

INADEQUACY OF ARMED FORCES SPECIAL POWERS ACT, 1954 – AMENDMENT INDISPENSABLE

* Shreya Sawant

ABSTRACT

Forces does not constitute right... obedience is due only to legitimate powers.

Jean-Jacques Rousseau

His words elucidate that force is not right and obedience is only due to legitimate powers. AFSPA although being an act passed by parliament bestows unfettered and unrestricted powers which eventually leads to violation of numerous rights of innocent citizens.

The present paper analyses and examines the Armed Forces Special Powers Act (AFSPA), 1954 in its legal-social aspects.

The Author is at the first place going to deal with basic introduction of the legislation followed by its comprehensive history, and its present applicability. Author then deals with all the inclusive provisions of the Act which is next followed by the controversies regarding the Act ultimately making it unconstitutional followed by few incidents of violation of Human Rights, on national as well as international level further dealing with similar provisions of Criminal Procedure Code and Indian Penal Code which provides necessary safeguards which the Act is lacking next pursues the Reports of Committees which suggested that the Act should be repealed further Author discusses the important role played by judiciary which gave hope to aggrieved individuals lastly discussing why army favours the Act. In conclusion, author makes some suggestions which would ensure AFSPA to be more humane allowing it to walk parallelly to the Constitution which eventually would make it efficient.

ARMED FORCES SPECIAL POWERS ACT (AFSPA)-

The AFSPA is an Act passed by the Parliament which gives India's armed forces "special powers" to "restore the authority of the State" in regions notified as "Disturbed Areas". The decision to involve the Armed Forces was taken by the Central government as the police and the parliamentary forces failed to control the internal disturbances.

It has become an effective means to control militancy and maintain law and order.¹⁰⁸⁷

* Modern Law College, Pune University.

COMPREHENSIVE HISTORY OF ARMED FORCES SPECIAL POWERS ACT (AFSPA), 1958-

In the year 1942, the Viceroy of India, Lord Linlithgow, promulgated the Armed Forces Special Act. It was done to suppress the Quit India Movement launched by Mahatma Gandhi. Indian freedom fighters and civilians protested with violence in response.

After this, in the year 1947, Jawaharlal Nehru, the first Prime Minister of India, faced his first insurgency. In Assam, Baptist missionaries converted a majority of the Nagas into Christianity, and a community emerged within themselves called “Naga National Council” (NNC), aspiring for a common homeland and self-governance. The Naga leaders were adamantly against Indian rule over their people once the British pulled out of the region. Under the Hydari Agreement signed between NNC and British administration, Nagaland was granted protected status for ten years, after which the Nagas would decide whether they should stay in the Union or not. However, shortly after the British withdrew, independent India proclaimed the Naga Territory as part and parcel of the new Republic. The NNC proclaimed Nagaland’s independence. In retaliation, Indian authorities arrested the Naga leaders. An armed struggle ensued and there were large casualties on either side. The Armed Forces Special Powers Act is the product of this tension. Since then a brutal cycle of insurgency and counterinsurgency has been prevalent, affecting thousands of people.¹⁰⁸⁷

¹⁰⁸⁷ <https://afpa.in/afspa/>

¹⁰⁸⁸ The Draconian Armed Forces (Special Powers) Act, 1958- Urgency of Review by Research Scholar Caesar Roy
https://www.google.com/amp/s/gradeup.co/armed-forces-special-powers-act-i_amp
<https://www.gatewayhouse.in/time-to-repeal-afspa/>
<https://www.insightsonindia.com/2019/04/03/afspa/>

<h2>BLOODY HISTORY</h2> <h3>5 FACTS ABOUT INSURGENCY IN THE NORTHEAST</h3>	
<p>2 The Nagas were the first to raise the banner of insurgency. It started with Angami Zapu Phizo, chief of the rebel Naga National Council (NNC), leaving the Naga Hills in 1956 to fight for an independent Naga homeland from London</p>	<p>1 Out of 65 terror organizations in India, 57 are from the northeast part of the country. In fact, 34 are from Manipur itself. Of the 38 terror organizations banned under Section 35 of the Unlawful Activities (Prevention) Act, 1967, listed by the home ministry, 10 are from the northeast</p>
<p>3 On March 6, 1966, Air Force planes dropped incendiary bombs in Mizoram to check an unprecedented attack by the Mizo National Army, which had overrun the Aizawl treasury. This was the first and only time that the IAF has been used to attack Indians in India</p>	
<p>4 In a declaration made in 2015 four outfits — NSCN(IM), ULFA(I), KLO & NDFB — formed a united armed organization named The United National Liberation Front Of WESEA (UNLFW). WESEA stands for Western South East Asia, a term used by the sessionist groups</p>	<p>5 Of all the seven states of the northeast, Mizoram is the only island of peace with no major terror outfit active now. This came about after signing of the Mizoram Accord between the Laldenga-led Mizo National Front and the government of India on June 30, 1986</p>

Source: Times of India

PRESENT APPLICABILITY OF THE ACT?

It is effective in the whole of Nagaland, Assam, Manipur (excluding seven assembly constituencies of Imphal) and parts of Arunachal Pradesh. The Centre revoked it in Meghalaya on April 1, 2018. Earlier, the AFSPA was effective in a 20 km area along the Assam- Meghalaya border. In Arunachal Pradesh, the impact of AFSPA was reduced to eight police stations instead of 16 police stations and in Rirap, Longding and Changlang districts bordering Assam.

It was enforced in the State of Punjab in 1983 to quell the Khalistan movement. It was eventually withdrawn in 1997 after improvement of the security situation there.

It also came into force in Jammu & Kashmir in 1990 after the internal security situation worsened in the Valley due to the terrorist activities of the Pakistan-backed militants.

Tripura withdrew the AFSPA in 2015.¹⁰⁸⁹

INCLUSIVE OF ALL PROVISIONS OF ARMED FORCES SPECIAL POWERS ACT (AFSPA), 1958-

The Armed Forces (Special Powers) Act of 1958 (AFSPA) is a law with just six sections which enables certain *special powers* upon the members of Armed Forces in disturbed areas

¹⁰⁸⁹

<https://www.google.com/amp/s/www.thehindu.com/news/national/what-is-afspa-and-where-is-it-in-force/article23648102.ece/amp/>

in the State of (Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland & Tripura).¹⁰⁹⁰

It grants power to Governor of the State or Administrator of that Union Territory or the Central Government, to declare the whole area or any part of such State or Union Territory as *disturbed or in a dangerous condition* that the use of armed forces in aid of civil power is necessary to which the Act extends in either case with the aid of notification in Official Gazette.¹⁰⁹¹

The Act bestows following special powers to Armed Forces, in particular to any Commissioned Officer, Warrant Officer, Non- Commissioned Officer or any other person of equivalent rank in armed forces, in disturbed area, who is of the *opinion* that it is necessary for *maintenance of public order*:

- a) *use force or fire upon*, after giving due warning, against any person who is acting in contravention of any law or order for the time being in force in disturbed area in *prohibiting the assembly of five or more persons* or *the carrying of weapons* or any other thing capable of being used as weapons;
- b) *destroy* any arms dump, prepared or fortified position or shelter *from which attacks are made* or are likely to be made or are attempted to be made, or any *structure* used as a *training camp* for armed volunteers or utilised as a hide-out by armed gangs or absconders wanted for any offence;
- c) *arrest, without warrant*, any person who has committed a *cognizable offence* or *against whom a reasonable suspicion exists* that has been committed or is about to commit a cognizable offense;
- d) *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.¹⁰⁹²

¹⁰⁹⁰ Section 1 of ARMED FORCES SPECIAL POWERS ACT, 1958

¹⁰⁹¹ Section 3 of ARMED FORCES SPECIAL POWERS ACT, 1958

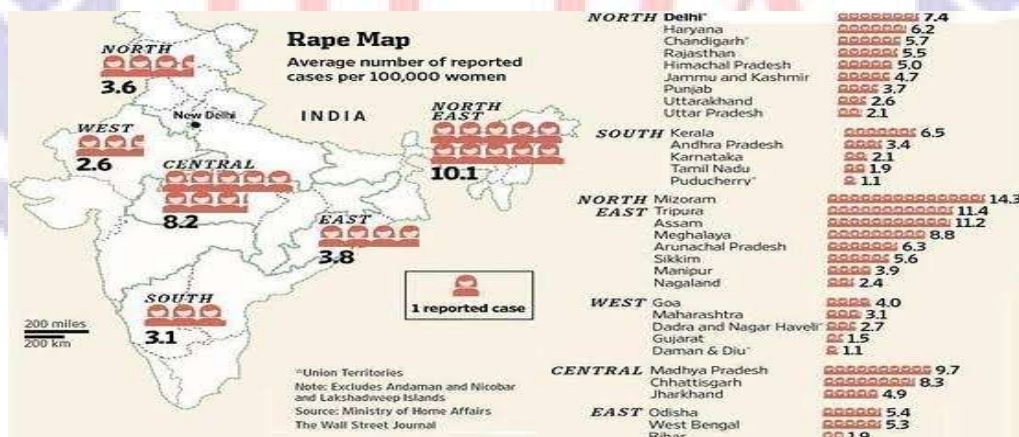
¹⁰⁹² S. 4 of AFSPA, 1958

This Act provides that any person who is arrested and taken into custody *shall be made over to the officer in charge of the nearest police station with least possible delay*, together with a report of the circumstances occasioning the arrest.¹⁰⁹³

This Act provides *immunity to armed forces'* personnel who exercised conferred power, that *no prosecution, suit or other legal proceeding shall be instituted*, except with the previous sanction of the Central Government.¹⁰⁹⁴

CONTROVERSIES REGARDING AFSPA-

- In simple terms, AFSPA gives armed forces power to maintain “public order”¹⁰⁹⁵ in “disturbed areas”. Although traditionally it acts to suppress the insurgency where separatist movements break out in times where the State machinery like the Police seems to be incompetent to handle the situation, it bestows unrestricted power to armed forces which numerous times resulted into infringement of rights of innocent citizens.



Source: The Wall Street Journal [In 2011, a total of 24,206 rape cases were registered in India, according to data released by National Crime Records Bureau].

- Despite accusation of assault, rape, murder, and many other atrocities have been reported from the areas where the army was deployed, no one has been prosecuted until the middle of 2016.

¹⁰⁹³ S. 5 of AFSPA, 1958

¹⁰⁹⁴ S. 6 of AFSPA, 1958

¹⁰⁹⁵ The expression “public order” signifies that state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the government. It may thus be equated with public peace and safety. (Romesh Thappar v. State of Madras, AIR 1950 SC 124; Brij Bhushan v. Delhi, AIR 1950 SC 129; Supdt., Central Prison v. Ram Manohar Lohia, AIR 1960 SC 633.)

The NCRB Crime in India, 2018 report was published in January 2020.

Rate of crime, 2018, NCRB

States	Rate of crime against women (per lakh)
Arunachal Pradesh	51.1
Assam	166.0
Manipur	17.7
Meghalaya	35.7
Mizoram	42.2
Nagaland	7.3
Sikkim	55.5
Tripura	46.5
India	58.8

➤ It is pertinent to note that “for purposes of legislative entries the term ‘public order’ is given a broad meaning.” The Supreme Court has, however, underscored that the state cannot violate fundamental rights of citizens in the garb of maintaining “public order.” The term “public order” has been consistently “interpreted somewhat narrowly” in matters concerning violation of fundamental rights of all individuals.¹⁰⁹⁶

Source: NCRB REPORT

- Furthermore, Act overrides a dozen of civil rights, including fundamental rights also it ensues isolation of people living in border states which altogether brings the Act in bad light.

1) THE TERM ‘DISTURBED AREA’ IS VAGUE- DISTURBED AREA-

Section 2(b) defines "disturbed area" as an area which is for the time being declared by notification under section 3 to be a disturbed area.

Section 3 states how an area can be declared disturbed. It grants the power to declare an area disturbed to the Central Government and the Governor of the State, but does not describe the circumstances under which the authority would be justified in making such a declaration. The provision declares the authority of the centre, but does not clearly define a disturbed area nor does it state the conditions, circumstances or prudent grounds for the declaration of the part as disturbed.

The requisite to declare any area as disturbed area wholly depends upon the ‘opinion of the Government official’. There is no precise definition of the term ‘disturbed area’.

The vagueness of this definition was challenged in *Indrajit Barua v. State of Assam and Another*¹⁰⁹⁷, the court decided that the lack of precision to the definition of a disturbed area

¹⁰⁹⁶ M.P. Jain, Indian Constitutional Law, 531 (Lexis Nexis Butterworths Wadhwa, Gurgaon, 6th edn., 2006).

was not an issue because the government and the people of India understand its meaning. And since the declaration depends on the satisfaction of the Government Official, it is not subject to judicial review.

However, a similar legislation i.e Disturbed Areas (Special Courts) Act, 1976, provides a clear definition. Under this Act, an area may be declared disturbed when “a State Government is satisfied that (i) there was, or (ii) there is, in any area within a State extensive disturbance of the public peace and tranquillity, by reason of differences or disputes between members of different religions, racial, language, or regional groups or castes or communities, the state government may declare such area to be a disturbed area”.¹⁰⁹⁸

The Apex Court later defined the term “disturbed area” when the Constitutional validity of AFSPA was challenged in *Naga People’s Movement of Human Rights v. Union of India*¹⁰⁹⁹, that “it has to be adjudged according to the location, situation and circumstances of particular case. As the term implies, only such area would be disturbed where there is absence of peace and tranquillity. A type of disorder is in existence that it may be regarded as a public order problem. Also, the extent of the disturbed area is confirmed to the area in which the situation is such that cannot be handled without seeking the aid of the armed forces.”

2) THE CENTRE-STATE CONFLICT ON SUPREMACY ON DECLARING “DISTURBED AREA”-

All remains well between the Central and State governments except when: (a) the Centre chooses to unilaterally declare an area as “disturbed area” while the State government is opposed to such moves; or (b) the governor of the concerned State, acting on the advice of the council of ministers, has proclaimed an area to be a “disturbed area” while the Centre is opposed to such proclamations.

The centre may unilaterally proclaim any area as “disturbed or dangerous”¹¹⁰⁰, while the State concerned may be of the contrary opinion, thereby compelling compliance and assistance

¹⁰⁹⁷ AIR 1983 Del 514

¹⁰⁹⁸ <https://www.cpr.in/articles/afspa-a-struggle-worth-living-for>

¹⁰⁹⁹ AIR 1998 SC 431

¹¹⁰⁰ S.3 of AFSPA, 1958

resulting in central supremacy. It has often been argued by the states concerned that “the very existence of AFSPA is making a mockery of the federal structure of the country.”¹¹⁰¹

3) ACT BEING UNCONSTITUTIONAL-

3.1) CONSTITUTIONAL BEING PARAMOUNT-

Our Constitution is a controlled constitution which confers powers on the various authorities created and recognized by it and defines limits of those powers. There is no authority, no department or branch of the State which is above or beyond the Constitution or has powers unfettered by the Constitution. It has devised a structure of power relationship which checks and balances and limits are placed on the powers of every authority of instrumentality under the Constitution.¹¹⁰²

3.2) A WAY OF CHECK AND BALANCE-

While framing any policy or law, Part III and Part IV should be considered as one is corner stone of Constitution and the latter is the conscience of the Constitution which helps to flourish social, economic equality among people. The object behind the inclusion is to establish ‘a Government of law and not of man’ a government system where the tyranny of majority does not oppress the minority. In short, the object is to establish Rule of Law.

Art.13 (2) of the Constitution provides that “*the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void*”.

However, AFSPA gives unfettered powers to the armed personal which always have been in controversy as it has underlying risk of misuse of these powers and eventually which abridges the rights conferred by this Part and any law made in contravention of Art.13(2) shall, to the extent of the contravention, be void.

3.3) PROVISIONS VIOLATIVE OF CONSTITUTION-

Though the Act was ostensibly intended to bring peace and stability but the use and misuse of the unrestricted powers granted by law to armed forces resulted in having an opposite effect.

¹¹⁰¹ THE ARMED FORCES (SPECIAL POWERS) ACT, 1958, AND FEDERAL CONFLICTS

Himanshu Ranjan Nath Falakyar Askari (Winter Issue 2017
ILI Law Review Vol. II)

¹¹⁰² Minerva Mills Ltd. & ors vs Union of India & Ors 1980 AIR 1789

3.3.1) Section 4 defines the special 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 officer requires no permission from superiors, is not answerable to anyone and does not have to justify the execution of these powers.¹¹⁰³

Exercise of power under Sec.4(a) to use force or even to the extent of causing death only on the basis of opinion directly violates *Right to life and personal liberty* granted under Article 21 of the constitution that states “*No person shall be deprived of his life or personal liberty except according to procedure established by law.*”

Any person can only be deprived by ‘procedure established by law’ which indeed needs to be “*right and just and fair*” and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.”¹¹⁰⁴

The provision is clearly violative of Fundamental Rights of the innocent individuals. Right which even cannot be suspended during emergency¹¹⁰⁵ is ignored in these areas.

Consequently, it is evident that the provision i.e Section 4(a) allows unrestricted powers to armed forces to deprive someone’s life only because they have opinion of the person being contradicting law which in any way does not seem to be just, fair and reasonable. No one has the Right to Kill anyone. Even crime committed by anyone needs to be proved beyond reasonable doubt to inflict punishment. The Act does not provide for any due process of law which would seem just, fair and reasonable to deprive any person of his life which is violative under Article 21.

The provision also prohibits the assembly of five or more people in the area. But the kind of assembly has not been defined. What if the assembly is a lawful and a peaceful one? Under article 19(1)(b) all citizens of India have a right to hold meetings and take out processions, provided the assembly is unarmed and peaceful. The Act does not clarify anything and is vague.

“It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasised that laws should give person of ordinary intelligence a reasonable opportunity

¹¹⁰³ <https://www.gatewayhouse.in/time-to-repeal-afspa/>
<https://www.cpr.in/articles/afspa-a-struggle-worth-living-for>

¹¹⁰⁴ Maneka Gandhi v. Union of India AIR 1978 SC 597

¹¹⁰⁵ 44th Amendment of the Constitution.

to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.¹¹⁰⁶

The provision also grants power to officer to arrest and search without warrant on mere suspicion. Whereas, Apex Court, in *Joginder Kumar v. State of U.P.*¹¹⁰⁷ and in *D.K. Basu v. State of West Bengal*¹¹⁰⁸ held that an arrest should not be made on mere suspicion of a person's complicity in the crime. The police officer must be satisfied about the necessity and justification of such arrest on the basis of investigation. This manifests nothing, but the arbitrariness of the law.

The National Police Commission in its third report has pointed out that power of arrest is one of the chief source of corruption in the police. According to the report, nearly 60 per cent of the arrests are either unnecessary or unjustified.

3.3.2) Section 5 of the Act states that after the military has arrested someone under the AFSPA, they must hand over that person to the nearest police station with the "least possible delay". Again, the uncertainty and ambiguity has crippled into the section.

Article 22(2) of the Constitution and Section 57 of CrPC demands that every person who is arrested and detained shall be produced before the nearest magistrate within period of 24 hours, for it ensures the immediate application of judicial mind to the legal authority of the person making the arrest and regularity of the procedure adopted by him. The provision of the AFSPA mentions the time period as with 'least possible delay'. The application of Sec 5 certainly will and has in fact, resulted into arbitrary detention, since the time period is not specified at all. If the AFSPA were defended on the grounds that it is a preventive detention law, it would still violate Article 22 of the Constitution.

3.3.3) Section 6 provides impunity to the military officers. It establishes that no legal proceeding can be brought against any member of the armed forces acting under the AFSPA, without the permission of the Central Government.

Article 33 of the Constitution stipulates that Parliament may by law determine to what extent the fundamental rights conferred by Part III shall stand restricted or abrogated in relation inter alia to the members of the Armed Forces so as to ensure the proper discharge of their duties and maintenance of discipline among them.

¹¹⁰⁶ Kartar Singh v State of Punjab (1994) 3 SCC 569

¹¹⁰⁷ AIR 1994 SC1349

¹¹⁰⁸ AIR 1997 SC 610

This section leaves the victims of the armed forces abuses without a remedy, while assures safeguards for the military. Moreover, even if any armed forces member is ever tried for any kind of abuse or wrong, then they are tried in the martial courts, whose judgments are usually not published or made public. That is the reason why several cases of human rights abuses have gone unheard.

4) HUMAN RIGHTS VIOLATION-

Human rights are rights inherent to all human being, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.

International human rights law lays down the obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.¹¹⁰⁹

The Armed Forces Special Powers Act contravenes both Indian and International law standards. This was exemplified when India presented its second periodic report to the *United Nations Human Rights Committee* in 1991. Committee asked numerous questions about the validity of the AFSPA. The Attorney General of India relied on the sole argument that it is a necessary measure to prevent the secession of the North Eastern states. He said that a response to this agitation had to be done on a "war footing." Further he relied on Art.355 of Constitution, which made it the duty of the Central Government to protect the states from internal disturbance.¹¹¹⁰

India is popularly considered as a nation which gives due importance to the rights and liberties of its citizens. It has absorbed the ideals of democracy in its truest sense. The Government is indeed "by the people, to the people and for the people". However, it is difficult to imagine that in a country like ours, exists a law which makes a mockery of the basic human rights.¹¹¹¹

¹¹⁰⁹ <https://www.un.org/en/sections/issues-depth/human-rights/>

¹¹¹⁰ Ibid.

¹¹¹¹ Journal of Social Welfare and Human Rights March 2014, Vol. 2, No. 1, pp. 265-279 ISSN: 2333-5920 (Print), 2333-5939 (Online) Copyright © The Author(s). 2014. All Rights Reserved. Published by American Research Institute for Policy Development

When AFSPA was imposed on the North-East, there were only two insurgent groups. Today there are more than 40 such groups. Over the years, the very definition of “normalcy” in areas of the North-East and Kashmir where AFSPA has been imposed has changed significantly. Everyday struggles with fake encounters, extrajudicial killings, torture and rape seem to have become the new “normal” in such places.

The gross human rights violations brought about by AFSPA have been admitted by governments, the judiciary and even the army. The same five-judge Supreme Court bench had said in 2016 that if “our armed forces are deployed and employed to kill citizens of our country on the mere allegation or suspicion that they are “enemy” not only the rule of law but our democracy would be in grave danger”.

Simply calling this draconian law “inhuman” is not enough. The truth is that there is a politics that sustains the Act and its use in various regions. For the Army, it is an easy tool to use unrestrained liberty to exercise dominance; for state governments, it is an important means to receive additional funds from the Centre, and for the Centre, AFSPA is a veil for its failure in delivering effective governance and development for the people.¹¹¹²

4.1) INCIDENTS OF VIOLATION-

- The Act fails to protect and uphold human rights;

this can be witnessed in the case of alleged custodial rape and killing of **Thangjam Manorama** by the Assam Rifles in 2004. In July 2004 she was arrested at her residence in Bamon Kampu reportedly under the AFSPA as a suspected member of the People’s Liberation Army. An arrest memo was given to her family at the time. Later that day, her dead body was found a few kilometres from her residence. There were multiple gunshot wounds on her back and her body also allegedly showed signs of torture. Medical tests confirmed that she was sexually assaulted after the child was sedated with sleeping tablets.

The Act reinforces a militarised approach to security which has proved to be not only inefficient but, also counterproductive in tackling security challenges.

- The CBI’s past interventions in encounter killings have led nowhere. Take the **Pathribal Killings** for example. Five days later, soldiers of Indian Army claimed they

9/11 of India: A Critical Review on Armed Forces Special Power Act (Afspa), and Human Right Violation in North East India

Dr. Sailajananda Saikia

¹¹¹² <https://www.newsclick.in/seventy-one-years-AFSPA-failed-sate-machinery>

had neutralised five “foreign militants” who were responsible for the massacre in Pathribal. After investigation, those killed turned out to be local men who had no role in the Pathribal killings. The ensuing case wound through courts and the CBI. The CBI’S charge sheet provided evidence that five soldiers were guilty of “cold-blooded murder”. But then the SC in its 2012 judgment said the Army could choose whether these men were to be prosecuted in a civilian court or in a military tribunal. The Army opted for the latter and closed the case in 2014 citing lack of evidence.

- Incident of 1988- gang rape of 14 tribal woman in Ujanmaidan by the Assam Rifles.
- Incident of 2006- 3 women raped by Assam Rifles in Dhalai district during a search operation.
- A particularly disturbing example of the volatile environment was the killings in Kohima city in 1995. Soldiers began shooting indiscriminately after mistaking the sound of a tire bursting for a bomb attack. 7 civilians, including girls age 3-8, were killed in the hour-long firing that ensued. A further 22 were seriously injured, including seven children.¹¹¹³
- Manipur is having long campaigned for the repeal of the AFSPA, a few engaging in

NOT SO SPECIAL
Irom Sharmila's marathon hunger strike has put the spotlight on an Act that is alleged to give soldiers the licence to kill

Nov 2, 2000 Assam Rifles personnel gun down 10 persons at Malom near Imphal

Nov 5, 2000 Irom Sharmila, then 28, begins her indefinite fast and vows not to comb hair or look into a mirror until AFSPA is repealed

Nov 9, 2000 She is arrested and charged with “attempt to commit suicide”, a crime under IPC then; subsequent release and re-arrest becomes a routine affair


Nov 21, 2000 Authorities begin force-feeding her through nasal tubes while in custody

July 11, 2004 Bullet-ridden body of alleged rebel Thangjam Manorama, 34, found a day after Assam Rifles personnel picked her up

Aug 12, 2004 AFSPA withdrawn from seven assembly constituencies in Imphal after Manorama's death triggers violent protests

Nov 2004 PM Manmohan Singh constitutes five-member Jeevan Reddy Committee to study AFSPA

June 2005 Reddy panel recommends withdrawal of AFSPA in 147-page report but centre takes no action



Oct 2, 2006 Sharmila takes stir to New Delhi and is arrested

Jan 2013 Supreme Court constitutes Santosh Hegde Commission to probe Manipur fake encounters after PIL lists 1,528 cases

April 4, 2013 Hegde panel finds six cases to be fake-encounter killings

Dec 10, 2014 Centre decides to decriminalise “attempt to suicide” by deleting section 309 from IPC, queering Sharmila's case

May 2015 Tripura's Left Front government decides to lift AFSPA after 18 years of imposition but Meghalaya wants the act

acts of desperation including self-immolation and stripping naked in front of an army camp. There have been cases of soldiers shooting down entire village on the suspicion of hiding insurgents. 10 civilians were shot while waiting in a bus station, by security personnel, in Manipur. This incident triggered Irom Sharmila, a human rights activist, to be on a hunger strike, for abolition of AFSPA which lasted for 16 years by being force-fed by doctors while in judicial custody. In 2016, the landmark judgment *Extra Judicial Execution Victim Families Association v. Union of*

¹¹¹³ Ibid.

*India*¹¹¹⁴ from Supreme Court tore into the cloak of secrecy maintained by the state about unaccounted deaths involving security forces in disturbed areas. Opposition to the AFSPA came to a head following the killing of Thangjam Manorama Devi in July 2004.

4.2) ARMED FORCES AND NHRC

The National Human Rights Commission, the custodian of human rights in India, may on its own motion or on the basis of petitions made to it on allegations of human rights violations by armed forces, seek a report from the Central Government. On receipt of the report, it may either not proceed with the complaint or, as the case may be, make its recommendations to the Government.

According to the NHRA, the Central Government shall inform the Commission of the action taken on the recommendations within three months or such further as the Commission may allow. It further stipulates that the Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations. A copy of the report so published will also be given to the petitioner.

Thus, the NHRC has no power to directly investigate into the alleged violations of human rights by the armed forces. Its role is limited to seeking a report from the Government on the violations and publishing the same.¹¹¹⁵

4.3) INTERNATIONAL HUMANITARIAN LAW AND AFSPA

The Armed Forces Special Powers Act, 1958 not only violates the national humanitarian standards of law, but even international. Under the relevant provisions of International Humanitarian Law, the AFSPA was challenged several times.

The imperative need for the government to abide by the International bill of human rights arises out of constitutional requirement, general customary International law, common law background, state practices and above all, the Union government's signature and ratification of Covenants.

The AFSPA, by its form and in its application, violates the-

- *Universal Declaration of Human Rights (UDHR)*,

¹¹¹⁴(2016) 14 SCC 536

¹¹¹⁵<https://www.google.com/amp/s/telanganatoday.com/afspa-and-human-rights-violation/amp>

- *International Covenant on Civil and Political Rights (ICCPR)*,
- *Convention Against Torture*,
- *UN Code of Conduct for Law Enforcement Officials*,
- *UN Body of Principles for Protection of All Persons Under any form of Detention*,
and
- *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*.

➤ **4.3.1) *International Covenant on Civil and Political Rights (ICCPR)***- Act violates both derogable and non-derogable provisions of international human rights law. These include:

- Article 6- The Right to Life,
- Article 7- The Prohibition of torture, cruel, inhuman and degrading treatment,
- Article 9- The Right to Liberty and Security of the Person, Protection in case of Conviction,
- Article 17- The Right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence,
- Article 21- The Right to Freedom of Assembly (Article 21),
- Article 26 - Equal Protection for all persons before the law,
- as well as Article 2 (3)- which provides for The Right to an Effective Remedy to anyone whose rights protected by the Covenant have been violated as AFSPA provides for immunity for military officers from any prosecution, suit or any other legal proceeding.

➤ **4.3.2) AFSPA also violates the following provisions of *UDHR***, such as;

- Article 1- Free and Equal Dignity,
- Article 2- Non-discrimination,
- Article 3- Life, Liberty, Security of person,
- Article 5- No torture,
- Article 7- Equality before the law,
- Article 8- Effective remedy,

- Article 9- No Arbitrary arrest.¹¹¹⁶

5) CrPC, IPC & AFSPA-

5.1) THE CRIMINAL PROCEDURE CODE, 1973 (Cr.P.C.) establishes the procedure police officers are to follow for arrests, searches and seizures, a procedure which the army and other Para- military are not trained to follow. Therefore, when the armed forces personnel act in aid of civil power, it should be clarified that they may not act with broader power than the police and that these troops must receive specific training in criminal procedure.

- S. 45 of the Cr.P.C. *protects the members of the Armed Forces* in the whole of the Indian territory from arrest for anything done within the line of official duty. Similar to Section 6 of AFSPA.
- Ch- V of the Cr.P.C. sets out the *arrest procedure* the police are to follow. S. 46 of Cr.P.C. establishes the way in which arrests are to be made. It is only if the person attempts to evade arrest that the police officer may use "all means necessary to affect the arrest." However, sub-section (3) of S. 46 of Cr.P.C. provides for limitation on use of force. The Cr.P.C has a section on the maintenance of public order, Ch-X, which provides more safeguards than the AFSPA.
- S.129 in that chapter allows for the *dispersal of an assembly* by use of civil force. Similar to S.4(a) of AFSPA. The Cr.P.C. does not state that force to the extent of causing death can be used to disperse an assembly. Moreover, dispersal of assemblies under Ch-X of Cr.P.C. is slightly more justifiable than dispersal under Section 4(a) of the AFSPA.
- Ss. 129-131 of Cr.P.C. refer to the *unlawful assemblies* as ones which "manifestly endanger" public security. Under the AFSPA the assembly is only classified as "unlawful" leaving open the possibility that peaceful assemblies can be dispersed by use of force.
- Ss. 130 and 131 of Cr.P.C. sets out the conditions under which the armed forces may be called in to *disperse an assembly*. These two sections have several safeguards which are lacking in the Act.¹¹¹⁷

¹¹¹⁶ Ibid.

¹¹¹⁷ Ibid

5.2) The INDIAN PENAL CODE(IPC),

- S. 302, only *murder* is punishable with death. Murder is not one of the offenses listed in section 4(a) of the AFSPA. Moreover the 4(a) offences are assembly of five or more persons, the carrying of weapons, ammunition or explosive substances, none of which are punishable with life imprisonment under the Indian Penal Code.
- Section 143, being a member of an unlawful assembly is punishable with imprisonment of up to six months and/or a fine. Even if the person has joined such unlawful assembly armed with a deadly weapon, the maximum penalty is imprisonment for two years and a fine. Moreover, persisting or joining in an unlawful assembly of five or more persons is also punishable with six months' imprisonment, or a fine, or both.¹¹¹⁸

6) RECOMMENDATIONS TO REPEAL-

6.1) B P JEEVAN REDDY COMMITTEE-

In 2005 the killing of **Thangjam Manorama** by the Assam Rifles in Manipur triggered widespread protests and outraged against the enforcement of AFSPA and as a follow up the government set up the **Jeevan Reddy Commission** to review AFSPA.

The committee was also of the view that the Act was too sketchy and inadequate in several particulars. The Committee also said that “Due to the number of reports of sexual offences committed by the armed forces in India’s conflict areas - a controversial law that gives sweeping powers to and often confers immunity on security forces- must be reviewed. Security forces must be brought under the purview of ordinary criminal law rather than under army law”.

It also noted that AFSPA had become “*an object of hate and an instrument of discrimination and high-handedness*”.¹¹¹⁹

Report-

(a) AFSPA should be repealed and appropriate provisions should be inserted in Unlawful Activities (Prevention) Act, 1967;

¹¹¹⁸ *ibid*

¹¹¹⁹ <https://byjus.com/free-ias-prep/understanding-the-armed-forces-special-powers-act/>

(b) The Unlawful Activities Act should be modified to clearly specify the powers of the armed forces and paramilitary forces and

(c) grievance cells should be set up in each district where the armed forces are deployed.¹¹²⁰

A democratic government agreed to a democratic demand voiced by the people of a first-ever-review of national security legislation. But the failure of government to persuade the armed forces to accept changes shows the inadequacy on government's part.¹¹²¹

6.2) 5TH Report, June 2007 of the Second Administrative Reforms Commission on Public Order endorsed the recommendations of the committee that AFSPA should be repealed and provisions of law needed for the effective operation of the security forces can be incorporated in the Unlawful Activities (Prevention) Act (1957).

6.3) SANTOSH HEGDE COMMITTEE-

In 2013, a committee headed by Supreme Court Judge Santosh Hegde was appointed to review the encounter killings of 1528 people in Manipur since 1979.

The Supreme Court was prompted to set up the Santosh Hegde Committee following the petition filed by the Extra Judicial Execution Victim Families Association of Manipur asking it to look into six charges of unlawful encounter killings in Manipur.

Committee submitted its report in 2013, saying five of the six encounters were “not genuine”, that “disproportionate force” had been used against persons with “no known criminal antecedents”, and that AFSPA gave “sweeping powers” to men in uniform without granting citizens protection against its misuse.⁰

Further, the committee was of the view that if greater power was given then greater would be restraint and stricter would be the mechanism to prevent its misuse or abuse, but this possibility was absent in the case of Manipur.¹¹²²

7) ROLE OF JUDICIARY-

➤ 7.1) SUPREME COURT'S GUIDELINES 1998-

In the case of *Naga People's Movement of Human Rights v. Union of India*¹¹²³, the validity of AFSPA was challenged before the Supreme Court and the five-judge

¹¹²⁰ <https://www.insightsonindia.com/2019/04/03/afspa/>

¹¹²¹ <https://www.gatewayhouse.in/time-to-repeal-afspa/>

¹¹²² <https://byjus.com/free-ias-prep/understanding-the-armed-forces-special-powers-act/>

¹¹²³ AIR 1998 SC 431

bench concluded that the Act is not violative of Constitution. SC viewed the law primarily through the lens of legislative competence (that is, whether Parliament had the power to enact the law) and rights-based concerns. But there is a larger structural problem at the heart of the statute, namely its disruption of the place of military power under the Constitution. Problem is the operation of war-like powers-that formally come into use by a way of a declaration of an emergency- through an ordinary statute. In other words, the emergency-related safeguards in the Constitution are bypassed by achieving the same outcome through a normal law.¹¹²⁴

Though Supreme Court ruled it as constitutional it does not mean it is just. The vagueness of the terms used in the provisions of the Act provide ample of scope for misuse.¹¹²⁵

Furthermore, Supreme Court gave following guidelines-

- (a) A suo-moto declaration can be made by the Central government; however, it is desirable that the state government should be consulted by the Central government before making the declaration;
- (b) AFSPA does not confer arbitrary powers to declare an area as a “disturbed area”;
- (c) The Act has to be reviewed every six months by the state;
- (d) The Army personnel are required to strictly follow minimum force under S. 4 against suspected of violating prohibitive orders;
- (e) The person arrested and taken to custody under S. 4 has to be handed over to the nearest police station within 24hours of such arrest.
- (f) The authorised officer should strictly follow the ‘Dos and Don’ts’ issued by the Army.

➤ 7.2) THE 2016 JUDGMENT–

Supreme Court’s ruling *Extra Judicial Execution Victim Families Association v. Union of India*¹¹²⁶ against the alleged encounter killings carried out under AFSPA came due to the plea submitted by the victim’s family of 1528 encounter killings carried out since 1979 in Manipur. The bench said “It does not matter whether the

¹¹²⁴ <https://www.google.com/amp/s/theprint.in/opinion/the-real-problem-with-afspa-is-how-a-normal-law-can-bypass-constitutional-safeguards/221299/%3famp>

¹¹²⁵ <https://www.gatewayhouse.in/time-to-repeal-afspa/>

¹¹²⁶ (2016) 14 SCC 536

victim was a common terrorist, nor does it matter whether the aggressor was a common person or the state. The law is the same for both and is equally applicable to both. This is the requirement of democracy and the requirement of preservation of rule of law and the preservation of individual liberties”.

The Supreme Court judgement said:

- Every death in the ‘disturbed areas’, be it of common person or insurgent, should be thoroughly enquired by the CID at the instance of the NHRC.
- Not every armed person violating the prohibitory order in a disturbed area is an enemy. Thorough investigation has to be conducted, since every citizen is entitled to all the fundamental rights including Article 21 of the Constitution.
- Even if the enquiry finds the victim too be an enemy, a probe should look into whether excessive or retaliatory force was used.
- The Apex Court also declared that “there is no concept of absolute immunity from trial by a criminal court” if an Army man has committed an offence.

Despite all the criticisms, AFSPA is a necessary evil whose negative effect can be significantly reduced by laying down clear rules on its implementation.¹¹²⁷

➤ 7.3) CURATIVE PETITION TO REVIEW JUDGMENT OF 2016-

Considering the state’s resistance to repealing AFSPA, it was no surprise when the Centre filed a curative petition on April 12, 2017 at the Apex Court, asking that Justices Madan B. Lokur and U.U. Lalit review their verdict. The morale of the armed forces will be broken if they are held accountable for actions taken under AFSPA, the government suggested.

But the Supreme Court re-instilled people’s faith in justice and upheld its 2016 judgment on April 28, 2017. The court observed that the situation in Manipur has “never been one of war” and killing of citizens on mere suspicion of being the “enemy” jeopardises democracy.

The Apex court brought home an important message: justice delayed is not always justice denied.¹¹²⁸

¹¹²⁷(2016) 14 SCC 536

<https://www.google.com/amp/s/telanganatoday.com/afspa-and-human-rights-violation/amp>

<https://byjus.com/free-ias-prep/understanding-the-armed-forces-special-powers-act/>

¹¹²⁸<https://www.google.com/amp/s/m.thewire.in/article/government/afspa-2017-supreme-court-irom-sharmila/amp>

WHY ARMY FAVOURS AFSPA-

- It provides necessary powers to conduct counter-insurgency operations efficiently.
- If AFSPA is repealed or diluted, it is the army leadership's considered view that the performance of battalions in counter-insurgency operations will be adversely affected and the terrorists or insurgents will seize the initiative.
- Many argue that removal of the act will lead to demoralising the armed forces and see militants motivating locals to file lawsuits against the army.
- Also, the forces are aware that they cannot afford to fail when called upon to safeguard the country's integrity. Hence, they require the minimum legislation that is essential to ensure efficient utilization of combat capability.
- The absence of such a legal statute would adversely affect organizational flexibility and the utilization of the security capacity of the state.
- AFSPA is necessary to maintain law and order in disturbed areas, otherwise things will go haywire. The law also dissuades advancement of terrorist activities in these areas.¹¹²⁹

CONCLUSION/SUGGESSTION-

AFSPA has faced a lot of criticism due to the grant of unfettered powers which have been misused by many. Though the Act was brought to maintain peace and stability, the rash chain of effects which came to light had eventually made the Act into bad light which led to immense opposition against the act.

Government should take clear stand regarding the Act. As suggested, replacement of AFSPA by Unlawful Activities (Prevention) Act will not pose problems for dealing with insurgency.

Government cannot function where the rights of the people are denied – by the government itself, by its security agencies or by non-state groups. It cannot govern, meet basic needs or deliver essential services in a state of constant tension, conflict and fear. Militant groups must also accept that basic services should not be interrupted because the needs of the people must be met. The critical role in anti-insurgency operations must be that of the police, which no

¹¹²⁹

<https://abhipedia.abhimanu.com/Article/State/NDQxOAEQVVEEQVWV/Armed-Forces-Special-Powers-Act-AFSPA-Assam-State>
https://idsa.in/idsanews/afspa-army-needs_gkanwal_060916

longer be located below the army or security forces. The police have the personnel, the knowledge, the skills, the language and mobility to enable greater effectiveness. The army must return to its role as the last resort of handling internal crisis, not the first and permanent one.¹¹³⁰

Supposedly the situation has improved to the extent which the government admits then AFSPA should be removed as were removed from Tripura. The state police, without the umbrella of the Act, have been able to successfully combat insurgency protection accorded to the public servants under the provisions of Criminal Procedure Code (CrPC) has been found that wherever AFSPA is operational, the Army's role becomes pivotal, and police are relegated to the backstage.

However, if situation in any of the area becomes dire then it does not seem feasible to remove AFSPA completely as it would create safe havens and breeding grounds for militants. For effective application basic step should be taken to define the key phrases like 'disturbed areas', 'such due warning as he may consider necessary' and 'of the opinion' more clearly. Crucial phrases (which are subject to personal interpretation) must not be left to the arbitrary subjective opinions of the state and central governments it should be an objective criterion which is judicially reviewable. Armed forces should not be allowed to carry out ant procedure on suspicion alone. Their operations should have an objective premise and should be judicially reviewable. A deceptively simple law on paper, AFSPA needs to be given serious thought and should be amended if not repealed altogether.¹¹³¹

The jurisprudence on the fundamental rights in India has come a long way since the Constitution has come into force. The fundamental Right to life under Article 21 of the Constitution has been extended to multiple rights such as the Right to environment, Right to privacy and many more. In the case of *Navtej Singh v. Union of India*¹¹³², Supreme Court spoke about India's commitment to human rights protection under the international law and India's constitutional duty to honour these International rules and obligations. AFSPA needs to be looked at with the same prism of constitutional morality along with all other transformative approaches that the Supreme Court holds as the hallmark of a democracy.

¹¹³⁰ <https://www.gatewayhouse.in/time-to-repeal-afspa/>

¹¹³¹ <https://www.cppr.in/articles/afspa-a-struggle-worth-living-for>

¹¹³² WRIT PETITION(CRIMINAL) NO.76 OF 2016

The judgment of *Extra Judicial Execution Victim Families Association v. Union of India*¹¹³³ reopened a path, one that many in Manipur- long embroiled in anti-insurgency operations- thought had been closed.

Although to some extent the guidelines provided by the judgments have helped in diminishing the adverse effects of the Act it still is a necessary evil whose negative effects should be tempered by laying down clear rules on its implementation.



¹¹³³ (2016) 14 SCC 536