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A Diagnosis of AFSPA: Its Contradictory Reality in Legal and Socio-Political Spheres

Rusham Sharma and Ayan Garg

ABSTRACT

This study revolves around interpreting the Armed Forces (Special Powers) Act, 1958, to reconsider its relevance, not just in today's time, but ever since it was enforced in the North Eastern States, by examining its legal and socio-political aspects. It also examines the attractiveness that has made AFSPA enforceable for the past six decades, in spite of having caused several human rights violations.

The loud dissent about these violations gets deafened by the time it reaches Mainland India, which consequently makes us question the role of active apathy played by the media and people. The article serves as an amplification of the crimes committed and protected under the AFSPA, and offers insight into the legal trajectory of the draconian Act from a socio-political standpoint, through constitutional violations, case laws, advisory opinions of the United Nations, and, most importantly, tangible experiences of the North East.

Keywords: AFSPA, North East, Ordinance, Meghalaya High Court, Armed Officials, Constitution, Colonial Law, International Law, Irom Sharmila, Thangjam Manorama, Protest, Mainland, Justice Jeevan Reddy Committee, Supreme Court Guidelines

INTRODUCTION

The Armed Forces (Special Powers) Act, 1958 (henceforth AFSPA), was a law imposed in the State of Nagaland to control the Naga Insurgency. It has been implemented in various 'Disturbed Areas' in North-East India since then, and continues to be in operation in most of Manipur, Assam, Meghalaya, Arunachal Pradesh, and Nagaland. Having originated as a quasi-emergency measure, the AFSPA contained sweeping provisions for the armed forces to carry out military operations to counter threats to national security. Another section in the Act limited the likelihood of an armed officer being prosecuted in case they commit an unlawful activity, thus granting blanket protection and immunity to an armed officer to handle pro-insurgency sentiments.

However, these provisions are endowed with the underlying message that even the commission of a crime could be protected, if executed by a badge of honour that personifies the protection of a nation. This has led to several human rights violations in the form of baseless arrests, rapes, murders, and disappearances. As more and more priority continues to be given to the authority of the State, it becomes necessary for citizens of a democratic nation to question the integrity of this legislation. Many citizens of India have come to realize the propagation of crimes through AFSPA and raised many rightful, yet peaceful, voices.

In this article, the authors wish to deliberate on the legality of AFSPA and its impact on the communities of the North East. It will be an injustice to not amplify the dissident voices that have come up in these 62 years; hence, we shall be analyzing some of these experiences and their interpretations by various other bodies as well.

AFSPA IN THE LEGAL SPHERE

Here, we shall be looking at AFSPA's legal deficiencies and challenges under both domestic and international law regimes. In order to set the context for our later discussion on the present-day legal challenges posed by AFSPA, it would be proper to start by analyzing its historical origin.

COLONIAL ORIGINS

It is a well-known fact that AFSPA has colonial roots - the Act was modeled after Lord Linlithgow's Ordinance XLI of 1942[1], a law promulgated to crush the Quit India Movement (herein referred to as 'the Ordinance'). But does a law merely having colonial roots vitiate it? Surely not, given that even our Constitution derives its content from British sources. However, it is still worthwhile to note that AFSPA didn't just copy its provisions from the Ordinance; it went above and beyond those. Now, while Sections 5 and 6 of the two laws (regarding arrest of persons and protection from prosecution respectively) are virtually the same, with identical wording and functioning, a key difference lies in the following two areas:

A) Who gets to exercise the special powers granted under the Ordinance/Act?

B) Under which situations can these powers be exercised?

As for our first question: The Ordinance restricted its provisions to '*officers not below the rank of Captain*'[2] (or other equivalent ranks) and officers acting under these orders. The onus of decision making was placed on higher ranking officers; this made the expectation of proper decision making from the army a reasonable one. However, AFSPA's provisions apply to '*any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank*.'[3] Why did AFSPA extend these special powers, initially reserved for higher ranking members of the Army, to almost all soldiers, when they would naturally possess less military knowledge and experience? There are very few justifications which can be given for this, none of which are free from the vice of arbitrariness. We unequivocally believe that this stipulation was one which AFSPA should have retained. It is important to note that this does not limit the scope of the Army's operations. If a situation does arise in which use of force becomes

[1] (Published in the Gazette of India Extraordinary, dated 15th August, 1942

[2] Section 2(1)

[3] Section 4

necessary, all that this stipulation would change is that the order for usage of force would be filtered through a chain of command, weeding out (in some cases, at least) the possibility of impulsive and unjustified fire. In this absence, the scope for abuse of power has increased so dramatically that even the former Governor of Manipur, Dr. Sidhu, admitted to the American Consulate General in Calcutta that the Assam Rifles had been routinely perpetrating atrocities in the region.[4]

We now move on to the second difference. The range of situations under which members of the Armed Forces have special powers is much broader under AFSPA than it was under the Ordinance. While the Ordinance laid down two situations, AFSPA has listed four. A comparison of the relevant sections proves and illustrates this point further. Section 2 of the Ordinance states:

"*...use such force as may be necessary, even to the causing of death, against any person who -*

(a) fails to halt when challenged by a sentry, or

(b) does, attempts to do, or appears to be about to do or attempt to do, any such act as would endanger or damage any property of any description whatsoever which it is the duty of such officer to protect;"

Whereas, Section 4 (a) of AFSPA states:

"*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;*"

Clearly, we can see that while the Ordinance was concerned primarily with the protection of property, its equivalent provision in AFSPA extends much farther. The Army gets to fire simply when there is a law prohibiting certain actions, and they form an opinion that the law is being violated. Notwithstanding other guidelines, the soldier still has the absolute right to determine whether someone is acting in contravention of a law or not. The problematic expectation is that a soldier will be able to do so correctly. We forget that soldiers are not meant to uphold the law in civilian areas. Upholding the law is the duty of the civil administration and police, and even under AFSPA, soldiers are forbidden from usurping their functions. And yet, this act expects an officer, a person whose training was not even concerned with identifying when a civil law is being broken, to act upon possible instances of defiance of orders based upon their own opinion. The unreasonableness of this expectation is truly staggering. We may contrast this with the Ordinance by noting that identifying when a property is being damaged is an area of relatively less subjectivity.

[4] Revealed in the Wikileaks Cablegate - Confidential Diplomatic Cable of September 1, 2006, 13:50 hours

Hence, we are of the belief that AFSPA took the already far-reaching provisions of Lord Linlithgow's Ordinance and made them even more arbitrary. Instead of decolonizing the security laws we inherited from the British regime, AFSPA perpetuated their brutality. Perhaps it's not implausible to say that the Act perpetuated colonialism itself: Several Manipuri government officials have stated that Manipur is governed less like a state and more like a colony of India.[5] This disenfranchisement has been undoubtedly caused by (inter alia) the repeated, continuous, and unrelenting imposition of AFSPA, over and over, for decades at a stretch.

With the completion of this hopefully expository comparison, we now turn to some present-day legal contradictions.

COMPATIBILTY WITH CURRENT DOMESTIC LAW

The significance of Indians recognizing citizenship as more than an abstract legal term, to inherit a more political understanding of what it means to be a citizen, has increased considerably. Viewing an individual as someone imbued with an ethnic difference reduces the person as a citizen, granting the law a chilling power to justify human rights violations disguised as 'protection'. This kind of law gives an impression of 'protecting' the citizen (in a non-redressable mechanism), instead of viewing the citizen as a legal entity having a contributory relationship to the law; also having the right to attain constitutional remedy under Article 32[6] of the Constitution. The complexity of issues posed by this law - affecting security, cultural, social, and political bases - becomes redundant if we view it solely from a constitutional lens; which, in its roots, is a problem for the judiciary to address. Our analysis is not to merely to carry out a diagnosis of Parliament's legislative competence to enact this law (as done by the Courts earlier), but to address the larger problem of how easily military powers get protected under a sympathy of 'working to save the nation', and the general instinct to punish without questioning or providing scope for rehabilitation, regardless of the amount of disruption it may be causing in the process. First and foremost, we need to give priority to exploring the overriding of power by the armed forces, rather than assuming that every legislation for the army is to protect our citizens.

This idea, of the overriding of power, grants us clarity regarding what gives the army a pass to portray every day in the North East as a war-like situation. Section 3 of AFSPA gives the Union Government

[5] Ibid.

[6] Remedies for enforcement of rights conferred by this Part

the power to declare certain regions to be disturbed areas, and therefore make AFSPA applicable there. Furthermore, we may refer to the provision of the Disturbed Areas Act, 1976, that allows for the labeling of an area as a disturbed area *'by reason of differences or disputes between members of different religious, racial, language or regional groups or castes or communities…'*[7]

This part of AFSPA, that's not even considered in civil society to be as draconian as the other sections, creates a rift and allows human rights violations at many levels that get hidden due to its cryptic nature. The ambiguity becomes problematic at the following juncture: Any ethnic (or other) division may be a disturbance for the ruling party during its tenure, but not be perceived as such by other parties. Thus, it is the ruling party's perception (invariably influenced by their partisan ideology) and not an objective assessment of the ground situation that leads to an area being labeled as disturbed. Its people are then questioned as militants and have to face collective punishment, even on a mere suspicion.

Hence, it is quite right to say that the ease with which a State voluntarily incorporates a war-like situation - even though there may not be an external body involved - is worrying, and that there is no exceptional ordinance required to create a situation frighteningly similar to that of a State emergency. Another factor that comes into play here is the crucial power given to the Union Government, despite not being in touch with the North-Eastern states – undoubtedly, at least, not as much as the State Governments are. This also makes it an executive issue, instead of a solely judicial one.

As per Section 5 of AFSPA, in case the officer wants to go easy on an individual, they have the option to arrest and transfer them to the nearest police station as soon as possible - which in most cases has turned to be more than a span of 3-4 days; usually, in this period, the individual is subject to torture, 3rd degree or otherwise. A general response that is given by those in support of this Act is that it is implicitly conveyed to the officers to follow Article 22 (2) of the Constitution[8]. However, it has been established through experiential evidence that this remains a hollow, unfulfilled expectation.

The draconian nature does not stop here, as these sections make a more lethal combination when read in conjunction with Section 6, which bans any form of legal proceedings that could take place against officers acting under this law, except with the prior sanction of the Central Government. An understanding of the unjust way in which Section 6 operates can be gained from the RTI filed by

[7] Section 3 (1) of Disturbed Areas Act, 1976

[8] Article states: "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

Senior Advocate, Vrinda Grover, in 2011, sent to the Ministry of Defence and the Ministry of Home Affairs (to which just the former replied). The response said:

"*From the year 1989-2011,*

- *Number of applications for sanction for prosecution for Human Rights violations by Security Forces received by the Ministry from 1989-2011: 44*
- *Number of applications for sanction for prosecution for Human Rights violations by Security Forces that remain pending for consideration by the Ministry from 1989-2011: 33*
- *Number of applications for sanction for prosecution for Human Rights violations by Security Forces that were rejected by the Ministry from 1989-2011: 11*
- *Number of applications for sanction for prosecution for Human Rights violations by Security Forces that were accepted by the Ministry from 1989-2011: NIL*"

We have discussed some of the incidents which occurred in this time period later in this text, which would shed even more light on the sheer apathy of not prosecuting horrific crimes; but suffice to say for now that these statistics should be self-explanatory in demonstrating how seriously the Central Government takes its duty of sanctioning – or, as it would appear, not sanctioning – cases for prosecution.

THE INADEQUACY OF STATE INTERPRETATIONS

In terms of judicial precedence, we needn't look beyond the Supreme Court's landmark verdict of 1997 in Naga People's Movement of Human Rights v. Union of India[9] (henceforth NPMHR). The Court upheld the Constitutionality of AFSPA, but also gave some cautionary measures in the form of a 'Do's and Don'ts' List.

This list gave guidelines such as:

- The arrested person is not to be kept in custody "longer than required".
- They are to be handed over to the nearest police station.
- Any form of interrogation by the armed officials is prohibited.

[9] 2 SCC 109 : AIR 1998 SC 431

- Third degree torture is to be barred.

The Court commented, rather than instructing, that it is '*desirable*' that the State Government be consulted before the Central Government declares an area 'disturbed', and that this declaration be made for a limited duration.

These recommendations provoke some general, yet imperative, questions: Just how long is the aforementioned 'longer than required' time period? Can it, depending on the choice of the official, stretch more than 24 hours? What use is it to prohibit interrogation, when the officer is still allowed to shoot a person based on mere suspicion or a non-evidential threat? What kind of judicial imposition is it when a verdict mentions the 'desirability' of an act, instead of a binding obligation? Since these questions in themselves are rhetorical, it feels almost unnecessary to further explain how all these 'improvements' have the potential to remain just performative suggestions, without any means of implementation or verification.

Almost a decade after this judgement, which unsurprisingly could not quell the problem in any meaningful manner, a Committee with Justice Jeevan Reddy as the Head was set up to look into AFSPA. This Committee's report was leaked (but not published) by The Hindu. It highlighted specific provisions which it deemed violative of the Constitution, and, in this process, exposed overstep of the Union Government that could have been ideally avoided.

For example, regarding Section 4, the Committee expressed the following condition to bring the Section within the Constitutional fold: '*Alongside, if and when an officer does decide to shoot a person, they need to give a verbal 'warning' with a fair and reasonable certainty in their minds about taking someone's life for the security of the State.*' However, how effective this clarification proved is debatable, since this Section still fails to synchronize with the most fundamental democratic Article of our Constitution: Article 21. As we extend the definition of Article 21 to include a broad spectrum of rights, like the Right to Privacy, we need to interrogate which statutory legislations are violating it. A clear preference is being given to (a subjective view of) the security of the state over the liberty of the state's citizens, and their right to have their life taken away only through a reasonable and fair procedure established by law.

Finally, the Committee suggested the repeal of AFSPA as it saw it as being "*too sketchy, too bald and quite inadequate in several particulars*" and that "*...the Act, for whatever reason, has become a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness*"[10]. Looking for logistically practical

[10] Part IV, Paragraph 5 (a)

solutions, it recommended that certain diluted provisions of a similar effect be incorporated in the Unlawful Activities Prevention Act (1967)[11].

THE MEGHALYA HIGH COURT: A CASE STUDY IN ARBITRARINESS

Having thus briefly discussed some pertinent legal lacunae in the Act, the authors would like to note that perhaps the extent of AFSPA's misuse could've been lessened had our institutions developed a more frugal and rational view of it. Unfortunately, over six decades, the perception of AFSPA has developed into that of a panacea. It is as if security in the North East is synonymous to, and inextricably linked with, the imposition of AFSPA. Any form of security trouble is met with a singular response - "Impose AFSPA and it'll be handled." Unfortunately, this kind of thinking is highly dangerous, and what is even more dangerous is how our Judiciary has adopted it as well. We shall illustrate this with an example - that of the Meghalaya High Court.

In its Order[12] of 02.11.2015, the Meghalaya High Court directed the Central Government to consider imposing AFSPA in the state. But was this Order necessary and/or justified, given the seriousness of such a recommendation? To answer this question, we shall first look at the context of this judgement. The situation in Meghalaya preceding this Order was described by the Court as follows: '*As per data supplied by the State Police, in the past, between January, 2015 and October 31, 2015 the insurgents of Garo Hills have abducted 25 civilians, 27 businessmen, 25 employees of private Sector, 5 Government employees and 5 teachers, in total 87, for ransom. It appears that the police have rescued some of them, while a few have managed to escape from the custody. The rest being unfortunate were maimed to death for non-fulfillment of illegal demands… These poor villagers [referring to the inhabitants of the Garo hills] are forced to cooperate with the insurgents, and in doing so, they also have to face the wrath and vengeance of Police.*'

Taking this into consideration, the Court observed that the law and order situation in the Garo Hills had '*deteriorated beyond redemption*', and thus the Court had '*no other option but to issue serious directions in order to protect the civil liberties and fundamental rights of the people.*' Citing some previous precedents[13], the Bench directed the Central Government to consider the implementation of AFSPA in the State.

Notwithstanding its legal validity, the authors believe that this Order was inherently flawed, and we support this view with the following observations:

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[11] Part IV, Paragraph 5 (b)

[12] WP(C) No. 127 of 2015,

[13] Nandini Sundar and others v. State of Chhattisgarh; Naga Peoples Movement of Human Rights v. Union of India; State of West Bengal and others v. Committee for Protection of Democratic Rights, West Bengal

- Firstly, it is important to note that the measures taken by the Central Government to aid the State - an extensive list which included the increase of funds, deployment of CAPF Companies, creation and upgradation of Police Stations, etc. - were also detailed in three affidavits attached to the same Order.[14] The affiants stated that a lot of these anti-insurgency measures had proved inadequate because of bureaucratic and administrative failures. It was to be reasonably inferred that proper implementation of these measures would have produced, at least in some part, the desired results. However, the Court did not at all examine the possibility of facilitating this; instead, it focused its attention solely on AFSPA. It had a kneejerk reaction to the situation instead of a planned and balanced approach. The Bench wrongly stated that this direction was the only choice that they had, whereas the authors believe that it's clear that there were other solutions at hand.

- Secondly, the Court called for the continued application of AFSPA '*till life becomes normal and the incidents of rampant kidnapping and killing totally stop*.' We believe that the former part of this stipulation ('till life becomes normal') is rather vaguely worded, and the latter part ('the incidents of rampant kidnapping and killing totally stop') is too broad for the application of AFSPA, whose scope is ideally narrowly restricted to aiding the civil authorities, and not taking over the administration of the region - a fact which was observed in the very same Order.

- Thirdly, it may be noted that even the Central Government was not amenable to the Order. The Minister of State for Home Affairs, Shri Kiren Rijiju, stated that the Central Government would be filing a Special Leave Petition in the Supreme Court, since it believed that AFSPA would not solve the problem in the insurgency-hit Garo hills.[15]

[14] Two filed by Mr. Sanjay Kumar, Under-Secretary to the Government of India, on 01.07.2015 and 11.08.2015; and one filed by Shri JPN Singh, Director (North East) in the Union Ministry of Home Affairs, on 19.10.2015

[15] https://www.outlookindia.com/newswire/story/centre-to-move-sc-on-hc-order-to-enforce-afspa-in-meghalaya/920014

- Lastly, it is worth mentioning that the Order was heavily criticized by about 60 distinguished members of civil society as well.[16]

Hence, we believe that this Order, suffering from these problems, reflected the grave flaw in the institutional approach of countering insurgency with the help of AFSPA. Because of how frequently it has been used, the law has come to be viewed as the automatic solution for any security issue in the North East. Guided, or rather misguided, by this view, the Government has used AFSPA as a Band-Aid for security troubles far too many times and far too arbitrarily.

THE INTERNATIONAL LAW REGIME

Having thus outlined AFSPA's deeply contentious and problematic place in our domestic law, we now turn to the international sphere for a brief note on its incompatibility there as well.

Countless human rights bodies and at least three United Nations Rapporteurs (Cristof Heyns, Margaret Sekaggya, and Rashida Manjoo) have independently called for the immediate repeal of AFSPA. Where do these demands stem from? We must make no mistake about this: There is equal parts disgust at the atrocities committed under the Act, and equal parts concern over the international conventions it blatantly violates.

We begin with a look at two relatively less known (but nonetheless important) UN texts: the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[17] and the Code of Conduct for Law Enforcement Officials[18].

At this point, a semantic technicality may be pointed out that members of the Armed Officers are not 'law enforcement officials', and thus do not fall strictly within the purview of these texts. However, the Commentary to Article 1 of the Code of Conduct states: '*In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.*' In practice, it has been seen that is indeed the effect of AFSPA under which Army officers are given the de-facto power of upholding the law. They must then be bound by the same standards.

Article 3 of this Code has been interpreted as stipulating: '*In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not*

[16] https://www.thehindu.com/news/national/eminent-citizens-oppose-hc-order-on-afspa/article7920006.ece
[17] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders
[18] General Assembly Resolution 34/169

sufficient to restrain or apprehend the suspected offender.' This implies that the usage of force is supposed to be exceptional. In stark contrast, under AFSPA, the usage of force is the norm. Flying in the face of this Article, it allows for firearms to be discharged in a disturbingly wide range of situations.

In the 'Basic Principles', there are General Provisions (many of which are in clear contradiction with AFSPA) and then Specific Provisions. Special Provisions 13 and 14, relating to unlawful assemblies, state: '*In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary.*' Again, we see that AFSPA is diametrically opposed to this; it gives free reign to the use of force to disperse assemblies.

It also stands in contradiction of Special Provision 11 (C): '[*Prohibiting] the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk.*' No one with an objective moral compass can call the injuries – mostly fatal ones – caused by our Army's firearms and ammunitions to be warranted, given how many are inflicted when people are engaged in absolutely innocent acts.

Then there is General Provision 7: '*Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.*' This may be the most violated of these provisions, considering how the prosecution percentage usually doesn't go beyond a flat 0%. A case in point is: Assam Rifles authorities told the Justice Hegde Commission that the force had received 66 complaints against its personnel stationed in Manipur in five years, of which three were addressed. That's a rather impressive prosecution rate of 4.54%!

With the basic message remaining the same, that AFSPA is simply incompatible with multiple principles of international law, we shall now cite the provisions of the International Covenant on Civil and Political Rights (ICCPR) - a cornerstone of modern human rights law - that AFSPA violates. These are Articles 2 (3), 6, 7, 9 and 21, to name a few; they are concerned with the right to seek remedy, right to life, right against torture, and right of assembly. Having covered these legal pitfalls already, we shall not be reproducing our arguments here, but the authors hope that by now it is clear that these rights have been crushed under AFSPA.

Finally, we refer to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). An indirect discriminatory measure which objectively leads to 'an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or origin' is prohibited under the ICERD. And while this may not be the intention, the effect of AFSPA is to discriminate against the people of the North East, people with significant ethnic differences, by placing

them under an alternate legal regime. This unfortunate fact has led the Committee on the Elimination of Racial Discrimination to criticize and call for repeal of AFSPA[19].

Thus, having legally analyzed AFSPA from both domestic and international perspectives, the authors believe it is well established that this law is manifestly unjust, arbitrary, and unconscionable. We shall now delve into its socio-political consequences, and the contradictions it has created in these areas.

AFSPA IN SOCIO-POLITICAL SPHERES

Under the ideological hegemony of the Government, a nationwide binary distinction between protests is disturbingly propagated to the citizens; this takes the form of a protest being classified as either a 'Good Protest' or a 'Bad Protest'. Some may perceive this terminology used by the authors as vague, or dubious, but what choice is left to us when we, the citizens, are bound by ever-changing interpretations of what a protest is? There exists an entire arena of reasonable restrictions that reshape continuously according to the convenience of the Government. The idea of dissent gets buried due to the apprehension and hesitance that surrounds the idea of a protest; it should be a 'Good Protest', and they should be 'Good citizens'. If it leaves a protestor behind bars, it becomes a 'Bad Protest'. This thought allows for dissent to accompany impoverishment, meaningless arrests, and media apathy; making it a struggling journey for a citizen who had the ambition to drive the Government to change its legislation, manner of enforcement, etc. The feeling of fear replaces the freedom which dissent is supposed to carry within itself. Despairingly, we must note that getting arrested has become the primary criterion to determine the quality of a protest, and hence of a citizen, by virtue of participation. Currently, what stands as the socially accepted definition of the 'Right to Protest' covers very little of what this right ideally encompasses and emblematizes.

Invariably, social protests are carried out in North-East India as well, except that every North-Eastern protest and/or dissent is viewed as bad, unfaithful, or appalling for the legislation (which is considered supreme). The cherry atop this cake is the adversity which AFSPA brings, leaving little scope for any judicial proceeding. This is bound to leave the citizens of the North East justifiably embittered.

[19] UN Doc. CERD/C/IND/CO/19 (5 May 2007), at Paragraph. 12

EXPERIENCES UNDER AFSPA: SUFFERING IN SILENCE

Let's consider Section 4 of the Act that grants the right to kill a person if they are, or are treated with the suspicion of being, a militant. As mentioned previously, officers ought to give a warning in these circumstances. This provision was followed in the following manner in the case of Thounaojam Herojit, a police constable in Manipur[20]:

"At first, he kept a tally of his kills in his head: "10, 11, 12 …" But his job, eliminating suspected militants, soon became routine. In Manipur, high in the welter of green hills that blur the border with Myanmar, nearly any young man could be a suspect, and there was no time to take them all to court.

It became a habit for Herojit to make his victims face him. He looked them in the eye when he pulled the trigger. Later he kept a diary, recording dates, and names, and marking them: killed. Eventually, there was a second notebook, then a third."

It goes without saying that AFSPA protected the constable from getting the reasonable punishment he deserved as retribution. Ideally, a warning is supposed to be given in the form of verbal acknowledgment. However, it was replaced by an intimidating stare. Eventually, killing became something he began enjoying.

This is not an isolated incident, for the Indian Army has killed thousands of ordinary people and relabeled them 'militants' to avoid prosecution - as if getting prosecuted is an effortless process in itself.

Upon the orders of the Supreme Court, a special committee of the Central Bureau of Investigation was set up in 2017 to look into these instances of murders, fake encounters, rape cases, and disappearances. To this, the army officers of Manipur exhibited verbal revolt, clamouring that FIRs cannot be filed in 'anti-insurgency operations'. This gained support from the Central Government, which found it 'ethically impossible' to intervene in military operations. Their convenient denial is interestingly reflective of the larger problem at hand; that is, the absence of military disruption by any bureaucratic machinery.

This disturbing silence reminds us of the lonely fight that the North Easterners have been fighting, but also ignites hope, as their dissent has not died. It has unrelentingly urged the bureaucracy and judiciary to take a just stance, as we see in the experience of Irom Sharmila, a Meitei woman and human rights activist. Dragged into a solitary world of activism, she started her Satyagrahi fight by launching a hunger strike as a response to the brutality of the armed forces. The culmination of her

[20] https://www.theguardian.com/world/2016/jul/21/confessions-of-a-killer-policeman-india-manipur

hunger strike took place after 16 years of her confinement in police custody (she was arrested for 'attempting suicide', and was forcefully fed using a Ryle's tube). She acknowledged the cruel dryness of politics, and decided to change her tactics, because politics had won. Politics cruelly made her stumble through the disorderly arrangement of implicit and explicit injustice; and in the most tragic irony, she decided to imbibe politics herself, by contesting elections.

Irom Sharmila's exemplary rebellion rewarded her with the title of the 'Iron Lady of India', along with fame and all forms of recognition, but the performativity of all of this cannot be ignored. She was at the receiving end of mainland sympathy, by being given compliments and wishes on account of her being patient, rebellious, brave, and strong. However, this was not what she had aimed for. The most renowned of activists termed her a Goddess. She welcomed all these compliments in her stride, but a Goddess is not made to sacrifice her freedom while being in confinement by the Government. This phrase must be kept in our minds: *16 years, and yet not a single State action in her favour.*

THE MANORAMA INCIDENT AND ITS AFTERMATH

The weight of tragedy which AFSPA carries with itself gave momentum to another popular movement in 2004, when another young Meitei woman called Thangjam Manorama was brutally murdered after getting arrested by the Assam Rifles from near her home. The lower part of her body was found to be pitilessly mutilated with bullets, which was suspected to have been done to hide the evidence of rape. Being deployed under AFSPA, the Assam Rifles were not subject to any interrogation by the State Government, as a result to which the case was handed over to the Union Government - whose report was never released.

The obvious failure to assign accountability to the culprits led to a string of loud, incensed protests in Manipur, which would make any onlooker shiver. In light of Manorama's custodial killing, recognizing the racialized and gendered aspects of a North Eastern woman's experience became a strenuous yet mandatory concept, because these women go through the pressure of defying several patriarchal structures: The Army, the public sphere, and the personal home. Only by understanding this complexity would we be able to bring into light a protest that gained massive attention: The demonstration on 15 July, 2004, in which women protested naked while holding a banner that said: "Indian Army, Rape us."

This specific instance became a source of strength for many, as women defied the conventionality of viewing their bodies in terms of victimization or objectification, and turned that characteristic to see

their bodies outside of it. They turned their own source of oppression to use against the State, highlighting the perpetuation of abuse against their bodies. This required the collective labour of emphasizing on their bodies as being objects viewed in the light of humiliation and objectification simultaneously. They used their nudity to highlight the paradoxical truth of something that requires shielding (from the army), but does not receive even a shred of it.

A strange aftermath took place, in the sense that the events of this protest got published in several articles (with pictures), along with getting heavy attention from other forms of media as well. What was it about this protest that contradicted the usual norm of North East India fighting AFSPA in solitude and loneliness? Before one deems this media attention as a hopeful change, the authors would like to make a clarification. The attention by the media was on an entirely clashing ground from the central ambition of the protest. The media profitably severed the protest from its concrete ideological roots to instead talk about the nature of the women during it; the gasps, the surprise, and the attention it carried with itself. To this day, we see its remembrance more as a naked protest than an anti-AFSPA protest. The inherent message of a protest that highlights the reality of AFSPA can only be conveyed if obstacles like a non-democratic, sensationalist media are eradicated. Of course, this primarily requires the identification of structures that perpetuate the violation of human rights, along with its diagnosis in a legal sense, and outside of it.

Hence, the experiences of North Easterners (and the responses to the same) evidentially substantiate the abundance of problems with AFSPA in terms of its legislative incompetence, the effects of its draconian implementation, and the futility and lack of mainland actions.

‘INCLUSIVE EXCLUSION’: COLONIAL ANTHROPOLOGY AND MAINLAND APATHY

The establishment as to how AFSPA deliberately changed from a means to curb Naga Insurgency to a means of ‘governing’ the entire North East can be concreted by understanding, and thereby questioning, it as a post-colonial law. Despite the anti-colonial movement (through peaceful protesting, marching, and other Gandhian ways of Satyagraha), India’s intrinsic inclination that came naturally to it was to adopt many of the British laws. Here, we make an argument that challenges India’s anthropological lens of viewing the citizens of the North East as incomplete.

All colonial texts classified Indians in a binary manner: Mainland Indians were described as ‘savages’, while North Eastern Indians were described as belonging to ‘tribes’ from China and Southeast Asia.

This racial narrative became the sole lens to understand the North East, which was then adopted by Independent India as well.

The Mainland Indian problems of caste and religion were attended to, and their solutions were detailed in various Articles of the Indian Constitution (along with other provisions) after intensive debates by the Constituent Assembly. On the other hand, the people of the North East continued to be regarded as 'untreatable savages, immune to social modernity'. This institutional apathy continues to date, and coerces us to believe in the need for 'protection' of the aforesaid 'incomplete' citizens. Active (non) ignorance by the State and its citizens plays a crucial role in the continued working of AFSPA. There is a collective mainland obliviousness that makes us 'over-legalize' issues that can be dealt with if seen as political ignorance, or lack of cultural freedom. Not only is there something legally problematic in AFSPA, it also vindicates the hyper-nationalism that wants the North Eastern citizens to be 'ideal' citizens by irrationally curbing their fundamental rights and punishing, instead of rehabilitating, them. One of the works by Papori Bora[21] on the 'inclusive exclusion' of the North East backs this idea by rightfully saying:

"The Northeast emerges as being both inside and outside the concept of India; in other words, the North-easterners are both included and excluded from the category of Indian citizen at the same time. They are included because they are supposed to have the full rights and privileges of an Indian citizen under the constitution. At the same time, they are excluded because they cannot be incorporated within the way the nation is imagined – after all, it is this imagination that provides the concept of an Indian citizen in the legal sense with its force and signification. It is by virtue of occupying this space (rather the ***non-space****) of being both inside and outside, or included and excluded at the same time that the North-easterners emerge as incomplete national subjects and citizens."*

The authors quote this to reinforce how contemporary legislations, AFSPA in this case, have got a pass due to this persistent anthropological bias, and this legalizes the existence of the concept of incomplete citizenship. The performative mechanism of *giving* citizenship in a sense that complicates the notion of democracy and merges performative democratization with tyrannical restrictions, landing them in a confusing space between inclusion and exclusion. The Act recognizes the problem of insurgency that citizens of North East India face (inclusion) and gives an approach that further adds to the disturbance in an area by having developed a legal way of killing, raping, and kidnapping

[21] Papori Bora (2010) Between the Human, the Citizen and the Tribal, International Feminist Journal of Politics, 12:3-4, 341-360

people (exclusion). In this strenuously undemocratic process, they consciously want to forget that the problem of insurgency is *faced* by North East India, and not *created* by North East India.

This concept of a planned and structural inclusive exclusion can also be witnessed in the case of Irom Sharmila in light of her hunger strike. Her 16-year-old strike was not a victory; it has never been one. It lost because apathy existed and persisted, both on a governmental and a personal level. Even more so, the Central Government went ahead to criminalize this peaceful protest by labeling it as an 'attempt to commit suicide' under Section 309 of the Indian Penal Code and force-fed her nasally. In this context, to say that the Indian State institutionally ignored her would be utterly false, for they made an active effort - to make it counterproductive. They tried to draw an end to her protest, despite it setting a world record. It was this effort that also maintained the performativity of the world record: by not letting it lead to reform of any kind. While her right to protest was (performatively) maintained, cryptic ways of limitation were enforced (in this instance, the force-feeding) instead of reconsidering the legality of AFSPA. This legal confusion left Sharmila with fewer choices of advancing towards her goal.

In comparison, we may examine the Anti-Corruption protest by Anna Hazare, which similarly involved the Gandhian vision of a peaceful protest via hunger strike. The contradiction comes into play when we factor in the recognition by the State. Noticeably, when the protest by Anna Hazare gained momentum, it was regarded as a 'political sensation' by the media, shaking the entire nation. Everyone acted as if they saw corruption in a new light. Why was this drastically different impact there? The simple answer is: It was deemed newsworthy, due to its geographical and social position, and the outpouring of mainland sympathy. This protest received recognition within 15 days by the Indian State. This was, however, to be fair, not as quick as the arrest of Irom Sharmila - taking place within *three* days of the beginning of her protest.

Taking this into consideration, we reiterate the idea of the 'non-space' (as highlighted in the citation); how the legality of our Constitution forces the Indian State to recognize the North-Eastern people as 'citizens', but also finds ways to make that citizenship incomplete.

This inclusive exclusion had also been maintained in the previously mentioned report of the Justice Jeevan Reddy Committee, which suggested the incorporation of some provisions of AFSPA into yet another controversial act, the Unlawful Activities (Prevention) Act, 1967. This report consisted of entire clauses that could be inserted into the UAPA by amending it; thus nationalizing this issue instead of diagnosing hyper-nationalism as one of its issues.

Hence, we believe that the implicitly dangerous juggling between inclusion and exclusion proves problematic either way, due to the persisting legal and social mechanisms of not terminating, but reinforcing, this apathy.

CONCLUSION: THE WAY FORWARD

After six decades of human rights violations, merely repealing AFSPA may be unjustified if it is not accompanied by an erasure of ambiguity from the Disturbed Areas Act, 1976. We need to collectively eradicate the idea of the mixing of cultural communities with that of danger, and solidify this eradication through law. Hence, the injustices suffered by these communities over the years need to be looked at again by the courts of law, setting a judicial precedent to compensate for the delayed justice. We emphasise on the role of the judiciary so that the power is not held exclusively by the Government.

Since 1958, AFSPA has legalised the burying of countless violations, causing transgressions of the rule of law and perpetuation of social divisions. Through the means of our study, we have wished to (re)examine the shameless propagation of inciting one human being against the other. By objectively analyzing the law using a democratic lens, we have come to the conclusion that an immediate repeal of AFSPA is urgently required in our nation. We notice a carefully structured inter-loop between violence and abusive authority, one leading to the other, which can only be curbed by abrogation of this law.