

THE LAST RESORT: AFSPA

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INTRODUCTION

The Armed Forces (Special Powers) Act, or 'AFSPA' as we call it, has been causing a lot of heated arguments and scrutiny because of its controversial provisions. The main idea behind this act is to keep public order intact and tackle insurgency, terrorism, and other national security threats. It gives special powers to the armed forces in "disturbed areas." But what stirs up the pot is the provision that allows them to use force, even deadly force, if they think it's necessary.

On the one hand, some contend that this power to kill is essential in high-risk scenarios where armed militants or terrorists are endangering both the military forces and civilians, protecting everyone from damage. They claim it's a difficult job, and the forces require this power to respond swiftly to impending threats. However, many contend that this strategy is flawed. They contend that it may result in abuse of authority, breaches of human rights, and a lack of accountability. Maintaining public order while protecting the lives of both military personnel and innocent civilians can be a true balancing act in some locations where insurgency and violence have a long history.

But to be clear, the AFSPA should not be a permanent fixture. We should gradually phase it out as the security situation improves and the need for such severe powers diminishes. The decision to repeal the legislation should be based on a comprehensive assessment of the situation on the ground. It should consider aspects such as a decrease in militant activity, the restoration of public order, and the building of functional governing mechanisms. We should treat the AFSPA as something exceptional, applicable only in situations that truly call for it. We need to look at its historical context, study case examples, and consider legal and ethical aspects to understand the necessity of this "right to kill" provision. We must also address the valid concerns raised by human rights groups and activists, ensuring that human rights are protected and those responsible for abuses are held accountable.

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Through this exploration, we can develop a more nuanced understanding of the AFSPA and its provisions. It's important to remember that security dynamics change over time, and we should focus on alternative strategies for maintaining peace and security as we move forward. Let's strive for a system that respects human rights while keeping the safety of both our armed forces and civilians a top priority.

BACKGROUND OF AFSPA

The Armed Forces (Special Powers) Act (AFSPA) is a piece of legislation that has its origins in British-era regulations enacted to repress protests during the Quit India movement. The AFSPA was initially implemented through four ordinances in 1947, which were later replaced by an Act in 1948. Its current form, applicable in India's Northeast, was introduced in Parliament in 1958 by then-Home Minister G.B. Pant. Originally named the Armed Forces (Assam and Manipur) Special Powers Act, 1958, the law has since been amended to incorporate the states of Arunachal Pradesh, Meghalaya, Mizoram, and Nagaland, extending its scope beyond the initial territories. The AFSPA offers extraordinary capabilities to armed forces operating in these designated locations to maintain public order and successfully suppress insurgencies. However, it has also sparked a heated bit of controversy due to fears about human rights abuses and the misuse of its provisions. Critics argue that the Act may violate civil freedoms and result in incidents of excessive force and impunity.

The Armed Forces (Defence of India) Rules, 1939, which were created by the British colonial government in India during World War II, were succeeded by AFSPA. The rules allowed the armed forces broad rights to arrest, search, and imprison anyone they deemed a security danger. The rules were also utilised to restrict freedom of movement and suppress the media. These laws were first imposed in September 1939, shortly after World War II began. They were designed to give the military forces the authority they needed to keep law and order in India during the war. The prohibitions were also considered a method to prevent anti-British feelings from spreading in India. From the start, it was a contentious enactment. Critics warned that the armed forces were given too much power and impunity and that they may be used to crush legitimate protests. The rules were also viewed as a representation of British colonial power.

The Indian government has claimed numerous times that AFSPA is a temporary measure that will be abolished once the situation in the afflicted districts improves. is required to keep law

and order in parts of India afflicted by insurgency or other forms of violence. They claim that it empowers the military forces to deal with armed militants and other criminals and that it is a useful weapon for preventing terrorist attacks and other forms of violence.

The northeast has seen its fair share of insurgent activity, making maintaining order and security extremely difficult. There is a wealth of information available regarding these insurgencies, and organisations such as the South Asian Terrorist Portal (SATP)¹ have diligently reported on them. They've methodically chronicled a timeline of regional insurgency episodes. The SATP is well-known for its data collecting and analysis, therefore its archives offer a treasure of information about the northeast's insurgencies.²

A paper titled 'Insurgencies in India's Northeast: Conflict, Co-option & Change' by Subir Bhaunik³ delves into the reasons behind these insurgencies. It's not a simple story – there are so many factors at play, like colonial history, economic exploitation, political marginalization, and cultural identity, all tangled up in the mix. The consequences of these insurgencies have been brutal. We're talking bombings, ambushes, assassinations, kidnappings, and attacks on both civilians and security forces. It's caused a lot of suffering and made it tough to keep the region stable. Here are some examples of the grim reality on the ground:

The Nellie Massacre: In 1983, a group of armed militants attacked the Nellie village in Assam, killing over 2,000 people. The massacre was one of the deadliest attacks in the history of the Northeast insurgency.⁴

Mandai Bazar: The Mandai massacre of 1980, a tragic event in Tripura, witnessed the brutal killing of approximately 450 Bengalis, purportedly carried out by tribal individuals. The incident was characterized by the then Chief Minister of Tripura, Nripen Chakraborty, as a "genocide," reflecting the severity and scale of the violence perpetrated during that time.⁵

¹ South Asian Terrorism Portal, available at: <https://www.satp.org/> (accessed 13th July 2023)

² Insurgency North East: Timeline (Terrorist Activities) -2023, South Asian Terrorism Portal available at: <https://www.satp.org/terrorist-activity/india-insurgencynortheast> (accessed 13th July 2023)

³ Subir Bahumik 'Insurgencies in India's Northeast: Conflict, Co-option & Change', East-West Center Washington (July 2007)

⁴ In Nellie: 'They were killing everyone' (ruralindiaonline Feb 18) <https://ruralindiaonline.org/en/articles/in-nellie-they-were-killing-everyone/> (accessed 13th July 2023)

⁵ In Mandai Bazar, shadow of 1980 Bengali massacre, as 3 tribal candidates faceoff in Tripura polls, (The Print Feb 12 2023) <https://theprint.in/india/in-mandaibazar-shadow-of-1980-bengali-massacre-as-3-tribal-candidates-faceoff-in-tripura-polls/1367595/> (accessed 13th July 2023)

Upheavals of Tripura: Television journalist Santanu Bhowmik was hacked to death while covering IPFT protests at Mandai, At least five persons were murdered in different parts of the state in the last two months.⁶

The acts of violence and atrocities, such as the Nellie Massacre, Mandai Bazar, and recent disturbances in Tripura, provide a bleak picture of India's northeastern security situation. These sad occurrences show the difficulties that authorities have in preserving law and order, combating insurgency, and protecting both armed forces personnel and civilians. The AFSPA is generally viewed as essential in such tight settings to solve the ongoing security challenges in these difficult areas. It delegated particular powers to the armed forces, including the use of force and, if necessary, the authorization to use lethal force. Supporters say that such rights are essential for self-defense and sustaining public order in the face of armed extremists, rebels, and organized violence. The most recent change to the:

- Requiring the armed forces to report all cases of firing to the local police.
- Establishing a Special Investigation Team to probe all cases of civilian deaths in AFSPA-related operations.
- Setting up a review mechanism to assess the need for the AFSPA every six months.

CONSTITUTIONAL PERSPECTIVE

The constitutionality of AFSPA has been challenged on grounds such as:

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Violation of the right to life and liberty: Section 4 of the AFSPA permits the armed forces to use deadly force against people deemed to constitute a "threat to public order," a word that some feel is overly broad. Regrettably, this provision has resulted in the callous killing of innocent bystanders, raising major human rights issues. The Act's indiscriminate use of force has provoked criticism and calls for greater restraint in upholding the basic right to life and liberty.

Stifling Freedom of Expression: AFSPA's extensive powers have been accused of suppressing free expression and stifling dissident voices. People in affected communities may be hesitant to express their concerns or join in nonviolent protests for fear of retribution from

⁶ Upheavals rock Tripura (Telegraph India, 31 Dec 2017) :<https://www.telegraphindia.com/north-east/upheavals-rock-tripura/cid/1426642>(accessed 13th July 2023)

military forces. Fear of reprisal has inhibited open debate and productive participation, weakening the foundations of democratic dialogue.

Lack of due process: Section 6 of the AFSPA, which grants military services immunity from prosecution, has aroused severe concerns about a lack of accountability for human rights violations. Victims of such assaults have little legal recourse, exacerbating the severity of the situation. In the absence of effective due process processes, impunity thrives and attempts to safeguard justice and defend human rights are undermined.

Undermining civilian control: The autonomy given to the military forces under AFSPA has sparked worries about power concentration and the potential lack of accountability to democracy. The Act allows for acts outside of the regular legal framework, creating concern about the balance of power between the armed forces and the civilian administration. Critics think that strong oversight and checks on the exercise of power by the military forces are crucial for a good democratic administration.

Unchecked Arrests: The section of the AFSPA that allows the military forces to make arrests without a warrant based on mere suspicion has alarmed critics. This broad power gives the military forces significant latitude, which could lead to unregulated and arbitrary detentions. In the lack of severe standards for initiating arrests, individuals may be apprehended only based on subjective views, with no substantial proof to support their detention.

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Harassment of Innocent Civilians: Due to the obvious arbitrary character of the detentions permissible under AFSPA, innocent individuals have been harassed by military forces. Civilians may undergo unjustified inspection, interrogation, and, in some circumstances, physical and psychological abuse during these detentions in conflict-affected areas. This not only violates human rights but also creates a fearful and insecure environment in these communities.

Impact on Livelihoods: Detentions without a valid cause can have far-reaching implications for the lives and livelihoods of people affected. Innocent individuals subjected to protracted incarceration may suffer significant disruptions, such as loss of income and reputational harm, compounding their already precarious condition. Furthermore, the psychological trauma caused by unjustified detentions might have long-term consequences for their well-being.

Fear and Distrust: Unfortunately, the practice of arbitrary detentions has instilled fear and distrust in impacted communities toward the armed forces. This erosion of trust undermines efforts to create constructive connections between civilians and security forces, impeding the collaborative approach required to successfully address the core causes of conflict.

JUDICIAL VIEWS

Naga People's Movement of Human Rights v. Union of India)⁷.

The verdict was reached in 1997 by a three-judge panel led by Justice S.C. Agarwal. It kept the AFSPA in existence, but it curtailed the rights of the military forces under the Act. The court, for example, ruled that the armed forces may not utilise its AFSPA authority to arrest or detain anyone without a warrant. The court also determined that the military could not use their AFSPA jurisdiction to demolish property without cause. The verdict was a significant victory for the government because it confirmed the AFSPA's constitutionality. However, the ruling also reduced the military services' powers under the Act, which was a victory for opponents of the AFSPA. The decision is still regarded as a significant precedent in matters involving the AFSPA. It has been cited in several subsequent instances, and it has helped influence the courts' understanding of the AFSPA.

“You go to a place in the exercise of AFSPA, you commit rape, you commit murder, then where is the question of sanction? It is a normal crime which needs to be prosecuted, and that is our stand,” The bench of Justices Swatanter Kumar and B.S. Chauhan declared⁸.

Political disagreements, according to critics, are one of the reasons why AFSPA has yet to be repealed.

“The present situation demands measures no less significant from the current Prime Minister, who decided that AFSPA must be reviewed. But he did not follow this up because the opposition from the Defence Ministry was just too strong.” - Sanjoy Hazarika⁹

Human Rights Watch stated in a 2008 report that India's Armed Forces Special Powers Act has been used to undermine fundamental freedoms for 50 years and should be repealed.¹⁰

⁷ (1998) 2 SCC 109: AIR 1998 SC 431.

⁸ Cannot invoke AFSPA in rape, murder: SC to Army (Indian Express 4 Feb 2012): <https://indianexpress.com/article/news-archive/regional/cannot-invoke-afspa-in-rape-murder-sc-to-army/> (accessed 13th July 2023)

⁹ An abomination called AFSPA, (The Hindu 12 Feb 2013) <https://www.thehindu.com/opinion/lead/an-abomination-called-afspa/article4404804.ece> (accessed 13th July 2023)

THE FUTURE OF AFSPA

The Armed Forces Special Powers Act (AFSPA) has been a subject of contention and disagreement due to how it is implemented and the impact it has on human rights and governance in conflict-affected areas. According to critics, the AFSPA gives military troops far too much power, which may lead to human rights breaches and a lack of accountability. They are concerned that the AFSPA's broad powers, such as the authority to shoot and detain suspects, would lead to disproportionate use of force and extrajudicial killings. This raises serious issues about the right to life and personal liberty, especially when innocent civilians are caught in the crossfire or suffer alleged mistreatment during military operations. Accountability is one of the most critical challenges. After an incident, the army's explanation is frequently defensive and too little, too late. The AFSPA represents abuse, oppression, and discrimination. Its use and misuse have fueled a cycle of brutality and impunity, inflaming militancy in many sections of the country.¹¹

One of the most concerning aspects of AFSPA is the provision that allows for the use of lethal force even in non-combat situations based just on suspicion of a threat. This perplexing language has been used to justify a wide range of crimes against innocent people, including extrajudicial murders and enforced disappearances. The Act essentially allows the armed forces a licence to murder, making them judges, juries, and executioners with no oversight or checks on their actions. AFSPA has been regularly used to stifle dissent and crush legitimate grievances of oppressed groups under the guise of maintaining security and combating insurgency. It has created an atmosphere of fear and intimidation, with citizens always fearful of getting caught in the crossfire.

The AFSPA is a colonial-era relic that has no place in modern democratic society. It goes against the fundamental values of justice, fairness, and human rights that a democratic government is intended to uphold. Instead of preserving citizens' rights, it has become a weapon of oppression, routinely trampling on fundamental human rights in the guise of national security. It is past time to consign AFSPA to the history books. The presence of the Act merely serves to reinforce a cycle of violence and further alienates already marginalised

¹⁰ India: Repeal Armed Forces Special Powers Act (Human Rights Watch 18 Aug 2008)<https://www.hrw.org/news/2008/08/18/india-repeal-armed-forces-special-powers-act> (accessed 13th July 2023)

¹¹Dr.SailajanandaSaikia, '9/11 of India: A Critical Review on Armed Forces Special Power Act (Afspa), and Human Right Violation in North East India', Journal of Social Welfare and Human Rights (March 2014)

and disenfranchised groups. To truly address security issues and sustain public order, the government should prioritise addressing the core causes of insurgency and violence, engaging in meaningful conversation with affected communities, and maintaining the rule of law.

Removing AFSPA in increments is entirely possible considering the improving situation of northeastern states.¹²

In addition, the government must actively engage local communities, civil society organisations, and regional players in the development of alternative security and peace initiatives. This includes investing in the region's socioeconomic growth, addressing the root causes of the insurgency, promoting dialogue and reconciliation, and fortifying democratic institutions. A comprehensive approach that addresses both security concerns and local people's grievances is required for long-term stability in these places. Recognizing this necessity, the government has taken steps to gradually eliminate AFSPA from some locations, demonstrating a readiness to examine and change its strategy. This decision is a significant move, displaying an appreciation of the significance of a more considered and long-term approach to preserving security while respecting human rights.

By concentrating on creating trust, fostering inclusivity, and exploring feasible long-term solutions, we may pave the way for a brighter and more peaceful future in these places. It is our shared responsibility to actively listen, learn, and collaborate in order to effect meaningful and long-term positive change.

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To sum it up, we have to move forward while acknowledging the necessity of the power to kill under the AFSPA in high-risk scenarios, it is critical to plan for the law's future. The AFSPA should be phased out progressively as the security situation improves and other peacekeeping and security methods are created. The repeal of AFSPA should be complemented by steps to address human rights violations, a lack of accountability, and the promotion of inclusive governance. India can move toward a more durable and rights-respecting framework for preserving public order and countering insurgency by using a sophisticated approach that takes into account the developing dynamics of the afflicted regions.

¹² Insurgency down in northeast, Army shifts to LAC,(18 sep 2022)<https://www.thehindu.com/news/national/northeast-insurgency-losing-public-support-recruitment-down/article65906559.ece>(accessed 13th July 2023), see also CURRENT INSURGENCY SITUATION AND WAY FORWARD (First India 16 Sep 2022)<https://firstindia.co.in/news/lifeStyle/current-insurgency-situation-and-way-forward>(accessed 13th July 2023)

CONCLUSION

Some argue that the ability to employ force is critical in precarious situations where armed militants or terrorists pose a significant threat to both the military and civilians. They believe it protects all and allows the troops to respond rapidly to looming threats. Many people, on the contrary, believe that this method is flawed. They are concerned that it will lead to misuse of authority, breaches of human rights, and a lack of accountability. Finding the correct balance between keeping the peace and protecting lives is extremely difficult, especially in areas with a history of violence.

AFSPA should never be a permanent remedy, rather it should be phased away gradually when the situation improves and the necessity for such drastic measures reduces. Decisions to repeal the legislation should be based on a comprehensive assessment of the circumstances on the ground, taking into account considerations such as reduced militant activity, restoring public order, and strengthening governance institutions. We should approach AFSPA as a special case, employing it only when absolutely essential. To make educated decisions, we must evaluate historical settings, case studies, and legal and ethical issues, as well as the concerns highlighted by human rights groups and activists. Understanding the significance of AFSPA requires an understanding of its historical context. It was first used to repress rallies during the Quit India movement during the British colonial administration. Its reach has grown over time to include numerous insurgency-affected regions. Its colonial history raises worries about power consolidation and the potential lack of public control over military actions.

Over the years, courts have expressed varying opinions on AFSPA. While some have defended its legitimacy, others have criticized the powers provided by it. The courts stress the importance of accountability and check on the authority of the armed forces to prevent abuse and human rights violations. To further answer the concerns of human rights groups and activists, it is critical to research historical settings and case precedents to better comprehend the necessity of AFSPA's "right to kill" provision. Recognizing previous violations and holding those responsible accountable is critical to restoring trust and working toward a more rights-respecting framework.

In the long run, AFSPA cannot be considered a lasting answer. As security conditions improve and the situation in impacted areas improves, the need for such harsh measures

decreases. It is critical to phase out AFSPA gradually, based on a thorough assessment of the ground realities. This strategy ensures that the act is only used in real emergencies. It is also critical to engage in meaningful communication with affected communities and involve local stakeholders in decision-making. Investing in the socioeconomic development of violent regions can address some of the underlying causes of unrest and contribute to long-term stability.

Lastly, the goal should be to achieve a balance between maintaining public order, addressing security threats, and protecting human rights. To secure the safety of both armed troops and civilians while supporting democratic ideals and honoring the rights and dignity of all individuals, we need a strategic approach. India can progress towards a more stable and inclusive future in AFSPA-affected regions by aggressively working on alternative security and peace measures.

