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SHOULD AFSPA BE REPEALED?

AUTHORED BY - ANURADHA KAR & JAYPRAKASH MISHRA

INTRODUCTION

In places designated as "disturbed zones," the Indian Military Forces, as well as state and paramilitary forces, are given special authority under the AFSPA, a law passed by Parliament. The AFSPA Act's implementation aims to keep the peace in unrest-prone areas. A few districts in three North-Eastern States recently repealed AFSPA.

15 police station regions in 7 districts of Nagaland, 15 police station areas in 6 districts of Manipur, 23 districts totally and 1 district partially in Assam are all getting rid of AFSPA.

The action is a "product of the better security situation and quick development owing to the persistent efforts and various agreements to eliminate insurgency and create enduring peace in Northeast," the administration claims.

Nonetheless, the AFSPA was given a six-month extension in three Arunachal Pradesh districts. The Army's 21st Para Regiment in Nagaland responded to information from an insurgent group. The party was supposed to be ambushed, but the army accidentally shot six civilians. The tragedy happened when they were travelling home in a car from a coal mine.

After killing these persons, the neighborhood's residents congregated at the scene, sparking a fight. Throughout the altercation, eight more people and one military died.

According to sources, the regiment was moved in from Assam for the special operation even though it is not frequently based in Nagaland. The 21 Paras are a highly skilled special forces outfit, indicating that the mission had top clearance.

The draconian Armed Forces Special Powers Act (AFSPA) is sometimes described as a law from the colonial era.

It is in effect in "disturbed" areas of Assam, Nagaland, Manipur (excluding Imphal), Arunachal

Pradesh, and Meghalaya in the North-East. It grants the Army broad authority to detain, fire, or kill someone out of the blue. They can do this without a warrant. And in these situations, Army officers who are involved are rarely prosecuted with any crimes.

In rare instances of internal unrest in India, the Army was called in to prevent actual or prospective violence. The AFSPA grants the army unprecedented authority in such a situation. In other words, the army is only called in when local police efforts have been unsuccessful and the insurgents have acquired the upper hand. The risk in such a scenario is that insurgents could seize control and force a state to split from the Union. In any democracy, this is simply unacceptable.

The AFSPA gives the military "special powers" that must be exercised with great caution. The army is authorised by law to shoot people in the head, destroy property, and hold suspects indefinitely. Unless specifically prohibited by the central government, military personnel working in accordance with the AFSPA are exempt from any legal actions brought under other provisions of the IPC CrPC, and civil lawsuits.

It's been found that the armed units have repeatedly abused the repressive authorities given by the Act by arranging fictional contacts and sexually harassing the women in unstable areas. What's more alarming is that the armed forces get away with their crimes since under the Act, no lawsuits can be brought against them. Hence it is obvious that AFSPA infringes human rights.

The Rowlatt Act of the British rule is frequently contrasted with the AFSPA because, like the Rowlatt Act, any suspicious individual may be detained only based on suspicion under the AFSPA. Opponents claim that rather than running the country based on the bullet, the issue may be resolved using the principles of dance (election).

THE ORIGIN OF AFSPA

When the Indian constitution came into effect, the AFSPA was established in 1958 in MANIPUR and ASSAM to safeguard the north-eastern states from escalating secession, violence, and threats to national security. The AFSPA brought an ordinance in 1958 and was authorised within 3 months. After various modifications, it was expanded in 1972 to include

all of northeastern India. The seven sisters states are a collective name for these states.¹

According to a human rights organisation called Human Rights Watch, the AFSPA is based mostly on language of an ordinance that was passed during the British rule to stifle the independence movement. Unlike a number of contentious laws, the AFSPA has colonial roots. In 1942, against the backdrop of Gandhi's Quit India Campaign, the AFSPA had been passed as an ordinance.

The movement lost its leader shortly after it began on 8th of August, 1942 and violence broke out in several locations across the nation. Many influential leaders, including Jawaharlal Nehru, VV Patel, and Mahatma Gandhi, had been imprisoned.

The previous Viceroy Linlithgow issued the Armed Forces (Special Powers) Ordinance, 1942, after becoming alarmed by the extreme level of violence in the nation.

This Ordinance essentially gave the Armed Forces "permission to murder" in the event of internal unrest. The government of India issued four ordinances in 1947 that were similar to this one to address internal security concerns and turmoil brought on by the division of four provinces: Bengal, Assam, East Bengal, and the United Provinces.

ENACTMENT OF AFSPA BY PARLIAMENT

Armed forces (Assam and Manipur) special powers act, 1958

In order to combat the Naga insurgency in the Assam region, AFSPA was first put into effect.² 99% of Nagas reportedly participated in a "free and fair plebiscite" in 1951, and they chose to form a "free sovereign Naga nation," according to the Naga National Council (NNC). A boycott of the 1952 first general election eventually spread to include officials and public schools run by the government.

Assam's govt passed the Assam maintenance of Public Order (Autonomous District) Act in the Naga Hills in 1953 to address the problem. Furthermore, police actions against the insurgents were stepped up. When the situation deteriorated, the Assam state government sent the Assam

¹ Bharti Aman "AFSPA: Is It Violating Constitutional Rights of NorthEast" [Vol. 5 Iss 3; 2130]

² Admin, "Armed Forces Special Powers Act (AFSPA) - UPSC Exam Preparation" (BYJU'S April 4, 2022) <<https://byjus.com/free-ias-prep/understanding-the-armed-forces-special-powers-act/>> accessed March 15, 2023

Rifles to the Naga Hills and enacted the Assam Disturbed Areas Act of 1955, which gave the local paramilitary groups and state police forces a legal foundation on which to fight the insurgency.

On May 22, 1958, President Dr. Rajendra Prasad passed the Armed Forces (Assam and Manipur) Special Powers Order 1958 in response to this danger. The Military Forces (Assam and Manipur) Special Powers Act of 1958 later amended it.

Just the Governors of the States and the Administrators of the Union Territories were given the authority to designate certain regions in the relevant State or Union Territory as "disturbed" under the Armed Forces (Assam and Manipur) Special Powers Act, 1958.

According to the "Objects and Reasons" section of the Bill, this authority was granted because "it is deemed acceptable that the Govt be given the power to declare areas as "disturbed," in order to allow its military forces to exercise special powers, keeping in mind the responsibility of the Union under Article 355 of the Indian Constitution, inter alia, to safeguard every State against such an internal disturbance."

All of the North-Eastern states were subsequently included.

Armed Forces (Punjab and Chandigarh) Special Provisions, 1983 act

In order to allow the central armed forces to function in the state of Punjab and the UT of Chandigarh while fighting the Khalistan movement in the 1980s, the centre initiated the AFSPA in 1983 by repealing The Armed Forces (Punjab and Chandigarh) Special Powers Ordinance of 1983.

In 1983, the Act became operative in Chandigarh and throughout Punjab.

The wording of the Act mostly stayed identical to that of AFSPA (Assam and Manipur) of 1972, with the exception of two sections that provided the armed forces additional capabilities. Subsection (e), which stipulates that any automobile may be forcibly stopped, examined, and impounded if it is believed to have been harboring proclaimed offenders or ammunition, was added to Section 4. Any lock may be opened by a soldier "if the key thereof is withheld," according to newly introduced sec 5.

The AFSPA was abolished in 1997, around 14 years once it went into existence, as the Khalistan movement lost steam. While the Punjab government repealed the DAA in 2008. It was overturned in September 2012 by the high court of Punjab and Haryana.

Armed Forces (Jammu and Kashmir) Special Provisions act, 1990

This Act may be put into effect if the Central Govt or the Governor of JK deem that all or any part of the State is in such a disorderly and dangerous situation.

The Disturbed Areas Act (DAA), a unique piece of legislation, was created in 1992 specifically for Jammu and Kashmir. The government claimed the state may still be designated as a disturbed area under Section (3) of the AFSPA even after the DAA for J&K expired in 1998. Although the AFSPA's implementation in J&K has been very problematic, it is still in place and in use.

WHAT THE ACT SAYS.

The Articles of the Indian Constitution give state governments the power to declare a state of emergency for any combination of the following: The local government and police are unable to deal with issues locally. The amount of unrest or instability in the state is too great for local forces to handle successfully.

The state government has the right to request assistance from the federal government in such circumstances. In the majority of situations, such as during elections, when the local police may be overworked and unable to manage all of the duties at hand, the federal government complies by dispatching the BSF and the CRPF. Certain situations are not covered by the AFSPA. It only occurs when a state, or a portion of it, is designated as a "disturbed area" may AFSPA be put into effect. AFSPA is used in instances where there is ongoing unrest, such as in militancy and insurgency, and notably when borders are in danger.

The Armed Forces Special Powers Act (AFSPA) grants an officer of the armed services the following authority in a region that has been designated as "disturbed":

Use deadly force, including lethal force, against anyone breaching the law or the peace in the disturbed area after giving a sufficient warning.

Get rid of any weapons caches, covert locations, fortified locations, shelters, or training

grounds from which armed volunteers, armed gangs, or exiles from justice launch armed attacks.

Someone who has committed cognizable offences or is suspicious of having done so may be arrested without a warrant, and the police may use force if necessary.

It is necessary to enter and search a location in order to carry out these arrests, free any person wrongly detained, or gather any firearms, ammunition, or explosives. It is necessary to stop and search any vehicle or vessel that has a good reason to believe it is transporting such a person or weapons.

Each individual detained and taken into custody pursuant to this act shall forthwith be delivered to the officer in charge of the nearest police station, together with a report of the circumstances giving rise to the detention.

Army officers are not held legally liable for their actions. The law provides immunity from prosecution, litigation, and other legal proceedings for anyone who breaks it.

The India's Supreme Court revoked the privilege of the armed units from prosecution under the AFSPA on 8/07/2016, declaring in an 85-page ruling: "It makes no difference whether the attacker was a layperson or the state, or whether the victim was an ordinary person, a militant, or a terrorist. The legislation has the same meaning for both and it applies to them equally. This is a requirement of democracy as well as a requirement for maintaining the rule of law and personal freedoms."³

JUDICIAL INTERPRETATIONS ON AFSPA

In Naga People's Case, the courts examined a number of concerns, focusing in particular on the idea of arbitrary nature and the powers that were determined to be unlawful under the AFSPA. Several arguments were made in opposition to the AFSPA's shooting privileges, its immunity provisions, and the Centre's authority to prosecute armed personnel. Nonetheless, despite the numerous critiques that this law received, no one argued that it ought to be less

³ Lakshmi, WritingLaw and Anika, "What Is AFSPA, Demand for Its Repeal, and Constitutionality" (*WritingLaw* March 12, 2022) <<https://www.writinglaw.com/about-afspa/#constitutionality>> accessed March 15, 2023

strict to prevent harassment of individuals in these locations. The constitutional legitimacy of the AFSPA needs to be considered, as well as other available approaches that the Sc has deemed significant in a democracy. This ultimately means under the AFSPA, the state governor and the federal government have the authority to designate any region of the state, no matter how tiny, as a disturbed area. The India Supreme Court has determined in this case that AFSPA was constitutionally lawful. In accordance with Entry 1 of the State List, Article 248 when read with Entry 97, and Entries 2 & 2-A of the Union List, Parliament is fully authorised to enact the act, and as a result, Parliament had the authority to do so in 1958.⁴

The recommendations said that:

Under Section 4, the army troops must closely adhere to the use of minimal force when confronting suspects of disobeying orders.

Within 24 hours of being detained and brought into custody pursuant to Section 4, a person must be delivered to the closest police station. The state is required to examine the law every six months.⁵

Indrajit Barua v. The State of Assam and Anr., another well-known case, the court determined and ruled that it is the responsibility of the state to guarantee the safety of its citizens and the fulfilment of their rights under Article 21, which is also extended to those in areas where the AFSPA is in effect. Those who reside in areas designated as "disturbed areas" are denied any protection for their lives and liberties, which include protection under the Crpc and even the right to go to court and seek redress, which violates Article 14 of the constitution, which states that all citizens are entitled to. By examining the circumstances in Northeastern India, it is possible to draw the conclusion that the local population will eventually live under military control.

Some examples, such as the Shopian Case, had two ladies who vanished as they were coming from the fields. Their lifeless bodies were found the following day, and it was alleged that the military soldiers stationed nearby had sexually assaulted and killed them. In the end, it was not

⁴ - SS and others, 'Armed Forces Special Powers Act, 1958: Necessity or Misuse of Power' (*iPleaders* May 27, 2019) <<https://blog.ipleaders.in/afspa-armed-forces-special-powers-act/>> accessed March 15, 2023

⁵ "NHRC Can Intervene When Rights Are Violated under AFSPA, Says Member" (*Hindustan Times* December 16, 2021) <<https://www.hindustantimes.com/india-news/nhrc-can-intervene-when-rights-are-violated-under-afspa-says-member-101639630063731.html>> accessed March 15, 2023

possible to hold the armed forces accountable or to interrogate them about the occurrence because the injuries to the girls' private parts that were meant to be documented in the post-mortem reports had been covered up. In actuality, there was no FIR filed in the case where this horrible occurrence took place. A writ of habeas corpus was issued in the case of Luithukla v. Rishang Keishing, and the court determined that the army must follow the Code of Criminal Procedure. But, there wasn't any enforcement, and none paid enough attention to the rulings of the Guwahati High Court.

SOME RECOMMENDATIONS ON AFSPA

Committee of Jeevan Reddy

After massive demonstrations and anger against the use of AFSPA in 2005 after Thangjam Manorama was killed by the Assam Rifles in Manipur, the government established the Jeevan Reddy Commission to review AFSPA.

The committee was adamant that the Armed Forces (Special Powers) Act, 1958, must be repealed following extensive investigation, several visits, and hearings held both inside and outside the North-Eastern States.⁶ The committee also felt that the act is inadequate and too vague in a number of areas.

The committee further stated that "the Armed Forces Special Powers Act (AFSPA), a contentious law that grants unprecedented power to and frequently confers immunity on security forces, must be reviewed because of the number of reports of sexual offences committed by the armed forces in India's conflict areas, such as Kashmir and the North East. Instead of being governed by army law, security forces should be taken under the jurisdiction of regular criminal law.

Additionally, it stated that AFSPA had turned into "an object of hate and a weapon of discrimination and highhandedness".

Committee of Santosh Hegde

A committee led by Supreme Court Judge Santosh Hegde was chosen in 2013 to examine the

⁶ IAS Cby L, "Should Afspa Be Repealed or Not? - Lukmaan IAS Editorials" (*Lukmaan IAS* January 5, 2022) <<https://blog.lukmaanias.com/2022/01/05/should-afspa-be-repealed-or-not/>> accessed March 15, 2023

1528 encounter fatalities that occurred in Manipur since 1979.

The Extra Judicial Execution Victim Families Association of Manipur petitioned the Supreme Court to investigate six allegations of unlawful encounter killings in Manipur, which led to the formation of the Santosh Hegde committee.

Five of the six encounters were deemed to be "not genuine," "disproportionate force" was utilized against individuals with "no known criminal antecedents," and the AFSPA gave men in uniform "sweeping powers" without providing the public protection from its abuse, according to the Santosh Hegde committee's report, which was submitted in 2013.

The committee also thought that granting additional authority would lead to greater constraint and better safeguards against abuse or misuse, but in the instance of Manipur, this capability was not present.

Commission of Sarkaria: It recommended that the states create their own system for preserving and managing public order.

The National Police Commission: Instead of using the army and paramilitary forces, it advises using the Central Reserve Police force in routine law enforcement.

United Nations View: The UN requested India to repeal the AFSPA in 2012, claiming it does not have a place in Indian democracy. It is deemed to be against international law by some UN treaty authorities.⁷

REPEALING OR NON REPEALING OF AFSPA

To repeal

It has been referred to as a licence to murder. Human rights advocates disagree with the act's sections 4 and 6.

As there are now more armed organisations than there were before the act was enacted, critics

⁷ "AFSPA, the Law That Allows Incidents like the Nagaland Killings to Occur" (*The Wire*) <<https://thewire.in/rights/afspa-nagaland-civilian-killings>> accessed March 15, 2023

claim it has failed to stop terrorism and bring normalcy back to troubled areas. Several others even blame it for the rising levels of violence in the places where it is in effect.

The government's decision to label a certain location "disturbed" cannot be contested in court. As a result, many instances of human rights breaches go unreported.

At a time when India is vying to become a permanent member of the United Nations Security Council, the AFSPA is incompatible with the framework and essence of our democracy and harms India's standing at the international high table.

WHAM (winning hearts and minds) ought to be the main objective of a counter-insurgency campaign rather than liquidation or annihilation. AFSPA permits soldiers to commit murder undetected. Its widespread application fosters an environment of leniency that is detrimental to WHAM and widens the gap between the military and the community.

Some few former senior police officers who were actively engaged in counter-insurgency operations claim that the AFSPA is like providing a shield for security equipment when it is not needed. After a while, there is no longer any connection between AFSPA and reducing violence.

Not to Repeal

The majority of the objections to the AFSPA are utopian, i.e., they exclude the army's worries. The sensitive nature of the subject is deliberately left out.⁸ Removing the law will demoralise the military and encourage extremists to encourage locals to sue the army.

Absence of such an action would have a negative impact on organisational flexibility and the use of the state's security capabilities. The security forces would be unable to carry out their assigned duties as a result.

Some few former senior police officers who were actively engaged in counter-insurgency operations claim that the AFSPA is like providing a shield for security equipment when it is not needed. After a while, there is no longer any connection between AFSPA and reducing

⁸ "AFSPA and Human Right" (*Legal Service India - Law, Lawyers and Legal Resources*) <<https://www.legalserviceindia.com/legal/article-212-afspa-and-human-right-.html>> accessed March 15, 2023

violence.

In order to conduct counterinsurgency operations in unrest-prone areas, the Army has adopted a pragmatic stance and campaigned for AFSPA.

Both India's internal and exterior security are converged in JK and the North-East area. As a result, AFSPA becomes an essential instrument in the Army's arsenal given the strategic significance of these areas and the vastly porous international boundary.

CONCLUSION AND SUGGESTIONS

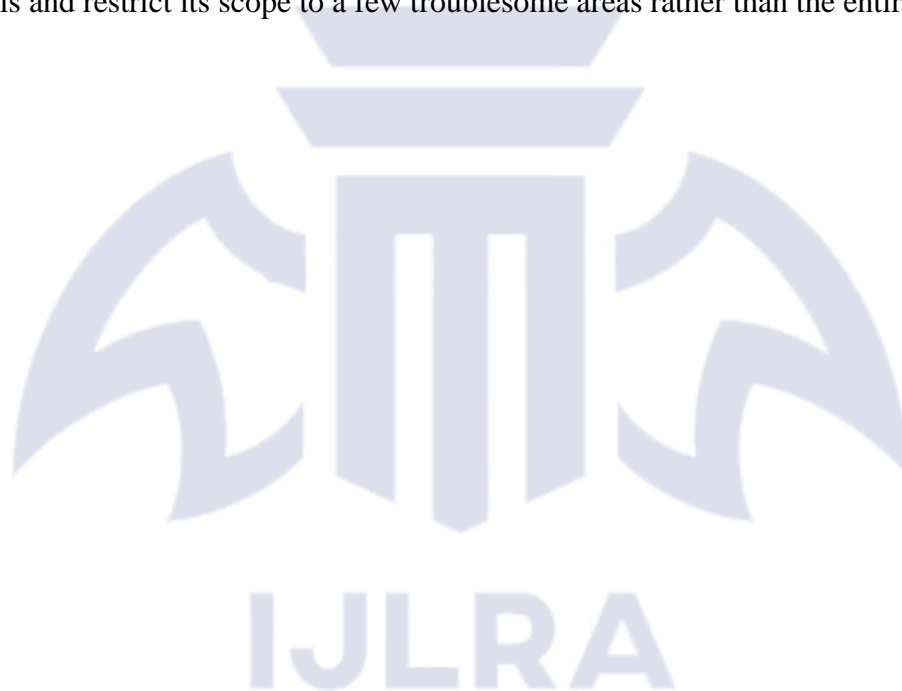
The following are some good ideas for improving how the AFSPA operates:

- Section 4(a) ought to be changed or repealed since it violates the right to life. Additionally, it goes against the fundamental tenet of criminal justice, which is that everyone is presumed innocent until and unless proven guilty. Also, the inclusion of "Law and order" under the State's list in accordance with Art 246 and the 7th Schedule is incongruous. It is hence Ultra vires.⁹
- Article 22 of the constitution requires that an arrested individual appear before the magistrate within 24 hours, hence Sec 5 should be in accordance with that provision.
- Section 6 should have a wider application. It ought not to be necessary to wait for Central Government permission; instead, a special committee might be established to launch investigations without delay or bias.
- The practical issues of ensuring openness in counter insurgency operations must be overcome by innovative means. The army must conduct thorough investigations into human rights breaches and swiftly bring the offenders to justice. Once the charges have been established, exemplary penalty must be administered.
- The National Crime Records Bureau (NCRB) has already been reporting alarmingly low conviction rates in addition to high incidence of crimes against women. The Centre for Social Research in New Delhi has conducted a research that calls for police training to place more focus on gender awareness as well as sensitivity. It was suggested that the National Police Academy create a gender policy for police education. However, the

⁹ Desk THN, "What Is Armed Forces (Special Powers) Act, and Where Is It in Force?" (*What is Armed Forces (Special Powers) Act, and where is it in force? - The Hindu* April 23, 2018) <<https://www.thehindu.com/news/national/what-is-afspa-and-where-is-it-in-force/article23648102.ece>> accessed March 15, 2023

2012 paper entitled "Integrated Police Training" makes no mention of the crucial subject of making IPS personnel aware of abuse against women in the home, in public spaces, etc.¹⁰

- The current regime of the act is no longer a reasonable response in light of the numerous instances of human rights breaches that have occurred throughout time. The AFSPA has come to stand for tyranny in the areas where it has been applied. The government must thus speak with the affected people and reassure them that appropriate action will be done.
- The government ought to consider enforcing and repealing AFSPA on an individual basis and restrict its scope to a few troublesome areas rather than the entire state.



¹⁰ Drishti IAS, "Armed Forces (Special Powers) Act (AFSPA)" (*Drishti IAS* October 1, 2022) <<https://www.drishtiias.com/daily-updates/daily-news-analysis/armed-forces-special-powers-act-afspa>> accessed March 15, 2023