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## **ARMED FORCES (SPECIAL POWERS) ACT, 1958 (AFSPA): A NEED FOR REFORMS AND ALTERNATIVES**

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### **ABSTRACT**

One of the most debated laws in the security-law nexus in India is the Armed Forces (Special Powers) Act, 1958 (AFSPA) which was enacted to reduce insurgency and domestic strife in specific regions of the country. The Act was created in a manner that was supposed to allow the armed forces to maintain social order and the national integrity and over time the sustained enforcement of AFSPA has raised considerable worrying consequences to the constitutional and human-right aspect. This treatise is a critical inquiry in the lenses of constitutional protections, judicial review, and international standards, such as human-rights norms. It highlights the issues of excessive use of force, legal immunity against criminal charges and the consequences of undermining confidence in the civilian and democratic accountability.

**Keywords:** AFSPA, National security, Human rights, Constitutional Law, Disturbed areas.

## **Introduction**

Armed Forces (Special Powers) Act, 1958 (AFSPA) remains among the most debatable laws to be discussed in the context of the constitutional and security legislation in India. AFSPA was enacted as an attempt to counter unusual internal violence and insurgency; the law grants exclusive powers to the armed forces, such as prerogative against the use of lethal force, creation of warrantless arrest orders, and searching operations based on pure suspicion. Initially envisioned as a policy being a temporary, extraordinary act that protects the national wholeness, its prolonged implementation in disturbed areas, specifically in parts of the Northeast and Jammu & Kashmir, has made it an almost permanent aspect of the policy in territories wracked by conflict. The crux of the matter about AFSPA lies in the very fact that the necessity of national security creates the tension with the constitutional rights to the essentials.

## **MAIN BODY**

Armed Forces (Special Powers) Act, 1958 (AFSPA) came up as a legislative reaction to peculiarities of internal security faced by the post-independent India. Its historical precursors go back to colonial founded emergency laws, specifically the Armed Forces Special Powers Ordinance of 1942, issued by the British to suppress Quit India Movement. Despite being passed in a completely different constitutional and democratic environment, AFSPA had the benefit of inheriting the reasoning of giving extraordinary powers to the armed forces in circumstances that were deemed to be threatening the social order and the sovereignty of the nation. The post-independence India saw various conflicts and insurgency activities and the most serious one took place in the Naga Hills of Assam involving armed resistance of the Indian state in 1950s. The failure of current policing measures to deal with organised insurgency led the Parliament to pass AFSPA in 1958. This is the legislative purpose of AFSPA, as stipulated, that is to empower the armed forces with assisting civil authorities to the preservation of the social order in the territory of the so-called disturbed areas. Section 3 of the AFSPA permits the central government or a governor of any state to declare any area to be a disturbed area at his or her subject satisfaction on the need to deploy armed forces. Interestingly, the Act does not specify objective requirements, time constraints and legislative checks and balances on such statements and thus provides a lot of discretion to the executive powers. AFSPA becomes active once a region is proclaimed to be disturbed area. In sections 4

and 6, the operating framework of the Act is contained. Section -4 authorises the use of force (intermediate or lethal) on any individuals violating law or order by commissioned officers, warrant officers, non-commissioned officers and other authorised personnel. It also allows arrest without a warrant, search and seizure without prior court sanction and destruction of arms caches or fortified posts. These authorities are sanctioned by the notion of necessity in the operation in hostile environments where the standard authorities face significant constraints in enforcing the law. Section 6 provides immunity to personnel of the armed-forces by requiring the sanctioning of the central government in advance of some prosecution, suit, or legal action being taken against acts performed under the Act. This clause is the most controversial aspect of AFSPA, which practically subjects army officers to the jurisdiction of criminal jurisprudence, which is incredibly questionable in terms of accountability and the rule of law. According to critics, demand of prior sanction is a banner to abscond judicial review, which contributes to the culture of impunity. Constitutionally, the AFSPA is passed in accordance with the Entry 2A of the List 1 (the Union List) and Article 355 of the Indian Constitution and which places upon the Union the responsibility of protecting states against internal unrest.

The contact with the AFSPA in the courts has attempted to achieve the harmonization of the constitutional rights and national security needs. *Naga People movement of Human rights Vs. Union of India (1997)*. The Supreme Court of India affirmed in anti-terrorism operations in Union of India that the constitutional validity of the AFSPA did not bring constitutional safeguards like the regular review of declarations of disturbed areas of practice and proportional expediency in force. However, the Court never declared the abolition of Section 6, which permits the viability of such executive immunity accompanied by some checks. Essentially, the historical development and legislative structure of AFSPA indicates the challenge of the Indian State to control internal security of the constitutional democracy. Its sweeping discretionary authorities, accountability structure are persistence even after its law in longevity have been conceived as an emergency procedure to withstand insurgency and to maintain the integrity of a territory and they have spawned enduring legal and ethical disputes. This historical and legislative background is critical to understanding modern requirements of changes and also in examining the options of alternatives to AFSPA.

Armed Forces (Special Powers) Act, 1958 (AFSPA) remains among the most controversial corresponding legislation of internal-security phenomena in India with respect to its far-

reaching and enduring constitutional and other-human-rights ramifications. Despite the intention of the Act to be applied in extraordinary law and order circumstances during the event of insurgency, the scope of powers and immunity granted is of major concern in terms of being compatible with the constitutional scheme, more so, Part III of the Constitution which revolves around Fundamental Rights. On the constitutional level, AFSPA is also often criticized to violate Article 14 (Right to Equality), Article 19 (Freedoms of speech, movement and forming association) and Article 21 (Right to Life and Personal Liberty). Section 4 permits armed forces members to exercise force up to the point of death depending on a reasonable suspicion alone.

Despite the constitutional validity of AFSPA which had been affirmed by the Supreme Court in the case of *Naga people movements of Human Rights v. Union of India* it equally stressed the necessity of a regular reinterpretation and a strict adherence to instructions in order to avoid abuse. This is especially a violation of the ICCPR provision of accountability because there are no independent investigations of alleged abuses. Democratically and federally, the extended use of AFSPA has resulted in some chilling effect to civil liberties and political expression in the areas it has been applied. Movement limitations, gatherings and life in general have become a normalized state of exception with military necessity becoming an order of the day that supersedes civilian government. Such a militarization of civilian territory does not only dilute the local administrative institutions but also creates an alienation of populations in the long run hence frustrating the very purpose of ensuring normalcy and constitutional order. The Supreme Court in the last couple of years taken a more rights-oriented stance especially in case of *Extra Judicial Execution Victim Families Association (EEVFAM) v. Union of India*, where it was declared that the claim of fabricated encounters had to be investigated without references to the AFSPA, it was stated that such investigation had to be conducted independently even in the areas under AFSPA. This was a significant affirmation of the fact that constitutional protection never stops acting in turbulent regions. However, judicial intervention will not be good enough without a legislative change. Altogether, AFSPA is a multifaceted constitutional dilemma: the law that was created to save national wholeness and functions in a manner that tends to weaken the most basic rights and public responsibility. Considering the constitutional and human-rights issues in this regard therefore becomes critical to justice and the rule of law as well as the objective of attaining sustainable peace and legitimacy in the conflict affected areas.

The extensive impact of the Armed Forces (Special Powers) Act, 1958 has had a far-reaching and complex effect on civil society and governance in the territories where it has been

exercised, and especially in some areas of North-East India and Jammu and Kashmir. Even though the Act was initially designed to meet the extraordinary security exigencies incited by insurgency and armed rebellion, the continued use of the act has brought a substantive matter of concern in terms of democratic governance, civil liberties as well as the nexus between the state and its citizen. On the civil society level, AFSPA often relates to an overall sense of fear and mistrust. One particular harmful consequence has been the loss of the trust of the population in the institutions of the state. Democracy is reliant on the rightfulness of the power and the approval of the ruled. The immunity test of AFSPA found in Section 6 as the requirement that the prosecution of armed forces members can only occur upon the advance sanctions of the central government has drawn significant critiques due to its impeding of accountability. The frequency of refusals or lack of passage of sanctions indicates the opinion that victims have little access to justice. This does not only destroy the trust of people in the criminal-justice system but it also delegitimises the rule of law in the concerned areas. Governance wise, AFSPA has aided militarisation of civilian spaces. The security forces predominance in the day-to-day activities often pushes the civil administration to the sidelines and undermines the local administration systems. Civil authorities can be submissive to military authorities, and as a consequence, administrative autonomy and accountability are undermined. The dynamic has, over time, undermined the ability of the local institutions.

In the Armed Forces (Special Powers) Act, 1958 some precautions are included here to prevent the abuse of extraordinary power; however, it is found that precautions used are weak, procedural and practically it is ineffective. AFSPA has several main protective measures in place, whereby the armed forces member is not supposed to exercise powers until a due warning is given and the power should be required to the extent that it is likely to maintain public peace. In principle, this is a manifestation of the concept of proportionality; in practice, though, the subjective judgment of the officer on the ground combined with ambiguous statutory language like the notion of reasonable suspicion significantly water downs the concept of accountability and permits arbitrary use of force.

On the same ground, the Second Administrative Reforms Commission suggested that a measure needs to be taken on the issue of AFSPA wherein the document needs to be changed to allow a more formal review mechanism, a time limit and a higher input by the state governments. Although the security imperatives of the armed forces were taken into consideration in these proposals, the destructive nature of the long-term militarisation to the

democratic governance and civil liberties was also realised. However, legislative action, grounded on such recommendations, are not comprehensive and coherent.

Overall, the currently available safeguards in AFSPA are mostly procedural and have very weak enforcement measures. Despite being thorough and containing sound policy arguments, reform suggestions have fallen due to political inertia and the narrow-security policymaking. The critical analysis therefore shows that, unless there is a reform of the laws to curb immunity, increase civilian control and responsibilities all the safeguards of AFSPA will be more a symbolic than a practical act.

The escalating constitutional and human rights issues raised by the Armed Forces (Special Powers) Act, 1958 provoke the necessity to find the possible alternatives that would maintain national security and at the same time eliminate the violation of civil liberties. A balanced security system that goes beyond a purely militarised system has to take in a multidimensional approach which is grounded on the rule of law, the principle of democratic responsibility, and participatory rule. Instead of entire and immediate repealing, a gradual shift in favour of other mechanisms can provide a long-term solution.

One of the main substitutes is enhancement of the French criminal law and the control over the procedure. The authority to arrest, search, and investigate as well as available legislative powers in place like the Code of Criminal Procedure and special anti-terror laws offer adequate powers against extended internal conflicts where extraordinary powers of military force are not necessary. The strong liaison between the military and the civil law enforcement units as well as the establishment of effective operational guidelines can aid effective counter-insurgency without the need to suspend the constitutional rights. Accountability and confidence with the people can be strengthened due to judicial oversight particularly when mandatory magisterial inquiry of civilian casualties is done.

## **Conclusion**

Armed Forces (Special powers) Act 1958 is a legislative response that is extraordinary and issued at an extraordinary time in response to extraordinary security issues as a measure of ensuring the sovereignty and integrity of the Indian State. Nevertheless, as AFSPA has developed over the course of decades of its operation, it grew into a tension of national security needs and constitutional guarantees of basic rights. Although it is indeed a truth that the armed

forces are in need of having sufficient operational powers in troubled regions, the long term and unabated use of the AFSPA have raised significant issues about accountability, proportionality and rule of law.

The Supreme Court of India judicial interventions have attempted to engrave certain rules in the constitution under the Act such that use of force even in the violated regions must adhere to the necessity and proportionality principles. However, judicial review has not been effective in correcting the structural flaws of the AFSPA including the sweeping immunity provision and the near-monopoly of the executive in invoking and maintaining the same. Such restrictions have led to alienation among the citizens, low trust in state structures, and in certain areas, the problem of revision of the whole task of restoring normalcy.

Ineffectually, the future of AFSPA needs to actions that lie in a measured transition of exceptionalism to normalcy. The resiliency of democratic state is no longer to be judged by the validity of emergency powers, but it should be measured by its capacity to reestablish civilian forms of governance and by respecting basic rights even during the time of internal security crisis. Significant change or gradual withdrawal of AFSPA, with strong institutional back up, would confirm that India is convinced of its constitutionalism, at the same time giving national security the necessary protection without affecting human dignity and rule of law.

## References

1. Armed Forces (Special Powers) Act, 1958.
2. Constitution of India, arts. 14, 19, 21.
3. *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109.
4. *Extra Judicial Execution Victim Families Assn. v. Union of India*, (2017) 3 SCC 1.
5. Supreme Court of India, *People's Union for Civil Liberties v. Union of India*, (1997) 3 SCC 433.
6. Jeevan Reddy Committee, Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958 (Ministry of Home Affairs, 2005).
7. Second Administrative Reforms Commission, Fifth Report: Public Order (Government of India, 2007).
8. U.N. Human Rights Committee, International Covenant on Civil and Political Rights (1966).
9. Gautam Bhatia, *Public Law and Constitutional Accountability* (Oxford Univ. Press 2019).
10. Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas Publ'g House 1982).
11. H.M. Seervai, *Constitutional Law of India* (4th ed. 2013).
12. Ramachandra Guha, *India After Gandhi* (Pan Macmillan 2007).
13. Vrinda Grover, The Armed Forces Special Powers Act: A Human Rights Perspective, 40 Econ. & Pol. Wkly. 4927 (2005).
14. Anuradha Raman, AFSPA and the Doctrine of Proportionality, 6 Nat'l L. Sch. India Rev. 121 (2014).
15. Amnesty International India, *Justice Under Fire: Human Rights Violations and AFSPA* (2015).
16. Human Rights Watch, "Everyone Lives in Fear": Patterns of Impunity under AFSPA in India (2008).
17. S.P. Sathe, *Judicial Activism in India* (Oxford Univ. Press 2002).

18. Law Commission of India, 267th Report on Hate Speech (2017) (for limits of state power).
19. Sanjib Baruah, Durable Disorder: Understanding the Politics of Northeast India, 44 *Econ. & Pol. Wkly.* 50 (2009).
20. B.B. Pande, Human Rights and Counter-Insurgency Laws in India, 21 *Indian J. Int'l L.* 123 (2011).