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Constitutionality of armed forces special power act: A challenge to rule of law

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Abstract

One of the major factors that defines the relationship of the Indian Government with the Northeast region is The Armed Forces (Special Powers) Act, 1958 (AFSPA). This Act has been enacted to counter the insurgencies in the north-east. However, fifty-nine years past its implementation violence in the region has not mitigated. The fallout has been not merely brutalisation of the security forces but a legitimisation of violence. The list of armed forces atrocities are never ending episode to the people of the North-East. There is no clear definition of 'disturbed area' under the Act and the army officials have extraordinary powers to shoot to kill even on mere suspicion and also the armed officials are shielded from prosecution and enjoys blanket immunity for atrocities committed in the name of law and order. The constitutional safeguards to which every citizen of India is entitled to has been taken away by this very Act. In a democracy, the concept of Rule of Law assumed different dimensions and means that the holders of public process must be able to justify publicly that the exercise of power is legally valid and socially just. The Indian Constitution has adopted and incorporated Rule of Law which is reflected in its Preamble and Fundamental Rights. The principles of Rule of Law which says that there should be 'absence of discretionary powers in the hands of the Government officials and justice must be done through known principles' and 'all the persons irrespective of status must be subjected to the ordinary court of land' has been violated by AFSPA. There have been numerous protests and debates which are still continuing. Many committees have been set up to look into the matter, and the fight to repeal this draconian law is still on but they all have fallen in deaf ears and AFSPA still rules the north-east.

Keywords: AFSPA, security forces, Constitution, Rule of Law, disturbed areas

Introduction

India is popularly known worldwide as largest democracy with a population of over 1 billion. India ranks right after China as the second most populous country in the world. According to the Constitution, India is a "sovereign, socialist, secular, democratic republic". The founding fathers of independent India wanted to build the new Nation on the principle of parliamentary democracy. However, the reality that our country is facing today is not as envisioned by our founding fathers and there is often a yawning gap between the noble principles of democracy and the political reality. There is contradiction between its commitment to democracy and the actual practice of governance, the gap between existing legal provisions and their implementation^[1]. The Constitution of India guarantees to every citizen Fundamental Rights. Article 21 of the Constitution of India provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law". The United Nations Human Rights Committee in its "General Comment No. 14: Article 6 (Right to life) stated that the right to life enunciated in the first paragraph of article 6 of the International Covenant on Civil and Political Rights is the supreme right from which no derogation is permitted even in time of public emergency..... It is basic to all human rights^[2].

The Supreme Court of India has over the years expanded the ambit of the right to life to cover elements such as the right against solitary confinement, against being handcuffed, against delayed execution, against public hanging, against sexual harassment of women, the right to privacy, to shelter, to medical assistance, legal aid, to reputation, to education, to food, to a clean and healthy environment, to go abroad, etc^[3]. The Supreme Court in *Maneka Gandhi v. Union of India*^[4].

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held that “the procedure [depriving a person of their right/ right to life] cannot be arbitrary, unfair or unreasonable one”. In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* ^[5], the Supreme Court further held that “Article 21 requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful”. The AFSPA is a direct assault on the above mentioned legal interpretation of fundamental rights which constitutes a cardinal principle of Indian jurisprudence.

The most blatant violation of the right to life is extrajudicial execution, euphemistically called deaths in “fake encounters” in India. There are no witnesses in most encounter killings. The Govt. of India enacted the AFSPA in 1958 and established a procedure under which any commissioned officer, warrant officer or non-commissioned officer or any other person of equivalent rank may legally deprive a person or persons of their lives, not just in cases of self-defence, but also for contravening laws or orders prohibiting the assembly of five or more persons.

Such law is antithetical to constitutionalism since they overturn the fundamental tenets of modern jurisprudence on which democracy rests, a person is presumed to be innocent till proven guilty. It makes difficult for persons booked under such law to redress their grievances and get relief, such as bail. It grants extraordinary power to the investigating agencies to elicit confessions. Thus the Act empowers the investigating agencies to easily frame a person whom they suspect to be guilty and may use force upon their discretion to even killing persons on mere suspicion ^[7].

AFSPA is alleged from various fields as one of the most draconian legislations used by the Indian rulers to enslave and oppress people under the garb of fighting separatism. The army personnel argue that for fighting insurgency in the hostile and sensitive region they need protection which is only given by such an act like AFSPA. However, these views are just one sided and need to be rectified for they seem to forget that it is the civilians, not the so called militants, who are the majority of the victims under AFSPA. The very basis of constitutionalism is challenged by the Act.

Historical background

The origin of AFSPA can be traced back to the colonial rule of the British which was imposed back then to suppress the ‘Quit India’ Movement of the freedom fighters. It is the Indian *avatar* of the Armed Forces (Special Powers) Ordinance, 1942 enacted by the British to brutally suppress the Indian struggle for independence in the wake of the widespread ‘Quit India’ Movement of 1942. The Ordinance was promulgated by Lord Linlithgow, the then Viceroy and Governor General of British India on the 15th August 1942 ^[8]. The colonial Ordinance was adopted by Democratic India with few modifications. When the Armed Forces Special Powers Bill (1958) was first tabled in the Parliament the Government had supported it as a necessary piece of legislation to fight militancy in the Naga Hills. Despite serious objections to its extreme provisions the AFSPA was enacted.

AFSPA when first enacted applied only to the north-east territories of Assam and Manipur. It was implemented with an aim to contain armed rebellion by Naga militants. It was amended in 1972 to extend to each of the seven new states

created in north east, namely, Assam, Manipur, Meghalaya, Nagaland, Tripura, Mizoram and Arunachal Pradesh. In 1983, to counter militancy in Punjab and Chandigarh, similar law with special powers was enacted ^[9]. In Jammu and Kashmir similar law is in force since 1990 ^[10]. While introducing AFSPA on 18th August 1958, the government accepted it as an emergency measure and it was supposed to have remained in operation only for one year. However, even after 62 years of imposition of the AFSPA, the problem in northeast is far from resolved ^[11].

Substance of AFSPA

The security forces are given wide powers, including the power to shoot to the extent of killing people in mere suspicion and to arrest people without warrants. They also provide blanket immunity from prosecution as any complaint is subject to prior permission from the Central Government before security personnel can be prosecuted. This permission is almost never given. These powers are formulated very broadly and framed in a vague language. For instance, the Act allows the officers to “use such force as may be necessary” for arresting the suspects and to enter and search any premises. The Act contains no effective safeguards to protect rights despite the fact that there is inherent risk of abuse of such broad powers.

As per Section 4(a) of the AFSPA the armed forces are granted power to shoot to kill in law enforcement situations without regard to international human rights law restrictions on the use of lethal force ^[12]. AFSPA permits the use of lethal force if the target is part of an assembly of five or more persons, they are holding weapons or “carrying things capable of being used as weapons.” ^[6] The terms “assembly” and “weapon” which are used to incriminate are not defined or explained properly in the Act and thus can be easily misused thereby violating the basic human rights of the individuals ^[13].

Furthermore, Section 4(c) of the Act fails to protect against arbitrary arrest as it permits the security forces to arrest anyone on mere suspicion that a “cognizable offence” has already taken place or is likely to take place in the future ^[14]. Worsening the scenario, AFSPA provides no specific time limit for handing over the arrested persons to the nearest police station. Section 5 of the Act provides vague advisory provision that those arrested has to be transferred to police custody “with the least possible delay” ^[15].

Under Section 6 of the Armed Forces Special Powers Act, “No prosecution, suit 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.” This provision has been a hurdle to even state governments from initiating legal proceedings against the armed forces on behalf of their population without the approval of central government. Such a sanction is not granted easily which has in effect facilitated a shield of blanket immunity for security forces implicated in serious abuse of human rights.

AFSPA: A challenge to Rule of law

Considering the above discussion it is apparent that substantive provisions of the AFSPA go against the basic principle of Rule of law. It is an unquestionable fact that the armed forces operate in areas which are difficult and have to face trying circumstances being afflicted by internal armed

conflicts. More so, in these circumstances the upholding of supremacy of the judiciary and the rule of law are of utmost significance so that justice is served. However, if the law enforcement officials stoop to the same level as the non-state actors and perpetrate the same unlawful acts, there will be no difference between the law enforcement personnel and the non-state actors who are branded as “terrorists”.

The State sure have legitimate reasons, right and duty to take all due measures to eliminate terrorism to protect their nationals, human rights, democracy and the rule of law and to bring the perpetrators of such acts to justice. 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 under the constitution and international law. Rule of Law has to be preserved under any circumstances as it is the basic feature of our Constitution. The AFSPA has become synonymous to repression which is the anti-thesis to the principle of Rule of Law because of its sheer misuse of power which has been widely documented in various case studies of last few years by different Human Rights organisations and NGOs as well ^[1]. Most armed conflicts in Northeast India are not mass-based rural insurgencies that challenge state power which is the focus of conventional counter-insurgency theory. The resilience of numerous small militant outfits reflects the structural weaknesses of the Indian state which the political class seems unwilling to acknowledge ^[17]. There is incoherence in the state practice and Rule of Law that is embodied in the supreme law of our land.

The problem with AFSPA is not just the actual violation of rights that occur in ‘disturbed areas’ owing to the Act. The fact that once the AFSPA is in force, the government through a simple notification can declare any area, or the entire state, or parts of the state, as ‘disturbed’ without any public debate. The armed forces with special powers can be deployed with immediate effect along with the suspension of fundamental freedoms. An area once declared ‘disturbed’ can remain so without timely review and revision ^[18]. This is sheer mockery of Rule of Law where people do not have any say over the matter. The government of India treats the AFSPA as normal and routine. Thus the annual report of the Home Ministry describes the ‘disturbed areas’ under the AFSPA simply under ‘Steps taken by government to deal with the situation in the North Eastern Region.’ AFSPA is a crude recrudescence and revival of the British colonial statute and it should not be re-enacted in the post - colonial scenario under any circumstances ^[19], especially when India highly proclaims to uphold the principles of Rule of law and has guaranteed fundamental rights to every citizen.

Constitutionality of AFSPA

The debate on the constitutional validity of AFSPA has been around ever since the Act was enacted for the first time in 1958. The constitutional validity of the Armed Forces (Special Powers) Act, 1958 was challenged for the first time in 1997 in the Supreme Court of India in the *Naga People’s Movement of Human Rights v. Union of India* case ^[20]. Various provisions of the Armed forces (Special Powers) Act, 1958 were challenged based on Constitutional mandates. However, the Supreme Court upheld the constitutional validity of the AFSPA, ruling that the powers given to the army were not “arbitrary” or “unreasonable”. This approach of Supreme Court however failed to consider obligations of India under international law. The Supreme

Court held that powers conferred under section 4(a) to (d) and 5 on the officers and NCOs ^[21] are not arbitrary and unreasonable and are not violative of Article 14, 19 and 21 of the Constitution. However, the declaration of an area as ‘disturbed’ which is a precondition for the application of the AFSPA should be reviewed after every six months considering the development of events during that period of time. On the matter of permission to prosecute, the Court observed that the Central Government had to give reasons for denying said sanction. The Court also ruled that safeguards issued by the Army in the form of a list of “Do’s and Don’ts”-including one requiring army personnel to use ‘minimum force’ were legally binding in all circumstances and that if soldiers were found violating them they should be prosecuted and punished ^[22]. This ruling has been criticized by various activists calling it “shocking” and said it did not provide sufficient limits on the abuse of power granted under the AFSPA. Legal commentators have pointed out that the Court did not adequately consider whether the AFSPA violated the human rights mandates of the nation and the framework of fundamental rights guaranteed by the Constitution of India. The Supreme Court while referring to such Do’s and Don’ts, stated: “*serious note should be taken of violation of these instructions and the persons found responsible for such violation should be suitably punished under the Army Act, 1950*” ^[23].

Despite such mandates given by the Apex Court, there are no visible instances of security forces being punished for violation of these instructions. Leaving it to armed forces to respect the Do’s and Don’ts issued by the armed forces as according to controversial Supreme Court Judgement on the constitutional validity of the AFSPA has proved to be inadequate and ineffective. The People’s Union for Democratic Rights (PUDR) has given critique of the ruling by stating that, in upholding the constitutional validity of AFSPA, the court did not deal with “*the basic fact that the Constitution does not envisage long term deployment of the armed forces in civilian areas and considers any armed forces deployment harmful to the democratic fabric.*” It also did not inquire whether the use of armed forces actually provides any assistance to civil power or not. There are empirical evidences which show that the role of the armed forces in ‘disturbed areas’ transcends beyond the nature of assisting the civil administration which the ruling has left out in consideration. According to the PUDR there are several instances where “...collectors, superintendents of police, ministers and other high officials of the civil administration being themselves stopped at gun point from entering areas falling within their own work jurisdiction.” ^[24]

The legitimacy of AFSPA is drawn from Article 355 of the Constitution which bestows a duty upon the union to protect every state against external aggression and internal disturbance. Consequently, incidents of violations and excesses committed by the armed forces are viewed as mere aberrations, a matter of mistaken judgment by few errant officers. The Act fails to meet the minimum standards of fundamental rights enshrined in our Constitution. The Act itself perpetuates violation and impunity, as opposed to the claim that it is to counter violence in areas declared disturbed. Law does not merely mean an enacted ‘Act’ or a formal procedure, rather it implies principles of natural justice as also laid down in the *Maneka Gandhi* case. Every law has to qualify the litmus test of fundamental rights

guaranteed by the Constitution which are the basic rights [26].

It is true that States have legitimate reasons, right and duty to take all due measures to eliminate terrorism to protect their nationals, human rights, democracy and the rule of law and to make the perpetrators of such acts accountable. However, this does not equate to the fact that State has absolute authority to take away the bare minimum right such as 'right to life' or violate human rights guaranteed under the Constitution and international law [27]. AFSPA has created a form of indefinite emergency rule in areas it is imposed but since it is not formally declared so, hence it is not bound by the limits that democratic constitutionalism impose on emergencies in order to avoid excess of powers. The AFSPA is a colonial legacy of the 'routinized use of constitutional, emergency-like executive authority' which had explicit emergency powers. The British colonial state enjoyed similar powers as a tool to establish executive supremacy over 'the limited space established for democratic participation' during the decades before India saw dawn of independence. The story of how democratic India has made law for its people raises troubling questions about its postcolonial constitutional culture [28].

Conclusion and Suggestions

There is lack of co-ordination and proper dialogue between the state civil government and the armed forces during most of the major operations. Holding on to colonial law like AFSPA has resulted in systematic repression of the innocent civilians. The Government needs to consider the fact that AFSPA has adversely effected on the psychology of the northeast people. It is no longer a hidden fact as to why there are so many cries and protests coming from the northeast region pertaining to AFSPA. AFSPA has only brought frustration and alienation amongst the people of the North-East and may act as a source of national disintegration. By repealing AFSPA both the state Government and the Centre need to join hands and work together thereby facilitating conducive environment to people of northeast to actually realise their right to equality and the right to life guaranteed by the Constitution. The purpose of AFSPA is to curb internal armed conflict which as of now is evident that it has failed to do as acts of violence still continues. The peace process between the government of India and Naga armed opposition groups stresses the axiom that political problems cannot be resolved by merely terming it as law and order problem.

Urgent steps have to be taken to resolve the prolonged tyranny caused by AFSPA by initiating dialogue with those involved. Political solutions need to be resolved through political solutions and not through terror tactics. A pragmatic move must be taken to preserve the principles of Rule of law and of human rights of the people and at the same time addressing the grievances of those who have resorted to violence to make their demands being heard by the authorities, governments both at centre and state.

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