CHAPTER III

LEGAL AND CONSTITUTIONAL ANALYSIS OF SECTION 4 (a) OF AFSPA

3.1 Rule of Law and Indian Constitution

Dicey's 'rule of law' as a doctrine proved influential in nineteenth century and is respected almost in all the constitution and norms in the world. The 'rule of law' doctrine has been embraced across the political spectrum: on the right, Friedrich Hayek placed it at the heart of development policy; on the left, the Marxist historian E.P. Thompson called it an 'unqualified human good'. Rule of law permeates the entire fabric of Indian Constitution and indeed forms one of its basic features; rule of law excludes arbitrariness or unreasonableness. Whenever there is arbitrariness or unreasonableness, there is denial of rule of law. Even law can promote arbitrariness.

Law and rule are two different concepts. As Justice Khanna emphasized in his celebrated descending opinion in the Habeas Corpus case, 'a state of negation of rule of law would not cease to be such a state of the fact that such a state of negation of rule of law has been brought about by statute.' A necessary element of rule of law is that law must not be arbitrary or irrational. It is therefore essential that a constitution has effective provisions to curb arbitrariness of the executive and the legislature. One of the significant ways in which constitutionalism can be promoted in a country is to have entrenched, guaranteed and justifiable rights and liberties of the people.
According to A.V Dicey, the rule of law in England involved the following institutional arrangements: a) that no person is punishable except for a breach of law established in the ordinary manner before the ordinary courts of the land; this is in contrast to arbitrary power and excludes wide discretionary authority; b) that no man is above the law; that every person, whatever be his rank and condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals, or equality before the law and this excludes exemptions of officials or others from a duty to obey the law which governs citizens; c) that general principles of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

‘Rule of law’ is enshrined in Indian Constitution. In order to avoid arbitrariness Indian Constitution has detail fundamental rights that enumerates basic inalienable rights of not only of the citizens but also includes any person. Indian constitution has guaranteed basic inalienable rights under the part III of the constitution. Article 21 stipulates that ‘life and personal liberty cannot be deprived except under a ‘procedure established by law’. The expression ‘life’ and ‘personal liberty’ in article 21 have been given wide interpretation by the Supreme Court of the India. Supreme Court in Kubic Darusz vs. Union if India, held that “since ‘life’ is also recognized as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to article21 of the Constitution. The meaning of the word ‘life’ cannot be narrowed down”.

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It has been discussed in Chapter I that the expression ‘life or personal liberty’ under Article 21 of the Constitution of India includes the right to live with human dignity. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution of India. In this context, reference may be made to the decision of the Apex Court in D.K. Basu vs. State of West Bengal (DK Basu onwards). The DK Basu decision of the Supreme Court is the only decision that addresses the issue of death in custody/disappearance from custody in general terms, as something that pervades law enforcement in India. It laid down binding and enforceable guidelines to prevent violation of the fundamental rights of the citizens of India by the law enforcement agencies. The Supreme Court declared that a failure to comply with the guidelines laid down by it would tantamount to contempt of court and, would be punishable as such.

Further, it is briefly discussed in Chapter I that the most important phrase in article 21 is ‘procedure established by law’. Thus the right to life and personal liberty is one of the supreme rights guaranteed in the constitution and it cannot be taken away without ‘a procedure established by law’. The conditions of a ‘procedure established by law’ is that the guarantee of a fair, just and reasonable procedure. It is not an arbitrary one. In fact, it means ‘due process’ of law must be observed while depriving someone’s right to life and personal liberty. AFSPA is a procedure established by law and its validity has been upheld by the Supreme Court of India in NPMHR 1997.

On the contrary, observing on the implementation of AFSPA, Jeevan Reddy Committee observed, ‘[the] Act, for whatever reason, has become a symbol
of oppression, an object of hate and an instrument of discrimination and highhandedness. This observation by the Jeevan Reddy Committee came after wide consultations with the government officials, member of armed forces, civil society members and individuals. These observations provide a scope to examine if AFSPA fits to be called a fair, just and reasonable ‘procedure established by law’ and what are the contributory factors that made it a ‘symbol of oppression?’.

This aspect makes it important to understand the provisions of AFSPA related to the special powers and their interpretations by the judiciary and its follow up.

3.2 Competency of parliament to enact AFSPA

First and foremost question is that whether Indian Parliament is competent to enact a law like AFSPA? Several arguments were put forward in this regard by civil society bodies arguing that AFSPA is a colourable legislation. This aspect has been answered in NPMHR\textsuperscript{12} in 1997. In NPMHR, the Supreme Court observed that AFSPA is not \textit{ultra vires} as is ‘an enactment with respect to maintenance of public order which is a field assigned to the State legislature under entry 1 of the State List’. The court also observed against the contention that the Central Act is, in pith and substance, a law relating to 'armed rebellion' and that the subject of armed rebellion falls within the ambit of the emergency powers contained in Part XVIII (Articles 352 to 360) of the Constitution and that in exercise of its legislative power under Entry 2A of the Union List Parliament has no power to legislative on the subject of armed rebellion.

The salient features of the NPMHR 1997 with regards to the competency of the parliament in passing the legislation are:
Parliament was competent to enact AFSPA in exercise of the legislative power conferred on it under Entry 2 of List I (pertaining to naval, military and air forces and also any other armed forces of the Union) and Article 248 of the Constitution read with Entry 97 of List I (pertaining to residuary powers of legislation). After the insertion of Entry 2A in List I by the Forty-Second Amendment to the Constitution, the legislative power flows from Entry 2A of List I (pertaining to deployment of any armed force of the Union or any other force subject to the control of the Union in any state in aid of the civil power etc).

- It is not a law in respect of maintenance of public order falling under Entry 1 of List II.

- While AFSPA is not a law under Entry 1 of List II, the expression 'in aid of the civil power' in Entry 2A of List I and Entry 1 of List II, implies that deployment of the armed forces of the Union shall be for the purpose of enabling the civil power in the state to deal with the situation affecting maintenance of public order which has necessitated the deployment of the armed forces in the state. It does not displace the civil power of the state by the armed forces of the Union.

- AFSPA is not a colourable legislation or a fraud on the Constitution. It is not a measure intended to achieve the same result as contemplated by a proclamation of emergency under Article 352 or a proclamation under Article 356 of the Constitution.

It has also been urged that Article 352 incorporates certain safeguards which are sought to be by passed by the Central Act [AFSPA]. Counsel Sibal has also adopted the same line and has urged that the Central Act was enacted to deal
with a disturbed or dangerous condition which is no less than armed rebellion and the parliament is seeking to by-pass article 352 or article 356 of the Constitution and the Central Act is, therefore, unconstitutional.

The submission of Dhavan is that the Central Act deals with the situation and the circumstances which are broadly similar to the circumstances of 'internal disturbance' and armed rebellion' in which a proclamation under article 352 would be made for a part of the territory of India and that such a proclamation under article 352 is the only and exclusive method to deal with such circumstances and the parliament is disempowered from enacting legislation dealing with 'armed rebellion', terrorism or insurgency in any part of India.

It has also been submitted that since the circumstances covered by the Central Act and article 352 are similar, the Central Act is a colourable legislation and a fraud on the Constitution since it does not incorporate within it constraints similar to those contained in article 352 which have the effect of limiting its application within stringent limits and enabling a responsible and effective monitoring of its use and abuse.

In the 5th report of the second Administrative Reforms Commission, defined that 'public order' implies a harmonious state of society in which all events conform to the established law and is synonymous with peace, tranquility and the rule of law. 'Public disorder' has several connotations depending upon the nature of the State. In well developed societies, governed by the rule of law, even relatively minor infractions of law may be regarded as a public order problem. In most liberal democracies only serious disturbances which affect the even tenor of life would constitute a breakdown of public order. In autocratic societies,
however, even orderly and peaceful protests and demonstrations against the State are often treated as breaches of public order\textsuperscript{13}. Public order implies the absence of disturbance, riot, revolt, unruliness and lawlessness\textsuperscript{14}.

In such a situation, article 355 of Indian constitution has been cited often as a defense for enactment of AFSPA\textsuperscript{15}. In NPMHR 1997, it was argued that the Union Government is under an obligation to take steps to deal with a situation of internal disturbance in a state and the provisions of the Central Act [AFSPA] have been enacted to enable the Central Government to discharge the obligation imposed on it under Article 355 of the Constitution and to prevent the situation arising due to internal disturbance assuming such seriousness as to require invoking the drastic provisions of Article 356 of the Constitution.\textsuperscript{16}

Jeevan Reddy Committee, too, observed that article 355 of the Constitution places an obligation on the Union of India to protect every state against 'external aggression and internal disturbance'. It also noted that prior to the Constitution (44th Amendment) Act the expressions 'external aggression' and 'internal disturbance' were common to both Articles 352 and 355. With the substitution of 'internal disturbance' by the expression 'armed rebellion' by the said Amendment, the power under Article 352 may not be available with the Union in case of an 'internal disturbance'.

Jeevan Reddy Committee observed, 'if the Government of a state was not carried on in accordance with the provisions of the Constitution, the President could take action under Article 356 and assume to himself the powers of the government of that State and exercise other powers mentioned in that Article. However, by Constitution (44th Amendment) Act, the expression 'internal disturbance'...
disturbance' in Article 352 (1) was substituted by the expression 'armed rebellion'. With this the connection between Articles 355 and 352 got snapped partially'.

This Committee further observed that it is the duty and power of the Central Government under Article 355 comes into play only in case of 'internal disturbance' i.e., 'domestic chaos' or 'internal commotion'. The said power is not available in each and every problem of public order. 'Internal disturbance' means failure of public order on a large scale and in a sustained manner, for whatever reason it may be, affecting the entire state or part of the state. The expression 'internal disturbance' itself is expressive of the level of disturbance, chaos and commotion it contemplates and article 355 empowers the Union to act on its own i.e., without a request from the State Government, to protect the State from internal disturbance17.

Opinion expressed by the National Commission to Review the Working of the Constitution in 2000 on article 355 is as follows: 'the constitution (under article 355) does not expressly provide as to how the duty of the Union to protect a State against external aggression and internal disturbance is to be carried out; obviously, it is left to the judgment of the Union how to meet any such situation, as and when it arises, but it does provide, in article 356, the manner in which it has to perform its duty to ensure that the government of every State is carried on in accordance with the provisions of the Constitution.

However, the Administrative Reforms Commission under chapter centre-state relationship examined articles 355 and 352 and opined that it does not confer on the Union Government power for deployment of armed forces in constituent except at the request or with concurrence of the state government18.
A discussion on declaration of ‘disturbed area’ is relevant here.

3.3 Declaration of ‘disturbed area’

The second next area of discussion is that of ‘disturbed area’. AFSPA becomes enforceable only when an area is declared as ‘disturbed area’ as per section 3 of the same Act. Thus an understanding of what constitutes ‘disturbed area’ is significant here.

AFSPA as enacted in 1958 allowed only Governors of the States and the Administrators of the Union Territories to declare an area as ‘disturbed’. However the amendment of 1972 enabled the Central Government, too, make such a declaration. This is because ‘keeping in view the duty of the Union under Article 355 of the Constitution, inter alia, to protect every state against internal disturbance, it is considered desirable that the Central Government should also have power to declare areas as ’disturbed’, to enable its armed forces to exercise the special powers.’\textsuperscript{19}

In Naga People’s Movement of Human Rights vs. Union of India\textsuperscript{20}, it was held that there is no requirement that it [Central Government] shall consult the State Government before making the declaration. The Court held a declaration under section 3 has to be for a limited duration subject to periodic review before the expiry of six months and the conferment of power to make a declaration under section 3 of AFSPA on the Central Government is not violative of the federal scheme as envisaged by the Constitution. Further, the Court held, ‘a similar conferment on the Governor of the state cannot be regarded as delegation of the power of the Central Government’. ‘Although a declaration under section 3 can be made by the Central Government \textit{suo motu} without consulting the concerned State
Government, it is desirable that the State Government should be consulted by the Central Government while making the declaration', held the court.

Section 2(b) of the Act says, ‘disturbed area’ means an area which is for the time being declared by notification under section 3 to be a disturbed area’. Section 3 of the Act defines when an area can be declared as ‘disturbed’. This Section, however, does not specifically say either that the Governor may, after issuing a declaration, request the Union government to depute the armed forces nor does it say expressly that the Central Government may, on issuance of a notification under the section, depute armed forces to the state to act in aid of the civil power as probably, these steps were thought to be implicit in the situation21.

The conditions of declaration of disturbed area depend on the ‘opinion’ of the Governor of that State or the administrator of that Union Territory or the Central Government. In Indrajit Barua vs. State of Assam and another22, it was observed by the Delhi High Court that power conferred on Governor of Assam to declare any area as ‘disturbed’ is not arbitrary on ground of absence of legislative guidelines. ‘Disturbed area’ is not defined in either of the two statutes of AFSPA and the Assam Disturbed Areas Act, 1955. According to the Court interpretation of a disturbed area has to be adjudged according to location, situation and circumstances of a particular case as the term implies ‘only such area would be disturbed area where there is absence of peace and tranquility’. The Court further observed that the term ‘disturbed area’ was well understood by the legislatures as well as the people of India.

It is ruled that the Governor of the state cannot be made answerable before judiciary for making a declaration of ‘disturbed area’ under section 3 of AFSPA.
The validity of Governor’s declaration of ‘disturbed area’ was challenged before the GHC. In Naga People’s Movement of Human Rights vs. Union of India, declaration of disturbed area under section 3 of AFSPA of Senapati Dist of Manipur was challenged before the GHC. Governor of Manipur was made a party in the petition. It was held by the GHC that Governor is immune from legal proceedings by virtue of article 361 of constitution and Governor is not a necessary party for the above petition.

A legal point here to be noted is that Governor of a state is a responsible position and falls under the category like that of constitutional head like president of India. Governor’s oath of office in embedded in the constitution under article 159 like that of President of India under article 60 of the constitution while other legislators take oath under 3rd schedule. Hence, governor should be made answerable before the legislative assembly for declaring an area as ‘disturbed’ like that of the president’s obligation before the parliament after an emergency declaration.

Assam was declared as ‘Disturbed area’ under the Disturbed Areas Act 1955 when current Nagaland was a part of Assam in 1955. Nagaland became a separate state in 1963. Then the entire state of Assam was declared a ‘disturbed area’ in November, 1990 under AFSPA and the Disturbed Areas Act on the pretext that the use of armed forces in aid of civil power was necessary to counter the prevailing dangerous situation arising out of the ULFA sponsored militancy. Till today Assam remains ‘disturbed’. Further on September 17, 2001, the areas falling within 20 KM of wide belt in the State of Arunachal Pradesh, Nagaland and Meghalaya along the border of the State of Assam was also declared as
'disturbed areas'. Whole state of Manipur was declared as 'disturbed' in 1980. Later after the agitation in July 2004, it was partially lifted from Imphal city. Nagaland remained disturbed area till today while 38 police stations of Tripura and two districts of Arunachal Pradesh (Tirap and Changlang) have been declared 'disturbed' at present.

Role of the armed forces deployed are to act in 'aid to civil administration' as per section 3 of AFSPA. This deployment is for the purpose best observed by Justice Sangma in NPMHR vs. Union of India, that, 'the role of the security forces in a disturbed area is to assist the civil administration so as to give confidence to the innocent and law abiding people'.

The role of armed forces was further clarified in Nongshitombi Devi vs. Rishang Keishing when it was held that the role of armed forces when they are called 'in aid of civil power' under the provisions of the AFSPA, civil authorities and the armed forces to work as hand in glove. It was further noted that the armed forces must act in co-operation with the district administration and not as an independent body.

This view was later reconfirmed in Luithukia vs. Rishang Keishing. In this case, the GHC again clarified that the armed forces must act in cooperation with the district administration and not as an independent body. On the role of the district administration, the court observed in the same judgment, that after the armed forces are deployed in the disturbed area, the civil authorities doesn't cease and for the operational part of the activity, the armed forces must be given free hand but in other matters they must take the civil authorities in confidence and work in harmony.
The operative power of the army is confined to section 4 and 5 of AFSPA. ‘The army authority is only to exercise his power and perform his duties provided under sections 4 and 5 of the Act only and no more’ as was decided in Peoples Union for Human Rights vs. Union of India and others\textsuperscript{29} by the GHC. The Court also interpreted that ‘in aid of’ has been used to mean to supplement or support the civil power i.e, civil power is to be supplemented or support the civil power by the armed forces and armed forces are employed or deployed for limited purpose as provided under section 4 and 5 of the Act.

However, the declaration of an area as disturbed cannot continue forever. As pointed out earlier, periodical review of the declaration of ‘disturbed area’ under section 3 of the Act is compulsory before the expiry of six months.

Nevertheless, the declaration of ‘disturbed area’ sounds similar to the declaration of ‘emergency’ at the state level although Supreme Court held that ‘it is not a measure intended to achieve the same result as contemplated by a proclamation of emergency under article 352 or a proclamation under article 356 of the constitution\textsuperscript{30}’. In the NPMHR 1997 case, it was argued that AFSPA was introduced to bypass all such safeguards that the emergency provisions in the constitution from articles 352 to 360.

Under the constitution, the Union Government commands ‘emergency powers’ under article 352 and it can exercise those powers to declare any part of the territory of India facing grave emergency, also under armed rebellion, to be under Emergency. Exercise of this power requires the government to obtain a parliamentary endorsement of the proclamation within a month and the exercise of the powers can only be for a period of six months.
However in practice, it has been noticed that it is the Central Government plays a dominant role in decision making over the declaration of disturbed area in a state. It was reported that in 1988, the Central Government declared disturbed areas in Tripura without the consent of the then State Government\textsuperscript{31}. The State of Nagaland was declared ‘disturbed area’ for a further period from October 20, 2010 to June 30, 2011 under the AFSPA despite the fact the Nagaland state assembly passed resolution four times against the extension of disturbed area status in the state\textsuperscript{32}. Manipur government decided in consultation with the Central Government to extend the AFSPA 1958 in the state for one more year from December 1, 2010 to November 30, 2011\textsuperscript{33}.

Already pointed out in Chapter I, that the international legal standard such as laid down in article 4 of ICCPR allows declaration of emergency ‘in times of emergency which threatens the life of the nation’, that is has to follow an official proclamation that measures taken have to be ‘strictly required by the exigencies of the situation’, and that certain fundamental rights including right to life and the right not to be tortured can never be suspended. The Human Rights Committee in its General comments on article 4 of the Covenant took the view that measures taken under article 4 are of an exceptional and temporary nature and may last as long as the life of the nation concerned is protection of human rights becomes all the more important, particularly those rights from which no derogations can be made.’

Government of India is a party to International Covenant on Civil and Political Rights (ICCPR), 1977 and article 4 of it puts a mandate to the state parties like India that during public emergencies, when the life of the nation is
threatened, a state may suspend some of the rights specified in the Covenant. But right to life is 'non-derogable' and a state cannot suspend it at anytime not even during national emergency in India.

Special Rapporteur on State of Emergency, Mr. Leandro Despouy noted that 'when speaking about perpetual states of emergency, that this 'anomaly essentially consists in the routine introduction of a state of emergency followed by its straightforward perpetuation or its repeated renewal or extension' and such anomalies are particularly serious because they disregard the principle of time limitation which establishes the temporary nature of states of emergency\textsuperscript{34}. It was also noted that 'normally states of emergency is accompanied by disappearances, summary executions, detentions without due process, torture and other cruel, degrading and inhumane practices'.\textsuperscript{35} Observation of Special Rapporteur on State of Emergency fits the situation of North East India which continues to be 'disturbed' from 1958 till today.

3.4 Section 4(a) of AFSPA

As discussed earlier, section 4(a) of Armed Forces (Special Powers) Act, 1958, is a provision that enabled the armed forces with special powers of using force to the extent of causing death in a 'disturbed area' for maintenance of law and order of the state in 'aid to civil administration'\textsuperscript{36}. As per section 2 of AFSPA, 'armed forces' capable of exercising power under section 4(a) would mean the military forces and the air forces operating as land forces, and includes other armed forces of the Union so operating and refers to both armed and paramilitary forces operating in 'disturbed areas', such as the Border Security Force (BSF),
Assam Rifles, Rashtriya Rifles, Sikh Regiment, National Security Guards (NSG), and others. Each of these forces is governed by their own Acts.

Interpretation of section 4 (a) by different bodies argue that the special power to use force to the extent of causing death is not absolute or unguided. Certain regulations definitely apply. Jeevan Reddy committee observed 'the power conferred by clause (a) [section 4(a) of AFSPA] can be better appreciated if its essential ingredients are separately set out. ‘(i) where there is in force, in the disturbed area, a law or an order prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire arms, ammunition or explosive substances; (ii) any officer of the armed forces of the above named rank, may, if he is of the opinion that it is necessary so to do for the maintenance of public order, after giving such due warnings as he may consider necessary, fire upon or otherwise use force even to the causing of death of such person’.

The Committee further observed that it is thus clear that according to clause (a) of Section 4, the power to fire upon the persons is not unregulated or absolute. Such a power comes into play only where the ingredients mentioned under (i) and (ii) are satisfied and furthermore where such officer of the armed forces is of the opinion that it is necessary to fire upon such person(s) or to otherwise use force against such person(s) for the purpose of maintaining public order. It goes without saying that the 'opinion' must be formed honestly and fairly. Later on in 2007, the Second Administrative Reforms Commission in its Fifth Report on 'Public Order' supported the views expressed by the Jeevan Reddy Committee and recommended the repeal of AFSPA.
Prior to the Jeevan Reddy Committee and Administrative Reform Commission, the Supreme Court in NPMHR 1997 contended that the powers under section 4 and 5 of AFSPA can only be exercised when: (i) a prohibitory order of the nature specified in that clause is in force in the disturbed area; (ii) the officer exercising those powers forms the opinion that it is necessary to take action for maintenance of public order against the person/persons acting in contravention of such prohibitory order; and (iii) a due warning, as the officer considers necessary is given before taking action\(^42\).

The Court further observed that 'the power conferred under clauses 4(a) to (d) of section 4 and 5 of the Central Act [AFSPA] on the officers of the armed forces, including a non-commissioned officer, are not arbitrary and unreasonable and are not violative of the provisions of article 14, 19, 21 of the constitution and while exercising the powers conferred under section 4 (a) of the Central Act [AFSPA], the officer in the armed forces shall use minimal force under a prohibitory order.'

A close reading of the above quote from the judgment established the fact that Supreme Court upheld that section 4(a) as not violative of right to life guaranteed under article 21 of the Indian constitution, however, added clear guidelines to be followed before, during and after acting under section 4(a) of AFSPA. Para 56 -58 of the judgment codified these guidelines and marked as 'Do's and Don'ts'\(^43\). Section 4(a) is not independent of these 'Do's and Don'ts'. Any violation of the guidelines would amount to arbitrary and extrajudicial execution and arbitrary deprivation of right to life.
The Supreme Court further ruled in the same judgment that 'the instructions in the form of 'Do's and Don'ts' to be treated as binding instructions which are required to be followed by the members of the armed forces exercising powers under the Central Act [AFSPA] and a serious note should be taken of violation of the instructions and the persons found responsible for such violation should be suitably punished under the Army Act, 1950'.

The Supreme Court of India cautioned in the same judgment that 'the conferment of the power under section 4 of AFSPA by the Central Government in areas to be disturbed areas 'does not, however, result in taking over of the state administration by the Army or by other armed forces of the Union and the Central Act [AFSPA] only provide for cognizance of offences'. Except these, the other functions have to be attended by the State Criminal Justice machinery, viz., the police, the magistrates, the prosecuting agency, the courts, the jails, etc. 'This would show that the powers that have been conferred under section 4 of the Central Act do not enable the armed forces of the Union to supplant or act as substitute for the civil power of the state and the Central Act only enables the armed forces to assist the civil power of the state in dealing with the disturbed conditions affecting the maintenance of public order in the disturbed area', Supreme Court clarified.

A close reading of the section reveals that any officer, even to the lower grade like non-commissioned officer can use force to the extent of causing death of a person if he is or about to act in contravention of any law after due warnings which would depend on the judgment of the executing officer of armed forces. In Indrajit Barua vs. State of Assam, it was held that the width of the power
conferred by sections 4 and 5 of the two Acts do not make the sections suffer from the vice of being arbitrary. The supreme right to life was allowed to be taken away by granting 'power to kill' and 'is not unreasonable on ground of absence of any safeguard', as according to the Court, 'no absolute or unguided power has been conferred as there are sufficient safeguards postulated to ensure proper exercise of power'. It was further held that 'conferment of power on low ranking officials like a havaldar cannot be said to be bad and unjustified. A havaldar is not such a junior official or an irresponsible officer. A havaldar is fairly high and certainly holds very responsible position'.

Judicial pronouncements in different cases on allegation of infringement of human rights while exercising power under AFSPA too univocally interpreted the 'special powers' of armed forces in a narrow meaning. In Nongshitombi Devi vs. Rishang Keishing\textsuperscript{46}, the GHC held that though the armed forces have been given wide powers by the Act, these are to be confined within the narrow limit and in this limit, they do not really supplant the ordinary machinery for maintaining law and order.

In Peoples Union for Human Rights and others vs. Union of India and others\textsuperscript{47}, the court said that "under the provisions of the Act of 1958, the legal points decided by this court in Nongshitombi Devi vs. Rishang Keishing\textsuperscript{48}, Civil Liberties and Human Rights Organization vs. P.L Kukrety, GOC 'M' sector, Assam Rifles and others\textsuperscript{49} be made known to commissioned officers, non-commissioned officers, warrant officers and havilders as in the course of four months the above officers were acting in ignorance of law and that gave rise to numerous complaints in Habeas Corpus and other petitions before this court. The
quality of day to day life of innocent persons was altered. We have witnesses the effects on persons as to how it affected to their detriment”.

In Luithukia vs. Rishang Keishing50, the GHC held that the ‘civil authorities and armed forces have to work as hand in glove and not in suppression of any side’. The court explained that in the constitutional set up there is no provision for a military rule in any part of the territory of India and of course the armed forces must be allowed free hand in so far as dealing with insurgents or terrorists are concerned but then, while dealing with others they have to strike a balance between crushing of violence and crushing of liberty.

In Purnima Baruah vs. Union of India and others51, GHC held that the power of the army authority given by Section 4 of the Act to arrest person implies the authority to detain, but the army authority shall make over the arrested person to the officer in charge of the nearest police station with least possible delay, as provided under section 5. Similar view was upheld in Bacha Bora vs. the State of Assam and Others52, where a person was arrested and the GHC found no satisfactory explanation by the army authority and hence GHC ordered compensation of rupees 5 thousand.

It was decided by the GHC in Peoples Union for Human Rights vs. Union of India and others53, that the army authority can arrest a citizen or individual male or female, without any invitation on the part of the police authority or without reference to the police authority of the state, wherever and whenever the Act is enforced. The High Court explained that the language employed in sections 4© and (d) is plain and unambiguous and capable of one construction only and therefore, it would not be open to the Courts to adopt any other hypothetical
construction on the ground that consequences would be unreasonable, unjust or oppressive. In such a situation, section 4 (C) and (d) do not contemplate invitation on the part of a police authority or reference to a police authority of the state.

Supreme Court has cautioned in several judgments to undertake extreme care while arresting a person without a warrant. It held in the State of Punjab vs. Ajaib Singh\(^54\), that the arrest without warrant requires a greater protection than arrest under warrant. Personal liberty was stated to be a fundamental right in the case of Kharak Singh vs. State of U.P\(^55\). In Sishbud vs. State of Delhi\(^56\), it was held that 'five principles are held to be part of a criminal law – inquest, investigation, arrest, search of places, trial followed by formation opinion'. The provisions of AFSPA under section 4 doesn’t reflect adherence to these requirements.

Interrogation of the arrested person is completely prohibited in the custody of the armed forces. In Nongshitombi Devi vs. Rishang Keishing\(^57\), it was held that the person arrested by the army officer cannot be interrogated. Army officer do not have the power to investigate and interrogate as to the involvement of the arrested person in any offence. In Civil Liberties and Human Rights Organisation vs. P.L Kukrety\(^58\), it was held that if persons are detained in violation of the Act [AFSPA], the army authority is liable to pay compensation.

National Human Rights Commission observed in case no. 12235/24/98-99 'the law in India recognizes the right of a citizen to private defense and in the course of such private defense even the causing of death can be justifiable in some circumstances'\(^59\). The same right of self-defense is available to a policeman [read law enforcement officers]. In addition, the use of force if it results in causing of
death in the course of an attempt to arrest a person accused of an offence punishable with death or imprisonment for life, can also be justifiable under law. However, if a death is caused in an encounter that cannot be justified on the ground of a legitimate exercise of the right to private defense, or in proper exercise of the power of arrest under section 46 of Criminal Procedure Code, the police officer causing the death would be guilty of the offence of culpable homicide. Whether the causing of death in the encounter in a particular case is justified will therefore depend upon the facts established after a proper investigation'.

Section 4(a) makes no reference to use lethal power in self-defense. Its lacks safeguard and hence is not restricted or regulated in legal sense. This special power is often used arbitrarily to commit extrajudicial execution, disappearances, torture, rape, arbitrary detention or any other crimes as defined under IPC.

In 2009, media reported that Home Ministry drafted the proposed amendments to AFSPA and sought the opinion of Defence and Law Ministries and is now lying before the Cabinet Committee on Security for further discussion. Later it was reported that the Centre is all set to introduce Armed Forces (Special Powers) Amendment Act 2009 in the winter session of the Parliament. Of the 62 new Bills proposed to be introduced during the current session the AFSPA 2009 is listed in serial number 4. The proposed amendment would drop words like 'even to the causing of death' while retaining the language of the rest of the clause, informed media. The deletion of the word 'death' as a consequence of an armed action was aimed at softening the tone and
tenor of the clause to pacify the agitating political parties and human rights organisations.

It was also reported in the same news item that the Home Ministry has argued that provisions in the Criminal Procedure Code (Cr.P.C) including sections 144, 100 and 46 gives enough legitimacy to the Forces to prohibit assembly of more than five persons, shoot in self defense or kill a person resisting arrest and [hence amendment to AFSPA is relevant, emphasis added]. It was also reported that the Home Ministry has proposed that the law be extended in a state for a further six months only after seeking the state’s permission. In short, amendments proposed by Ministry of Home Affairs includes dropping the phrase ‘even to causing of death’ as a permissible consequence of firing, or use of force by the armed forces, providing a grievance redressal mechanism to address complaints on AFSPA abuse, army’s powers to search premises and make arrests without warrants etc be undertaken in presence of a civilian magistrate, search and seizure operations and seizure operations should be vested with the civilian administration.

Defence Ministry has opposed the proposed amendments. A media report pointed out that the Government’s proposal ‘to dilute’ the AFSPA has not found favour with the security forces as they want the Act ‘in totality’ to deal with terrorism and insurgency. The Defence Ministry officials argued that given the background and operational environment, officials said that any dilution in the Act would hamper the functioning of the commanders as the security forces were deployed in ‘extraordinary circumstances’, and with the near-absence of a functioning state administration, the security forces therefore needed
constitutional validity of all the clauses of the Act. The court, at the same time, passed a series of ‘Do's and Don'ts’. The Army has been following these guidelines religiously.

c. The Army has been already following proposed amendments like handing over an army personnel involved in an encounter to the local police and magistrate.

d. Section 7 [section 6 in case of NES] of the AFSPA offers protection to security personnel acting in good faith in their official capacity, and their prosecution is permitted only after sanction of the Central Government.

e. Section 4 gives the Army powers to search premises and make arrests without warrants, to use force even to the extent of causing death, destroy arms and ammunition dumps, fortifications or shelters or hideouts and to stop, search and seize any vehicle. Section 6 stipulates that arrested persons and seized property are to be handed over to the police with least possible delay.

f. Comparing this action with a situation where the army is asked to assist the civil authority during a riot, it is not practical to look for a magistrate during an encounter or to wait for a search warrant to enter a house where the militant is likely to be hiding. Any delay would allow him to get away thereby nullifying the efforts of the army to conduct pro-active actions.

Meanwhile, the practice of extrajudicial executions under AFSPA was challenged before the Supreme Court of India in August 2012 by Manipur based NGO called Extrajudicial Execution Victim and Family Members Association and Human Rights Alert (WP Crl no 129 of 2012). The petitioners prayed for constitution of Special Investigation Team (SIT) to investigate 1528 cases of extrajudicial executions committed in Manipur since 1980. Several hearing took
place before the court. Central Government in one of the affidavits filed before the Supreme Court reaffirmed that the government is considering amendments over section 4(a) of AFSPA. Administrative liquidation was cited as a defense for the number of killings in Manipur to which the Supreme Court ruled that 'custodial death, fake encounters cannot be justified as administrative liquidation'. The Court held that 'it was not open to the State to take shelter behind the number of policemen and other security personnel killed to justify illegal custodial deaths and fake encounters'.

The Court observed, 'for this court, the life of a policeman or a member of the security forces is no less precious and valuable than any other person. The lives lost in the fight against terrorism and insurgency is indeed the most grievous loss'. The Bench said 'in a situation where the court finds a person's rights, especially the right to life, under assault by the State or the agencies of the State, it must step in and stand with the individual and prohibit the State or its agencies from violating the rights guaranteed under the Constitution'. The Court ordered constitution of the three member team to investigate into six cases of extrajudicial execution to begin with and the rest would be considered later. The court has also directed the commission to examine the functioning of Manipur Police and security forces.

3.5 Section 4 (b), 4 (c) and 4 (d)

The concept of extrajudicial executions (EJE) as discussed in Chapter I, depicts that such executions take place under different contexts or situations. Field study (presented later) shows that exercise of section 4 (a) is followed by the exercise under other sections like arrest without warrant (section 4c). Sometime
section 5 that prescribes handing over an arrestee to the nearest police station comes into play followed by exercise under section 4. Hence, keeping all these practical situations in mind, it is important for all practical reasons, to understand the relevance and significance of other sections of the Act specially section 4 (b-d), section 5 and section 6 of the Act. Section 6 of the Act will be discussed separately in a separate chapter.

Special powers granted under section 4 (b-d) of the AFSPA are: (b) Power to destroy structures used as hide-outs, training camps or as a place from which attacks are or likely to be launched etc; (c) Power to arrest without warrant and to use force for the purpose; (d) Power to enter and search premises without warrant to make arrest or recovery of hostages, arms and ammunition and stolen property etc.

On the power granted under section 4(b), Jeevan Reddy Committee observed that 4(b) is independent of 4(a). The requirement of a law or an order prohibiting the assembly of five or more persons referred to in clause (a) is not necessary for acting under clause (b). Under this clause, the officer of the armed forces is empowered to destroy any arms dump etc if he is of the opinion that 'it is necessary so to do'. It was further observed that though the clause expressly does not say, it necessarily means, that such a course or action is necessary for effectively discharging their duties.

Section 4 (c) of AFSPA empowers an officer of the armed forces the power to arrest any person without warrant who has committed or who is reasonably suspected to have committed a cognizable offence or to prevent a person who is 'about to commit a cognizable offence'. This power to arrest an
individual without warrant is comparable to the power conferred upon a police officer by section 41(a) of the Code of Criminal Procedure but armed forces are bound to hand over the person arrested to the nearest police station with 'least possible delay'.

In Nongshitombi Devi vs. Rishang Keishing, it was held that 'members of the armed forces cannot arrest each and every person they choose, but can exercise their powers only against whom who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed such crimes or about to commit and after a person is arrested, no necessity of further interrogation to find out his involvement. This is because section 5 requires his immediate handing over to the police with a report of the circumstances occasioning the arrest'.

In one of early accounts of abuse of section 4(c ) of AFSPA is that of Gaibidingpao Kabui vs. Union Territory of Manipur and another where the detention of one Gaibidingpao Kabui and two others was found completely against the law. In this case a writ petition was filed for release of Gaibidingpao Kabui and two others who were arrested on August 12, 1961 near Tameinglong, Manipur by the army and were produced before the magistrate.

On August 24, 1961, Gaibidingpao sent a petition to the Magistrate from jail stating that he is a cultivator and innocent of any offence and is not a Naga hostile. The petition was sent for an offence report against the arrestees from Police. A counter statement was filed for the Government where it was stated that the petitioner and other two persons were arrested by the army under section 4©
of AFSPA. Police couldn’t prove any report of handing over of the arrested persons to the police by the army as per section 5 of AFSPA.

Court ruled that such arrest can be made under Section 4(c) by the Army of a person who has either committed a cognizable offence or against whom a reasonable suspicion existed that he has committed or is about to commit a cognizable offence and as soon as such arrest is made, the Army have to make over the arrested person, under Section 5 of the said Act, to the O/C of the nearest police station together with a report of the circumstances occasioned in the arrest. These provisions were not proved by the police. Hence the court ordered that the detention of the petitioner and the other two persons under arrest was totally against the law and they should be released from jail.

In Niloy Dutta vs. District Magistrate and others\(^7\), petition was filed when a newspaper Natun Dainik reported on January 24, 1991 the detention of two suspected ULFA members on January 22, 1991. The question arose for consideration whether women are protected from interrogation at the police station houses. Clause 2 of article 20 and clause 1 and 2 of article 22 of the constitution of India and section 160 Cr.P.C proviso 1 provided that no male person under the age of fifteen or woman shall be required to attend any place other than the place in which such male person or women resides’. The issue here is whether these provisions are applied in the context of AFSPA. It was held that whenever army officials have to deal with women under AFSPA as offenders before arrest or as witnesses or ‘otherwise’ when women are to be interrogated, no women is expected to be taken to the army camp for interrogation. Field study show that this provision was not complied with in many cases.
The Supreme Court ruled in NPMHR 1997 that 'section 4 of the Central Act can be exercised by the personnel of the armed forces only with the cooperation of the authorities of the State Government concerned and in this regard the safeguards in the form of a list of 'Dos & Don’ts' for security forces are legally binding. Hence violation of the list will constitute violation of AFSPA. Following the 1997 judgment, the National Human Rights Commission (NHRC) recommended that 'the concerned Ministries issue carefully formulated guidelines to all concerned personnel of the armed forces and para-military forces, based on the orders of the Supreme Court'.

In NPMHR 1997, the Supreme Court also held that the property or the arms, ammunition etc., seized during the course of search conducted under Section 4(d) of the Central Act must be handed over to officer in charge of the nearest police station together with a report of the circumstances occasioning such search and seizure. The provisions of Cr.P.C. governing search and seizure have to be followed during the course of search and seizure conducted in exercise of the power conferred under Section 4(d) of the Central Act.

It may be relevant to quote here the international law like the Body of Principles for the Protection of Persons under any form of Detention or Imprisonment (adopted by the UN General Assembly in resolution 43/173 of 9 December 1988) that provides 'a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority'. ICCPR also provided safe guard against detention without warrant. Article 9 of ICCPR specifies in para 2 that anyone who is arrested shall be
informed, at the time of arrest, of the reasons for his arrest and shall be promptly of any charges against him'.

In its application, the AFSPA does lead to arbitrary detention. If AFSPA is defended on the grounds that it is a preventive detention law, it would still violate Article 22 of the Constitution. Preventive detention laws can allow the detention of the arrested person for up to three months. Under 22(4) any detention longer than three months must be reviewed by an Advisory Board. Moreover, under 22(5) the person must be told the grounds of their arrest. Under section 4(c) of the AFSPA a person can be arrested by the armed forces without a warrant and on the mere suspicion that they are going to commit an offence. The armed forces are not obliged to communicate the grounds for the arrest. There is also no advisory board in place to review arrests made under the AFSPA. Since the arrest is without a warrant it violates the preventive detention sections of article 22.

3.6 Section 5 and 'least possible delay'

Section 5 of AFSPA puts an obligation to the armed forces to hand over an arrested person to the nearest police station 'with least possible delay together with a report of the circumstances occasioning the arrest'. The section prohibits detention by army. This provision is in contrast to article 22 of Indian constitution that has made a fundamental right to be produced before a magistrate within 24 hours. Different interpretations of what constitutes 'least possible delay' by the judiciary are as follows:

One of the early cases decided by the Supreme Court on section 5 is that of V.L.Rohlu vs. Dy. Commander, Aijal, Distt. Mizoram. It was decided by the Supreme Court that 'what is the least possible delay in a case depends upon the
facts, that is to say, how, where and in what circumstances the arrest was affected, the difficulty of the terrain, the presence of hostile elements in the area must be considered in this connection'. In the instant case, the petitioner was a resident of Mizo District was first produced before the Magistrate on March 3, 1968 that is roughly two months after his arrest by the Armed Forces under s. 4(c) of the Armed Forces (Assam & Manipur) Special Powers Act, 1958. Thereafter two criminal cases covering a wide range of offences under the Assam Maintenance of Public Order Act, the Arms Act and several sections of the Indian Penal Code were filed against him on November 10, 1969 and February 26, 1970.

He was remanded to judicial custody from time to time the period of remand being on each occasion more than 15 days. The petitioner filed a petition for a writ of habeas corpus in the GHC (Misc. Criminal Case No. 506 of 1969) but his petition was dismissed and on its dismissal by the High Court, the petitioner filed a writ petition in Supreme Court under article 32 of the constitution of India. One of the questions that petitioner prayed for is for consideration was whether his detention was illegal on the ground that the armed forces had not handed him over to the civil authorities with the 'least possible delay' as required by s. 5 of the Armed Forces (Assam & Manipur) Special Powers Act, 1958. The Supreme Court held that 'although the Armed Forces surrendered the petitioner to the civil authorities after some delay, which was not intended by the law, there was not too much delay'.

A similar case decided by the Supreme Court is that of Saptawna vs. State of Assam80, that, where initial arrest and detention of the accused by the army authority is illegal and the detention becomes lawful when subsequently he was
arrested by civil police and produced before the Magistrate as under trial prisoner, the Court cannot order release by issuing writ of habeas corpus.

‘Delay would be counted only if there is physical circumstance that’s bars the armed forces to hand over the detenu to the nearest police station’, decided GHC in Nongshitombi Devi vs. Rishang Keishing\(^8\). It was further decided that ‘the delay only permits delay due to some physical impossibility to carry its command and not otherwise’ (emphasis added). Judges were of the opinion that the phraseology of ‘with least possible delay’ has been used because in some cases it may not be possible to hand over the arrested person for reason or other. The reasons must be cogent, genuine and relevant. In this case detention of 5 days by the armed forces was held illegal and violation of section 5 of AFSPA.

In Civil Liberties and Human Rights Organization vs. P.L Kukrety, GOC ‘M’ sector, Assam Rifles and other\(^8\), GHC observed that arrested person is to be made over to the nearest police station with the least possible delay. Persons arrested by the Assam Rifles was handed over to police after 5 days while the police station was only 40 km away, was held as violation of fundamental rights of the person under article 21 and 22 of the constitution and compensation was awarded for delay beyond legally permitted time. In fact, in case of arrest of any person, army authority is duty bound to handover to the officer-in-charge of the nearest police station with least possible delay as decided in Horendi Gogoi v. Union of India\(^8\).

Despite these judgments violations remained rampant. Taking serious note of the violations under AFSPA, the GHC directed the government of Assam in its judgment in Peoples Union for Human Rights and others vs. Union of India and
others to issue instruction to the commissioned and non-commissioned officers, havildars and warrant officers of the armed forces such that any person arrested by the armed forces or other armed forces of the union shall be handed over to the nearest police station with least possible delay and be produced before the nearest magistrate within 24 hours from the time of arrest. Court also directed that a person who either has committed a cognizable or against whom reasonable suspicion exist such persons alone are to be arrested, innocent persons are not to be arrested and later to give a clean chit to them as is being 'white'.

Shortest possible time was meant to be the meaning of 'least possible delay'. In Purnima Baruah vs. Union of India and others, the GHC held that the words 'least possible delay' may be said to do the thing within the shortest possible time. No arbitrary time limit can be set down as it may not be possible in many cases to affirmatively say or precisely quantify the period of time by reference to hours, dates or months. However, it will be possible having regard to the circumstances of the case, to say whether thing was done or was not done with 'least possible delay'.

Therefore, whenever the question of 'least possible delay' arises for decision, in computing the period of time the Court has to have regard to the particular circumstances of the case --physical impossibility or otherwise to make over the arrested person to the nearest police station, and how, where and in what circumstances the arrest was effected, for example. In this case, Dipanka Barua was arrested from Ulubari of Guwahati city on December 31, 1990. There are several police stations within 10 km from Ulubari in Guwahati. Although the nearest police station is at Patanbazar (within 1km), the army authority had taken
Dipanka to Jorhat, which is about 300 kms away from the place of arrest (Ulubari), and there was delay of two days in handing over the detenu to the police station in Jorhar. The Court held it as violation of article 22 of the constitution and section 5 of AFSPA and awarded compensation.

Reconfirming the above judgment, the GHC in Bacha Bora vs. State of Assam and others, held that when an act is done after an interval of time and there is no explanation forthcoming for delay, it cannot be said to have been done with least possible delay. ‘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 the particular case.

GHC found no ambiguity in understanding what constitutes ‘least possible delay’. In Kinjinbou Liangnei vs. Union of India and others, it was held by GHC that ‘the law is quite clear that if any person is arrested and taken into custody under the said Act, he shall be made over to the officer in charge of the nearest police station with the least possible delay’. In this case Assam Rifle took 4 days to hand over the detenu to nearest police station which was only half km away and the Court observed that that it ‘is completely in violation of the established principle of law’. The GHC observed, ‘under sections 4 and 5 of AFSPA there are procedure for arrest and production of person or persons and the armed personnel or the paramilitary authority or police officers who are the custodians of law and order, should have greatest respect for the personal liberty of the citizens and should not flout the laws by stopping to such bizarre acts of lawlessness’.
Not satisfied, by the Judgment the Army authorities obtained an order from the Supreme Court in August 2001, explicitly empowering themselves with the authority to detain and interrogate suspects in the name of collection ‘operational intelligence’ if not ‘substantive intelligence’.

Jeevan Reddy Committee observed that the person arrested under clause (c) of Section 4 has to be produced before a Magistrate within 24 hours of his arrest (excluding the time taken for journey) and it is within this period that the officer of the armed forces who made the arrest shall hand over the person to the police and the police shall produce the person before the Magistrate. The Reddy Committee argued that article 22 (2) of the constitution confers a right upon the person arrested and detained in custody to be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the court of Magistrate and further declares that such person shall not be detained in custody beyond the said period without the authority of a Magistrate as ‘article 22 (2) remains untrammeled and unaffected’ and therefore, to be obeyed by armed forces as well.

However list of ‘Do’s and Don’ts’ are binding as per Supreme Court’s NPMHR 1997 rulings. These guidelines were diluted favouring the armed forces in Masooda Parveen vs. Union of India and others. The court explained the difficulty of implementing the list of ‘Do’s and Don’ts’ by observing ‘we must however observe that the application of the guidelines cannot be mechanically applied and must of necessity relate to the facts of each case’. The Supreme Court held that anyone produced after 5 days will fall within ‘least possible delay’ as some time armed forces may require that much time for necessary questioning and
held that the requirement in Section 6 of the 1990 AFSPA Act may be relaxed in certain circumstances.

The Court explained that after the detention of the detainee and extracting vital information about arms and ammunition, the first priority for the armed forces would have been to recover the weapons as to cause any delay could lead to a failure of the operation. In the short time available to the army patrol it was perhaps not feasible or practicable to first inform police station. 'we are also not un-mindful of the fact that prompt action by the army in such matters is the key to success and any delay can result in the leakage of information which would frustrate the very purpose of the army action... ' the court stated.

It is not clear if section 5 is bound to follow the same time limit as that of article 22 of Indian Constitution as evident from the different opinions expressed by the judiciary in different cases. It is clear from the above discussion that the there no established uniform interpretation about what constitutes 'least possible delay' by the judiciary. What constitutes 'least possible delay' has been given different interpretation in different times. Thus it can be concluded that the constitutional provision under article 22 is violated under section 5 of AFSPA.

3.7 Illustrative judicial decisions in the contexts of EJE

a. Sebastian M. Hongray vs. Union of India & others, a writ of habeas corpus filed before the Supreme Court under article 32 of the constitution is a landmark decision that set precedent for the human rights jurisprudence in India where court ordered exemplary compensation for violation of right to life. This is a case where two men disappeared from the custody of the army. On the morning of March 10, 1982, the personnel of 21st Sikh Regiment of Indian army in
Huining village, Ukhrul, Manipur to conduct a cordon operation and then Paul and Daniel, a school teacher and a pastor respectively were taken into custody. Later the family visited the army camp and demanded their release. Army informed them that they have been released on March 11, 1982 but they never returned home. Mr. Sebastiian M. Hongray on behalf of the families filed a Writ of Habeas Corpus to the Supreme Court of India.

On November 24, 1983, the Court in its judgment directed the CBI to conduct an enquiry. The court allowed the writ of habeas corpus and held that the two men were taken in on March 10, 1982 and they never left the army camp on March 11, 1982 [and hence] it is obligatory upon the army to produce C. Daniel and C. Paul and to explain their whereabouts, more so because respondents claim the power to arrest and question anyone under the provisions of Armed Forces (Special Powers) Act, 1958'. On April 19, 1984, a summary of enquiry made by the CBI was submitted to the Court in which it was stated that the efforts made to locate Mr. Paul and Mr. Daniel has yielded no result.

Following this report, the Court in its judgment directed the Union of India to pay exemplary compensation of rupees one lakh each to the both families, as the court opined, that ‘both of them must have met an unnatural death’. Court also found that the army authority committed contempt of court by ‘willful disobedience to a writ issued by a Court constitutes civil contempt’. Prima facie, it would be an offence of murder and therefore directed the police to continue to investigate into the matter.

b. In Tekarangsen and others vs. Union of India and others, a minor boy was killed due to indiscriminate firing by the army and seriously injured a minor
girl. Enquiry conducted by the additional deputy Commissioner didn’t find any evidence of encounter necessitating the cross firing. Compensation was awarded for the loss of life and grievous injury as the rate of rupees 2 lakh and 1 lakh respectively.

c. In Mahmud Ali vs. Union of India\textsuperscript{96}, one Nazrul Islam alias Mantu Das, son of Samur Ali, was picked from the house of Akshay Kalita in Orang Market, close to a tea estate in Darrang district, Assam on 05 August 1998 by the personnel of Madras Field Regiment of Majbat camp. Captain Pushpendra of the Indian army denied arresting Nazrul Islam and claimed that he was killed in an encounter. On 14 December 1998, the GHC directed the district and sessions’ judge to conduct an inquiry. The report, submitted on February 20, 2001, disbelieved the story of an encounter and held the army responsible for arresting and killing Nazrul Islam in custody. The GHC awarded a compensation of Rupees one lakh and 50 thousand for violating right to life.

d. Sanamacha, aged about 15 years was picked up by Army on February 12, 1998 and involuntarily disappeared. Two inquiry commissions were formed - C Upendra Inquiry commission constituted by the State Government and another commission by the Assam Rifles sitting at the Assam Rifle office in Kangla, Manipur. Army appeared for hearing before the C Upendra Commission. Enquiry is over but the reports are not made public. After the two inquiry commissions, the family approach the GHC. GHC found that Army picked up Sanamacha on February 12, 1998, blind folded him and took him away in a gypsy from Angtha village, Yaripok, Manipur\textsuperscript{97}. Court held 17 Raj Rifles of Indian Army responsible for the disappearance of Sanamacha. Army paid 3 lakh rupees as compensation to
the family. Legal proceeding for the prosecution of Major Mahindra of 17 Raj Rifle who was found guilty of disappearance of Sanamacha is sub-judice. This case will be discussed later in detail.

e. In Notle vs. Union of India and others, a petition was filed on April 26, 1996 by the wife of Bu-o Angami, Mrs. Notle, complaining of illegal and wrongful detention of her husband, Du-o Angami, arrested by the 29th Bn. Assam Rifles on 18 April 1996 from his house in Kohima in a blind folded manner without disclosing the ground of arrest along with two other men. Bu was neither produced before a magistrate nor was handed over to the nearest police station as required under AFSPA. On April 24, 1996, the court ordered the army to hand over the detenue to the nearest police station which met non-compliance.

A contempt petition was moved on 30 April 1996 against Commanding Officer 29th Assam Rifles. On October 28, 1997, the petition was sent to the main seat of GHC for final hearing on November 17, 1997. The Commandant 29th Bn. Assam Rifles, filed three affidavits and these affidavits revealed that detention of Bu. In the course of investigation it was discovered that on April 28, 1996, when the police had come to take over Bu-o and two other arrested in the course of the search operations, Bu-o was left behind as he had refused to sign documents. Within 20 minutes after the departure of two others Bu had died. His dead body along with FIR was handed over to the police by security forces. Court ordered compensation of rupees 2 lakh and 50 thousand.

f. In Nazima and others vs. Union of India and others, the GHC (Imphal bench) found that CRPF personnels responsible for the unjustified killing of three personnels who were the driver, conductor and cleaner of a bus. The bus, bearing
registration no. MNP 8842, was on election duty on October 3, 1999 at Thoubal district in Manipur for escorting officials and election materials and when the bus reached Tonsen Lamkhai at 1.25 pm, a group of CRPF personnel of 35 BN stopped the bus and asked the drivers, cleaner and conductor to get down and as soon as they get down the CRPF personnel opened indiscriminate firing and killed the three. The court held that the act is in violation of article 21 and 22 of the constitution and hence awarded compensation of 3 lakh rupees.

**g. In Phulo Bala Das vs. Union of India**, one called Rubul Das was taking part in a ‘naam’ song in a prayer meet in a village called Gandhibari where he was picked up by JKLI group on December 24, 1997 and the next day his dead body was handed over to the police by the army. Army claimed that he was killed in an encounter. Enquiry by district judge and session judge found that the encounter was staged. Commission found that army personnel of 13 JKLI camped at Gandhibari killed by bullet injuries. No help from local police was taken while carrying out the operation. Court found no indication that Rubul was a militant. The court while awarding compensation of 2 lakh rupees held that any death in the custody of the army being a custodial death shall be resulted in the infringement of the basic human rights guaranteed under article 21 of the constitution.

**h. In Khargeswar Nath vs. Union of India**, the detenu was picked up by army from the house of a relative on May 30, 1997 at around 9-30 pm and an arrest memo was issued. Later the on June 1, 1997 the family of the detenu was informed that he has been killed. The GHC found that the detenu was killed while trying to flee from custody and his death was not intentional but accidental. The court held it was a lapse on the part of the army to hand over the detenu to the
nearest police station with least possible delay. Compensation of rupees 50 thousand was ordered.

i. The custodial torture and death of Ojit's Singh\textsuperscript{102} is glaring example of violation of provisions of AFSPA. On 16 February 1997 afternoon around 4 p.m., K. Ojit Singh, 15 years old boy was picked by the army personnel, 57 Mtn. Div. C/O 99 APO/ Manipur, from Bashikhong Mamang Leikai, Imphal, Manipur. Ojit Singh's family found out that the army personnel had badly beaten up K. Ojit Singh before taking him away in their custody. On 19 February 1997, around 4 p.m., the army officials brought Ojit Singh to Singjamei police station after holding Ojit Singh for nearly 84 hours, but within few minutes rushed with him to local hospital as he was grievously injured and had multiple external and internal injuries. Later he died in the hospital. Based on a statement by army, the police registered an FIR No. 52(2)97 U/S 13 U/A (P) Act.

Death of Ojit Singh triggered a public outcry. Government of Manipur constituted an inquiry commission under the Commission of Inquiry Act 1952 to investigate the death of Ojit in the custody of army. Union of India moved a petition against it and the court accordingly stayed the Commission through an order dated 25 April 1997. Army officials claimed that Ojit Singh had sustained injuries when he fell down in a ditch while trying to escape his arrest early in the morning of 19 February 1997. The army authorities also claimed that as a member of PREPAK, Ojit Singh had been involved in unlawful activities for a number of years.

The GHC examined the post-mortem report to discover that there were 16 external injuries and were also serious internal injuries like congested heart and
small hemorrhage spots and concluded that the army authorities were telling lies and that Ojit Singh had died from the torture inflicted on him while being in their custody. The HC also held that the State Government was at liberty to make the necessary investigation to fix the responsibility for the arrest and the death of Ojit Singh. The court also directed to pay Rs. 300,000 in compensation.

j. In writ Petition no 2154 and 2155/04, the GHC while dealing with the cases of encounter deaths, found army responsible for violation of section 4(a) of AFSPA and ordered compensation. The petitioners of these two writs alleged that on February 12, 2004 army personnel of 62 Field Regiment of Harisinba army camp, came to enquire about the son of (petitioner of case no WP 2154/04) Khalasan Daomari, Sri Protul Daimari. As per instruction of army authority on February 14, 2004, the petitioner along with said Protul Daimari went to the army camp who was interrogated for about two hours and directed to produce him again in the army camp again on March 3, 2004.

On the same day, they enquired as to whether there is another Protul Daimari in the same village and directed to produce him on March 6, 2004. Accordingly on March 6, 2004, the petitioner along with other Protul Daimari, son of Nahima Daimari accompanied by one Upen Daimari went to army camp and on that day the army released the son of the petitioner but the other Protul Daimari was taken into their custody.

On March 7, 2004, again the petitioner being informed about the requirement of his son by the army authority, he was taken to the army camp. On March 8, 2004, the petitioner got the information that there are two dead bodies lying in Paneri Police station and he recognized the bodies of the two Protul
Darnari. FIR was lodged by the petitioner (Majbat PS case no 17/04 under section 302/34 IPC).

The army authority also lodged an FIR with Paneri Police station (Paneri PS case no. 21/04) alleging that two persons were killed in an encounter. The GHC on April 21, 2008 directed the district judge Mangaldoi to cause an enquiry on the death of both Protul Daimary. On March 12, 2009, GHC directed the Union of India to pay an amount of Rs 4 lakh each to the family members as compensation for the two deaths in custody. The GHC concluded that both the detainees were killed in custody of Army and directed the Union authorities to register a case under Section 302 IPC against the errant army officer/s along with the provisions of Army Act. The outcome of the order is pending.

More court cases will be discussed later.

3.8 Is 'special power' under section 4 (a) necessary?

An examination of the provision of the IPC, Cr.P.C can be noted to check whether these codes have sufficient provisions to deal with law and order situation in 'disturbed area'. It is to be noted here that section 15 of the Police Act 1861 empowers a State Government to declare an 'area disturbed' or in 'a dangerous state' and to deploy any police force for a fixed period. If such a police force is not sufficient, CrPC under section 129, 130 and 131 permits the civil authorities to deploy the Army.

The CrPC has a section on the maintenance of public order, Chapter X, section 129 in that chapter allows for the dispersal of an assembly by use of civil force. The section empowers an Executive Magistrate, officer-in-charge of a police station or any police officer not below the rank of sub-inspector to disperse
such an assembly. This section doesn't prescribe lethal power to disperse an assembly. If police is unable to deliver the desired result to disperse an assembly, there are provisions to call armed forces. Hence under sections 130\(^{105}\) and 131\(^{106}\) of CrPC sets out the conditions under which the armed forces may be called in to disperse an assembly. T

These two sections have several safeguards which are lacking in the AFSPA. Under section 130 of the Cr.P.C, the armed forces officers are to follow the directives of the Magistrate and use as little force as necessary in doing so. Under Section 131 of Cr.P.C, when no Executive Magistrate can be contacted, the armed forces may disperse the assembly but if it becomes possible to contact an Executive Magistrate at any point, the armed forces must do so. Section 131 only gives the armed forces the power to arrest and confine. Moreover, it is only commissioned or gazetted officers who may give the command to disperse such an assembly, whereas in the AFSPA even noncommissioned officers are given this power. Thus it is clear that AFSPA grants wider and unwarranted powers than the Cr.P.C for dispersal of an assembly.

Moreover, the unlawful assembly under sections 129-131 of Cr.P.C refer to the unlawful assemblies as ones which 'manifestly endanger' public security whereas under the AFSPA the assembly is only classified as 'unlawful' and what is 'unlawful' depends on the opinion of the members of the armed forces which leaves scope for abuse for power.

These provisions were not accepted as adequate in 'disturbed area' by the Supreme Court in NPMHR 1997. While observing the provisions of section 130 and 131 of Cr. P. C, the Supreme Court commented that the 'provision contained
in these sections cannot be treated as comparable and adequate to deal with the situation requiring the use of armed forces in aid of civil power as envisaged by the Central Act.

As regards the procedure for arrests chapter V of the Cr.P.C sets out the arrest procedure by the police under section 46 of Cr.P.C. It is only if the person attempts to evade arrest that the police officer may use 'all means necessary to affect the arrest.' However, sub-section (3) of section 46 of Cr.P.C limits this use of force by stipulating that this does not give the officer the right to cause the death of the person, unless they are accused of an offence punishable by death or life imprisonment. This power is already too broad. AFSPA has no such yardsticks and norms to be followed.

Another legal point deserves to be mentioned here is that under the Indian Penal Code, at Section 302, only murder is punishable with death. In this light section 4 (a) of AFSPA is nothing but summary execution awarded instantly for offences of assembly of five or more persons, the carrying of weapons, ammunition or explosive substances and none of which are punishable with life imprisonment under the Indian Penal Code. Under section 143 of the Indian Penal Code, being a member of an unlawful assembly is punishable with imprisonment of up to six months and/or a fine. Comparing these two provisions, it appears that the same offence committed by someone in a disturbed area under the AFSPA is punishable with death while it is not the same in non-disturbed areas.

3.9 To Sum up

There is no clarity about the interpretation of different sections of AFSPA and thus created ambiguity and allowed wide scope for abuse of discretionary
power under section 4(a) of AFSPA by the armed forces who are deployed in ‘aid to civil authority’. Since the armed forces are called ‘in aid’ to the civil authority, granting of lethal power under a special law like AFSPA is unjustified as the civil authority under whom the armed forces are to act has no such ‘special power’.

‘Minimal use of force’ has been prescribed by the Supreme Court in NPMHR 1997 judgment and ‘minimal use of force’ is definitely doesn’t mean taking away lives. An elaboration of the prescription would imply that force can only be used if it is ‘strictly necessary’ and force must be exercised with restraint and in proportionate to the objective considering the aim of the operation, the danger of the situation and the degree to which the force might risk life.  

Force threatening human lives cannot be used arbitrarily based on suspicion. Presumption of innocence and audi alterem partem are two basic fundamental principles of criminal justice in evidence laws. These basic principles can only be ensured by the justice delivery mechanisms through a proper fair trial. The Supreme Court has rightly decided in NPMHR, 1997 that maintenance of public order involves cognizance of offences, search, seizure and arrest followed by registration of reports on offences [FIRs], investigation, prosecution, trial and, in the event of conviction, execution of sentences. The powers conferred under AFSPA only provide for cognizance of offences and other functions have to be attended by the State Criminal Justice machinery.

The power to make arrest without warrant under section 4(c) of the AFSPA on the suspicion that the accused ‘has committed or is about to commit a cognizable offence’ is more problematic. The issuance of arrest memo is not adequate and warrant prior to arrest is indispensable. Often arrests without warrant
lead to torture and other human rights violations including extrajudicial killings. Similarly, search without warrant under section 4(d) of the AFPSA has been one of the main causes of alienation of the masses.

While no legitimate question is ever raised when security forces ‘destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made’ while exercising powers under clause 4(b) of the AFSPA, the powers to shoot where absconders may be hiding is legally untenable. The Supreme Court in its various judgements held that ‘absconding by itself is not conclusive either of guilt or of a guilty conscience’.

It can be concluded that though Supreme Court upheld the Act 1997, subsequent review of the Act by other bodies like various UN bodies in 2005, 2007, Second Administrative Reform Commission 2007, Jeevan Reddy Committee 2006 has observed much in contrary to Supreme Court and recommended the repeal of the Act. Moreover Government’s decision to repeal the ‘special power of using force to the extent of causing death’ by way of bringing an amendment in the Act and to make it ‘more humane’, reflects that the section 4(a) of AFSPA resulted into arbitrarily deprivation of lives of the citizens by granting power to commit extrajudicial executions.
Notes and References:


2 M.P Jain, Constitutional Law, fourth edition, page.439

3 ibid

4 A.D.M Jabalpur vs. Shivkant Shukla, AIR 1976 SC 1707

5 M.P Jain, supra


7 (1990) 1 SCC 568, AIR 1990 SC 605

8 (1997) 1 SCC 416

9 D.K. Basu vs. The State of West Bengal and others – AIR 1997 SC 3047

10 Ashok Agarwal, In Search of vanished blood, SAFHR paper series 17, SAFHR Kathmandu publication 2008, Pg 2

11 Jeevan Reddy Committee report, 2005, pg.75

12 (1998) 2 SCC 109. Several writ petitions (Writ Petition (Crl.) No. 550 of 1982 with WP (C) Nos. 5328 of 1980, 9229-30 of 1982 and 13644-45 of 1984, CA Nos. 721 to 724 of 1985 and 2173-76, 2551 of 1991) and Writ Petition (C) Nos. 13644-45/84 filed before the Supreme Court clubbed together and judgment were given. The petitions are Naga People's Movement for Human Rights v Union of India and others (Civil Rule No 1043 of 1987) and Manipur Baptist Convention and another v Union of India and others, Civil Rule No 1355 of 1987. The Guwahati High Court disposed of the first petition to be filed on the events at Oinam, Civil
Liberties and Human Rights Organisation vs. State, Civil Rule No 2 of 1987, in an order in 1987. This particular petition will be referred to hence forward as NPMHR 1997.

13 Second Administrative Reform Commission, 5th report on 'Public Order', available on http://arc.gov.in/5th%20REPORT.pdf, as on January 10, 2011

14 ibid

15 The plain text of article 355 is 'it shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every state is carried on in accordance with the provisions of this constitution'.

16 Article 257A (Assistance to States by deployment of armed forces or other forces of the Union) contemplated Government of India deploying the armed forces of the Union for 'dealing with any grave situation, of law and order in any State' - a grave encroachment into the domain reserved to the States under the Constitution. Under the Constitution, law and order as well as public order are both within the exclusive province of the States. This article is now repealed.

17 Jeevan Reddy Committee report, supra

18 Administrative Reform Commission report, 5th report on Public Order, supra

19 Jeevan Reddy Committee report, Part II, supra

20 AIR 1998 SC 431

21 Part II of Jeevan Reddy Committee Report, supra

22 AIR 1983 Del. 514

23 (1988) 1 GLR, 240, Civil rule no.1043 of 1987

25 Jeevan Reddy Committee Report, supra

26 (1988) 1 GLR 139

27 (1982) 1 GLR 756

28 (1988) 2 GLR 159

29 (1991) 1 GLR, 456


31 ACHR, 'Lawless law Enforcement according to Law?', op. cit., page 14


34 As quoted in 'States of Emergency: Their impact of Human Rights', a study prepared by the International Commission of Jurists, 1983, page iii and 477, as
The plain text of section 4 (a) of AFSPA is 'any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the Armed Forces may, in a disturbed area, if he is of the opinion that it is necessary to do so for 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 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 firearms, ammunition or explosive substances'.


Jeevan Reddy Committee Report, supra.

Second Administrative Reforms Commission, Fifth Report ,Page 130, supra

Ashok Agarwal, 'Law's Autonomy', supra

Detailed list is presented in Chapter II.
NHRC weblink http://nhrc.nic.in/faceenccases.htm as on may 25, 2009. The first guidelines issued by the National Human Rights Commission (NHRC) in respect of procedures to be followed by the state governments in dealing with deaths occurring in encounters with the police were circulated to all chief secretaries of states and administrators of union territories on 29.3.1997. The experiences of NHRC over the years had not been encouraging. Most of the states are not following the guidelines in the true spirit. NHRC’s guidelines are relevant in the armed conflict situation in NES as the armed forces, para military forces
and state police carry out ‘counter insurgency’ operations under a unified command mechanism where the chief secretary of the state is the de-jure head while the corps commander of the Army is the actual operational head.

60 The Assam Tribune, November 1, 2009
61 The Assam Tribune, November 20, 2009
62 Special Correspondent, *Cabinet panel to decide on AFSPA*, The Assam Tribune, November 1, 2009.
63 Official draft of the proposed amendment bill was not available for reference as it is not made public yet. Information on the amendment is mostly collected from the media sources.
66 Rahul Datta, *Armed forces stick to their guns over diluting AFSPA*, supra
67 *ibid*
68 *ibid*
the similarity to religious book’, Army’s Northern Command chief Lt Gen BS Jaswal told a Delhi-based news channel.

70 Gilani, Iftikar, PMO sitting over AFSPA amendment proposal, supra


72 ibid

73 (1982) 1 GLR 756

74 1963 Cri LJ 451 decided on February 12, 1962

75 (1991) CriLJ 2933

76 Amnesty International, India briefing, 2006, supra

77 Quoted from conference background reading papers distributed by Arms Control Foundation of India on September 8, 2010 at a conference in Delhi.

78 ibid

79 WP No. 238 of 1970, (Date of judgment September 29, 1970 by the Supreme Court)

80 AIR 1971 SC 813 and (1971 Cri LJ 679)

81 (1982) 1 GLR 756

82 (1988) 2 GLR 137

83 (1991) GLR 3081

84 (1991) 2 GLR 1

85 1991 CriLJ 2675,
1991 CriLJ 2782

Paras 49, 53 of the NPMHR judgment, 1997

(1998) 4 GLT, 139, civil rule no.580 of 1992

Order dated 17-8-2001 of the Supreme Court of India, Criminal Original Jurisdiction, Criminal Miscellaneous Petition no. 4198 of 1999 in Writ Petition (Crl.) No. 550 of 1982, Naga People’s Movement for Human Rights vs. Union of India as quoted in Loitongbam, Baloo, Counter-terrorism in North East India, Jammu & Kashmir, Gujarat, Chattisgarh and Jarkhand: North-east India Experience, a paper presented at ICJ conference on Terrorism, Counter-Terrorism and Human Rights on Feb 27, 2007

Part II of the report


Equivalent to section 7 of AFSPA as applied in Jammu and Kashmir.

1984 AIR 571, 1984 SCR (1) 904, 1984 SCC (1) 339, 1983 SCALE (2)775 date of judgment November 24, 1983

1984 AIR 1026, 1984 SCR (3) 544, 1984 SCC (3) 82 , 1984 SCALE (1) 629, date of judgment April 23, 1984

(2003) 1 GLT 218, civil rule no. 115(K) of 1997


1998 (3) GLT 43.
Three writs were dubbed together as the subject matter was the same. These are Nazima and other vs. Union of India and others, WP © no. 876 of 2001, Farida and others vs. Union of India and others, WP © 878 of 2001 and Tombi and others vs. Union of India and others, WP © 892 of 2001.

(2007) 2 GLT 465

(2004) 1 GLR 518

Kangujam Ongbi Thoibi Devi vs. State Of Manipur And Others, 1999 CriLJ 3584 and personal interview with the family

GHC case Sri Khalason Daimari vs. Union of India and others, WP No 2154 and 2155/04

Dhavan, Rajeev in, ‘The Manipur Crisis’, The Hindu, August 20, 2004

Section 130: (1) If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces. (2) Such Magistrate may require any officer in command of any group of persons belonging, to the armed forces to disperse the assembly with the help of the armed forces under his command, and to arrest and confine such person forming part of it as the Magistrate may, direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(3) Every such officer of the armed forces shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little
injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

106 Section 131: When the public security is manifestly endangered by any such assembly and no Executive Magistrate can be communicated with, any commissioned or gazetted officer of the armed forces may disperse such assembly with the help of the armed forces under his command, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law, but if, while he is acting under this section, it becomes practicable for him to communicate with an Executive Magistrate, he shall do so, and shall thenceforward obey the Magistrate as to whether he shall or shall not continue such action.

107 This standard is derived from the UN Principles of the Code of Conduct and United Nations Basic Principles on the use of Force and Firearms.