

## AFSPA - The Law and its Ramifications: An Analysis

**\*Dr. Bhanwri Sharma**

### **Introduction**

The July 8, 2016 verdict of Supreme Court of India held that armed forces cannot claim blanket immunity from prosecution, and that criminal proceedings can be instituted against armed forces personnel in cases of use of excessive force resulting in the death of any person. This historical judgment of the Supreme Court in Extra Judicial Execution Victim Families Association Manipur (EEVFAM) is not only an important milestone in the struggle of families of persons extrajudicially executed by the police and security forces in Manipur, but also for the whole of Northeast and Jammu and Kashmir. At the heart of this petition which demands an inquiry into the 1,528 cases of alleged fake encounters over the last 20 years by security forces and the state police is the Armed Forces (Special Powers) Act (AFSPA), 1958. The AFSPA, which was enacted ostensibly to tackle insurgency in the North East has been a bitterly contentious law proving to be ostensibly inimical to its espoused *raison d'être*. Dolly Kikon notes that 'The AFSPA is more than just a legal act. It is a security framework that has given rise to an AFSPA culture: a culture of terror and militarized societies. In particular, two terms in the Act, 'disturbed area' and 'suspicion', have created a culture of repression and intimidation.' In the midst of the binary created by the Indian Army and various (internally sparring) anti-state groups, the people of the 'disturbed areas' are in the middle of nowhere, have become simply 'collateral damage' of the long standing conflict.

### **The Law**

The AFSPA can be applied to areas in all states of the Northeast with the exception of Sikkim and it has been in operation in various parts of India's Northeast since 1958. It was also enforced in Jammu and Kashmir since 1990, after the Parliament approved the same AFSPA to quell terrorist activities. This Act is promulgated in those areas which are declared as 'disturbed' under the Disturbed Areas Act (DDA) by the governor of the state or the Ministry of Home Affairs of the Union. This Act when enforced bestows a wide range of special and extraordinary powers to the armed forces, including paramilitary forces such as the Border Security Force (BSF), Assam Rifles, Rashtriya Rifles, Sikh Regiment, National Security Guards (NSG), and others. Section 4 of the Act allows 'any commissioned

---

**AFSPA - The Law and its Ramifications: An Analysis**

*Dr. Bhanwri Sharma*

**78.1**

officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces' to fire 'even to the causing of death' upon any person acting in contravention of any law or order, any person carrying weapons or anything capable of being used as a weapon, and to prohibit the assembly of more than five people. Secondly, the Act allows armed forces personnel to arrest without warrant and with any necessary force '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.' Thirdly, the Act allows armed forces personnel to enter and search any premises without a warrant to 'make any such arrest' destroy arms, hideouts and to stop, search and seize any vehicle. Evidently, incidents of fake encounters, arrest, rape, assaults, pillage, kidnap and torture on trivial matters continue to occur during search operations, cordon and crackdowns from all over the 'disturbed areas'. The most significant part of the Act is Section 6, which ensures impunity to the armed forces by providing that no prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the central government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act. The AFSPA is highly prized by the military, which is unrelenting to demands that the Act be revoked for being barbaric, undemocratic and for escalating violence. Mr. P. Chidambaram, the former Finance Minister had stated that the Ministry of Defense (MOD) favors amendment of AFSPA into a more 'humanitarian law', however, the Indian armed forces oppose even reviewing AFSPA, let alone being repealed. The Army argues that the AFSPA is an essential tool to maintain peace and stability in a challenging region, rife with inter-ethnic clashes and political turbulence caused by recalcitrant armed groups, threatening national sovereignty with their separatist demands. The fundamental arguments given for this immunity is (i) to protect the armed forces from frivolous charges, as held in the Indrajit Barua versus State of Assam case, (ii) that the such powers are necessary to protect the army (iii) that the army's self discipline and adequate safeguards would prevent misuse, and (iv) that the army's internal investigation proceedings are sufficient to bring the culprit to account. The ground\_reality however is quite different.

### **Protests, Reports, Remonstrations and Commissions**

For decades, human rights groups and women's organizations in the Northeast have expressed opposition to human rights abuses in the region and to the AFSPA. In the late 1990s, an India-wide campaign was initiated in opposition to this Act, and mobilized support for its repeal. Since the 1990s major international human rights organizations such Amnesty International, Human Rights Watch, the Asian Centre for Human Rights, and several different United Nations Agencies have released reports on human rights violations under the AFSPA and made recommendations to the Indian Government. The AFSPA's explicit role in fostering violence in the region is well documented. Activism aimed at the repeal of the Act was reinvigorated following the alleged sexual assault and death in custody of a woman named Thangjam Manorama in Imphal, Manipur, India in July 2004. A group of 32 civil society organizations based in Manipur formed a coalition called the Apunba Lup to

---

### **AFSPA - The Law and its Ramifications: An Analysis**

*Dr. Bhanwri Sharma*

protest abuses under the AFSPA and call for its repeal. Others from the Northeast have expressed their opposition to the AFSPA through more extreme protests such as self-immolation, a fast until death (Irom Sharmila has been fasting for last 16 years, demanding the repeal of the act) or naked protests (Some Manipuri women stripped themselves in front of the Kangla fort, the bastion of Assam Rifles). The Manipur government set up Justice Upendra Commission to investigate Manorama's custodial rape and death but the concerned soldiers refused to appear before the Commission citing the lack of jurisdiction of the Commission on the Armed Forces due to the provision of AFSPA. Upon being approached by the Assam Rifles, the Guwahati High Court on 23 June 2005, pronounced that the Armed Forces were beyond the purview of the state government. However, it asked the Union Government to work upon the Upendra Commission's report. Both sides appealed and it was finally in August 2010, that the Guwahati High Court decreed that the Manipur government could act on the Upendra Commission's report.

The central government appointed the Justice Jeevan Reddy Commission in 2005. The Committee called the AFSPA too vague, a symbol of oppression, an object of hate, easily abused and an instrument of discrimination and high-handedness. "However, in tune with the general 'notions of national sovereignty, national security, national integrity, and national interest' the Reddy Commission did not recommend that the armed forces leave the Northeast, rather that the UAPA should be further revised to take on certain provisions of the AFSPA. In 2013, the Santosh Hegde Commission set up by the Supreme Court had found that all the six cases of alleged fake encounters it investigated were indeed so. In all these cases, the accused belonging to the combined force of the paramilitary Assam Rifles and the Manipuri Commandos, also investigated the allegations! Many such cases have been reported by various agencies. Many a commission such as Jeevan Reddy Commission 2005; Veerapan Moily's Administrative Reforms Committee 2007; Mohammad Hamid Ansari's Working Group on Confidence Building Measures in Jammu and Kashmir 2007; Santosh Hegde Commission 2013 have recommended for the repeal of the AFSPA. Human rights activists and academics have also urged for the same as it violates basic rights and international human rights and humanitarian law. Some have also pointed out to the lack of debate in the parliament while legislating on such an important issue.

### **Court Rulings, Amendments and Relief**

Judicial review of the Act was excruciatingly slow. In 1972, the AFSPA was amended to confer the power to declare an area "disturbed" on the Union government, specifically the Governor who is appointed by the President and represents the Union in states. This power was previously vested in the state government. The amendment also extended the AFSPA to other states in the Northeast. In the Naga People's Movement for Human Rights vs. Union of India in November 1997, Supreme Court upheld the constitutional validity of the Act after hearing petitions challenging it filed in 1980, 1982, 1984, 1985 and 1991. The court ruled that the powers given to the army were not "arbitrary" or

---

## **AFSPA - The Law and its Ramifications: An Analysis**

*Dr. Bhanwri Sharma*

“unreasonable” and concluded that they did not violate the contested provisions of the Indian Constitution. The only consolation was that the declaration of an area as “disturbed” should be reviewed periodically in six months. This practically was nullified by declaring some areas as disturbed for decades as there was no limit on renewal of the declaration. The designation ‘disturbed’ is cannot be subjected to judicial review, nor can it be contested by state governments, let alone local governments in the said area or concerned civil society actors. With respect to the “prosecution, suit or other legal proceeding” of army personnel subject to “sanction” the Court ruled that since the order of the central government refusing or granting the sanction is subject to judicial review, the “central government shall pass an order giving reasons.” The court also ruled that safeguards in the form of a list of “Dos & Don’ts” for security forces are legally binding. The judgment of the Supreme Court in Extra Judicial Execution Victim Families Association Manipur (EEVFAM) and Another v Union of India and Another is an important milestone in the struggle of families of persons extra judicially executed by the police and security forces in Manipur. On 8 July 2016, the Court held that armed forces cannot claim blanket immunity from prosecution, and that criminal proceedings can be instituted against armed forces personnel in cases of use of excessive force resulting in the death of any person. In order to meet the “requirement of a democracy and the requirement of preservation of the rule of law and the preservation of individual liberties”, the Supreme Court mandated that, all allegations of excessive use of force resulting in death of any person by the police and security forces in Manipur, are to be thoroughly inquired into, regardless of the alleged identity of the victim, be it a militant or an insurgent. This would prevent any misuse or abuse of powers by members of the armed forces.

The inquiry will ascertain whether the deceased was in fact an enemy who was killed in an exchange of fire or a victim of a fake encounter. Even if it is established that the deceased was in fact an “enemy,” “the question for enquiry would still remain whether excessive or retaliatory force was used to kill that enemy”. At this point, the Court pointed out the anomalies in the internal inquiry conducted by the army as well as the magisterial inquiry, and did not preclude the possibility of judicial inquiry or an inquiry by the National Human Rights Commission (NHRC) or an inquiry under the Commissions of Inquiry Act, 1952, once detailed information about each of the 1,528 cases is collected.

### **AFSPA and Human Rights**

The exercise by the armed forces of the unchecked powers to arrest, search, seize and even shoot to kill conferred under Section 4 of the Act has resulted in large-scale violation of the fundamental rights of the citizens under Articles 14,19,21,22 and 25 of the Constitution. Amnesty International has received reports that the AFSPA has in practice facilitated the torture and ill-treatment of people while in custody. The absolute authority of the armed forces to shoot on sight on mere suspicion and for an offence as basic as violating an order is a direct assault on the fundamental right to life. Both domestic and international law have established supremacy of the right to life from

---

### **AFSPA - The Law and its Ramifications: An Analysis**

*Dr. Bhanwri Sharma*

which no derogation is permitted even in times of public emergency which threatens a nation. Article 22 of the Indian Constitution lists many safeguards on preventive and punitive detention including, right to be informed of the grounds of arrest; right to consult; and to be defended by a lawyer; the right to be produced before a magistrate within 24 hours; and freedom from detention beyond the said period except by order of the magistrate. Under international law, arbitrariness has been defined as not just being against the law, but interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. Understandably the Section 6, which ensures impunity to the armed forces draws the harshest rancor from society at large as it violates not only the spirit of the constitution, but also a very basic tenet of democracy. It is a direct contravention of the fundamental rights enshrined in the Constitution. The right to an effective remedy is implicit in article 32 of the Indian Constitution. The fundamental rights in the Constitution of India include a right to enforceability of these rights. The independence of judiciary even in times of emergency, when certain rights are per force suspended, is of critical significance in any democracy. The Constitutional (44th Amendment) Act, 1978 of the Indian constitution, has ascertained that right to life and liberty (Article 21) and certain rights under Article 20 cannot be suspended even in times of emergency. The AFSPA requirement of mandatory sanction of the Union executive for prosecution substantially frustrates the role of judiciary and compromises access to justice, thereby thwarting democracy.

### Conclusion

While there is no agreement on how to begin to resolve problems in the region, the AFSPA is still a common ground, uniting people from diverse positions against the injustice perpetrated by the Indian state and its proxies. India's defends the AFSPA is on the grounds that immunity for security forces is needed so long as there are situations that, in the government's view, require intervention of the armed forces. However, to have the situation for 58 years unequivocally implies the failure of the state in running civil administration with its political and administrative paraphernalia, relying on army on an everyday basis for decades together. The government has to ensure that it would not condone any violation of human rights through various mechanisms such as prompt, thorough and impartial investigation of any alleged violation, bringing those found responsible promptly to justice, provision of adequate reparation for the victim.

**\*Associate Professor  
Department of Political Science  
Seth R.L. Saharia Govt. P G College, Kaladera**

**Reference**

1. Kikon, D. 2009. The predicament of justice: Fifty years of Armed Forces Special Powers Act in India. *Contemporary South Asia* 17, no. 3: 271–82
2. Ministry of Home Affairs 1958/1998, Section 4a.
3. Ministry of Home Affairs 1958/1998, Section 4d.
4. Kikon, D. 2009. The predicament of justice: fifty years of Armed Forces Special Powers Act in India. *Contemporary South Asia* 17, no. 3: 271–82]
5. Amnesty International 2005; Human Rights Watch 2008; South Asia Human Rights Documentation Centre 1995.
6. BBC-[http://news.bbc.co.uk/2/hi/south\\_asia/3599254.stm](http://news.bbc.co.uk/2/hi/south_asia/3599254.stm).
7. <http://manipuronline.com/headlines/nude-protest-at-kangla-movement-against-afspa-revive-memory-of-04-uproar-hc-allows-state-govt-to-open-manorama-probe-report/2010/09/06>.
8. Chaise, C., and S. Hazarika. 2009. The state strikes back: India and the Naga insurgency. Policy Studies series, 52. Washington: East–West Center.
9. Singh, U.K. 2007. The state, democracy and anti-terror laws in India. New Delhi: Sage, 29.
10. Baruah, S. 2007. Postfrontier blues: Toward a new policy framework for Northeast India. Policy Studies series, 33. Washington: East–West Center, 5.
11. Fernandes, W.(2013). AFSPA: Who rules India?, *The Hindu*. Retrieved from <http://www.thehindu.com/opinion/oped/afspawhorulesindia/article4407851>; Hazarika, S. (2013). An abomination called AFSPA, *The Hindu*. Retrieved from <http://www.thehindu.com/opinion/lead/anabominationcalledafspa/article4404804>.
12. See India: If They Are Dead Tell Us. “Disappearances” in Jammu and Kashmir. 02/03/1999, AI Index: ASA 20/002/1999.
13. South Asian Human Rights Documentation Centre [SAHRDC] 1995.
14. See India: If They Are Dead Tell Us. “Disappearances” in Jammu and Kashmir. 02/03/1999, AI Index: ASA 20/002/1999.
15. 2016 SCC OnLine SC 685 [Bench: Madan B Lokur and Uday Umesh Lalit JJ].
16. EEVFAM, para 135.
17. EEVFAM, para 144.
18. Amnesty International, 2005, AI Index: ASA 20/025/2005.
19. Article 4, International Covenant on Civil and Political Rights, 1966.
20. United Nations, Human Rights Council, General Comment No 8, Right to Liberty and Security of Persons (Article 9), ICCPR, 30 June 1982, available at

- [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?OpenDocument).
21. Gaikward, N. 2009. Revolting bodies, hysterical state: Women protesting the Armed Forces Special Powers Act (1958). *Contemporary South Asia* 17, no. 3: 299–311.
  22. Sanjib Baruah, “AFSPA: Legacy of Colonial Constitutionalism,” *Seminar Magazine*, No 615, November 2010 available at paper [http://www.indiaseminar.com/2010/615/615\\_sanjib\\_baruah.htm](http://www.indiaseminar.com/2010/615/615_sanjib_baruah.htm).