

A CRITICAL STUDY OF AFSPA : A NECESSITY OR MISUSE OF POWER

SUBMITTED BY

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ABSTRACT :

The Armed Forces (Special Powers) Bill was introduced in first session of the constituent assembly of India by the first defence minister, Sardar Baldev Singh. It was debated in the house in December 1947. The Armed Forces Special Powers Act, 1958 was basically brought forward as an immediate measure to control the insurgency problem in North-East India. When peaceful means to resolve the problem fail, the state moves in stronger forces. The ultimate instrument of power available to the state is the army. It cannot afford to fail, as it is the instrument of last resort. Hence it is provided with special powers, thus AFSPA. This article attempts to re-evaluate the disputation on the AFSPA in terms of its necessity or misuse of power. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism — not privileges to be sacrificed at a time of tension. AFSPA was neither crafted by the army nor drafted by soldiers. It was enacted by Parliament seeking to ensure that a situation was brought back from the brink. 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 and Jammu and Kashmir. The Armed Forces (Special Powers) Act has come for widespread criticism in Jammu and Kashmir, Manipur and other parts of the northeast because of the human rights abuses that have come to be associated with its operation. The need is to explain as to why this law is necessary if the security forces are to resolutely contain the internal unrest and insurgencies that threaten the nation's cohesion and integrity.

Keywords

AFSPA is almost as old as independent India. From parliament's archives, Nayak obtained a scanned copy of the debate on AFSPA, 1948, which was held in the constituent assembly in 1947. He also obtained the Disturbed Areas AFSP

Ordinances of Bengal, East Punjab and Delhi and the North-West Frontier Province (NWFP). Of these the ordinances, Bengal and NWFP had not empowered the armed forces to use force to the extent of causing death. That power was granted only in the East Punjab and Delhi ordinances. All these ordinances were replaced by the AFSPA Act of 1948, which empowered the armed forces to shoot and kill if necessary. Later on, the AFSPA of 1958 was enacted. The AFSPA was enacted on August 18, 1958, as an emergency measure to allow the deployment of the army to counter a separatist movement in the north-eastern Naga Hills. However, it has remained in force in several northeast states for five decades and in Jammu and Kashmir since 1990. When the civil administration expressed its helplessness to deal with the armed insurrection that erupted in Nagaland in 1958. The Centre thereafter acted swiftly, the President of India promulgating on 22 May 1958, the Armed Forces (Assam and Manipur) Special Powers Ordinance, 1958, which gave the Armed Forces the power to operate in the disturbed areas in the State of Assam and Union Territory of Manipur. Later the Ordinance was replaced by the Armed Forces (Special Powers) Bill, which received Presidential assent on 11 September 1958. It came on the Statute Book as THE ARMED FORCES (SPECIAL POWERS) ACT, 1958 (28 of 1958). It was later extended to Jammu and Kashmir as the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, on July 05, 1990. The Act initially covered areas in the Kashmir Division of the state. Subsequently, in August 2001, it was extended to the Jammu Division too. The Act, passed in the context of secessionist and separatist movements, confers certain "special powers" upon members of the armed forces in areas declared "disturbed" in the insurgency affected states of northeast, namely Nagaland, Manipur, Mizoram, Tripura, Assam and Arunachal Pradesh, and the state of Jammu and Kashmir.¹² Under Article 246 of the Constitution, Parliament makes laws concerning the

deployment of the Armed Forces “in aid of the civil power”, prescribing the powers, jurisdiction, privileges and liabilities of soldiers during deployment. The Armed Forces (Special Powers) Act, 1958 (AFSPA) is one such law. When law and order, and peace in society are disturbed and are beyond political resolution, governance calls for using the force of the state and central police (CAPFs). Disturbance of law and order usually happens because of a conflict of interests within civil society, caused by inappropriate laws and unfair policies and poor or ill-motivated implementation, in short, maladministration or mis-governance. When law and order cannot be restored despite deploying state and central police or because of their misuse, it can only be restored by deployment of the Armed Forces (Army) on internal security duties in aid of the civil power as permitted by the Constitution. As government has no other option; the Army is its instrument of last resort. When government calls the army for internal security duties as for example, to quell rioting, the army may confront a violent mob. The army officer commanding the sub-unit is obliged to take the written permission of a magistrate who accompanies the sub-unit, before opening fire if the situation so warrants according to the discretion of the magistrate, because the soldier cannot use firearms against civilians without permission from civil authority. But when law and order breaks down in a large area, government cannot provide magistrates to day-and-night accompany every army sub-unit, and it therefore empowers the Army to handle such situations by means of AFSPA.

The Act has six sections, the first giving out the short title and extent of the Act and the second defining various terms as to their meaning. Section 3 empowers the Constitutional head of any state to declare the whole or any part of the state to be a disturbed area. Only after such declaration, the Armed Forces can be employed to deal with the situation. Section 4 of the Act grants enabling powers to the military, once an area has been declared as disturbed. This includes the use of force if required against a person acting in contravention of the law, even to the extent of killing a person for the commission or suspicion of the commission of offences, the power to destroy any arms dump or fortified position from which armed attacks are being made or likely to be made and the power of search and arrest without a warrant. Section 5 provides for an arrested person to be

handed over to the police with the least possible delay. Section 6 provides protection to persons in respect of anything done or purported to be done in exercise of the powers conferred by the Act

Unfortunately, the debate over the Act has been reduced to an absurd test of patriotism and contradiction. Repeal of the AFSPA has become a core demand of residents and activists in the areas in which it is in operation. While some contend that repealing the Act would be an insult to the Indian army and would put the soldiers at risk, others feel that it has adversely affected conduct of Indian army creating a climate of rage among ordinary people against the army. Numerous independent commissions in India have recommended repealing the law. Hearing several petitions challenging the constitutional validity of AFSPA, the Supreme Court ruled in 1997 [*Naga People’s Movement of Human Rights v Union of India* [1997] ICHRL 117 (27.11.1997)] that the powers conferred under clauses (a) to (d) of Section 4 and Section 5 of the Central Act on the officers of the armed forces, including a Non-Commissioned Officer, are not arbitrary and unreasonable and are not violative of the provisions of Articles 14, 19 or 21 of the Constitution... The Supreme Court of India in its judgement of 27 November 1997 stated that The Central Act cannot be regarded as a colourable legislation or a fraud on the Constitution. It is not a measure intended to achieve the same result as contemplated by a Proclamation of Emergency under Article 352 or a proclamation under Article 356 of the Constitution. The vagueness of the definition of ‘disturbed area’ was challenged in *Indrajit Barua v. State of Assam* case (AIR 1983 Del 513). The court decided that the lack of precision to the definition of a disturbed area was not an issue because the government and people of India understand its meaning. However, since the declaration depends on the satisfaction of the Government official, it is not subject to judicial review.[1]

There is a need to explain as to why this law is necessary if the security forces are to resolutely contain the internal unrest and insurgencies that threaten the nation’s cohesion and integrity. A soldier on joining any stream of Armed Forces gives undertaking on completion of his basic training, by oath or allegiance to the Constitution, “I pledge to obey the command of the President under national flag as ordered by my superiors on land, air and sea even at the risk of my

life". This is for the security and territorial integrity of our nation. There is no other service where one has to sign such an undertaking. But when called upon to perform duties like to fight the undergrounds/Terrorists/Insurgents/ anti nationals, the Armed Forces have to face them, most of the times, with bullets and IED blasts both in urban/towns/built up areas and in ravines, hills and dense jungle. At times some security personnel encounter their relatives/friends too from other side but they have to continue to perform their duties even if he has to be apprehended/killed. The AFSPA provides Armed Forces 'enabling power' to carry out their tasks in good faith and without fear of unnecessary drags in the courts. When Armed Forces can be called in other than counter insurgency are: if civil riots erupt out on any grounds in any part of India or if civil police revolts and refuses to perform their duties as had happened in UP under NDA rule and Punjab police had refused to face armed Khalistani Kharkoos (Kharkoos in Panjabi term is for a terrorist). This service called 'Aid to civil power' is requisitioned at the highest level and a magistrate (normally class one) accompanies army troops on all occasions. Absolutely controlled situation is restored to the deputy commissioner who takes over and relieves the army with clearance certificate indicating time & date such service dispensed with. No criminal case is registered in any court even on occurrence of collateral damages, injuries / deaths. Activists have made the focus of their criticism, giving soldiers the "right to kill" is not AFSPA's principal flaw. After all, if a 'law and order' situation has arisen which compels the government to deploy the Army, soldiers have to be allowed to use deadly force. Even a private citizen has the right to kill someone in self-defence, though the final word on the legality of her or his action belongs to the courts. Similarly, a civilised society expects that the use of deadly force by the Army must at all times be lawful, necessary and proportionate, it is important to recognise that AFSPA does not give an officer the unqualified right to fire upon and cause the death of any person in a Disturbed Area. At a minimum, that person should have been carrying weapons or explosives. The shooting of an unarmed individual, and the killing of a person in custody, are not acts that are permissible under AFSPA. Force is allowed in order to arrest a suspect but the fact that the Act authorises the use of "necessary" rather than "deadly" force in such a

circumstance means the tests of necessity and proportionality must be met.

The AFSPA is an enabling legislation. It legitimises deployment of the Army in large areas which the civil administration may notify as "disturbed areas". AFSPA is applicable only to the Armed Forces (under the Ministry of Defence), and not to CAPFs or state police forces under central or state ministries of Home Affairs respectively. Thus the term "Armed Forces" (proper noun) should not be applied to just anybody of uniformed persons bearing firearms such as police or CAPFs who may be authorized and trained to use firearms, but only to the soldiers of India's military. But, often unable to distinguish between the Army and civilian forces that bear arms, Media persons often use the catch-all term "security forces" or "armed forces" (common noun) to include the military, CAPFs and state police. The confusion is exacerbated because CAPFs and police forces wear camouflage uniforms that are virtually indistinguishable from Army uniforms. In tense situations where a journalist takes risks, it can be risky for him/her, and even more so for any member of the public, to ask an armed man to which force he belongs. Thus often enough, the media and the public straightaway blame the Army for incidents involving CAPFs or police, because of AFSPA.

The government has a responsibility to ensure the protection of citizens from abuses by separatist militants and armed groups. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism — not privileges to be sacrificed at a time of tension. 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 bring the perpetrators of such acts to justice. the Supreme Court in its judgement stated that the AFSPA "does not displace the civil power of the State by the armed forces of the Union and it only provides for deployment of armed forces of the Union in aid of the civil power". It is important to understand that the Army operates on the direction of the political authority. The onus for deploying the Army hence lies on the Centre and not on the Army. AFSPA is a Civil Act enacted by the Parliament of India for deployment of Armed Forces to meet violent internal situations created by underground militant outfits to further their illegal and unconstitutional causes. The law provides

necessary powers and legal support to the Armed Forces for carrying out proactive operations against the militants in a higher hostile environment. Declaring an area as 'disturbed' is also not an arbitrary decision by the state government, but follows from a complete breakdown of the state machinery due to the hostile activities of insurgents, militants or terrorists. The Army is thus called in as the last option and the consequences of failure could well mean the disintegration of the state. If the Army is not enabled to carry out its task, then the result could be failure with serious consequences. There is no gainsaying the fact that political necessity drives deployment of the security forces for internal security duties. The forces are aware that they cannot afford to fail when called upon to safeguard the country's integrity. Hence, they require the minimum legislation that is essential to ensure efficient utilisation of combat capability. This includes safeguards from legal harassment and empowerment of its officers to decide on employment of the minimum force that they consider essential. The absence of such a legal statute would adversely affect organisational flexibility and the utilisation of the security capacity of the state. The annulment of the Act, as being debated by sections of the civil society, could prove disastrous at the central and the state government levels. As it would dilute the capacity of an important instrument of the state – the armed forces – to tackle the security challenges faced by the country, it would motivate the insurgent leadership, field cadres and their over ground supporters to engage in reckless damage to public life and property and it may well result in a security situation which slides beyond redemption, necessitating major political compromise. The resultant lack of security cover would adversely affect the governance and development capacities in the insurgency affected states, and the eventual redress of local grievances. The annulment of the Act could have serious repercussions at the tactical level. It would result in loss of morale and reluctance amongst the security forces to undertake operations fearing litigation, thereby leading to a slow tempo of operations. A frail legal standing would embolden the insurgent/terrorist organizations and their over ground workers (OGWs) to level frivolous allegations resulting in the military leadership appearing more often in courts rather than in

leading counter-terrorist operations. The judiciary too is likely to be targeted by the insurgents/terrorists to make them pliant thereby posing an additional security burden. Also, over a period of time judicial standards and rectitude would deteriorate leading to a loss of faith in the system. A soldier makes significant personal sacrifices in his life, and all that he wishes is that the nation accepts his contribution in difficult conditions, and does not drag him to court for undertaking a task assigned to him. He surely seeks reasonable immunity while acting in good faith to prevent destruction to life and property. It would also be important to put to rest the much overstated argument that the security forces shelter errant personnel from prosecution. The prosecution figures speak for themselves. 3

Extraordinary situations demand extraordinary measures, and AFSPA is what is required to deal with anti-Indian terrorists whose stated objective is breaking up the country. Important internal security operations carried out successfully by Armed Forces against Naxalites were in Andhra Pradesh and Orissa in a distance past and in Punjab against Khalistani insurgents in recent past when Punjab continued to be placed under PR for eight years and above. At occasions, Army troops had to operate wearing Khaki uniforms too, to boost the sagging morale of civil police who used to almost refuse to confront Kharkoos (Terrorists)/their sympathizers and to avoid media eye. Ultimately net result, the Army had assisted the civil administration to achieve a win position. Terrorism would never have been rooted out in Punjab or Mizoram without the AFSPA and without the tough measures that were taken by the security forces operating under the protection of the Act. The army is deployed for counter-insurgency duties primarily because police forces of that state and even the paramilitary forces, on their own, cannot tackle the terrorists. The army has never asked to be deployed for counter insurgency operations. In a counter-insurgency theatre, the army is battling the terrorists who are the enemy, but within Indian territories and amidst Indian citizens. And this, unfortunately, and howsoever hard the army may try to prevent it, leads to collateral damage at times. It is extremely difficult, if not impossible, for a soldier to pick out a terrorist from a crowd of citizens and neutralise him. Often, citizens themselves bring harm upon themselves by behaving in what a soldier may defensibly deem to be suspicious behaviour. A

lot of civilian deaths from shootings by the army have occurred when civilians have ignored soldiers' orders to stop at checkpoints. There is no reason why an innocent person will not stop at a check post and subject himself and his vehicle to inspection. But many disregard soldiers' orders and get shot in the process, leading to outcries of human rights abuses. Insurgent is unlawful. Armed Forces trooper is bound by law. If he is chasing some unlawful in his area covered by AFSPA & that insurgents enter in zone declared 'not covered under AFSPA' will he have to abandon the chase. It puts him to questions of inefficiency, hobnobbing with UGs, blame of assisting insurgents to escape and putting life of his informer(s) in danger at the hands of insurgents. The Indian army doesn't relish internal security and counter-insurgency duties. It is indeed a thankless task and earns it a lot of flak. And above all, it takes away from the army's primary objective of defending the country against external aggressors. Our army is trained to deal with external aggressors and in times of peace, would be much better off training for war and not hunting down terrorists or protecting civilians in insurgency-hit-areas. Battling insurgency is never a zero-sum game. Troops involved in battling insurgency are always considered oppressors in their area of operations, even if they do their best to win hearts and minds. Kashmir is an example. The same youth who pelt stones and openly protect militants in encounters, participate in army-organised cricket competitions and youth festivals. They flock to join the army when recruitment rallies are conducted. Accusations would always flow and separating the wheat from the chaff is almost impossible, as the army is not local. It also represents the Central government against whom the battle is being fought. The bullets do not solve a problem. However, when those who feel that only stones or bullets which hurt or kill government representatives, whether it be the army or other security agencies, can compel the state to accede to their demands, they must be responded to in equal measure, by force. The military on internal security duties is to civil society what an ICU is to a critically ill person. A patient cannot remain for years in a hospital ICU, because he/she would be effectively dead.

The army or supporting security agencies have never invented a problem. The problems have arisen either due to political failures or because a weakness in the political system has been exploited by a group seeking power

and control by force, supported in funds, weapons or ideology by an enemy power. When peaceful means to resolve the problem fail, the state moves in stronger forces. The ultimate instrument of power available to the state is the army. It cannot afford to fail, as it is the instrument of last resort AFSPA was neither crafted by the army nor drafted by soldiers. It was enacted by Parliament seeking to ensure that a situation was brought back from the brink. In the process, the army creates an environment by application of power, for a political solution to follow. It has been successful in Punjab, Nagaland and Mizoram. The environment was also created on numerous occasions in Kashmir, but no government could capitalise on it.

Indian Army has well established operational doctrines and have earned the reputation of best Army in duties abroad as well within the Nation. Its secular role in nation building activities stands aloftly upright. People in our north-eastern states and Kashmir, who for decades have been trapped in the crossfire between government police and military forces on the one hand, and the bullets, grenades and IEDs of militants on the other, want nothing more than peace and democratic freedoms. Irom Sharmila, a national icon of courageous non-violence, who has been on fast for 12 long years demanding repeal of AFSPA, stated it squarely and unequivocally in 2013: "I am against a government that uses violence as a means to govern" She goes further to say that "the government and the army are colluding to cheat the people". Her stating that the people are being cheated of peace, social order and meaningful development is understandable and correct. But her accusation of army's colluding with government, suggesting that the army has an institutional interest or stake in internal security deployment, is unfounded. It bears repetition that the army comes out of barracks at the specific call of government and not of its own accord. Therefore, "cheat the people" refers to government cheating the people through abject failure of the politics of development, and monumental political-bureaucratic corruption of ideology and principles. India's societies need the "treatment" of honest political effort by transparent dialogue and engagement with people, and "nutrition" of good governance for their growth. Society does not need the army, except to guard the country's borders against external aggression and protect its sovereignty and territorial integrity.

Day by Day corruption increases and its becoming hard to survive without special forces in our daily lives. In order to have a peaceful situation, AFSPA should not be repealed to the public a necessity became painfully obvious. Today, countries across the globe are going in for more stringent laws in their effort to tackle the cancer of terrorism. AFSPA has to be seen in the light of current day realities and not in an isolated prism. The debate on AFSPA also needs to follow a different narrative. AFSPA can no longer be discussed in terms of the Act being 'good' or 'bad'. The central issue is whether the Act is essential. In disturbed environments, the issue often gets deflected from real causes to imaginary ones. AFSPA is not the cause of the problem. That lies in the failure of the political and administrative processes to meet the aspirations of the people. A prominent academic gave forth the view that as AFSPA has not succeeded in bringing peace to the Northeast and to J&K, it should be scrapped. That was being too clever by half. On a similar yardstick, we could well ask for the scrapping of the political and administrative machinery of the state for failing to deliver. Be that as it may, the security forces have delivered time and again on stabilising the state to permit other initiatives to flourish and take root. The onus for building peace now lies on other actors. Extraordinary situations demand extraordinary measures, and AFSPA is what is required to deal with anti-Indian terrorists whose stated objective is breaking up the country.