The Armed Forces Special Powers Acts and the institutionalisation of rape in India

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Abstract

The Armed Forces Special Powers Acts (AFSPA) which are implemented in Kashmir and the North Eastern states of India have often been condemned for infringing on civil liberties, with many calling for it revocation. The inclusion of immunity clauses within the Acts which protect members of the armed forces against any legal action within civilian court processes further perpetuates a climate of impunity wherein barely any cases of abuse by the security forces have been prosecuted; including cases of sexual abuse. While sexual violence is a common occurrence in conflict zones, the cases reported in Kashmir and North Eastern India are particularly deplorable due to lack of accountability and the recalcitrant way in which the Indian government has dealt with allegations of sexual abuse. Nonetheless, the institutionalisation of rape in Kashmir and the North East cannot solely be attributed to the implementation of AFSPA. Rather, it is the longstanding pattern of “Othering” that exists; wherein the majority Hindu-Indian population distinguishes itself from ethnic-minorities in the North-East and the predominantly Muslim Kashmiris; which has led to a widespread level of tacit acceptance of sexual abuse in these regions. This is exemplified by the lack of public outrage towards such cases. This paper thus seeks to argue that both these factors have resulted in the institutionalisation of rape in Kashmir and the North Eastern states and will do so by dissecting the Acts, exploring the judiciary’s interpretations of the Acts, addressing specific cases of sexual abuse in both the North Eastern and Kashmiri contexts and by examining public opinion on cases of sexual abuse in these regions in comparison to the infamous Nirbhaya case.

**Keywords:** Human rights, sexual violence, gender-based violence, conflict zones, India.
Introduction

The use of systematic rape in conflict zones is a phenomenon that has existed throughout history and regrettably continues to this day. In fact, almost every modern-day conflict has involved the use of sexual warfare (United Nations Division for the Advancement of Women, 1998). It is thus apparent that the antiquated view of women being part of the “spoils” of war is yet to be obsolete. Whilst systematic sexual violence is common in areas where conflict has resulted in a breakdown of the justice system, it is rare for such occurrences to take place in democratic countries with an established legal tradition. In this case, India is an anomaly. Despite its reputation for being the largest democracy in the world, India’s counter-insurgency methods within its North Eastern states and Kashmir continue to tarnish its human rights record. The Indian military’s unreasonable use of force upon civilians within these areas has often been met with little to no ramifications. The Indian government itself often responds to such allegations with callousness. While the Indian judiciary has attempted to reprimand the Indian military on its grave human rights abuses in Kashmir and the Northeast, the number of actual convictions remains abysmally low. This is attributable to immunity clauses within the Armed Forces Special Powers Acts, which essentially exempts military personnel acting within the regions above from any legal proceeding within the civilian justice system. The Indian judiciary is thus impotent in administering justice to victims of sexual abuse within these areas resulting in a severe lack of accountability. The Armed Forces Special Powers Acts are thus instrumental in establishing this culture of impunity. Nonetheless, given that India is a democratic country, these acts would not remain operative without public support or at least public indifference. This paper thus explores these different components and their role in perpetuating a culture of systemic sexual violence within Kashmir and the Northeast of India.
Overview of the Acts

The Armed Forces Special Powers Acts were introduced by the Indian government as a means of providing members of the Indian armed forces with additional powers to combat separatist movements within “disturbed areas” (Bhattacharyya 2016, 2). The Armed Forces Special Powers (Assam and Manipur) Act, referred to as the Northeast Act hereafter, was implemented first in 1958 (Armed Forces (Assam & Manipur) Special Powers Act 1958) whilst its Kashmiri counterpart, The Armed Forces (Jammu and Kashmir) Special Powers Act; referred to as the Kashmir Act hereafter; was enacted in 1990 (Armed Forces (Jammu and Kashmir) Special Powers Act 1990). Despite the first act’s applicability being limited to the states of Manipur and Assam initially, its application was later extended to all seven states within the North Eastern region of India (Armed Forces (Assam & Manipur) Special Powers Act 1958). The content of both acts are very similar. This paper will only focus on the special powers section (section 4 in both Acts) and the immunity clause (section 7 in the Kashmir Act and section 6 in the Northeast Act). It should also be noted that the special powers sections of both acts differ as the Kashmiri Act confers further powers of vehicle search and seizures unto members of the security force (Armed Forces (Jammu and Kashmir) Special Powers Act 1990, s 4(e)).

These Acts have often been criticised for the vast range of powers granted to members of the security forces. For instance, under sections 4 subsections (a) of both Acts:

Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area, if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, 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. \textit{(Armed Forces (Jammu and Kashmir) Special Powers Act 1990 s4(a); Armed Forces (Jammu and Kashmir) Special Powers Act 1990 s4(a))}

Subsection (c) of both acts further grant officers the power to:

\textit{...arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest. \textit{(Armed Forces (Jammu and Kashmir) Special Powers Act 1990 s4(c); Armed Forces (Jammu and Kashmir) Special Powers Act 1990 s4(c))}}

Whilst both subsections clearly curtail civil liberties and basic human rights; such as the right to be free from arbitrary deprivation of life and the right to be free from arbitrary detention; the most insidious common feature is their imprecision. The vagueness in the articulation of the powers allows for a very liberal interpretation of the act thereby broadening the scope of the act to allow for a draconian application.

The Acts further contain immunity clauses which states that:

\textit{No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act. \textit{(Armed Forces (Assam & Manipur) Special Powers Act 1958, s 6; Armed Forces (Jammu and Kashmir) Special Powers Act 1990, s 7)}}

As such, any alleged abuse of the powers granted cannot be curtailed by the Indian judiciary. This clause has resulted in an extremely low rate of convictions of abuse by the Indian armed forces within these regions which has resulted in a climate of impunity.
Case Studies of Sexual Abuse in Kashmir and North East India

While the Acts do not promote sexual violence per se, it is arguable that the lack of express prohibition against the use of rape by the security forces and the difficulties associated with criminal prosecution of rape committed by members of the Indian armed force perpetuates a culture of sexual violence in Kashmir and the Northeast. This is exemplified by the numerous cases of sexual assault by members of the security force in Kashmir and the Northeast whose perpetrators do not face legal consequences. Another notable element of these cases is the lack of media attention afforded to them. One of the most infamous incidents of this nature occurred in 1991, in the Kashmiri villages of Kunan and Poshpora, wherein nearly 100 women alleged that members of the Indian Border Security Force had raped them after taking the menfolk of the villages away for interrogation. The army officials maintain that these allegations were fictitious and were concocted as a means of denigrating the Indian Army, thereby implicitly accusing these women of cooperating with insurgents. Nevertheless, the government failed to follow the appropriate procedures in investigating incident. A report details how a ‘local magistrate who visited the village requested that the commissioner order a more comprehensive investigation, only to be told that officials in Delhi had denied the charges without checking with officials in the state’ (Asia Watch Committee 1993, 7). Following criticisms of the government’s handling of the situation, the Press Council of India was sent to investigate the incident. Their findings generally reflected that of the government’s (Ranjan 2015, 446) and the victims were rejected on the basis that their testimonies ‘kept changing’ (Human Rights Watch 2008, 7).

Thus, no legal proceedings were brought against the perpetrators until 2014, when the state High Court ruled that the Government should offer the victims compensation. This order was, however, stayed by the Supreme Court following petitions by the Indian Army (The
The victims have yet to receive any justice despite over 20 years of pursuing the case through every available mechanism and unfortunately this is by no means an isolated incident.

Similarly, in the Northeast, allegations of sexual assault by the Indian army are rampant. One incident that attracted significant public attention was the rape and murder of a Manipuri woman named Thangjam Manorama who was reportedly ‘taken from her residence in the early hours of 10 July 2004 by three Assam Rifles personnel,’ and was later found dead, ‘bearing signs of torture and rape’ (Ranjan 2015, 447). The security forces accused Manorama of having been involved with insurgent groups and held her responsible for ‘a number of bomb blasts’ (Human Rights Watch 2008), and while these allegations were neither proven nor disproven, she was never afforded the right to a fair trial. After Manorama’s bullet ridden body was found, members of the Assam Rifles claimed that she was shot when she had attempted to escape. This was contended by the forensics report which detailed that ‘the nature of the bullet wounds suggested that the shots were fired at close range and that Manorama was lying down when she was shot’ (Ibid.). Even if it is accepted that section 4 of AFSPA grants the officers the power to kill her without facing legal proceedings, her sexual assault remains illegal. However, no culpability was ever assigned for her rape, torture or murder. This led to protests within the city of Imphal wherein a group of activists stood naked outside the Assam Rifle headquarters carrying signs reading ‘Indian Army Rape Us’ (Ranjan 2015, 447). While there are many other cases with similar circumstances that occurred in both Kashmir and the Northeast, there have been no convictions of perpetrators to date. The scope of AFSPA’s immunity clause should not include sexual crimes yet every time an allegation of sexual abuse by the military is
made, the victim is labelled an insurgent or a sympathizer and their testimony is brushed off as anti-Indian propaganda.

**International and Domestic Views on AFSPA**

It would be false to state that the Indian government completely neglects the issues that have arisen through its implementation of AFSPA. In fact, when there was public outrage expressed after the death of Thangjam Manorama Devi, the Indian government responded by establishing the Committee to Review the Armed Forces (Special Powers) Act in 2004. The Committee, more commonly known as the Justice Reddy Committee, was given mandate to review the Northeast Act and to make recommendations in accordance with its findings. A report was published summarising the Committee’s conclusions on the issue. It recommended ‘amending provisions of the Act to bring them in consonance with the obligations of the government towards protection of human rights,’ or replacing the Act entirely with a ‘more humane legislation’ (Justice Reddy Committee 2004, 5). It noted that the immunity clause often protects members of the armed forces in cases of ‘illegal killings, torture, molestations, rapes and extortions’ (Ibid., 43) and criticised the Act for being ‘too sketchy, too bald and quite inadequate in several particulars’ (Ibid., 75). Its recommendations were, nonetheless, never effected. It should further be added that no committees were ever established to examine the merits of the Kashmir Act.

In 2012 after public outcry and country wide protests following the Delhi gang rape case (commonly referred to as the *Nirbhaya* case), the Indian government established the Committee on Amendments to Criminal Law, also known as the Justice Verma Committee. This Committee reported on the issue of gender based violence and made recommendations to the Indian legislature on how to eliminate the threat of sexual violence
against Indian women. The report further dedicated a section to sexual offences against women in border regions wherein it acknowledged the lack legal protective mechanisms for women in conflict areas such as Kashmir and the Northeast (Justice Verma Committee 2012, 149). In ensuring that women in conflict areas are not deprived of rights that are ‘afforded to citizens in any other part of [India],’ the committee made several recommendations, including: ‘sexual violence against women by members of the armed forces or uniformed personnel must be brought under the purview of ordinary criminal law;’ (Ibid., 150). Despite the government adopting many of the recommendations made by the Committee into an Anti-Rape Bill, the recommendations relating to AFSPA were widely ignored (Ranjan 2015, 441). Nevertheless, the Indian government’s application of some recommendations of the Justice Verma Committee demonstrates that it is willing to adhere to public opinion. Thus, its continual failure to address the aberration of women’s rights in Kashmir and the Northeast demonstrates a clear juxtaposition and is illustrative of the popular opinion on women’s rights issues in Kashmir and the Northeast.

AFSPA’s compatibility with India’s human rights obligations have also often come under scrutiny in the international sphere, with many organisations calling for it to be repealed including the International Commission of Jurists which published an article stating that AFPA ‘has facilitated gross human rights violations by the armed forces in the areas in which it is operational’ (International Commission of Jurists 2015). The International Commission of Jurists is not alone in its condemnation of the Acts as many other prominent organisations have released scathing reports that denounce them. In 2008, Human Rights Watch released a report entitled “Getting Away with Murder,” which detail the Acts’ effects on the different states within which it is implemented. The report concludes by urging the Indian government to repeal AFSPA due to its application resulting in a ‘cycle of atrocity and
impunity,’ adding that the ‘growth of militant groups under the 50-year application of AFSPA is evidence that countering armed insurgency with disregard for human rights is ineffective’ (Human Rights Watch, 2008). This statement outlines the paradoxical nature of the Acts which seek to combat security threats with repressive laws only to have it result in legitimising militancy.

Various bodies under the United Nations have expressed a similar view. The UN Human Rights Council, for instance, released multiple Special Rapporteur reports that have urged AFSPA’s repeal, from the Special Rapporteur on extrajudicial, summary or arbitrary executions (UN Human Rights Council 2015) to the Special Rapporteur on the situation of human right defenders (UN Human Rights Council 2012). Reports by the UN Committee on the Elimination of Racial Discrimination (CERD, 2007) and Committee on the Elimination of Discrimination against Women (CEDAW, 2007) also outlined similar concerns. These reports illustrate the range of issues that AFSPA has impacted upon.

Notwithstanding the criticisms it has received from the organisations listed above, the greatest challenge to AFSPA’s legitimacy, with particular regard to its immunity clause, has been the Indian judiciary’s stance on the matter. The absoluteness of the immunity clause was first challenged in the Supreme Court Case of General Officer Commanding v CBI Anr. In this case, the Court found that the immunity clause was in fact mandatory (General Officer Commanding v CBI Anr. 2012, [53]) and that the special powers granted are justified by the ‘dangerous conditions’ that military personnel are faced with in combating militancy (Ibid., [11]). The legality of the Act was subsequently challenged in the case of Extra Judicial Execution Victim Families Association & Anr v Union of India & Anr. wherein the Court found the Act to be constitutional (Extra Judicial Execution Victim Families Association & Anr v
The Armed Forces Special Powers Acts and the institutionalisation of rape in India

A Krishnan

Union of India & Anr. 2012, [109]). The Court nevertheless indicated that its constitutionality was not absolute:

When the State uses such excessive or retaliatory force leading to death, it is referred to as an extra-judicial killing...society and the courts obviously cannot and do not accept such a death caused by the State since it is destructive of the rule of law and plainly unconstitutional. (Ibid., [122]).

The judgement further indicated that the immunity clause was limited by stating that it would not protect those who employ ‘excessive force or retaliatory measures [at which point] he then becomes an aggressor and commits a punishable offence’ (Ibid.). The decision from this case was unprecedented as it was the first instance of the judiciary being openly critical of the misuse of powers within AFSPA.

Public Indifference and Possible Causes

When the 2012 Delhi gang rape incident occurred, protests and public outcry were so widespread that it caught the attention of international media (Ranjan 2015, 441). It was apparent that the central government needed to uproot the prominent rape culture existent in India in order to demonstrate that it did take the concerns of Indian women seriously. Yet there are rarely any country-wide protests or media attention given to cases of sexual assault in Kashmir and the Northeast despite its high frequency of cases and the brutal nature of such incidents (Ibid.). It can thus be inferred that there exists a level of public indifference to sexual assault when it occurs in these regions. The question we are posed with is why. There are a few possible reasons for this lack of public agitation. The first is that the frequency of sexual assault cases from the regions is so high that it has led to public desensitization to the issue and as a consequence, such issues are no longer
considered “newsworthy” (Gregoire, 2015). This theory is particularly reflective in the Indian media’s coverage of Thangjam Manorama’s rape and murder which gained publicity more so due to the ‘naked protests’ than the incident itself. That is to say, the incident was only publicised due to the uncommon nature of the protest rather than the common occurrence of rape and extrajudicial killing in the North East.

Given that India’s population is composed of people who are multi-religious and of multi-ethnic background, another possible reason for public indifference towards sexual violence in Kashmir and the Northeast is a culture of “Othering.” This idea suggests that Indian society while united by its shared nationality is fragmented due to ethnic and religious divisions. It is thus the majority that dictates the narrative on what it means to be Indian (Ranjan 2015, 449). As such, any individual not fitting within the dominant’s mould is regarded as an outsider or an “Other.” That such attitudes are pervasive in Indian society is apparent from the way in which the people of Kashmir and the Northeast are perceived by the majority. For instance, Kashmiris are often ‘seen as unpatriotic and as owing allegiance to an entity other than India,’ and are thus mistrusted (Ibid.). This narrative seeks to define Kashmiris as the “Other” due to their predominantly Muslim population. On the other hand, the people of the Northeast are “Othered” as a consequence of their ethnic difference to the majority as North Eastern Indians often have East Asian features unlike the majority population. The commonplace use of the derogatory term “chinki” against North Eastern peoples demonstrates that the majority distinguishes itself from the North Easterners (Das, 2014). By imagining the people of the Northeast and Kashmir as so radically different that they are the “Other,” the majority Indian population is hence able to justify the actions of the armed forces in those regions or at least remain indifferent to their plight. Thus, the security discourse in India is rooted in the idea that Kashmiris and the North Eastern Indians
are the ““intimate and viral other”, who can never be fully trusted and must be assimilated into the norm to become obedient national subjects’ by any means necessary (Ranjan 2015, 449) whilst any who dares to challenge this narrative is labelled anti-Indian (Krishnan 2017). With all these factors taken into consideration, the normalisation of rape in the regions of Kashmir and North East India thus cannot be solely attributed to the implementation of AFSPA. Public indifference as a result of “Othering” should also be considered as a contributing factor.

**Conclusion**

In spite of the fact that India’s democracy is often undermined by corruption and nepotism it is clear from the *Nirbhaya* case that if public dissatisfaction was loud enough the Indian legislature would respond. It can further be gathered from the *Nirbhaya* case that rape culture is not so pervasive in India that sexual assault is tolerated by mainstream Indian society. However, it does seem like there exists a hierarchy wherein rape of women from Kashmir and the Northeast are not afforded the same level of public outrage to which rape in other parts of India are. It is apparent that the use of AFSPA has resulted in this disparity. Nonetheless, it is also apparent that without a radical transformation of attitudes towards the people in bordering states, revoking AFSPA remains a distant possibility.
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