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# **AN ANALYTICAL STUDY OF AFSPA IN** **CONTEXT OF PROCEDURAL AND** **INVESTIGATIVE POWERS**

AUTHORED BY: GAURAV

## **ABSTRACT**

In the world's largest democracy, where the Legislature and the Judiciary have continuously thrived to secure the fundamental rights and civil liberties guaranteed by the Constitution of India, the Armed Forces (Special Powers) Act enacted in 1958 wherein some special investigative and procedural powers have been conferred upon the armed forces have been a controversial subject over the years. Time and again, it has been opined that these special investigative and procedural powers are derived from an ambiguously drafted set of rules leading to human rights violations and thus it often leads to the question as to what extent these powers can be exercised and should the personnel exercising such powers be held accountable for any mischief against any person done in the name of the national security. The researcher aims to study AFSPA brought in force for the purpose of national security, extra-ordinary powers provided therein, the need for them and the grey areas that often result into exploitation of fundamental rights of people. The paper also discusses the landmark cases on the issue.

## **INTRODUCTION**

"External affairs will follow internal affairs.

Indeed, there is no basis for external affairs if internal affairs go wrong."

Insurgency and regional conflicts leading to violence in the border area situated states is not something new. Besides the external threat from the neighboring countries, India has been witnessing continuous internal threats from various militant outfits and insurgent groups. Such threats require a timely response and for that, some special investigative powers have to be conferred upon the authorities so that they can bypass the procedural hurdles laid down by the ordinary law of the land in order to deal with the threat effectively. Such kind of attacks emanating from within the national boundaries pose a greater threat to the security and unity of a nation and therefore flares up discussions

with as to how the 'internal security' shall be maintained. This is why the use of armed forces was felt necessary in some areas to regulate the internal affairs. So, taking into consideration the insurgency incidents and the geopolitical situation of India where the neighboring countries continuously attempts to disturb the public peace and tranquility, various legislations has been enacted for the purpose of securing the national security, AFSPA being one of them.

AFSPA is a legislation which enhances states' power to arrest, investigate and to search any place. AFSPA can be traced back to the times of British rule in the year of 1942 when an ordinance called the Armed Forces (Special Powers) Ordinance was promulgated by the Britishers to suppress the Indian freedom movement. Initially, it was Armed Forces (Assam and Manipur) Special Powers Act, 1958 applicable to only Assam and Manipur. It was adopted during the times of Naga rebellion. It was initially proposed that the Act would be revoked after a period of 12 months. However, the Act continued to remain in force in both the States and was also extended to other "disturbed" areas of the neighboring States. It was later renamed to Armed Forces (Special Powers) Act. It has been amended several times to add new States under its ambit. In the 72<sup>nd</sup> amendment, the states of AP, Meghalaya, Mizoram, Nagaland and Tripura were also brought under the purview of AFSPA. In 1983, it was invoked in the State of Punjab and Union Territory of Chandigarh and by the time in 1990 it was invoked in J&K as well to control the rising insurgency incidents. Several governments in the past decades has advocated for the AFSPA as an effective means to prevent terrorist activities and to prevent people from carrying out activities threatening the integrity of India and to prevent states from succeeding from the Union of India. Under AFSPA, government has been provided with the absolute authority to declare any area as "disturbed area" and thereby invests the powers in the armed forces enabling them to restore peace and security in the disturbed areas. AFSPA has been subjected to heating debates from time to time with some terming it as a 'draconian law' while some defending it in the name of larger interest of the nation's security.

## **AFSPA AND ITS APPLICABILITY**

AFSPA is a very small legislation consisting of only 6 sections. Despite being so it has been the most controversial legislation across all the legislations passed by the Parliament of India. It has aided various famous operations carried out by the Indian armed forces including Operation Blue Star in Punjab and lesser known Operation Sarp Vinash at Surankot. This Act has been subjected to severe

criticism both at the national and international level. But at the same time, it has received the continuing backing from the Government of India.

AFSPA is not an Act which is in force pan India. It is invoked only in areas declared as the ‘disturbed areas’ by the Central Government. From time to time AFSPA has been invoked in different states as per the needs of the times. Since its enactment it has been in force at least once in all the north eastern states and the state of J&K. During the peak of insurgency incidents in the late 1990’s AFSPA was imposed at multiple states at a single time in order to deal with the threats effectively.

With insurgency-related incidents in the northeast region down by 85% from the levels recorded at the peak of militancy two decades ago, the Centre has withdrawn the Armed Forces Special Powers Act (AFSPA) totally from Meghalaya as well as from eight out of 16 police stations in Arunachal Pradesh, with effect from March 31, 2018.<sup>1</sup> In 2015, the Tripura government had lifted AFSPA from the state after 18 years. Until September 30, 2017, all areas falling within a 20-km belt in Meghalaya bordering Assam were notified as “disturbed” areas. Effective from October 1, 2017, this was reduced to a 10-km belt.<sup>2</sup> However, on March 31, 2018, it was decided that given the improved situation, AFSPA need no longer be in force even in this 10-km stretch.

Presently, AFSPA, 1958, is operational in the entire States of Assam, Nagaland, Manipur (except Imphal Municipal area), three districts namely Tirap, Changlang and Longding of Arunachal Pradesh and the areas falling within the jurisdiction of the eight police stations in the districts of Arunachal Pradesh, bordering the State of Assam. The notification declaring Manipur and Assam as “Disturbed Areas’ has been issued by the State governments. For Nagaland, the notification is issued by the MHA.<sup>3</sup>

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<sup>1</sup> Bharti Jain, AFSPA removed from Meghalaya after 27 years, Times of India (24/04/2018), available at [http://timesofindia.indiatimes.com/articleshow/63887983.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://timesofindia.indiatimes.com/articleshow/63887983.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) <https://timesofindia.indiatimes.com/india/afspa-removed-from-meghalaya-after-27-years-assam-too-may-reduce-afspa-area/articleshow/63887983.cms>, last seen on 15/01/2021.

<sup>2</sup> Ibid.

<sup>3</sup> Special Corrospendent, AFSPA extended in Nagaland, The Hindu (30/12/2019), available at <https://www.thehindu.com/news/national/other-states/afspa-extended-in-nagaland/article30434509.ece>, last seen on 26/01/2021.



## PROCEDURAL AND INVESTIGATIVE POWERS

Section 4(a) is another provision granting special investigative and procedural powers to the armed forces. It empowers the armed forces personnel to use appropriate force against a person acting in contravention of law in force in the disturbed area. This power even includes the power to shoot after giving sufficient warning even to the effect of causation of death. This provision has been widely criticized as being violative of right to life guaranteed under the Article 21 of the Indian Constitution. This provision is also against the cardinal principles of criminal justice system. The powers provided herein are indeed arbitrary and extensive in its very nature but the judiciary has upheld the validity of this provision in the greater interest of the nation. The Delhi High Court in the case of *Indrajit Barua v. State of Assam*<sup>4</sup> has justified this provision by stating that “if a law ensures and protects the greater social interest than such law will be a wholesome and beneficial law although it may infringe the liberty of some individuals : it will ensure the liberty of the greater number of the members of the society at the cost of one and a few”<sup>5</sup>. Here the court followed the Bentham’s principle of “greatest happiness for the greatest number of people. Any commissioned officer, non-commissioned officer, warrant officer or any other officer of equivalent ranks is empowered to, in a disturbed area, destroy any arms dump, prepared or fortified position or shelter from which armed 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, if he is of the opinion that it is necessary to do so.”<sup>6</sup>

Section 5 of AFSPA states that any person arrested under this Act shall be produced in front of the officer in charge of the nearest police station with the ‘least possible delay’ along with a report of circumstances in which the person has been arrested. The Act nowhere defines as to how much time amounts to the least possible delay, thereby leaving a room for the officials to exercise their discretion in this regard. This provision has been interpreted depending upon the circumstances of each case. There is no fixed threshold exceeding which might amount to violation of this provision. Though, in the general terms it can be defined as without any arbitrary and unnecessary delay.

It has been contended that the help of armed forces can be sought even under section 130<sup>7</sup> of CrPC.

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<sup>4</sup> Civil Appeal No. 834 of 1980 Letters Patent Appeal No. 108 of 1980.

<sup>5</sup> Ibid.

<sup>6</sup> Section 4(b), AFSPA.

<sup>7</sup> Sec 130 Crpc – Use of Armed Forces to disperse assembly

But the deployment of the armed forces under CrPC is quite different from that of invoking AFSPA. Here the armed forces aren't invested with the required powers to conduct searches or arrest a suspect without warrant. The armed forces will first have to get the required permissions and this way the element of surprise is lost. When there are sudden attacks and the attackers hide soon after it, inflicting heavy damage, quick action on the part of armed forces is very essential to effectively deal with the threat. For the right action at the right moment the armed forces have to have some powers, else there would be no difference between armed forces and the civil authorities. This is why the armed forces are invested with the powers to arrest without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence<sup>8</sup> and also 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.<sup>9</sup> Even the CrPC allows to search without a warrant where a police officer has reasonable grounds to believe that circumstances are such that unreasonable delay can't be afforded.<sup>10</sup> But in terms of detention without warrant, as per the Criminal Procedure Code, no police office shall detain any person without warrant for period longer than 24 hours.<sup>11</sup> Whereas AFSPA is silent as to for how long a person can be arrested or detained without a warrant.<sup>12</sup>

The Supreme Court has upheld the validity of section 4 and held that it can be compared to section 130 and 131 of CrPC as they deal with individual and isolated cases while section 4 is concerned with a situation where whole or a part of the State is in a disturbed or dangerous condition. In such circumstances, section 130 and 131 can't be treated as comparable or adequate to deal with the situation envisaged in section 4.<sup>13</sup>

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(1) If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces.

(2) Such Magistrate may require any officer in command of any group of persons belonging to the armed forces to disperse the assembly with the help of the armed forces under his command, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(3) Every such officer of the armed forces shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

<sup>8</sup> Section 4(c), AFSPA, 1958.

<sup>9</sup> Section 4(d), AFSPA, 1958.

<sup>10</sup> Section 41 and section 165, CrPC, 1973.

<sup>11</sup> Section 57, CrPC, 1973.

<sup>12</sup> Supra 28.

<sup>13</sup> Naga People's Movement of Human Rights v. Union of India, 1998 (2) SCC 109.

Section 6 provides immunity to armed forces. This has been the most debatable provision of this Act and it has been alleged that it restricts the accountability of the armed forces as it provides immunity to armed forces from general law. This provision has been discussed in the case of Naga People's Movement of Human Rights v. Union of India<sup>14</sup>. So, the issue has been dealt in Chapter 4. The immunity extends to the ambit of National Human Rights Commission (NHRC), which is not authorized to investigate the alleged violations by the armed forces in the 'disturbed areas'.<sup>15</sup>

## **DISTURBED AREA**

Section 3 of the Act lays down the power to declare an area as the "disturbed area". Under this section the Governor of that State or the administrator of that State or the Central Government can issue a notification declaring therein an area as the "disturbed area". The notification is usually issued by the Central Government i.e the Ministry of Home Affairs but there have been instances where the final call as to whether to call in the armed forces or not is left to be taken by the State administration. The section lays down that a notification under this section can only be issued when any of the above empowered authorities is of the opinion that such circumstances have occurred which makes it necessary to use the armed forces in the aid of the civil police. Once an area has been marked as "disturbed" the armed forces acting therein get special powers to arrest without warrant<sup>16</sup>, to enter and search any premises without warrant<sup>17</sup>, destroy any arms dump<sup>18</sup>, to make preventive detention and if the circumstances require even to kill the person. The notification can be issued either for the whole state or a part of the state. An area can be disturbed due to various reasons such as dispute among people belonging to different religions, among people belonging to different caste, languages etc. But most of the time an area is declared as disturbed owing to violent activities by the alien elements with an aim to destabilize the democratically elected government. State's demand of autonomy has also lead to clash of interest between the central government. Demand for autonomy has been made primarily to preserve the local rituals and culture of that State. People of these States sometimes resort to violent activities against the government institutions to get their demands met. These circumstances also lead to imposing of AFSPA in these areas.

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<sup>14</sup> Ibid.

<sup>15</sup> Section 19, Protection of Human Rights Act, 1993.

<sup>16</sup> Sec 4(c), AFSPA.

<sup>17</sup> Sec 4(d), AFSPA.

<sup>18</sup> Sec 4(b), AFSPA.

Now the basis for declaration has been a gray area. The section is a little ambiguous as to what circumstances should be deemed sufficient to get the aid of the armed forces. Even the judiciary hasn't made a clear stand on this issue. The court held that there must exist a law and order situation where assistance of armed forces in aid of the armed forces is required.<sup>19</sup>

An argument that the AFSPA is being used for political gains has often been put forward. The people putting forward this argument believe that the areas under AFSPA are no more disturbed and it should be repealed with immediate effect. But the facts state otherwise. 334 soldiers have lost their life in period of 2016-18 while serving in the AFSPA imposed areas.<sup>20</sup> If the claimed areas are peaceful then who is killing the soldiers? Apart from this, let us not forget that Indian Army has lost more than 700 officers and 9000 soldiers to the insurgency.<sup>21</sup>

## THE JUDICIAL APPROACH ON AFSPA IN INDIA

In the case of Naga People's Movement of Human Rights v. Union of India<sup>22</sup>, the SC directed the Indian army to treat a list of do's and don'ts as binding so that the disturbance to everyday life of people is minimized. This list of guidelines is formulated to restrict the excessive and ambiguous investigative and procedural powers of the armed forces making it mandatory to follow a certain code of conduct. Consequently, a significant decrease has been observed in complaints pertaining to the issue of violation of human rights in the name of national security. The Court held that the words of AFSPA implied a time bound declaration, and therefore, a declaration that an area is "disturbed" cannot take effect for more than six months at a time. the Court held that the power to declare an area "disturbed" was neither arbitrary nor unguided, even though AFSPA lays down no guiding criteria for such a declaration. The court also rejected any suggestion that the military's extensive powers to search, seize property, arrest people and use force against them were excessive. The Court maintained that security laws deal with threats more elevated than public disorder, and the national legislature, which is constitutionally empowered to legislate on matters concerning the "defense of India," has clear authority to pass these laws. The constitutionality of the AFSPA was upheld by the constitution

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<sup>19</sup> Extra Judicial Execution Victim's Families Association v. Union of India (2013 SC).

<sup>20</sup> Press Trust of India reported this, as the then defence Minister Mr. Rajnath Singh submitted a report to Rajya Sabha, on June 24,2019.

<sup>21</sup> Harwant Singh: Don't demoralize the soldiers by diluting AFSPA, Hindustan Times (New Delhi, 21/08/2018).

<sup>22</sup> (1998) 2 SCC 109.

bench<sup>23</sup>. The court further observed that the alleged enemies in these disturbed areas are also the citizens of India and they also enjoy the fundamental rights guaranteed by the constitution of India, so the armed forces has to exercise a certain amount of care while carrying out its operations. The court was of the view that the armed forces have not been maintained to kill the innocent and doing so would amount to violation of rule of law and natural justice. Personnel of armed forces before taking action needs to ensure that it is 'necessary' and 'due warning' has been given and minimum force required shall be exercised to effectively deal with the person acting in contravention of the law. These directions by the Supreme Court place and extraordinary onus on the armed forces for self-regulation. The most significant observation made by the SC was that the members of the armed forces don't enjoy absolute immunity from prosecution as provided under the Act and held that the provisions of CrPC are equally applicable to the security personnel and therefore even the ordinary courts have the jurisdiction to try the matter<sup>24</sup>. In 2017, Government of India filed a petition in the SC against this order. This petition was rejected by the SC and held that no reasonable case can be made out to grant back the immunity to the armed forces carrying out operations in the 'disturbed areas'. However, the traditional perception of the AFSPA leading to grave violation of human rights has still lead to a persistent demand by the people for its revocation.

The Supreme Court in the case of Extra Judicial Execution Victim's Families Association v. Union of India<sup>25</sup> has made some significant observations. The Court held that the power of armed forces to cause death is not absolute. It has to be determined whether use of force is disproportionate or retaliatory or not. No one can act with impunity particularly when there is loss of an innocent life. There is no blanket impunity available to perpetrators of the crime. There can be presumption raised as to every person killed in an encounter was a terrorist or a militant. Doing an encounter shall be the last option to resort to and the legitimacy of every encounter must be looked into. Also the Court held that the substitution of words "internal disturbance" by "armed rebellion" in Article 352 of the Indian Constitution implies that internal disturbance can no more be a ground for declaring emergency. So, to declare emergency internal disturbance has to coupled with the armed rebellion. Also the failure of constitutional machinery is a prerequisite to declare emergency under art 352.

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> (2016) 14 SCC 536 : 2016 (4) SCC (Cri) 508.

Based on this reasoning the Supreme Court held that the situation in Manipur is at best an internal disturbance and it's doesn't amount to a threat to the security of whole nation or a part thereof. So instead of declaring the emergency, the armed forces should be deployed in aid to the civil police to deal with the internal disturbance. The court further held that AFSPA is not to supplant civil authorities and only supplement it. The armed forces must act in corporation and conjunction with the civil administration and shall be deployed only until the normalcy is obtained. The court observed that the deployment of armed forces is intended to restore normalcy.<sup>26</sup> It would be very odd if the normalcy is not obtained within a reasonable time frame.<sup>27</sup> Thus the Court intended that the deployment should not be for an indefinite period. If the normalcy is not obtained within a reasonable time frame it would mean that the armed forces failed to work in aid to the civil administration. The deployment of armed forces should only be for the emergency situations and the Government should not rely upon AFSPA as a long term solution. The Court further stated that both court martial court and court instituted under CrPC have the jurisdiction to try offences such as murder, culpable homicide not amounting to murder, rape etc committed by the armed forces deployed in the "disturbed areas".<sup>28</sup> To reach this conclusion the court relied upon the interplay between section 4 and 5 of CrPC and section 125 and 126 of Army Act. But no doubt the criminal court lacks such jurisdiction unless the sanctions are provided by the Central Government.

The Guwahati High Court in the case of Solomi Shingnaisui v. Union of India ordered that the authorities are duty bound to pay compensation for the custodial death of a citizen and the compensation may be granted under the public law by the Supreme Court and the High Courts in addition to private law remedy and punishment to wrong doers under the criminal law.<sup>29</sup> The same court also held that nobody is authorized under the Indian Constitution to take away the right to life and liberty except according to procedure established by law.

The Indian judiciary has been a little reluctant in getting into the nitty gritty of the AFSPA provisions. It would be right in saying that judiciary has turned a blind eye towards some of the ambiguities in the Act in the larger interest of the nation. A declaration under sec 3 of the AFSPA can't be substantially questioned as this section doesn't lay down any specific criteria as to what circumstances

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Guwahati High Court (Imphal) WP No. 591 of 1999; Order dated 24 Apr 2001.

are sufficient to form the 'opinion' unless it is prima facie manifested that the opinion formed by the government is in bad faith and amounts to abuse of law.<sup>30</sup> A little more active role from the judiciary would be highly appreciable like that of in Sebastian M Hongray case<sup>31</sup>, where the court imposed exemplary fine on the government for failing to produce two detained persons under AFSPA. Though the stand taken by the Supreme Court in recent years is an encouraging one and more judgments inclined towards human rights could be expected in the near future. The aim should be to make AFSPA a more citizen friendly and simultaneously strict for the disturbing elements.

## CONCLUSION AND SUGGESTIONS

In 2022, India is going to celebrate its 75<sup>th</sup> Independence Day and some people are lamenting another anniversary i.e. 64 years of AFSPA. Enacted as a short term measure to effectively deal with the insurgency in the Naga Hills, the AFSPA has managed to remain in force for over six decades now especially in the north eastern region of India. This fact in itself is highlighting the failure of various governments to provide an amicable and permanent solution to achieve the peace in the region. The Act provides for exemplary powers to arrest merely on the basis of suspicion. This power is susceptible of exploitation and can gravely infringe upon the fundamental right of the suspected persons. On the other hand, in an insurgency hit area, such powers become imperative. To keep a balance, more safeguards shall be incorporated within the Act itself by way of an amendment. Provision for anticipatory bail, prior notice to suspected person to present himself and furnish the bond to maintain the law and order and failure to appear upon such notice will entitle the army forces to take action, would create a situation of equilibrium.

Government has repeatedly insisted that AFSPA is necessary to deal with the militancy and terrorism in the "disturbed areas". Shri. L.K. Advani, a prominent Indian politician, once said "to modify or to revoke AFSPA in the State of J&K is to surrender to Pakistan's strategy of breaking down of India". India have one of the largest territorial boundaries and is home to the most diverse cultures of the world. Different communities over the years have come forward with a demand of separate nation or demand of autonomy. Such demands are against the basic structure of the Indian Constitution. Had India surrendered to such demands India wouldn't be like it is today. The neighbors, who believes in

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<sup>30</sup> Supra 33, at 15.

<sup>31</sup> AIR 1984 SC 1026.

expansionist theory, would have acquired most of the land. So, the Union of India do needs the security laws to prevent its disintegration at the behest of foreign powers. But the fact is that the international laws requires to reinforce basic human rights and not undermine them. So, at the same time the basic human rights of the citizens should be respected and shall not be infringed. Reform of India's security laws-whether substantive or procedural-will not be easy to push through, given that certain core security provisions have recurred in different generations of laws. Eg. POTA, TADA NSA. All these Acts have the different name but the essence and the basic structure is common to all of them. So, multiple, routine, regular checks and balances stitched into the executive's exercise of security powers will compel public deliberation and, as a result, encourage reasoned decision making. Moreover, national security is an arena where governments can too easily dismiss non-state critics, however cogent, by citing their ignorance of classified information or questioning their patriotism. This is another problem that comes with the enactment of the security laws. It becomes imperative here to give the accused person a chance to show his innocence before any harsh action is taken against him. The principles of nature justices i.e Audi Alteram Partem and reasoned order has to be followed while acting under security laws as well. A respect for the fundamental and basic human rights of individuals is the bedrock of a true democracy. It is the duty of the State to undo the damage done by its officers to the individuals. For that, provisions must be enacted within the AFSPA which binds the violators to pay exemplary monetary damages. Armed forces deployed in the civil areas must win over the confidence of the people instead of exploiting the power conferred upon them. They are there to safeguard the public interests. They must set up complaint kiosks to listen to the people's complaint. No operation or policy can succeed without the support of the people. So it becomes very important to know the expectations of the people from the armed forces.

Request for sanctions remain pending with the government for a very long time, thereby hindering the process of justice. The Santosh Hegde Commission also stated that a period of maximum three months should be fixed for the government to decide whether to give sanction or not. This order of the government should be a 'speaking order'. On the other hand, many a times there are also motivated complaints filed against the army to defame it or to hinder its operations. Because of this sometimes some personnel are reluctant to an action, which is otherwise necessary, fearing inquiry against him. Even if a complaint is found to be frivolous, the person filing the complaint is allowed to walk way freely without any accountability. This shows the need to provide the armed forces with the desired legal support for protection of their actions done in good faith. Woman are used as the shield during



the operations. Every false rape claim is another nail in the coffin of the genuine rape victim. Further, it is not the citizens who are always at the receiving, armed forces deployed in the disturbed areas are far more vulnerable to life threats. Thousands of personnel have laid their life fighting the insurgency in the disturbed areas. Lastly, the Government of India should adopt necessary and proper steps for all round development of the entire NE India. It's time that government should now think of a permanent solution to the prevailing challenges in the north east. Development, employment opportunities, taking the local people into confidence before framing policies is the key.

