

ARMED FORCES SPECIAL POWERS ACT, 1958 (AFSPA): A REVERIE OF NATIONAL SECURITY AUTOCRACY

Ms. Mansi Panwar¹

ABSTRACT

In the democratic country like India where young and old, poor and rich and officer and common man are equally treated has still a north-east part of our country which is set aside through all those means of living in a democratic country. The Armed Forces Special Powers Act, 1958 was basically brought forward as an immediate measure to control the insurgency problem in North-East India. More than 60 years of de facto army rule through the Armed Forces (Special Powers) Act (AFSPA) 1958 in India's northeast has engendered neither stability nor peace. Problems regarding the impunity of violence and crime, official corruption and the virtual collapse of the rule of law continue, but the Act remains in operation. This article attempts to re-evaluate the disputation on the AFSPA in terms of its necessity by turning the pre-requisites on its head and arguing that the secessionist insurgencies which were originally used to justify the Act have actually long ceased to exist. Since the principle of existential necessity that provided a fig leaf to the Act no longer applies, its continued application needs to be re-examined. It is further argued that the Indian military's increasing clout in internal security policy-making may have grave implications for Indian democracy itself, with negative impacts on the rule of law and in relation to safe inclusion strategies for India's northeast.

INTRODUCTION

India is an ancient land where innumerable civilization thrived. It is a country which has withstood the ravages of time and upheld its identity as an Independent, self-reliant nation. Over the years, there arise insurgencies in the north-eastern part of India comprising of the seven states of Arunachal Pradesh, Nagaland, Mizoram, Manipur, Tripura, Assam and Meghalaya which have apparently been cut off from the rest of India. Accountable it on the geographical positioning of the states, where there in the socio-cultural differences or the

¹ Student of B.B.A. LL.B. (Hons.), School of Law, Galgotias University, Greater Noida, U.P.

unique history of the region, integration and assimilation of the “seven sisters” as they are popularly known has been and continues to be a challenge. Add to this the woes caused by what has been known as the draconian law, the tainted “*Armed Forces Special Powers Act, 1958*” (AFSPA) – tainted by murders, torture and enforced disappearances perpetrated in the region using the legislation. The AFSPA has been holding the north eastern population within its dictatorial sway since 1958 for over fifty years.²

This act is one of the acts first implemented by the British to suppress the Quit India movement in 1942. Basically, the government grants impunity to the people of the armed forces to do whatever is required to maintain “*peace and order*” which often leads to the violation of the human rights, but the poignant fact is that peace today has become the subject to be discussed in conferences and summits and endeavors to have it and have been futile as violence has made its way to establish its diabolical might. It also empowers all the officers in the armed forces to arrest without warrant, to destroy any structure that may be hiding absconders without any verification, to conduct search and seizure without consent and to shoot even to the causing of death, granted with legal immunity from its repercussions³ or fallout.

The enforcement of AFSPA has resulted in countless incidents of arbitrary detention, torture, rape and looting by security personnel. No legal proceeding against abuse of such despotic or we can say the arbitrary powers can be initiated without the prior permission of the Central government. When AFSPA came into force it conferred the power only on a state government to designate an area “disturbed”, after which the Army could enter. An amendment in 1972 extended the power to the Central government as well.⁴ The extraordinary implication of this is that the people of the states in which AFSPA applies could not be trusted to ask for Central help, which must therefore be imposed on them even if they do not feel the need for it. This amendment undermined the basic structure of the Constitution. On the one hand it makes elected state governments look like traitors if they decline to invoke AFSPA, and when the army is deployed over their objection, it becomes an army of occupation.

² Arvind nanda, topical essays, maruti prakashan.

³ www.quora.com last visited on 31st October 2015.

⁴ <http://www.pucl.org/Topics/Law/2005/afspa.htm> last visited on 31st October 2015.

At times one beats with the question that how one does officially declares a region to be “disturbed area”. The Act provides Section (3) which empowers the governor of the state or Union territory to issue an official notification on The Gazette of India, following which the centre has the authority to send in armed forces for civilian aid. It still in catechism whether the governor has to precise the centre to send in the army or whether the centre on its own sends in troops. Once declared ‘disturbed’, the region has to maintain status quo for a minimum of three months, according to The Disturbed Areas (Special Courts) Act, 1976.⁵

“There is no doubt that States have legitimate reasons, right and duty to take all due measures to eliminate menace of terrorism in order to protect their country, human rights, democracy and the rule of law and to bring the perpetrators of such acts to justice”.⁶ However, that does not give the State the right to take away the right to life in an intentional and unlawful way or violate human rights guaranteed, despite the fact that India's 2011 report on the Optional Protocol to the Convention of Rights of Child (CRC)⁷ states that India does not face either international or non international armed conflict situations, “said by the National human right commission (NHRC).⁸ The NHRC is the only body when collate with other bodies in the country that has a reasonably accurate tally of the number of deaths that take place every year in what are called encounters, and which tries to establish the truth in each case.

Recently Tripura has withdrawn the armed force special powers act (AFSPA), but the law continues to be in force elsewhere in the Northeast, besides in J&K. AFSPA was imposed by Tripura in February 1997 after a spate of killings and kidnappings by the National Liberation Front of Tripura, bringing two-thirds of its than 42 police station areas under its provisions. As the Left Front government made its decision, AFSPA was in force in only 26 of the state's 74 police station areas.⁹ As the government is trying to bring fruits on development to these areas ever since AFSPA was enforced in Tripura, as per the provisions of the Act, was reviewed and extended after every six months.

One drives with the question that why it was enforced and why after a bit over 18 years. Tripura removes AFSPA and still prolonged in other states. The answer to this question is when AFSPA was being imposed in Tripura the terrorism was at its peak. According to

⁵ <http://www.humanrights.asia/> last visited on 31st October 2015.

⁶ <http://www.pucl.org/Topics/Law/2005/afspa.htm> last visited on 31st October 2015.

⁷ CRC is a treaty adopted by united nations general assembly in 1989

⁸ NHRC is an autonomous statutory body established in 1993 according to the provisions of the Protection of Human Rights Act. The Commission is composed of a chairperson and six members. (<http://www.childlineindia.org.in/National-Human-Rights-Commission.htm>) last visited on 31st October 2015.

⁹ <http://www.firstpost.com/> last visited on 1st November 2015.

a *Deccan Herald* report¹⁰, Tripura saw a rapid decline in militancy over the past "When the Act was imposed there were only 42 police stations and two-third of the entire police station areas were under this act,"¹¹ five years as hundreds of militants surrendered, which became one of the decisive cause of repealing the Act from the state.

On AFSPA, as Amnesty International notes, the justice Jeevan Reddy Committee¹² found that "the Act, for whatsoever reason, has become a symbol of oppression, an object of enmity and an instrument of discrimination and high-handedness". What it does not recall is that the committee recommended that AFSPA be repealed for this reason, but also felt that in the North-East, there was a "staggering desire of a staggering majority of the region that the Army should remain (though the Act should go)".¹³

MUNICIPAL LAW

For the first time AFSPA came into the glare in 2004 with the custodial death of a Manipuri woman, Thangjam Manorama Devi, accused of being an underground operative Manipur. In May 1958, Dr. Rajendra Prasad, the then President of India, in response to the continued unrest in the northeastern territories of the union, including self determination activities by Naga tribes¹⁴ that spilled over into the state of Manipur, promulgated the Armed Forces (Assam and Manipur) Special Powers Ordinance.¹⁵ The ordinance entitled the Governor of Assam and the Chief Commissioner of Manipur to declare the whole or any part of Assam or Manipur, respectively, as a "disturbed area". When AFSPA was imposed, there were four eminent insurgent groups, after a period of 35 years; there were more than a dozen prominent insurgent groups in Manipur.¹⁶

It has been the noble motive of the state affected by the AFSPA and of the centre to bring the disenchanted citizens around the table for heart-to-heart discussions on what makes them drift away from the mainstream and take to arms.

¹⁰ Deccan herald is an English daily newspaper in the Indian state of Karnataka.

¹¹ Said by CM sarkar www.firstpost.com last visited on 1st November 2015.

¹² A five member committee under the chairmanship of justice B P jeevan reddy a former judge of Supreme Court.

¹³ <http://thewire.in> what-amnesty-international-missed-in-its-kashmir-report-5378/

¹⁴ The Naga tribes comprised of people who practiced headhunting and preserved the heads of enemies as trophies through the 19th century and as late as 1969.

¹⁵ <http://www.indianetzone.com/> last visited on 2nd November 2015.

¹⁶ <http://www.humanrights.asia/> last visited on 2nd November 2015.

The Supreme Court's verdict in 1988 in the matter of Naga Peoples' Movement of Human Rights vs. Union of India¹⁷ was essentially that the competency of the parliament to enact the central law was genuine. The Court stated that in the act of deployment of the armed forces in aid of the civil power in a state, the forces shall operate in assistance with the civil administration. A notion was made that during the course of such deployment the surveillance and control over the use of armed forces would not have to be with the civil authorities of the state concerned and that the state would not have the exclusive power to determine the purpose, the time period and the areas within which the armed forces should be requested to act in advancement of the civil power. The powers that the Act conferred were not 'arbitrary and unguided'. Its position on whether section 4 violated fundamental rights was a clear negative: 'The powers conferred are not discretionary and unreasonable and are not violative of Articles 14, 19 or 21 of the constitution.'

In the *Indrajit Barua*¹⁸ case, the Delhi High Court says that it is the duty of the state to assure the protection of rights under Article 21 to the largest number of people. Couched in the rhetoric of the need to protect the "greater good", it is clear that the Court did not feel that Article 21 is a fundamental right for the people of Assam. The Court stated, "If to save hundred lives one life is put in peril or if a law ensures and protects the greater social interest then such law will be a wholesome and beneficial law although it may infringe the liberty of some individuals."¹⁹ The AFSPA is in place in limited parts of India. Since the people residing in areas declared "disturbed" are denied the protection of the right to life, are obliged to sacrifice their constitutional rights in the name of the "greater good". As Military people over such areas are invested with the special powers which often led in rise of the abuse of human rights like there is a case in which the officers Instead of rounding (up) the hostile Nagas, some military personnel trespassed into the houses of some retired tribal official and committed rape on the widow. So, such things have deteriorated the situation. Yet, unlawful law enforcement only begets contempt for the rule of law and contributes to a brutal cycle of violence.

ABSOLUTE IMPUNITY TO THE FORCES

¹⁷ (1998) 2 SCC 109 : AIR 1998 SC 431.

¹⁸ *Indrajit Barua vs. the State of Assam and Anr.* on 3 June, 1983 AIR 1983 Delhi 513.

¹⁹ *Supra* 15.

Impunity enjoyed by the armed forces form an exception to the rule that all persons and things within a sovereign state are subject to its jurisdiction. The obligation to exempt the forces and their officers is a necessary consequence of the conditions on which they ought to maintain that as representatives of sovereign states they owe no allegiance to the state to which they are accredited. The people of the Armed Forces in the whole of the Indian Territory are protected from arrest for anything done within the line of official duty by Section 45 of the code of criminal procedure (CrPC). Wherein Section 6 of the AFSPA provides them with absolute immunity for all atrocities committed under the AFSPA. A person wishing to file suit against a member of the armed forces for abuses under the AFSPA must first seek the permission of the Central Government.²⁰

Section 6 of the Armed Forces Special Powers Act says that, “No prosecution, or other legal proceedings 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 powers conferred by this Act.”²¹Section 6 suspends the Constitutional right to filed suit when for the first time question was raised by Mr. Mahanty in 1958.He said that Section 6 of the AFSPA "immediately takes away, abrogates, pinches, frustrates the right to constitutional remedy which has been given in article 32(1) of the Constitution." This further shows that the AFSPA is more than an emergency provision as it is only in states of emergency that these rights can be suspended.

This provision violates India’s treaty obligation under Article 2(3) of the international covenant on civil and political right (ICCPR)according to which “To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity” it also ensures that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;²²

The BP Jeevan Reddy Committee recommended for the repeal of the Act on the grounds that: ‘The act is too sketchy, too bald and quite meager in several particulars.’ Its finding was that

²⁰ <http://rostrumlegal.com/an-analysis-on-the-status-of-armed-forces-special-powers-act-in-north-east-india> last visited on 4th November 2015.

²¹ <http://www.pucl.org/topics/law/2005/afspa> last visited on 4th November 2015.

²² Supra 20.

the Act '*has become a symbol of oppression, an object of hostility and an instrument of bigotry and highhandedness.*' But a practical approach was made by it that the main, if diluted, provisions be retained by incorporation into the Unlawful Activities Prevention Act (UAPA)²³. The UAPA, amended last in vigil of Mumbai 26/11 on December 31, 2008, includes a comprehensive definition of terrorism.²⁴ It completely anticipated the deployment of armed forces in tackling this threat and had the clause providing cover from legal liability in the form of its Article 49 (b), analogous to Section 6 of AFSPA.²⁵ The preeminent intention for insertion of AFSPA provisions in the UAPA was to specify powers, duties and procedures relevant to armed forces deployment and to also provide for an internal contrivance ensuring accountability with a view to guard against abuses and excesses by delinquent members.²⁶

In a report of UN Human right commission in 1991 on AFSPA it was explained how in practice this leaves the victims of the military without a remedy. Habeas corpus²⁷ cases have been the only remedy available for those arrested under the AFSPA, but there are hardly cases who seeks such permission to file a case in north-east and if done and when the armed forces are tried in army courts, the public is not informed of the proceedings and the court martial judgments are not published.²⁸ There was an emergency in 1975 wherein the right to file for writs of habeas corpus was suspended as ruled by the Supreme Court in *A.D.M. v. Shivakant Shukla*,²⁹.

²³ The text of the report was leaked to The Hindu and is available at <http://www.hinduonnet.com/nic/afa/>. The committee included a former Director General Military Operations, Lt Gen (Retd) VR Raghavan.

²⁴ The definition of terrorism in section 15 is: 'Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,— (a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause— (i) death of, or injuries to, any person or persons; or (ii) loss of, or damage to, or destruction of, property; or (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or (b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or (c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.'

²⁵ Text is available at <http://www.indiacode.nic.in/> last visited on 4th November 2015.

²⁶ <http://www.idsa.in/>.

²⁷ A habeas corpus petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment.

²⁸ <http://www.lectlaw.com/> last visited on 4th November 2015.

²⁹ AIR (1976) 2 SCC 521.

The Emergency had been declared under Section 359 of the Constitution. This section has now been amended, affirming that the fundamental rights of section 20 and 21 cannot be suspended, even at the time of emergency. Therefore, should an emergency be declared at present era, the right to file habeas corpus on the grounds that the fundamental right to life has been denied should be allowed. Nevertheless, the 1975 case exemplifies the court's yielding for the executive, even if it means a total suspension of individual liberty. In a meeting with the government National Human Rights Commission (NHRC), a representative of SAHRDC was able to discuss cases where BSF and armed forces in Jammu and Kashmir were punished for abuses. Yet, the results of these trials were not published and the NHRC representative stated that it would endanger the lives of the soldiers.³⁰ Instances of human rights abuses by the army have shown that unless there is public accountability there is no incentive for the army to change its conduct. Without the transparency of the public accounting, it is impossible to be sure those perpetrators are actually punished.

The present report finds that the AFSP Act is, both on its face and in its practical application, incompatible with India's obligations under international human rights law, in particular, the ICCPR³¹. REDRESS, the Asian Human Rights Commission and Human Rights Alert call on India to consider these findings urgently and to give effect to the rights recognized in the Covenant, as required by the ICCPR and India's constitution. The ICCPR, to which India has been a party since 1979, outlines a series of rights and corresponding obligations that are relevant when interpreting the Act and its application. These include the right to life (article 6), the prohibition of torture, cruel, inhuman and degrading treatment (article 7), the right to liberty and security of the person (article 9), the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence (article 17), the right to freedom of assembly (article 21), as well as article 2(3), which provides for the right to an effective remedy to anyone whose rights protected by the Covenant have been violated.

The application of the Act has over the years led to numerous violations. The following examples are the most illustrative ones, which were widely covered by the media and triggered investigations which, however, were not capable of leading to the establishment of the truth of what had happened the widely reported events that took place on 5 March 1995 in Kohima, Nagaland, still stand out as one of the most glaring examples. The military, while

³⁰ <http://www.hrdc.net> last visited on 16th November 2015.

³¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December (1966) entry into force 23 March 1976, in accordance with Article 49.

driving along the streets of the town, mistook the sound of a burst tyre from their own convoy for a bomb explosion and opened fire indiscriminately. Individuals who were considered to be terrorists' accomplices were dragged from their houses and arbitrarily killed. As a result, seven civilians lost their lives. In addition, 22 passers-by, including seven minors, were injured. A commission of inquiry set up by the Government of Nagaland found that there had been no reasonable ground for the use of any force in the circumstances.³²

INTERNATIONAL HUMANITARIAN LAW

IHL is the branch of international law dealing with humanitarian problems arising from conflict both international and non-international. Since AFSPA covers 'internal upheaval' as against 'armed combat', therefore such areas are not covered under IHL by definition.

When AFSPA is examined in relation to IHL, it needs to be seen in an analogy with these two sets of provisions i.e. The Customary rules include the principles of distinction between civilians and assailant; and between civilian objects and military objectives. They prohibit indiscriminate attacks and bring about proportionality and due precautions. This is the stance IHL takes to balance military necessity and humanitarian concerns. In terms of protection to civilians and fighters hors de combat, customary law makes allowance for state sovereignty to derogate certain rights in times of emergencies. However, some rights remain non-derogable (covered in the section on human rights law below) so as to constrain abuse of a state's emergency power³³.

The position of the Supreme Court of India carries immense persuasive weight when interpreting the constitutional vires of the Act. One could argue that the main points of discussion concerning the constitutionality of the Act in *Naga People's Movement for Human Rights* revolved around the procedures followed during the enactment and the implication of the Act in the centre-state relations. However, the Supreme Court of India has been liberal in reading in international human rights jurisprudence to be applied at the domestic level

CRITICAL ANALYSIS

³² Supra 25.

³³ Gasser, Hans-Peter, "International Humanitarian Law," in L. Maybee and B. Chakka (eds.), *International Humanitarian Law: A Reader for South Asia*, New Delhi: ICRC, 2008

The act has often placed flak from human rights groups as it gave sweeping powers and immunity to the army in combat ridden areas, but stiffness arise along two lines. One is in providing the legal cover necessary for the centrally controlled armed forces to aid civil authority in a sphere that is also the responsibility of state governments in charge of public order. The Act designates that military deployment be examined or reviewed in consultation between the Centre and the states. The second accent area is the self determination that can be given such forces once deployed. While designation or we can say arrangement has been allude as solution, the structures and procedures are not connoted. There is also the problem of dispensing justice in case of abuse or misuse of power by the military, which has drawn the critical attention of human rights activists, resulting in the AFSPA being in the public eye.

India recognizes the situation in ‘disturbed areas’ as internal security issues but not as internal conflicts. These do not warrant imposition of emergency.³⁴ Nevertheless, they are of sufficient intensity to require employment of the military. Currently, there are gaps between AFSPA and the stringent stipulations of IHL³⁵ and IPCCR³⁶. Domestic law is unlikely to change though it is constitutionally required to be in line with international law and norms.³⁷

CONCLUSION

“If a free country cannot help the many who are in need of it, cannot save the few who do not need it”. The strength of the country itself as ‘democratic’ lies in upholding the supremacy of the judiciary and primacy of the rule of law. Democracy demands that every citizen, like his leaders should have the sense of nationality. Our legislators have forgotten the public good and they are busy in providing lucrative means to their own men in disregard of democratic norms. In a democratic system means are as important as the ends. One needs only justice in a democratic nation.

The belief that the nation is behind the military is valid. However, the people of the country are interested in being defended and protected not only effectively but also in the right and legal way. The only way to guarantee that the human rights abuses wreak by the people of the armed forces in the North East cease is to both repeal the AFSPA and remove the military

³⁴The Punchhi committee report on Centre-State relations has envisaged a category of ‘local emergency’ to cover internal disturbances type situations in its report of April 2010.

³⁵ International humanitarian law.

³⁶ International covenant on civil and political right.

³⁷ <http://www.idsa.in/> last visited on 16th November 2015.

from playing a civil role in the area. Indeed with 50% of the military forces in India acting in a domestic role, through internal security duties, there is a serious question as to whether the civil authority's role is being usurped. As long as the people do not rely on the local police they will not be able to assume their proper role in law enforcement. The continued presence of the military forces prevents the police force from carrying out its functions. This also perpetuates the justification for the AFSPA. Therefore the army could instead re-emphasis 'lessons learnt' and 'best practices' to ensure that its record is in sync with expectations of a modern, professional 21st century army.