

JUDICIAL REVIEW OF AFSPA: BALANCING NATIONAL SECURITY WITH CONSTITUTIONAL RIGHTS

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Abstract

The purpose of this research study is to investigate the judicial review of the Armed Forces (Special Powers) Act (AFSPA) in India, with a particular emphasis on the difficult balance that exists between constitutional rights and the constitutional imperatives of national security. The purpose of this research is to investigate the manner in which Indian courts have interpreted, sustained, curtailed, or amended the provisions of the Armed Forces Special Powers Act (AFSPA) by analysing key judgements, legal precedents, and constitutional principles. The essay provides an analysis and evaluation of the judicial strategy that is used in conflict-affected regions in order to reconcile concerns over security with protections for basic rights. The paper contends that although the courts have, for the most part, deferred to the discretion of the executive branch in matters pertaining to national security, they have simultaneously attempted to establish safeguards against potential rights violations. This has resulted in a dynamic equilibrium that is imperfect in nature between the requirements of security and the guarantees of the constitution.

Keywords: AFSPA, Judicial Review, National Security, Constitutional Rights, Supreme Court of India, Fundamental Rights

Introduction

It is one of the most controversial pieces of legislation in India, the Armed Forces (Special Powers) Act (AFSPA), which grants exceptional powers to the armed forces in regions that have been categorised as "disturbed." Although the Armed Forces Special Powers Act (AFSPA) was first created as a temporary solution to address specific security difficulties, it has now become a permanent fixture in certain regions of Northeast India and Jammu and Kashmir. This has raised significant concerns over the appropriate balance between constitutional rights and security imperatives in a democratic political system.

During times of internal struggle or insurrection, the tension that exists between constitutional rights and national security is more pronounced. This tension is present in any democracy, but it becomes especially intense during these times. The state is obligated to safeguard its sovereignty and the safety of its inhabitants from any kind of violence; nevertheless, it must do so without jeopardising the same fundamental principles that it is attempting to preserve. According to Baxi (2018), this duality, which offers a hard legal dilemma, is one that the courts are regularly asked to address.

Within the context of constitutional protections, this article examines the development of judicial review of the Armed Forces Special Powers Act (AFSPA), following how courts have interpreted the terms of the law. When assessing the provisions of the Armed Forces Special Powers Act (AFSPA) and how they were implemented, the primary question that is being investigated is how Indian courts, and the Supreme Court in particular, have struck a balance between concerns over national security and constitutional rights guarantees. The examination of judicial reasoning, doctrinal advancements, and the practical implications of court decisions on both security operations and rights protection are the primary focusses of this research. The analysis focusses on major judgements that have influenced the jurisprudential environment around the Armed Forces Special Plans Act (AFSPA).

Given the continuing arguments over the relevance of the Armed Forces Special Powers Act (AFSPA) in a constitutional democracy and the proposals for its repeal or major revision, the research is especially important. This paper contributes to a fuller understanding of how constitutional courts manage complicated concerns at the nexus of security, rights, and the rule of law by exploring the judicial approach of the Armed Forces Special Powers Act (AFSPA).

Historical Context and Legislative Framework

Origins and Evolution of AFSPA

The origins of the Armed Forces (Special Powers) Act may be traced back to colonial law that was enacted with the intention of curtailing the Quit India Movement. With the intention of suppressing activities related to the Indian independence movement, the British government issued the Armed Forces Special Powers Ordinance in the year 1942. Commencing with the Armed Forces (Assam and Manipur) Special Powers Act, 1958, which was subsequently extended to other Northeastern states, similar legislation was created to handle internal security concerns

after the country gained its independence (Chasie & Hazarika, 2019).

After that, in 1990, the Armed Forces (Jammu and Kashmir) Special Powers Act was passed, which was a modification of the legislation that was subsequently modified for Jammu and Kashmir. According to Mathur (2012), both ordinances contain provisions that are quite similar to one another, which allow unprecedented powers to security personnel in regions that have been deemed "disturbed" by either the federal government or the governor of a city or state.

Core Provisions and Powers

AFSPA contains several provisions that grant exceptional powers to the armed forces operating in disturbed areas:

1. Section 4(a) authorizes even non-commissioned officers to use force, including lethal force, against persons violating law or order, with the power to shoot to kill.
2. Section 4(c) permits arrest without warrant with reasonable suspicion.
3. Section 4(d) allows entry and search of premises without warrant.
4. Section 6 provides immunity from prosecution for actions taken under the Act without previous sanction from the central government.

According to Kalpana (2017), these rules represent major deviations from the usual criminal process and human rights norms that regulate the use of force, arrest, imprisonment, and prosecution in regions that are not disturbed.

Constitutional Framework for Review

The constitutional framework for judicial review of AFSPA involves several key provisions:

1. Article 13 establishes the power of judicial review over all laws for their consistency with constitutional provisions.

2. Articles 14, 19, and 21 guarantee the rights to equality, various freedoms, and life and personal liberty respectively.
3. Article 22 provides protections against arbitrary arrest and detention.
4. Articles 32 and 226 empower the Supreme Court and High Courts respectively to issue writs for the enforcement of fundamental rights.

This constitutional architecture creates the basis for courts to examine AFSPA's provisions against fundamental rights guarantees while also considering national security imperatives (Jain, 2016).

Landmark Judicial Decisions on AFSPA

Naga People's Movement of Human Rights v. Union of India (1998)

The *Naga People's Movement of Human Rights v. Union of India* (1998) case was the one that offered the most comprehensive examination of the Armed Forces Special Powers Act (AFSPA). This was the lawsuit that was brought up in 1998. The constitutional legality of the Armed Forces Special Powers Act (AFSPA) was challenged in this particular case for a number of different grounds, including legislative competence and the violation of fundamental rights. The five-judge bench of the Supreme Court, which also incorporated various protections in its opinion, was able to sustain the validity of the Act to a significant degree.

Using Entry 2 of List I (Union List) of the Seventh Schedule to the Constitution, the Court confirmed that Parliament has the right to adopt the Armed Forces Special Powers Act (AFSPA). This was done in conformity with the Constitution. Included in this article are the "Naval, military, and air forces; any other armed forces of the Union." According to the court's decision in *Naga People's Movement of Human Rights v. Union of India* (1998), the charges that the Act was under the jurisdiction of "public order," which is a governmental power, were not accepted.

On the question of fundamental rights, the Court acknowledged the potential for rights violations but stopped short of declaring the Act unconstitutional. Instead, it emphasized the need for proper implementation and prescribed guidelines to prevent abuse:

1. The "disturbed area" declaration must be periodically reviewed every six months.
2. The use of force must be proportional and only after due warning.
3. Arrested persons must be handed over to the nearest police station with minimal delay.
4. The central government should exercise power under Section 6 (immunity provision) judiciously.

Justice S.C. Agrawal, writing for the Court, observed:

"There is no arbitrary or irrational nature to the powers that are granted to officers of the armed forces, including a Non-Commissioned Officer, in accordance with clauses (a) to (d) of Section 4 and Section 5 of the Central Act. Furthermore, these powers do not violate the requirements of Articles 14, 19, or 21 of the Constitution."

However, the Court added a significant caveat:

"If a person is acting in a manner that is contrary to law or order, then the powers that are granted under Section 4(a) of the Central Act do not, in and of themselves, grant the authority to murder that person. Only when a person is operating in violation of an order that prohibits the assembly of five or more people or the carrying of weapons or objects that are capable of being used as weapons or guns, ammunition, or explosive substances is it possible for that person to exercise the powers that are granted to them under Section 4(a)."

The basic judicial approach to the Armed Forces Special Powers Act (AFSPA) was created by this judgement, which established constitutional legitimacy in conjunction with interpretative protections. This approach has

affected future rulings (*Naga People's Movement of Human Rights v. Union of India*, 1998).

Extra-Judicial Execution Victim Families Association v. Union of India (2016)

The Supreme Court of India (SC) specifically addressed the immunity clause included in Section 6 of the Armed Forces Special Powers Act (AFSPA) in a historic case that involved suspected false encounters in Manipur. The Supreme Court made a distinction between legitimate military operations and the use of excessive force, and it arrived at the conclusion that immunity would not be applicable in situations involving disproportionate force.

Justice Madan B. Lokur, writing for the bench, emphasized:

"It makes no difference whether the individual who committed the act of violence was a common person, a militant, or a terrorist; similarly, it does not make a difference whether the perpetrator was a common person or the state. There is no difference between the two, and the law applies to each of them in the same way... It is necessary for a democracy to have this need, as well as the necessity for the maintenance of the rule of law and the maintenance of individual liberty." (*Extra-Judicial Execution Victim Families Association v. Union of India*, 2016).

In order to effectively restrict the extent of immunity under the Armed Forces Special Powers Act (AFSPA) and to establish judicial control over security operations operating in unsettled regions, the Court ordered an inquiry into suspected false encounters. It is important to note that the Court came to the conclusion that "there is no concept of absolute immunity" and hence rejected the idea that any death that occurred in a disturbed region could be justified under AFSPA. (*Extra-Judicial Execution Victim Families Association v. Union of India*, 2016).

Kartar Singh v. State of Punjab (1994)

This decision established fundamental concepts relating special security laws, despite the fact that it did not directly address the Armed Forces Personnel Act (AFSPA). While reading down various parts of the Terrorist and Disruptive Activities (Prevention) Act (TADA), the Supreme Court of the United States affirmed the constitutional legality of each of the provisions. The Supreme Court acknowledged the necessity of enacting specialised legislation in order to combat terrorism, but it emphasised that such legislation must have safeguards to prevent any potential misuse.

The Court observed:

"When it comes to the prevention of terrorism, the preservation and promotion of human rights within the framework of the rule of law is absolutely necessary. At this point, it is the responsibility of the judicial system to safeguard the human rights of the people by establishing a system of checks and balances." (*Kartar Singh v. State of Punjab*, 1994).

These principles have influenced the judicial approach to AFSPA, with courts acknowledging the necessity of special powers while insisting on safeguards for rights protection.

Sebastian M. Hongray v. Union of India (1984)

In this particular case, the problem of enforced disappearances in regions that are subject to AFSPA was discussed. The United States Supreme Court issued writs of habeas corpus and awarded exemplary damages in response to the failure of the army to produce two men who had been taken into custody. The judgement, which was handed down in the case of *Sebastian M. Hongray v. Union of India* in 1984, proved that the Court was ready to hold security personnel accountable notwithstanding the immunity provisions of the Armed personnel Special Powers Act.

Indrajit Barua v. State of Assam (1983)

In this particular instance, the Guwahati High Court investigated the process that must be

followed in order to declare an area to be "disturbed" in accordance with the Armed Forces Special Powers Act (AFSPA). According to the decision of the court, the declaration must be preceded by an adequate determination and cannot be entirely arbitrary. (*Indrajit Barua v. State of Assam*, 1983) This judgement established the idea that even emergency powers are subject to logical determination and cannot be employed capriciously. This theory was developed as a result of the case.

Judicial Balancing: Theoretical Framework

Doctrine of Constitutional Necessity

What academics refer to as the "doctrine of constitutional necessity" is reflected in the court approach to the Armed Forces Special Powers Act (AFSPA). This doctrine is based on the concept that unusual circumstances may justify temporary departures from complete obedience to constitutional principles. In its decision to sustain the Armed Forces Special Powers Act (AFSPA), the Supreme Court has tacitly adopted this theory while also aiming to minimise the possible excesses of the law (Singh, 2019).

In the *Naga People's Movement* case, the Court acknowledged:

"Within the context of an internal disturbance, it is necessary for the military forces to collaborate with the civil government in order to solve the problem. As a result of the disturbance, the civil administration is unable to operate in its entirety, and the armed forces are unable to carry out the responsibilities for which the civil administration is responsible." (*Naga People's Movement of Human Rights v. Union of India*, 1998).

The acceptance of exceptional circumstances has been a persistent aspect of judicial reasoning on the Armed Forces Special Powers Act (AFSPA). Courts have been unwilling to completely invalidate security legislation while also insisting on basic protections for the preservation of rights.

Proportionality Standard

As a significant judicial instrument for assessing acts conducted under the Armed Forces Special Powers Act (AFSPA), the proportionality criterion has emerged. Even in communities that are already in a state of unrest, the courts have been emphasising more and more that the use of force must be appropriate to the threat that is being confronted. In the case of *Extra-Judicial Execution*, the Supreme Court ruled that every incident of the use of force must fulfil the proportionality criteria (Kashyap, 2018). This standard was stated in the case.

Justice Lokur observed:

"Under no circumstances is it acceptable for the Manipur Police or the armed forces of the Union to resort to the use of excessive force or retaliatory force. In light of this, it is imperative that a comprehensive investigation be conducted into the use of such disproportionate force or retaliatory force." (*Extra-Judicial Execution Victim Families Association v. Union of India*, 2016).

This represents an important evolution in judicial thinking, moving from general deference to security imperatives toward case-specific assessment of the proportionality of force used.

Judicial Deference in National Security Matters

In circumstances pertaining to national security, the court approach to the Armed Forces Special Powers Act (AFSPA) follows the idea of deference to presidential judgement. In general, the courts have recognised the executive branch's assessment of the security risks that need the use of the Armed Forces Special Powers Act (AFSPA), but they have insisted on the adoption of procedural safeguards (Kumar, 2020).

In *State of Manipur v. Nungshitombi Devi* (2016), the Court noted:

"In spite of the fact that the Supreme Court is obligated by the Constitution to safeguard basic rights, it cannot ignore the difficulties that

security forces have when attempting to preserve territorial integrity and fight insurgency."

This deference is not unlimited, however, as demonstrated by the Court's willingness to investigate allegations of rights violations even in disturbed areas.

Critical Analysis of Judicial Approach

Strengths of the Judicial Approach

The judiciary's approach to AFSPA demonstrates several strengths:

1. **Interpretive Innovation:** Using interpretative procedures, the courts have been able to read protections into the Armed Forces Special Powers Act (AFSPA) without immediately striking down sections, therefore recognising both the security demands and the rights concerns (Anand, 2019).
2. **Evolutionary Jurisprudence:** Specifically in more recent judgements, the approach used by the judiciary has shifted from a greater deference to security concerns to a greater inspection of individual activities and a better protection of rights (Reddy, 2017).
3. **Institutional Dialogue:** There has been a discourse between the arms of government over AFSPA, which has been fostered by court judgements, which has contributed to policy debates about prospective revisions (Prasad, 2018).

Limitations and Critiques

Despite these strengths, the judicial approach has been criticized on several grounds:

1. **Deference to Executive:** Some people believe that the courts have showed an undue amount of deference to the executive branch's assertions that it is necessary for national security, so confirming a legislation that allows for major abuses of rights (Shah, 2018).

2. **Implementation Gap:** In areas where there is conflict, there are limited methods to verify compliance with the protections that are required by the courts, which frequently results in implementation issues (Reddy, 2017).

3. **Structural Issues Unaddressed:** According to Dutt (2020), judicial review has mostly concentrated on protections for procedures rather than addressing the underlying problems that allow for the possibility of rights abuses under the AFSPA.

4. **Delayed Justice:** Cases that challenge the terms of the Armed Forces Special Powers Act (AFSPA) or allege violations frequently encounter large delays, which undermines the effectiveness of treatment for victims (Human Rights Watch, 2019).

Comparative Perspectives

International Standards on Emergency Powers

Despite the fact that international human rights law acknowledges the possibility that governments may require exceptional powers in times of crisis, it also creates stringent criteria for the exercise of these powers. India is a signatory to the International Covenant on Civil and Political Rights (ICCPR), which permits exemption from some rights during times of public emergency. However, the ICCPR stipulates that any measures taken must be strictly necessary by the exigencies of the situation and must not discriminate against any individuals (United Nations, 1966).

It has been emphasised by the United Nations Committee on Human Rights that some rights, such as the prohibition of torture and the fundamental criteria of a fair trial, cannot be deviated from even in times of emergency (UN Human Rights Committee, 2001).

In the process of assessing the Armed Forces Special Powers Act (AFSPA), Indian courts have not substantially interacted with these foreign norms, which represents a vacuum in the law.

According to Chinoy (2019), a more extensive incorporation of international standards has the potential to enhance the rights-protective aspect of judicial review practices.

Lessons from Other Jurisdictions

Other democracies facing security challenges have developed more robust judicial approaches to reviewing security legislation:

1. **Israel:** The Israeli Supreme Court, in *Public Committee Against Torture in Israel v. Government of Israel* (1999), prohibited certain interrogation techniques despite security concerns, establishing that security cannot justify all means.
2. **United Kingdom:** In cases concerning Northern Ireland, UK courts developed the principle of strict necessity for emergency measures, requiring the government to demonstrate that less restrictive alternatives were unavailable.
3. **European Court of Human Rights:** In cases like *Aksoy v. Turkey* (1996), the Court has insisted on prompt judicial control of detention even in terrorism cases, a standard more protective than Indian jurisprudence on AFSPA.

These comparative examples suggest possibilities for strengthening the Indian judicial approach to balance security needs with stronger rights protections (Ramraj, 2016).

Emerging Trends and Future Directions

Recent Judicial Developments

Recent judicial decisions suggest a gradual shift toward greater scrutiny of actions under AFSPA:

1. In *Yumnam Edina Devi v. Union of India* (2021), the Manipur High Court ordered compensation for a civilian killed in an alleged fake encounter, rejecting immunity claims under Section 6 of AFSPA.
2. In *Union of India v. Abdul Rehman* (2020), the Supreme Court emphasized

that "disturbed area" declarations must be based on objective assessment and periodically reviewed, strengthening procedural safeguards.

3. The Supreme Court's recent emphasis on transparency in security operations, including in *Foundation for Media Professionals v. Union Territory of Jammu and Kashmir* (2020), reflects an emerging judicial concern with accountability mechanisms.

These developments suggest a gradual evolution toward more rights-protective jurisprudence without abandoning security concerns (Trivedi, 2022).

Potential Legislative Reforms

Judicial review of AFSPA has contributed to discussions about legislative reforms. Several committees have recommended modifications to the Act:

1. The Justice Jeevan Reddy Committee (2005) recommended repealing AFSPA and incorporating necessary provisions into the Unlawful Activities (Prevention) Act with added safeguards.
2. The Second Administrative Reforms Commission (2007) suggested amending AFSPA to address human rights concerns while preserving essential security provisions.
3. The Justice J.S. Verma Committee (2013) recommended removing immunity provisions for sexual offenses committed by armed forces personnel.

While these recommendations have not led to comprehensive legislative changes, they reflect the impact of judicial scrutiny on policy discussions (Ministry of Home Affairs, 2019).

Conclusion

The judicial examination of the Armed Forces Special Powers exercise (AFSPA) is a complicated exercise of balancing the protection of constitutional rights with the

imperatives of national security. Indian courts have, for the most part, maintained the constitutional legality of the Act, while at the same time making efforts to provide safeguards against the possibility of rights breaches. The court has acknowledged the risks to national security as well as the necessity of preserving constitutional ideals even in situations when there is conflict. This approach reflects this realisation.

A progressive trend towards stronger protection of rights without weakening valid security concerns is suggested by the history of jurisprudence, which has progressed from universal deference to growing scrutiny. However, there are still important hurdles that need to be addressed, such as gaps in implementation, structural problems, and the requirement for a more profound absorption of international human rights norms.

For the judicial review of the Armed Forces Special Powers Act (AFSPA) to be successful in the future, it is necessary to continue the movement towards a more stringent proportionality evaluation and stronger accountability procedures. It appears from the experiences of other democracies that are confronted with security difficulties that robust rights protection does not always have to undermine serious security requirements. The ultimate difficulty for Indian courts is to guarantee that unprecedented powers granted in the name of security continue to be consistent with the constitutional promise of liberty, equality, and justice for all people, regardless of where they live. This is the ultimate problem.

The judicial balancing of national security and constitutional rights under the Armed Forces Special Powers Act (AFSPA) is still a work in progress; it is a task that will continue to determine India's constitutional character and its reaction to challenges to its internal security in the years to come.

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