



# BOFAXE

## INDIAN WOMEN V. INDIAN ARMED FORCES (PART 1)

### AFSPA Tipping the Scales of Justice

Sexual violence and crimes against women are commonplace in India. With judicial remedy running at a painfully slow pace, high-profile politicians condemning rapes is nothing but lip service to women in the country. The situation is made worse when the law grants impunity to the perpetrators of crimes against women, such as the Armed Forces (Special Powers) Act 1958 (AFSPA). The Parliament of India, under AFSPA, has conferred the Indian armed forces special powers to maintain order in 'disturbed areas' and has granted them with impunity from prosecution. Sexual violence and abuses by the Indian army are rampant in the states where AFSPA is in force, with countless instances surfacing over the decades. Women are targeted by the security forces on the pretext of being militant sympathisers, and the cases are squashed by the military and government alike. This blog post highlights the incompatibility of AFSPA with Indian and international law and calls for the state's acceptance of and compliance with international law in this context.

#### Origins of AFSPA and Associated Atrocities

AFSPA traces its origins to the Armed Forces Special Powers Ordinance of 1942 of British India, with the intention of snubbing the Indian resistance movement. Independent India retained the Act to tackle demands of sovereignty, such as those made by the Naga leaders for the state of Nagaland to be independent of the Indian Dominion. The Assam government enacted the Assam Maintenance of Public Order (Autonomous District) Act 1953 as a response to the Naga leaders. With increasing insurgency, the Government of India (GOI) tightened its grip and revised the Act, which eventually became the Armed Forces (Special Powers) Act 1958. The amendments of 1972 and 1986 extended the power of enforcing the Act from the state governments to the central government. The Act, which is now enforced in 31 districts and partially in 12 districts of 4 Northeastern states, namely Nagaland, Assam, Arunachal Pradesh, and Manipur, and the entire state of Jammu and Kashmir, grants army officers impunity from prosecution.

The Independent People's Tribunal, a human rights NGO, reported the rapes of 100 women, including minors and the elderly, in Jammu and Kashmir in 1991. The notorious Kunan-Poshpora mass rape case, where at least 23 women of the Kashmiri twin villages of Kunan-Poshpora were raped by four personnel of the Rajputana Rifles in 1991, remains unresolved to this day. Of the rape cases that saw the light of day in Manipur, only one resulted in the rapists being tried and punished. In other instances of abuse of power, civilians who were suspected to be militant sympathisers were routinely arrested, interrogated, tortured, and sexually abused. Two sisters were falsely accused of sheltering underground activists by the Central Reserve Police Forces and taken to a camp. They were allegedly stripped naked and beaten with iron rods and sticks 'on their hips, buttocks, thighs, calves and feet'. In April 1998, a soldier of the 6<sup>th</sup> Battalion Jammu and Kashmir Rifles raped a 27-year-old pregnant woman at gunpoint, a case that the competent court ruled as molestation instead of rape. In March 1999, an 11-year-old girl was taken into custody based on the claim that she was in a relationship with an underground activist. Two days after her interrogation, the girl committed suicide.

#### Incompatibility of the AFSPA with Domestic Law

According to the AFSPA, officers have, upon reasonable suspicion, the authority to arrest, enter, and search without the need for a warrant (AFSPA § 4). They are neither obligated to inform the person of the reason for their arrest nor can they be prosecuted or face legal proceedings unless there is express permission from the GOI (AFSPA § 6). Rights activists, journalists, and lawyers have long claimed that the AFSPA is unconstitutional and a violation of Article 21 (Protection of Life and Personal Liberty) and Article 14 (Equality before Law) of the Indian Constitution. AFSPA's existence flouts the Indian Penal Code's provisions on rape (Sec. 376), kidnapping and abduction (Sec. 354), and sexual harassment (Sec. 509), rendering them futile.

Singh has stressed that 'The government's obligation to abide by the International Bill of Rights arises out of constitutional requirements, customary international law, India's common law background, state practices and, above all, the Union Government's signature and ratification of the two key international covenants of 1979'. Yet, allegations of extrajudicial killings, rape, torture, disappearance, harassment, and other violations of human rights continue to mire the armed forces. The validity of AFSPA has been challenged in the High Courts as well as the Supreme Court of India. However, the courts denied that AFSPA is incompatible with the Constitution, claiming that AFSPA Sections 4 and 5 are not unreasonable or arbitrary and, therefore, not in violation of the Constitution.

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# BOFAXE

## INDIAN WOMEN V. INDIAN ARMED FORCES (PART 2)

### AFSPA Tipping the Scales of Justice

#### — Incompatibility of the AFSPA with International Law

Considering that conflicts in Northeastern Indian states and in Kashmir meet the criteria to be qualified as Non-International Armed Conflicts (NIACs), India is obligated to follow common article 3 of the Geneva Conventions. Women are “especially protected” from sexual violence under International Humanitarian Law, and rape, forced prostitution, and any other form of indecent assault constitutes war crimes. However, India’s denial of the conflicts as NIACs makes considerable room for human rights violations under the pretext of protection by the enforcement of AFSPA.

Drawing from the 1998 Akeyesu judgement and the International Criminal Tribunal for the former Yugoslavia, it is an odd solace to see the definition and scope of rape being expanded and accepted. On grounds of rape being a crime against humanity (Article 3(g) of the Rome Statute), the International Criminal Tribunal for Rwanda defined rape in its 1998 Akeyesu judgement (596-598). Through the judgement, Singh and Butalia posit that the ‘definition of rape advanced from simply “non-consensual intercourse” to rape and sexual violence as a physical invasion of a sexual nature, committed on a person under coercive circumstances and as part of a widespread or systemic attack on a civilian population that has been discriminated against on national, ethnic, political, racial or religious grounds’.

Torture, enslavement, and persecution were taken into account as elements of sexual violence along with acts of rape by the ICTY in the historic cases of Mucić et al (488, 500, 510) and Kunarac et al (181, 189). As elements of international crimes such as torture, enslavement, and persecution were previously not acknowledged as falling in the scope of gender violence, the ICTY advanced ‘the development of international justice in the realm of gender crimes by enabling the prosecution of sexual violence as a war crime, a crime against humanity and genocide’. Article 7 of the Rome Statute of the International Criminal Court categorises torture, rape, sexual slavery, enforced prostitution, other forms of sexual violence, or serious injury to body or to mental or physical health as a crime against humanity.

Clearly, sexual crimes committed by army officers operating under AFSPA warrant prosecution. According to the UN Human Rights Committee, section 4 of AFSPA is incompatible with Articles 6, 9, and 14 of the International Covenant on Civil and Political Rights. AFSPA also violates Articles 1, 2, 3, 5, 7, 8, 9, and 17 of the Universal Declaration of Human Rights. Holding India accountable for its draconian colonial era law is difficult as India is not party to the Rome Statute on qualms that the ICC impinges on its sovereignty.

#### Activism by Women and Failure of the Indian Government

Numerous protests sprinkled across the decades have called for repealing the Act. The extent of sexual violence and rape have pushed women to resort to activism. A prime example is the Meira Paibi (‘women with bamboo torches’), a group of Manipuri women who have been at the forefront of peace and resistance right from the colonial era. Despite being marred by their alleged role in the Kuki-Meiti Conflict of 2023, their contributions towards fighting AFSPA cannot be discredited. Their most prominent demonstration is perhaps the naked protest by 12 elderly women outside the then camp of the Assam Rifles troops in response to the rape of a 32-year-old woman by the troops. ‘Come Indian Army Rape Us’, their placards read, chilling the entire nation.

Another famous example is Irom Chanu Sharmila, also known as the ‘Iron Lady of Manipur’. Known for holding the world’s longest hunger strike of 16 years, Irom Sharmila cycled through being detained by Indian authorities (one year as a penalty for attempting suicide), being released, fasting, and then being arrested again. She has long called for the abolishment of AFSPA but to no avail. Eventually disheartened, shunned, and shamed by her own community, Irom Sharmila withdrew from the political landscape and activism.

Women have fought long and hard, and continue to do so, yet authoritarian laws like AFSPA and its supporting government forces are an uphill battle. India believes that justice can be ensured by the state’s judiciary and law enforcement, a belief that aids the perpetration of crimes and obstructs justice. However, enforcement of a colonial era “draconian” law is anything but a good colour on a “democratic” state, which India claims to be. It is time India amends its criminal laws and opens its judicial system up to the International Criminal Court. It is the duty of the state to protect its citizens, and while it is unfortunate that women have to fend for themselves against crimes of sexual violence, the agency and the will to stand for one’s rights embodies the strength of womanhood.