MARTIAL LAW IN INDIA: THE DEPLOYMENT OF MILITARY UNDER THE ARMED FORCES SPECIAL POWERS ACT, 1958

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ABSTRACT:

The question for inquiry in this article is whether the key provisions of the Armed Forces Special Powers Act, 1958 ("AFSPA"), an Indian Parliamentary legislation, amount to a de facto proclamation *of Martial Law in India. The constitutional validity of AFSPA has been upheld by a unanimous constitution bench of five judges of the Supreme Court of India. But the AFSPA has not yet been examined from the Martial Law perspective. In order to engage in this inquiry, this article briefly traces the development of the idea of Martial Law and argues that military acting independent of the control of civilian authorities is the most important feature of Martial Law. This article also argues that in order for a geographical area to be under Martial Law, there is no need to have a formal promulgation of the same. In other words, an area can be under Martial Law without formally being so declared. They key feature to note is whether the military is acting independent of the civilian control or not. The AFSPA is then analyzed from this angle and it is concluded that when the AFSPA becomes applicable to any area in India, that area is under* de facto *Martial Law. The question of whether or not the Indian Constitution impliedly or expressly authorizes the proclamation of Martial Law is*

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a natural follow-up question that is left for future examination. However, the Supreme Court's decision upholding the constitutional validity of the AFSPA is criticized on the ground that the Court should have recognized and called the AFSPA as what it truly is–a legislation authorizing a de facto proclamation *of Martial Law in India.*

I. INTRODUCTION

Use of the military acting independent of local civilian authorities and courts for domestic law enforcement in a country that is committed to democratic values and the 'rule of law' raises formidable ideological challenges.[1] Most pressing of these challenges arise in the context of the country's military.[2] The question for inquiry in this paper is whether the key provisions of the Armed Forces Special Powers Act, 1958 ("AFSPA"), an Indian Parliamentary legislation, amount to a *de facto* proclamation of Martial Law in India. The constitutional validity of the AFSPA has been upheld by a unanimous constitutional bench of five judges of the Supreme Court of India.[3] But the AFSPA

1. Colm Campbell & Ita Connolly, *A Model for the 'War Against Terrorism'? Military Intervention in Northern Ireland and the 1970 Falls Curfew*, 30 J.L. & SOC'Y 341, 342-43 (2003).

2. *See id.* at 346.

3. Naga People's Movement of Human Rights v. Union of India, (1998) 85 AIR 431 (India).

has not yet been examined from the Martial Law perspective.[4] In order to engage in this inquiry, this article briefly traces the development of the idea of Martial Law and argues that the military acting independent of the control of civilian authorities is the most important feature of Martial Law. This article also argues that in order for a geographical area to be under Martial Law, there is no need to have a formal promulgation of the same. In other words, an area can be under Martial Law without formally being so declared. The key feature to note is whether the military is acting independent of civilian control. The AFSPA is then analyzed from this angle and it is concluded that when the AFSPA becomes applicable to any area in India, that area is under *de facto* Martial Law. The question of whether or not the Indian Constitution impliedly or expressly authorizes the proclamation of Martial Law, which is the natural follow-up question that arises from this inquiry, is left for future examination. However, the Supreme Court's decision upholding the constitutional validity of the AFSPA is criticized on the ground that the Court should have recognized the AFSPA for what it truly is–a legislation authorizing a *de facto* proclamation of Martial Law in India.

Part II argues that the most important feature of Martial Law is the military acting independent of civilian authority and control. When a geographical area is put under Martial Law, the military is called out and the military commander is under no legal obligation to take his orders from the civilian authority of the area. The military commander might be required to cooperate with the civilian authorities in the area, but he is allowed to make his own decisions. To that extent, the military acting independent of any civilian supervision clearly distinguishes an area under Martial Law from the military merely acting as an aid to civilian authority (where the military acts under the supervision and command of the civilian authority). Having identified this key feature of Martial Law in Part II, Part III then applies this rule to the AFSPA. The Indian Parliament enacted the the AFSPA and, as previously mentioned, a constitutional bench of five judges of the Supreme Court of India unanimously upheld its constitutional validity.[5] However, the AFSPA has never been examined, either academically or judicially, from the Martial Law angle. Part III discusses the key provisions of the AFSPA and the Supreme Court

4. Use of the AFSPA has been described as 'martial law regime' by only one commentator and that too was done in passing and without any detailed legal analysis that the subject deserves. *See* Hiren Gohain, *Post-Colonia Trauma?*, 41 ECON. & POL. WKLY. 4537, 4537 (2006).

5. *Naga People*, (1998) 85 AIR at 431.

decision that upheld the constitutionality of the AFSPA. After this, it applies the rule set out in Part II to the AFSPA and concludes that the 'disturbed area notification'[6] issued under the AFSPA that authorizes the calling out of the military to the disturbed area so notified is a *de facto* proclamation of Martial Law. Part IV concludes by briefly restating the key arguments made in the article. This paper concludes that the 'disturbed area notification' under the AFSPA amounts to a *de facto* proclamation of Martial Law and the Supreme Court should have recognized it and called it for what it truly was. Again, whether or not the Indian Constitution expressly or impliedly gives the authority to proclaim Martial Law is a natural follow-up question that arises from this discussion. This Paper leaves that inquiry for further examination in the future.

II. MARTIAL LAW

A. Inability of Civilian Authorities and Courts to Function Effectively–A Precondition for Martial Law

It has been understood for a long time now that Martial Law and Military Law are not the same things.[7] Expounding the nature of Martial Law, Sir Matthew Hale in 1713[8] observed that Martial Law, owing to the circumstances that make it necessary, "in Truth and Reality [is] not Law, but something indulged rather than allowed as Law."[9] Sir Matthew also observed that the exercise of Martial Law,

6. Armed Forces (Special Powers) Act, No. 28 of 1958, INDIA CODE, § 3, http://indiacode.nic.in ("Power to declare areas to be disturbed areas. If, in relation to any State or Union Territory to which this Act extends, the Governor of that State or Administrator of that Union Territory, as the case may be, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that that the use of armed forces *in aid of the civil power* is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area."), *amended by* Armed Forces (Assam Manipur) Special Powers (Amendment) Act, No. 7 of 1972, INDIA CODE, § 4.

7. *See, e.g.*, Charles M. Clode, *The Law Military as Distinct from Martial Law*, 29 L. MAG. & L. REV. Q. J. JURIS. 24, 25-27, 32 (1870). See generally J. V. Capua, *The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right*, 36 CAMBRIDGE L. J. 152, 152 (1977), for an early history (from 1300 to 1628) of Martial Law in England.

8. *See* SIR MATTHEW HALE, THE HISTORY OF COMMON LAW OF ENGLAND 26 (Charles M. Gray ed., 3rd ed. 1971) (1739); Mark Neocleous, *From Martial Law to the War on Terror*, 10 NEW CRIM. L. REV. 489, 491 (2007) (indicating that Sir Matthew Hale's book was published in 1713). *But see* George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. LEGAL HIST. 52, 53 n. 2 (1974) (indicating the date of publication of Sir Matthew Hale's book as 1820).

9. MATTHEW HALE, THE HISTORY OF COMMON LAW OF ENGLAND 40 (1713).

owing to its nature, is not to be permitted when civilian courts are functioning, "for Martial Law, which is rather indulg'd than allowed, and that only in Cases of Necessity, in Time of Open War, *is not permitted in Time of Peace, when ordinary Courts of Justice are open*."[10] In 1731, Congressman John Rowan of Kentucky expressed similar views: "Society will never submit life to the discretion of a military court, except under the most absolute and imperious necessity, *in which a civil court cannot interfere*, particularly during war."[11]

Confusion was caused by the 1792 opinion delivered by Lord Chief Justice Loughborough in *Grant v. Sir Charles Gould*[12] because in this case the phrase Martial Law was understood by Lord Loughborough as akin to what we today would call Military Law,[13] i.e. laws that apply to members of the military and armed forces. By 1870, though, it was clearly understood that Martial Law and Military Law are not the same things.[14] By 1902 this distinction became very clear, i.e. Military Law is statutory[15] and is applicable to members of the military and armed forces[16] and Martial Law is the law of necessity and exists for the protection of society when, and where, civilian authorities and courts are unable to function.[17] However, in 1915 Albert Venn Dicey revived this confusion by stating that Martial Law as properly understood (i.e. suspension of civilian authority and courts and its substitution by military government), "is unknown to the law of England."[18] Dicey's views are not really helpful because even though he denies the existence of Martial Law under English Law,[19] he does concede that, "the common law right of the Crown and its servants to repel force by force . . . is essential to the very existence of orderly government, and is most assuredly recognized in the most am-

10. *Id.* at 42 (emphasis added).

11. Dennison, *supra* note 8, at 57-58 (emphasis added) (citing 18 ANNALS OF CONG. 1731 (1808) (Joseph Gales ed., 1852)).

12. Grant v. Sir Charles Gould, 126 Eng. Rep. 434, 449 (1792).

13. *Id.* at 449-50; *see also*; Clode, *supra* note 7, at 25-26; Dennison, *supra* note 8, at 54-55.

14. Where tribunals are established under martial law, in the strict sense of the term, as, for instance, where a colony is in a state of disaffection or open revolt, it by no means follows, as in the case of the administration of the law military, that the persons composing the Courts should be military persons, or that those over whom the jurisdiction is exercised should be soldiers. In truth, under martial law, the difference between a soldier and a civilian disappears, as we have said, before that overpowering necessity which calls such a state of things into existence.

Dennison, *supra* note 8, at 27-28.

15. W. S. Holdsworth, *Martial Law Historically Considered*, 18 L. Q. REV. 117, 122 (1902).

16. Frederick Pollock, *What is Martial Law?*, 18 L. Q. REV. 152, 153 (1902).

17. *See, e.g.*, 1 HORACE E. SMITH, STUDIES IN JURIDICAL LAW 113-14 (1902).

18. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE CONSTITUTION 283 (8th ed. 1915).

19. *Id.* at 283, 287-89.

ple manner by the law of England."[20] Incidentally, we may note that the incorrectness of Dicey's position, at least to the extent it was to be of any comparative use, was demonstrated in 1812 by General Jackson when he declared Martial Law in New Orleans during the war with Dicey's countrymen. Jackson proclaimed, "Why is martial law ever declared? Is it to make the enlisted or drafted soldier subject to it? He was subject to it before."[21] Dicey's view gives the military, "a mandate for extensive action in situations of emergency, without the need for parliamentary approval, and with questionable regard to the wishes of the elected government."[22] Willoughby, in 1929, compounded the difficulty by defining Martial Law as inclusive of Military Law and calling Martial Law as understood in 1902 as 'Martial Law *in sensu strictiore*.'[23] In England, a similar description was provided by Chalmers and Asquith in 1936.[24] Later, Willoughby did for US constitutional Law what Dicey had done for English constitutional law almost a decade and a half earlier, stressing on the circumstances that make the proclamation of Martial Law *in sensu strictiore* necessary.[25] Even though the text of the US Constitution does not talk about Martial Law, Willoughby found this power located in the bigger concept of Police Powers.[26] He also found some equivalence between the power to proclaim Martial Law and the power to suspend the writ of *habeas corpus*, something explicitly allowed by the US Constitution.[27]

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20. *Id.* at 284.

21. ROBERT STANLEY RANKIN, WHEN CIVIL LAW FAILS: MARTIAL LAW AND ITS LEGAL BASIS IN THE UNITED STATES 14 (Duke University Press 1939) (quoting the martial law proclamation made by General Jackson in New Orleans); *see also* H. Erle Richards, *Martial Law*, 18 L. Q. REV. 133, 133 (1902). *See generally* Wing Commander U. Ch. Jha, *Military Justice in Difficult Circumstances: The South Asian Countries*, 54 MIL. L. & L. WAR REV. 301 (2015) (making a similar point in the Indian context).

22. Campbell & Connolly, *supra* note 1, at 349.

23. WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1586 (2d ed. 1929).

24. DALZELL CHALMERS & CYRIL ASQUITH, OUTLINES OF CONSTITUTIONAL LAW 363 (5th ed. 1936).

25. WILLOUGHBY, *supra* note 23, at 1602; *see also* United States v. Diekelman, 92 U.S. 520, 526 (1875) (defining Martial Law as the law of necessity in the actual presence of war).

26. WILLOUGHBY, *supra* note 23, at 1590-92; *see also* Robert Stanley Rankin, *The Constitutional Basis of Martial Law*, 13 CONST. REV. 75, 75 (1929) [hereinafter Stanley].

27. In time of war, or of domestic insurrection or disorder, when so-called martial law has been declared, the privilege of the writ of habeas corpus, together with all the other civil guarantees may, for the time being, be suspended; but, as we have learned in the preceding chapter, actual public necessity, and this alone, will furnish legal justification for this.

The existence of civil war operates as regards the enemy *ipso facto*, that is, without formal declaration, as a suspension of the privilege of the writ of habeas corpus, together with, as said, the suspension of the other guarantees to the individual against arbitrary executive action. In the preceding chapter the principle is argued that the

By the 1960s, it was generally agreed, at least in the United States, that Martial Law is distinct from Military Law.[28] Disagreement existed as to whether Martial Law is a "replacement for an otherwise functioning civil government"[29] or, as a "supplement only to those functions of civil government which have been disrupted by the disturbance."[30] If the position before 1960 is consulted, we will see that the second view is consistent with the historically accepted position. Martial Law cannot be proclaimed to replace an otherwise functioning civilian government. Rather, it is proclaimed if the civilian government is unable to effectively discharge its functions. Thus proclaimed, if the civilian government is allowed to function, it is so allowed only because such is the will of the military commander. We will return to this idea later.

Whereas Military Law applies only to the members of the military and armed forces and is statutory and exists for the preservation of discipline and order in the military and armed forces, Martial Law puts the military in charge of an area that is under distress and where calling out the military to preserve order is necessary, thus making Martial Law a part of constitutional law.[31] Martial Law, justified and continued only by necessity, is not statutory[32] and can be proclaimed, in the words of Sir John Mackintosh, "When foreign invasion or civil war *renders it impossible for the Courts of law to sit, or to enforce the execution of their judgments*, [and] it becomes necessary to find a rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community."[33] Those that govern a nation must decide, during times of peace as well as war,[34] whether or not to proclaim Martial Law. That decision depends on whether or not, in a given situation, it has become necessary to so proclaim,[35] thus

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establishment of martial law may properly take place not only upon the theater of active hostilities, but elsewhere when the actual necessities of the case demand it.

The suspension of the privilege of the writ of habeas corpus falls short of the establishment of martial law, but to justify it there is required the same public necessity as that required for the enforcement of martial law.

WILLOUGHBY, *supra* note, 23, at 1612-13 (emphasis added).

28. *See, e.g.*, Note, *Martial Law*, 42 S. CAL. L. REV. 546, 549 (1969) [hereinafter *Martial*] (first citing CHARLES FAIRMAN, THE LAW OF MARTIAL RULE 20-23, 31-43 (1930); and then citing FREDERICK BERNAYS WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 6-14 (1940)).

29. See *Martial*, *supra* note 28, for a discussion of old US judicial authority on this point.

30. *Id.*

31. Clode, *supra* note 7, at 30-32.

32. *See* Stanley, *supra* note 26.

33. Clode, *supra* note 7, at 29 (emphasis added) (quoting Sir John Mackintosh).

34. *See* Stanley, *supra* note 26, at 76-77.

35. *See* Clode, *supra* note 7, at 32 ("For the proclamation which, under circumstances of admitted necessity, calls martial law into existence is not to be considered as the legal creation of

making the authority to proclaim Martial Law a part of constitutional law or public law.[36] In fact, the proclamation of Martial Law by General Jackson during the war (against the British) of 1812 in New Orleans and its continued operation, even after the British having been defeated and peace being restored, was justified by General Jackson by a direct reference to the US Constitution that allows the suspension of the writ of *habeas corpus*.[37] Once proclaimed, the military takes complete control and as the threat becomes bigger, necessity becomes graver and therefore discretion becomes freer.[38]

At least since 1713, and certainly since 1731, the inability of the civilian authorities and courts to properly or effectively discharge their functions has been the hallmark of the necessity that makes a proclamation of Martial Law necessary.[39] Thus, if the civilian authorities and courts are open and able to effectively discharge their functions, Martial Law cannot be imposed for it is not necessary to do so.[40] In reverse, if Martial Law has been imposed, it stands to reason that civilian authorities and courts were not able to discharge their functions. We can therefore examine the genuineness of a proclamation of Martial Law by examining whether or not the civilian authorities and courts were able to carry out their functions.[41] General Jackson's con-

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that law, but is merely a statement of facts, which of their own force have already rendered that law necessary.").

36. *See* WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 486-89 (3d ed. 1914); DICEY, *supra* note 18, at 280-90; SMITH, *supra* note 17, at 109-16; WILLOUGHBY, *supra* note 23, at 1587; Stanley, *supra* note 26, at 75.

37. RANKIN, *supra* note 21, at 12 (quoting General Order of March 14, 1815 issued by General Jackson) ("If [the US Constitution] authorizes the suspension of the habeas corpus in certain cases, *it thereby impliedly admits the operation of martial law*, when, in the event of rebellion or invasion, the public safety may require it.") (emphasis added).

38. Holdsworth, *supra* note 15, at 129.

39. *See, e.g.*, HALE, *supra* note 8; Neocleous, *supra* note 8.

40. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866) ("Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."); *see also* SIMEON E. BALDWIN, THE AMERICAN JUDICIARY 299 (1905); CHALMERS & ASQUITH, *supra* note 24, at 368-69; WILLOUGHBY, *supra* note 23, at 1599; Holdsworth, *supra* note 15, at 129; Stanley, *supra* note 26, at 77.

41. The US Supreme Court in two classic expositions of law on the point *viz.* Duncan v. Kahanamoku, 327 U.S. 304, 313 (1946) and *Ex parte* Milligan, 71 U.S. at 127 did exactly that. A proclamation of martial law cannot be justified if civilian courts are 'open and able to function as usual' and the threat that necessitates the proclamation of martial law had ceased. *See* James D. Barnett, *Martial Law and Civil Courts*, 25 OR. L. REV. 135, 135 (1946). In fact, in a 1931 Bombay High Court opinion, where the proclamation of Martial Law under section 72 of the Government of India Act, 1919 by the Governor-General of India, Chief Justice Beaumont observed that under English constitutional law, Martial Law can be proclaimed by the executive branch where a state of war or a state of insurrection amounting to war exists but the Courts are competent, and indeed duty bound to review, "after the restoration of normal conditions to decide

tinued proclamation of Martial Law in New Orleans in 1812 was reviewed by the courts in a similar way, even after the war with the British had ended and peace had been restored.[42] In other words, the military cannot be called out and allowed to exercise its authority independent of any control and supervision by the civilian authorities and courts in a given area, unless it can be shown that the civilian authorities and courts are unable to effectively discharge their functions.[43] When civilian authorities and the courts are unable to effectively function,[44] which necessitates, as a last resort, calling out the military and putting the entire area under military administration, we are in a state of Martial Law, notwithstanding whatever we might formally call the state that we are in.[45]

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whether and to what extent martial law was justified." Chanappa Shantirappa v. Emperor, (1931) Bombay AIR 57, 58. (India).

42. *See, e.g.*, RANKIN, *supra* note 21, at 17 (quoting Judge Martin in Johnson v. Duncan, 3 Mart. (o.s.) 530 (1815) ("The proclamation of martial law, *if intended to suspend the functions of this Court or its members*, is an attempt to exercise powers thus exclusively vested in the legislature. I therefore cannot hesitate in saying that it is in this respect null and void.") (emphasis added) (internal citations omitted)).

> 43. Military troops are sometimes used as an aid to the civil authorities when martial law is declared. The troops then act a role similar to deputy sheriffs, and do nothing under their own responsibility but act directly under the civil power. This use of troops is easily recognizable from the use of troops under martial law because there is no declaration of martial law, and the troops act in entire subordination to the civil authorities.

Stanley, *supra* note 26, at 77.

44. Major Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 85 (2000) (arguing that in the event of civilian agencies becoming overwhelmed in an environment of chaos and panic the President has the 'obvious option' to declare martial law). This position has been accepted since the 'close of 17th century England' where, "Never in peace-time–that is, so long as the ordinary courts were open–was government to resort to its armed forces to quell civil disturbances; nor could it otherwise take recourse to martial law." *See* David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1, 16 (1971). The Andhra Pradesh High Court in India has also accepted this view. *See* Subba Rao v. Supreme Commander, Defense Forces, (1980) 67 AIR 174, (India) (Justice Chowdary indicating that "[o]ne of the tests adopted to find out whether such a situation justifying imposition of Martial Law exists or not is to find out whether the Courts are open and are functioning regularly.").

45. A state of Martial Law, given its nature, can proclaim itself and can exist with or without a formal declaration of the same. *See* BIRKHIMER, *supra* note 36, at 488; Frazer Arnold, *The Rationale of Martial Law*, 15 AM. BAR ASS'N J. 550, 552 (1929); Martial, *supra* note 28, at 548 n. 11 (citing WIENER, *supra* note 28, at 20); Richards, *supra* note 21, at 139. But see United States *ex rel.* Palmer v. Adams, 26 F.2d 141, 143, 145 (1927), where the absence of a proclamation of martial law was one of the factors which led the US federal district Court to conclude that no martial law existed in Colorado and that troops were therefore in action only in aid of civil authority.

B. Military Acting Independent of Civilian Authorities and Courts–A Consequence of Martial Law

In a state when the military acts independent of the civilian authorities and courts, the civilian authorities and courts may be allowed to function, but they function not "as of right" but, "in subordination to the military authority and to the will of the general or other officer in command, by whose permission it is exercised, and under whose direction they conduct judicial business and administer the law."[46] Under Martial Law, "it may be . . . [a military commander's] will to have it applied, so far as ordinary matters of litigation are concerned, by [civilian] courts."[47] If civilian authorities and courts function in a state of Martial Law, they function because the military commander allows them function.[48] Two important British cases illustrate the point.

First case in point is the 1830 decision in *Elphinstone v. Bedreechund* from the Supreme Court of Bombay where Elphinstone, who was the sole commissioner of a territory in British India, proclaimed Martial Law in the said territory and appointed one Captain Robertson as the military commander of the area.[49] Captain Robertson seized and imprisoned the treasurer of the local prince (who surrendered one month after the treasurer was imprisoned) and forced the treasurer to give up money that was the property of the prince.[50] The executor of the treasurer sued Captain Robertson and Elphinstone for the money in the Supreme Court of Bombay.[51] The court held that, "the Courts being open, the war was over at the time when [the treasurer] was thus imprisoned, that the property belonged to [the treasurer], and that therefore [the executor] could recover it."[52]

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46. Clode, *supra* note 7, at 33.

47. BALDWIN, *supra* note 40, at 303.

48. A vast mass of matters intimately affecting the happiness of the governed, their liberties and property rights must hourly be cared for by duly constituted officers, or great suffering, inextricable confusion, and injustice to individuals will result. Property is entailed, marriages entered into, contracts made, and many other every-day domestic concerns must regularly and systematically pursue their accustomed course, or society receives a shock from which it but slowly and painfully recovers. It is not the policy of military commanders to bring about such a condition of affairs. On the contrary, it is a matter of deep solicitude with them to prevent it. The attainment of this end is most easily accomplished by the civil judicature, to the extent absolutely necessary, acting under military control.

BIRKHIMER, *supra* note 36, at 488-89.

49. *See* Elphinstone v. Bedreechund, 1 Knapp's Rep. 316, 316-18 (1830); *see also* CHALMERS & ASQUITH, *supra* note 24, at 368-69; Holdsworth, *supra* note 15, at 129-30.

50. Holdsworth, *supra* note 15, at 129.

51. *Id.*

52. *Id.* at 129-30.

The decision was reversed on appeal by the Privy Council on the ground that just because civilian courts are sitting by themselves is not enough to conclude that a state of Martial Law does not exist because the key determining factor is whether the courts are sitting in their own right or as mere licensees of the military power.[53]

The second is the 1901 case from another British colony: *Ex parte Marais*.[54] In 1901, during the Boer War, the petitioner Marais was arrested without warrant and detained in a town 300 miles away from where he was arrested.[55] When Marais petitioned the Supreme Court in Cape Town for his release, the jailer filed an affidavit before the Court stating that he was, "detained by an order of the military authorities for contravening martial law regulations."[56] His lawyers argued that, since "civil courts were still exercising uninterrupted jurisdiction, which went to show that the 'ordinary course of law could be and was being maintained[,]' . . . a state of war did not exist and martial law could not be applied to civilians."[57] The Privy Council was not impressed and held that, only on the basis of the fact that civilian courts have been permitted to pursue their ordinary course, it cannot be concluded that a proclamation of martial law is invalid.[58] The fact that Marais conceded in his petition that war was raging did not help either.[59] In the words of Frederick Pollock, "the absence of visible disorder and the continued sitting of the courts are not conclusive evidence of a state of peace."[60] Therefore, the functioning of civilian authorities and courts does not mean we are not in a state of Martial Law.[61] Rather, the important question is whether the military is under the control of the civilian authority or whether it is acting independent of the civilian authority.[62] If the military is acting independent of the civilian authority and the courts, such would be a state of *de facto* Martial Law whether or not it is so called.

53. *Id.* at 130.

54. *Ex parte* D. F. Marais [1902] AC 109 (PC) (appeal taken from Sup. Ct. of the Cape of Good Hope).

55. David Dyzenhaus, *The Puzzle of Martial Law*, 59 U. Toronto L. J. 1, 31 (2009).

56. *Id*.

57. *Id.* at 32.

58. *Ex parte* Marais, [1902] AC at 114; *see* Neocleous, *supra* note 8, at 497.

59. *Ex parte* Marais, [1902] AC at 114; *see also* Dyzenhaus, *supra* note 55, at 32

60. Pollock, *supra* note 16, at 157; *see Ex parte* Marais, [1902] AC.

61. *See, e.g.*, Willoughby, *supra* note 23, at 1602.

62. *See* Stanley, *supra* note 26, at 77.

C. *Military Acting-in-Aid of Civilian Authority v. Martial Law*

Short of a proclamation of Martial Law, whereby the will of the military commander is supreme, there exists another concept of 'Military Acting-in-Aid of Civilian Authority.' The first traces of this concept may be found in the writings of William Birkhimer in 1914 when he observed that, "in time[s] of peace statutes authorizing the exercise of military power over civilians are to be construed strictly."[63] In fact, in 1915, Dicey gave a precursor to this concept (having denied the existence of Martial Law under English law) when he spoke of the common law right of the Crown and its servants to "repel force by force."[64] However, in England the distinction between war and civil disorder had been accepted since the 14th century.[65] In 1549 and 1553, Edward VI and Mary had created the institution of Lord-Lieutenants who were "chiefly of a military character" but were to be "appointed only in periods of stress."[66] As is usually the case with authorities of this kind, they were soon abused.[67] Later, in America, in the late 1700s, British soldiers and not civilian authorities were used by the British "with increasing regularity" for the suppression of civil disorders.[68]

In 1929, views expressed by two leading American scholars gave shape to this concept. First was Dicey's American counterpart Willoughby who defined Martial Law as, "that law which has application when the military arm does not supersede civil authority but is called upon *to aid it* in the execution of its civil functions."[69] The other was Rankin who expressed the view much more clearly than Willoughby by emphasizing the distinction between Martial Law and Military Acting-in-Aid of Civilian Authority.[70] Rankin clarified that:

> Military troops are sometimes used as an *aid to the civil authorities* when martial law is not declared. The troops then act a role similar to deputy sheriffs, and do nothing under their own responsibility but *act directly under the civil power*. This use of troops is easily recognizable from the use of troops under martial law because there is no

63. BIRKHIMER, *supra* note 36, at 484.

64. DICEY, *supra* note 18, at 183.

65. Engdahl, *supra* note 44, at 7.

66. *Id.* at 9.

67. *Id.* at 9-10 (citing F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 267-288 (1st ed. 1919)).

68. Engdahl, *supra* note 44, at 26.

69. WILLOUGHBY, *supra* note 23, at 1586 (emphasis added).

70. Stanley, *supra* note 26, at 76-77.

> declaration of martial law, and the troops act in *entire subordination* to the civil authorities.[71]

Rankin provides the key distinction between Martial Law (which he calls 'Punitive Martial Law'[72]) and Military Acting-in-Aid of Civilian Authority (which he calls 'Preventive Martial Law'[73]). Under the former, the military reigns supreme and the continued existence of civilian authority is only because the military commander allows it to exist,[74] whereas, under the latter, the military is not independent of the civilian authority and acts subordinate to it. There is historical evidence to support this well-accepted distinction[75] from the America of the mid-1800s.[76] The only criticism of Rankin's view is that he insists on a 'declaration' of Martial Law whereas we now know that a state of Martial Law can exist without a formal declaration.[77] In England, this concept of Military Acting-in-Aid of Civilian Authority was stated as a part of English constitutional law by Chalmers and Asquith in 1936.[78] The responsibility for maintaining order being vested with the local civilian authorities, the assistance of military should be invoked as a "last expedient" and having invoked it the military, "should act under the direction of civil authority . . . [and] should not, in ordinary cases, fire without his orders, nor omit to fire when ordered by him."[79] Just like Rankin, Chalmers and Asquith also accepted the distinction between Martial Law and Military Acting-in-

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71. *Id.* at 77 (emphasis added).

72. *Id.* at 84 ("Punitive when the courts are not functioning in the proper manner . . . .").

73. *Id.* ("and preventive when it is desired that the troops *act as aid* to the civil authorities.") (emphasis added).

74. BIRKHIMER, supra note 36, at 488.

75. This distinction has been drawn in the context of administration of criminal law during civil disorders. *See* A. Kenneth Pye & Cym H. Lowell*, The Criminal Process during Civil Disorders,* 1975 DUKE L.J. 581, 591-92, 596-97 (1975) (citing OTTO KERNER, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 189 (1968)).

> 76. But far more common were the cases in which soldiers were called to aid civil officials in dispersing mobs or suppressing riots precipitated by hotly contested elections or other public issues, or in other ways to assist the civilian officers. It was well understood that when they were used under such circumstances the soldiers were not used in their military character, but merely as civilian assistants subject to the command of ordinary civil officers, and no more privileged in their use of force against citizens than the civil officers were themselves.

Engdahl, *supra* note 44, at 50 (first citing United States v. Stewart 2 Hay. & Haz. 280 (1857); and then citing Ela v. Smith 71 Mass. (5 Gray) 121 (1855)).

77. *See* BIRKHIMER, *supra* note 36, at 548, 548 n. 11 (quoting WIENER, *supra* note 28, at 20).

78. CHALMERS & ASQUITH, *supra* note 24, at 362.

79. *Id.*

Aid of Civilian Authority but they seem to allow much greater leeway to the military, even when acting in aid of civilian authority.[80]

Military Acting-in-Aid of Civilian Authority is a dangerous concept and, unless close attention is paid to what it actually means and where its scope ends, it is a concept big enough to subsume within itself all the power and authority that the military commands under Martial Law and leave out the limitations imposed on the military under Martial Law.[81] Professor Mark Neocleous notes, "the explicit declaration of martial law in situations which were understood implicitly to be emergencies of some sort has been transformed into the explicit use of emergency powers involving the implicit use of martial law powers."[82] Preserving and maintaining peace and order is generally the responsibility of the local civil authorities and courts[83] presumably because local authorities are better aware of local problems[84] and the military is not designed for this purpose anyway.[85] It might happen that, in order to maintain peace and order, circumstances may worsen to a point where the local civil authorities become overwhelmed and distressed. In such a situation the local civil authorities might deem it necessary to call out the military (which is under the control of federal authorities) for help and assistance with law enforcement functions.[86] However, calling out the military to aid the civilian authorities and courts at times when they are in distress does not, and has never been accepted to, amount to a proclamation of Martial Law.[87] During these times, the military's assistance is generally requested by civilian authorities themselves and once called, the military acts under the command of the local civilian authorities.[88]

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80. *Id.* (citing WAR OFFICE, MANUAL OF MILITARY LAW (1907)) ("Still, circumstances may exist which make it the duty of the troops to ignore or act in independence of the orders of the magistrate, or, indeed, of their own superior officers.").

81. *See, e.g.*, Neocleous, *supra* note 8, at 503-04.

82. *Id.* at 508; *see also* Jason Collins Weida, Note, *A Republic of Emergencies: Martial Law in American Jurisprudence,* 36 CONN. L. REV. 1397, 1400 (2004) (urging the US Supreme Court "to narrowly interpret congressional authorization of emergency powers as a means to limit excessive emergency measures imposed by the executive.").

83. *See, e.g.*, Colonel L. J. Crum, *The National Guard and Riot Control: The Need for Revision*, 45 J. URB. L. 863, 864-65 (1968).

84. Note, *Riot Control and the use of Federal Troops,* 81 HARV. L. REV. 638, 640 (1968).

85. Campbell & Connolly, *supra* note 1, at 346-47 (citing ANTHONY BABINGTON, MILITARY INTERVENTION IN BRITAIN: FROM THE GORDON RIOTS TO THE GIBRALTAR INCIDENT (1990)).

86. *See, e.g.*, U.S. CONST. art. IV, § 4 cl. 6; 10 U.S.C.A. §§ 251, 254 (West 2016); Luther v. Borden 48 U.S. 1, 7-8 (1849).

87. *See* Engdahl, *supra* note 44, at 71.

88. *Id.*; *see* Bishop v. Vandercook, 200 N.W. 278, 280 (Mich. 1924); State v. McPhail, 180 So. 387, 390 (Miss. 1938). *But cf.* Herlihy v. Donohue, 161 P. 164, 167 (Mont. 1916) (explaining that "the inferior military officer may defend his acts against civil liability by reference to the order of

The danger arises as follows: If overwhelmed and under distress, the choice of calling out the military for assistance in law enforcement functions is a choice available to the local civil authorities. However, if the deployment of the military is authorized by a statute and in such a deployment the local civil authorities have no say, and once deployed the military and civil authorities both continue to function but the military acts independent of the civilian authorities and courts, we come dangerously close to a situation where we have in fact, knowingly or unknowingly, proclaimed Martial Law, although we call it Military Acting-in-Aid of Civilian Authority.[89] Consequently, we are liable to make the error of reviewing the legality of this act by applying an incorrect and inapplicable judicial standard of review. In other words, we end up reviewing the legality of a proclamation of Martial Law by analyzing whether or not it is a statutorily valid calling-out of the military to come and aid the civilian authorities. Meanwhile, the military, acting independent of the civilian authorities, continues to exercise its authority in complete disregard of the local civilian authorities, something that it can only do once Martial Law is proclaimed.[90]

There is another problem. If the troops (as well as their officers) are not clear as to why they have been called out, they will be unclear as to whether they are supposed to enforce the law (i.e. act strictly as assistants of the local civilian authorities and courts, in other words, take their orders from civilian authorities) or maintain peace and order (i.e. act independently and exercise discretion in use of force), and the extent to which they are allowed to go in enforcing the law.[91] One

his superior, unless such order bears upon its face the marks of its own invalidity or want of authority.").

89. This point is illuminated by a similar scenario in Canada. The military could be called for assisting in law enforcement functions by the provincial Attorney General, but in 1998 the Canadian Parliament amended the law and vested this authority in the federal authorities. This was criticized as, "Unlike the traditional aid of civil power, there is no requirement that the provinces be consulted before the troops are called out." Editorial, *Calling out the Troops*, 48 CRIM. L.Q. 141, 142 (2003). The Canadian Supreme Court also expressed its concerns as this move impinged the provincial jurisdiction over administration of justice. *See* R v. Nolan, [1987] 1 S.C.R. 1212 (Can.). These issues have been raised in Australia as well. *See, e.g.*, Michael Head, *Calling out the Troops – Disturbing Trends and Unanswered Questions*, 28 UNSW L.J. 479, 480 (2005). The definition of Martial Law in a 1967 Michigan statute also supports this point. Here Martial Law is defined as, "exercise of partial or complete military control over domestic territory in time of emergency because of public necessity." Mich. Compiled L. § 32.505(sec. 105)(j) (West 2013).

90. *See, e.g.*, Campbell & Connolly, *supra* note 1, at 349.

91. This point has been noted by Colonel Robin Evelegh (who was the Commanding Officer of an infantry battalion in Belfast, Ireland) in his book PEACE-KEEPING IN A DEMOCRATIC SOCIETY (1978) reviewed in, and quoted by, Book Review, 8 ANGLO-AM. L. REV. 65, 66 (1979).

proposed method to deal with this problem is to limit and clearly define the powers of the military when called out to act-in-aid of the civilian authorities.[92]

III. Deployment of Military under the Armed Forces Special Powers Act, 1958

A. *The Armed Forces Special Powers Act, 1958*

The AFSPA is a very peculiar piece of legislation. It was enacted in 1958 in the wake of violence that had become, "the way of life in north-eastern States of India[,]" which the state administration was unable to contain.[93] It therefore became *necessary* that the state administration be aided by the military in order to contain this violence (caused by the Naga rebellion[94]) and restore normalcy in the state.[95] Accordingly, choosing a 'quintessential military response,'[96] on September 11, 1958, the Indian Parliament enacted the AFSPA.

The phrase 'armed forces' is defined in the AFSPA to mean, "the military forces and the air forces operating as land forces, and includes other armed forces of the Union so operating."[97] The AFSPA comes into force only when a normal law and order situation becomes so deteriorated that the state police force is not able to contain it.[98] When the AFSPA starts operating in an area, the military 'virtually replaces' the civilian administration.[99] It grants extraordinarily wide powers to commissioned officers, warrant officers and non-commissioned officers or any other officer of an equivalent rank of the mili-

92. *See, e.g.*, Pye & Lowell, *supra* note 75, at 655, 690; Wing Commander U. C. Jha, *Special Laws and the Armed Forces in South Asia*, 10 ISIL Y.B. Int'l Hum. & Refugee L. 134, 147 (2010) [hereinafter *Special Laws*].

93. *The Armed Forces Special Powers Act, 1958*, Gov't of India Ministry of Home Aff., http://mha.nic.in/sites/upload_files/mha/files/pdf/armed_forces_special_powers_act1958.pdf (last updated June 7, 2017).

94. *See* Gohain, s*upra* note 4, at 4537.

95. *See* Surabhi Chopra, *National Security Laws in India: The Unraveling of Constitutional Constraints*, 17 Or. Rev. Int'l L. 1, 6-7 (2015).

96. Manas Mohapatra, *Learning Lessons From India: The Recent History of Antiterrorist Legislation on the Subcontinent*, 95 J. Crim. L. & Criminology 315, 327 (2004) (citing South Asia Human Rights Documentation Centre, Armed Forces Special Powers Act: A Study in National Security Tyranny § 4, http://www.hrdc.net/sahrdc/resources/armed_forces.htm (last visited September 22, 2017)).

97. Armed Forces (Special Powers) Act, No. 28 of 1958, India Code, § 2(a), http://indiacode.nic.in.

98. *See* U.C. Jha, *Terrorism and Human Rights Law: A Comment*, 44 Econ. & Pol. Wkly. 70, 70 (2009) [hereinafter *Terrorism*].

99. Gautam Navlakha, *On Ending the War against Our Own People*, 46 Econ. & Pol. Wkly. 24, 26 (2011).

tary that are operating under this law.[100] In order to maintain public order, they are allowed to use deadly force on people who are violating the rule prohibiting assembly of five or more persons, or are carrying weapons or things capable of being used as weapons.[101] The power to use deadly force is extraordinarily wide in its sweep prompting a legal commentator to repeatedly describe this power as a 'license to kill,' "so wide in its sweep, so shorn as it is of any curb on excess or any sense of proportion."[102] This 'license to kill' provision has been roundly criticized and it has been strongly urged that this provision be amended to bring it in line with the Life and Liberty Clause of the Indian Constitution.[103] Officers also have the power to arrest without warrant[104] and search without warrant.[105] The only limiting force on the exercise of these drastic powers is the individual sense of discretion of the officer in charge of the troops on the ground.[106] The other limitation is the Handing Over Provision (HOP) in the AFSPA

100. *See* Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 114 (2006) (citing R. K. Raghavan, *The Indian Police: Problems and Prospects*, 33 PUBLIUS 119, 129 (2003)).

101. Armed Forces (Special Powers) Act § 4(a), http://indiacode.nic.in ("Special Powers of the Armed Forces. If [any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces] is of opinion that it is necessary so to do for the maintenance of public order, *fire upon or otherwise use force, even to the causing of death*, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or things capable of being used as weapons or of firearms, ammunition or explosive substances.") (emphasis added).

102. A. G. Noorani, *Draconian Statute – Armed Forces (Special Powers) Act, 1958*, 32 ECON. & POL. WKLY. 1578, 1578 (1997) [hereinafter *Draconian*]; A. G. Noorani, *Supreme Court on Armed Forces Act*, 33 ECON. & POL. WKLY. 1682, 1682 (1998) [hereinafter *Supreme*]; A. G. Noorani, *Armed Forces (Special Powers) Act: Urgency of Review*, 44 ECON. & POL. WKLY. 8, 9 (2009) [hereinafter *Armed*].

103. *Armed*, *supra* note 102, at 8. *See generally* INDIA CONST. art. 21 ("No person shall be deprived of his life and personal liberty except according to the procedure established by law.").

104. Armed Forces (Special Powers) Act § 4(c), http://indiacode.nic.in ("Special Powers of the Armed Forces. [Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,] *arrest, without warrant*, any person 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 force as may be necessary to effect the arrest.") (emphasis added).

105. Armed Forces (Special Powers) Act § 4(d), http://indiacode.nic.in ("Special Powers of the Armed Forces. [Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,] *enter and search without* warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary.") (emphasis added).

106. *Draconian*, *supra* note 102, at 1578; *Supreme*, *supra* note 102, at 1683.

whereby, "any person arrested and taken into custody under [the AFSPA] 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."[107] This is consistent with the view that when acting under the color of Martial Law, "It is the function of the military forces to hold the prisoner until order is restored and he can be safely turned over to the civil authorities for trial. Martial law prevents but it does not punish."[108] However, the AFSPA does provide full legal immunity to any person who acts under its authority.[109]

The Governor of the State, Administrator of the Union Territory, or the Union Government in New Delhi can issue a Disturbed Area Notification, which in turn triggers the deployment of the military under the AFSPA to aid civilian authority.[110] The Disturbed Area Notification is not required to be reviewed periodically, but one legal commentator has argued that, given the nature of this notification, "the making of the declaration carries within it an obligation to review the gravity of the situation from time to time and the continuance of the declaration has to be decided on such a periodic assessment of the gravity of the situation."[111]

B. The Constitutionality of the Armed Forces Special Powers Act, 1958

In *Naga People*[112] the constitutional validity of the infamous Armed Forces Special Powers Act, 1958 (AFSPA) was challenged before the Supreme Court of India.[113] Since the case involved a 'sub-

107. Armed Forces (Special Powers) Act § 4(d), http://indiacode.nic.in.

108. RANKIN, *supra* note 21, at 179 (citing L. K. Underhill, *Jurisdiction of Military Tribunals in the United States over Civilians*, 12 CAL. L. REV. 159, 178 (1923-1924)).

109. Armed Forces (Special Powers) Act § 6, http://indiacode.nic.in ("Protection to persons acting under the 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 the exercise of the powers conferred by this Act.").

110. *Id.* at § 3 ("Power to declare areas to be disturbed areas. If, in relation to any State or Union Territory to which this Act extends, the Governor of that State or Administrator of that Union Territory, as the case may be, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that that the use of armed forces *in aid of the civil power* is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area.") (emphasis added).

111. *Supreme*, *supra* note 102, at 1682.

112. Naga People's Movement of Human Rights v. Union of India, (1998) 85 AIR 431 (India).

113. This was not the only law that was challenged in this case. Along with Armed Forces Special Powers Act, 1958, which was enacted by the Union Parliament, the validity of the Assam

stantial question of interpretation' of the Indian Constitution and, as required by the Indian Constitution,[114] the case was referred to a Constitution Bench of five judges of the Supreme Court.[115] The Court delivered a unanimous opinion. Justice Agrawal delivered the opinion of the Court in which all four other judges concurred.[116] The unanimous Court upheld the validity of the AFSPA and rejected all constitutional challenges raised in the case.[117]

In *Naga People*, out of the several grounds on which the constitutionality of the AFSPA was assailed, a key ground was the vesting of the control and supervision of the military.[118] It was argued in this case that the military cannot act independent of the control and supervision of the civilian state authority.[119] Since the military has been called out to act in aid of the civilian authority, which has been overwhelmed with the violence and thus has not been able to contain such violence, the military, during its deployment in the state, must always be under the control and supervision of the civilian state authority. In other words, the civilian state authority will always retain, "a final directorial control [over the military] to ensure that the armed forces act in aid of civil power and do not supplant or act in substitution of the civil power."[120] These arguments were rejected, and the unanimous Court held that:

> We are, however, unable to agree with the submission of the learned counsel for the petitioners that during the course of such deployment the supervision and control over the use of armed forces has to be with the civil authorities of the State concerned, or that the State concerned will have the exclusive power to determine

Disturbed Areas Act, 1955 (which was enacted by the State Legislature of Assam) was also challenged. *Naga People*, (1998) 85 AIR at 440.

114. India Const. art. 143, § 2.

115. The Constitution Bench comprised of Chief Justice J. S. Verma, Justices M. M. Punchhi, S. C. Agrawal, Dr. A. S. Anand, & S. P. Bharucha. *See Naga People*, (1998) 85 AIR at 431.

116. *Id.* at 440.

117. *Id.* at 462-64.

118. *Id.* at 446 (On behalf of the petitioners, Shanti Bhushan argued that, "the use of the Armed Forces in aid of the civil power contemplates the use of Armed Forces under the control, continuous supervision and direction of the executive power of the State and that Parliament can only provide that whenever the executive authorities of a State desire, the use of Armed Forces in aid of the civil power would be permissible but the supervision and control over the use of armed forces has to be with the civil authorities . . . .") (emphasis added).

119. *Id.*

120. *Id.* (On behalf of the petitioners, Dr. Rajiv Dhavan argued that, "the State in whose aid the Armed Forces are so deployed shall have the exclusive power to determine that purpose, the time period and the areas in which the Armed Forces should be requested to act in aid of civil power and that the State remains a final directorial control to ensure that the armed forces act in aid of civil power and do no supplant or act in substitution of the civil power.").

> the purpose, the time period and the areas within which the armed forces should be requested to act in aid of civil power.[121]

However, the Court unanimously interpreted the phrase 'in aid of civil power' in the AFSPA.[122] Incidentally, this phrase is also mentioned twice in the Indian Constitution.[123] The Court held that:

> The expression "in aid of the civil power" in Entry 1 of the State List and in Entry 2A of the Union List implies that deployment of the Armed Forces of the Union shall be for the purpose of enabling the civil power in the State to deal with the situation affecting maintenance of public order which has necessitated the deployment of the Armed Forces in the State. *The word "aid" postulates the continued existence of the authority to be aided.* This would mean that even after deployment of the Armed Forces the civil power will continue to function. The power to make a law providing for deployment of the Armed Forces of the Union in aid of the civil power in the State does not comprehend the power to enact a law which would enable the Armed Forces of the Union to supplant or act as a substitute for the civil power in the State.[124]

We may in passing also note that the AFSPA was not examined on the touchstone of the Life and Liberty Clause of the Indian Constitution.[125] The AFSPA needs to be re-reviewed so as to determine

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121. *Id.* at 447.

122. Armed Forces (Special Powers) Act, No. 28 of 1958, INDIA CODE, § 3, http://indiacode.nic.in.

123. *See generally* INDIA CONST. sched. 7, list I, entry 2A. ("Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State *in aid of the civil powers*; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.") (emphasis added); *Id.* at list II, entry 1 ("Public Order but not including the use of naval, military or Air force or any other armed force of the Union or any other force subject to the control of the Union or of any contingent or unit thereof *in aid of the civil power*.") (emphasis added).

124. Naga People's Movement of Human Rights v. Union of India, (1998) 85 AIR 431, 447 (India) (emphasis added).

125. *See generally* INDIA CONST. art. 21. ("No person shall be deprived of his life or personal liberty except according to procedure established by law."); *see* Maneka Gandhi v. Union of India, (1978) 2 SCR 621, 668 (India) (the Supreme Court held that the 'procedure established by law' under article 21 must be a 'just, fair and reasonable' procedure); *see also* State of Punjab v. Dalbir Singh, (2012) 99 AIR 1040, 1060 (India) (holding that, "in our Constitution the concept of 'due process' was incorporated in view of the judgment of this Court in *Gandhi*."); Selvi v. State of Karnataka, (2010) 97 AIR 1974, 2009 (India) (where the Supreme Court interpreted the "right against self-incrimination" through the ethos of "substantive due process" and "right to fair" trial); Sunil Batra v. Delhi Admin., (1978) 67 AIR 1675, 1690 (India) (holding that, "[t]rue, our Constitution has no 'due process' clause . . . ; but, in this branch of law, after [R. C. Cooper v. Union of India, (1970) 3 SCR 530 (India)] and *Gandhi* . . . the consequence is the same."); Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413, 439 (1998); Mohapatra, *supra* note 96, at 325.

whether it can withstand scrutiny under the Life and Liberty Clause, and it has been suggested that it might not.[126] It is beyond the brief of this article to examine this question in detail.[127] There is, however, an inherent contradiction in these two holdings. In its first holding, the Court clearly rejects the view that the control and supervision of the military deployed in aid of civilian authority in a state can be with such civilian authority in the state.[128] This means that once deployed, the military will be independent of the civilian authority in the state. However, in its second holding, the Court interprets the phrase "in aid of the civil power" to mean that the deployment of the military to aid the civilian authority does not mean that the military can act as a substitute for the civilian authority in the state.[129] The Court, it seems, was mindful of this contradiction and tried to reconcile these two holdings by further observing that:

> In our opinion, what is contemplated by Entry 2-A of the Union List and Entry 1 of the State List is that in the event of deployment of the armed forces of the Union in aid of the civil power in a State, the said forces shall operate in the State concerned in cooperation with the civil administration so that the situation which has necessitated the deployment of the armed forces is effectively dealt with and normalcy is restored.[130]

C. De-Facto Proclamation of Martial Law under the AFSPA

When called to aid the civilian authority of a state, the military can either act independent of that civilian authority or it can act under its supervision. So long as the civilian authority continues to exist and function, the military cannot act independent of the civilian authority when deployed to aid that civilian authority. In a situation where the civilian authority either ceases to exist or is so overwhelmed that it is unable or incapable of functioning, the military can be deployed to act independent of the civilian authority. In such a situation, there is effectively no functioning civilian authority left, therefore to insist of control and supervision by the civilian authority of the state would be pointless. A situation where, in a geographical area, civilian authority

126. *See, e.g.*, Chopra, *supra* note 95, at 14-15, 25-26; *Armed*, *supra* note 102, at 9-11.

127. However, it has been noted that use of the military in ordinary law enforcement has not had its desired effects. *See, e.g.*, Mohapatra, *supra* note 96, at 342 ("While the Indian government has endowed its law enforcement and military with more and more power to extinguish the threat of terrorism, there is scant evidence that this increase in privileges has had its desired effect.").

128. *Naga People*, (1998) 85 AIR at 447.

129. *Id.*

130. *Id.*

has, for all practical purposes, ceased to exist and the military is deployed to take charge and restore normalcy to the area in order for the civilian authority to be established again, is a situation where Martial Law has been proclaimed.

Martial Law may be imposed consequent to a formal declaration of the same, or it may arise out of necessity, but where, on facts that the military is in charge (in the event of all civilian authority ceasing to exist) or the military is acting independent of the civilian authority (in the event of civilian authority being totally helpless), the area would be under Martial Law. The Court's Cooperation Holding, whereby, once deployed (admittedly to aid the civilian authority), the military must act in cooperation with the civil administration, is inconsistent with the legal conclusion that obtains once the doctrinal position on Martial Law is consulted. The military can act independent of the local or state civilian authority, but this can happen only when Martial Law is proclaimed in an area. In absence of a proclamation of Martial Law, the military, when called to aid the civilian authority in a state, must act under the control and supervision of the civilian authority of the state. The Court's first holding (as reproduced above), in effect, amounts to a judicial sanctioning of a *de facto* proclamation of Martial Law[131] whereby the military is allowed to operate in a notified disturbed area without any control or supervision of the state or local civilian authority–the very authority the military is supposed to aid.[132]

As stated above,[133] Military Acting-in-Aid is a dangerous concept unless close attention is paid to its scope. While judicially reviewing the legality of the military being called out to aid the civil authorities, we are liable to make the error of reviewing the legality of this act by applying an incorrect and inapplicable judicial standard of review. We can end up reviewing the legality of a proclamation of Martial Law by analyzing whether or not it is a statutorily valid call out of the military to come and aid the civilian authorities. Meanwhile, the military, act-

131. Use of the phrase '*de facto*' to characterize the Indian Parliament or Union Government's actions in dealing with national security situations is not new. Commenting on other Indian national security legislations, Chopra has characterized several of them as authorizing '*de facto* preventive detention'. *E.g.*, Chopra, *supra* note 95, at 19 (citing Unlawful Activities (Prevention) Act, No. 37 of 1967, INDIA CODE, § 43D(2), http://indiacode.nic.in). Kalahan et al. have also said that several Indian national security legislations, "to a considerable degree . . . [function] more as preventive detention laws than as laws intended to obtain convictions for criminal violations . . . ." Kalhan et al., *supra* note 100, at 173.

132. *See* Chopra, *supra* note 95, at 13-14 ("AFSPA authorizes the military to use force in [the disturbed] area far in excess of what ordinary criminal law authorizes, without being invited to do so by the civil administration.").

133. *Supra* Part II, Sub-Part C.

ing independent of the civilian authorities continues to exercise its authority in complete disregard of the local civilian authorities,[134] something that it can only exercise once Martial Law is proclaimed.[135] Martial Law can be invoked in circumstances where the civilian authority, for all practical purposes, has ceased to exist and there is no other option left but to call out the military to maintain peace and order. Civilian authority will then be allowed to function but that is completely dependent on the will of the military commander. In fact, it has been shown that, when the AFSPA is invoked, civilian authorities "start playing second fiddle" and, "instead of 'coming to the aid of civil administration', the armed forces virtually replace it."[136] Courts have held consistently that the continued existence of civilian authority is no basis to conclude that a proclamation of Martial Law was invalid.[137] Thus, the presence or absence of civilian authority is not helpful in determining whether or not an area is under Martial Law. The key factor is the degree of control that the civilian authority exercises over the military. As per *Naga People*, once deployed, subsequent to the issuance of a 'disturbed area notification,' the military is not required to act under the civilian authority.[138] This holding of the Court therefore amounts to a *de facto* sanctioning of a proclamation of Martial Law.

The deployment of the military to aid the civilian authority under section three of the AFSPA is triggered by the issuance of a Disturbed Area Notification, which can be issued by the Governor of the State, Administrator of the Union Territory or the Union Government in New Delhi.[139] The difficulty with section three is that it does not

134. The abuses of the AFSPA are too numerous and well recorded, several of those allegations have been denied by the Army whereas in several other instances the Army has been forced to take action. *See, e.g.*, Uttam Sengupta, *'The ULFA Boys are not amateurs'*, INDIA TODAY (Dec. 31, 1990, 11:15 AM), http://indiatoday.intoday.in/story/ulfacertainlyhavethebenefitofverygoodintelligenceltgenbaljitsingh/1/316031.html (where Lieutenant General Baljit Singh, then Chief of Staff of Eastern Command, denied allegations of power abuse by the Army under the AFSPA). *But see*, Gohain, *supra* note 4, at 4537 (describing at least three events of power abuse where in one incident of custodial torture, specifically that "[t]here was such a public outrage that the army general in charge of operations in Assam was forced to visit the bereaved family and apologise.").

135. *See, e.g.*, Campbell & Connolly, *supra* note 1, at 349.

136. Navlakha, *supra* note 99, at 26.

137. Campbell & Connolly, *supra* note 1, at 348-49.

138. *See* Naga People's Movement of Human Rights v. Union of India, (1998) 85 AIR 431, 447 (India).

139. Armed Forces (Special Powers) Act, No. 28 of 1958, INDIA CODE, § 3, http://indiacode.nic.in ("Power to declare areas to be disturbed areas. If, in relation to any State or Union Territory to which this Act extends, the Governor of that State or Administrator of that Union Territory, as the case may be, is of the opinion that the whole or any part of such State or Union

clearly describe the circumstances under which the issuance of a Disturbed Area Notification is justified.[140] So long as the Notification is statutorily valid, and the statute's constitutionality is already upheld, it will be very difficult to examine the true nature of this Notification.[141] This is exactly what we found in our analysis in the preceding part, i.e. we are in a situation where we end up reviewing the legality of a proclamation of Martial Law by analyzing whether or not it is a statutorily valid call-out of the military to come and aid the civilian authorities. Meanwhile, the military, acting independent of the civilian authorities, continues to exercise its authority in complete disregard of the local civilian authorities, something that it can only exercise once Martial Law is proclaimed.[142] Furthermore, the use of the military in a situation that does not warrant a proclamation of Martial Law is bound to have adverse impact on the military itself that has, in this case, led to soldiers committing suicide and killing their own, prompting the army generals to urge a political solution.[143] Some retired officers have also said that by making the military focus on its secondary role (i.e. aiding civilian administration in conflict), the military's primary responsibility has been compromised and its discipline affected.[144]

D. The Facts Behind the De-Facto Proclamation of Martial Law under the AFSPA

It appears from *Naga People* that the real reason the Supreme Court declared that the military should be independent of the civilian authority is because of the complete and utter failure of the civil authority in that state.[145] The Governor of the state of Assam said in his report, "Magnitude of loot and plunder, however, became colossal in due course of time, presumably in view of the State Government's

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Territory, as the case may be, is in such a disturbed or dangerous condition that that the use of armed forces *in aid of the civil power* is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area.") (emphasis added).

140. *See Special Laws*, *supra* note 92, at 135.

141. One commentator noted that in "declaring Assam a 'Disturbed Area' nowhere has the government referred to any outbreak of violence or armed insurrection in the state." Udayon Mishra, *Worse than Emergency Days*, 16 ECON. & POL. WKLY. 731, 732 (1980). If the disturbed area notification is recognized for what it truly is, the standard of judicial review applicable would be different.

142. *See, e.g.*, Campbell & Connolly, *supra* note 1, at 349.

143. Gohain, *supra* note 4, at 4537.

144. Navlakha, *supra* note 99, at 27.

145. *See* Naga People's Movement of Human Rights v. Union of India, (1998) 85 AIR 431 (India).

failure to act. . . . The holders of public [offices] have been rendered totally ineffective. The statutory authorities are in a state of panic incapable of discharging their functions."[146] Directly referring to certain secessionist groups[147] like United Liberation Front of Assam (ULFA),[148] the Governor's report noted, "'The loss of faith is the efficacy and the credibility of the Government apparatus is so great that the thin distinction between ULFA,[149] AASU[150] and AGP [Asom Gana Parishad] which existed at some stage, stands totally obliterated. Glooms [sic] hangs over the whole state. By the fall of dusk, the people are huddled in their homes. Nobody's life, property or honour is safe. The basic attributes of a civilised and orderly society stand annihilated.'"[151]

In a media interview, the then Governor of Assam, D. D. Thakur, said that, at the time he took over as the Governor, the entire administration was "defunct and demoralized" and even pointed out that the police had failed in arresting the violent activities of the ULFA.[152] The government's loss of its grip on administration further resulted in a popular loss of faith in the Constitution and law of the country and the constitutional process as well.[153] Historically, a proclamation of

146. *Id.*

147. See Gohain, *supra* note 4, at 4537, which critically describes the enactment of the AFSPA that was, "Originally calculated to suppress the Naga rebellion, [but] is now being applied liberally wherever in this region insurgency raises its head." *Id.*

148. Shekhar Gupta & Uttam Sengupta, *A Violent Mess*, INDIA TODAY (Sept. 15, 1990, 5:52 PM), http://indiatoday.intoday.in/story/assaminturmoilgovernmentstruggleshopelesslytoestablishsemblanceofauthority/1/315549.html.

149. ULFA stands for United Liberation Front of Assam. To put the Governor of Assam's report in context, it is important to remember that in the early 1990s, ULFA rejected the demands to hold talks with the Indian Government to discuss their grievances on the ground that, "ULFA will 'consider' holding talks with 'India government' if the agenda for such talks has at the top the question of the restoration of the lost sovereignty of the Asom People of Asom, whose unchallenged and sole representative, in ULFA's view, is naturally the organisation itself." Kamaroopi, *Enigma of ULFA*, 26 ECON. & POL. WKLY. 1786, 1786 (1991).

150. AASU stands for All Assam Student Union. In 1989, AASU along with All Bodo Students Union (ABSU), "successfully paralysed life in Kokrajhar and Darrang districts and, for various periods of time, cut off the entire North-east from the rest of the country. . . . The actions of the state's police are certainly not such as to encourage an early end to the agitation. In retaliation to violence against policemen, they have gone on a rampage in Bodo-dominated villages in Kokrajhar and Darrang districts. Thereby they may have destroyed whatever chances existed of isolating the militants and may[,] in fact, have helped broaden the militants' base." Farzand Ahmed, *Turn for the Worse*, INDIA TODAY (Apr. 30, 1989, 1:47 PM), http://indiatoday.intoday.in/story/bodolandagitationassaminforalongperiodofturmoil/1/323415.html.

151. *Id.* at 462.

152. *See* Farzand Ahmed, *I'm Having a Trying Time, Says Governor D. D. Thakur*, INDIA TODAY (Mar. 31, 1991, 10:33 AM), http://indiatoday.intoday.in/story/evenstatepolicehasbeenactivatedandiscapturingulfaactivistssaysddthakur/1/318081.html.

153. Gupta & Sengupta, *supra* note 148.

Martial Law has generally followed circumstances like these because, not only has the local administration failed to maintain law and order, there has also been no faith left in the local administration to be able to effectively discharge those functions. Negotiating with the ULFA was not a viable option in face of 'killings and violence,'[154] especially when the ULFA did not hesitate in killing even a Russian technician Sergei Gritchenko employed by Coal India in the region.[155] One 1989 special news report described the situation as follows: "So complete is the sense of insecurity, so complete the acceptance of the inevitability of utter chaos in the coming months that each community is busy forming its own private army and collecting arms."[156] The police chief was assassinated and businessmen of non-Assamese ethnicity were forced to leave the state and were forced to transfer their properties to local Assamese before leaving.[157] The following paragraph from a news report clearly shows that the factual situation would have justified the proclamation of Martial Law even if it was invoked expressly:

> ULFA's writ is taken more seriously than the state Government's. The organisation openly runs military camps in the Brahmaputra valley. Its cadres have received their basic training from the Kachin Independent Army in the adjoining Burmese jungles, where they shop for arms with extorted money. Intelligence agencies say ULFA has forged links with other extremist groups, particularly Nagas, and there are indications of links with extremists in Punjab and Kashmir.[158]

In fact, Lieutenant General Baljit Singh, the then Chief of Staff of Eastern Command, when asked "whether the police could have been used against ULFA[,]" categorically stated that the ULFA was an insurgent organization and to handle the ULFA, "would have been beyond the capabilities of the police."[159]

These facts, as narrated in *Naga People*, and also otherwise, clearly indicate that the civilian authority was completely unable to function. The AFSPA, as has been noted before, comes into force only when a normal law and order situation becomes so deteriorated that the state police force is unable to contain it.[160] This was a classic case of calling out and handing over the state of affairs to the mili-

154. *See* Ahmed, *supra* note 152.
155. *See* Kamaroopi, *supra* note 149.
156. Gupta & Sengupta, *supra* note 148.
157. *See id.*
158. *Id.*
159. Sengupta, *supra* note 134.
160. *See Terrorism*, *supra* note 98, at 70.

tary–a proclamation of Martial Law by whatever name it is called. On such facts, the Supreme Court had no other option but to declare that the military is not subject to the control and direction of the civil authority in that state. But, in doing so, the Court made an error. It did not call a section three notification for what it truly was, and what could only be its most fair characterization under the circumstances; it was a *de facto* proclamation of Martial Law. The military might be enforcing civilian law, and it might even be cooperating with the civilian authority in the disturbed area but the fact remains that the military is under no obligation to answer to civilian authorities as regards their conduct in the disturbed area. The military personnel, exercising powers under the AFSPA, take orders from and are answerable only to the military authorities.[161] Responding to the UN Human Rights Committee in March 1991 in regards to the Second Periodic Report under the International Covenant on Civil and Political Rights,[162] the then Attorney General stated that, given the infiltration and secessionist activities in the north-east part of India, the AFSPA was necessary.[163] The Attorney General's justification before the Supreme Court and then before the Human Rights Committee was the same–the AFSPA is necessary.[164] This is the classic justification for Martial Law. It is further remarkable that in the long and chequered history of the AFSPA, only a few commentators have examined the use of the AFSPA from an angle that comes close to this analysis,[165] and only one commentator has so far called the use of the AFSPA for what it truly is (albeit in passing and without any analysis)–a law that imposes Martial Law on the disturbed area so notified under the Act.[166]

161. *See, e.g.*, *id.* at 71 ("Since March 1993, a human rights cell has been functioning in the army headquarters under the additional director general (discipline and vigilance). In the last 15 years, it has received more than 1,200 cases from the north-east and J&K for alleged violations of human rights. Only 54 cases have been found true, wherein 115 personnel have been punished and in 17 cases compensations have been awarded."). Note that even in the case of alleged human rights violations from the areas where the AFSPA is applicable, it is the military that decides the claims presented by the petitioners, and not the civilian administration. *See id.*

162. *See* Naga People's Movement of Human Rights v. Union of India, (1998) 85 AIR 431 (India).

163. *Terrorism*, *supra* note 98, at 71.

164. *Naga People*, (1998) 85 AIR at 464.

165. *See, e.g.*, Chopra, *supra* note 95, at 6-7; *Armed*, *supra* note 102, at 8.

166. Gohain, *supra* note 4 ("The army is virtually imposing a martial law regime on areas regarded as infested with insurgents.").

IV. CONCLUSION

Use of the military in a domestic crisis is nothing new.[167] In *Moyer*,[168] even though there was no formal declaration of Martial Law by the Governor of Colorado, he still had the petitioner "Moyer summarily arrested and imprisoned."[169] The Governor had determined, though, that a state of insurrection existed because of a violent labor strike. In such circumstances, the US Supreme Court held that the Governor's determination of the state of insurrection was conclusive.[170] Much water has flown under the proverbial bridge since *Moyer* was decided in 1909. However, compared with the facts in context of the AFSPA noted above, clearly the situation was much more critical as compared to *Moyer*. Whether it is still the same situation is, however, arguable.

The AFSPA authorizes the deployment of the military in any area that has been so notified under the disturbed area notification issued under section three of the AFSPA. When the military is so deployed, it is supposed to cooperate with the civilian authorities but there is no need for the military to act under their command and control. Clearly then, the military acts independent of the civilian authority in the area where the military is deployed. Is the issuance of a disturbed area notification, therefore, a *de facto* proclamation of Martial Law? This article argues that it is. The existence of civilian authority in an area where the military has been deployed to maintain law and order is no ground to conclude that the area is not under Martial Law. The key factor is whether the military is acting under the command and control of the civilian authority or independent of it. Obviously, the military will act in cooperation with the local civilian authority once it is deployed in the area, but there is no legal obligation for the military to do so. In the case of a conflict, the military commander will clearly outrank and out-command the civilian authority. If such is the situation, then the area is under Martial Law, by whatever name we call it.

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167. *See* Note, *Rule by Martial Law in Indiana: The Scope of Executive Power*, 31 IND. L. J. 456, 456 (1995); Note, *Martial Law and the National Guard*, 18 N.Y. L. F. 216, 220-223 (1972). These two articles document the extensive use of Martial Law by State Governors in the United States where they declared Martial Law and called in the National Guard to handle domestic situations like strikes and other like instances of public unrest. *See also* Note, *Constitutional Law – Martial Law – Preserving Order in the State: A Traditional Reappraisal*, 75 W. VA. L. REV. 143, 144 (1972) [hereinafter *Preserving Order*] (citing KERNER, *supra* note 75).

168. Moyer v. Peabody, 212 U.S. 78 (1909).

169. *Preserving Order*, *supra* note 167, at 158.

170. *Moyer*, 212 U.S. at 83 (1909).

Given the grave circumstances that necessitate putting an area under Martial Law, this is not only desirable but necessary–it would not work otherwise. But calling it what it truly is, is important to ensure that the proper standards of judicial review are applied when the matter reaches the courts. When the Supreme Court upheld the constitutionality of the AFSPA, it failed to realize the disturbed area notification for what it truly was–a *de facto* proclamation of Martial Law. It is beyond the scope of this article to examine what might have happened should the Court have realized this. But the settled legal position going back more than two centuries, and, the facts as they are borne out from the Court's opinion and other reliable sources, clearly indicate that the circumstances on the ground were such that nothing less than calling in the military would have helped. The necessary precondition of 'necessity' was therefore factually fulfilled–it was necessary to proclaim Martial Law, and that's exactly what the Indian Parliament did. Was the proclamation of a *de facto* Martial Law by way of the AFSPA necessary? I think it was, at least when the AFSPA was first enacted and enforced. But is it necessary in 2018 to keep areas of the Indian Republic under *de facto* Martial Law? That might be a tough ask for the government. Is there any constitutional authority with the Indian Parliament to provide for a declaration of Martial Law by legislation? That is the natural follow-up question that arises, but, being beyond the scope of this paper, is left for future examination.