
AFSPA UNDER SCRUTINY: A DEEP DIVE INTO ITS CONSTITUTIONAL LEGITIMACY

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ABSTRACT

Insurgency is a major concern in some parts of India and requires military intervention. However, balancing national security with the civil liberties of the people in such areas has always been quite a task. This entire debate imposes a grave concern on the very constitutional validity of AFSPA. The provisions of AFSPA are colonial in nature and extremely non-democratic in nature. They give the government and the Armed Forces the absolute power to curtail the very fundamental rights of the citizens, enshrined under the Indian Constitution, without any accountability to the wrong-doers in the Armed Forces. This study involves the case analysis of the repercussion of AFSPA in the north-east India and Jammu and Kashmir. The primary reason for the entire misuse of AFSPA lies in the subjectivity of the declaration of any region as a “disturbed area” given under section 3 of AFSPA, 1958. The recommended solution for the same is giving it an objective definition to ensure fairness and transparency. AFSPA is, indeed, required in some areas of the country, but with limited powers and much more accountability. Therefore, this study suggests major amendments under AFSPA, instead of advocating to entirely repeal the same.

The Armed Forces Special Powers Act, although necessary in some places and situations, systematically violates Article 14, 19 and 21 of the Indian Constitution. India’s commitment to international human rights law, including the International Covenant on Civil and Political Rights (ICCPR), is compromised by the broad, unchecked powers under AFSPA, especially those related to the right to life, protection from arbitrary arrest, and the prohibition of torture. Article 51(c) of the Indian Constitution directs the state to respect international law and treaty obligations. Hence, this study delves into the constitutional validity of AFSPA and its implications on the civil liberty of the people. It aims to propose recommendations for areas which actually do need military intervention in better ways than, currently, ensured under AFSPA.

Keywords: AFSPA, Constitutional Legitimacy, Civil Liberties, Human Rights Violations, Insurgency.

Introduction

Insurgency is the process by which a group of armed rebels try to take over their country, through force¹. A 2018 United Nations report elaborated on the grave human rights violations in Kashmir and called for an international inquiry in the same. “It is essential the Indian authorities take immediate and effective steps to avoid a repetition of the numerous examples of excessive use of force by security forces in Kashmir” said the UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein². It tells about the negative implications of the Armed Forces Special Powers Act in Jammu and Kashmir.

In 1942, AFSPA was first implemented during the Quit India Movement³, by the Colonial Government. Since its independence, India has been facing insurgency in various parts of the country like J & K and the North-Eastern states of India. In 1958⁴, Armed Forces Special Powers Act⁵ was implemented for the first time to curb the separatist movements in Assam and Manipur. It was implemented through an ordinance. This ordinance declared the states of Assam and Manipur as “disturbed areas”. In 1972, AFSPA was implemented throughout the seven sisters. In 1983, it was enacted in the state of Punjab and the Union Territory of Chandigarh. In 1997, AFSPA was repealed from Punjab but subsequently, implemented in Jammu and Kashmir, to combat the insurgency which not only had domestic ramifications, but also international ramifications. In 2022, it was partially lifted from the North-East India, following the killings of more than a dozen civilians in Nagaland⁶. Currently, AFSPA exists in

¹ Cambridge English Dictionary, s.v. “Insurgency”, Cambridge Univ. Press, *Cambridge Dictionary*, <https://dictionary.cambridge.org/dictionary/english/insurgency>.

² Office of the U.N. High Commission for Human Rights, *First-ever UN Human Rights Report on Kashmir Calls for International Inquiry* (Press Release, June 14, 2018), <https://www.ohchr.org/en/2018/06/first-ever-un-human-rights-report-kashmir-calls-international-inquiry-multiple-violations>.

³ *Armed Forces (Special Powers) Act: An overview*, *Free Law* (July 4, 2022), [https://www.freelaw.in/legalarticles/Armed-Forces-\(Special-Powers\)-Act:-An-Overview](https://www.freelaw.in/legalarticles/Armed-Forces-(Special-Powers)-Act:-An-Overview).

⁴ Rituparna Bhattacharyya, “Living with Armed Forces Special Powers Act (AFSPA) as Everyday Life,” 83 *GeoJournal* 31 (2018) Rituparna Bhattacharyya, “Living with Armed Forces Special Powers Act (AFSPA) as Everyday Life,” 83 *GeoJournal* 31 (2018), https://www.jstor.org/stable/45117478?searchText=AFSPA%20during%20the%20quit%20india%20movement&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3DAFSPA%2Bduring%2Bthe%2Bquit%2Bindia%2Bmovement%26so%3Drel&ab_segments=0%2Fbasic_search_gsv%2Fcontrol&refreqid=fastly-default%3A55b8874316a4fa2f360c7e1bf5cee80a.

⁵ *The Armed Forces (Special Powers) Act, 1958*, Act No. 28 of 1958 (India) (assented to Sept. 11, 1958), https://www.mha.gov.in/sites/default/files/armed_forces_special_powers_act1958.pdf.

⁶ “Indian State Tense After Killing of 14 Civilians,” *BBC News* (Dec. 6, 2021), <https://www.bbc.com/news/world-asia-india-59544599>.

Nagaland, Manipur, Assam, Arunachal Pradesh and Jammu and Kashmir⁷.

Governments have repeatedly defended AFSPA as a necessary evil- an emergency law⁸ supposed to protect the integrity of the country. But at what cost? The very law which was supposed to protect the people from civil-unrest and ensure the integrity of the country, is hurting its people in unimaginable ways and fading away the trust the people of the country have in its Armed Forces. Therefore, it is the responsibility of the government to make a law which safeguards the integrity of India while ensuring the rights of its citizens.

Constitutional Issues

AFSPA is a clear violation of Articles 14, 19, 21 and 22 in various ways.

- **Article 14**

AFSPA stimulates an unreasonable differentiation between the people residing in the “disturbed areas” and the people living in the rest of the country. People, under AFSPA, live under harsher conditions with curtailed rights⁹. It undermines the right to equal protection by placing security personnel above the law as the victims of AFSPA do not enjoy the same legal recourse as others, evidently violating Article 14’s mandate of equality¹⁰. However, in *Naga People’s Movement of Human Rights vs. Union of India*¹¹, the Supreme Court held that sections 4 and 5 of the Act are not unconstitutional in nature as they fulfill the criteria of intelligible differentia due to the prevalence of insurgency in those areas¹². Nevertheless, equality is, indeed, compromised when the

⁷Shivangi Basu et al., “The Armed Forces Special Powers Act (AFSPA): A Contextual Analysis,” *International Journal of Law, Policy and Social Review* 22 (2022), <https://www.lawjournals.net/assets/archives/2022/vol4issue3/4-3-14-910.pdf>.

⁸ Nitin A. Gokhale, “Why the Government Must Not Repeal AFSPA,” *Hindustan Times* (Apr. 25, 2022), <https://www.hindustantimes.com/opinion/why-the-government-must-not-repeal-afspa-101650889128256.html>.

⁹ Kosha Doshi & Bandana Saikia, “The Case of Nagaland: Addressing Controversial Provisions of the Armed Forces Act in India,” *JURIST- Commentary* (Feb. 4, 2022), <https://www.jurist.org/commentary/2022/02/doshi-saikia-armed-forces-act-nagaland-india/#:~:text=AFSPA%20has%20always%20been%20highly,54%20Justice%20Jeevan%20Reddy>.

¹⁰ Suman, “Terrorism, Anti-Terror Law and Denial of Human Rights in Jammu and Kashmir,” 35 *Delhi Law Review* 94 (2020), [https://lawfaculty.du.ac.in/userfiles/downloads/Delhilawreviewjournal/DLR%20Vol.%20XXXV%20\(2019-20\).pdf#:~:text=section%207%20of%20AFSPA%20as,human%20rights%20law%20and%20the](https://lawfaculty.du.ac.in/userfiles/downloads/Delhilawreviewjournal/DLR%20Vol.%20XXXV%20(2019-20).pdf#:~:text=section%207%20of%20AFSPA%20as,human%20rights%20law%20and%20the).

¹¹ *Naga People’s Movement on Human Rights v Union of India*, 1998 SCC(CRI) 514.

¹² *AFSPA: A Mockery of Human Rights*, NUJS Constitutional Law Society Blog (Feb. 9, 2024), <https://wbnujscls.wordpress.com/2024/02/09/afspa-a-mockery-of-human-rights/#:~:text=In%20Naga%20People%E2%80%99s%20Movement%20of,not%20be%20a%20defence%20to>.

people of certain regions are being treated differently in a manner which violates their rights.

- **Article 19**

Article 19 guarantees Freedom of Speech, Expression, Assembly, Movement, etc. Section 4(a) of AFSPA permits even a non-commissioned officer to use lethal force on an assembly of five or more, violating Article 19(1)(b)¹³. However, the Supreme Court, in 1997, ruled that the Freedoms given under Article 19 of the Indian Constitution could be curtailed by the reasonable restrictions given under the same, as these aim to combat violence and insurgency¹⁴. Yet, AFSPA has been labelled as a constitutional fraud because it imposes de facto emergency rules on the “disturbed regions”¹⁵. Moreover, the Supreme Court itself emphasizes that this power should be temporary and in such manner which would restore normalcy. An indefinite period of AFSPA prevailing over a certain region would indeed curtail the rights of the people under Article 19, despite the reasonable restrictions clause.

- **Article 21**

Article 21 ensures the Right to Life and Personal Liberty to the people. It states that no person shall be deprived of its Right to Life and Personal Liberty except through a procedure established by law. Section 4 of AFSPA violates Article 21 as a whole as it empowers the Armed Forces to fire upon any person, even to the extent of causing the death of that person, if that person is acting in contradiction to the law. In *AK Gopalan v State of Madras*¹⁶, it was held that the Right to Life and Personal Liberty of an individual could be curtailed through the procedure established by law, differentiating it from the American concept of the due process of law. This was overturned by *Maneka*

¹³ Kosha Doshi & Bandana Saikia, “The Case of Nagaland: Addressing Controversial Provisions of the Armed Forces Act in India,” *JURIST* (Feb. 4, 2022), <https://www.jurist.org/commentary/2022/02/doshi-saikia-armed-forces-act-nagaland-india/#:~:text=the%20recent%20unfortunate%20killings%20of,on%20the%20act%E2%80%99s%20most%20serious>.

¹⁴ Explained: Nagaland Case, When SC Laid Down Procedure for Using AFSPA,” *The Indian Express* (Dec. 30, 2021), <https://indianexpress.com/article/explained/explained-in-nagaland-case-when-sc-laid-down-procedure-for-using-afspa-7661500/#:~:text=The%20petitioners%20and%20also%20the,powers%20that%20could%20be%20misused>.

¹⁵ *Id.*

¹⁶ *A.K. Gopalan v State of Madras*, 1950 AIR 27.

Gandhi v Union of India¹⁷, where the concept of golden triangle¹⁸ was emphasized on, stating that Articles 14, 19 and 21 cannot be separated and have to be read together. This case ruled that the due process of law is the mandate. Contradictorily, AFSPA violates the due process of law under Article 21 in various ways. A major loophole is that it empowers the Armed Forces to arrest any person who has committed a cognizable offense, or is under the suspicion of the same, or might commit one in future, without a warrant¹⁹. In practice, however, evidence of widespread abuse indicates that Article 21's guarantees routinely compromised under AFSPA, raising serious constitutional questions.

- **Article 22**

Clause 1 and 2 of this Article requires the arrested person to be informed of the grounds of his arrest and presented in front of a magistrate within 24 hours of the arrest, respectively. AFSPA violates clause 1 by have absolutely no mention of informing the arrested person the grounds of his arrest. Section 5 of AFSPA violates clause 2 of Article 22 by empowering the Armed Forces to detain the arrested person for an indefinite period. It has, although, mentioned that the Armed Forces should not do unnecessary delay in handing over the arrested person to the police. However, undue delay has nowhere been defined, rendering it a subjective clause, giving discretionary powers to the Armed Forces. The Supreme Court in 1997 read down these concerns by insisting that despite AFSPA, the detainee must be handed over to civilian authorities promptly and normal CrPC procedure would apply²⁰. In fact, after the NPMHR judgement²¹, the Court directed that arrested persons must produced before a magistrate within 24 hours, aligning with Article 22 of the Indian Constitution. This was intended to reconcile AFSPA with Article 22. Nonetheless, ground reports and later inquiries show that compliance is erratic at best, and Article 22 violations remain rampant under the cover of AFSPA.

¹⁷ *Maneka Gandhi v Union of India*, 1978 SCC (1) 248.

¹⁸ Vidhi Malik, "The Golden Triangle of the Indian Constitution: 14, 19, 21- A Judicial Perspective" *International Journal of Advanced Legal Research* (Issue 3, 2022), <https://ijalr.in/volume-4-issue-3/the-golden-triangle-of-the-indian-constitution-article-14-19-21-a-judicial-perspective-vidhi-malik/>.

¹⁹ AFSPA: A Mockery of Human Rights, *NUJS Constitutional Law Society Blog* (Feb. 9, 2024).

²⁰ *Id.*

²¹ *Naga People's Movement of Human Rights v Union of India*, 1998 (2) SCC 109.

Case Studies

1. North-East India

Armed Forces Special Powers Act (Assam and Manipur), 1958 ²²

- a. Section 3²³ of this Act empowers the Governor or the Chief Administrator of that State or Union Territory, or the Central Government to declare the whole of any State or Union Territory, or a part of the same, as a “disturbed area” which needs intervention from the Indian Armed Forces. The problem with this section is that the “disturbed area” is not defined anywhere at all. This makes this provision extremely subjective and entitles the government to authoritatively curtail the civil liberties of its people.
- b. Section 4²⁴ of the aforementioned Act states that whenever a State or a Union Territory, or any part of the same, is declared a “disturbed area” it empowers the Armed Forces to fire upon any person, even to the extent of causing the death of that person, if that person is acting in contradiction to the law. It also empowers the Armed Forces to arrest any person who has committed a cognizable offense, or is under the suspicion of the same, or might commit one in future, without a warrant. This provision gives the Armed Forces the power to preventive detention. It also gives them the power to search any person without a warrant. The major loophole of this particular section is that it gives authoritative powers to the Armed Forces, imposing a big question on the Right to Life and Personal Liberty of the people of the concerned disturbed area, under Article 21 of the Indian Constitution.
- c. Section 5²⁵ of this Act imposes a mandate on the Armed Forces to hand-over the arrested person to the nearest police station, without any unnecessary delay. However, the time period for a “delay” is not defined, again, making this provision very vague and subjective and giving the Armed Forces absolute powers to keep the arrested person in their custody in the name of “necessity”, for an unlimited period.

²² *The Armed Forces (Special Powers) Act, 1958*, No. 28 of 1958 (India), https://www.mha.gov.in/sites/default/files/armed_forces_special_powers_act1958.pdf.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

- d. Section 6²⁶ of this Act protects the members of the Armed Forces from any allegation regarding an act done under the powers sanctioned by this Act. This portrays no accountability for the actions conducted by the Armed Forces in the disturbed Areas.

The secessionist movements in the north-east India, primarily resulting from the ethnic diversity, does require some sort of military intervention, as they could otherwise lead to violent civil-unrest, claiming many lives²⁷. Armed Forces Special Powers Act is, currently, enacted in the north-east states of Nagaland, Assam, Manipur and Arunachal Pradesh. On 31 March, 2025, the headlines of almost every newspaper boomed with the extension of AFSPA in more districts of the aforementioned states for the next six months, applicable from 1 April, 2025²⁸.

- **Nagaland**

AFSPA has been extended in eight districts and twenty-one police station areas of five other districts of Nagaland, for the next six months, enforced from 1 April, 2025²⁹.

- **Manipur**

From April 1, 2025, AFSPA has been extended to the whole of Manipur, except the areas under the jurisdiction of thirteen police stations of five districts of the state, for six months³⁰. Sharmila Chanu, an activist from Manipur, has been protesting for the repeal of AFSPA³¹. Quite evidently, in vain. In 2012, a PIL was filed against the fake encounters by the Manipur police³². Subsequently, in 2013, Justice Santosh Hegde Commission was set-up to look into the extrajudicial killings on the hands of the Armed Forces³³. In 2016, the police and the Armed Forces were directed, by the Supreme Court of India, to not use retaliatory or unnecessary force in “disturbed

²⁶ *Id.*

²⁷ Prabhat Datta, “Secessionist Movements in North East India,” 53 *Indian Journal of Political Science* 536 (Oct.-Dec. 1992).

²⁸ MHA Extends AFSPA in Some Parts of Manipur, Nagaland and Arunachal,” *The Indian Express* (Mar. 31, 2025), <https://indianexpress.com/article/india/afspa-manipur-nagaland-arunachal-9914489/>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ UWRD Calls for Attention on Justice Santosh Hegde Commission’s Findings on Extrajudicial Killings,” *Imphal Times* (Jan. 25, 2019), <https://www.imphaltimes.com/other-news/uwr-d-calls-for-attention-on-justice-santosh-hegde-commissions-findings-on-extrajudicial-killings/>.

areas”³⁴. In *Extra-Judicial Execution Victim Families Association (EEVFAM) v Union of India*, the Supreme Court dealt with approximately alleged 1500 fake encounter cases in Manipur over decades of AFSPA enforcement.

- **Arunachal Pradesh**

On January 22, 2014, Changlang, a few jawans from the Assam Rifles kidnapped and gang-raped a minor³⁵. This is what authoritative power does to the humans- it corrupts them makes them inhumane. AFSPA is applicable, from April 1, 2025, in Tirap, Changlang and Longding districts of Arunachal Pradesh, along with three police stations in Namsai district, for the next six months³⁶.

- **Assam**

The Dangari Fake Encounter Case (1994)³⁷ is the prime example of the misuse of AFSPA in Assam. In this, five youths were picked up by the Indian Army in the Tinsukia District and later killed. Reports have also surfaced sexual offences committed by the security forces where AFSPA is implemented³⁸. Most recently, AFSPA has been lifted from Dibrugarh and now prevails in three districts of Assam³⁹. Its implementation has been extended for 6 more months, from April 1, 2025.

2. Jammu and Kashmir

After the partition, Jammu Kashmir was in a very deplorable state, as was most of India.

³⁴ “Killing of Civilians in Nagaland: What is AFSPA and Why is it so Controversial?,” *India Today* (Dec. 7, 2021), <https://www.indiatoday.in/india/story/nagaland-civilians-killing-what-is-afspa-and-why-is-it-so-controversial-1885000-2021-12-07>.

³⁵ “Centre Empowers Assam Rifles in Arunachal Pradesh to Tackle Insurgency,” *The Sentinel (Guwahati)* (2019), <https://www.sentinelassam.com/north-east-india-news/arunachal-news/assam-rifles-jawan-sentenced-to-10-years-imprisonment-over-rape-charges-595206>.

³⁶ MHA Extends AFSPA in Some Parts of Manipur, Nagaland and Arunachal,” *The Indian Express* (Mar. 31, 2025), <https://indianexpress.com/article/india/afspa-manipur-nagaland-arunachal-9914489/>.

³⁷ “1994 Assam Fake Encounter: Major General, Six Others Get Life Term,” *The Hindu* (Sept. 2018), <https://www.thehindu.com/news/national/1994-assam-fake-encounter-major-general-six-others-get-life-term/article25221579.ece>.

³⁸ “Repeal the Armed Forces Special Powers Act,” *Economic & Political Weekly* 39(40): 4461 (Oct. 2, 2004), https://www.jstor.org/stable/pdf/4415619.pdf?refreqid=fastly-default%3Aafa8a09a9db07239137cb30eb4b3e184&ab_segments=&initiator=&acceptTC=1.

³⁹ “AFSPA Extended in 3 Districts in Assam; Withdrawn from One: Govt Order,” *Hindustan Times* (Mar. 30, 2025), <https://www.hindustantimes.com/india-news/afspa-extended-in-3-districts-in-assam-withdrawn-from-one-govt-order-101743353415816.html>.

Soon after India's independence, on 20 October, 1947, Kashmir was infiltrated by tribesmen from Pakistan's North-West Frontier Province⁴⁰. They caused extensive violence throughout the region. Troubled, on 24 October, 1947, Maharaja Hari Singh asked for India's help⁴¹. On October 26, 1947, Maharaja Hari Singh signed an Instrument of Accession, agreeing to merge with India, in exchange for protection against Pakistan's large-scale bloodshed and invasion⁴². India intervened and drove away the Pakistani forces, calling off the first war between India and Pakistan. However, ever since the merger of Jammu and Kashmir with India, an increasingly rising militancy has been observed in that state. In the 1980s, the militancy and subsequently, the violence in Kashmir was at its peak, resulting in the enactment of AFSPA throughout the state, in September 1990⁴³. Armed Forces Special Powers Act (Jammu and Kashmir), 1990⁴⁴, is practically the same as that of the 1958 Assam and Manipur Act, having the same shortcomings as aforementioned.

In March 2025, Army Chief General Upendra Dwivedi said that AFSPA could be repealed in future in Jammu and Kashmir, on the condition that the Jammu and Kashmir police could handle the situation there⁴⁵. However, the current situations are not adequate. India needs to do much more progress in Jammu and Kashmir for AFSPA to be lifted from the state.

International Human Rights Law and AFSPA

India has internationally been subjected to severe criticism regarding the authoritative powers it has given to its Armed Forces through AFSPA.

- **ICCPR Article 6⁴⁶- Right to Life**

⁴⁰ National Institute of Open Schooling, *Military History of India*, ch. 16: "Internal Disturbances and Security" (NIOS, n.d.), https://nios.ac.in/media/documents/military_history_375/Book-2/Chapter-16.pdf.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Armed Forces (Jammu and Kashmir) Special Powers Act, 1990*, No. 21 of 1990 (India) (enacted Sept. 10, 1990), https://www.mha.gov.in/sites/default/files/The%20Armed%20Forces%20%28Jammu%20and%20Kashmir%29%20Special%20Powers%20Act%2C%201990_0.pdf.

⁴⁴ *Armed Forces (Jammu and Kashmir) Special Powers Act, 1990*, No. 21 of 1990 (India), https://www.mha.gov.in/sites/default/files/The%20Armed%20Forces%20%28Jammu%20and%20Kashmir%29%20Special%20Powers%20Act%2C%201990_0.pdf.

⁴⁵ "AFSPA Removal in Jammu and Kashmir Possible but Not Now, Says Army Chief," *India Today* (Mar. 8, 2025).

⁴⁶ *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

Article 6 of ICCPR guarantees the right to life of every individual and mandates that no one shall be arbitrarily deprived of life. AFSPA's authorization of lethal force against civilians in broad circumstances is viewed as facilitating "arbitrary deprivation of life". The United Nations Human Rights Committee (UNHRC)⁴⁷- which monitors ICCPR implementation- in its 1997 report on India⁴⁸ explicitly expressed concern at the continued use of AFSPA. It found that AFSPA's immunity provisions and overall operation were incompatible with Article 6 and with the obligation to protect life and investigate killings.

The UNHRC⁴⁹ noted that India was effectively allowing a derogation from the right to life without formally availing the emergency derogation provisions of the ICCPR. In 2015, the UN Human Rights Committee reiterated similar concerns in its review of India, citing AFSPA as problematic for right to life and recommending deeper accountability for security forces⁵⁰. Additionally, Article 6(1) of ICCPR obliges states to investigate and prosecute serious violations of the right to life. By shielding personnel via prior sanction, AFSPA was said to foster impunity, which "contributes to a climate of impunity and deprives people of remedies" required by Article 2(3) of the ICCPR (the right to an effective remedy). This language came from UNHRC's 1997⁵¹ observations, effectively stating that AFSPA's bar on prosecution was *prima facie* inconsistent with India's duty under international law to redress human rights abuses.

- **ICCPR Article 9⁵²- Freedom from Arbitrary Detention**

Article 9 of the ICCPR guarantees that no one shall be subject to arbitrary arrest or detention, and that anyone arrested must be informed of charges and brought

⁴⁷ United Nations Human Rights Council- *About the Council*, <https://www.ohchr.org/en/hr-bodies/hrc/about-council>.

⁴⁸ Human Rights Watch, *World Report 1997: India* (1997), <https://www.refworld.org/reference/annualreport/hrw/1997/en/22768>.

⁴⁹ *Id.*

⁵⁰ U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: India*, U.N. Doc., <https://www.worldcourts.com/hrc/eng/2015.htm>.

⁵¹ Human Rights Watch, *World Report 1997: India* (1997), <https://www.refworld.org/reference/annualreport/hrw/1997/en/22768>.

⁵² *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

promptly before a judge⁵³. AFSPA's regime- Section 4(c) and 5⁵⁴- clearly conflicts with this. The law permits arrests on suspicion without warrant and does not ensure prompt judicial oversight (using the term "least possible delay" instead of a fixed of a fixed timeline). India has a reservation to Article 9 of the ICCPR⁵⁵, which it often invokes to justify AFSPA. However, international experts and bodies have criticized this stance. The UN Human Rights Council⁵⁶ and various UN Special Rapporteurs, on extrajudicial executions, human rights defenders and violence against women, have repeatedly urged India to repeal or amend AFSPA because it violates Article 9 safeguards. As the JURIST commentary⁵⁷ notes, Sections 4 and 5 of AFSPA directly contravene Article 9 by allowing arbitrary detentions and failing to bring detainees promptly before a judicial authority.

- **ICCPR Article 7⁵⁸- Prohibition of Torture and Cruel Treatment**

Although India has not ratified the Convention Against Torture (CAT)⁵⁹ as of 2025, it is still bound by ICCPR Article 7 which forbids torture or cruel, inhuman or degrading treatment⁶⁰. Reports from AFSPA- affected areas abound with allegations of torture during interrogations and custodial abuse by security forces, The lack of accountability under AFSPA's sanction regime means victims of torture have little recourse which violates the right to an effective remedy. The UNHRC in 1997⁶¹ explicitly mentioned the failure to investigate and prosecute torture as a breach of India's obligations, linking it to AFSPA's impunity clauses. Moreover, international

⁵³ *Id.*

⁵⁴ *Armed Forces (Special Powers) Act, 1958*, No. 28 of 1958 (India), https://www.mha.gov.in/sites/default/files/armed_forces_special_powers_act1958.pdf.

⁵⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>.

⁵⁶ UNHRC Briefed on AFSPA, Manipur Crisis," *The Sangai Express* (Imphal, July 17, 2024), <https://www.thesangaiexpress.com/Encyc/2024/7/17/By-Our-Staff-ReporterIMPHAL-Jul-16-Human-rights-activist-Babloo-Loitongbam-has-briefed-the-United-Nations.html>.

⁵⁷ Kosha Doshi & Bandana Saikia, "The Case of Nagaland: Addressing Controversial Provisions of the Armed Forces Act in India," *JURIST- Commentary* (Feb. 4, 2022), <https://www.jurist.org/commentary/2022/02/doshi-saikia-armed-forces-act-nagaland-india/>.

⁵⁸ *International Covenant on Economic, Social and Cultural Rights*, 1966, 993 U.N.T.S. 3, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

⁵⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, 1465 U.N.T.S. 85, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>.

⁶⁰ *International Covenant on Economic, Social and Cultural Rights*, 1966, 993 U.N.T.S. 3, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

⁶¹ Human Rights Watch, *World Report 1997: India* (1997), <https://www.refworld.org/reference/annualreport/hrw/1997/en/22768>.

human rights NGOs have documented patterns of torture in counter-insurgency operations, arguing that AFSPA facilitates a climate where torture can occur unchecked⁶².

- **Compliance with International Humanitarian Law (IHL)⁶³**

India insists that situations in AFSPA regions are internal law-and-order issues, not armed conflicts, so it doesn't apply international humanitarian law- the Geneva Conventions⁶⁴- domestically. Nevertheless, even under IHL, non-combatant immunity and proportional use of force are key principles⁶⁵. The fact that AFSPA empowers lethal force even in policing scenarios has drawn criticism from the International Committee of the Red Cross⁶⁶ and others for blurring lines between combatants and civilians. Indeed, UN Basic Principles on the USE of Force and Firearms by Law Enforcement (1990), though non-binding, set out that law enforcement officials should use firearms only as a last resort and in proportion to the threat, and intentional lethal use is justified only to protect life⁶⁷. AFSPA's broad wording regarding allowing shooting to enforce prohibitory order, does not fully comport with these principles.

Article 51(c) of the Indian Constitution directs the state to respect international law and treaty obligations⁶⁸.

Recommendations

If a state or a region of that state demands a removal of AFSPA, the police of that particular

⁶² Dr. Kamei Aphun, "Understanding AFSPA and Its Implications," 28 *IOSR Journal of Humanities and Social Science* 101-03 (Dec. 2023), <https://www.iosrjournals.org/iosr-jhss/papers/Vol.28-Issue12/Ser-1/O281201101103.pdf>.

⁶³ United Nations, *Basics Principles on the Use of Force and Firearms by Laws Enforcement Officials* (adopted Sept. 7, 1990), <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc-002-0703.pdf>.

⁶⁴ International Committee of the Red Cross, *What is International Humanitarian Law?* (Geneva, 2024), <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/publications/icrc-002-0173.pdf>.

⁶⁵ International Committee of the Red Cross, "Fundamental Principles of IHL," ICRC Casebook (Glossary), https://casebook.icrc.org/a_to_z/glossary/fundamental-principles-ihl.

⁶⁶ International Committee of the Red Cross (ICRC) <https://www.icrc.org/en> (accessed Apr. 14, 2025).

⁶⁷ Christof Heyns (U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to India*, U.N. Doc., https://idsn.org/wp-content/uploads/2015/02/SR_executions1.pdf#:~:text=The%20Special%20Rapporteur%20on%20extrajudicial%2C%20summary%20or%20arbitrary,protection%20of%20the%20right%20to%20life%20in%20India.

⁶⁸ *The Indian Constitution*.

region have to be sufficiently capable to handle the transition⁶⁹. Therefore, instead of suggesting a complete removal of AFSPA, this study seeks to propose certain recommendations to renew the provisions of AFSPA in order to ensure national security along with the fundamental rights and civil liberties of the people.

1. Clear and objective definition for “disturbed area”.

Amend AFSPA and define what a “disturbed area” is meant by. Lay down precise criteria as to what would fall under one. The criteria may include the intensity of violence, failure of civilian proceedings, presence of armed groups aiming to

2. Include sunset clauses and periodic review.

There should be a fixed time period, after which, the title of “disturbed area” would end, unless renewed with proper justification.

3. Enhance state government and civil oversight.

Involve the state government of the state or the region of the state where AFSPA is being implemented in decisions related to its enactment and execution. Cooperative Federalism could be practiced.

4. Independent grievance redressal mechanism.

Perhaps, establish a body under the Human Rights Commission of that state where AFSPA has been implemented, aimed at addressing the misuse of AFSPA.

5. Ensure accountability by amending section 6.

As the Verma Committee suggested⁷⁰, entirely remove heinous offences such as rape, sexual assault and torture from section 6 of this Act. These could not possibly fall under the ambit of national security. No protection shall be ensured to the Armed Forces if they commit one such offence under the pretext of the exercise of their official duties.

⁶⁹ “AFSPA Removal in Jammu and Kashmir Possible but Not Now, Says Army Chief,” *India Today* (Mar. 8, 2025).

⁷⁰ “Justice Verma Panel Suggests Amendment to AFSPA,” *The Times of India* (Jan. 24, 2013), <https://timesofindia.indiatimes.com/india/justice-verma-panel-suggests-amendments-to-afspa/articleshow/18157655.cms>.

Moreover, section 6 should be amended further to provide for some sort of justification for the killings on hands of the Armed Forces.

6. Involvement of local institutions.

Implementing measures like requiring a local magistrate to accompany the security forces during the operations under AFSPA. Over time, ensure that the Armed Forces play a supporting role while the Police play the core role.

7. Amendment of section 5 of the Act to define “delay”.

There should be a specific time limit for the Armed Forces to hand over the arrested person, under AFSPA, to the Police. This would avoid the arbitrary control of the Armed Forces and ensure civil authority’s involvement almost immediately.

Conclusion

The Armed Forces Special Powers Act (AFSPA)⁷¹, originally conceived as a temporary measure to curb insurgency and maintain national integrity, has evolved into a deeply contentious law that raises grave constitutional and humanitarian concerns. While its intent, to maintain internal security, is not disputed, the manner and extent of powers it confers on the Armed Forces starkly contradict the core values enshrined in the Indian Constitution, particularly the rights guaranteed under Articles 14, 19, 21, and 22⁷². Through detailed doctrinal analysis and case studies, this paper has demonstrated that AFSPA’s provisions not only undermine democratic accountability but also facilitate a culture of impunity and abuse in the regions it governs.

Further, India’s commitment to international human rights law, including the International Covenant on Civil and Political Rights (ICCPR)⁷³, is compromised by the broad, unchecked powers under AFSPA, especially those related to the right to life, protection from arbitrary arrest, and the prohibition of torture.

⁷¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, 1465 U.N.T.S. 85, https://www.mha.gov.in/sites/default/files/armed_forces_special_powers_act1958.pdf.

⁷² *International Covenant on Economic, Social and Cultural Rights*, 1966, 993, U.N.T.S. 3, <https://cdnbbsr.s3.waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2024/07/20240716890312078.pdf>.

⁷³ *Human Rights Watch, World Report 1997: India* (1997), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

The paper does not seek to deny the complexity of India's security challenges, particularly in insurgency-prone regions. However, a balance must be struck between national security and the fundamental rights of the people. Clearly defining terms like "disturbed areas", incorporating sunset clauses, enhancing civil oversight, and ensuring strict accountability for human rights violations are not just legal necessities, but are moral imperatives in a democratic republic.

Ultimately, AFSPA must transition from being a symbol of fear and authoritarianism to a framework grounded in constitutional values, rule of law, and human dignity. Only then can India truly uphold its democratic ethos while addressing the genuine threats to its unity and sovereignty.