Chapter V

Armed Forces Special Powers Act-An Analysis

1. History
When the All India Congress Committee launched the Quit India Movement in Bombay in 1942 and at the same time in Singapore, about 40,000 British Indian soldiers who had joined the Indian National Army were marching towards India from the eastern front together with the Japanese soldiers. In a sweeping move, Congress was declared an illegal organization.

Prominent Congress leaders were arrested and imprisoned. A mass cataclysm broke out all over India. The Viceroy Lord Lin Lithgow declared emergency all over the British India and promulgated the Armed Forces (Special Powers) Ordinance 1942 on 15th August 1942. This Ordinance conferred power on Commissioned Officers not below the rank of Captain in the army, to use force if necessary to the extent of causing death of a person who fails to halt when challenged by a sentry or who attempts to destroy property which the Officer has been deputed to protect.

The power to arrest a person was also given along with a duty to hand over the arrested person to the Police. Immunity was also provided to army personnel acting under the Ordinance. This Ordinance was extended to the whole of British India.
The armed forces were protected from legal action, unless prior sanction is obtained from the Central Government. India got Independence five years later on 15th August 1947 after the promulgation of Armed Forces Special Powers Ordinance 1942, and became a Sovereign Democratic Republic on 26th January 1950. The armed forces are still enjoying the same Special Powers and rights granted in the colonial ordinance in the remote North East corner of the country even today. In its new incarnation, the enabling legislation is called the Armed Forces (Special Powers) Act, 1958. On May 22, 1958, the Armed Forces (Assam and Manipur) Special Powers Ordinance was invoked by the North Eastern state of Assam to tackle the insurgent movement brewing in the region to demand an independent state for the ‘Naga Tribe’ out of Assam.

This ordinance was later adopted by the Indian Parliament as a central legislation on September 11, 1958 to deal with the anti-government uprising which had spread to other North Eastern states of India. Subsequently this Act was amended on 5th April 1972 and henceforth known as the Armed Forces (Special Powers) Act 1958. The subsequent division of States in the North-East led to amendments in 1972 and 1986 extending the Act to all the newly created States. The amendment additionally gave powers to the Central Government to apply the Act, a power which was hitherto a sole prerogative of State Government through the Governor. The North Eastern states that originally came under the operation of the act included Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura.¹

¹ Chaudhary, Shweta. Extraordinary Military Powers and Right to Self Determination in Kashmir, University of Toronto.
2. Kashmir

The existence of the Act can be traced back to the Jammu and Kashmir Disturbed Areas Act, 1990. A temporary law, it was supposed to expire on July 18, 1992. It was re-enacted as President’s Act in 1992 under Article 356 of the Indian constitution which gives the authority of legislating on J&K to the parliament. The AFSPA (J&K) received the assent of the president of India on September 10, 1990 and was implemented from July 5, 1990.

It applies to the areas declared ‘disturbed’ by state or the central government (under its section 3) for “the military forces and the air forces operating as land forces and includes any other armed forces of the Union so operating. On just the next day, the Governor’s administration declared all the (then) six districts (Anantnag, Baramulla, Badgam, Kupwara, Pulwama and Srinagar) in Kashmir disturbed besides the areas falling within 20 kilometers of the LoC in Poonch and Rajouri under the section:

\( (c) \) Arrest, without warrant, any persons who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;

\( (d) \) enter and search, without warrant, any premises to make any such arrest as aforesaid or to recover any person believed to be wrongful restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawful kept in such premises, and may for that purpose use such force as may be necessary, and seize any such property, arms, ammunition or explosive substances;
(e) stop, search and seize any vehicle or vessel reasonably suspected to be carrying any person who is a proclaimed offender, or any persons who has committed a non-cognizable offence, or against whom a reasonable suspicion exists that he has committed or is about to commit a non-cognizable offence, or any person who is carrying any arms, ammunition or explosive substance believed to be unlawfully held by him, and may, for that purpose, use such force as may be necessary to effect such stoppage, search or seizure, as the case may be.

3. **Power of search to include powers to break open locks, etc.**
   Every person making a search under this Act shall have the power to break open the lock of any door, Almirah, safe, box, cupboard, drawer, package or other thing, if the key thereof is withheld.

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

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

After the Armed Insurgency on the rise, in November 2011, the central government expanded the Armed Forces Special Powers Act in J&K for an alternate year. The Act was first forced in the state in 1990 and from that point forward its term has been augmented consistently by the unanimous understanding of all concerned factions.

This time around, be that as it may, the choice to develop the Act met with some resistance. The Intelligence Bureau contradicted its augmentation referring to the "enhanced" security circumstance in the state where as both the state government and the Ministry of Defence emphatically underpinned its development. Taking the signal from the state government and the armed force, the central government pronounced the entire of Assam a 'disturbed zone' and broadened the Act for an alternate year.

Additionally in March 2012, the Tripura government enlarged the AFSPA in the state for an additional six months. The Act, which was forced in 1997, is shortly completely upheld in 34 police headquarters and halfway in six police headquarters of the state. On account of Tripura as well, the state government settled on the expansion of the Act notwithstanding clear change in the security
situation. Quickly, the Act is in work in Assam, Nagaland, Manipur (but the Imphal civil region); Tripura (40 police headquarters); the Tirap and Changlang locale of Arunachal Pradesh and a 20 km cinch in the states with Assam.

Apart from the Northeast, the AFSPA is likewise in force\(^2\) in Jammu and Kashmir, which went under its purview on July 6, 1990 according to the Armed Powers (Jammu and Kashmir) Special Powers Act of 1990. Prior, Punjab was additionally brought under the Act through the Armed Forces (Punjab and Chandigarh) Special Powers Act of 1983. The AFSPA is forced in regions influenced by inward defiance, insurrection or militancy.

Since it is a typical practice in the nation to send the military to control such turmoil, this Act gives the military impunity empowering environment to do their obligations without dread of being indicted for their activities. The history of the Armed Forces Special Powers Act is as takes after: Genesis of the Armed Forces (Special Powers) Act, 1958.

The roots of the Armed Forces (Special Powers) Act, 1958 could be followed to the Armed Forces (Special Powers) Act of 1948. The last thus was established to displace four mandates the Bengal Bothered Areas (Special Powers of Armed Forces) Ordinance; the Assam Disturbed Areas (Special Powers of Armed

Forces) Statute; the East Bengal Disturbed Areas (Special Powers of Military) Ordinance; the United areas Disturbed Areas (Exceptional Powers of Armed Forces) Ordinance—conjured by the focal government to manage the interior security circumstance in the nation in 1947\(^3\).

The Armed Forces Special Powers Act of 1948, as a matter certainty, was demonstrated on the Armed Forces Special Powers Ordinance of 1942, proclaimed by the British on August 15, 1942 to stifle the 'Quit India' movement. As the title itself shows, 'unique forces' were offered on 'specific officers' of the military to bargain with an 'emergency'.

These 'special forces' incorporated the utilization of power (even to cause death) on any individual who does not stop when tested by a sentry or reasons harm to property or stands up to arrest. Above all, the Ordinance gave complete resistance to the officers; their actions couldn't be tested by anybody in court with the exception of with the former regard of the central government, the Armed Forces (Special Powers) Act of 1948 was revoked in 1957, just to be revived a year later in 1958.

The connection was the quick crumbling inner security circumstance in that brought together Assam. The Nagas, who occupied the Naga Hills of Assam also Manipur, had contradicted the merger of their region with that of India in light of the fact

that they were racially and socio-politically distinctive announcing autonomy in 1951 and raised the flag of rebellion.

They boycotted the first general race of 1952, in this way showing their disapproval of the Indian Constitution and began submitting savage acts against the Indian state. So as to manage this resistance, the Assam government forced the Assam Maintenance of Public Order (Autonomous Region) Act in the Naga Hills in 1953 and increased police activity against the agitators⁴. At the point when the circumstances exacerbated, Assam sent the Assam Rifles in the Naga Hills and ordered the Assam Bothered Areas Act of 1955, with a specific end goal to give a legitimate skeleton for the paramilitary compels and also the furnished state police to battle insurrection in the region.

The Assam Disturbed Areas Act of 1955 was a mirror picture of the Armed Forces Special Powers Ordinance of 1942 as it gave 'uncommon forces' to the military occupied with counter revolt. As stated by Sections 4 and 5 of the Act: “A justice or police officer not beneath the rank of sub-inspector or havildar if there should arise an occurrence of the equipped extension of the police or any officer of the Assam Rifles not underneath the rank of havildar/jamadar" had the ability to capture, shoot alternately murder any individual on suspicion”.

Segment 6 of the Act gave security against any sort of arraignment without the assent of the central government. At the

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same time the Assam Rifles and the state furnished police proved unable hold the Naga defiance and the agitator Naga Nationalist Council (NNC) framed a parallel government—the Federal Government of Nagaland—on March 22, 1956.

This strengthened the boundless brutality in the Naga Hills. The state organization ended up unequipped for taking care of the circumstances and requested central support. Reacting to the claim of the state government, the focal government sent the armed force to control the disobedience and restore commonality in the district. The President of India declared the Armed Forces (Assam also Manipur) Special Powers Ordinance on May 22, 1958 to present 'unique forces' on the military and also give them the lawful schema to capacity in the 'disturbed zones' of Assam and the Union Territory of Manipur.

A bill looking to swap the law was presented in the rainstorm session of the Parliament on August 18, 1958. While presenting the Armed Forces Special Forces Bill, the home clergyman, G. B. Gasp, contended that the bill might empower the military to capacity viably in a circumstance checked by pyromania, plundering and dacoity. The bill, then again, confronted some resistance.

A few parts of Parliament contended that giving such clearing forces to the armed forces, forces would lead to the violation of the fundamental rights of the people; that it would allow the government to circumvent the Constitution to impose an emergency—without actually declaring it and the armed forces
would usurp all the powers of the civilian government and that it would result in the armed forces committing excesses with impunity. Laishram Achaw Singh, an MP from Manipur, described the bill as a “Lawless Law”. Nevertheless, after a discussion lasting a total of seven hours, the bill was passed by both the houses of the Parliament with retrospective effect from May 22, 1958. The bill received the President’s assent on September 11, 1958 and was printed in the Statute Book as The Armed Forces (Special Powers) Act, 1958 (28 of 1958).


Indeed as the Sikh activist crusade was arriving at its stature in Punjab, an outfitted separatist development began in Kashmir in 1989. Altogether, the Kashmiri revolt has both domesticated and also outside extents, which provides for it a character of its own. Locally, the focal government's inclination to force its will on the state without acknowledging the political yearnings of the individuals had estranged them. Remotely, Kashmir has been a bone of controversy between India and Pakistan over which both nations, have battled four wars.

Initially, the uprising was absolutely indigenous however soon Pakistan began abetting and supporting the agitators. From the mid-1990s Pakistan likewise began directing Afghan war veterans and its Islamist jihadist to resuscitate the hailing

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uprising in the state. As the circumstances in the state started to disintegrate, the focal government forced representative's guideline in January 1990.

In September 1990, the representative summoned the Disturbed Areas Act and the state was pronounced as Disturbed. The Disturbed Areas Act of 1990 was however transitory in nature and stayed in power just work July 18, 1992. This was supplanted by the Disturbed Areas Act of 1992 which was re-ordered as a Presidential Act. Once the state gathering was restored after the 1996 races, it authorized the Disturbed Areas Act of 1997 and pronounced the whole state a bothered range. The Act was however permitted to pass in 1998.

On September 11, 1990, the central government ordered the Military (Jammu and Kashmir) Special Powers Act and authorized it reflectively from July 5 1990. According to the Act expressed that the military might be utilized to help the civil organization in the irritated region to counteract terrorist acts steered towards striking fear in the individuals and any movement that imperilled the regional honesty of the nation or looked for the withdrawal of a some piece of the domain of India or offended national images, for example, the Constitution, the national song of devotion or flag. Initially, the Act was authorized in six regions (Anantnag, Baramulla, Budgam,

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Kupwara, Pulwama and Srinagar) and in zones inside 20 Kms of the line of control in Poonch and Rajouri districts.


In an area declared "disturbed” an army officer is legal free to carry out following operations:

a) Fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law” against "assembly of five or more persons" or possession of deadly weapons.

b) Destroy any shelter (private or govt.) from which armed attacks are made or likely to be made or attempted to be made.

c) Arrest any person without warrant who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence.

d) Enter and search, without warrant, any premises for purpose of arrest or to recover any person, arms, explosives.

e) To search and seize any vehicle suspected to be carrying an offender or any person against whom any reasonable suspicion exists that he has or is about to commit an offence.

f) To provide legal immunity to the army personnel found involved in any violation or ethical breach i.e., they cannot be sued or prosecuted.
8. Legal analysis

The Armed Forces Special Powers Act contradicts both Indian and International law models. This was exemplified when India introduced its second occasional answer to the United Nations Human Rights Committee in 1991.

Individuals from the UNHRC posed various questions about the legitimacy of the AFSPA, addressing how the AFSPA could be regarded established under Indian law. Notwithstanding, India depended on the sole contention that the AFSPA is an essential measure to keep the withdrawal of the North Eastern states. This thinking epitomizes the endless loop which has been established in the North East due to the AFSPA. The utilization of the AFSPA pushes the interest for more independence, giving the general population of the North East more motivation to need to withdraw from a state which institutes such powers and the unsettling which follows keeps on defending the utilization of the AFSPA from the perspective of the Indian Government. A major factor preventing the return of normalcy in Kashmir is the opposition to the Armed Forces (Special Powers) Act, 1990 (in short AFSPA).

Demands continue to be made for its repeal. There have also been attempts at exploring the options of making the law more humane. The option to lift the law from certain districts of the state, while continuing to operate in the areas still “disturbed”, has also been suggested. The ministry of defence (MoD) has so far seemed unwilling to accept any major changes. The deliberations of the Cabinet Committee on Security and the all-party meeting convened by the government have also failed to yield a consensus.
9. **Indian law perspective**

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Article 21 of the Indian Constitution guarantees the right to life to all people. It reads, “No person shall be deprived of his life or personal liberty except according to procedure established by law”. Judicial interpretation that "procedure established by law means a "fair, just and reasonable law" has been part of Indian jurisprudence since the 1978 case of *Maneka Gandhi*. This decision overrules the 1950 *Gopalan* case which had found that any law enacted by Parliament met the requirement of "procedure established by law".

Article 4(a) of the AFSPA, stipends military work force the ability to shoot to kill, consequently fervently damaging the protected appropriate
to life. This law is quite recently subjective, uncalled for, out of line, and preposterous on the grounds that it enables the military to utilize an over the top measure of constrain. The offenses under segment 4(a) are: "acting in contradiction of any law or request for the present in constrain in the aggravated zone precluding the get together of at least five people or the conveying of weapons or of things fit for being utilized as weapons or guns, ammo or dangerous substances". None of these offenses fundamentally include the utilization of drive.

The military are in this way permitted to retaliate with forces which are horribly out of proportion with the offense. Equity requires that the utilization of drive be defended by a requirement for self-preservation and a base level of proportionality. As pointed out by the UN Human Rights Commission, since "assembly" is not defined, it could well be a lawful assembly, such as a family gathering, and since "weapon" is not defined it could include a stone. This show how wide the interpretation of the offences may be, illustrating that the use of force is disproportionate and irrational.

Article 14 of the Indian Constitution “guarantees equality before the law”. This article guarantees that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." The AFSPA is in place in limited parts of India. Since the people residing in areas declared "disturbed" they are therefore being denied the protection of the right to life, denied the protections of the Criminal Procedure Code and prohibited from seeking judicial redress, they are also denied equality before the law.
Article 22 of the Indian Constitution states that:

"(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

The remaining sections of the Article deal with limits on these first two sections in the case of preventive detention laws. On its face, the AFSPA is not a preventive detention law therefore the safeguards of sections (1) and (2) must be guaranteed to people arrested under the AFSPA. Section (2) of Article 22 was the subject of much debate during the framing of the Indian Constitution.

There was argument over whether the time limit should be specified or whether the words "with the least possible delay" should be used. Dr. Ambedkar, one of the principal framers of the Indian Constitution argued that "with the least possible delay" would actually result in the person being held for a shorter period of time, whereas "twenty-four hours" would result in the person being held for the maximum time of twenty-four hours. The application of these terms has since shown that a specified time period constitutes a greater safeguard. Under the AFSPA, the use of "least possible delay" language has allowed the security forces...
to hold people for days and months at a time. In its application, the AFSPA does lead to arbitrary detention.

If the AFSPA were 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. The case of *Luithukla v. Rishang Keishing*, a habeas corpus case, exemplifies the total lack of restraint on the armed forces when carrying out arrests. The case was brought to ascertain the whereabouts of a man who had been arrested five years previously by the army.

The Court found that the man had been detained by the army and that the forces had mistaken their role of "aiding civil power". The court said that the army may not act independently of the district administration. In the habeas corpus case of *Bacha Bora v. State of Assam*, the petition was denied because a later arrest by the civil police was found to be legal. However, in a discussion of the AFSPA, the court analyzed Section 5 (that is of turning the arrested person over to the nearest magistrate "with
least possible delay"). The court did not use Article 22 of the Constitution to find that this should be less than twenty-four hours, but rather said that "least possible delay" is defined by the particular circumstances of each case. In this case, the army had provided no justification for the two week delay, when a police station was nearby, so section 5 was violated. Nevertheless, this leaves open the interpretation that circumstances could justify a delay of 5 days or more.

The CrPC establishes the procedure police officers are to follow for arrests, searches and seizures, a procedure which the army and other paramilitary are not trained to follow. Therefore when the armed forces personnel act in aid of civil power, it should be clarified that they may not act with broader power than the police and that these troops must receive specific training in criminal procedure. In explaining the AFSPA bill in the Lok Sabha in 1958, the then Union Home Minister stated that the Act was subject to the provisions of the Constitution and the CrPC. He stated “these persons [military personnel] have the authority to act only within the limits that have been prescribed generally in the CrPC or in the Constitution."

If this is the case, then why was the AFSPA not drafted to say "use of minimum force" as done in the CrPC? If the government truly means to have the armed forces comply with criminal procedure, then the AFSPA should have a specific clause enunciating this compliance. Further it should also train the armed forces in this procedure.

Chapter X, sections 130 and 131 of the CrPC sets out the conditions under which the armed forces may be called in to disperse an assembly. These two sections have several safeguards which are lacking in the Act.
Under section 130, the armed forces officers are to follow the directives of the Magistrate and use as little force as necessary in doing so.

Under 131, 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 on gazetted officers who may give the command to disperse such an assembly, whereas in the AFSPA even non-commissioned officers are given this power. The AFSPA grants wider powers than the CrPC for dispersal of an assembly.

Chapter V of the CrPC sets out the arrest procedure the police are to follow. Section 46 establishes the way in which arrests are to be made. It is only if the person attempts to evade arrest that the police officer may use "all means necessary to effect the arrest." However, subsection (3) 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. Section 4(a) lets the armed forces kill a person who is not suspected of an offence punishable by death or life imprisonment.

Under the Indian Penal Code, at Section 302, only murder is punishable with death. Murder is not one of the offenses listed in section 4(a) of the AFSPA. Moreover the 4(a) offences are assembly of five or more persons, the carrying of weapons, ammunition or explosive substances, none of which are punishable with life imprisonment under the Indian Penal Code.
Under section 143 of the Penal Code, being a member of an unlawful assembly is punishable with imprisonment of up to six months and or a fine. Even if the person has joined such unlawful assembly armed with a deadly weapon, the maximum penalty is imprisonment for two years and a fine. The same offence committed by someone in a disturbed area under the AFSPA is punishable with death. This again violates the Constitutional right to equality before the law.

Section 45 of the CrPC protects the members of the Armed Forces in the whole of the Indian territory from arrest for anything done within the line of official duty. Section 6 of the AFSPA provides them with absolute immunity for all atrocities committed under the AFSPA. A person wishing to file suit against a member of the armed forces for abuses under the AFSPA must first seek the permission of the Central Government.

In a report on the AFSPA to the UN Human Rights Committee in 1991, Nandita Haksar, a lawyer who has often petitioned the Guwahati High Court in cases related to the AFSPA, explains how in practice this leaves the military's victims without a remedy. Firstly, there has not been a single case of anyone seeking such permission to file a case in the North East. Given that the armed forces personnel conduct themselves as being above the law and the people are alienated from the state government, it is hardly surprising that no one would approach Delhi for such permission. Secondly, when the armed forces are tried in army courts, the public is not informed of the proceedings and the court martial judgments are not published.

_Habeas corpus_ cases have been the only remedy available for those arrested under the AFSPA. A _habeas corpus_ case forces the military or
police to hand the person over to the court. This gives the arrested person some protection. However, a habeas corpus case will not lead to the repeal of the act nor will it punish particular officers who committed the abuses. Also, only people who have access to lawyers will be able to file such a case.

It was contended that Section 6 of the AFSPA "immediately takes away, abrogates, pinches, frustrates the right to constitutional remedy which has been given in article 32(1) of the Constitution." thereby suspending the Constitutional right to file suit. This further shows that the AFSPA is more than an emergency provision because it is only in states of emergency that these rights can be constitutionally suspended.

Section 32(1) of the Constitution states that: "the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed." In the Constitutional Assembly debates, Dr. B.R. Ambedkar said, "If I was asked to name any particular article of the Constitution as the most important - an article without which this Constitution would be a nullity. I would not refer to any other article except this one (Article 32). It is the very soul of the Constitution and the very heart of it." During the emergency in 1975 the right to file for writs of habeas corpus was suspended as ruled by the Supreme Court in *A.D.M. v. Shivakant Shukla*.

The Emergency had been declared under Article 359 of the Constitution. This section has now been amended, stating that the fundamental rights of Articles 20 and 21 cannot be suspended, even in a state of emergency. Therefore, should an emergency be declared today, the right to file
habeas corpus on the grounds that the fundamental right to life has been denied should be allowed.

In a state of emergency, fundamental rights may be suspended under Article 359, since the 1978 amendment to this article, rights under Articles 20 and 21 may not be suspended. As shown above, the AFSPA results in the suspension of Article 21 right to life, therefore AFSPA is more draconian than emergency rule. Emergency rule can only be declared for a specified period of time, and the President's proclamation of emergency must be reviewed by Parliament. The AFSPA is in place for an indefinite period of time and there is no legislative review.

Chapter V of the CrPC sets out the arrest procedure the police are to follow. Section 46 sets out exactly how arrests are to be made. It is only if the person attempts to evade arrest that the police officer may use all means. The liberal goal should hence be informed by a thirst to find a way to prevent a situation in which another 50 years later, another generation of commentators are left to repeat the dreary chant that the cycle of violence is destined to go on endlessly. The cycle must be broken somewhere, unfortunately this is not simply the removing of one side of the argument—in this tense dialectic, for the counter argument, as already mentioned, can be equally hegemonic.

This however is not an excuse for the continuance of AFSPA; it is rather a plea for a better liberal argument against the AFSPA. The question “what after the AFSPA?” in this sense is not plain rhetoric as many who dread political incorrectness might make it out to be. It is stark reality. The campaign for the end to AFSPA must continue, but alongside it, in equal earnest, so must also the effort to find a liberal answer to the
question “what after AFSPA?” Perhaps the quest for this Holy Grail should be a grand and collaborative project of the civil society and the state.

10. **International law perspective**

Under relevant international human rights and humanitarian law standards there is no justification for such an act as the AFSPA. The AFSPA, by its form and in its application, violates the Universal Declaration of Human Rights (the "UDHR"), the International Covenant on Civil and Political Rights (the "ICCPR"), the Convention Against Torture, the UN Code of Conduct for Law Enforcement Officials, the UN Body of Principles for Protection of All Persons Under any form of Detention, and the UN Principles on Effective Prevention and Investigation of Extra-legal and Summary Executions.

International Covenant on Civil and Political Rights ("ICCPR"): India signed the ICCPR in 1978, taking on the responsibility of securing the rights guaranteed by the Covenant to all its citizens. The rights enunciated by the ICCPR are those which must be guaranteed during times of peace by the member states. In times of public emergency, the ICCPR foresees that some rights may have to be suspended. However, the ICCPR remains operative even under such circumstances since certain rights are non-derogable. The AFSPA violates both derogable and non-derogable rights.

Article 1 of the ICCPR states that all people have the right to self-determination. As discussed previously, the AFSPA is a tool in stifling the self-determination aspirations of the civilians living in a disturbed area.
Article 2 imposes an obligation on the states to ensure that all individuals enjoy the rights guaranteed by the Covenant.

This includes an obligation to provide a remedy for those whose rights are violated. When India gave its second periodic report to the UN Human Rights Committee in March 1991, members of the Committee pointed out that the AFSPA violates this right because article 2 foresees more than just a legal system which provides such remedies, but requires that such a system work on the practical level.

The greatest outrage of the AFSPA under both Indian and international law is the violation of the right to life. This comes under Article 6 of the ICCPR, and it is a non-derogable right. This means no situation, or state of emergency, or internal disturbance, can justify the suspension of this right. The armed forces in the North East have systematically tortured the people they arrested under the AFSPA. Article 7 of the ICCPR prohibits torture and this also is a non-derogable right.

During Operation Bluebird, the Assam Rifles committed gross abuses of this right. The Operation was launched in the wake of an attack on an Assam Rifles outpost in Oinam, a village in Manipur.

Under similar circumstances in "Operation Rhino", Rajputana Rifles surrounded the village of Bodhakors on October 4, 1991. An extensive house to house searched was conducted during which women were sexually harassed and men were taken to interrogation camps. They were beaten up and kept without food or water. During this combing operation not a single insurgent was found. The People's Union for Civil Liberties (PUCL) noted, "It is very difficult to understand the logic such useless
raids, mass torture and interrogations, unless the purpose is taken to be the creation of pure terror for some sinister and ulterior motives."

Article 26 of the ICCPR, like Article 14 of the Indian Constitution guarantees equal protection for all persons before the law. The AFSPA violates this right because the inhabitants of the North East do not have equal protection before the law. They live under virtual but undeclared state of emergency and are given no remedy for the injustices they suffer at the hands of the military.

11. International humanitarian law
The four Geneva Conventions of 1949 along with the two optional protocols, constitute the body of international humanitarian law. These provisions are suited to human rights protection in times of armed conflict. Under these conventions the International Committee of the Red Cross (ICRC) is given access to all international conflicts. In no international armed conflicts, the ICRC can only offer its services. UN Intervention Kashmir, along with the Israeli-Palestinian conflict and the war in Korean Peninsula, was among the first crisis that the United Nations had to confront in the post-World War II period. Sixty years have passed by since Kashmir conflict was first debated in the U.N and yet the conflict continues to elude a solution. The U.N involvement in the Kashmir Conflict largely lasted for 17 years (1948-65). After the Indo-Pak war of 1965, the U.N engagement with Kashmir continued at a very nominal level till the 3rd Pakistan-India war of 1971 and completely ended with the signing of the Simla Agreement in 1972, an Indo-Pak peace agreement, which laid emphasis on adopting a bilateral framework to solve the Kashmir imbroglio and kept the U.N out of the picture afterwards.
During the course of its engagement with the Kashmir Conflict, spanning 23 years (1948-1971), the U.N passed a number of resolutions, which were aimed at mediation and resolution of the conflict. Between 1948 and 1971, the U.N Security Council passed 23 resolutions on Kashmir Conflict.

“Vis-à-vis k issue U.N. resolutions are not self-enforceable. Invoking Art. 6 of the UN charter, they were recommendatory in nature, applicable only if the parties to the dispute, India and Pakistan would both approve. In contrast art.7 is enforceable by armed U.N intervention. In present times, the world powers intervening in trouble spots like Iraq are UN mandated”.

India lodged a complaint under Article 35 (Chapter VI) of the UN Charter in the UN Security Council on January 1, 1948 charging Pakistan with 'aiding and abetting' the Pakistani tribal invasion in Jammu and Kashmir. In the United Nations, India claimed that all the territories of the Princely State of Jammu and Kashmir legally belonged to her by virtue of the treaty of accession signed by the Hindu king of the Kingdom with the Indian Union. Two weeks later, Pakistan responded to the Indian complaint with counter charges. Pakistan denied having aided the raiders, accused India of annexing Kashmir and of trying to throttle Pakistan in its infancy. The first UN debate on Kashmir started under the rubric of "Kashmir Question". However, the Pakistani delegation argued that the Kashmir Question had to be seen in the context of India's attempts to negate the existence of the newly born State of Pakistan and that the conflict in Kashmir was threatening the very survival of Pakistan. The

7 Kashmir Stray Thoughts, Dr. Javid Iqbal (153).
Pakistani argument was to prevail and the debate in the U.N shifted from "Kashmir Question" to "India-Pakistan dispute". The UN Military Observers Group that was later established in the divided territories of Kashmir- with offices in both Indian-occupied-Kashmir and Pakistan occupied-Kashmir- was to be known as "UN Military Observer Group in India and Pakistan" (UNMOGIP) and not as "UN Military Observer Group in Kashmir". The job of the group was to monitor, investigate and report complaints of cease-fire violations along the "cease-fire line" in Kashmir to the United Nations.

After hearing Indian and Pakistani representatives, the UN Security Council passed its first resolution (Resolution 38) on Kashmir Conflict on January 17, 1948, calling India and Pakistan to exercise restraint and ease tensions. Three days later, on January 20, the Security Council passed another resolution (Resolution 39), creating the United Nations Commission for Indian and Pakistan (UNCIP) to investigate the dispute and mediate between the two countries.

Led by Britain and the United States, the U.N Security Council passed another resolution (Resolution 47) on April 21, 1948, which enlarged the membership of the UNCIP from 3 to 5, called for cessation of hostilities between India and Pakistan, withdrawal of all Pakistani troops and tribesmen and bulk of Indian troops (except for a minimal number required for maintaining law order), allowing return of refugees, release of political prisoners and holding of a UN supervised plebiscite in the (Princely) State of Jammu and Kashmir to determine the aspirations of her people. The plebiscite was to be held by a UN appointed plebiscite administrator. The UN Security Council passed another resolution on June 3, 1948, which reaffirmed the previous resolutions and asked the
UNCIP to proceed to the "disputed areas" to carry out its mission as stated under Resolution 47 of April 21, 1948.

The UNCIP reached the Indian sub-continent in July 1948 and after deliberations with Indian and Pakistani leadership, produced a proposal, which called for an immediate ceasefire and a truce agreement between India and Pakistan, withdrawal of all Pakistani tribals and nationals and bulk of India's troops. India rejected the proposals on the basis of the argument that the proposal did not opportune any blame on Pakistan—which India considered as the aggressor in Kashmir—whereas Pakistan rejected the plan as the Interim administration of Valley of Kashmir and the territories that had fallen under Indian control had been assigned to Sheikh Abdullah's control. Sheikh Abdullah, who had become the Prime Minister of the autonomous J&K State on March 5, 1948, was considered by Pakistan as India's ally and by implication could influence the plebiscite in India's favour. Pakistan also rejected the agreement on the ground that it was supposed to withdraw all its forces from the State whereas India was allowed to retain some of its troops to maintain order, which could potentially lead to coercion or intimidation of voters by Indian forces to influence the outcome of the proposed plebiscite.

On August 14, 1948 the UNCIP submitted proposals to the Indian and Pakistani governments, which for the first time contained an acknowledgment from Pakistan about the presence of its troops in the State of Jammu & Kashmir. The proposal envisioned the withdrawal of Pakistani troops and nationals and bulk of Indian troops from the State, subsequent to their withdrawal the administration of the territory was to be run by the Commission.
On December 11, 1948, the UNCIP laid out a new set of proposals that elaborated on the question of Plebiscite in the State of Jammu and Kashmir. As per the proposals "The question of accession to India or Pakistan was to be decided by a free and impartial plebiscite, which was contingent upon.

The two countries accepted the cease-fire plan and allowed the U.N to observe the ceasefire from January 1, 1949. The ceasefire-line "went through the western part of Jammu and the eastern part of Poonch, leaving the capital city of Poonch on the Indian side of the line, then crossed the Jhelum River at a point west of Uri and made a large sweep following the valley of the Kishinganga River. From there, it proceeded to Kargil, which also remained on the Indian side, and then north-west to the Chinese border. Hunza, Gilgit, Baltistan, Chilas, the great part of Poonch, and the smaller part of Jammu remained in control of Pakistan and Azad Kashmir".

On January 5, 1949, the United Nations came up with a new plan for a plebiscite. To address Pakistan's fears that the Plebiscite outcome may be influenced in India's favor by Sheikh Abdullah-who was seen as close to Indian PM Nehru and had been appointed as the interim head of J&K administration-and the limited Indian troops which were meant to maintain law and order during the plebiscite, the UN proposed that the State of Jammu and Kashmir should be under the full control of the Plebiscite Administrator. The Plebiscite administrator was to enjoy quasi-sovereign powers over the State of Jammu and Kashmir. The proposal was rejected by the Indian side, which maintained that the State had become a part of the Indian Union.
In December 1949, UNSC President General A.G.L McNaughton tried to mediate between Indian and Pakistan at the UN but failed to manage an agreement between the two sides. McNaughton submitted a series of proposals, suggesting demilitarization of Kashmir to ensure an impartial Plebiscite in Kashmir. These proposals were rejected by India.

After the failure of McNaughton proposals, the United Nations replaced the UNCIP by a single UN representative Owen Dixon in 1950. Owen Dixon after meeting the officials of India and Pakistan soon concluded that there was little or no hope regarding an Indo-Pak agreement on demilitarization proposals. Dixon came up with a set of proposals, which envisioned holding of 'regional plebiscites' in the State of Jammu & Kashmir.

The proposals submitted to the UN Security Council in 1950, suggested (a) holding a Plebiscite in the whole State of Jammu & Kashmir, region by region (b) holding a Plebiscite only in regions which were 'doubtful', the rest would constitute those regions that were expected to vote definitely either for an accession with either India or Pakistan. The doubtful region was meant to be the Valley of Kashmir. However India and Pakistan could not come to an agreement on the Dixon proposals. After the failure of Dixon, the U.N appointed Frank Graham as a U.N representative to mediate between Indian and Pakistan to get them to agree on holding a plebiscite in Kashmir. Graham worked from 1951-53 without meeting any success. Frank Graham was followed by Gunnar Jarring in 1957 who also failed to make any headway on Kashmir.

In the wake of the termination of the mandate of UNCIP, the UN Security Council passed Resolution 91 on 30 March, 1951, which established the
United Nations Military Observer Group in India & Pakistan to monitor the ceasefire line (now called Line of Control, the border that divides Indian and Pakistani controlled parts of Kashmir) in Kashmir. The UNMOGIP still maintains its presence in both Indian-administered-Kashmir and Pakistan-administered-Kashmir.

On 23 January 1957, India's client regime in 'Jammu & Kashmir', led by Bakshi Ghulam Mohammad adopted a constitution for the State and a resolution ratifying the State's accession with India. Pakistan raised the issue in the U.N Security Council and a day after, the UNSC passed a resolution which reiterated the earlier U.N resolutions on Kashmir that called for a final settlement of the dispute "in accordance with the will of the people expressed through the democratic method of free and impartial plebiscite conducted under the auspices of the U.N."

Thus the 1957 UN resolution deemed any constitutional change undertaken by India within Indian-administered-Kashmir as irrelevant to the resolution of Kashmir Conflict.

The Dixon Plan seemed to be the last serious endeavor on part of the U.N to solve the Kashmir conundrum. Although Pakistan kept raising the Kashmir issue in the United Nations in the 60s, U.N involvement in Kashmir was considerably reduced after Indo-Pak war of 1965. In 1962 the Kashmir Question was again debated in the U.N Security Council. However, the UNSC failed to pass a resolution on Kashmir in view of a Soviet veto, which discouraged the UNSC from pursuing the Kashmir question afterwards.
The UN was virtually elbowed out of the Kashmir dispute by Russia after the Indo-Pak war of 1965 when Russian negotiated the Tashkent Peace Agreement between the two rival nations on 10 January 1965. During the Indo-Pak 1965 war the UN passed a strongly worded resolution, calling on India and Pakistan to agree on a ceasefire. However it was only after intense pressure applied by the two superpowers, U.S. and the Soviet Union that India and Pakistan agreed to observe a UN sponsored ceasefire on September 29, 1965.

The last UNSC resolution (307) that dealt with Kashmir was passed in the wake of the India –Pakistan war of 1971, where Kashmir was not at the centre of the conflict between the two countries. The resolution could be passed only after Indian had declared a unilateral ceasefire. UNSC's attempts to pass resolutions during the 1971 war were blocked by a Soviet veto and with the signing of the Simla peace accord between India and Pakistan in 1972, which laid stress on bilateral solutions to the Kashmir issue, the UN involvement in Kashmir was in reality dead.

The failure of the U.N in mediating a solution to the Kashmir dispute can be largely ascribed to Indian refusal to heed to the resolutions. India had taken the issue to the UN, with the hope that the international body would declare Pakistan as an aggressor in the 1947-48 war and would help her to gain control over Pakistan-administered-Kashmir as India claimed the whole of Kashmir by virtue of the accession treaty signed by the Maharaja of Jammu & Kashmir with her. Contrary to India's expectations, the UN called for a Plebiscite in Kashmir. Consequently India was to shy away from implementation of UN resolutions.

The fresh delineation of the "cease- fire line", which was originally
established in 1949 after the Indo-Pakistan cease-fire in Jammu& Kashmir-in Kashmir by India and Pakistan in 1972 converted the "cease-fire line" into "Line of Control" (LOC), which from an Indian perspective turned the temporary border in the disputed territory of Kashmir into a de facto 'permanent border between' India and Pakistan. Pakistan was forced to accept the change in the wake of its defeat in the 1971 war. India contended that with the formation of Line of Control, the mandate of the UNMOGIP had expired. However Pakistan insisted that the "UN Military Observer Group in India and Pakistan" (UNMOGIP) continue monitoring the LOC as it was a disputed border and that the "LOC" was in fact the original cease-fire line.

India wanted the UNMOGIP to leave as it didn't want to accept any sort of international intervention in the Kashmir conflict. Since 1972 India has not reported to the UNMOGIP whereas Pakistan has continued to report Indian violations of the LOC to the observer group. While the movement of the UNMOGIP is unrestricted in Pakistan-administered-Kashmir, the observer group is nowhere in sight beyond their office premises at Sonawar locality of Srinagar.

With its limited mandate, the group has played virtually no role in the conflict after 1972. Even during the popular Kashmir uprising in 1989-90, when hundreds of thousands of Kashmiris marched in pro-freedom processions in Kashmir Valley and when thousands crossed the LOC to receive arms training, the UNMOGIP remained in hibernation in its Srinagar office.

In October 2001, the UNMOGIP Chief, Major-General Hermann Loidolt’s described Kashmir as a "tortured country" and blamed India and
Pakistan for playing games with Kashmir. The observer also described the LOC as a ceasefire-line and a disputed border, which fell under UNMOGIP mandate. The statement evinced a sharp reaction from India, which called the UN observer's statement as 'uncalled for' and the Indian External Affairs Minister threatened to lodge a complaint in the U.N against the observer. Not surprisingly, Loidolt's statement was welcomed by Kashmiri separatist leaders.

The most recent UN effort to engage with Kashmir came during the Indo-Pak border confrontation of 2002, when India mobilized half a million troops along its border with Pakistan to pressurize Pakistan to stop aiding insurgents in Kashmir. UN Secretary General Kofi Anan's efforts to mediate during the crisis were snubbed by India. Kofi Annan was not allowed to visit India and to placate Indian fears. Annan stated that UN resolutions on Kashmir were not "enforceable in a mandatory sweep".

12. UN and the politics of separatism in Kashmir

Though UN involvement in Kashmir has been reduced to a naught, the existence of UN resolutions on Kashmir has greatly shaped Kashmiri political identity vis-a-vis the Kashmir Conflict. The disputed status of Kashmir as declared by the UN played on the psyche of Kashmiri people and strengthened their distinct political identity. The UN involvement in Kashmir has left a firm imprint on separatist politics and political mobilization in Kashmir.

The Kashmir separatist party, Plebiscite Front, alluded to and took its name from the UN's notion of Plebiscite. The party was established in 1955 in Indian-administered-Kashmir by Sheikh Abdullah's close associate, Afzal Beigh and defined the Kashmiri self-determination
movement for around two decades. In Pakistan-administered-Kashmir, a pro-independence party, also by the name of Plebiscite Front was formed by Kashmiri nationalists. Though not formally linked to the Kashmir Valley centered, Plebiscite Front, the Pak-administered-Kashmir based Plebiscite Front shared its political vision. Despite that the UN resolutions on Kashmir gave Kashmiris only two choices to determine their political fate, viz., accession to India or to Pakistan, the plebiscite movement in both parts of Kashmir, while calling for a UN referendum in Kashmir wanted the inclusion of an independent Kashmir as a political option in the plebiscite.

From 1955 to 1974, the words, Plebiscite Front and Plebiscite -known as Mahaz-e-Rai Shumari and Rai Shumari, respectively, in Kashmir-were to dominate the popular political discourse in Kashmir. 'Hold the plebiscite now, hold it fast', constituted the key slogans of the plebiscite movement in Kashmir during the 1950s and 60s.

When a popular uprising broke out against Indian rule in Indian-administered Kashmir in 1990, one of most shouted slogans during pro-independence processions was to be, 'Until a plebiscite is held, our struggle will continue'. During the heady days of the 1990 uprising large pro-Independence processions of Kashmiris would often lead to the UNMOGIP headquarters in Srinagar to lodge protests and call on the UN to implement its resolutions on Kashmir. In one such procession, more than a million Kashmiris marched up to the UNMOGIP headquarters in Srinagar on 1 March, 1990, shouting pro-freedom slogans and calling for a UN supervised plebiscite.
The crowd also submitted memoranda to UN Secretary General urging him to intervene and push India into granting Kashmiris their 'right to self-determination'. Even now it is a common practice among Kashmiri separatists to send memoranda to the UNMOGIP in Srinagar, demanding implementation of UN resolutions in Kashmir or the fulfillment of the right of self-determination of Kashmiris.

In the ongoing wave of pro-independence mass protests in Kashmir, Kashmiris are again looking towards the UN with a faint hope. On August 18, 2008, responding to the call of separatist leaders who had called for a mass march up to UNMOGIP office, hundreds of thousands of people from the length and breadth of the valley converged near the Tourist Reception Centre, close to the UNMOGIP office in Sonwar locality of Srinagar to urge on the UN to intervene in Kashmir. The sea of people-comprising students from schools, colleges and universities, doctors, teachers, paramedics, thousands of Kashmir government employees, professionals and peasant masses - carried placards which read, "Stop Genocide of Kashmiris, Intervene UNO", "Ban ki-moon, Come soon", "We want plebiscite" etc.

Representatives of the Kashmiri separatist leadership presented a memorandum (addressed to U.N Secretary General, Ban ki-moon) to the UNMOGIP observers, urging on the UN to intervene in Kashmir. The memorandum, which was also published in the local press in Kashmir Valley stated, "...We the people of Jammu & Kashmir have firm faith in the institution of United Nations, which has been working for the mitigation of the sufferings of the oppressed around the world, will actively engage and monitor and intervene in Jammu and Kashmir and;"
a. Call upon India to end its forcible occupation of Jammu Kashmir and also desist from use of brute force against the people of Jammu and Kashmir.

b. By itself take all effective measures in giving the people of the State, the chance to exercise their right to self-determination for deciding their future as has been conceded to them by Pakistan and India and approved by the United Nations Organization...

Some of the protestors carried copies of the memorandum which had been circulated by the "Coordination Committee" of the separatist leadership.

In Kashmir's current media and popular discourses on Kashmir conflict, 'UN-Kashmir relationship' has again come under focus. Kashmir Valley's largest selling English daily, Greater Kashmir, recently cited Zafar Shah, an eminent Kashmiri lawyer, as saying 'when armed resistance broke out in the valley in 1990, at least 600 memoranda were presented to the UN Observers stationed in Kashmir'. Shah, a Kashmiri nationalist, further said, "The UN resolutions passed in 1948 are the backbone of the Kashmir struggle and give legitimacy to it".

Despite the UN's gross failure in Kashmir, the presence of UNMOGIP office in Kashmir continues to symbolically affirm the Kashmiri sentiment that their land is not yet another Indian State but an internationally recognized disputed territory and that their cause is a historical and just one.

The words United Nations, Self-determination and Plebiscite have become integral to the Kashmiri political lexicon. Though the UN has
failed in bringing about a solution to the Kashmir conundrum, its past involvement in Kashmir Conflict has undoubtedly provided legitimacy and strength to the separatist argument in Kashmir. Ironically, on the one hand Kashmiri separatism has drawn strength from the UN resolutions but on the other hand the framing of the Kashmir Conflict as an India-Pakistan (Inter-State) Conflict in the UN has prevented international recognition of the Kashmiri nationalist movement as the defining characteristic of the present day Kashmir Conflict.⁸

The ICRC’s mandate in the context of non-international armed struggle is based on Protocol II to the Geneva Conventions. However, India has not signed either protocol to the Geneva Conventions. Nevertheless, the ICRC can offer its services in such a conflict. Hence, when the ICRC offers its services in such a situation, a state should not consider it as an interference in its internal affairs. Basically in the long run, with respect to the working mechanism of ICRC, it well may be thought as an alternative to AFSPA Act.

A noted US expert on South Asia, Stephen Cohen, acknowledged that in the past, the US had seldom openly challenged the legitimacy of the accession of Kashmir to India. Yet, at this time, in a series of speeches and informal addresses and innuendo’s the traditional American position on Kashmir was altered so that the US now openly declared all of Kashmir to be a disputed territory.”

13. Comparative law standards

The British armed forces presence in Northern Ireland is an apt comparison to the Indian military presence in the North East. The British carry out arrests under the Northern Ireland (Emergency Provisions) Act or the Prevention of Terrorism (Temporary Provisions) Act. When detainees were held for seven days without charge the European Court of Human Rights found this to be in violation of the European Human Rights Covenant.⁹