

Critical evaluation of armed forces (special powers) act, 1958: Sovereignty first

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ABSTRACT

India is often identified by the power of its people, a democracy in a rather developed form- "by the people, of the people, for the people". We, however, seldom appreciate the irony that lies in the use of sovereignty to achieve democracy. The answer really lies in the act of balancing the use of power to instate fairness and egalitarianism. One such legislation, that time and again questions the abuse of power to instate peace, is the Armed Forces (Special Powers) Act, 1958 (AFSPA). Having been initially introduced in the Seven Sister States, it was extended to Jammu and Kashmir in July 1990.

This alleged draconian law has faced criticism for the uninhibited and arbitrary powers bestowed by it to the armed forces. Armed forces being given the power to rightfully shoot, based on a mere suspicion. This has given rise to animosity amongst the citizens, arising out of fear of rampant shootings for the sake of "maintenance of public order". With absolute immunity provided under Section 6 of the Act, no lawful legal proceeding can be brought against any member of the armed force acting under AFSPA, without the prior permission of Central Government of India. This provision acting as a shield for the perpetrators of heinous crimes is another lacuna present in the Act. Precisely quoted by the famous British politician, Lord Acton, "Power corrupts, Absolute power corrupts absolutely". The abundance of subjectivity and lack of restraint has made AFSPA a perpetrator of violence and abuse. However, the question really is, can such absolute power be allowed to violate all fundamental rights guaranteed to the citizens by our Constitution; Can humanity be allowed to suffer without oversight?

As India transforms into a superpower, it will have to strive towards balancing the use of powers. We are a Sovereign Republic and the protection of our independence is foremost, nevertheless, with a conscientious damage to humanity. India is a Sovereign, Socialist, Secular, Democratic Republic. The suppression of the rights of its citizens at the behest of an impactful yet questionably tyrannical law like AFSPA, ought to be re-evaluated.

1. Introduction

India as a developing nation is one which has always given a lot of importance to the rights, duties and liberties of its citizens. The ideals of preamble can clearly be seen reflected in our constitutional mandate. The government we elect is indeed "by the people, to the people and for the people". Keeping in mind whatever is mentioned above it is almost impossible to believe that in our country itself, there exists a law like the **Armed Forces Special Powers Act, 1958**, popularly known as AFSPA.

An ordinance with the name Armed forces (Assam and Manipur) Special Powers Ordinance, 1958, was brought up by the President on 22nd May, 1958 as violence had become a part of usual life in the North- Eastern States of India and the administration of the states had become impossible to be maintained due to internal disturbances. Section 3 of the Ordinance gave powers to the Governor of Assam and Chief Commissioner of Manipur to declare the whole or any part of Assam or Manipur, to be a disturbed area. Powers were also conferred to any Commissioned Officer, Warrant Officer, Non-Commissioned Officer or any other person of equivalent rank through Section 4 & 5 of the Ordinance. Later, the Ordinance

with modifications was passed by both houses of the Parliament and therefore was converted into an Act. It received assent from the President on 11th September, 1958 and in turn came into the Statute book as The Armed Forces Special Powers Act, 1958.

Constitutional Validity of the Act – Is AFSPA humane?

The Armed Forces Special Powers Act, 1958 confers special powers upon the members of Armed Forces in certain disturbed areas of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. The aim of the act since the time it has been enacted has been to restore and maintain the public order in the disturbed areas as declared by the Governor or Central Government under Section 3 of the Act. When we read the Act, it clearly says that it has been enacted to assist the State Governments which are incapable to maintain its internal disturbances. However, contrary to the aim for which this Act has been enacted, it has widely been misused and also criticized at both National and International forums.

While reading out the provisions of the Act, one can clearly see the amount of proportionality involved in exercise of

powers being diluted to a great extent. Now we shall analyse the various sections of the Act which have been in question since the time the act has been enacted.

Section 3 of the Act, gives the power to Central Government or Governor to declare any area as disturbed area on their own discretion. No guidelines have been laid down for exercising such discretion. In the case of **Indrajit Barua vs State of Assam**, it was held that the Governor is empowered to declare any area of the state as a “disturbed area”. The same however, could not be arbitrary in nature in the absence of legislative guidelines. Thus, it was exempted from judicial scrutiny.

Section 4 of the Act says that any officer of the armed forces can shoot to kill any person in case of commission or suspicion of the commission of any offence such as acting in contravention of any law or order present in the disturbed area for the time being in force prohibiting the assembly of five or more persons, carrying any weapons or carrying anything which can be used as a fire arm or ammunition. If we carefully read this section, we can clearly see that there is no level of proportionality involved in the use of force as even a lawful meeting or gathering can be considered to be an unlawful one. To invoke the powers granted under this provision. The armed officer only needs to be “of a certain opinion that it is necessary for him to shoot or kill for maintenance of law and order” and only give “such warnings as he may consider important and necessary”. This shows how everything has been left to the whims and fancies of the officer. The amount of unchecked power exercised under the blanket of the Act has only been exploiting and terrorizing people. An International NGO, named Human Rights Watch, has termed this Act as a medium of oppression, discrimination and state abuse.

Section 5 talks about the situation where if in case the military has arrested someone under the AFSPA, they need to hand over that person to the nearest police station with the “least possible delay”. Now the question that arises here is with relation to this phrase “least possible delay” which has actually been left undefined and therefore the armed forces are at full liberty to exercise their discretion.

Section 6 of AFSPA provides immunity to the armed forces that no legal proceedings can be initiated against them under the Act before taking prior permission from the Central Government. This provision has been criticised on the grounds that the victims are left with no legal recourse as they never get the required government sanction to initiate proceedings against the alleged members of armed forces. This provision is used as a shield by the perpetrators of heinous crimes to move freely in the society with their uniform's on.

2. Series of Case Laws from Guwahati High Court Decisions to the landmark judgement delivered in Naga Peoples Movement for Human Rights VS Union of India Case

Preventive detention or unlawful detention is one of the biggest challenges or problems when we talk about AFSPA, the same was also discussed in the case of

A. Horendi Gogoi vs Union of India¹

It was held that in case any person is arrested, the Armed authorities are bound to hand over the arrested person to the nearest police station with “least possible delay”. Now, here also, if we carefully study this phrase, the problem lies with this undefined and unambiguous phrase which can be interpreted according to the discretion of the armed force personnel.

The legal implementation of the act was also stressed upon in this case. The Court had mentioned regarding the restrictive and protective measures which had to be followed by the Armed forces as provided under the act. A due warning was to be given before taking any action of any sort. **(like using force or before firing)** Reasonable suspicion regarding commission of any cognizable offence by a person before arresting him was held to be an important factor which has to be kept in mind by the Armed forces. The Court also stated that the inhuman behaviour of the Armed Personnel's was not just because of the Act, but the overburdening situation and training of the Armed force members was a major reason for specific grave incidents highlighted in various cases.

Providing a solution for this issue mentioned above, Supreme Courtsaid that our country needed a more Humanitarian Forced Power, which was to be trained in the fundamental principles of Criminal Jurisprudence along with the already established practices and procedures.

B. Inderjit Barua vs State of Assam²

The Hon'ble Delhi High Court in this case had held that the lack of precision in the definition of a “disturbed area” was not an issue as such because according to the Delhi High Court the Government and People understood the meaning of what disturbed areas were. The Court in this case also held that the Governor was empowered to declare any area of the state as a disturbed area and the same could not be held to arbitrary on grounds of absence of legislative guidelines. Thus, it was exempted from judicial scrutiny.

C. Extra Judicial Execution Victims' Families Association And others. vs Union of India³

The Court in this case ordered that a commission shall be appointed to make a thorough enquiry in cases with relation to AFSPA and findings were to be recorded regarding the past antecedents of victims and circumstances in which they were killed. Report made by this commission headed by Justice Santosh Hegde had tabled its report in 2013 for the first time after its commission.

Only two specific commissions were set up to review the working of AFSPA. (Jeevan Reddy Commission and Santosh Hegde Commission) Both the Commissions had openly criticised AFSPA and had asked for its repeal. While one of the commissions never saw the light of the day, the recommendations of the other commission are still into consideration.

D. Naga Peoples Movement for Human Rights VS Union of India⁴

¹(1991) Gau CR 3081

² (1991) 2 GLR 119

³ Writ Petition (Criminal) no.129 of 2012

In this case, the Constitutionality and Validity of Armed Forces (Special Powers) Act, 1958 and the Assam Disturbed Areas Act, 1955 were raised before a Constitutional Bench of 5- Judges. A unanimous decision was delivered upholding the validity of both AFSPA and Assam Disturbed Areas Act.

Some key highlights of the judgement delivered by Supreme Court is as follows:

- I. AFSPA is constitutionally valid.
- II. Parliament competent to enact AFSPA in exercise of its legislative powers under ENTRY 1 of the State List and Article 248 read with Entry 97 and Entries 2 and 2-A of the Union List.
- III. Since Parliament is competent to enact AFSPA, therefore it cannot be challenged on the ground of it being a colourable legislation.
- IV. Under Article 355 of our Constitution, it is the duty of the Union to protect every State against external aggression and internal disturbances.
- V. For an area to be declared as a "disturbed area" there must exist a grave situation of disturbance in law and order on the basis of which the Governor of the State or Central Govt. can declare a particular area as disturbed or dangerous.
- VI. The powers under Section 4(a) of AFSPA should only be exercised in case either if there is an order made in that regard or if the officer exercising such powers forms an opinion that it is necessary to take action for maintenance of public order. A due warning shall be given by the officer before taking necessary action.
- VII. Section 4 of AFSPA cannot be challenged on the ground of existence of alternate provisions like the Section 130 and 131 Cr.P.C as these sections only deal with individual and isolated cases while the provision under AFSPA is concerned with a situation where whole or any part of a state is in question.
- VIII. Various other provisions of AFSPA were also held to be Constitutionally valid, including the requirement for sanction before prosecution.
- IX. The Supreme Court had also directed that instructions in the form of Dos and Don'ts to be issued by Army Headquarters will have to be treated as binding instructions which are required to be followed by members of the armed forces under this Act. Also, a serious note should be taken of the violation of instructions and the ones who are found to be responsible for such a violation should be punished under the Army Act, 1950.

3. Requirement of Prior sanction before prosecuting Army officers under AFSPA (Concerning Section 6 of AFSPA)

The Supreme Court answered all questions relating to this topic in the very famous and important judgement delivered in the case of **General Officer Commanding (Army) vs Central Bureau of Investigation. (May 01, 2012)**.⁵ The issue that was addressed in this case was whether or not sanction was required to prosecute Army officials under AFSPA. There were two instances of alleged fake encounters. Five people were killed by the Armed Officials in a counter insurgency operation

⁴AIR 1998 SC 413

⁵ Air 2012 SC 1890

in 1994. Another five people were killed in Jammu and Kashmir in March 2000. Allegations were raised against Army officers that they had done fake encounters. The CBI was therefore asked to investigate the matter. CBI in its findings stated that all people who were killed were victims of fake encounters. CBI then moved to the court to initiate proceedings against the accused Army officials.

Contention of Alleged Army Officers

The officers contended that they could only be prosecuted with the prior sanction or permission of the Central Government. The Officers based their claims upon provisions of AFSPA, 1958. Section 6 of the Act provides that no legal proceedings can be instituted against an officer unless prior sanction is granted by Central Government.

ISSUES

- Is prior sanction always required to prosecute Army officers for any act committed in the course of duty?
- At what exact stage is sanction required?
- Does Court martial require prior sanction?

Judgement

The Supreme Court held that in all cases sanction is not required to prosecute officials. An officer only enjoys immunity from prosecution in cases when he has acted in accordance with the Act. A reasonable nexus needs to be established between actions and duties of the official.

Citing an example, the Court said that – If in a raid, an officer is attacked and he retaliates, his actions can be linked directly to a lawful discharge of his duty. Even if there are some kind of miscalculations in the retaliation made by the official, still his actions cannot be said to be arising from some personal motive.

Supreme Court clearly drew a difference between actions arising out of "official discharge of duty" and "misuse of authority".

While answering the various issues, Supreme Court ruled that taking sanction from Central Government under the AFSPA or Armed Forces (J&K) Special Powers Act was mandatory before prosecuting the alleged members. However, no sanction was required during the investigation stage.

However, Hon'ble Supreme Court ruled that there is no requirement of sanction under the Army Act, 1950. Hence, if the Army chooses, it can prosecute the accused through court-martial instead of taking the route of criminal court.

4. Various Committees with Regard to AFSPA

i. Justice Verma Committee- The Committee on Amendments to Criminal Law⁶

This was a three- member committee headed by Jagdish Sharan Verma who is a retired Supreme Court judge. It was set up by Central Government in December 2012. The main

⁶DNA. (2013). *Justice JS Verma committee's recommendations* - [Accessed 3 Nov. 2015]. <https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary>

aim to set up this committee was to review laws against sexual assault as a week before the formation of this committee, an incident related to gang rape and murder of a 23-year-old woman had come into light. It was on 16 December, 2012 that this heinous crime took place. There was a lot of protest in the streets, clashes with police, riots and backlash from the media and human rights group against the government's response to the incident.

Then with reference to AFSPA, came in the committees 657-page report which had reference regarding sexual violence in the conflict zones. It also had a section regarding the same. The Committee said that AFSPA legitimized sexual violence in such zones and was a tool for exemption from punishment. It recommended immediate review in relation to the continuance of the Act. The Committee's report which was released in the year 2013 received a warm welcome from Several Human Rights groups and organizations, including the very famous UN High Commissioner for Human Rights. The report clearly stated that women protection in conflict zones was often neglected, and emphasized on the importance of providing security to them so that they could lead a life with dignity, the same way as others enjoy a life with respect and dignity in other parts of the country.

The Committee in its recommendations said that sexual violence against women by members of Armed forces was to be brought within the purview of criminal law as a part of ordinary law of the land. Another recommendation by the committee involved amendment in the provision of AFSPA relating to the removal of the requirement of taking prior sanction from the Central Government for the prosecution of Armed Personnel's for crimes involving violence against women.

J.S. Verma while giving an interview to some media house had said that sexual violence against women by armed personnel could not be associated by anyway with the performance of any official duty and therefore the same shall not require prior sanction from the government. The recommendations by the committee were later channelized in the form of new laws on violence against women and the same was passed in April 2013. An amendment was made to the Code of Criminal Procedure which removed the need for prior sanction for the prosecution of government officials for committing crimes involving violence against women i.e. rape, sexual assault, sexual harassment, stalking. However, a similar amendment that was initiated with relation to AFSPA was ignored.

ii. Justice Jeevan Reddy Committee (2005)⁷

An alarming statement was made by Justice Jeevan Reddy Committee with regard to the arbitrary and unfettered powers vested in the Act. The statement in exact words was *"the law had become 'a symbol' of oppression, an object of hate and an instrument of discrimination and high-handedness."* Certain recommendations were made by this committee also. One of such recommendations was relating to the repeal of 1958 Act and certain provisions to be added to

⁷<https://tilakmarg.com/opinion/justice-jeevan-reddy-committee-suggestion-to-repeal-armed-forces-special-powers-act-to-be-rejected/>

Unlawful Activities (Prevention) Act, 1967. The Act of 1967 was held to be unclear and was recommended to be modified in order to have clear & clarified specifications on the powers of the Armed Force Personnel's in those areas. Grievance cells were recommended to be set up in each and every district where Armed forces were deployed.

iii. Justice Santosh Hegde Commission (2013)⁸

In January 2013, the Supreme Court appointed a three-member commission which was to be headed by Santosh Hegde. (Retired Supreme Court Judge) This was done in response to a Public Interest Litigation for seeking investigation in cases of alleged extra judicial executions committed in the State of Manipur between 1978 and 2010. It was established to determine whether a total of six cases identified by the court were "encounter deaths" or whether the armed forces had fired in self-defence. The commission mandated to evaluate the role of security forces in Manipur. In the report submitted to the court in April 2013, the commission had mentioned about six cases it had investigated and all were found to be extra judicial executions. It had concluded by saying that AFSPA was widely abused by security forces in Manipur and had made a mockery of the law.

The Santosh Hegde Commission had mainly criticized the lack of safeguards that were available against abuse of AFSPA provisions. It clearly mentioned how arbitrary and uncontrolled powers in this act were only provided to the Armed forces to an extent of killing people on mere suspicion under the garb of their uniform along with protection against prosecution. It also pointed out the failure of the Act in providing protection to citizens against possible misuse of these arbitrary powers.

Lord Acton rightly said, **"Power corrupts, Absolute power corrupts absolutely"**

On similar lines, AFSPA has proved to be a corrupt legislation which has failed to fulfil the constitutional mandate of our country.

5. International Opposition Against AFSPA

Not only Indian law but AFSPA violates International law also. It violates Universal Declaration of Human Rights (UDHR), The Convention Against Torture, The UN Code of Conduct for Law Enforcement Officials, The International Covenant on Civil and Political Rights (ICCPR), UN Principles on Effective Prevention and Investigation of Extra-legal and summary executions, Principles for Protection of All Persons Under any form of Detention. AFSPA has been subject to a lot of criticism by many UN experts, which includes Special Rapporteurs on violence against women, extra-judicial executions, etc.

UN Special Rapporteur - Rashida Manjoo violence against women – its causes and consequences, after her visit to India in April 2013 said that AFSPA has clearly resulted in impunity for human rights violations. She had also called for its repeal by stating that *"The interpretation and implementation of this Act, is eroding freedoms and fundamental rights which*

⁸Hoskote, Amitabh & Hoskote, Vishakha. (2018). 437 THE DEBATE ON ARMED FORCES SPECIAL POWERS ACT. 10.5281/zenodo.1221395.

includes the freedom of movement, association and peaceful assembly, dignity and bodily integrity rights, safety and security for women, in J&K and in the states of North-East India.”

UN Special Rapporteur – Cristof Heynson summary, extra-judicial and arbitrary executions had visited India in March 2012. While giving his report to the UN Human Rights Council, he stated that “powers granted under AFSPA in reality are broader and wider than those which are allowed under a state emergency as even *The Right to Life may be suspended under the Act and also certain safeguards that are provided under a state emergency are absent.*”

UN Special Rapporteur – Margaret Sekaggya who had visited India in January 2011 had also called out for the repeal of AFSPA in her report. She was deeply disturbed by a huge number of cases of defenders who claimed that they had been targeted by the security forces under AFSPA.

International and National Human Rights Groups and Activists, including the ones like Amnesty International⁹ have been calling for the repeal of AFSPA for years now. Amnesty International recognises the Constitutional duty of the Government of India to protect the citizens from various crimes and abuses including the ones committed by Armed forces. AFSPA has been held to be ineffective in meeting such goals as mentioned above and has actually created a culture of fear and threat at places where it has been in operation.

Certain Recommendations have also been given by Amnesty International India during September 2013. These are as follows:

- Till the time AFSPA is repealed, interim measures shall be provided for prosecution of members of Armed forces who are suspected or charged with human rights violations.
- The requirement of taking sanction from Central Government before prosecuting in all cases of human rights violations shall be removed.
- The Indian legislation or the security legislations in specific should comply fully with India’s International legal obligations so that all can be in line with International standards including the UN Principles for prevention of Extra- legal, Arbitrary and Summary executions.
- It urges the State governments in states where AFSPA is functional to initiate independent and complete investigations into all human rights violations which includes sexual violence and extra-judicial executions, allegedly committed by Armed forces. In cases where sufficient admissible evidences are found, the suspects shall be prosecuted.
- The victims who have suffered human rights violations shall be provided with adequate compensation and shall be rehabilitated.

- The State shall ensure that all officials who are held accountable for any lapses in the case whether it be in relation to registering or investigating the case.
- Protection of the civilian population from crime and abuse by Armed personnels.

6. Suggestions and Recommendations

AFSPA has been a hot topic of discussion and political debate since very long. However, the situation has remained stagnant only. No real changes have been made to the draconian law that has destroyed various families. Even after the various committees and recommendations, the Government has failed to bring any changes in the law or to completely repeal the law. I have already mentioned the lacunae’s present in the Act with regard to the provisions - Section 3, 4, 5, 6. AFSPA is a tool to counter insurgency in the disturbed areas. However, it has only been used in an arbitrary and uncontrolled manner to commit crimes and then hide the same under the garb of the Army uniform. Complete removal of the Act is not the solution. Major amendments with regard to the sections mentioned above in the Act, however might solve the issue. As a solution to this problem, I think the judiciary shall play an active role to prosecute those found guilty of committing crimes in the discourse of their duty. The provision regarding seeking permission from the Central Government to initiate or prosecute those alleged of misusing their powers should be completely removed, no amendments shall be made to the same. This Act has always sounded like a nightmare for the innocent people who have been far away from the shadow of humanitarian principles. India should not allow its future to be dominated by such violent and draconian laws. It is high time that India should give space for Democracy and cherish the constitutional values instead of suppressing the genuine democratic voice of “We the people”. Sovereignty First is the way out.

References

1. The Armed Forces (Special Powers) (28 of 1958) Act, 1958 (As amended by the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972).
2. Bhattacharyya, Rituparna. (2016). Living with Armed Forces Special Powers Act (AFSPA) as everyday life. *GeoJournal*. 10.1007/s10708-016-9752-9.
3. Hazarika, Angshuman. (2013). An Analysis on the Status of Armed Forces Special Powers Act in North East India. *Rostrum’s Law Review*. 1. 98.
4. (2016, July 08). Army can’t use excessive or retaliatory force even in Afspa- notified areas: SC. *Hindustan Times*
5. National Campaign Committee Against Militarisation and Repeal of Armed Forces (Special Powers) Act (1997). Where ‘peacekeepers’ have declared war: Report on violations of democratic rights by security forces and the impact of the Armed Forces (Special Powers) Act on civilian life in the seven states of the north-east. New Delhi. Team Nagaland: Sangvai, S., Andolan, N.B., Murthy, B., and Murthy, L.
6. The Armed Forces Special Powers Act, 1958 and Federal Conflicts, Winter Issue 2017: *ILI Law Review Vol. II*, Himangshu Ranjan Nath, Falakyar Askari
7. “The Armed Forces (J & K) Special Powers Act. 1990” Indian Ministry of Law and Justice published by Indian government, retrieved on 10 December 2014.

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<https://www.amnesty.org/download/Documents/12000/asa200422013en.pdf>