

Armed Forces (Special Powers) Act-1958 Vs Human Rights: A Critical Study

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Abstract

Human Rights today have become a global agenda. While previously functioning as a part of broader political ideologies (say, progressive liberalism), in our time the notion operates as an autonomous ideology of a global programme- equipped with its advocates and detractors. Basically human rights are meant to be good news for the underprivileged, the downtrodden, and the dispossessed. As one sees, this has historically been the function of human rights- from the assertion of baronial rights against the king in the Magnacarta and to the proclamation of citizen's rights against feudal absolutism in the French Revolutions, to the demand for social and economic rights in the era of industrial capitalism. Thus, rights have been always meant to be protective shield of the weak against the mighty. However, detached from their historical and social contexts, rights (taken abstractly) have a double-edged status, for they can serve as weapons of aggression and domination in the hands of powerful. The baronial rights against the king can turn into privileges asserted against pleasants and serfs; the revolutionary into weapons of exclusion wielded against foreigners and strangers.

In this context the interface between AFSPA and Human rights gives space for a critical examination in India's context for the Act in a state weapon against the rebels but in different quarters has been condemned as violation of human rights. The North-Eastern region, particularly the state of Assam has been the victim of the said Act and more. In the name of insurgency and declaring it as the disturbed area, the Act is being implemented without due regard towards the rights of the citizens for which many innocents people lost their lives and injured forever. In view of this the paper is a critical engagement with the Act and its impact on human rights of general people and 'rebels' in the state.

Keywords: Human Rights, disturbed area, rebel, armed forces, special powers

Introduction

Human being is not an individual entity. It has physical existence, moral and biological urges, social relations, cultural practices and desires for religious fulfillment, political achievements and economic security. There is always a sense of freedom and also a sense of a community of being inherent in them.

In other words, the human existence becomes meaningful in relation with environment in general. Human and Nature provides the domain of action and interaction and a harmonious plane of relations. This defines a holistic personality achievable only through guaranteed human rights. Needless to say, the scope of human rights is as ever expanding reality.

The social scientists and philosophers have agreed that every human being is entitled to some basic rights. There is universal acceptance of Human Rights and these are applicable in domestic and international planes. The concept of covers a broad spectrum Human rights and it embraces civil rights, civil liberties and social, economic and cultural rights. The World Conference on Human Rights held in Vienna in 1993 stated in its Declaration that all human rights are derived from the dignity and worth inherent in the human person, and the human person is the central subject of human rights and fundamental freedoms. But, there are state instruments which infringe upon these rights. One of them the gruesome one in India is the Armed Forces (Special Powers) Act, 1958 (AFSPA).

The AFSPA has been in the centre stage which has attracted the attention of the scholars, politician and the people at large in recent days. This act was passed and implemented keeping in view certain situations in the country. Right from the beginning this act has been a target of the social and human rights activities who visualize this act as repressive in nature. The AFSPA has been argued as a controversial and debatable issue in the realm of Human Rights of the people of North –Eastern States (NES) for last several decades. In the name of emergency or during the time of emergency, the security forces of the country have been operating in disturbed areas of NES to combat insurgency groups with the immunity of this Act. Under the shadow of emergency and immunity, the armed personals of the country have violated the rights of the people of NES in inhuman manners and also violated basic principles of the Constitution of the land. It is noted that a segment of the people of this region made demands for separate Independent States or Autonomous Council more particularly in Naga Hills of Assam (now Nagaland) and Manipur since the time of independence and they took violence as their means of Movement. Therefore, the Government of India had decided to enact the AFSPA to combat the out fits of the region and help the civil administration.¹

¹ LOK SABHA DEBATES, Second Series vol. XVIII, 1958, 11 August to 22nd August, 1958. Fifth Session 1958, (New Delhi, Lok Sabha Secretariat, 1958), p. 1439-41

Historical Background of AFSPA: The AFSPA has a long historical background. To understand the historical background of this Act thoroughly we need to go back to the time of freedom movement of India. In 1917, the Government of England formed an inquiry committee headed by an English Judge Mr. S. A. T. Rowlatt to submit a detailed report on the freedom movement in India. After observing the overall situation of freedom movement of India, the committee submitted its report to the Government and recommended extra judicial proposal in the guise of law. On the basis of the recommendation of the committee a bill was introduced and after that it became a law known as the Rowlatt Act. “This Act authorized the Government to arrest any person without trial, to intern and restrict movement of persons suspected of anti-British activities. This Act enabled the British Government to suspend the rights of Habeas Corpus, which is the foundation of civil liberties in any society.”² On the other hand the judges were also empowered to judge the political cases without jury. Simultaneously, there was no any provisions and scope for appeal against their decisions.

After the Rowlatt Act, at the peak and height time of the Quit India Movement, the British government considered that in such an emergency situation it was necessary to confer special powers on certain officers of His Majesty’s armed forces and hence promulgated the Armed Forces (Special Powers) Ordinance, 1942 (AFSPO) on 15th August 1942 and extended it to the whole of British India³ to neutralize the impact of the freedom movement. According to the Section 2, Sub Section 1(a) and 1(b) of the AFSPO, an officer not below the rank of Captain in His Majesty’s armed forces might order in writing to any personnel under his command to use force even to the causing of death against any adhering to the cause of the Indian freedom movement. The Indian National Congress strongly opposed that draconian law and expressed that it aimed only to crush the Quit India Movement and the spirit of Indian nationalism.⁴

After five years, India became independent on 15th August 1947. Just after independence, the nation faced certain unexpected situations in various parts of the country due to the result of partition. To meet that situation in certain parts of the India, the Government of India issued four ordinances viz. the Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947, Assam Disturbed Areas (Special

² *Why AFSPA Should be Repealed*, Sing Soyam Lokendrajit, p29

³ *An Illusion of Justice*, People’s Union for Democratic Rights, Delhi, 1998 p 2

⁴ Sing Lokendrajit, p 32-33

Powers of Armed Forces) Ordinance, 1947, the East Punjab and Delhi Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947, and the United Provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947. Subsequently, these acts were replaced by the Armed Forces (Special Powers) Act, 1948 temporarily and then further repealed by Act 36 of 1957.⁵

The Nagas of Naga Hill District of Assam took up arms against the Government of India for a separate independent Nagaland just after the independence of the country. The violence and insurgent activities were the means of their movement. They started indulging in arson, murder, looting, dacoity, etc. in Assam and Manipur during their uprising. To combat the insurgent activities of the area due to incidents and spread of violence in Assam and particularly in Naga Hills and Manipur, the Government of India headed by the same group of people who strongly opposed the AFSPA of 1942 became more ambitious to promulgate a series of legislations- Assam Maintenance of Public Order (Autonomous District) Act, 1953, Assam Disturbed Area Act, 1955 and ended in the Armed Forces (Assam & Manipur) Special Powers Act 1958 (AFSPA).⁶ It has been considered as an evil re-incarnation of British colonial law like the Rowlatt Act of 1919.

Armed Forces (Assam-Manipur) Special Powers Ordinance-1958: Armed Forces (Assam and Manipur) Special Powers Ordinance was promulgated by the President of India on 22nd May, 1958 in which some special powers had been given to the members of Armed Forces in disturbed areas of Assam and Manipur just after 12 days of Budget Session of the Parliament.⁷ Later, this Ordinance was introduced in Summer Session of the Parliament in the same year. Introducing the Armed Forces Special Powers Bill (1958) in Lok Sabha, the then Home Minister of the State Shri Govind Ballabh Pant said that certain misguided sections of Nagas were involved in ‘arson, murder, loot, dacoity etc. and “So it has become necessary to adopt effective measures for the protection of the people in those areas. In order to enable the armed forces to handle the situation effectively whenever such problem arises hereafter, it has been considered necessary to introduce this bill.”⁸ The Bill was passed by Parliament after having a three hour

⁵ Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958 submitted to the Government of India Ministry of Home Affairs, 2005 p¹⁰

⁶ *An Illusion of Justice*, People’s Union for Democratic Rights, Delhi, 1998 p 2

⁷ Bhadra, Sujata, *Uttar-Purbanchal: Raster Juddha, Manuser Pratirodh*, APDA Publication, Kolkata, 2004 p¹²

⁸ Note of Shri Sanjoy Hazarika, a member of the Committee to Review the Armed Forces (Special Powers) Act, 1958 p¹⁴⁵

discussion in Lok Sabha and four hours in Rajya Sabha. The Act was amended in 1972 & 1986 and renamed as Armed Forces (Special Powers), Act 1958 and extended to the whole of NES due to the creation of new states viz. Arunachal Pradesh, Meghalaya, Mizoram and Nagaland.⁹

AFSPA and its Provisions: The AFSPA has only six sections and a preamble. The preamble of the Act, as amended, read as “An Act to enable certain special powers to be conferred upon members of the Armed Forces in disturbed areas in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura.”¹⁰

On the other hand the Section 1 of the Act defines the title of the Act. Section 2 limits the jurisdiction of the Act to the seven states of the NE. The sub-section 2 (a) of the Act is stated about the meaning of the “armed forces”. According to this section “armed forces means the military forces and the air forces operating as land forces, and includes other armed forces of the Union so operating”. On the other hand the Section 2 (b) of the AFSPA speaks about the meaning of “disturbed area”. It is argued that “disturbed area means an area which is for the time being declared by notification under section 3 to be a disturbed area”.¹¹ The Act defines a disturbed area tautologically i.e. a disturbed area is an area which is disturbed area. This definition of the Act is useless and incomplete because, this Section is silent regarding the Person who will declare an area as disturbed area and the ground of such declaration.¹² Section 2 (c) of the Act stated about the meaning of Armed Forces and Air Forces Acts whether it is defined or not defined. It is said that “all other words and expressions used herein, but not defined and defined in the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950) shall have the meanings respectively to them in those Acts”.¹³

⁹ XVI the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act 1972 No. 7 of 1972 (5 April 1972) 6 and Armed Forces (Special Powers) Act 1958 (28 of 1958)

¹⁰ AFSPA 1958

¹¹ Section 2 of the AFSPA

¹² Sing Soyam Lokendrajit, p7

¹³ Section 2 of the AFSPA

Declaration of a Disturbed Area: Section 3 of the Act contains with the powers to declare areas to be disturbed areas. It says that “If, in relation to any state or Union Territory to which this act extends, the Governor of that State or the administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State of Union territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may by notification in the Official Gazette, declare the whole or such part of such State or Union territory to be a disturbed area.”¹⁴

Special Powers to Armed Forces

Section 4 of the Act gives special powers the Armed Forces. It states that any Commissioned Officer, Warrant Officer and Non-Commissioned Officer or any other person of equivalent rank in the armed forces may, in a disturbed area-

- (a) if he is of the opinion that it is necessary to do so for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use forces, 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;
- (b) if he is of opinion that it is necessary to destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders wanted for any offence;
- (c) 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 forces as may be necessary to effect the arrest.
- (d) enter and search, without any warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or exclusive substance believed to be

¹⁴ Section 3 of the AFSPA

unlawfully kept in such premises, and may for that purpose use such forces as may be necessary.

Section 5 of the Act deals with arrested persons to be handed over to the police. This Article of the Act stated that any person arrested and taken into the custody by the army under this Act shall be handed over to the officer in charge of the nearest police station with least possible delay, together with a report of the circumstances causing the arrest. The words least possible delay is also ambiguous. This Act is quite silent in this regard. By giving an order in this matter court direct the central government to give instructions to the concerned officers to hand over the arrested persons without delay so that the police may make them present before the magistrates within 24 hours of their arrest.¹⁵

Section 6 of the Act relates to the protection of persons under the Act. It is stated that “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.” This section of the Act granting immunity from prosecution is dangerous because it creates the impression that the security force can act with impunity.¹⁶ It seems that apart from the legal and constitutional procedure, this Act only emphasizes upon the armed forces to combat with a few section entangling with rather than the majority people of the region. The existing rules and legislations are not applicable upon the armed force, even if they kill innocent people. This Act recognizes the Armed Forces as holy one and they never do wrong even when they kill innocent people.

AFSPA in Human Rights Perspective: Section 3 of the Act empowers the Central Government as administrator or the Governor to declare any part or the entire state or Union Territory as disturbed area, when the Governor or the Administrator is of the opinion that “use of armed forces in aid of civil powers is necessary” for that area and whereupon, it can deploy the Armed Forces to that area in aid of civil powers to assist only, not to supersede.¹⁷

¹⁵ Goswami, 1994, p233

¹⁶ PUDR Vs. Union of India, AIR 1992 Gau.52

¹⁷ Human Rights Principle, Practice & Abuse, P. K. Goswami, ed. N. Sanajaoba, 1994, p231

This Act also envisages the role of Armed Forces strictly as that of assisting civil administration 'if necessary' in disturbed or dangerous conditions. The Act has very clearly limited the role of the Armed forces to provide necessary aid but not to suppress the powers and functions of the civil administration. But, in practice, the civil administration is virtually sidetracked and marginalized by the Armed Forces. In the district level, the Deputy Commissioner and Superintendent of Police are kept in darkness. The Army Civilians Committee which is constituted during the time of emergency only in name. Instead of aiding the civil administration, they keep the whole administration in their hand and conduct the mass raids, arrests without informing the civil authority. Legally, it is essential for armed forces to be accompanied by Magistrates when they go for operation or mass raid, search, and arrest. But they ignore it and even do not keep Gaonburah (village headman) along with them.¹⁸ On the other hand, on the basis of opinion made by the Centre/State/Union Territory, any area may be declared as disturbed area. But there is no clear cut basis, criterion or special parameter of such an opinion on disturbed area.

The large scale violation of Human Rights of the people of North East is because of the arbitrary nature of the term disturbed area. "The vague and circular definition of 'disturbed area' as being an area which is so 'disturbed or dangerous' as to require the aid of the armed forces ensures that any area can be declared as disturbed. The definition or the rest of the provisions of the Act offer no guidelines and lays no objective criteria to adjudge an area as disturbed".¹⁹ "Section 3 also does not contain any requirement of periodic review to assess, even on the basis of subjective criteria, whether an area continues to be a disturbed or dangerous state and notifications having drastic effects on the citizens can routinely continue".²⁰ Section 3 also states that the Armed Forces are to be deployed in the disturbed area only to aid the civil power. However it does not lay down any machinery, procedure or mechanism for the 'aid' to provid the civil power.²¹ "In absence of a concrete method, the army hierarchy and chain of command has no place for coordination with civil administration. A soldier is under no obligation to carry out orders of the collector/magistrate or the Superintendent of Police of an area. Thus, except the formation of a onetime

¹⁸ Goswami, 1994, p238

¹⁹ An Illusion of Justice, People's Union for Democratic Rights, Delhi, p 4

²⁰ *ibid*

²¹ Why AFSPA Must Go, A Fact Finding Report, Submitted to the Repeal of the Armed Forces (Special Powers) Act by PUDR, 2005p¹⁶

opinion that the aid of the army is necessary and subsequent notification to a disturbed area under section 3, the civil power has no further role to play”.²²

Power to shoot and Arrest: The Section 4 (a) of the Act empowers, the commissioned officer, warrant officer and non-commissioned officer or, any other person of equivalent rank of army, on such declaration, to fire or to use force even to cause death of a person, who is acting in contravention of order prohibiting the assembly of person or carrying firearms, ammunitions or explosive substances. The above-specified officers can dismantle arms, dumps, structures, hide-outs, used by gangs or absconders and arrest without warrant, any person who has committed a cognizable offence and further to enter and search premises to recover such property.²³ This is a dangerous power which has been conferred to the armed forces compared with the other ordinary laws of the land more particularly the CrPC which is sufficiently enough to maintain law and order situation in the country. The clause 144 of the CrPC prohibiting the assembly of five more persons is punishable with a month's imprisonment. But a person may kill for the same reason under the AFSPA.²⁴ On the other hand the people of North East have normal tradition to carry out some arms, usable domestic weapons or agricultural implements like different types of Dao, Bow and Arrow, Air gun etc when go for farming hunting. In such a situation if the armed forces draw an opinion that he or she is dangerous to him and fire arms without giving warning or opportunities to self defence or self analysis during the time of emergency in disturbed area then the rights to life and other Human Rights of the people will be violated in the name of combating the insurgency. This is normally happened in the North East. Many civilians have been killed in such situations. There is no provision for inquest mandatory into the death of the person killed by the armed forces or no requirement for them even give a report as to under what circumstances he formed an opinion to shoot and justify the killing.²⁵

This Section of the Act empowers even the non-commissioned officers like Havaldar to create an opinion in deployed disturbed area to search arrest and kill anybody without giving any information, warrant and

²²An Illusion of Justice, People's Union for Democratic Rights, Delhi, p 4

²³. Goswami, 1994, p231

²⁴ Why AFSPA Must Go, 2005p16.

²⁵ Why AFSPA Must Go, 2005 p¹⁷.

warning before proceeding to take such an important and sensitive action. On the other hand, deployment of such kind of non-commissioned officer in disturbed area, may be from outside of North East, perhaps may not having enough knowledge of the area, people of the area, their customs, conventions, behaviour etc. which may be against the legislation.

Power to Destroy Arms Dump: The Section 4 (b) of the AFSPA empowers army men to draw an opinion to destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders wanted for any offence. Empowering by this sub section the Armed Forces who are deployed in the operation may draw any opinion to destroy home, schools and any other religious institutions of the region because the structure and pattern of the house of above mentioned of the NES are always suspicious and doubtfully looked upon due to its pattern, type, mode of construction, position, location etc.²⁶

Power to Arrest without Warrant: The Section 4 (c) of the Act empowers armed personnel's to arrest, without warrant, any person who has committed or is about to commit a cognizable offence in disturbed areas. Arrest without warrant is a serious encroachment on the right to life and liberty of a person. This section of the act confers powers to the armed forces to deprive a person of his or her liberty without any procedural safeguard and confers wide powers without any duty to exercise or restraint. On the other hand "there is no mechanism to check that in fact there was credible information or grounds for reasonable suspicion that the person arrested was likely to commit a cognizable offence".²⁷ According to the law of the land a person should be arrested against whom reasonable suspicion exists or he is going to do or commit a cognizable offence. It is also noted that if "a person arrested under section 4 (c) will deprive from his fundamental rights under Article 22 of the Constitution to be informed of the grounds of arrest".²⁸ The fundamental constitutional rights to be informed of the grounds of arrest, to consult a lawyer and to be produced before a Magistrate within 24 hours are all violated by the powers conferred by this provision.

²⁶ An Illusion of Justice, p 9

²⁷ ibid

²⁸ ibid

Power to Search and seize: The Sub section 4 (d) of the Act provides “any Commissioned Officer (CO), Warrant Officer (WO) and Non-Commissioned Officer (NCO) or any other person of equivalent rank in the armed forces may, in a disturbed area enter and search without any warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substance believed to be unlawfully kept in such premises, and may for that purpose use such forces as may be necessary”.

The power of search and seizure under this section has been extensively used by the armed forces in the time of operations and leading to widespread violation of fundamental rights of the citizens residing in areas declared as disturbed area. In such operations large areas comprising a number of villages are surrounded and people are ordered to come out of their home and they are grouped in one place and kept without food and water till search operation last. ”. Even that people were beaten, tortured and other form of degrading treatment given in open field or other area where they were kept for searching.

Arrested Persons hand over to Police: The Section 5 of the Act deals with arrested persons to be handed over to the police. The Supreme Court of India had strongly urged upon the state government and police authority to see that the constitutional and legal requirements to produce an arrested person before a magistrate within 24 hours of arrest must scrupulously be observed.²⁹ In the case of Purnima Baruah vs. Union of India, the Gauhati High Court held that violation of Section 5 of the Act would not only amount to wrongful detention but also to violation of constitutional and legal rights.³⁰

The Supreme Court (SC) in its land mark judgment has included: “While exercising the powers conferred under clauses (a) to (d) of section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of Do’s and Don’ts issued by the army authorities which are binding and disregard to the said instructions would entail suitable action under the Army Act, 1950.”³¹ The SC also explicitly states that “the Army shall not interrogate arrested persons. In practice, however, this act has been used to sanction prolonged army custody and use of third degree methods to interrogate. The Army as against

²⁹ Khatri Vs. State of Bihar, A 1981 SC, 928)

³⁰ Purnima Baruah vs. Union of India and others, 1991(1) GLR, 375

³¹ Naga Peoples’ Movement for Human Rights Vs. Union of India, AIR 1998 SC 431

police interrogation vitiates the whole process of criminal investigation. The Army is no longer then acting 'in aid of civil power' but is a power unto itself."³²

Immunity to Armed Personals: The section 6 of the Act states that no prosecution shall be made except with the previous sanction of the Central Government for 'anything done or purported to be done in exercise of powers conferred by this Act'. It is also noted that yet, the Central Government invariably does not give sanction even in grave cases like rape and murder. "Under the circumstances, there is no justice to victims- no FIR filed, no independent prosecution, no witnesses and no freedom from threat when the same armed forces continue to operate in the area."³³

Conclusion:

From the above discussion it is found that the provisions included in the AFSPA are against the norms of human rights of the people. The military, police and other paramilitary personnel have been committing gross excesses in declared disturbed areas without any fear of punishment and unleashing inhuman action upon innocent people violating the norms of constitutional rights and legal provisions of the country. For that reasons numerous mass protests were resorted to in different parts of the country and legal challenges have been also made in the apex court of the land. On the basis of the demand of civil society and mass movement and to examine the constitutional validity or legality of the Act, the government was compelled to form review committees or judicial commissions in different times to draw necessary opinion on the act. But till today this Act has been neither reviewed nor repealed except withdrawal from the Punjab in 1997.

The study reaffirms that the AFSPA is responsible for the violation of human rights in Assam. This study argues that to protect Human Rights of the individuals of the state, AFSPA ought to be repealed or amended humanitarily for effective protection of human rights and to ensure higher quality of life for the individuals. The study further argues that not only Armed Forces violated the Human Rights of the people of Assam but the rebel organizations are equally responsible for it. In the opinion of the human rights activists the AFSPA moves a step ahead of the then the British Ordinance and empowers even a non-commissioned officer to make an opinion in disturbed area and arrest anyone, search without any information, keep arrested persons in custody and fire upon.

³² Why AFSPA Must Go, 2005 p¹⁸

³³ Why AFSPA Must Go, 2005 p¹⁸

