.
6. Principal Secretary to Hon'ble Chief Minister.
7. Commr/Secretary, Law.
8. Director General Police, Srinagar.
9. Director General, BSF, New Delhi.
10. Director General, ITBP, New Delhi.
11. Director General, CRPF, New Delhi.
12. GOC, XVI Corps C/o 56 APO
13. GOC, XV Corps C/o 56 APO
14. GOC, XIV Corps C/o 56 APO
15. Divisional Commissioner, Jammu.
16. Director Information, J&K, Srinagar.
17. All District Magistrates of Jammu Division.
18. All District Superintendents of Police, Jammu Division.
19. Pvt. Secretary to Hon'ble MOS(Home)

Accessed from::

http://mha.nic.in/sites/upload_files/mha/files/pdf/Armedforces%20J&K%20Splpowersact1990.pdf

on 15 November 2015

APPENDIX 2: GUIDELINES OF THE SUPREME COURT OF INDIA

LIST OF DOS AND DON'TS DIRECTED BY SUPREME COURT

Dos

1. Action before Operation

- (a) Act only in the area declared 'Disturbed Area' under Section 3 of the Act.
- (b) Power to open fire using force or arrest is to be exercised under this Act only by an officer/JCO/WO and NCO.
- (c) Before launching any raid/search, definite information about the activity to be obtained from the local civil authorities.
- (d) As far as possible coopt representative of local civil administration during the raid.

2. Action during Operation

- (a) In case of necessity of opening fire and using any force against the suspect or any person acting in contravention of law and order, ascertain first that it is essential for maintenance of public order. Open fire only after due warning.
- (b) Arrest only those who have committed cognizable offence or who are about to Commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit cognizable offence.
- (c) Ensure that troops under command do not harass innocent people, destroy property of the public or unnecessarily enter into the house/dwelling of people not connected with any unlawful activities.
- (d) Ensure that women are not searched/arrested without the presence of female police. In fact women should be searched by female police only.

3. Action after Operation

- (a) After arrest prepare a list of the persons so arrested.
- (b) Hand over the arrested persons to the nearest police station with least possible delay.
- (c) While handing over to the police a report should accompany with detailed circumstances occasioning the arrest.
- (d) Every delay in handing over the suspects to the police must be justified and should be reasonable depending upon the place, time of arrest and the terrain in which such person has been arrested. Least possible delay may be 2-3 hours extendable to 24 hours or so depending upon a particular case.
- (e) After raid make out a list of all arms, ammunition or any other incriminating material/document taken into possession.

(f) All such arms, ammunition, stores etc. should be handed over to the police station along with the seizure memo.

(g) Obtain receipt of persons and arms/ammunition, stores etc. so handed over to the police.

(h) Make record of the area where operation is launched having the date and time and the persons participating in such raid.

(i) Make a record of the commander and other officers/JCOs/ NCOs forming part of such force.

(k) Ensure medical relief to any person injured during the encounter, if any person dies in the encounter his dead body be handed over immediately to the police along with the details leading to such death.

4. Dealing with Civil Court

(a) Directions of the High Court/Supreme Court should be promptly attended to.

(b) Whenever summoned by the courts, decorum of the court must be maintained and proper respect paid.

(c) Answer questions of the court politely and with dignity.

(d) Maintain detailed record of the entire operation correctly and explicitly.

Don'ts

1. Do not keep a person under custody for any period longer than the bare necessity for handing over to the nearest police station.
2. Do not use any force after having arrested a person except when he is trying to escape.
3. Do not use third-degree methods to extract information or to extract confession or other involvement in unlawful activities.
4. After arrest of a person by the member of the armed forces, he shall not be interrogated by the member of the armed force.
5. Do not release the person directly after apprehending on your own. If any person is to be released, he must be released through civil authorities.
6. Do not tamper with official records.
7. The armed forces shall not take back a person after he is handed over to civil police.

List of Dos and Don'ts while Providing Aid to Civil Authority Dos

1. Act in closest possible communication with civil authorities throughout.
2. Maintain inter-communication if possible by telephone/radio.
3. Get the permission/requisition from the Magistrate when present.

4. Use little force and do as little injury to person and property as may be consistent with attainment of objective in view.
5. In case you decide to open fire:
 - (a) Give warning in local language that fire will be effective; (b) Attract attention before firing by bugle or other means;
 - (b) Attract attention before firing by bugle or other means;
 - (c) Distribute your men in fire units with specified Commanders;
 - (d) Control fire by issuing personal orders;
 - (e) Note number of rounds fired;
 - (f) Aim at the front of crowd actually rioting or inciting to riot or at conspicuous ringleaders, i.e., do not fire into the thick of the crowd at the back;
 - (g) Aim low and shoot for effect;
 - (h) Keep Light Machine Gun and Medium Gun in reserve;
 - (i) Cease firing immediately once the object has been attained;
 - (j) Take immediate steps to secure wounded.
6. Maintain cordial relations with civilian authorities and paramilitary forces.
7. Ensure high standard of discipline.

Don'ts

8. Do not use excessive force
9. Do not get involved in hand-to-hand struggle with the mob
10. Do not ill-treat anyone, in particular, women and children
11. No harassment of civilians
12. No torture
13. No communal bias while dealing with civilians
14. No meddling in civilian administration affairs
15. No Military disgrace by loss/surrender of weapons
16. Do not accept presents, donations and rewards

Accessed from: https://www.upr-info.org/IMG/pdf%20COHR_IND_UPR_S1_%202008anx_Annex_XXII_AI_Breifing_on_AFSPA_in_Manipur.pdf

on 15 November 2015

REFERENCES/ BIBLIOGRAPHY

- Ahmed, Ali. 2012. 'AFSPA in Light of Humanitarian Law' in Chadha, Vivek (ed.) *Armed Forces Special Powers Act: The Debate*. New Delhi: Lancer Books with Institute for Defence Studies and Analyses (IDSA).
- Das, Pushpita. 2012. 'The History of Armed Forces Special Powers Act' in Chadha, Vivek (ed.) *Armed Forces Special Powers Act: The Debate*. New Delhi: Lancer Books with Institute for Defence Studies and Analyses (IDSA).
- Gonsalves, Colin. 2005. *The Fake Repeal of AFSPA*. E-Pao website. Accessed on 13 June 2016 http://www.e-pao.net/epSubPageExtractor.asp?src=news_section.opinions.Opinion_on_Killing_of_Manorama.The_Fake_Repeal_Of_AFSPA
- Habibullah, Wajahat. 2012. 'Armed Forces Special Powers Act, Jammu and Kashmir' in Chadha, Vivek (ed.) *Armed Forces Special Powers Act: The Debate*. New Delhi: Lancer Books with Institute for Defence Studies and Analyses (IDSA).
- Hegde, Justice Santosh. 2013. *Hegde Commission Report on AFSPA*. The Hindu. Accessed on 26 July 2016. http://www.thehindu.com/migration_catalog/article11984420.ece/BINARY/Hegde%20Committee%20Report%20on%20AFSPA
- Jha, UC. 2015. *Armed Forces Special Powers Act: A Draconian Law?* Delhi: Vij Books Pvt Ltd.
- Kadyan, Raj. 2013. The Armed Forces Special Powers Act- Need for Review? New Delhi: United Service Institution of India, Journal of the United Service Institution of India, Vol. CXLII, No. 591, January-March 2013.
- Schoefield, Victoria. 2003. *Kashmir in Conflict: India, Pakistan and the Unending War*, New York: IB Tauris & Co Ltd.
- Srivastava, Devyani. 2012. 'Rights-Based Critique of AFSPA' in Chadha, Vivek (ed.) *Armed Forces Special Powers Act: The Debate*. New Delhi: Lancer Books with Institute for Defence Studies and Analyses (IDSA).
- Verma, Justice JS. 2013. *Report of the Committee on Amendments to Criminal Law by Justice JS Verma Committee*. Kafila website. Accessed on 27 Jun 2016. <https://kafila.online/2013/01/27/the-justice-js-verma-committee-report/>

i The text of the Armed Forces Special Powers Act 1990 has been attached at Appendix 1. The Guidelines of the Supreme Court of India in the form of Dos and Don'ts have been listed out in Appendix 2.

ii The ruling has been given in the case of Indrajit Barua vs State of Assam, 1983.

iii The gang-rape and brutal attempt to murder a girl in Delhi on 16 December 2012 is known as the Nirbhaya Case. The name Nirbhaya was given to protect the girl's identity from public, but was found and made public by some sections of the media. The girl died subsequently due to extensive injuries sustained during the rape and violent physical assault by the rapists. All the rapists have been given the death penalty, and the same has been upheld by the Supreme Court. Though the Justice Verma Committee was not mandated as such, it has commented on the issue of sexual offences in conflict zones.

iv For instance, General VK Singh, Former Chief of Army Staff, Indian Army, and currently Member of Parliament from the ruling Bhartiya Janata Party, in an interview with Frank Pereira on 'To The Point', talk show on Rajya Sabha Television, 15 January 2015.

v The Constitutional validity of AFSPA has been challenged in the *Naga People's Movement of Human Rights vs Union of India* case in 1997. The Supreme Court has upheld the Constitutional validity of the Act, ruling that the powers given to the army are not 'arbitrary' or 'unreasonable', or violative of the provisions of Articles 14, 19 and 21 of the Constitution. Arrests pertaining to women need to follow the same procedure as laid down in the Criminal Procedure Code, Sections 47(2), 51(2), 100(3) and 160(1). On the issue of declaring an area disturbed, the Court ruled for a review every six months. If the Government of India does not give sanction for prosecution in any particular case, it has to justify the refusal of sanction. The same is subject to judicial scrutiny.