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Ph: +918255090897 Website: [journal.lawmantra.co.in](http://journal.lawmantra.co.in)

E-mail: [info@lawmantra.co.in](mailto:info@lawmantra.co.in) [contact@lawmantra.co.in](mailto:contact@lawmantra.co.in)

## AFSPA: THE DRACONIAN UNREASONABLE LAW\*

### INTRODUCTION

The Armed Forces (Special Powers) Act (AFSPA), is an Act of the Parliament of India which was passed on 11 September 1958. It is a law with merely six sections granting special powers to the Indian Armed Forces in what the act terms as 'disturbed areas'. The Act has received condemnation and disapproval from the civilian society due to the alleged violations of human rights of the civilians in the regions where the Act is in force. As per the Act, in a 'disturbed area,' a military officer can fire upon an unlawful assembly of five or more people if the need arises or even for illegal possession of firearms. The military is free to use any amount of force that may even justify causing death to perpetrators as per the law. Furthermore, as per the law, the Army is not entitled to produce any search warrants or explain arrests for any operations carried out by the armed forces. It is evident that due to the massive unaccounted power bestowed on the army and the soldiers, there is always the apprehension of misuse. A number of cases and instances can be cited which elucidate the apprehension of the civilians. It is extremely rare to see areas, like that of the North Eastern States, wherein the State machinery under the garb of an Act covers up gross violations of human rights. The Armed Forces Special Power Act (AFSPA), introduced to curb insurgency in the remote jungles of the far flung areas, has remained a telling tale of agony. The people of the North East region have increased their clamor to revoke the act from the region as it has caused damage and destruction, with total disregard to the human rights of its citizens

India is a country that continues to have a veritable spectrum of draconian laws that are purportedly intended at discontinuing terrorism but are used effectively by state agents to exploit and abuse human rights. These laws include the Maintenance of Internal Security Act (MISA), Terrorist and Disruptive Activities (Prevention) Act (TADA), Prevention of Terrorism Act (POTA), the Disturbed Areas Act (DAA), and the Armed Forces Special Powers Act (AFSPA), the Assam Preventive Detention Act, National Security Act, Essential Services Maintenance Act and the Armed Forces (Jammu and Kashmir) Special Powers Act (1990). These laws have been implemented all over the country; however, they have the most appalling effects on the human rights of minorities, vulnerable communities in areas where people have opposed these laws. India is believed to be a nation that gives due importance to the concept of rights and liberties of its citizens and indeed is one that has a Government, which is "by the people, to the people and for the people". Nonetheless, is it disappointing to see that in a country like ours, we continue to have laws that make a mockery of the human rights of the citizens.

### THE ARMED FORCES SPECIAL POWERS ACT: EXPLANATION

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\*Mr. Saif Rasul Khan, Government Law College, Churchgate, Mumbai.

The Act was introduced in the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura, and thereafter the act was later extended to Jammu and Kashmir in July 1990. It is a draconian law that gives unbridled powers to the armed forces. Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces is granted the right to shoot to kill based on mere suspicion that it is necessary to do so in order to “maintain the public order” in a “disturbed area”. The ‘Introduction to the Act’ states that it has been enacted to assist State Governments, which are incapable of maintaining internal disturbance. However, the act has been widely criticized by national and international human rights agencies. The United Nations Human Rights Committee had questioned the validity of AFSPA in 1991 in light of Article 4 of the International Covenant on Civil and Political Rights, the Government of India harped on the fact that it is essential to prevent the secession of the states of North Eastern India. It is disturbing to observe that unfortunately, the states of the North Eastern India were never fully integrated in our country’s mainstream due to vast differences in social structure, culture, language, facial features and geographical remoteness. In addition, the successive governments in the centre have hardly been responsive towards working for the economic and social development of the region. The primary interest lied in the vast exploitation of the reserves of natural resources in the area. The tyranny of armed forces compels people to demand freedom through violent means, which in turns justifies the need for AFSPA, thereby creating a vicious circle.

## **HISTORY**

The British propagated the Armed Forces Special Powers Ordinance of 1942 on 15 August 1942 to suppress the Quit India Movement. Modeled on these lines, four ordinances were invoked by the dcentral government to deal with the issue of internal security in the country post 1947. They were:

1. The Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance
2. The Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance
3. The East Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance
4. The United provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance

## **THE ACT: PROVISIONS**

According to the Armed Forces Special Powers Act (AFSPA), in an area that is proclaimed as "disturbed", an officer of the armed forces has powers to:

- After giving such due warning, Fire upon or use other kinds of force even if it causes death, against the person who is acting against law or order in the disturbed area for the maintenance of public order,
- Destroy any arms dump, hideouts, prepared or fortified position or shelter or training camp from which armed attacks are made by the armed volunteers or armed gangs or absconders wanted for any offence.
- To arrest without a warrant anyone who has committed cognizable offences or is reasonably suspected of having done so and may use force if needed for the arrest.
- To enter and search any premise in order to make such arrests, or to recover any person wrongfully restrained or any arms, ammunition or explosive substances and seize it.
- Stop and search any vehicle or vessel reasonably suspected to be carrying such person or weapons.

- Any person arrested and taken into custody under this Act shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.
- Army officers have legal immunity for their actions. There can be no prosecution, suit or any other legal proceeding against anyone acting under that law. Nor is the government's judgment on why an area is found to be disturbed subject to judicial review.
- Protection of persons acting in good faith under this Act from prosecution, suit or other legal proceedings, except with the sanction of the Central Government, in exercise of the powers conferred by this Act.

## **PROSECUTION OF ACCUSED UNDER AFSPA**

The AFSPA is an act with merely 6 sections. In the Act, the section that are the most damning are in the fourth and sixth sections: the former enables security forces to “fire upon or otherwise use force, even to the causing of death” where laws are being violated. The latter says no criminal prosecution will lie against any person who has taken action under this act. It is interesting to note that in about 54 years, there has been not a single prosecution of any army personnel under the Act. The army, paramilitary or soldiers, none have been prosecuted for the alleged offences committed by them, including murder, rape, destruction of property (including the burning of villages in the 1960s in Nagaland and Mizoram) etc. In the examples cited of gross violation of the human rights, many a times villagers were compelled to depart their homes at gunpoint, toss their belongings onto the back of a truck and move to a common site where they were herded together with strangers and formed new villages. It is a reprehensible and appalling law that the country has little idea about. There are hardly any who show concern for the citizens who suffer. Furthermore, there is no provision of any judicial review to the “disturbed area” declaration made by the authorities.

## **AFSPA AND HUMAN RIGHTS VIOLATION**

The Act violates a number of human rights of the citizens. There is absolutely no provision to punish the guilty and there no judicial redress available to the people who suffer from the aggression of the armed forces.

Firstly, the ‘Right to Life’ is violated by section 4(a) of the AFSPA, which grants the armed forces power to shoot to kill in law enforcement situations without regard to international human rights law restrictions on the use of lethal force. Lethal force is broadly permitted under the AFSPA if the target is part of an assembly of five or more persons, holding weapons, or “carrying things capable of being used as weapons”. The terms “assembly” and “weapon” are not defined.

Secondly, the ‘Right to Liberty and Security’ of person is violated by section 4(c) of the AFSPA, which fails to protect against arbitrary arrest by allowing soldiers to arrest anyone merely on suspicion that a “cognizable offence” has already taken place or is likely to take place in the future. Further, the AFSPA provides no specific time limit for handing arrested persons to the nearest police station. Section 5 of the AFSPA vaguely advises that those arrested be transferred to police custody “with the least possible delay.”

Thirdly, the ‘Right to Remedy’ is violated by section 6 of the AFSPA, which provides officers who abuse their powers under the AFSPA with immunity from legal accountability. This section of the AFSPA prohibits even state governments from initiating legal proceedings against the armed forces on behalf of their population without central government approval. Since such a sanction is



seldom granted, it has in effect provided a shield of immunity for armed forces personnel implicated in serious abuses.

In practice, the AFSPA also facilitates violation of the right to be free from torture, and from cruel or degrading treatment. Since the AFSPA provides powers to arrest without warrant and then detain arrested persons for unspecified amounts of time, the armed forces routinely engage in torture and other ill-treatment during interrogation in army barracks. Areas declared “disturbed” under the AFSPA over the past 50 years vary significantly according to their conflict history, ethnic constituency, and levels of militancy. However, all these areas share a common experience of widespread human rights abuses during the imposition of the AFSPA. The AFSPA has also had the opposite effect to that intended by the Indian government: in each state where the AFSPA has been implemented and soldiers have been deployed, the armed forces have become a symbol of oppression and an object of hate. Human rights violations have served to fuel conflicts and act as a recruiting sergeant for militant groups in many parts of the country. Arbitrary detention, torture, and the killing of peaceful critics have had the effect of closing democratic and peaceful paths of opposition, forcing organizations underground and fueling a growth in militancy. It is estimated that over 70 armed opposition groups may be operating across the northeast alone. While the conflict has died down in Punjab, there are numerous militant groups operating in Jammu and Kashmir.

## **AFSPA AND IMPUNITY**

Impunity occurs when perpetrators of human rights violations are not held accountable by the state for their actions. Impunity can be divided into two types.

- De facto impunity takes place when the state fails to prosecute for lack of capacity or will, often for political reasons, such as state support for the abuse or to protect high ranking officials or state institutions. De facto impunity has been rampant in India, where in even well-documented abuse cases there is no political will to prosecute.
- The second kind of impunity is de jure impunity, in which laws or regulations providing immunity or amnesty make it difficult or impossible to prosecute a perpetrator for human rights abuses. India has several such provisions in its laws, aimed at shielding its military personnel and civilian officials from legal accountability. Such laws are contrary to the right to a remedy and reparation for gross violations of international human rights law.

Both forms of impunity lead to more human rights violations and undermine faith in the government and security forces; de jure impunity sends a particularly negative signal to victims about state indifference to and complicity in their suffering. Among the worst immunity provisions provided under Indian law is the one that protects those operating under the AFSPA. It is often used to prevent civilian prosecutors from prosecuting soldiers. AFSPA requires prior approval of the central government for civilian prosecutions of military personnel. That approval is seldom forthcoming. The Indian government claims that the soldiers responsible for human rights violations have to face military courts. Under the Army Act, the military may transfer a soldier from civilian to military custody for offenses that can be tried by a court martial.

## **KASHMIR**

In July 1990, AFSPA was invoked in the entire Kashmir valley and the area covering 20 km radius from the Line of Control in the twin border districts of Rajouri and Poonch. In August 2001, it was extended to the Jammu region. Leh and Kargil districts in Ladakh are not disturbed areas and the soldiers there do not have special powers that grant them immunity from any act of omission

and commission. AFSPA in Kashmir is seen through a military and political prism. It is not merely seen as a law that should continue or be dismantled based on the merit of the situation. Its defence is seen as an expression of Indian patriotism. The continuation of AFSPA is inevitable because of the terror exported by Pakistan combined with the one germinating within. It is true, that the Army has made supreme sacrifices to bring about a change in the situation. These sacrifices cannot be measured by the body bags that went home of the warriors or never reached there. It is a saga of their suffering for others in hostile situations and working with the single objective to bring about peace in the state, where politicians could hold elections and form governments. They have really saved Kashmir and Kashmiris. The security forces saved the situation by fighting Pakistan-sponsored militancy and the militants who came from places such as Sudan and Afghanistan. Nevertheless, the situation has changed now – physically. There is less violence, but there is no decline in the mindset of violent extremism.

In a report, titled “Denied: Failures in Accountability for Human Rights Violations by Security Force Personnel in Jammu and Kashmir”, leading international organization Amnesty International claims that the Act has allowed the security forces to get away with atrocities and to deny justice to the victims.<sup>1</sup> The report states that about 96% of the complaints against the army in Jammu and Kashmir have been dismissed as “baseless or false” or aimed at “maligning the image of Armed Forces”. As of December 2011, the army human rights cell had received 1,532 complaints from various parts of the country. Of these, only 54 were considered “true” and 129 military personnel had been prosecuted. The main fault lies, according to Amnesty, in the lack of transparency across institutions. The executive has fared miserably when it comes to ensuring justice for the victims of AFSPA. The impunity under Armed Forces Special Powers (Jammu and Kashmir) Act, 1990, is derived largely from section 7 of the law, which stipulates that prior permission from the state or central authorities is required to prosecute the alleged perpetrators in civil courts. After charges are framed by the police, the case file must be sent to the ministry of defence or the ministry of home affairs for permission to prosecute. Repeated efforts by the families to move the cases to civilian courts have proved futile. “To date,” the Amnesty report says, citing a Right to Information response from 2012, “the central government has denied permission to prosecute under section 7 of the AFSPA in every case brought against members of the army or paramilitary, or in a small number of cases, has kept the decision pending for years”. The defence ministry claims to have received 44 applications for sanction to prosecute since 1990. The sanction process is reportedly as opaque as the military courts. The reports states that victims’ families were rarely informed of sanction decisions and so were unable to challenge them. Victims’ kin have also found the military unwilling to part with information on inquiries into alleged human rights violations or the conduct of court-martials. Neither did it provide evidence for branding complaints “false”. Amnesty recommends that an “independent and impartial authority” should try all the violations committed under international law. Further, the requirement for executive sanction must be removed, that the jurisdiction of military courts be limited and prosecutions take place in civilian courts once criminal investigations have gathered sufficient evidence, and that a programme for reparations be established for the victims of human rights violations under AFSPA.

## **SITUATION IN NORTH EASTERN STATES**

### **NAGALAND**

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<sup>1</sup> Amnesty India, Report “25 years of AFSPA in J&K demonstrates a failure of accountability, claims Amnesty”, dated Jul 01, 2015.

AFSPA was enacted in 1958, before the birth of Nagaland in December 1961. AFSPA came in the context of the Naga rebellion in what was then the Naga Hills district of Assam — and has refused to leave more than 50 years after the new state was created, thanks to continued insurgencies by multiple rebel groups. But the situation has changed dramatically since the NSCN(M) — “the mother of all insurgencies” — began peace talks over 14 years ago, and most civil society groups in Nagaland are now opposed to the continuation of AFSPA. Civilians in Nagaland complain of the misuse of the AFSPA under which they have lived for 50 years. The presence of the armed forces is a part of their everyday life. Violence has affected almost every family. Soldiers have been responsible for untold killings and “disappearances,” and for sexual abuse and rape of women.

## **MANIPUR**

In Manipur, where the clamour for the repeal of AFSPA has been loudest — with Irom Sharmila on a hunger-strike since December 2000 — the government, on August 12, 2004, withdrew the Act in seven assembly constituencies comprising the Imphal municipal area. Yet, there have been several instances of the state police force getting involved in brutal extra-judicial killings of civilians, including a pregnant woman, in the capital. Torture, which includes beatings, electric shocks, and simulated drowning, is common. Arbitrary arrests and extrajudicial executions continue.

## **ASSAM**

Assam was the first state to have the AFSPA in 1958. The Act returned to present-day Assam on November 27-28, 1990, when the state was declared a ‘Disturbed Area’ in the wake of large-scale violence by the ULFA. The armed forces carry out abuses in the name of counterinsurgency operations and were shielded from accountability by the AFSPA. One of the severe abuses under the AFSPA in Assam has been the imprisonment of young children. A huge number of children between the ages of four and 12 have languished in different jails across the state. The unarmed children and their mothers were detained by Bhutanese soldiers in a 2003 counterinsurgency operation against militant bases in Bhutan. They were handed over to Indian authorities and were jailed. The children have also suffered sexual violence at the hands of the armed forces. Assam accounts for nearly half of the country’s encounter deaths registered by the National Human Rights Commission, government statistics show. AFSPA has been in force without a break ever since, except in the Guwahati municipal area, from where it was lifted about a decade ago. In November 2014, the Union Home Ministry extended the application of AFSPA in Assam for one more year in view of *“violent incidents caused by the underground outfits viz ULFA(I), NDFB(S) and the border areas of the state of Assam by underground outfits like GNLA, KPLT, UALA, ULFA (I), NDFB(S), NSCN (IM) and NSCN (K)”*.

## **MEGHALAYA**

AFSPA is not in force in Meghalaya despite a series of violent acts by armed insurgent groups including the most dreaded Garo National Liberation Army (GNLA). Nevertheless, areas within 20 km of the state’s boundary with Assam are under the purview of the Act. The Home Ministry has declared this 20-km belt “disturbed”, and armed forces deployed in Assam are permitted to go into this area in hot pursuit of rebel groups. The armed forces have committed numerous atrocities against civilians in Meghalaya under the auspices of the AFSPA. During “Operation Birdie” in 1997-98, many Khasi tribal women were reportedly raped. The Assam Rifles also used women as human shields, in violation of the laws of war, in a retaliation attack on the NSCN. The soldiers placed the muzzle of their guns on the women’s shoulders as they battled with the rebels. While the violence in Meghalaya has largely died down, widespread allegations of arbitrary detention, rape, and torture was never properly investigated.

## **ARUNACHAL PRADESH**



Three districts of the state — Tirap, Changlang and the newly-created Longding — had been under AFSPA since 1991, and the Centre on March 27 brought the whole state under it. In the state, a number of civilians have faced the brunt of the violence committed by militants from neighboring states and by the security forces. For example, Indian security forces assaulted villagers of Borduria during a search for National Socialist. However, strong protests by the state government and civil society organisations forced the central government to limit its application to the districts bordering Assam.

## **MIZORAM**

In the state, insurgency declined with the signing of the Mizo Accord on June 30, 1986. It is believed to be the only successful accord in the country so far. The signing of the accord simultaneously led to the withdrawal of AFSPA, which was in existence in the state since the time it was the Lushai Hills district of Assam in the mid-1960s. As in other areas militarized under the AFSPA, women in Mizoram were particularly vulnerable to violations by security personnel, including rape, sexual violence, and arbitrary detention.

## **JUSTICE VERMA COMMITTEE**

The Justice J.S. Verma Committee was formed to suggest certain amendments to the laws pertaining to the crimes committed against women. The Committee, in its report, recommended the review of the continuance of the Armed Forces (Special Powers) Act (AFSPA) in the context of extending legal protection to women in conflict areas. *“There is an imminent need to review the continuance of the AFSPA and AFSPA-like legal protocols in internal conflict areas as soon as possible,”* it said. *“This is necessary for determining the propriety of resorting to this legislation in the area(s) concerned.”*<sup>2</sup> In its report submitted to the Union Home Ministry, committee member Gopal Subramaniam said that as per the testimonies of the people from Jammu and Kashmir, Chhattisgarh, Odisha, Andhra Pradesh and the North-East, it was evident that there was a pressing need to try armed forces personnel guilty of sexual offences in conflict areas under the ordinary criminal law. The Committee suggested that there should be Taking cognizance of the complaints and reports of sexual assaults on women by men in uniform and the civil society’s demand for repeal of the AFSPA, the committee recommend an immediate resolution of “jurisdictional issues.” The report cited the Supreme Court’s observations on the said matter, i.e., that security forces should not be able to cover up under the AFSPA in cases of crimes like rape and sexual assault. *“Systematic or isolated sexual violence, in the process of Internal Security duties, is being legitimised by the Armed Forces Special Powers Act, which is in force in large parts of our country,”* the committee said.

The Committee stressed that women in conflict areas are entitled to the necessary security and protection that is afforded to citizens in India. The Committee further recommended that the crimes of sexual violence against women by member of the armed forces should be brought under the purview of the ordinary penal/criminal laws. In addition, the Committee recommended that special care must be taken to ensure the safety of the women who complain of such offences and associated witnesses from influence and threats. The Committee stated that special commissioners must be appointed for women’s safety and security in all areas of conflict in the country. The commissioners must be vested with sufficient powers to supervise and initiate action and set off criminal prosecution. *“This should be a subject under the regular monitoring of the special commissioners mentioned earlier,”* the committee said. It also suggested stringent adherence to laws related to

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<sup>2</sup> Smriti Kak Ramachandran , The Hindu, “Don’t allow Army men to take cover under AFSPA, says Verma”, dated Jan 24, 2013, <http://m.thehindu.com/news/national/dont-allow-armymen-to-take-cover-under-afspa-says-verma/article4337125.ece/>

detention of women during specified hours of the day. It said measures to ensure their security and dignity would not only go a long way in providing women in conflict areas their rightful entitlements, but also restore their confidence in the administration.

## **TRIPURA REPEALS ACT**

The state of Tripura has successfully withdrawn the Armed Forces Special Powers Act after 18 long years. This abandonment is an indication to the evenhanded employment of force and good governance. As per the data of the South Asia Terrorism, the number of insurgency related deaths (civil, security forces, militants) declined from 2009 when there were 11 casualties. The state saw none in 2013, the year after it recorded one death. This is in sharp contrast to 2004 when militancy in the state claimed 514 lives, including 453 civilians, 45 militants and 16 members of the security forces. *"Insurgency activities in the state are now reduced almost at zero. The demand for withdrawing the AFSPA has been persuaded at various levels, but we could not take a decision because the security forces did not clear it,"* Sarkar said while announcing the move.<sup>3</sup>

## **UNITED NATIONS AND AFSPA**

India is a signatory to the International Covenant on Civil and Political Rights. The Human Rights Committee has expressed its dismay in the year 1997 that *"some parts of India have remained subject to declaration as disturbed areas over many years."* The report stated that India, in effect, uses emergency powers for long periods without following procedures spelt out in a Covenant to which it is a signatory. The reference is to Articles 3 and 4 of the Covenant. In Article 3, the state parties *"undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."* However, in times of *"public emergency which threatens the life of the nation,"* they may *"take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation."* However, the right to life and the norms regarding the prohibition of torture, slavery and servitude are non-derogable. The UN questioned the constitutionality of the AFSPA under Indian law and asked how it could be justified in light of Article 4 of the International Covenant on Civil and Political Rights. On 23 March 2009, UN Commissioner for Human Rights Navanethem Pillay asked India to repeal the AFSPA. On 31 March 2012, the UN asked India to revoke AFSPA saying it had no place in Indian democracy. Christof Heyns, UN's Special Rapporteur on extrajudicial, summary or arbitrary executions said, *"During my visit to Kashmir, AFSPA was described to me as 'hated' and 'draconian'. It clearly violates International Law. A number of UN treaty bodies have pronounced it to be in violation of International Law as well."*

## **CONCLUSION**

Thus, in conclusion it can be accepted that AFSPA is an unjust and unbalanced legal provision that needs to be amended, if not repealed. The Act must be amended to make it citizen-friendly. All the cases of violation of human rights of the citizens must be addressed and those guilty must be punished for the offences committed by them. The contribution of the Army is not diluted in the light of the gross abuse of human rights committed under the Act. However, such unaccounted power given under the Act is dangerous and even though it is the reputed Army in question, the crimes committed cannot and should be ignored. India should not allow the future

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<sup>3</sup> Anubha Bhonsle, CNN IBN "Why Tripura's AFSPA withdrawal may have little bearing for rest of 'AFSPA states'?", dated May 28, 2015, <http://m.ibnlive.com/news/india/why-tripuras-afspa-withdrawal-may-have-little-bearing-for-rest-of-afspa-states-998247.html>



to be subjugated by violent paradigm such as the continuing use of AFSPA. The unfettered power has scarred many lives in the regions of North East and Jammu and Kashmir. It is time that people are relieved from the Act and are given the freedom to live without any fear and threat to their lives. The loss suffered by the people in these areas is unimaginable and the entire nation must come together to voice the cause and ensure that action is taken to address these concerns. It is time India gives space for democracy and its cherished values to reemerge instead of suppressing the genuine democratic voice of "*We the people*" which continues to remain excluded under the tyrannous rule.

