

People's Union for Democratic Rights

newsletter

VOLUME 2 NUMBER 1

MARCH 2022

This newsletter is the fourth in a new initiative by PUDR to keep those interested in the organisation's work and issues of civil liberties and democratic rights informed of some of the issues that we are working on. A more comprehensive account of the issues and organisation's work can be found on <https://www.pudr.org>.

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AFSPA

On December 4, an Indian army operation in Mon district of Nagaland killed six coal miners who were returning to their village, Oting, after a day's work. Following these deaths and that of eight other civilians during the protests, the Central Government set up a committee to review the Armed Forces (Special Powers) Act (AFSPA) in Nagaland. Barely five days later, a fresh notification extended the remit of AFSPA in the state by six months, even while the committee's report is awaited.

AFSPA's draconian provisions suspend many of the rights of ordinary citizens, including the fundamental right to life, and there is documentation of widespread human rights abuses committed by personnel of the armed forces under the Act's protection. Despite this, the application of this extraordinary law has become routine, and the notification of AFSPA has remained in place for over 63 years in several states of the North-East.

Origins: AFSPA came to life in 1942 as a British Ordinance to suppress the Quit India movement. It re-emerged in the form of the 1958 Act when widespread anti-government protest in the Naga areas of the North-East was brutally suppressed by the army. It was amended in the 1970s to apply to the newly formed states of the North-East. Subsequently, through separate Acts, it was imposed on Punjab and Chandigarh in 1983 and on Jammu and Kashmir in 1990. The notification for AFSPA was allowed to lapse from Punjab (in 1997), Tripura (in 2015), Meghalaya and some parts of Arunachal Pradesh (in 2018), but it has remained in force in Nagaland, Manipur, Assam, parts of Arunachal Pradesh since 1958 and in Kashmir since 1990. Though designed by a colonial state for subjugation of its subjects, the law's provisions have been made

more draconian post-Independence by the democratically elected government.

PUDR has been actively engaged in opposing the law, demonstrating its abuse through reports based on numerous fact-finding missions in the North-East and in Kashmir. It was also one of the petitioners in one of the most significant legal challenges to the law, on constitutional grounds, by the Naga People's Movement for Human Rights. The organisation's opposition to the law has been consistently based on both the design of the law – the draconian provisions – and the practice of the law – or the way the law has operated on the ground.

Powers and protection (impunity): The broad remit of the law empowers any commissioned or non-commissioned officer of the armed forces to use force to the point of causing the death of any person who contravenes orders that prohibit the assembly of five or more persons, or is carrying weapons or things capable of being used as weapons. Those violating the law, who could therefore be killed, would include, for example, a group of six or more students, or a group of family members, as well as anyone in possession of a kitchen knife, a sickle to cut grass, or even a piece of wood, iron or a brick. In a 1997 judgment, the Supreme Court ordered the use of minimum force for violation of prohibitory orders, but it did not remove or amend the clause allowing the use of force up to the point of causing death.

AFSPA empowers a member of the armed forces to destroy a shelter, arrest a person, and search any place not just on suspicion of the commission of an offence but also on suspicion that an offence may be committed in the future. Such offences are not confined to

serious ones related to terrorism or armed struggle, but even lesser ones which have no implications for violent activities, such as simple theft.

A place can be destroyed if it has arms or ammunition or is the source of an attack but also if it is a shelter “from where attacks are likely to be made”. It can be destroyed if it is used as a hideout by a member of an armed gang, but also by any absconder “wanted for any offence”. A person can be arrested without warrant by a member of the armed forces for committing “a cognisable offence” even if the offence bears no relation to any form of terrorist or dangerous activity. The arrest can even be based on the likelihood of being “about to commit” such an offence. A place can be entered and searched without warrant if there is suspicion that arms or ammunition or explosive substances are being stored there, but also if a person is being wrongfully confined there or if there is any stolen property on the premises even if this has no implications for violent activities.

These extraordinary powers empower not only the armed forces as a body but also any individual member of the armed forces and can be exercised even by a non-commissioned officer of the armed forces. This gives a great deal of latitude to individual judgement and does away with any checks and balances based on a chain of command and control.

The overbroad provisions are made more deadly by the law’s requirement for prior sanction to initiate prosecution. AFSPA makes it mandatory to secure sanction from the Central Government to initiate prosecution, suit or legal proceeding against any member of the armed forces for any act committed in exercise of the powers. This removes the normal deterrent against abuse of power, as has

been evident from the widespread abuses that have continued for decades in areas under AFSPA, while sanction for prosecution has been withheld in most cases. PUDR has analysed the provisions of the law in its 1983 report *Endless War: Disturbed Areas of the North East*.

Incidents: The incidents of horrifying human rights violations committed by personnel of the armed forces are numerous, but the following are illustrative. One of the earliest cases to be documented is in Matikhru village in Meluri in Nagaland (then part of Assam) in September 1960. Following an attack on an Indian army post by Naga rebels, the army surrounded the village and unleashed a vicious attack, beating and torturing villagers, burning granaries and houses, and killing nine men.

Among the worst cases of horrific abuse was Operation Bluebird, an Indian army operation in Oinam village in Manipur, which lasted for three months, between July and October 1987, during which 27 civilians were killed, hundreds tortured, homes destroyed and women raped by personnel of the Assam Rifles (a paramilitary organisation under the operational command of the Indian army and the administrative command of the Ministry of Home Affairs) in retaliation against an attack on the army by an armed Naga group. The incident led to one of the longest court cases (discussed below).

The emergence of rape as a recurring pattern in many major incidents of violence in areas under AFSPA gives an inkling of how the law really operates on the ground, protecting the use of violence including sexual violence as a means of punishment and subjugation. In June 1989, over a dozen women and girls, the youngest of them 12 years old, were allegedly gang-raped over a period of three days in Ujan Maidan in Khowai district of Tripura by members of the

Assam Rifles. The state government dismissed the allegations and the army only conceded that one woman may have been molested. A Supreme Court appointed commission found evidence of the gang rape of at least four women, rape of another two and molestation of one.

AFSPA has also shielded the armed forces from incidents of mass killings, where the forces have opened fire on peaceful public protests, such as in Bijbehara in Kashmir in 1993, when the BSF fired on a crowd, causing 51 deaths and injuring 76. Despite the efforts of the National Human Rights Commission and the findings of a magisterial inquiry, which found the firing to be unprovoked, all those charged were acquitted.

(For more information on how AFSPA has operated, see links at the end of the newsletter.)

Increasing control decreasing safeguards: In 1972, the power to impose AFSPA, resting with the Governor of the state until then, was also extended to the Central Government, which has used it in spite of opposition by many state governments. This is evident from its recent extension in Nagaland, despite the Nagaland state assembly's resolution calling for its repeal, and even though the Act itself states that it comes into operation in "aid of civil power".

Over time different versions of the 1958 Act have been enacted to extend its use to other states, each version adding more draconian provisions. The 1983 Act for Punjab and Chandigarh added the power to stop, search and seize any vehicle or vessel not only suspected to be carrying arms or explosive substances or a proclaimed offender but also any person who has committed, or is suspected of committing or even about to commit a non-cognisable offence. This means that

the right to search and seize a vehicle applies even to cases where the person in the vehicle committed or was intending to commit an offence of a less serious nature, which could include, for example, cheating; hardly an offence requiring the intervention of the armed forces. The Act also authorised the breaking open of the lock of any door or box, if the key was not provided.

The 1990 version of the Act for Jammu and Kashmir includes the provisions of the Punjab Act, but adds further draconian provisions. In Section 3, the need for declaring an area as disturbed covers not only prevention of terrorist acts or activities that seek to disrupt the sovereignty and territorial integrity of India but also causing insult to the national flag, the national anthem and the Constitution of India.

Concerns for human rights have not been reflected in reviewing the provisions of AFSPA. Despite being in force since 1958, its provisions have been upheld by the courts repeatedly on the grounds of national interest and security. A comparison of Section 197 of the CrPC and Section 6 of AFSPA, both of which make it mandatory to seek prior approval of the Central Government for prosecution, is illustrative.

In 2013, on the recommendation of the Justice J.S. Verma committee, Section 197 of the CrPC was amended to exclude the need for prior sanction to prosecute a public servant in cases of alleged sexual offences against girls and women. However, the government did not accept the committee's recommendation that the same exclusion should apply to AFSPA. There are also other exceptions in Section 197, listing crimes for which sanction to prosecute is not required. The courts have also ruled from time to time on the issue, as in a recent ruling of the Kerala High Court stating that Section 197 is

not intended to safeguard illegal acts and that prior sanction is not necessary to prosecute police officers in cases of police brutality, since such acts are not related in any manner to the discharge of their official duties. But no such caveats have been imposed on AFSPA.

Sanction: A look at how the government has used its power to sanction prosecution for abuses, or more accurately, withheld sanction, clearly demonstrates the entrenched immunity of AFSPA. Between 1991 and 2015, the Central Government received 38 requests for sanction. According to an answer in the Rajya Sabha in 2015, 30 of these were denied and 8 were pending. The Jammu and Kashmir government disclosed in response to an RTI request that it had not received sanction from the Centre in a single case from 1990 to 2011. According to another answer in the Rajya Sabha in 2018, the Central Government said it had received 50 cases for sanction from the government of Jammu and Kashmir between 2001 and 2018, but denied sanction for 47, while three remained pending.

A breakup of these 50 cases clearly shows the nature of abuse of power. Of these cases, 33 had resulted in deaths, 4 of the deaths involved torture, 8 related to disappearances and 3 to rape. The reason given for withholding sanction for prosecution was lack of sufficient evidence to establish a prima facie case, even though the question of ascertaining guilt or innocence ought to be a judicial function. AFSPA therefore can allow for killing of a civilian on the basis of unproven suspicion and can also exonerate personnel of the armed forces before a judicial trial is initiated.

Courts: Courts have upheld the constitutionality of AFSPA in totality. While the 1997 Supreme Court judgment responding to the constitutional challenge to the law urged for some limitations on the exercise of the Act, PUDR's 1998 report on the judgment titled

An Illusion of Justice found these stipulations to be largely cosmetic, with the Court focusing only on the procedural validity of the law.

The curbs the court instituted through this judgment included the need for a periodic review of the declaration of the Act in any area before the expiry of six months, use of minimum rather than maximum force on persons contravening prohibitory orders, handing over of arrested persons to enable them to be produced before a magistrate within 24 hours, and that the provisions of the CrPC should be followed in search and seizure. In addition, the court stipulated that the army needed to follow its own list of Do's and Don'ts, as revised in the light of the Supreme Court order. However, the judgment did not spell out a clear mechanism for the implementation of these safeguards or a pathway for redressal in case of their violation. The lacunae this left is obvious from the findings of a subsequent commission appointed by the Supreme Court, as shown below.

The tortuous road to inadequate justice: Delay, obfuscation and flouting of court orders marks the tortuous trajectory of painful and painstaking efforts by civilians to get justice for grave human rights violations, as is evident from various court cases. In one of the longest legal struggles (against the Oinam massacre of 1987), the Manipur High Court disposed of the case in 2019, 28 years after it was initiated. While noting that most of the papers were missing, it ordered the government of Manipur to constitute a committee to hold an enquiry into the incident for awarding compensation.

Another shocking case where justice has been denied under the garb of procedure is that of the July 2004 rape, torture and murder of Thangjam Manorama Devi whose body was recovered from a paddy field a day after she was taken into custody by personnel of

the Assam Rifles. Anger over the killing led to the famous naked protest by Manipuri women outside the Kangla Fort base of the Assam Rifles. The Upendra Singh Commission of Inquiry appointed by the Manipur state government termed the killing “one of the worst crimes in a civilised society governed by the rule of law” saying that nine personnel of 17 Assam Rifles were directly or indirectly involved in the torture and murder of Manorama. However, a legal challenge to the state government’s jurisdiction in appointing the Commission of Inquiry resulted in burial of the report, even though it was handed over to the Supreme Court in 2014, ten years after her murder.

In response to a writ petition in 2012, seeking investigation into 1,528 cases of extra-judicial executions in Manipur between 1978 and 2010, the Supreme Court appointed the Justice Hegde Committee to conduct an enquiry into the first six cases documented by the petitioners (the Extra-Judicial Execution Victim Families Association). The committee found all six cases, in which seven persons had been killed, were fake encounters. The Court then ordered registration of FIRs in close to 100 cases, as well as a CBI investigation.

The Hegde Committee remarked that the Do’s and Don’ts listed in the 1997 Supreme Court judgment “remained largely on paper and are mostly followed in violation”. Its recommendations that steps be taken to denotify areas under AFSPA and the decision to extend AFSPA be placed before the state legislature and that the Central Government respond to the requests for prosecution within a reasonable timeframe, preferably three months, failing which prosecution should be presumed, were all ignored.

Government-appointed committees have called for repeal of the law. Both the B.P. Jeevan Reddy Committee and the Fifth Report on



Public Order of the Second Administrative Reforms Commission have recommended repeal of the Act (albeit suggesting that part of the law's provisions be included in another piece of draconian legislation, the UAPA) but been ignored by the government. The result is the creation of an enabling environment for repeated incidents of human rights violations. Several generations have grown up under the shadow of the gun in states where the democratic functioning of the elected government is constrained and restricted by the extraordinary powers accorded to the armed forces.

The pattern of obfuscation and lack of transparency following the Mon killings follows a similar path. Though a Home Ministry panel was set up following a meeting with the state government, there have been differing interpretations of both its composition and timeline. A Special Investigative Team constituted by the state government has submitted its preliminary report, but no details are available. The army has its own court of inquiry, but the details of its internal processes are never shared publicly or even with the families of the victims.

It is worth asking why, despite the demand for repeal of AFSPA, there has been no demand for prosecution of those responsible for killing innocent villagers. Does the shield of “national security” override all other considerations including human rights, riding rough shod over the rights of the people the Act purportedly intends to protect?

There is, till now, little to suggest that the victims of the Mon killings will receive the justice that has been denied to thousands of victims of AFSPA.

Article 14's Sedition report

Even though the Supreme Court has called for a review of the law of sedition, amidst concerns of its gross misuse, the cases registered under Section 124 A of the IPC continue to rise. [Article 14's](#) recently published [Sedition Database](#) provides the most comprehensive insight into the contemporary use of the law, tracked over a decade between 2010 and 2021.

The research has documented 867 cases of FIRs registered under sedition against 13,000 people since 2010. The law has been used against a variety of activities ranging from political protests and journalistic writing to wearing T-shirts, cheering for a rival cricket team and even in instances of marital discord. The report shows that despite an abysmally poor rate of conviction at 0.1 per cent, the accused have spent long periods in custody, with lower courts denying bail in the majority of cases.

PUDR report on gig workers

Since the last newsletter, PUDR has published [Behind the Veil of Algorithms: Invisible Workers – A Report on Workers in the 'Gig' Economy](#). Based on a fact-finding investigation, the report examines the business model of the gig economy and covers issues that affect gig workers.

Ramanadham meeting

The 36th Annual Dr. Ramanadham lecture was delivered by urbanist and activist Dr Gautam Bhan on 12 February 2022 on the topic “Urban Planning and Democratic Rights”. Drawing attention to the inherently political nature of our cities, the lecture focused on the gap between informal settlements and the logic of official regulation, and the role of democratic struggle in reclaiming the space of urban citizenship. The discussion following the lecture further explored

key areas of PUDR's work (such as safety and conditions of work in industrial areas) and how it intersects with urban planning.

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As this newsletter focuses on AFSPA, we end with a link to a brilliant piece of oratory, capturing the terror and absurdity of AFSPA, from the film *Haider*, which also brings to mind Saadat Hassan Manto's Toba Tek Singh: <https://www.youtube.com/watch?v=ZTvEh1q8oqo>

For more detailed documentation and analysis on AFSPA:

- Endless War: Disturbed Areas of the Northeast (Published 1983)
- Restless Frontier: Army, Assam and Its People (Published 1991)
- Civil War and Uncivil Government: Report on H.R. Violations in Kashmir (Published 1997)
- Where Peacekeepers Have Declared War (Published 1997)
- An Illusion of Justice (Published 1998)
- Grim Realities of Life, Death and Survival in Jammu and Kashmir (Published 2001)
- No More Army Rule (Published 2004)
- End Army Rule: A Report on the Working of AFSPA in the NorthEast (Published 2004)
- Missing in Action: A Report on the Judiciary, Justice and Army Impunity in Kashmir (Published November 2007)