India: Killing One Colonial Law at a Time – After Section 377, It's Time to Repeal AFSPA

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AFSPA needs to be looked at with the same prism of constitutional morality along with all other transformative approaches that the Supreme Court holds as the hallmark of a democracy.

The Armed Forces Special Powers Act, 1958, had its genesis in the 1942 Lord Linlithgow ordinance, which was enacted to curb the Quit India movement. Soon after Independence, the country faced various secession movements and Nagaland was one among the former states to demand secession from India. The government quickly evoked the Armed Forces Special Powers Act: a law that was once used by the British to curb movements of freedom struggle which saw many Indians being killed or imprisoned.

AFSPA, like many other colonial laws, was introduced in almost the same shape as it existed prior to Independence. Worse, the powers to shoot, which were limited to officers with a rank of a captain in the 1942 ordinance, were extended to even non-commissioned officers, thus making it more arbitrary than before.

AFSPA gives power to an armed personnel to shoot a person if they have reason to believe that there is a threat from that person. The law also gives immunity to the armed forces against prosecution among various other protections.

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AFSPA has been in force since 1958 at different times for different reasons and in almost all of Northeast, Punjab (now repealed), and then finally in Jammu and Kashmir.

A bad law

AFSPA has been a controversial law since its enactment, as it gave the armed forces unfettered powers. There have been continued protests for the revocation of AFSPA due to concerns about human rights violations in Kashmir as well as the Northeast, which are a daily occurrence.

It has been almost 60 years since the law has been in force in India, but the situation in the conflict areas has not changed. The number of people who are being killed in Jammu and Kashmir and the Northeast has been the same, and, in fact, the people have been alienated more in the recent past. The number of civilians being killed and blinded for life along with the introduction of the pellet guns in 2016 has made the people of Kashmir more apprehensive of the government at the Centre than ever.

There are people as young as 15 who have been booked under the Public Safety Act, which is another state-specific law that allows the police to detain people for months without a trial. There are multiple allegations of fake encounters in Manipur, as alleged in the recent case of *Extra-Judicial*

Execution Victim Families Association and Anr. vs Union of India. Rape and sexual harassment of women continues unabated. Yet all the voices of the civil society in Kashmir and Northeast have gone unheard in the commotion of law and order.

The futility of the advisory

The Supreme Court in the case *Naga People's Movement of Human Rights v Union of India (1998)* upheld the constitutionality of the AFSPA, but gave certain cautions in the form of 'dos and don'ts' by the armed forces chief. The dos and don'ts are a range of duties, such as: a person should not be kept in custody for a period longer than required and should be handed over to the nearest police station; no force should be used on a person arrested, except if he is trying to escape; third-degree methods, which are methods which cause pain and suffering should not be used against those arrested or under suspicion to extract information or confessions out of them; only the armed forces should arrest a person; the armed forces should not carry out any form of interrogation. These are only a few of the various guidelines mentioned by the court.

Also read: When the Supreme Court Gave Hope to Those Fighting Against AFSPA

How effective these dictums have been can be gauged from reports of the various committees constituted in the past to assess the impact of the AFSPA. The Justice Santosh Hegde Committee (2013), appointed by the Supreme Court to look into the extrajudicial killings in Manipur found that, that the *Dos and Don'ts* dictum of the Supreme Court hold no significance in the field and the army has not been following them. The committee found four out of six deaths it was inquiring in Manipur have similar patterns of cause of death and could be cases of fake encounters. The report also concluded that AFSPA has not been able to achieve peace in the Northeast, and on the contrary, it has widened the distance between the people of these areas and the mainland.

There have been other committees in the past which have found the law arbitrary and have recommended the repeal of AFSPA. They are the J.S. Verma Committee (2012) and the Justice Jeevan Reddy Committee (2005). The Justice Verma Committee also pointed out the vulnerability of the women in conflict zones such as Kashmir; that there are higher chances of women getting harassed and raped at the hands of Armed Forces in the disturbed areas.

Towards a transformative law

The jurisprudence on the fundamental rights in India has come a long way since the Constitution has come into force. The fundamental right to life under Article 21 of the constitution has been extended to multiple rights such as the right to environment, right to privacy as held in the case of *KS Puttaswamy and Anr. v Union of India* and the right to love of people from same sex as heldvery recently in the case of *Navtej Singh v Union of India*. The Supreme Court in the case of *Navtej Singh v Union* of India also quoted various international covenants while discussing the fundamental rights of the LGBT community. The court spoke about India's commitment to human rights protection under the international law and India's constitutional duty to honour these International rules and obligations.

Also read: Why It is Ominous to Have Army Personnel Petitioning the Courts Over AFSPA Cases

It is interesting that the conventions that the Supreme court has cited in support of the rights of the LGBT persons also have provisions which *exclusively* talk about the protection of human rights in conflict zones. Article 2(3) of the International Covenant on Civil and Political Rights, which the Supreme Court cited while declaring Section 377 unconstitutional, for instance, makes it obligatory for all member nations to provide for remedies for violations of rights, even if they are carried out by

people acting in official capacities. The Universal Declaration of Human Rights states categorically that “no one shall be subjected to arbitrary arrest, detention or exile”.

Time to revisit Naga People’s Movement case

In the Naga People’s case, the Supreme Court was looking at various issues on the arbitrariness and the unconstitutionality of the powers under AFSPA. Various contentions were raised against the power to shoot under the AFSPA, the immunity to the Armed Forces, and the powers to grant permission by the Centre for prosecuting the Armed personals. Surprisingly, all the arguments were repudiated by the Supreme Court in a paragraphs or two with no deliberation on any of them. There were no arguments on the rights of the people in the disturbed areas and impact of the law on ground except for a few observations that the law should be less harsh for it deals with our own countrymen.

Navtej Singh, on the other hand looks at Section 377 of IPC not just for the fault in the provision of the law but how severely it has been discriminatory to the LGBT community.

On the question of arbitrariness of the Section 377, the court held, “Section 377 IPC subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment”.

Also read: Home Ministry Revokes AFSPA in Meghalaya, Dilutes the Act in Arunachal

The Supreme Court further refers to the case of Shayara Bano (which held triple talaq as unconstitutional for being violative of the right to liberty and dignity of the Muslim women under Article 21 of the constitution), followed by various other cases which put the right to life and dignity of the citizens at the highest pedestal. The Court borrows a range of literary references, testimonies of people who had faced harassment for being members of LGBT community, various progressive legislations and rulings in order to stress on the need for a revocation of the provision of law.

It talks about constitutional morality, which gives primacy to the rights of each and every person as opposed to the collective consciousness or the societal morality of the people at large-a doctrine which Kaushal got completely wrong when it held that Section 377 only affects a minority of people.

Navtej Singh therefore is a classic case which shifts the focus from mere interpretation of the law to the individual and the collective freedom of the victims of the law. It envisages transformative approaches to the law while keeping the rights of the people at its core; an approach which severely lacked in the Kaushal’s case or for that matter the Naga People’s case which upheld the validity of AFSPA.

AFSPA needs to be looked at with the same prism of constitutional morality along with all other transformative approaches that the Supreme Court holds as the hallmark of a democracy. This would basically mean that AFSPA is repealed or overhauled completely.

Mustafa Haji

P.S.

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