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# A CRITICAL ANALYSIS OF THE ARMED FORCES SPECIAL POWER ACT (AFSPA). A NEED OF THE TIME OR A DELINEATION FROM THE MORALITY OF THE LAW?

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## I. ABSTRACT

Martin Luther King Jr. stated that "There are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws."

Armed forces special power act (AFSPA hereafter) is imposed on states or areas by the center of the governor of a state after it is declared "disturbed" under section 3 of the said Act. The Act defines these areas to be hazardous or prone to militancy and gives exclusive power to the armed forces deployed in these areas. It is the comprehensive power that the armed forces enjoy after the implementation of this act that is becoming the reason for apprehension. Pure impunity to the armed forces under this act gives them the power to shoot down any person on mere suspicion of them being involved in the contravention of the law. Various claims questioning the authenticity of these encounters have been raised with negligible or no action being taken at all. This paper accentuates various such claims and also a handy view of the act of violating human rights. The paper undertakes empirical and analytical research into the morality, or immortality of law, whichever can be concluded upon elucidating the facts and circumstances and in consequence, the predicament of those who are affected by AFSPA.

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The letter of the law in the paper is one thing, its motive is another, and its application, that matters, is a whole different thing, that is the real subject matter of any law. And the real evaluation of law is through those who are affected by it, be it in negative or positive terms. The political aspirations of the rest of the country can never scapegoat the equally innocent precious lives, as a sacrifice to sustain or replenish the former. The paper also concerns a jurisprudential analysis of the said Act. The paper concludes that if it is imminent in all circumstances to sustain this law to sustain peace, which the data proves contrary, then it would also be in the best interest of humanity, peace, and the morality of the country to make some serious deliberations upon the law.

## **II. KEYWORDS**

Jurisprudential, analysis, AFSPA, criticize.

## **III. INTRODUCTION**

This paper is a detailed study of the Armed Forces Special Power Act<sup>3</sup> (AFSPA hereafter) concerning gross human rights violations. This paper aims to scrutinize the vexed nature of this highly contentious Act. A draconian law introduced first by the British governor-general Lord Linlithgow to suppress the rising dissent against them has found its place in the rule book of the world's largest democracy; India.<sup>4</sup> This act, once implemented, gave deliberated power to the commissioned officers to act in any manner requiring any amount of force. The officer had the power to kill, destroy property, and unconditional power to arrest. The word reasonable apprehension in the Act is a double-edged sword that, owing to its subjective interpretation and personal biases, is used as a tool to crack down on violence. In post-independence India, the first use of AFSPA was seen in 1952

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<sup>3</sup> THE ARMED FORCES (SPECIAL POWERS) ACT, 1958, NO. 28, ACTS OF PARLIAMENT, 1958 (INDIA)

<sup>4</sup> The Armed Forces (Special Powers) Ordinance, 1942, NO. XLI, ORDINANCES OF GOVERNOR-GENERAL, 1942, (British India)

in Nagaland. The Armed Forces Special Powers Act was enacted in 1958 to deal with the rising violence in the Northeastern States.<sup>5</sup>

The Act, which was revoked on April 1, 2018, from Meghalaya, is still applicable in all of the states of North-East India and parts of Arunachal Pradesh. It is also effective in certain parts of Manipur and a similar act is enforced in Jammu and Kashmir (now it has been declared as a Union Territory<sup>6</sup>).<sup>7</sup> It has been, as already mentioned, a controversial matter, with many human rights groups opposing it. One of its supporters is Irom Sharmila of Manipur. She went on a hunger strike in 2000 in protest of an incident that happened in the town of Malom also known as the “Malom Massacre”<sup>8</sup>. It was enacted due to the inability of the State governments to control the situation. However, in the garb of freehand executions, and impunity from the pursuance of those acts, the officers in general abhor and misuse the Act horrendously. This may well be elucidated with the facts and data which speak for themselves, which is also the subject matter of this paper. The paper is also a tribute to all those innocent people to whom justice has never been served.

#### IV. HISTORICAL BACKGROUND OF AFSPA

The AFSPA act that we see today can be said to be a compendium of 4 ordinances 1) The Bengal Disturbed Areas (SPAF) Ordinance, Act 11 of 1947; The Assam Disturbed Areas (SPAF) Ordinance, Act 14 of 1947; East Punjab and Delhi Disturbed Areas (SPAF) Ordinance, Act 17 of 1947; and the United Provinces Disturbed Areas (SPAF) Ordinance, 1947 Act 22 of 1947.<sup>9</sup> The draconian law was introduced right after the rise of the Quit India movement to vanquish the dissident. Introduced by the then viceroy of India Lord

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<sup>5</sup> See, supra note 1

<sup>6</sup> See, THE JAMMU AND KASHMIR REORGANIZATION ACT, 2019, NO. 34, ACTS OF PARLIAMENT, 2019 (INDIA)

<sup>7</sup> See, THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 1990, NO. 21, ACTS OF PARLIAMENT, 1990 (INDIA)

<sup>8</sup> Alok Pandey, B Sunzu, “Manipur’s Malom Massacre: High court orders Rs 5 Lakh compensation for victim’s families, December 7, 2014, available at < <https://www.ndtv.com/india-news/manipurs-malom-massacre-high-court-orders-rs-5-lakh-compensation-for-victims-families-709536>. > The NDTV, (last visited on 25 December 2021).

<sup>9</sup> THE ARMED FORCES (SPECIAL POWERS) ACT, 1958, NO. 28, ACTS OF PARLIAMENT, 1958 (INDIA)

Linlithgow, seeing the uprising protest the act was implemented which resulted in the death of approximately 2500 people<sup>10</sup> and uncountable arrests. The blood bath did not stop here it went a step ahead and the army burnt village after village, the arrested protesters were beaten and tortured. An act that was solely introduced to violate human rights and suppress dissent is to date being used to do the same. After the independence of India, in 1954 the first prime minister of India found himself helpless in controlling the Naga insurgency for independence and sent in thousands of forces to crush the rebels. The armed struggle ensued resulting in casualties on either side. The violence was over, and in 1958 the Nehru government introduced the India Armed Forces Special Power Act in the parliament, and it was passed. "We want a free India. But we do not want a free India with barbed wires and concentration camps, where sergeants can shoot at sight any man," Surendra Mohanty, a dissident member of the parliament from Orissa, told the house.<sup>11</sup> Then the act was implemented in various Indian states from Jammu and Kashmir (1990 to date)<sup>12</sup> to parts of Arunachal Pradesh, Meghalaya, Tripura, and Nagaland. The blanket impunity that the act gave to the armed forces increased mass human rights violations, custodial torture, civilians' deaths in the areas it was enforced.

In the year 1826 when the British government annexed Assam into the then Indian British Empire<sup>13</sup> in the year 1881, the Naga hills were annexed too as a part of British India<sup>14</sup> A revolt for independence was also seen by the Nagas after the emergence of the Naga Club in 1918 which directed the Simon Commission in the year 1929, to let them live in peace and decide their faith.<sup>15</sup> After the formation of the Naga National Council in 1946 under

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<sup>10</sup> Peer, Basharat, "The Armed Forces Special Powers Act: A brief history." *Al Jazeera*, 8 March 2014, available at <<http://america.aljazeera.com/articles/2014/3/8/armed-forces-specialpowersactabriefhistory.html>> (last visited on 24 December 2021).

<sup>11</sup> *ibid.*

<sup>12</sup> Naseer Ganai, "Why AFSPA In Jammu And Kashmir Is Not Just A Defense Act." *Outlook India*, 7 December 2021, available at <<https://www.outlookindia.com/website/story/india-news-why-afspa-in-jammu-and-kashmir-is-not-just-a-defence-act/404114>> (last visited on 25 December 2021).

<sup>13</sup> "British Period." *Sonitpur District*, 18 December 2021, available at <<https://sonitpur.gov.in/portlet-sub-innerpage/british-period>> (last visited on 25 December 2021).

<sup>14</sup> Kashyap, Samudra Gupta, "Explained: Everything you need to know about the Nagaland insurgency." *The Indian Express*, 4 August 2015, available at <<https://indianexpress.com/article/india/india-others/everything-you-need-to-know-about-nagaland-insurgency-and-the-efforts-to-solve/>> (last visited on 25 December 2021).

<sup>15</sup> *ibid.*

the leadership of Angami Zapu Phizo, whose objective was to establish Nagaland as a “sovereign Naga state” the state was later declared independent in August 1947 following India’s independence and the withdrawal of the Britishers. A referendum also took place in 1951 in which 99% supported an independent state.<sup>16</sup> On March 22, 1952, Phizo formed the underground Naga Federal Government (NFG) and the Naga Federal Army (NFA). A state that from the very inception denied joining India was forcibly made to do so and any rising disagreement was taken care of with AFSPA. In a later visit to Kohima by Atal Bihari Vajpayee (then prime minister) he admitted in his speech that mistakes had been committed and lamented the unnecessary spilling of blood in the state.<sup>17</sup>

## V. IS AFSPA THE NEED OF THE HOUR?

The government's defense of this act is the security concern of the disturbed areas and the militancy threat to the state. The government also claims that it is the mere misrepresentation of the said act that brings it a bad name and how without it they would fail to control certain situations. Ever since Kashmir was merged with India a strong resistance to this decision was seen which gave rise to several small militant groups who stood against the state and the government using arms. By any estimation, the AFSPA has extreme grinding powers, but resilient conditions require extreme steps. Aspersers of the AFSPA may not acknowledge that insurgents are now tremendously well-trained. Insurgent or rebel fighters are often backed and supplied weapons by external powers to produce a secessionist movement inside India. These trained fighters are equipped with the latest guns and explosives which are far better than what the local police bear, which further is used to impose severe attacks on the army personnel. Militants are individuals and often groups that train in weapons and ammunition with the sole objective of overpowering a state. Several militant groups are active in Jammu and Kashmir as of now like Harkat ul mujahid, the badr, and jamaat ul mujahideen. the army is only deployed

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<sup>16</sup> *ibid.*

<sup>17</sup> *ibid.*

after the law-and-order is no longer existent and the situation is out of control. The efficiency of the army equals the pressure on the rebels and their activities hence they tend to instigate the locals to agitate for the removal of AFSPA which would simply mean withdrawing the army. The adherents of AFSPA also claim that if not for AFSPA the state would have lost Jammu and Kashmir long back.<sup>18</sup> countless numbers of militant attacks have taken place in the past by these militant groups on the security forces. The Army comprehensively sees AFSPA as a source enabling Act that gives them the necessary authority to conduct counter defensive operations efficiently.<sup>19</sup> If AFSPA is revoked or amended, it is the army is of the view that the performance of troopers in counter-insurgency operations will be severely affected and the terrorists or insurgents will grasp the ambition.<sup>20</sup> Stating all these reasons the government has resorted to using the act as the last hope to combat tough situations.

Civilian casualties across Jammu and Kashmir and Northeast are the result of the counterinsurgency while the army enjoys pure exception under AFSPA. In the past 21 years, more than 4,900 civilians have been assassinated in J&K alone while over 4,300 lost their lives in the states of Assam, Nagaland, Manipur, Mizoram, Meghalaya, and Arunachal Pradesh, as per official data count. The count of civilian casualties persisted to soar as high as 3,900 in the Left Wing Extremism-affected districts of Chhattisgarh, Maharashtra, Jharkhand, Bihar, and Andhra Pradesh.<sup>21</sup> The fatalities in these areas are often due to frequent clashes between security officials and militants, dummy encounters, mistaken identity, or target killing.<sup>22</sup> The tremendous pressure upon the army to produce results shows up in incidents like “Pathribal Encounters” of 2000 where 5 innocent

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<sup>18</sup> See supra note 15.

<sup>19</sup> AFSPA: The Army needs it! | Manohar Parrikar Institute for Defense Studies and Analyses.” *IDSAs*, 6 September 2016, available at <[https://idsa.in/idsanews/afspa-army-needs\\_gkanwal\\_060916](https://idsa.in/idsanews/afspa-army-needs_gkanwal_060916)> (last visited on 26 December 2021).

<sup>20</sup> *ibid*.

<sup>21</sup> Tripathi, Rahul. “Civilians biggest casualty of counter-insurgency operations.” *The Economic Times*, 5 December 2021, available at <<https://economictimes.indiatimes.com/news/india/civilians-biggest-casualty-of-counter-insurgency-operations/articleshow/88110504.cms>> (last visited on 26 December 2021).

<sup>22</sup> *Ibid*.

civilians were gunned down by the army in Jammu in Kashmir.<sup>23</sup> In another encounter that was carried out in the Hyderpora district of Kashmir where 2 suspected rebels were gunned down by the army resulting in 2 civilian deaths. The locals witnessing the incident claimed the army used the two men as human shields<sup>24</sup>. Is it impunity that promotes such action? Or the fear of not being prosecuted no matter what? A massive uproar was seen in Nagaland after 6 innocent coal mine workers were brutally shot down by the army on again mere suspicion of them being insurgents<sup>25</sup>. Protests erupted across the state with the army being attacked by the locals, their vehicles set ablaze, and camps targeted. The AFSPA act which was introduced to control militancy and turbulence and is required by the army to work in full efficiency is giving inhumane results instead.

## VI. JUDICIAL ANALYSIS OF AFSPA

The act itself is discriminatory for instance the act is different from the ones in Jammu and Kashmir and the northeastern by creating different divisions of citizenship the first being the armed forces those who are protected under this act second are the vulnerable individuals of the places where this act is applied and the third completely unaffected by the act i.e., people of the area where this act is not applied. Section 4 of the AFSPA act gives powers even to the noncommissioned officers who require no superior permission to demolish, kill or detain any individual<sup>26</sup>. Nor are they answerable to anyone for their acts or have to justify their action. Which directly intervenes with the constitution, the fundamental rights specifically, Article 21 of the Indian constitution. Section 5 of the said Act states that any person detained shall be handed over to the nearest police station at the earliest delay<sup>27</sup> This section again is in contrast with section 22(2) which further asserts

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<sup>23</sup> Ibid.

<sup>24</sup> Fareed, Rifat. "Civilians among four killed in Kashmir, families demand bodies." *Al Jazeera*, 17 November 2021, available at <<https://www.aljazeera.com/news/2021/11/17/india-kashmir-civilians-killed-human-shields>> (last visited on 26 December 2021).

<sup>25</sup> Agarwala, Tora. "Nagaland: 14 civilians killed by forces; soldier dies of injuries as violence erupts." *The Indian Express*, 6 December 2021, available at <<https://indianexpress.com/article/north-east-india/nagaland/nagaland-14-civilians-killed-by-forces-soldier-dies-of-injuries-as-violence-erupts-7657872/>> (last visited on 26 December 2021).

<sup>26</sup> See supra note 1.

<sup>27</sup> See supra note 1.



that any person detained should be put forward in front of a magistrate within 24 hours of his arrest.<sup>28</sup> The most impertinent part of the act is section 6 which gives the impunity of the armed forces from being prosecuted except under prior sanction from the central government. This provision of the act denies the victim his core right of “right to constitutional remedies” under section 32 of the Indian constitution.<sup>29</sup> The unclear definition of the terms used in the act gives adequate scope for the misuse or potential abuse. The constitution of India gives every woman the right to live with dignity and decency which was not at all visible in the case of “Manorma Devi” an alleged member of the separatist liberation party who was arrested by the Assam rifle and later found raped and killed around four km from her house.<sup>30</sup> Her body bore the sign of torture and gunshot wounds near the genitals. Protest and agitation started in the state and a commission by the state government that would investigate the entire matter was set up under the leadership of a retired judge, justice Upendra Singh. Justice Upendra in his report that was submitted a month later stated the army was guilty and how they refrained from cooperating in the inquiry.<sup>31</sup> The probe was then sent to the ministry of home affairs for them to analyze and the supreme court in this matter instructed the government to award a compensation of 1 million rupees to the family of Manorma without spelling any judgment on the case. If there was no crime, why the compensation?

Art 14 of the Indian constitution ensures impartiality before the law to each Indian citizen, but in the case of AFSPA, they are stripped of their very basic right to seek justice. The government's claim of the act being constitutional is just a blanket to shield the demonical AFSPA.

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<sup>28</sup> “Article 22(2) in The Constitution Of India 1949, available at *Indian Kanoon*, <<https://indiankanoon.org/doc/1371971/>>. (Visited 27 December 2021).

<sup>29</sup> “Article 32 in The Constitution Of India 1949, available at *Indian Kanoon*, <<https://indiankanoon.org/doc/981147/>>. (last visited on 27 December 2021).

<sup>30</sup> Roy, Esha. “Manorama rape and murder: 10 years on, family's hope for justice fades.” *The Indian Express*, 12 July 2014, available at <<https://indianexpress.com/article/india/india-others/manorama-rape-and-murder-10-years-on-familys-hope-for-justice-fades/>>. (last visited on 20 March 2022).

<sup>31</sup> “Manorama Devi rape and murder: Assam Rifles indicted.” *NDTV.com*, 11 September 2010, available at <<https://www.ndtv.com/india-news/manorama-devi-rape-and-murder-assam-rifles-indicted-431016>> (last visited on 27 December 2021).

During the UPA rule, another committee was set up under Justice Jeevan Reddy to examine AFSPA which labeled the act as a symbol of hate and oppression and asked the government to repeal it which the government nonetheless denied.

## VII. HUMAN RIGHTS AND AFSPA

Human rights activists and organizations have always been in contrast with the AFSPA act, they have always shown strong disapproval towards it. The population of Kashmir has witnessed everything false encounters, disappearance, torture, humiliation, and sexual violence. Bijbehara Massacre<sup>32</sup> in 1993 in the Anantnag district of Kashmir where approx. 51 civilians (the death count varies report to report) were killed after a protest was held following the siege of Hazratbal mosque. After an inquiry in 1994 the government held 13 BSF officers for murder which was followed by a general security force trial that discharged them of their charges. NHRC (National Human Rights Commission India) demanded to examine the transcript of the trials to see if it was authentic, which they were denied by the Vajpayee government and the case was later on dismissed. India has signed numerous international treaties to safeguard the human rights of its citizen which protect them from torture, right to life, dignity, and ruthless treatment. One such treaty being Geneva convention<sup>33</sup> was tossed when a standard 7th boy Mohd Azad was dragged out of his house by an army major of Assam rifle and shot down in broad daylight.<sup>34</sup> The killing bunged every single provision in the treaty. Are these treaties meaningless? Do they hold no significance? It is also a clear violation of

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<sup>32</sup> “Bijbehara massacre.” *Wikipedia*, available at <[https://en.wikipedia.org/wiki/Bijbehara\\_massacre](https://en.wikipedia.org/wiki/Bijbehara_massacre)> (last visited on 29 December 2021).

<sup>33</sup> “Geneva Conventions at 71: An in-depth look from the Indian perspective.” *The Economic Times*, 13 August 2020, available at <<https://economictimes.indiatimes.com/news/defence/geneva-conventions-at-71-an-in-depth-look-from-the-indian-perspective/articleshow/77519568.cms>> (last visited on 18 January 2022).

<sup>34</sup> “Army Major named in FIR for killing 12-yr-old in fake Manipur encounter | Imphal News.” *Times of India*, 3 August 2018, available at <<https://timesofindia.indiatimes.com/city/imphal/army-major-named-in-fir-for-killing-12-yr-old-in-fake-manipur-encounter/articleshow/65252258.cms>> (last visited on 18 January 2022).

“Article 21” of the Indian constitution which is the right to life<sup>35</sup>. This was further upheld in the case of **Maneka Gandhi vs Union of India**<sup>36</sup>.

“The oppressive cycle of the oppression phenomenon can go on and on, with hegemony-counter-hegemony, violence-counter-violence, and so on. As a result, the AFSPA's coercion has fueled the insurgents' counter-coercive responses and vice versa. It's no surprise, then, that the situation in the Northeast is still 'exceptional' enough to 'deserve' the AFSPA after 50 years<sup>37</sup>.” The armed forces also resort to unlawful detention of human rights defenders in the state of Jammu and Kashmir and slapping them with anti-terror laws one of the victims of such act is Khurram Parvez<sup>38</sup> who is an active and vocal human rights activist who keeps throwing light on army brutality and human rights violation in the region.

## VIII. JURISPRUDENTIAL ANALYSIS OF AFSPA

There is de facto social acceptance (*Geltung*) and validity (*Gultigkeit*) when it comes to the question of the legitimacy of the law and only the latter is the main subject of jurisprudential significance.<sup>39</sup> But denying the significance of social acceptance of law, the society results in chaos. It has been elucidated in what Eugen Ehrlich calls ‘living law’, a social reality that exists independent of the State’s positive law, and hence, a statute that

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<sup>35</sup> Article 21, The constitution of India, : available at [https://www.constitutionofindia.net/constitution\\_of\\_india/fundamental\\_rights/articles/Article%2021](https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2021) (last visited on March 22,2022).

<sup>36</sup> Maneka Gandhi v. Union of India, 1978 AIR 597, 1978 SCR (2)

<sup>37</sup> Chauhan, Rituraj Singh. “How AFSPA is Violating Every Commitment To Protect Human Rights.” *Youth Ki Awaaz*, 3 August 2017, available at <<https://www.youthkiawaaz.com/2017/08/armed-forces-special-power-act-right-to-kill/>> (last visited on 18 January 2022).

<sup>38</sup> Mashal, Mujib. “India's Arrest of Kashmiri Activist, Khurram Parvez, Is Criticized.” *The New York Times*, 23 November 2021, available at <<https://www.nytimes.com/2021/11/23/world/asia/kashmiri-activist-india-antiterror.html>> (last visited on 18 January 2022).

<sup>39</sup> Jurgen Habermas, “Moralbewusstsein und Kommunikatives Handeln (1983), and see also, Joseph Raz, “Authority, Law and Morality”, *The Monist*, July, 1985, Vol. 68, No. 3, The Concept of Law. pp. 295-334, Oxford University Press available at <[www.jstor.org/stable/2790292](http://www.jstor.org/stable/2790292)> (last visited on 22 March 2022).

is habitually disregarded is no part of 'living law'.<sup>40</sup> The law of AFSPA has been since long habitually disregarded and severally opposed but to no avail yet.

St. Thomas Aquinas argued that positive law, whichever that may be, can only be accepted as far as it complies with the principles of Natural Law.<sup>41</sup> Aquinas contended that certain actions will in all circumstances be wrong even though they be legitimized by the positive law of the land. The heinous acts perpetrated in the garb of AFSPA are, however, legitimized by the statute but have been delineated from the principles of natural law. Aquinas called those types of laws "corruption of law", which delineate from the principles of natural law hence lose the authority to be obeyed. The maxim '*lex Iniesta non est lex*' which means '*unjust laws are not law*' is ascribed to Thomas Aquinas.<sup>42</sup> Gustav Radbruch is one of the important examples who leads to the domination of natural law over positive law and morality over positive law as he was once a positivist but the mass massacre in Nazi regime turned him into a moralist and he then discarded the separation of morals from the law.<sup>43</sup> Clarence Morris stressed that any law without public support is bound to fail and law should be justified morally, socially, and technically.<sup>44</sup> It is not strange in saying that laws like AFSPA have lost public support and that was too long ago. It has been elucidated by various data.

Lon Luvois Fuller, a staunch natural lawyer, proposed eight requirements of law or the legal system be complied with to be legitimized as to give human behavior to the authority and direction of legal rules.<sup>45</sup>

These 8 essentials of the same are-

1. There should be definite rules,
2. These rules must be well-publicized,

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<sup>40</sup> N.V. Paranjape, "Studies in Jurisprudence & Legal Theory", pg. 66, 6th Edn., Central Law Agency, Feb. 2011

<sup>41</sup> Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, 108 (Oxford Press, 2012)

<sup>42</sup> Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, 14 (Oxford Press, 2012)

<sup>43</sup> N.V. Paranjape, "Studies in Jurisprudence & Legal Theory", pg. 114, 6th Edn., Central Law Agency, Feb. 2011

<sup>44</sup> See *ibid.*

<sup>45</sup> N.V. Paranjape, "Studies in Jurisprudence & Legal Theory", pg. 116, 6th Edn., Central Law Agency, Feb. 2011

3. No abuse of retrospective legislation,
4. The rules must be easily understandable,
5. The rules must be practicable and not beyond a person's capacity to obey,
6. The principle must not be inconsistent with the other existing law,
7. the principles must not be subjected to frequent changes, &
8. There must be congruence between the principles announced and their actual administration.

This he called 'eight desiderata' and called them as 'inner morality of law' that makes law possible.<sup>46</sup> However, a law like AFSPA is deficient in the majority of those 8 requirements if we scrutinize.

Emile Durkheim considered social morality as a force for solidarity to happen between people without which society cannot exist.<sup>47</sup> It is this what he called 'social solidarity. Laws like AFSPA are defeating the very purpose of this social solidarity. According to Jeremy Bentham, the role of the government and the law is to promote the happiness of society by promoting pleasure and providing protection against suffering. He believed that if individuals in society were happy and comfortable, the entire political system would enjoy happiness and prosperity as well.<sup>48</sup> But the data shows the contrary for AFSPA as a law. HLA Hart, even though being positivist, acknowledged the 'core of indisputable truth in the doctrines of natural law'.<sup>49</sup> He also concedes to the certain minimum content of natural law in every law. But even though taking a positivist view of AFSPA, this view can be disregarded by quoting a positivist itself. AFSPA is lacking even that minimum content of natural law principles. The gross injustice, arbitrariness, inhumane treatment, and chaos in society leave no ground for elements of natural law in

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<sup>46</sup> John E. Murray Jr., *Introduction to the Morality of Law*, 10 Vill. L. Rev. 624 (1965). Available at: <<https://digitalcommons.law.villanova.edu/vlr/vol10/iss4/2>> (last visited on 18 March,2022).

<sup>47</sup> Grabb, Edward G., *Theories of Social Inequality: Classical and Contemporary Perspectives*, pg. 79 (second edition, Toronto, Holt, Rinehart and Winston, 1990.) HT609 G72

<sup>48</sup> NV Paranjape, "Studies in Jurisprudence", pg. 25 (7th edn. Central Law Agency, 2015)

<sup>49</sup>PA Bulloch and J Raz (eds), *The Concept of Law by HLA Hart*, 46. ( 2nd edn Oxford: Clarendon Press, 1994),

it. Certain things are scrutinized in their nature and certain through their consequences but unfortunately, AFSPA fails miserably on both fronts.

The 'greatest happiness of the greatest number,' Jeremy Bentham claims, is the end of the law. Utility, he explained, is a thing's "quality or inclination to avert some harm or achieve some benefit."<sup>50</sup> The consequences of good and evil are respectively pleasure and pain.<sup>51</sup> The principle was called utilitarianism which postulated that every act or law must satisfy the principle of the greatest happiness of the greatest numbers. According to Bentham, four aims must be met for a society to be happy: sustenance, plenty, equality, and citizen security. As a result, he believes that the law's primary mission is to achieve these societal objectives. AFSPA fails upon this principle of the greatest happiness of greatest numbers as well.

AFSPA fails miserably both upon the natural law principles as well as positive law principles, such as utilitarianism, even though both natural and positive law stand in opposite directions each other. Deontologically also, as contrasted to consequentialism, AFSPA is a repressive and abusive law that gains no ground in the right reason of justice, fairness, and security en masse. There was a Nazi law of 1934. It allowed Hitler to issue orders hostile to the German legal structure. There was a debate about its validity between Hart & Fuller on a judgment based on that law which was initiated by the Nazi administration when a spouse upbraided her spouse to the Nazi administration on account of her Husband's insulting remarks on Hitler's war. The spouse was indicted in the case passing and later the conviction changed to getting to be a trooper in the war against Russia. In the 1948 Nuremberg trial, the spouse (wife) was attempted and arraigned as her conduct drove her husband's freedom at stake. Fuller backed the decision of the court as he considered the law of Nazi administration veered off from 'its inner morality' and precluded as law which couldn't be complied with or adhered to.

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<sup>50</sup> BNM Tripathi, "Introduction to jurisprudence and Legal Theory", page 37 (15th edn, Allahabad Law Agency, 2004)

<sup>51</sup> Ibid.

We're, however, not saying that AFSPA is similar to that Nazi law but if they both delineate from the morality of the law, which is a subject matter of time, there is no difference between them either. And it should also be acknowledged in every circumstance that no matter how much the political insinuations of the people of the country matter, or how loud the voice of the demagogue is, or how strict or hard is the decision, there's always a Nuremberg trial lurking around the corner or at the end, either in this world or in the hereafter.

## **IX. CONCLUSION**

The state has every right to combat insurgency and protect its citizens and maintain peace and harmony in their country. But it should not be done at the cost of human life; the demonical law has caused more harm than benefit. It should not be done at the behest of demagoguery with greater evil than the greater good and that too for insinuating the conscience of those people who have nothing to do with the law and the people who are being affected by it. By looking from the utilitarian point of view, the law does not stand its ground in favor of the principle of the greatest happiness for the greatest number rather it is the opposite. Taking all the arguments in favor of the act, it still cannot outbalance the deaths and gross human rights violation that has taken place because of it. Statistically, analytically, jurisprudentially, and most importantly humanely, it can be concluded that the act or law of AFSPA has delineated from the morality of the law. Both with the convictions of natural law and positivism principles, it has been elucidated that AFSPA gains no ground for its legitimacy on moral, ethical, and point of authority to be obeyed. The law has long ago lost public support in favor of it. However, the public support of people other than those who are subject to it is a non-subject matter. The state should look into the act if not repeal or at least amend it to be more humane. There is, however, no repatriation, and recompensating at least in monetary terms for the cost of lives can never be compensated. But the state can still compensate by giving justice to those who lost their loved ones by holding the guilty army personnel accountable. Depriving them of justice is depriving them of their basic fundamental right. The above-

stated facts and compilation of data clearly state the misuse and abuse of power by the guilty authority.

Many measures can be taken for instance employing cameras on the heads of soldiers as it is carried out in many first world countries so that accountability should be established, and negligent acts are curbed and there can be scrutiny of whether the amount of reasonable suspension was at all reasonable or not. Safe passages and corridors are to be made out for women, children, and the aged to be evacuated in areas where clashes break out. Mass awareness programs should be encouraged to build confidence among pupils about the army. Women soldiers are available in every unit or battalion in case the need arises for example in search of homes and suspected female militants. However, these all are suggestive measures from a list that can be very exhaustive, but it solely rests in the policymaking of the government to execute and apply similar measures to rectify the error whose cost has been very high.