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SKILLS AND FACET OF ARMED FORCE SPECIAL POWER ACT

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INTRODUCTION

In post-independence era, the Indian state has witness many secessionist movements and has long suffered from extremist attacks. The dreadfully notion of secessionism disturbs the territorial integrity and unity of a country. India is one such country. In order to curb the secessionist activities of the militants, the Armed Forces Special Powers Act (AFSPA) was passed by Indian government in 1958. This act was first implement in north-eastern region then in Jammu & Kashmir, when flawed elections of 1987, in which the leaders of MUF (Muslim united front) had to face a fabricated defeat at the hands of mainstream political parties, resulted in violent means of struggle for secession from India. The massive militant uprising coupled with large scale infiltration of cross border militants turned the situation volatile. In order to suppress the movement, the central govt. introduced AFSPA in 1990.²³⁰ This act gives unrestricted and unaccountable power to armed forces once the area is considered disturbed under disturbed areas act²³¹. This act gives wide power to armed force to shoot, arrest (without warrant) and search, all in the name of “aiding civil power.” Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces is granted the right to shoot to kill based on mere suspicion that it is necessary to do so in order to “maintain the public order” in a “disturbed area”²³²

The implementation of AFSPA is a bone of contention in public and government. It is considered as the most draconian law passed by Indian parliamentary in its history. This act results in agony amongst public with respect to innumerable rapes, murder, extortion, protest as famous hungerstrike of Irom Sharmila Chanu in Manipur²³³.

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²³⁰ The armed forces special power act 1990(no 21 of 1990)

²³¹ Section 2(b) of AFSPA

²³² Kumar Aayush, and Goyal Preeti. “AFSPA: A Mockery of Human Rights” .Web. [http:// www.mightylaws.in](http://www.mightylaws.in) : Retrieved on:- 26 Oct 2011

²³³ "Manipur Fasting Woman Re-arrested". BBC News. 9 March 2009. Retrieved 8 May 2011

LEGAL ANYLASIS

Section 2 of AFSPA says that AFSPA will be implemented in any area if it declared by notification under section 3 of Disturbed Areas Act²³⁴. However section 3 of disturbed areas act lays down that if “The State Government may, by notification in the Official Gazette, declare that the whole or any part of any district of Jammu and Kashmir as may be specified in the notification, in a disturbed area.”²³⁵

Now first of all we must understand the meaning of the term ‘Disturbed Area’. "Disturbed Area" means an area which is in such a disturbed and dangerous condition that the use of armed forces in aid of the civil power is necessary to prevent

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(a) activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people;

(b) Activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution of India.²³⁶

Well it is not mentioned in disturbed areas act that central government is also authorized to implement this act. But it is mention in section 3 of armed forces special power act, 1958 that “If, in relation to the State of Jammu and Kashmir, the Governor of the State or the Central Government, is of opinion that the whole or any part of the State is in such a disturbed and dangerous condition that the use of armed forces in aid of the civil power is necessary to prevent ..” This section empowers the central government to declare any area disturbed but after the 1972 amendments to the AFSPA extends the power of central government to declare an area as disturbed. The 1972 amendment shows that the Central Government is no longer concerned with the state's power. Rather, the Central Government now has the ability to overrule the opinion of a

²³⁴ SECTION 2(b) of AFSPA

²³⁵ *Jammu And Kashmir Disturbed Areas Act, 1992*

[Act No. 4 of 1992]

²³⁶ National Legislative Bodies. “Armed Forces (Jammu and Kashmir) Special Powers Act 1990”. Web.<http://www.unhcr.org/refworld/docid/3ae6b52a14.html>. Retrieved on:- 27 Oct 2011

state governor and declare an area disturbed²³⁷. This amendment makes the state government helpless and makes Manipur state government withdrew the Act in some parts in August, 2004 despite the opposition from central government.²³⁸

Section 4: This section sets out the powers granted to the military stationed in a disturbed area. These powers are granted to the commissioned officer, warrant officer, or non-commissioned officer, only a jawan (private) does not have these powers.

The army can shoot to kill, under the powers of section 4(a), for the commission or suspicion of the commission of the following offenses: acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons, carrying weapons, or carrying anything which is capable of being used as a fire-arm or ammunition. To justify the invocation of this provision, the officer need only be "of the opinion that it is necessary to do so for the maintenance of public order" and only give "such due warning as he may consider necessary".

The army can destroy property under section 4(b) if it is an arms dump, a fortified position or shelter from where armed attacks are made or are suspected of being made, if the structure is used as a training camp, or as a hide-out by armed gangs or absconders.

The army can arrest anyone without a warrant under section 4(c) who has committed, is suspected of having committed or of being about to commit, a cognizable offense and use any amount of force "necessary to effect the arrest".

Under section 4(d), the army can enter and search without a warrant to make an arrest or to recover any property, arms, ammunition or explosives which are believed to be unlawfully kept on the premises. This section also allows the use of force necessary for the search.

²³⁷ http://www.hrdc.net/sahrdc/resources/armed_forces.htm

²³⁸ pao.net/epSubPageExtractor.asp?src=manipur.History_of_Manipur.AFSPA-A_Historical_Perspective.AFSPA-A_Historical_Perspective_1

This section has received criticism from human rights as violation of article 21, 19 and 22. As people of north –eastern and Jammu & Kashmir doesn't have these rights when the whole of India have these basic fundamental rights. Even at the time of enforcement of Article 352 & 356, the article 21 is not infringe.

Any major dilution or phased changes in this section will adversely affect the security of state as it make it hard to army to work without the special power which this act gives. Even the General Officer Commanding in Chief for Northern Command Lt Gen K T Pathaik told reporters here, 200 kms from Srinagar “We have a situation which has now carried on for more than 20 years and the Army requires the provisions to enable it to act... Without the provisions, the Army will be handicapped,”²³⁹

Section 5 says that **Arrested persons to be made over to the police** –Any person arrested and taken into custody 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. However the least possible delay is not defined anywhere and it is the question of a dispute as the delay sometimes maybe delay if it is for 2-3 days or sometimes it is not delay in any case if it is for 3-4 months. So it is left at the discretion of army to give the person to the police officers without any delay. But some armed officers made delay in sending arrested persons to the nearest police station and keep the custody of arrested persons to themselves and gives torture which is violation of human rights. In case *Horendi Gogoi v. Union of India*²⁴⁰.

In this act clause 6 says that **Protection to persons acting under 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.

²³⁹ <http://indianexpress.com/article/india/latest-news/army-will-be-handicapped-without-afspa-lt-general/>

²⁴⁰ (1991) Gau CR 3081.

This clause of the act is giving a legal immunity to the armed forces and any person who is doing an exercise his powers given or conferred by this act. Even the 1950's Army Act was a revision of the 1911 Indian Army Act. One of the goals of this revision was "to bridge the gap between the Army and civil laws as far as possible in the matter of punishments of offenses." The High Courts of the country have a limited right to interfere with the court-martial system. Court-martial proceedings do not have to satisfy Article 21 of the Constitution. In chapter five of the Army Act, the members of the services are granted privileges, including immunity from attachments and arrest for debt.²⁴¹

The protest, hatred, agony amongst public make the Manmohan Singh's government to set up a commission in 2005 in order to repeal this act

JUSTICE JEEVAN REDDY COMMISSION AND ITS RECOMMADATION

In 2004, in the wake of intense tension Justice Jeevan Reddy commission was launched by several civil society groups following the death of Manoram Devi, while in the custody of the Assam Rifles and the hunger strike undertaken by Irom Chanu Sharmila, the central government accordingly set up a five-member committee under the Chairmanship of Justice B P Jeevan Reddy, former judge of the Supreme Court. The 147-page report recommends, **"The Armed Forces (Special Powers) Act, 1958, should be repealed."** During the course of its work, the committee members met several individuals, organisations, parties, institutions and NGOs, which resulted in the report stating that "the Act, for whatever reason, has become a symbol of oppression, an object of hate and an instrument of discrimination and high handedness." The report clearly stated that "It is highly desirable and advisable to repeal the Act altogether, without of course, losing sight of the overwhelming desire of an overwhelming majority of the [North East] region that the Army should remain (though the Act should go)." But activists say the Reddy panel despite its recommendation for the 'repeal of the Act' has nothing substantial for the people. The protest, hatred, agony amongst public make the Manmohan Singh's government to set up a commission which gives its report in 2005 and order to repeal this act.

But government has neither officially accepted nor rejected its findings. Reasons for this are many. With rapid rise in terrorism throughout the country in the past couple of months coupled

²⁴¹ Ibid,8

with terrorist violence in many places, especially in the Northeast, the government of India cannot take a hasty decision on the removal of this Act, as it could spell several dangers to the strategic security and territorial integrity of the country²⁴².

If the Armed Force Special Power Act is repealed then it would dilute the capacity of an important instrument of the state – the armed forces – to wrestle the security challenges faced by the country.

Secondly, it would influence the rebel leadership, field cadres and their over ground followers to engage in thoughtless damage to public life and property. It may well result in a security situation which slides beyond revitalisation, necessitating major political negotiation.

Thirdly, the cancellation of the law and the resultant lack of security cover would adversely affect the governance and development capacities in the insurgency affected states, and the eventual redress of local grievances^{243]}.

This only makes the government not to repeal this act even after the constant demands of all civil organization to make this act more humane and accountable act.

CRITIQUE OF AFSPA

DISFAVOUR: The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by a law which curtails or takes away the personal liberty guaranteed by Article 21 is reasonable or not has to be considered not in the abstract or on hypothetical considerations like the provision for a full-dressed hearing as in a Courtroom trial, but in the context, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administering the Act may be called upon to deal with. Secondly, even the fullest compliance with the

²⁴² Concluding observations of the Human Rights Committee: India, UN Doc. CCPR/C/79/Add. 81, 8 April 1997, at para. 18

²⁴³ www.thehistorywriters.net

requirements of Article 21 is not the journey's end because, a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty guaranteed by Article 21 has still to meet a possible challenge under other provisions of the Constitution like, for example, Articles 14 and 19. *Maneka Gandhi vs. Union of India, Supreme Court, 1978* The Armed Forces Special Powers Act, 1958, (hereafter referred to as AFSPA and/or the Act), is a direct assault on the above mentioned legal interpretation of fundamental rights which constitutes a cardinal principle of Indian jurisprudence. Under the Act, in place currently in the Northeast states and Jammu and Kashmir, 1 powers vested with the armed forces are neither fair, nor just and reasonable. Such powers are considered essential in situations where the armed forces are required to be deployed to assist the civil government in ensuring peace and stability. But, instead of facilitating peace wherever applied, the Act has only left behind a trail of bitterness and anger. It has ignited wide scale public protests, been criticized by various representatives of the United Nations and other international human rights organizations, and hailed as a "symbol of oppression, an object of hate, and an instrument of discrimination and highhandedness" by the government-appointed. AFSPA goes against both Indian and International Law Standards. This was illustrated only when India presented its second periodic report to the United Nations Human Rights Committee in 1991. When the Attorney General of India was questioned by the members of UNHRC (United Nations Human Rights Council) on how AFSPA could not be Deemed Constitutional under the Indian Law and how it could be justified in light of article 4 of the ICCPR. He said that the secession in the Northeast had to be responded on a "war footing" relying on the only argument that the AFSPA is a necessary measure to prevent the secession of the North-eastern states and argued that the Indian Constitution in article 355, made it the duty of the central government to protect the states from internal disturbance and that there is no duty under international law to allow secession

Yet the Act persists till date in its original form. It draws its legitimacy from Article 355 "to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution". The Constitution does not expressly provide as to how the duty of the Union to protect a State against external aggression and internal disturbance is to be carried out; obviously, it is left to the

judgment of the Union how to meet any such situation, as and when it arises, but it does provide, in article 356, the manner in which it has to perform its duty to ensure that the government of every State is carried on in accordance with the provisions of the Constitution.²⁴⁴

Additionally, the Act was granted legitimacy by the Supreme Court in the *Naga People's Movement for Human Rights vs. Union of India, 1997*, the only case where the constitutional validity of the Act was challenged. Consequently, incidents of violations and excesses committed by the armed forces are viewed as mere aberrations, a matter of mistaken judgment by few errant officers. This paper argues that the provisions of the Act, not only fail to meet legal standards but are in direct violation of the democratic rights enshrined in our constitution and upheld by the Supreme Court. The Act itself perpetuates violation and impunity, as opposed to the claim that violations are only aberration. Although AFSPA is problematic on a number of grounds, this paper will focus specifically on how it contravenes fundamental rights, for the sake of brevity. Following from the critique, the paper will conclude that in failing to protect and uphold human rights, the Act reinforces a militarized approach to security which has proved to be not only inefficient but, in fact, counterproductive in tackling security challenges.

The Act empowers the central government and the governor of a state to declare any area within their territory as 'disturbed' based on their judgment of "disturbed or dangerous situation" warranting use of armed forces. Upon such a declaration, the armed forces have the power to shoot on sight, even to kill, any person believed to be violating existing laws and order prohibiting assembly of more than five persons (Section 4(a)) after giving "such due warning," arrest any person without warrant, even on the basis of reasonable suspicion of having committed a cognizable offence (Section 4(c)), use such force as necessary to effect arrest, and enter and search any premise without warrant (Section 4(d)). Worse, these powers are provided without adequate safeguards and complete immunity is given to armed forces for the exercise of the powers (Section 6). Not a single offence is defined in the Act and yet such wide discretion is given to the armed forces in such areas. Each of the above provisions is at odds with democratic rights.

The absolute authority vested in the armed forces to shoot on sight based on mere suspicion and for an offence as basic as violating an order is a brazen assault on the fundamental right to life.

²⁴⁴ <http://lawmin.nic.in/ncrwc/finalreport/v2b2-5.htm>

Both domestic and international law have established supremacy of the right to life from which no derogation is permitted even in times of public emergency which threatens the life of a nation. Terming the deprivation of life by state authorities as a matter of utmost gravity, international law has interpreted this right to include *not just measures to prevent and punish deprivation of life by criminal acts, but to prevent arbitrary killings by the security forces*. In other words, the “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures. The Supreme Court has interpreted the ‘right to life’ to include the right to live with human dignity whereas the term liberty, as used in the provision, as something more than mere freedom from physical restraint or the bounds of a prison. The power to shoot on sight violates the sanctity of the right to life, making the soldier on ground the judge of value of different lives and people the mere subjects of an officer’s discretion. Justice also requires that every accused be given all the protections of due process of law. Fair, just and reasonable procedure has been interpreted to include the right to speedy trial.⁹ this right encompasses all stages of trial: investigation, enquiry, trial, appeal, revision and retrial. Killing on the basis of suspicion deprives the

Victims (who are mere suspects) of all the protections of due process and leads to direct subversion of rule of law. These principles require that governments exercise strict control, including putting in place a clear chain of command for all officials responsible for apprehension, arrest, detention, custody and imprisonment; as well as those officials authorized by law to use force and firearms. As in the case of the right of self defiance accorded to civilians, the onus of proof lies with the person operating under this clause. But the protection provided to armed forces against prosecution under

Section 7 renders this impossible and thereby directly violates the protection of the right to life.

In order to protect and uphold the fundamental right to liberty, extensive safeguards have been placed on the power to arrest, both in international and domestic law. Article 22 of the Indian Constitution lays down several safeguards on preventive and punitive detention including, right to be informed of the grounds of arrest; right to consult; and to be defended by a lawyer of choice;

The right to be produced before a magistrate within 24 hours; and freedom from detention beyond the said period except by order of the magistrate. In keeping with constitutional

guarantees, CrPC 1973 lays down several checks and balances in order to reduce scope for arbitrary arrests and detention by the state, including the mandatory medical examination of the arrested person (Section 54) and a magisterial inquiry of every case of death in police custody (Section 176). Additional guidelines were further laid down in 1996 by the Supreme Court in the *DK Basu* case, in order to address the rampant arbitrary arrests and detention.

Finally, in order to complete the critique of AFSPA, it is important to consider it as being against the established legal framework governing situations of armed conflict. It was initially held that international human rights laws do not apply to situations of armed conflict, which are specifically governed by IHL, but this distinction no longer holds. It is now widely believed that international human rights law applies equally in situations of armed conflict.²⁸ States though are allowed to derogate from certain fundamental rights during times of emergency, both under international law and domestic law. While Article 4 of the ICCPR allows this under international law, Article 359 provides for suspension of certain rights under the Indian constitution. A couple of points here are of critical significance. *First*, even during such times, right to life and liberty are considered as being

paramount. As per the Constitutional (44th Amendment) Act, 1978, right to life and liberty (Article 21) and certain rights under Article 20 cannot be suspended even in times of emergency. In order to check against the misuse of the Emergency provisions and to put the right to life and liberty on a secure footing, it would be provided that the power to suspend the right to move the court for the enforcement of a fundamental right cannot be exercised in respect of the fundamental right to life and liberty.²⁹ Under international law, too, states are prohibited from abrogating certain rights including the right to life; prohibition from torture and equality before law. *Second*, derogations too must be subject to safeguards. These include, one, an official proclamation of emergency by the states before derogation in order to maintain principles of legality at a time when they are needed the most; two, justifications submitted by states as to why such measures are needed; and three, measures are limited to the extent strictly required by the exigency of the situation. Together, these safeguards affirm the value of human rights in tackling with even the most severe of security challenges

By way of summing up, it is clear that the provisions of AFSPA, both individually and in totality, do not meet requirements of domestic and international law. The Act facilitates human rights violation and spawns a culture of impunity. To consider such powers and immunity as

necessary to combat security challenges is a reflection of the continuance of the colonial mindset of subjugating the local population. The suggestion that human rights violations are permissible in certain circumstances is wrong. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by state or non-state actors, are never justified no matter what the ends. Research elsewhere has established the negative impact of such special security legislations on both, the rule of law and the peace process. Two lessons that support the arguments of this paper are of particular significance. First, that once civil liberties are eroded by statute, it is almost impossible to reinstate them leading in turn to normalization of emergency legislations; second, that such legislations shatter the faith of people in the criminal justice system, making it difficult to regain trust. Both of these apply in the case of AFSPA. The fact that the Act is in place in the Northeast states since 1958, and that while reviewing the Act, both the Supreme Court (in upholding the law) and the Reddy Commission (in not ensuring adequate safeguards) do not match up to the established standards calls into question their impact on rule of law. It is important to note

here that these standards have evolved precisely to respond to security challenges and not just for peace times. Ultimately, the continued use of AFSPA reflects the predominance of a security mindset within the government of India. To put an end to the culture of violence, alienation and injustice, it is important not only to repeal AFSPA but also reduce the civil powers accorded to the army to ensure that it in fact only assists and not supplants the civil administration. It is now universally accepted that the most effective strategy for counterinsurgency and counterterrorism is to strengthen the local police and civil administration. Alongside withdrawal of the armed forces from town and cities, the police must be trained in accordance with international

Standards and eventually become the frontline force in the state. But if force is to remain an ingredient of Indian government's response, it must amend AFSPA in conformity with domestic and international standards. This includes revocation of the power to shoot on sight, adhering to guidelines on arrest as laid down in the CrPC and *DK Basu* judgment, prohibition of use of force while effecting arrest, production of each arrestee within 24 hours before the court, and removal of the immunity clause so people have access to remedies in case of violation. Finally, protection of human rights and the criminal justice system must be developed as the bedrock of any security strategy. Only then will conditions for peace and conflict resolution be created.

FAVOUR: Going beyond the immediate however, a closer look is needed at the AFSPA and the circumstances under which it has come to acquire such negative connotations. The AFSPA, when promulgated in 1958 because of insurgence of Naga Hills. The AFSPA has been allowed to be applied continuously for 57 years. Army is not responsible for the maintenance of public law and order in state. Army is made responsible and allow to interfere in state's law and order in case of failure of police and other agencies. It is when the army interferes in the failure of police to protect the state affairs the area is declared disturbed under the Disturbed Areas Act. In fact, without the promulgation of DAA, the AFSPA is not applicable. The DAA is promulgated on the advice of the state government. So who is to be blamed for the demonization of the AFSPA? It must squarely lie with the political executive. And if the army has to operate in an internal security scenario, it needs the protective umbrella of the AFSPA just as the police operate under the Indian Penal Code and the Criminal Procedure Code.

The fact that the provisions of the AFSPA is implemented when the law and order goes from the hand of state. Army personnel, operating in those circumstances, need to enjoy at least similar powers as the police force. So, just as Section 45 of the CrPC disallows arrest of public servants and just as Section 197 provides impunity against prosecution to police official in case if they arrested any wrong person or do encounter of any criminal, Section 7 of the AFSPA gives similar protection to the army personnel in case of any shoot, search and arrest of any person.

If any police official do any alleged encounter or arrest then he is made liable under Indian Penal Code and Criminal Procedure Code as same with army personnel have to face court martial. AFSPA, however draconian it may sound to all civil organisation has been of great help in certain aspects. If we take the Kashmir situation Indian Army has been guarding the LoC and preventing any alteration of its alignment either way. The efforts of Indian army made the incident-free annual Amarnath pilgrimage after a long time and the best tourist destination from last 25 years. Now the demand from many politician like Omar Abdullah, Chief Minister of Jammu & Kashmir, Nitin Gokhale²⁴⁵, Hamid Ansari²⁴⁶ and many more that the Armed Force

²⁴⁵ <http://www.rediff.com/news/column/afspa-debate-is-clouded-by-emotion-distrust/20150225.htm>

²⁴⁶ http://www.telegraphindia.com/1141123/jsp/frontpage/story_19076485.jsp#.VPog8yzmPcc

Special Power Act should be amended and made more humane law makes the army difficult to do their job as always this was subject of rejection by every Defence Minister²⁴⁷ and any major²⁴⁸ or commander of army. Any dilution or changes in the act may allow inimical elements to exploit the situation.

CONCLUSION

The Armed Force Special Power Act 1958 is always a subject of controversies and debateable issue since the date of implementation. It is always subject of question by public due to brutal behaviour of army towards citizen especially the females who are mostly the victim in rapes, gang rape. The human rights organization internationally and nationally has always challenge led the validity of this act as it is violation of article 21 and left the victim from this act without remedy as army personnel enjoy the immunity under section 6.²⁴⁹

The revocation of the AFSPA from any area needs a concerted view of all organs of the state and Centre. A suggested way is to convert these areas into police administered areas/police districts as was done for Srinagar initially without revoking AFSPA. Subsequently, as the situation improves, while evolving the revocation, an exit strategy needs to be worked for gradual withdrawal of the armed forces from the specified area leading to smooth transition.

Lifting the AFSPA can certainly be attempted, but the provisions of the AFSPA, as an emergency law that empowers the army -- the nation's instrument of last resort -- must, however, continue to remain on the statute books given the increasingly violent and uncertain times that the sub-continent is likely to face in coming years.

²⁴⁷ <http://www.dailypioneer.com/nation/mha-says-no-to-panels-advice-to-repeal-afspa.html> Defence minister AK Antony directly opposed the repeal of AFSPA

²⁴⁸ <http://indianexpress.com/article/india/latest-news/army-will-be-handicapped-without-afspa-lt-general/>

²⁴⁹ Section 6 of Armed Force Special Power Act 1958