



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Analysis of the Link between AFSPA and Human Rights

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Received 21 July 2021; Accepted 13 August 2021; Published 17 August 2021

The Armed Forces Special Powers Act, 1958 (AFSPA) is an act operative in the North-East regions of the Indian Sub-continent as well as in the State of Jammu and Kashmir. AFSPA provides for the use of armed officials in ‘disturbed areas’ in order to secure national integrity and sovereignty. The state and its officials consider the Act as a necessary ingredient of national security as it helps them work in times of insurgency, fight terrorism and protect sensitive areas or borders. However, the act has created various issues apropos Human Rights violations. Numerous Human Rights activists have made efforts to urge the Government of India to recognize the immediate need to repeal the Act. The Act gains concerned attention for grave human rights abuse perpetrated by the government forces and the armed forces, in the areas where it is relevant. “AFSPA raises human rights concerns for it is said to be violative of Right to life and liberty, an absolute right guaranteed under Article 21 of Indian Constitution, and rights guaranteed under International Covenant on Civil and Political Rights (ICCPR), to which India is a party.” The Act, thus, is surrounded by controversies and continues to be an area of delegation. This paper critically analyses the legal position of the Armed Forces Special Powers Act, 1958.

Keywords: *armed forces, human rights, impunity.*

INTRODUCTION

The Armed Forces Special Powers Act (AFSPA) of 1958 is a law that empowers the army and security forces to enter into a property and make arrests without a warrant. It also incorporates

a large scope of impunity that officers receive as no individual or group can start a legal action against any instance performed or said to be performed under the provisions of AFSPA, even though the performed or purported may not have been sanctioned by the Central Government. AFSPA was supposedly an instrumental act for the British that would be used for the suppression of the 'Quit India Movement' phase, amongst various other phases of Indian independence movements. AFSPA came into being in September of 1958, through an Ordinance. Its amendment in 1972 conferred the Union Government with powers to declare an area 'disturbed', specifically upon the Governor of the state, appointed by the President of India. The law was primarily enacted in the North-eastern states and then extended to districts of Jammu and Kashmir. Use of the term 'armed forces' incorporated paramilitary as well as armed forces. Although AFSPA concerns national security and integrity, it violates rights enshrined in the Constitution as well as ICCPR. Abuse of human rights by officials and armed groups disturbs the balance maintained by humanitarian rights. All states under International human rights laws ought to protect their population from violent acts of crime. These also include acts committed by armed groups. International human rights law includes the Right to Life and Liberty, the Right to Remedy, the Right to be free from torture, degrading treatment, and punishments as enshrined in ICCPR. The Indian sub-continent has been a part of the ICCPR since 1979. Concerns raised, in accordance with humanitarian and international laws, calls for revocation of AFSPA.¹

LEGAL HISTORY

"The Supreme Court of India limited the excessive grant of powers to the armed forces under the Armed Forces Special Powers Act." The ruling relates to excessive grant of power under Section 3 of the Act, i.e., "the Governor of the State or the Administrator of that Union territory or the Central Government, in either case, if of the opinion that the whole or any part of such State or Union territory, as the case may be, is in such a disturbed or dangerous condition"², then that part or whole can be declared as a "disturbed" region. The Supreme Court enjoined

¹ Amnesty International, 'India: Briefing on the Armed Forces (Special Powers) Act, 1958' (Amnesty, 2005) <<https://www.amnesty.org/en/documents/ASA20/025/2005/en/>> accessed 10 July 2021

² Armed Forces (Special Powers) Act 1958, s 3

for a review on an interval of every 6 months in order to preserve and strengthen the rights of the arrested persons. It also determined the pre-existing list of “Do’s and Don’ts” of the Army to be legally binding. However, AFSPA continues to fall short on international standards set by treaties India is a part of and International laws. Judicial review of 1997, collective of petitions from 1980, 1982, 1984, 1985, and 1991, upheld the constitutional validity of the Act. It was concluded that provisions of the Indian Constitution were not violated and that the powers granted under the Act were “arbitrary” and not “unreasonable.”³

ANALYSES OF HUMAN RIGHTS AND ASFPA

Provisions of AFSPA provide sweeping powers to armed groups and individuals. These include the power to shoot, to kill people in required situations, and to arrest without a warrant. The Act is a shield for the forces as it protects them from prosecution and works as “virtual immunity”. Prosecution of officials requires prior permissions from the Central Government, which are generally declined. Acts under the provisions of the Act have seemingly facilitated extra-judicial killings, torture, rape, ill-treatment, etc. The Act is a threat to the rights of the local community as well as the Right to Life and Liberty (*Article 21 of the Indian Constitution*).⁴ Section 4 of AFSPA accounts for the Special Powers that are granted to officials and armed groups. Section 4(a) reads – “if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances.”⁵ The section evidently permits and incorporates the scope of violation of rights. It lacks the mechanism of accountability and investigation apropos the discretion. Section 4 violates an individual’s Right to Life as it allows to open fire in cases of contravention of law and order

³ Amnesty International (n 1)

⁴ Amnesty International, 'The Armed Forces Special Powers Act: Time for a Renewed Debate in India on Human Rights and National Security' (Amnesty, 2013)

<<https://www.amnesty.org/download/Documents/12000/asa200422013en.pdf>> accessed 10 July 2021

⁵ Armed Forces (Special Powers) Act 1958, s 4(a)

and not only in cases of self-defense. The ICCPR states that “No one shall be arbitrarily deprived of his life”⁶ and thus provides for an intangible Right to Life.

Sections 4(c) and 5 of AFSPA derogate an individual’s Right to Liberty⁷ and endangers one’s security. Section 4(c) allows for arrest, without any warrant, of a 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”⁸ and force may be used as deemed necessary to bring the person under arrest. Additionally, Section 5 speaks for the handing over of the arrested person to the nearest police station for further procedures. The stated sections contradict Article 9 of the ICCPR. The article states that “...No one shall be subjected to arbitrary arrest or detention...[A person must] be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”⁹ The Human Rights Committee, in the case of *A v. Australia*,¹⁰ explained Article 9 stating – “the notion of “arbitrariness” must not be equated with “against the law” but be interpreted more broadly to include such elements as inappropriateness and injustice.” Detention and arrest of individuals with reasonable suspicion amounts to “preventive detention” rather than “detention of suspects”, and thus violates Human Rights of an individual. Furthermore, Article 9 provides that the arrested or detained individual should be brought before a judge or a person authorized by the law to exercise judicial powers, at the earliest. The Supreme Court, in 1997, ruled that the arrested individual should be produced before the court within 24hrs. of the arrest.¹¹ However, according to the reports received by

Amnesty International, this rule has often been disregarded and individuals have been in custody for longer than the recommended time period.¹² Powers bestowed upon the armed and paramilitary forces under the Act have led to abuse of Human Rights shielded by impunity. Article 7 of the ICCPR provides against ill-treatment and torture. “No one shall be

⁶ International Covenant on Civil and Political Rights 1976, art 6

⁷ Constitution of India, art 21

⁸ Armed Forces (Special Powers) Act 1958, s 4(c)

⁹ International Covenant on Civil and Political Rights 1976, art 9

¹⁰ *A v Australia* CCPR/C/59/D/560/1993

¹¹ *Naga People's Movement of Human Rights v Union of India* (1998) 2 SCC 109

¹² Amnesty International (n 1)

subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”¹³ However, reports show that individuals under arrest or in detention experience torture and inhuman treatment. The case of Thangjam Manorama, a suspected member of the People’s Liberation Army, arrested by Assam Rifles allegedly showed signs of sexual assault and torture. Another case, of Mr. Thoudam Nanao Singh, allegedly showed signs of similar abuses, perpetrated by the Sikh Regiment. Various similar cases and cases of disappearances have been reported from all over the North-East and Jammu & Kashmir.¹⁴

Article 32 of the Indian Constitution guarantees remedies for the enforcement of rights warranted in the Constitution. Right to Remedy is implicitly provided under the article for any hindrance in the enforceability of fundamental rights guaranteed in the Constitution. Article 2(3) of ICCPR states that “...[the state must] ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” However, AFSPA severely reduces the scope of remedies available on the whole as initiation of any prosecution of armed personnel requires sanction/permit from the Central Government. Provisions of AFSPA specifically state that “no prosecution, suit or other legal proceedings 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.”¹⁵ The Supreme Court, in the case of *NPMHR v India*¹⁶, articulated that Section 6 of AFSPA, apropos granting of sanction, is subjected to judicial review. The Central Government ought to provide justifications or reasons for the decline of the sanctions. Nevertheless, this does not reduce the scale of abuse and violation of the rights. Section 6 of the Act reduces the horizons of available remedies and promotes impunity of the officials. Furthermore, Section 19 of the Protection of Human Rights Act (PHRA), relates to the procedure of remedy in cases involving armed forces and prevents the National Human Rights Committee (NHRC) from investigating the extent of the truthfulness of alleged violations of human rights.

¹³ International Covenant on Civil and Political Rights 1976, art 7

¹⁴ Amnesty International (n 1)

¹⁵ Armed Forces (Special Powers) Act 1958, s 6

¹⁶ Naga People's Movement (n 11)

CONCLUSION

“The Armed Forces (Special Powers) Act, 1958 was brought in as a temporary measure for a term of one year. However, it was never lifted completely and was rather amended in 1972 and extended to other areas in 1990.” Articles 4(1) and 4(3) of ICCPR state that “...the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law...” and that “Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.” Declaration of a region as “disturbed” and granting of powers is supposedly a part of an “undeclared emergency regime.”¹⁷ However, the Supreme Court ruled that the Act “does not displace civil powers of the State by armed forces” and it does not emulate to “Proclamation of Emergency under Article 352 or a proclamation under Article 356 of the Constitution.”¹⁸

Justice Verma Committee, popularly referred to as The Committee on Amendments to Criminal Law, submitted a report on laws against sexual assault. The report, amongst others, contained a section solely on AFSPA’s impunity against sexual assault and suggested a review of the Act. Additionally, it recommended that sexual assault on women, perpetuated by armed officials, should be brought under the preview of ordinary criminal law, and that prior sanction of prosecution from the Central Government should be removed. Furthermore, Justice Hedge Commission Report of 2013, on extrajudicial killings between 1978 and 2010, echoed AFSPA as a symbol of oppression, hate, and discrimination. The Act has also been scrutinized by UN Special Rapporteurs such Rashida Manjoo, Cristof Heyns, Margaret Sekaggya, and many more, for it promotes extra-judicial killings and violates human rights broadly.¹⁹ AFSPA has faced opposition and criticisms nationally as well as internationally.

¹⁷ Amnesty International (n 1)

¹⁸ Naga People's Movement (n 11)

¹⁹ Amnesty International (n 4)

However, many seem to refer to AFSPA as a last resort in times of emergencies and consider it vital for national security. It is also promoted as a necessary measure for controlling internal conflicts and maintaining public order.²⁰ The Government of India needs to address the ambiguity surrounding the Act and find a middle ground, i.e., to respect people's Rights to Life and liberty, Right to remedy, non-tolerance towards violation of rights by the forces, and the same time secure a mechanism to maintain national integrity and security.

²⁰ Xerxes Adrianwalla, 'AFSPA: National necessity or human rights violation?' (Gateway House, 2012) <<https://www.gatewayhouse.in/afspa-national-necessity-or-human-rights-violation/>> accessed 18 July 2021