

Mrs. Chatterjee Thangjam Vs. Norway AFSPA - A Cry in The Dark

Romita Roy

Final year Student, Jindal Global Law School

Abstract:

The Armed Forces (Special Powers) Act (“AFSPA”) has been the subject of several studies which have tried to make sense of its validity, usefulness and moral foundations. Over the course of its existence in several states in the North-East, the powers it has given to Military counterinsurgency operations has not led to the desired outcome it envisioned. Its usefulness in tackling counterinsurgency operations is questionable at best. But the widespread human rights violations it has led to is undeniable.

This paper will attempt to add to the existing scholarship on the possibility of scrapping the Act and removing its operation in North-East India. It will carry out an account of the widespread human rights abuses that have been carried out by the Indian military in the region and will argue that the Act ought to be scrapped altogether because of its failure to adhere to certain normative principles reflecting human dignity and freedom that the state has an obligation to uphold towards its citizens. It will not only analyse the provisions of the Act but will move towards assessing AFSPA in the international legal paradigm in which counterinsurgency is carried out. The paper shall finally conclude by imagining a possibility of allowing the scrapping of the Act which would be beneficial towards State security, the rights of citizens and setting norms for obligations of the State in upholding human rights.

Keywords: North-East India, Armed Forces, Counterinsurgency, Human Rights, International Law

“They can take anyone’s freedom from him, without a qualm. If we want to take back the freedom which is our birth right- they make us pay with our lives and the lives of all whom we meet on the way... And there will be no end to it... there will be no end”.

- Alexander Solzhenitsyn

Introduction

The recently released Bollywood film *Mrs. Chatterjee v. Norway* created much hullabaloo as the story involved a mother losing her child to a State’s actions and her fight to claim justice internationally. But back home in the far corners of North-East India, a far more gruesome tragedy befell the mother of one Thangjam Manorama. 11th July 2004 engrafted a black spot in the history of Northeast India yet again as another north-eastern mother lost her child to state oppression and the ugliness of the Armed Forces (Special Powers) Act (“AFSPA”). As dawn crept slowly the previous night, the armed men dragged Thangjam Manorama out of her house. When the 32-year-old woman tried to flee from their custody, they took their aim- a few short bursts of automatic gunfire crumpled her semi-clad body to the cool earth below. Her shrieks and hopeless cries were washed away in gruesome bloodshed. The killing evoked much resentment and protest in the valley. The world averted its gaze towards a group of women- several middle-aged, few elderlies and some young,

disrobed themselves, standing naked with sagging breasts and flowing hair, who marched in solidarity while holding a banner that read “Indian Army, Rape Us, Kill Us”.¹

To date, almost everyone knows Manorama’s ‘story’, but no one knows who killed her, and since then numerous incidents of killings, arbitrary arrests, torture, sexual violence and extra-judicial encounters are alleged to have taken place. Aghast by such violences, Irom Sharmila (the Iron Lady of Manipur, the prisoner of conscience)² was on a hunger-strike for long 16 years, demanding the abrogation of AFSPA from the whole of north-east. She then had to be force fed through a nasal tube. AFSPA has been in operation in the Northeast since 1958, and its enforcement till date sustains a reign of terror in the silent valleys of the region. The centre’s occasionally mulls over implementing ‘temporary revocation’ of the draconian law from some regions while its reimposition in other parts have always contradicted the ethos of democracy. In this paper, I shall argue that the language of the law, couched in the framework of international human rights and humanitarian law has by far failed to curb the raging war in light of the events and protests surrounding Northeast India. I shall use the state’s practice of ‘fake encounters’ and ‘forced disappearances’ as a tool to examine what transpires when the northeasterners routinely encounter the arbitrary and violent powers of the state. More often, than not, it is women who fall prey to such violences by “*men in uniform*”. Whilst understanding the implications of AFSPA in present times and taking into account the contemporary scholarship on the subject³, the paper shall conclude by suggesting that such state practices is normatively unattractive as a choice-of-law rule as it critically fails to assess a state’s legislative authority in using coercive force in ‘*counterinsurgency*’ to ensure ‘*public order*’ and ‘*national integrity*’, and thus, the Act should be scrapped off in its entirety with immediate effect.

“Friends of The Hill People”⁴

As one steps into Nagaland and passes by the Air Force gate or Army Cantonment area situated at the heart of Kohima, one can notice that their gates have “Friends of The Hill People” written on them in bold fonts. The question that looms around is, are the army really friends of the people or have they time and again proven to be ‘foes’ who have tortured and killed hundreds of innocent people on mere grounds of suspicion?

The people of Oting village at Mon observed a “Christmas of sorrows” in December, 2021 wherein 12 villagers were “*mistakenly killed*” in an Army operation.⁵ The AFSPA rubric has been regarded as a ‘draconian’ and ‘colonial’ Act, much like the 1919 Rowlatt Act, which bestows an unconditional power on the army to arrest and shoot people on mere suspicion. Section 4 and 6 of AFSPA confers the army with impunity to commit crimes (including rape and gang-rape) under the shield of counterterrorism.⁶ A plain reading of Section 3 indicates that the Act must be invoked to act in aid of the civil power. However, to much

¹ Anubha Bhonsle, “‘Indian Army, Rape Us’,” (Outlook, February 10, 2016), <https://www.outlookindia.com/website/story/indian-army-rape-us/296634>.

² Nadim Asrar, “Irom Sharmila Walks out of Manipur Jail after 14 Years,” (India Today, August 20, 2014), <https://www.indiatoday.in/india/story/irom-sharmila-walks-out-of-manipur-jail-after-14-years-204859-2014-08-20>.

³ Criddle, Evan J. “Proportionality in Counterinsurgency: Reconciling Human Rights and Humanitarian Law.” Essay. In *Counterinsurgency Law: New Directions in Asymmetric Warfare*, edited by William Banks, 24–41. USA: Oxford University Press, 2013.

⁴ Haokip, TS. “Foes or Friends of the Hill People?” Imphal Free Press. Imphal Free Press, June 11, 2021. <https://www.ifp.co.in/7826/foes-or-friends-of-the-hill-people>.

⁵ H.Kemaya Yanlem, “Can the Oting Killings Ever Be Forgotten, (Outlook India, February 11, 2023), <https://www.outlookindia.com/national/can-the-oting-killings-ever-be-forgotten--magazine-261038>.

⁶ Bhattacharyya, Rituparna. “Living with Armed Forces Special Powers Act (AFSPA) as Everyday Life.” *GeoJournal* 83, no. 1 (2018): 31–48. <http://www.jstor.org/stable/45117478>.

contradiction, many events like the incident at Mon district, Nagaland which re-ignited the issue of accountability, is a clear indication of the fact that the armed forces are not even aware of the action taken or sought to be taken by them. Further, Section 6 acts as a catalyst in providing the officers, a blanket immunity from prosecution or any other legal proceedings against such “mistaken killings”, except unless an explicit sanction has been granted by the Centre. Sanjoy Hazarika writes that such sanction for prosecution has not been granted in a single stance for nearly 70 years now.⁷

‘Fake encounters’ or ‘encounter killings’ has been a widely used connotation across the Northeast valleys, to gesture towards the staged gun battles that refers to a continued practice of state violence in the region. Since 1952, north-eastern local newspapers have continuously run news of government-issued press notices of civilians ‘killed in an encounter’. It is widely acknowledged that these killings are not results of individuals engaging in an armed battle with security forces, but rather episodes of extra-judicial executions of individuals who for one reason or another were ‘doubted’ to be members of separatists’ groups. It is then followed by official claims that the victim died due to ‘legitimate suspicion’. In all these cases the civilians are casted as terrorists, criminals or linked to some embodiment that poses a threat to the integrity and security of the nation. Thus, these violences are legitimized under the shield of the dominant ideology of ‘nationalism and patriotism’, aided by a traditional narrative that such killings are essential’ for maintaining ‘peace and security’ of states designated to have ‘law and order problems’ and hence the justification for continued suspension of ‘rule of law’ in the region.

Right To Rape?

Amidst many protests, Manorama’s case managed to reach Guwahati High Court, wherein the Apex Court gave a landmark judgement by claiming to have jurisdiction to try cases alleging violence committed by army personnel. The forensic reports confirmed the presence of semen in the deceased’s body and Justice Upendra who conducted the inquiry ‘courageously’ upheld the charges of rape against the army. However, to no surprise, no one has been convicted till date and the report has not yet been made available.

In cases involving rape and other forms of sexual violence, victims have alleged that when the accused is an army personnel, they face numerous obstacles in filing First Information Report (FIRs). Though the Indian Penal Code reads rape as cognizable offence, yet the police officers conventionally deny registering the offence. In rare cases, it is only after much public protests, are the complaints registered. However, such long routes delay the investigation process and medical examination of the victim’s body is done after the prescribed time has been exhausted. It in turn grants immunity to the accused against any further query. Section 197 of the Criminal Procedure Code explicitly bars the civil courts from taking cognizance of offences committed by Armed Forces “in discharge of his official duties” and hence, these cases are heard in the martial courts, which is composed of military personnels. The victims tend to feel alien to the surroundings- for in a court full of individuals related to the accused, there is little chance of justice being delivered to the victims. The committee report headed by Justice Reddy records numerous complaints by victims of rape and sexual assault, that they have been bribed with promises of job and compensation in return of taking down their allegations.⁸ In instances, where the victims were ‘bold’ enough to not comply to such requests (read force),

⁷ Hazarika, Sanjoy. “63 Years Later, India Must Repeal Afspa.” Hindustan Times, December 7, 2021. <https://www.hindustantimes.com/opinion/63-years-later-india-must-repeal-afspa-101638886750673.html>.

⁸ Ministry of Home Affairs, GoI, *REPORT OF THE COMMITTEE TO REVIEW THE ARMED FORCES (SPECIAL POWERS) ACT, 1958*, March 4, 2016, <https://andyreiter.com/wp-content/uploads/military->

they were subjected to what they term as ‘re-rape’. Succumbing to such mental agony along with the cobweb of family honour and shame, these women in most cases choose suicide as the last resort.⁹ The people of Mizoram choose not to speak about those days when such trauma was all the way more prominent. Such is the gravity of infliction, that they just term these as “troubles” and no discussions take place around them. According to some ‘competent authorities’ the victims are supposed to sweep ‘these happenings’ under the carpet and “move on”.¹⁰

It is evidently clear that the language of the law has a wider ambit to bring anything and everything under the ambit of “in discharge of official duties”. The intersection of rape and gender is explicitly seen in the painful incidents of India’s Northeast, where laws and regulations have turned women into ‘rape-able’ objects in the hands of the state. Manorama’s body has not only been the epitome of gender discrimination but also her racialized body classified her as an ‘incomplete citizen’.¹¹ Her killing was facilitated by the Army, as history repeated the same story time and again- the country’s promise of liberty and legal protection of rights does not extend to ‘anti-national’ and ‘anti-state’ citizens. In contemporary times, ethnographic analyses of political violence focussing on conflict, warfare and state repression have led to a resurgent gaze by anthropologists on themes of violence, law and justice.¹² From the fierce brutality of mass killing to the ‘soft knife’ of routinized immiseration, it reflects an inseparable interdependency on one another, which Nancy Scheper-Hughes rightly reflects as a concept of ‘genocide-continuum’ peddled on ‘multitude of small wars and invisible genocides’, spanned throughout the normative narratives of everyday social life. It is in this spirit, that when certain population of the nation is marked as ‘living dead’- whose lives are at the mercy of the state, and can be taken at will or by whim.¹³ Their deaths are translated to be ‘necessary’ and ‘legitimate’ in order to maintain the ‘security’ and ‘integrity’ of the nation. These systematic arbitrariness against those specific targets on a continuum of genocidal violence reflects on India's abuse of its sovereign power by eliminating segments from its citizenry under the shield of greater common good.

Counterinsurgency, AFSPA and the Futility of Seeking Justice.

AFSPA grants a wide range of power to the Indian army to rape, defile, damage and obliterate the bodies of ordinary people. The counterinsurgency operations carried out by Indian Armed forces, are driven by a multitude of factors. The logic behind such heinous crime works on the principle that violence from insurgent groups needs to be tackled with some amount of restorative counter violence from the state.¹⁴ The normative approach globally for dealing with armed conflict has been to employ the proportionality standard in international humanitarian law instead of human rights law, in cases where the internal disturbances lead to ‘genuine armed conflict’.¹⁵ This is also the paradigm wherein AFSPA is justified legally- that the powers

[justice/in/Government%20Documents/India%20-%202005%20-%20Report%20of%20the%20Committee%20to%20Review%20AFSPA%20\(Reddy%20Report\).pdf](https://www.ijfmr.com/justice/in/Government%20Documents/India%20-%202005%20-%20Report%20of%20the%20Committee%20to%20Review%20AFSPA%20(Reddy%20Report).pdf).

⁹ Arora, Rishika, and Iyina Grover. “Violence Against Women by the Army Personnel.” *OIDA International Journal of Sustainable Development* 12, no. 12 (April 10, 2020).

<https://doi.org/http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html>.

¹⁰ Arora and Grover, 15.

¹¹ Arora and Grover, 15.

¹² Duschinski, Haley. “Reproducing Regimes of Impunity.” *Cultural Studies* 24, no. 1 (2010).

<https://doi.org/10.1080/09502380903221117>.

¹³ Haley, 113.

¹⁴ Bhonsle, Anubha. “The Persistence of the AFSPA.” Essay. In *Internal Security in India: Violence, Order, and the State*, edited by Amit Ahuja and Devesh Kapur, 89–109. New York, NY: Oxford University Press, 2023

¹⁵ Criddle, 25.

granted to military personnel under its various sections are necessary to deal with insurgents and others who may cause internal disturbance. It is often argued that such powers should be used only to the effect that it serves specific ends- i.e., no civilians or innocents should be harmed because of military counterinsurgency. However, in North-East India, as has been demonstrated, the reality is far from this utopian vision. The paradigm in which AFSPA operates in, not only leads to the disproportionate death of innocent people- but is also fundamentally incapable of providing a different outcome. This is because the rationale on which it operates is deeply flawed as Evan Criddle argues. According to Criddle, such approaches simply do not work because it fails to account for the *character of the relationship* between the state and those, whom the state is targeting through violence.¹⁶ Human Rights, as Criddle writes, may be restricted by states in certain cases of genuine emergency so as to preserve the regime and secure equal freedom for all.¹⁷ But a state cannot endlessly justify its sovereignty and it must not derogate from certain *jus cogens* norms- norms which prohibit slavery, torture and summary execution.¹⁸ As long as the state justifies its sovereignty on the principle of protecting the integrity of the country and protection of people, it can create draconian municipal laws such as AFSPA which virtually grant full power as well as immunity from prosecution and accountability to deal with internal violence and continuously extend their application. This is exactly what has led to AFSPA, which was only meant to be a temporary legislation, to acquire a ‘long permanence’ in the North-East region. Six decades have passed, as Bhonsle has noted, without any set procedures, norms, and criteria followed in deciding prosecution sanctions under the Act.¹⁹

Perhaps a way out for assessing the possibility of revoking AFSPA from different states where it is still in force can be found in the Kantian legal framework. In this theoretical framework, the primary purpose of public law and institutions is to ensure safeguarding of human dignity by saving individuals from the threat of arbitrary actions of others.²⁰ This requires that, as far as possible, the state itself should refrain from the arbitrary use of force against people because that force itself undermines human dignity and imperils liberty.²¹ Such instances can be found in the example of India’s actions in the state of Tripura where AFSPA was withdrawn in 2015. After 2010, the State witnessed a rapid decline in militancy and in 2014, there was record turnout for the Lok Sabha elections.²² This led to the withdrawal of the Act. At the outset, the State justified its decision based on declining violence. But that is not the only factor at play- a key role was played by diplomacy, political will and better coordination of policing activities.²³ This required the State to view the relationship it shared with people – as Criddle argues- which allows the assessment of harm and violence in a proportionate manner. A similar approach could be used which combines political will with diplomatic talks along with reassessment of normative legal values to ensure that a state of normalcy returns.

Conclusion:

The long life of AFSPA in North-East has led to numerous tragedies for generations now. Its legislative intent having long been abandoned in favour of a perpetual permanence, lives of ordinary people continue to be shattered by its very existence. This may throw up the question of whether the Act really should be done

¹⁶ Criddle,25.

¹⁷Criddle,33.

¹⁸Criddle,33.

¹⁹ Bhonsle,120.

²⁰ Criddle,32.

²¹ Criddle,32

²² Bhonsle,93.

²³ Bhonsle,93.

away with, as the Centre argues that counterinsurgency operations are still necessary to ensure the security and freedom of all in the region.

This paper has argued otherwise and tried to meditate upon the possibilities for liberty and resolution which can be imagined paving the way for removal of AFSPA in the northeastern states, given the fact that the political will may feel otherwise in relation to removal of its powers. It is important to keep highlighting the importance of creating new modes of questioning the Centre's legislative authority and sovereign power to commit atrocities against its own citizens. It will thus lead to the building of not only a national consensus on the necessity of abolishing AFSPA, but will create standards for keeping authoritarian power in check globally.