

## AFSPA AND CONSTITUTION

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### INTRODUCTION

Fundamental rights are considered as a part of basic structure of Indian constitution but there are laws inconsistent to the rights provided in our constitution, one such law is AFSPA (ARMED FORCE SPECIAL POWER ACT, 1958). The objective of this Act is to maintain 'Public Order'. This law is inconsistent to Article 19 and 22 of constitution which provide right to freedom. During the colonial rule Lord Linglithow enacted this to suppress the quit India movement. This Act is considered arbitrary and have given immense power to the Army personnel. The areas which are notified by the central government like Jammu and Kashmir, and some districts of Assam, Arunachal, Manipur, and Nagaland. The constitutional validity of the AFSPA was challenged in Naga people's movement of Human right VS UOI<sup>i</sup>, the Apex court held the validity of the AFSPA.

The main contention in this was that does the Parliament have power to enact such arbitrary act under the 7<sup>th</sup> schedule (entry 97). After the 42<sup>nd</sup> constitutional Amendment entry 2A was added which provided power to central government to enact such Arbitrary law. Whether the central government has power to enact law under list 1 as public order is mentioned in List II (entry 1) which state has power to make laws. The apex court was on the opinion that AFSPA is constitutional, and parliament has power to make law and at the same time laid down certain guidelines which are:

- The person should not be arrested or detained for a term that more than what is necessary.
- No use of force except when the detainee is trying to escape.
- The person detained should be handed over to the nearest police station.
- Torture should be avoided to get information or to make confessions.

- Only the army personnel are allowed to be arrested under this Act.

Basically, the main contention of this petition was to see that section 4(a) is in consistency with the constitution. Section 4 (a) deals with use of deadly force by the armed force and the apex court was of the opinion that this was necessary to maintain the public order and harmony. Apex court was of contention that the disturbed area declared by the government under section 3 of the Act without a time limit shall be reviewed by them every six months.

## ANALYSIS

The main contention of this law is to maintain public peace and control violent situations if any occur. There was a committee setup by central government in 2005 under the chairmanship of Justice BP Jeevan Reddy<sup>ii</sup> with 5 members to review the provision of AFSPA. The main recommendations were that provisions should be made in consonance with human rights and amendment of the Act, but the government failed to act upon.

In *Harendra Kumar Deka vs State of Assam and others*<sup>iii</sup>

The High court said that no person shall be deprived of the right to life under Article 21 and use of deadly force should be used when there is a threat to public order. Section 6 of AFSPA does not give absolute immunity to armed force and are liable for their acts and legal proceedings should be initiated the police under the AFSPA and the same should be prosecuted.

The Apex court recently in *Extra-judicial execution victim family association vs Union of India*<sup>iv</sup>

In this case the court directed the CBI to find out the allegations made by the petitioner in the fake encounter case. The Apex court also gave a suggestion that every state should have Human right commission to provide effective remedy.

As we are all are aware about the judgement given by apex court in *Maneka Gandhi vs Union of India*<sup>v</sup> that right to life also includes right to live with human dignity and the same could be seen inconsistency with the AFSPA

Various recommendations and judgments were given to regulate AFSPA but none of them were looked into by the government. So, there is a need to reform this Act.

## **LEGAL POINT/ CASE COMMENT**

Operation Bluebird happened in 1987 is one of the biggest incidences which show that AFSPA is clear violation of Human and fundamental rights.

The judgement given by the supreme court in Naga people's movement of Human right VS UOI is a very narrow judgement and the same could be criticized on various issues or point given by the Hon'ble Apex court. I would not say that AFSPSA is unconstitutional, but the recommendation given by the Apex court were ambiguous as the time period, that how much time a person is to be detained is not mentioned and same could be interpreted in favour of Army or police.

There are various fundamental rights and the Apex court have included human rights under the Article 21 of the constitution as we can see in *Shreya Singhal vs UOI*<sup>vi</sup> which provide right to freedom of speech and expression. So, AFSPA is totally in violation of the various judgements given by the Apex court. There were various protests led by the state having AFSPA and there were many contentions related to section 4 of the act which gave the arbitrary power to shoot which can obviously be misused by the armed forces. There are just 6 sections in AFSPA 1958 which shows that it was not looked into that thoroughly. But the High court in *Luithukia v. Rishang Keishing*<sup>vii</sup> clearly stated that the armed forces were to work in cooperation of the district administration so that no misuse of power is done by the armed forces.

Under section 6 of the Act which clearly states no person to be prosecuted under this Act without prior approval of government. This is one of the many loopholes which should the government think upon to bring out a new and amended law keeping in view of the human rights and proper punishment and time period should be mentioned.

So, the Apex court has given various judgement to rectify the loopholes, but I personally think that is not enough we need a proper Act keeping in view with the fundamental rights provided under the constitution. Commission should be setup to bring a new and amended law. It is very

important to stop the unconditional power that is given to the army given under section 4 and 6 of the Act. Limitations should be there to stop this unconditional power. Section 5 should be made within the ambit of Article 22 of the constitution.

India is a signatory to the International Covenant on Civil and political rights <sup>viii</sup> so under Article 6 of the Covenant provides “Inherent right to life”. So, Section 4 of the AFSPA is clearly in violation of this Covenant which states that no person shall be deprived of this law. Under section 4 the state can decide whether to waive off this right which shows the arbitrariness of this Act. Thus, we are in dire need to amend this Act.

## CONCLUSION

There is thought to ponder upon that how the main objective of this Act was to stop enemies and anti-national uprising but, is it working? There need to be a system of checks and balances and Supreme court need to have a greater role and rigorous punishment should be there for committing crimes against Human dignity. Moreover, the provisions of AFSPA is in clear violation of International Covenant on Civil and Political Rights so there is an urgent need to amend the Act or bring a new one.

## ENDNOTES

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<sup>i</sup> (1998)2 SCC 109

<sup>ii</sup> Jeevan Reddy Commission | Exposing AFSPA (wordpress.com)

<sup>iii</sup> 2008 SCC OnLine Gau 652 : (2009) 2 Gau LR 263

<sup>iv</sup> 2016 14 SCC 536

<sup>v</sup> 1978 AIR 597, 1978 SCR (2) 621

<sup>vi</sup> AIR 2015 SC 1523

<sup>vii</sup> Luithukia v. Rishang Keishing Others | Gauhati High Court | Judgment | Law | CaseMine

<sup>viii</sup> International Covenant on Civil and Political Rights | OHCHR