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DOES AFSPA GIVE TOTAL IMMUNITY TO ARMED FORCES FOR KILLING CIVILIANS?

-Snigdha Khandelwal, student, Nalsar University of Law

Armed Forces Special Powers Act is a Central Act enacted in 1958 which provides protection to soldiers from any legal proceedings against them, who open fire or use force, which then results in death of any person operating in designated 'disturbed areas'.¹ A disturbed area can be defined as an area where there is necessity of use of armed forces in civil power, declared under Section 3 of the AFSPA Act.² It is currently in force in Assam, Nagaland, Manipur, three districts of Arunachal Pradesh and areas administered by eight police stations of Arunachal Pradesh on Assam border.³ In Jammu and Kashmir, the Armed Forces (Jammu and Kashmir) Special Powers Act of 1990 came into force.⁴ North-East India has been one of the troubled regions in the process of nation-building. This is why it has assumed the status of 'security zone' from the Government of India.⁵

The AFSPA finds its genesis in the Colonial India, enacted in 1942 known as The Armed Forces Special Powers Ordinance of 1942, to suppress the Quit India Movement.⁶ After Independence, the same ordinance was re-invoked in 1947 to deal with internal security caused by the Partition of India. In 1958, this ordinance was replaced with the Act and the Bill to introduce the same was done by the then Home Minister of India G.B. Pant, stating reasons to protect people from 'arson, murder, loot, dacoity, etc.', committed by certain misguided sections.⁷ AFSPA secured the title of 'permanence of the temporary', in the sense that this was a temporary measure that was adopted to deal with a specific situation but gradually, it acquired a status of permanency.

¹ The Armed Forces (Special Powers) Act, 1958, No. 28, Acts of Parliament, 1958 (India).

² Esha Roy, *what is AFSPA, and why states in North-East India against it*, THE INDIAN EXPRESS, Dec 11, 2021.

³ *Id.*

⁴ *Id.*

⁵ Akhil Ranjan Datta, *INDIAN STATE' AND COLONIAL APPARATUSES: CAN PEACE BE ACHIEVED IN NORTHEAST INDIA BY VIOLATING PEOPLES' RIGHTS*, 73 INDIAN JOURNAL OF POLITICAL SCIENCE, 283-298 (2012).

⁶ Ayesha Jain, *The Armed Forces Special Powers Act (AFSPA) & Why it Inspires Dissent*, THE QUINT, Dec 13, 2021.

⁷ *Id.*

AFSPA gives authority to soldiers to take necessary steps like power to use force like open fire even to the extent of causing death under Section 4 (a), power to destroy hide-outs, training camps of militants, etc. in Section 4 (b), power to arrest and enter and search any premises without any warrant under Section 4 (c) and Section 4 (d) respectively.⁸ The same when assisted with Section 6 which provides that no legal proceedings or actions will be taken against armed forces unless the prior sanction of Central Government⁹ for the acts committed by them, aggravates the chances of it being misused. However, this Act has one limitation attached to it in Section 4, that the authority to cause death is contextually limited by providing that such action can only be taken if the officer considers it necessary to do so to maintain public order and after duly notified that consideration may be required.¹⁰ The judgement given in *Extra Judicial Execution Victim Families Association v. Union of India*¹¹ made it clear that there are no immunities provided to the perpetrator of offences if the death caused by them is unjustified. The Act further stipulates those measures can be taken against those who violate public order, banning gatherings of five or more people.

This Act is a threat to aspects of democracy since it contravenes the normal law of the land by placing some citizens on unequal footings with other citizens of the country. It also affects the federal structure of our country since ‘law and order’ is a state subject.¹² Even though the Act mentions dealing only with those people who are in violation of law, it affects the local people too, once the state has been declared as ‘disturbed area’. Therefore, there have been several attempts to challenge the constitutionality of this Act. The apex court by a unanimous decision in the case of *Naga People’s Movement of Human Rights v. Union of India*,¹³ 1998, upheld the law stating that the Act does not impart arbitrary powers to the state to declare an area as a ‘disturbed area’. The court examined the law primarily in terms of legislative capacity and acknowledged that the Parliament has the power to enact the law. However, the Court provided with the time period for which there can be deployment of armed forces, which is only until a period of normalcy is achieved. The court also noted that it is “desired” for state governments to consult with the central government before declaring an area a “disturbed area”; the declaration must have a deadline and there must be a periodic review of the declaration that

⁸ *Id.*

⁹ Sneha Rao, *Does AFSPA give total immunity to armed forces for killing civilians*, LIVE LAW. IN, Dec 6, 2021.

¹⁰ *Id.*

¹¹ *Extra Judicial Execution Victim Families Association v Union of India*, (2016) 14 S.C.C. 578 (India).

¹² *supra* Note 5.

¹³ *Naga People's Movement of Human Rights v Union of India*, (1998) 2 S.C.C. 109 (India).

has expired for 6 months. While exercising the powers conferred on him or her by the AFSPA, the authorized officer must use the minimum force necessary to act effectively, and the authorized officer must strictly adhere to the “Do’s and Don’ts” issued by the military.

However, this does not quite prove to be effective. In 2004, there was a huge protest against this Act following the extrajudicial execution of a woman and therefore, a committee was formed ‘Committee to review the Armed Forces Special Power Act, 1958’ which recommended to repeal the said Act but it was not followed.¹⁴ The Act has been described as ‘draconian’ by Human Rights’ Organisations. National Human Rights Commission and Asian Centre for Human Rights have alleged that the armed forces have carried out extra judicial killings and various human rights violation, under the blanket of this Act.¹⁵ The Act instead of safeguarding security, has costed lives of the common man. There have also been instances of false encounters by armed personnel in order to get promotions and rewards in border and conflict zones.¹⁶ Another committee was constituted under the Retired Supreme Court Judge of India, Justice Jeevan Reddy, ‘Administrative Reforms Commission’ in its 5th Public Order recommended to repeal the Act and incorporate some of its provisions in UAPA, 1967.¹⁷ The same was again rejected by the Central Government. The famous Justice Verma Committee which was set up in 2012 to review laws against sexual assault also urged for an immediate review of the Act and requested to bring some crimes involving sexual violence against women by armed forces under the ordinary criminal law, thereby, diluting the prior approval requirement of Central Government to initiate a law suit against the armed forces.¹⁸

The army on the other hand is in favour of the Act as, according to them, repealment of this law will make their operations ineffective in difficult conditions.¹⁹ AFSPA continues to be a rallying point to express bitterness against the Indian government in Northeast India. Upholding the rule of law has also helped rebel groups create their legitimacy to survive and operate in the region and has generated huge hostility and anger among the youth against the

¹⁴ supra Note 9.

¹⁵ Adfar Rashid Shah, *Fallout of the Continued Use of the AFSPA*, 46 ECONOMIC AND POLITICAL WEEKLY, 5, 2011.

¹⁶ *Id.*

¹⁷ supra Note 9.

¹⁸ *Id.*

¹⁹ *Id.*

Government and hence, to come out in violent protests.²⁰ Therefore, it is high time for the Union to have a re-look at the Act and take reasonable measures.

²⁰ *Id.*