

The Legitimacy of the AFSPA- A Critical Study in the National & International perspective

Diganta Hatiboruah, Assistant Professor, Department of Political Science, North Lakhimpur College (Autonomous), P.O.Khelmati-787031 Dist: Lakhimpur, Assam, email : diganahb@gmail.com

Abstract

The Armed Forces (Special Powers) Act, 1958 (AFSPA) was enacted by the government of India to combat the insurgency problem of the states. The functioning of the act has attracted the attention of the scholars, politicians and the people at large in recent days. In the name of emergency or during the time of emergency, the security forces of the country have been operating in disturbed areas to combat insurgency groups with the immunity of this Act. Under the shadow of emergency and immunity, the armed personnel of the Country have violated the rights of the civilians of the concerned areas and also basic principles of the Constitution of India. Hence, the AFSPA has been argued as a controversial and debatable issue in the realm of Human Rights. The civil societies and a number of leading personalities firmly express their dissatisfaction over the act and make demand for its repeal. It also argued that this act violates the international norms of Human Rights. Even many organisations and individuals have also moved to the United Nations and the Supreme Court of the Country to examine its constitutional validity. Considering the dissatisfaction of the people and civil societies, the government of India constituted different commissions in different times. The Supreme Court of the Country also constituted judicial committees to examine different cases related to violation of human rights of the people of the locality. In this paper an attempt has been made to examine how this act violates the national and international provisions of human rights of the people.

Key words: *Human Rights, armed forces, special powers, insurgency, international community, constitutional validity*

Introduction

The Armed Forces (Special Powers) Act (AFSPA) was passed by the Parliament of India on September 11, 1958. Before introduction of the bill in Parliament, the President of India on 22nd May, 1958 promulgated an ordinance which was known as the Armed Forces (Assam and Manipur) Special Powers

Ordinances to provide some special powers to the members of Armed Forces.¹ After that this Ordinance was introduced in Summer Session of the Parliament in the same year. The Bill was passed by Parliament after having a three hour discussion in Lok Sabha and four hours in Rajya Sabha. The Act was amended in 1972 and 1986, renamed as Armed Forces (Special Powers), Act 1958, and extended to the whole of North Eastern States (NES).²

The state of Punjab also came under the preview of Armed Forces Special Powers by promulgation of the Armed Forces (Punjab and Chandigarh) Special Powers Act on October 6, 1983. The central government promulgated this act to enable the central armed forces to operate in the state and the union territory against the separatist rebellion. The Armed Forces (Punjab and Chandigarh) Special Powers Act was enforced in the whole of Punjab and Chandigarh on October 15, 1983. It was finally withdrawn from the State after 14 years later in 1997, after successful end of operation against the rebellion.

Like Punjab, the Jammu and Kashmir also come into the fold of armed forces special powers in 1990 when the situation in the state began to deteriorate. In January, 1990 the central government imposed Governor's rule in the state and in September 1990 the state was declared temporarily disturbed by the Disturbed Areas Act of 1990 in which remained in force till July 18, 1992. This temporary Disturbed Areas Act was replaced by the Disturbed Areas Act of 1992 which was re-enacted as an Act. On September 11, 1990, the central government enacted the Armed Forces (Jammu and Kashmir) Special Powers Act and this act was enforced in the state from July 5, 1990 in six districts (Anantnag, Baramulla, Badgam, Kupwara, Pulwama and Srinagar) as well as in areas within 20 kms of the line of control in Poonch and Rajouri districts till today.

¹ Bhadra, Sujata, *Uttar-Purbanchal: Raster Juddha, Manuser Pratirodh*, APDA Publication, Kolkata, 2004

² 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)

The AFSPA granted some Special Powers to the Armed Forces who were deployed in disturbed areas. Section 4 of the Act says about the special powers of 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, in a disturbed area-

- (a) if 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, may 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 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 may invoke provision of the Act.
- (c) may 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) may 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 unlawfully kept in such premises, and may for that purpose use such forces as may be necessary.

On the other hand the Section 6 of the Act says about the protection of the armed personnel. 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.³ It seems that apart from the legal and constitutional procedure, this Act only emphasizes upon the armed

³ PUDR Vs. Union of India, AIR 1992 Gau.52

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 that they never do wrong even when they kill innocent people.

Since the 20th century, the countries of the world have been expressing their commitment towards the promotion and protection of human rights, human dignity, freedom, self-determination, social and economic equality, justice, etc. of the people. The establishment of nation-states, after Wifelier, was in congruence with the ideology of political nationalism. These nation-states mostly wed to the ideology of 'welfare state' by divorcing the earlier exclusive concept of 'police state'. These newly emerged nation-states had the authority to wield the weapons of human rights and 'other instruments of Law' for the welfare of citizens individually and collectively. But, ironically, there are quite a number of instances where 'other instruments of Law' have been used indiscriminately contravening the provisions of human rights.

The AFSPA has been identified by the human rights activists, scholars, politician and the civil societies as an inhuman legislation of the government in the realm of human rights of the people. The AFSPA has been argued as a controversial and debatable issue in the perspective of Human Rights in general. AFSPA is regarded as an unconstitutional legislation of the government of India for its inhuman and anti-constitutional nature. Different International and national organizations, legal experts, human rights activists and many others make demand for repeal of this Act so that the people can enjoy a dignified and quality life.

After introducing the AFSPA it has been alleged that the armed forces of the country have been violating the rights of the people of the concern areas or states for the Act empowered the armed forces through extraordinary powers. 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 had been 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.

In this regards Irom Sarmila, a 35 years old Manipuri Woman set on hunger strike for 11 years from 2000 against the AFSPA. For her strong determination she is known as the Iron Lady of Manipur. It was a unique resistance to the cruel and apathetic government and its regime of draconian law.⁴ Similarly in Assam the Manab Adhikar Sangram Samiti, All Assam Students' Union, Asom Jatiyatabadi Yuba Chatra Parishad, North East Students Union, have expressed their dissatisfaction towards the act and opined that the AFSPA is solely responsible for violation of human rights of the people. International organisations such as Amnesty International and Human Rights Watch also expressed their dissatisfaction against the act demanding for immediate repeal of this act.

The Constitution of India has provided for some Fundamental Rights to the people in Part III of the Constitution from Articles 12 to Article 35. These Fundamental Rights are *Right to Equality* (Article 14 to 18), *Right to Freedom* (Article 19 to 22), *Right against Exploitation* (Article 23 & 24), *Right to Freedom of Religion* (Article 25 to 28), *Cultural and Educational Right* (Article 29&30) and *Right to Constitutional Remedies* (Article 32 to 35). Regarding the Right to life, the Article 21 is significant where protection of life and personal liberty is mentioned. Article 22 is also significant in case of protection against arbitrary arrest and detention in certain cases. But, these Rights of the people are not granted during the time of Army operation and in implementation of the Armed Forces (Special Powers) Act, 1958.⁵ Similarly the AFSPA seems to be opposite to the international conventions and their recognitions. Under the shadow of this Act men live in terror and insecure situation. This Act provides for license to the Armed Forces to commit extra-judicial murders of citizens incompatible with the provisions of right to life, as found in International Covenant on Civil and Political Rights, which India has committed to comply with.

It provides that the AFSPA is not only violating the Human Rights of the people of the NES, but also the provisions of universal declarations and international conventions, covenants, etc. Articles 1,3,5 and 9 of

⁴ Malem Mangal Laishram, AFSPA,1958-A Historical Perspective-Celebrating 60 Years of Indian Democracy and 50 Years of AFSPA- part-I

⁵ Bakshi, P.M., *The Constitution of India*: Universal Law Publishing Co. Pvt. Ltd, update reprint, 2004 p45-57

the Universal Declaration of Human Rights, 1948 say that all human beings are born free and equal in dignity and rights; everyone has the right to life, liberty and security of person; no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment; no one shall be subjected to arbitrary arrest, detention or exile. But in time of army operations and emergency, the above-mentioned recognitions of General Assembly were kept aside by the administration and even suspended the fundamentals rights of the people, which was gravious threat to the standard of Human Rights.

In a report of the Amnesty International of October, 1990, on “Operation Bluebird” A Case Study of Torture and Extrajudicial Executions in Manipur” it has been mentioned that this Act was responsible for the violation of Human Rights. It described a pattern of arbitrary arrests, detentions and torture made by the Armed Forces in North-East States. According to the report the pattern of the arbitrary arrest, detention and torture were as follows.

- a) **Arbitrary arrest and detention:** On 10 July 1987, after the attack of the NSCN on its outpost, the Assam Rifles moved into *Oinam* (it is a Sub-Division of Senapati district of Manipur) and the surrounding villages in apparent attempts to recapture the stolen weapons. Many men were arrested and detained for interrogation. The report of the Home Secretary of the State said that the Assam Rifles personnel apprehended large number of youths including boys of about 10 years of age and detained them for considerable periods than permissible under the law.
- b) **Torture:** Amnesty International found that many arrested people were tied up and beaten for several hours at a time with rifle butts, lathis (sticks), blow kicks, slaps, chains and hung upside down until they lost their consciousness, could not walk, or until their limbs were broken. On the other hand the Army personnel smeared chilly powder on genitals, eyes and nose of the arrested persons. Several victims were also given electric shock in different parts of the body until they lost their strength.⁶
- c) **Observation of Human Rights Watch on AFSPA:** The Human Rights Watch observed that the right to life is violated by the section 4(a) of the AFSPA “which grants the armed forces power to shoot to kill in law enforcement situations without regard to international human rights law restrictions on the use of deadly force. Lethal or deadly force is broadly permitted

⁶ Amnesty International on “Operation Bluebird” A Case Study of Torture and Extra-judicial Executions in Manipur, October, 1990

under the AFSPA if the target is part of an assembly of five or more persons, holding weapons, or “carrying things capable of being used as weapons...” The terms “assembly” and “weapon” are not defined”.⁷

Regarding the right to liberty and security of person of disturbed area, the Human Rights Watch also stated that this act has been continuously violated by its “section 4(c) of the AFSPA, which fails to protect against arbitrary arrest by allowing soldiers to arrest anyone merely on suspicion that a “Cognizable offence.” has already taken place or is likely to take place in the future. Further, the AFSPA provides no specific time limit for handing arrested persons to the nearest police station. Section 5 of the AFSPA vaguely advises that those arrested be transferred to police custody “with the least possible delay.”⁸

The Human Rights Watch again argued that the right to remedy is also violated by section 6 of the AFSPA, “which provides officers who abuse their powers under the AFSPA with immunity from legal accountability. This section of the AFSPA prohibits even state governments from initiating legal proceedings against the armed forces on behalf of their population without central government approval. Since such a sanction is seldom granted, it has in effect provided a shield of immunity for armed forces personnel implicated in serious abuses”. It is also stated that in practice the right to be free from torture and from cruel or degrading treatment of the persons also are violated by the AFSPA. Its provisions empower armed forces to arrest without warrant and then detain arrested persons for unspecified amounts of time. It is also reported that the armed forces routinely engage in torture and other ill-treatment during interrogation in army barracks”.⁹

To understand the objectives of the paper a field survey was conducted in Assam. A structural questionnaire was canvassed to collect information from 315 respondents. The questionnaire was prepared keeping in view the type of respondents; namely victim and non-victim. To capture the ground reality group discussion, informal meetings, face-to-face interview were also conducted without using

⁷ Getting Away With Murder 2008 p7

⁸ ibid

⁹ ibid

questionnaire. Data collected from these sources were recorded in the voice recorder and in field notes which were later transcribed. Table 1 shows the number and distribution of respondents.

Table No. 1
Distribution of Respondents

Sl. No	District	Non Victim Respondent			Victim Respondent			Total
		Male	Female	Total	Male	Female	Total	
1	Lakhimpur	114	46	160	132	06	138	298
2	Other Districts of Assam (Dhemaji, Sonitpur, Jorhat, Sibsagar and Dibrugarh)	12	05	17	00	00	00	17
Total		126	51	177	132	06	138	315

Source: Survey conducted by the researcher

The study reaffirms that the AFSPA is responsible for the violation of human rights in Assam. This study indicates 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 assure higher quality of life for the individuals. The study further reveals that not only Armed Forces violated the Human Rights of the people of Assam but the rebellion organizations are equally responsible for it.

In our study it is found that AFSPA is responsible for the violation of Human Rights in Assam. 85.31 per cent of total respondent believe that AFSPA is responsible for the violation of Human Rights in the state. For 14.69 per cent respondents AFSPA is not solely responsible for violation of Human Rights in Assam but some insurgency organizations are also equally responsible for it. Complying to the views of the respondents it is found that this Act harassed innocent people (according to 27.12 per cent respondents). It encouraged doing unlawful activities for 9.04 per cent respondents, where as 15.25 per cent respondents stated that the Act grossly violated Human Rights of the people, 5.65 per cent respondents opined that this Act created terror among people, for 11.30 per cent respondents this Act has violated liberty of the people, 8.47 per cent respondents opined that being empowered by this Act Armed Forces misuse their power.

From our study it is also found that during the time of army operation innocent people were detained or arrested on the basis of doubt according to 97.10 per cent respondents. The arrested or detained persons were arrested from different places. According to our data 54.81 per cent were arrested from their home, 7.97 per cent from market, 2.22 per cent from paddy field and 16.30 per cent were from outside their home. It is obligatory to all that the arrested or detained persons should be handed over to the civil administration within 24 hours. This principle of the law was violated by the armed forces. The armed forces never handed over the arrested or detained persons to the civil administration in time. While interviewing the victims, we could reach the conclusion that altogether 6.67 per cent of total detained or arrested persons were handed over to the civil administration within 24 hours, 5.93 per cent were released just after detention and 87.40 per cent were not handed over to the civil administration or nearest police station within 24 hours but kept them in army camps for several days and after interrogation and torture they were released directly from the army camps.

There has been several incidents of custodial death, rape and killing, inhuman punishment like beating, punching, kicking, pouring water, electric shock, applying chilly powder, hanging, pulling hair, hitting and pulling, staking, burning, sticking pin, etc. which still are afresh in the mind of people and they are suffering in shock and fear. Our study found that 82.96 per cent of the respondents and their family are still under suffering in fear or terror of Army Operations.

AFSPA is regarded as an unconstitutional legislation. Different International and national organizations, legal experts, human rights activists have demanded for the repeal of this Act from the state so that people can have dignified and quality life. In our study it is also found that 66.10 per cent of respondents believe that AFSPA is an unconstitutional legislation. On the other hand 83.35 per cent expressed that it is a draconian Act and it has no place in a democratic society.

Our study clearly demonstrates that the AFSPA has been violating the international and domestic norms of legal system. The AFSPA often violates the provisions of the constitutions like the Article 14, Article 21, Article 22, and Criminal Procedure Code (CrPC) in the disturbed areas.

To protect the human rights in real sense, initiative ought to be taken by the Government. Use of force is not only the way to solve the burning problem of the state. Therefore, in the international and national platform this act has been reviewed in different manners. The Supreme Court of India constituted a Judicial Enquiry Commission headed by the former judge Santosh Hegde to inquiry into the gross

violation of human rights by the Armed Forces, to investigate alleged cases of extra judicial killings in Manipur. After hearing the parties the Commission recommended that the AFSPA has failed to tackle insurgency problem inspite of gross violation of human rights, gross abuse of the Act and fake encounters being carried out and making mockery of law. Similarly the Justice Verma Committee pointed out that sexual violence has been conducted by the armed forces during the time of army operations. It must be recognized that women in conflict areas are entitled to all the security and dignity that is afforded to citizens in any other part of our country. It was observed that the molesty of women often been outraged by army personnel.

Due to the questions regarding the constitutional validity of this Act in the apex court of the land and voices raised by different organizations in national and international platforms for amending and repealing of this Act, the Central Government was compelled to constitute a five member review committee under the leadership of Justice (Rtd.) B.P. Jeevan Reddy, just after the murder of one Manipuri girl named Manurama Devi, in army custody. The committee after several public hearings in different parts of the country and considering the views of the organizations, individuals and state governments, submitted its Report in June, 2005 and suggested the Government to repeal this Act or amend it.

The Human Rights Committee raised questions on the issues of using force even to the causing of death while enforcing this Act and almost imposing undeclared emergency permanently in disturbed areas for decades. In third periodic report on India in 1997 the Committee emphasized that all measures taken by India in order to protect its population against terrorist activities must be in full conformity with its obligations under the International Covanta of Civil and Political Rights (ICCPR). The Committee reminded India that immunity provisions, such as those found in the AFSPA, are incompatible with the right to an effective remedy under international human rights law and the concomitant duty to investigate and prosecute gross human rights violations, such as torture.

The Committee on the Elimination of Racial Discrimination in its report in 2007 recommended the Government of India to repeal the AFSPA and or replace it by a more humane piece of legislation. The committee also stated that the members of the armed forces may not be prosecuted for doing their wrongful deeds, and it is not logical and against the norms of international humanitarians laws The Committee on the Elimination of Discrimination against Women in its third periodic reports in 2007 stated that India should strive to ensure that investigation and prosecution of acts of violence against women by the military in disturbed areas, do not violate their rights.

Suggestions

The AFSPA circumvents very important procedural safeguards set out in Chapter XVIII of the Indian Constitution relating to the declaration of a state of emergency. Even at the time of state of emergency the rights given under Articles 14 and 21 of the Indian Constitution can't be suspended and therefore the security forces ought to abide by that guarantee with due adherence to the rule of law. To declare a state emergency, the President ought to issue a proclamation. This proclamation ought to be set before every house of Parliament and cease to operate after one month unless approved. The proclamation is valid only for six months. The suspension of these safeguards by the AFSPA indicates unreasonable restrictions on the fundamental rights of civilians. In this regard some suggestions may be forwarded.

1. For a better environment of human rights and terror free situation in the state, the AFSPA need to be repealed so that people of Assam can enjoy their rights freely. If any emergency situation arises in the state to combat insurgency or group of insurgencies another humanitarian military Act should be introduced for a certain period in specific area.

2. The genesis of the rising of insurgency problem in the state needs to be studied from the ground reality neutrally and positive initiative needs to be taken to solve the matter in negotiation table, so that there should be no any condition of declaring any emergency, disturbed area or army operation in the state.

3. The Government of India should establish independent, impartial commissions of inquiry of all reports of extrajudicial execution, torture, rape and assault carried out by members of the armed and security forces. Members of the armed and security forces if found responsible for murder and other gross abuses or violation of human rights should be prosecuted and punished. After the end of the judicial procedure if any innocent people found intentionally victim by the armed forces should be paid compensation or placement as necessary.

4. The Government of India should strengthen and enforce existing safeguard procedure of law so that all detainees are protected from torture and brought before a magistrate or other judicial authority within 24 hours of their arrest. A centralized register of detainees accessible to lawyers and family members should be maintained.

5. All military personnel should be required to file a full report on any incident in which force is used. This report should include the circumstances under which the decision was made to use force. All reports of civilian deaths should be promptly investigated and forces found guilty of gross human right violation should be prosecuted.

6. All members of the armed forces should be required to report and justify the destruction of buildings and other private property. Procedures must be developed to allow civilians to claim compensation for wrongful destruction of property and to ensure prosecution of forces guilty of willful criminal behaviour in this regard

7. The AFSPA should be amended specifically to prohibit torture. The right to be protected against torture is inherent in the right to life and personal liberty guaranteed under Article 21 read with Article 14, 19(1), 20 and 22 of the Indian Constitution. Moreover, the use of torture to extract confessions is an offence under Section 330 of the Indian Penal Code and this is also to be well stressed upon.

8. The AFSPA should be amended to guarantee fair trial to the arrested persons by security forces. To uphold due process, detainees arrested by the armed forces should be handed over to civil authorities as quickly as possible.

9. The Government of India should empower or direct the National Commission on Human Rights to investigate into the inhuman activities done by the armed forces.

From the above discussion it has been seen that AFSPA has a significant impact on the society. This Act is responsible for the violation of rights of Assamese people in Army operations even without the declaration of constitutionally recognized State Emergency. The constitutional provisions of India, International Law of Human Rights, International recognitions, the decisions of Supreme Court or High Courts, Recommendations or suggestions of the various committees or commissions, opinion of Human Rights experts, views and demand of national and international organizations are violated by the Act. The 56 years of the act in NE India has proved to be insufficient in solving the insurgency problems of Assam and NE.

It is worth mentioning that initially this Act was passed in Parliament to solve to Naga and Manipuri insurgency problems but they failed to solve that problem. In spite of that the other states of the region also witnessed the rise of insurgent organizations. Nowadays several separatist insurgent and terrorist organizations are active in this region along with their various demands such as independent nation, separate state, autonomous council, autonomous district, etc. which have also violated the rights of the citizens. Therefore, various organizations or individuals have demanded the repeal or amendment of this Act for the protection and promotion of Human rights of the people of the state and have suggested that the Governments should take bold and peaceful initiative to solve the burning problems of the region.

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