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Armed Forces Special Powers Act and Its Relevance in Contemporary India

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ABSTRACT

The Armed Forces (Special Powers) Act is controversial legislation enacted in the year 1958, in order to eliminate insurgency in North eastern parts of the country. The Act enable certain special powers to be conferred upon members of the armed forces in disturbed areas in the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. AFSPA has been in the debate, as it grants the Armed forces huge array of powers, without imposing enough liability on their actions. The people of the north eastern states put-forth that fundamental rights are being violated as AFSPA being in place for more than 70 years. While on the other side, the Armed forces deem this to be essential legislation in order to carry out their operations to stop insurgency. In this paper the author, would look into administrative flaws in the sections of AFSPA and explain various provision in light of those violations. Rule of law has been declared by the Supreme Court as one of the basic features of the Constitution. As per rule of law, it is required that the people should be governed by the accepted rules rather than the decisions that are arbitrarily taken by the executive. The author would look into aspect of rule of law in AFSPA and whether it is followed or not. And then about the principles of natural justice are being followed in APSPA or not, and then into the landmark judgements. At last, the author would analyse various administrative reforms committee reports and their suggestions regarding the act and problems which need to dealt with it Act.

Keywords: AFSPA, Special powers, Disturbed Areas, Administrative law & Arbitrary.

I. INTRODUCTION

"To deny people their human rights is to challenge their very humanity." - Nelson Mandela²

The Armed Forces (Special Powers) Bill was passed by both the Houses of Parliament and it received the assent of the President in 1958. The purpose was to give certain special powers to armed forces who are deployed in disturbed areas which are in the states of North east and now union territory of Jammu & Kashmir. Ever since the passing of Act in the parliament it has been subjected to huge debate and especially criticism from wider sections of civil society. AFSPA

¹ Author is a student at Tamil Nadu National Law University, India.

² Trish McHenry, Carrying on the work of Nelson Mandela, CNN, July 17, 2015, <https://edition.cnn.com/2013/12/05/world/iyw-mandela-charitable-legacy/index.html>

is controversial since there is lot of vagueness in the act and huge number of powers conferred to Armed forces in spite of civilian government in place. This act has been in place for now more than 65 years and still there hasn't been in normalcy in the areas where the Act has been used, that seems to be the concern of the public living in those areas.

The Act was applied in the areas of North east states of Assam and Manipur and after an amendment in year 1972, it was applied to all the seven states of North eastern region. The Act was criticised for the abuse of power in the hands of Armed forces but there are argument from the armed forces that they need considerable amount of protection and immunity to fight against insurgents and repealing this act might take affect the confidence of armed forces. And the act is criticised by various international bodies since India is signatory of various international treaties and conventions it has failed to meet provisions of it by still using AFSPA. The human rights issue is due to vagueness of the act and armed forces interpret the sections according their own whims and fancies.

The constitutional and fundamental rights guaranteed to citizens have been robbed for the people of disturbed areas. And there are various administrative flaws which can be found in this act and but still the government hasn't amended any such. In this paper the author would like to into aspects abuse of power, rule of law and natural justice too. And author would look into administrative reforms committee report and will suggest some necessary changes needed in the Act.

II. BRIEF HISTORY OF AFSPA

The traces of AFSPA can be seen in colonial rule of India which was then done to suppress the Quit Indian movement. AFSPA 1958, is much similar copy to the Armed forces (Special Powers) Ordinance, 1942 which was promulgated by Lord Linlithgow³. This ordinance was in place in colonial rule, later adopted by Indian government after Independence with few modifications as AFSPA. The government at that time had supported it and said it is important to protect the country from insurgent groups. The much of insurgency happened in the Naga hills as they wanted to come together as single state under name of Naga National council and they wanted to govern themselves and have separate land.⁴ The Naga leaders were against rule of Indian government after Britishers left the country. As per British agreement with Naga people it was granted protected status for 10 years after which it can decide its own status but Indian government quickly announced that it is part of Republic of India after the Britishers left

³ Chadha, Vivek (ed.). "Armed Forces Special Powers Act: The Debate." Pg 12, IDSA Monograph Series, no. 7, November 2012.

⁴ Mullik, B. N. "My Years with Nehru, 1948-1964", Pg 14 – 16, Allied Publishers, 1972.

India. NNC declared itself as independent country⁵ and Indian government arrested Naga leaders and this led to armed struggle between the two and leading to people dying on the both sides and creating huge disturbances in the whole of the area causing issue of law & order problem and government wasn't able to contain issue.

At first unified Assam government used Assam Disturbed Areas Act 1955, to confer special powers to Assam police to bring law and order in state but it couldn't, so Assam rifles were deployed still it wasn't enough and then AFSPA ordinance was issued by the president and then Act was passed in parliament in year 1958. In spite of serious objection raised against the bill it was passed in both houses and enacted. And then MP Laishraw singh from Manipur commented it as "Lawless law". At first this law was applied to only states of assam and Manipur but after creation of new states in north eastern parts the act was applicable to all seven states of north east and to counter militancy in Punjab and Chandigarh the similar Act was applied and so was in Jammu& Kashmir in the year 1990 to counter terrorism. Even during the colonial version of AFSPA only the person in or above rank of captain had power to shoot to people but at present AFSPA guarantees not only Armed forces but conferred any commissioned person the power to shoot. While enacting AFSPA the government said it had enacted due to emergency situation and would stay valid only for one year but even after more than 65 years it being again and again renewed in the north eastern parts of the country.

III. AFSPA AND RULE OF LAW

The word "rule of law" is taken from English jurisprudence. It means no person is above the law of land and every person is subjected to court irrespective of his position. Rule of law mandates that no person shall be treated in arbitrary manner and the society need not be governed by the man but it needs to be governed by the law. And in Indian constitution the law of land is defined under Article 13. The term rule of law would mean there are legal barrier which are placed in to protect government arbitrariness and available to protect the citizen's rights.

Prof dicey says to maintain supremacy of rule of law there needs to be three principles which are needed to be followed:

1) Supremacy of law

As per the first principle dicey states that there should be lack of arbitrariness and every act will be controlled by law. He says when there is discretion there is arbitrariness and there is no place

⁵ Chandrika Singh, "Political Evolution of Nagaland", Pg 60, Lancers Publishers, 1981.

for such in a republic and no republic must create insecurity of legal rights on its subjects. Prof .Wade says that rule of law means government needs to subject of law and law doesn't need to subject of government.

2) Equality before law

Dicey second principle was equality of law. He says that “equality before the law and equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.” This principle says that irrespective of the position everyone including government and all people of land need to be treated equally.

3) Predominance of legal spirit

Dicey says there needs to be legal spirit, meaning there might be constitution for country which guarantees its citizens their rights but such rights would be properly guaranteed to its citizens only when they are rightly enforced by the courts.

In Indian constitution, rule of law has been adopted from English law with some changes in it. In India, constitution is the supreme command of state and no is above that and if any of the organ of government does something which is against constitution then it would be ultra virus. Part III of constitution comes under rule of law, which are enforceable by law and if any of it is violated then citizen can approach court under article 32 & 226. Though there isn't any direct mention of rule of law in Indian constitution, the principles of it are mentioned as justice, equality and liberty in the preamble itself. And another important aspect about rule of law which can be inferred from Dicey when he says there needs to be no room for arbitrariness is the principle of Due process. The due process of law is that every person needs to treated equally and justly so that it is line of justice and fairness.

The Indian constitution guarantees equality of law under Article 14 and right to life and liberty in articles 19, 20 and 21, when they are violated, the court have judicial review to preserve the rule of law. In the case of *Kesavananda Bharati v State of Kerala*⁶, the court stated that rule of law is indeed basic structure of constitution. And held that parliament could amend article expect basic structure and such is imposed by rule of law. And in the case of *Chief settlement v Om Prakash*⁷ the supreme court has said that in the constitution, the most important aspect being rule of law which would mean authority of the court to test all administrative actions and their legality. And if the any of administrative or executive action which fails to meet the standard of law will be set aside.

⁶ (1973) 4 SCC 225

⁷ A.I.R.1969 S.C.33

(A) Power to declare Disturbed Areas

Section 3 of AFSPA gives the central government power to unilaterally declare any area as disturbed area, it seems to be wide and would create room for arbitrariness. It could be made by the central government despite opposition from the state government. This was done in both Tripura and J&k despite opposition from state government, centre deployed armed forces and declared disturbed area⁸. This was not the case in AFSPA of 1958 but only after amendment of in the year 1972, the central government has got this power. The purpose of the Act is restoring law and order in the state, and it cannot be achieved until both government work in federal character in letter and spirit and it needs support of local people in achieving it. Can't ignore the fact that the state government would be better suited to analyse the situation than central government and thus power only in the hands of central government could cause arbitrariness. And there doesn't exist any standard procedure as when can a government declare it as disturbed area and with absence of enough definition it would be an opportunity for executive to escape the scrutiny. And the power to declare is right of government and also declaration of disturbed area is kept out of judicial review. As we can see this in contrary to what was decided in the case of Chief settlement v Om Prakash. And this section of act is highly arbitrary as there is no keep the checks and balances of the government it is outside the scope of judiciary. While the state can declare it as disturbed area and deploy forces only after consultation and request from central government but there is no such check to for central government.

(B) Doctrine of Void for Vagueness

One of important aspects in principles of Due process is doctrine of void for vagueness.⁹ This doctrine has serious influence and originated from American jurisprudence and it has also got wide popularity among the common law countries too. This doctrine states there would be non-applications of legislation which are too ambiguous or vague in nature. And for any legislation to be properly applied, it must not have any vagueness in its application so that there is no room of arbitrariness in the hands of government. This doctrine has been applied in the India by Supreme court in the case of Shreya Singhal v Union of India¹⁰, it had struck down section 66A in IT Act 2000 as the court stated the section is unconstitutional for its vagueness in terms such as "grossly offensive" and "menacing". In the AFSPA there is vagueness in term "disturbed areas" and there is not standard procedure for declaring an area as disturbed areas and it is all

⁸ Caesar Roy, "The Draconian Armed Forces (Special Powers) Act, 1958 – Urgency of Review", Pg 7, Indian Law Review, 2015

⁹ Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932)

¹⁰ AIR 2015 SC 1523

discretions of central government. And this creates vagueness in section but if we look into legislation of disturbed areas act 1976 it has stated for area to be declared as disturbed area, there needs to be disturbance in peace and tranquillity of area due to differences between people of different caste, class, race or communities. But that kind of definition is lacking in AFSPA and provides absolute authority to administration. Section 5 of the AFSPA states that whenever an armed forces arrest any person, they should hand over that person to nearest police station with least possible delay. Again, there is vagueness in the term what would constitute a least possible delay, if we look into Article 22(2) it states that every person needs to be produced before magistrate within 24 hours from arrest or detention. And this term “least possible delay” has again provided arbitrary power to arrest and detain person as they wish and there have been cases on ground that several persons were even detained for months.

(C) Doctrine of proportionality

The doctrine of proportionality is one of the important principles itself and it derived from rule of law and due process. This doctrine postulates that administrative measures must not be more than what is required¹¹. Lord Diplock¹² says that “you must not use a steam-hammer to crack a nut if a nutcracker would do”. And he also widened the judicial review on administrative action by using term irrational, illegal and improper. A set of three stage of test of proportionality was put forward by lord Clive, such that an administrative action or legislative is proportionate if 1) objective of legislation or decision of executive has reasonable to substantiate restriction on fundamental rights 2) method created for an such objective is reasonable enough 3) The method used to damage the freedom are no more than what is necessary to achieve objective. In India principles of proportionality has been accepted by the court, the supreme court in the case of *Om Kumar v Union of India*¹³ had stated that if there is any legislation which impose restrictions on fundamental rights the court could always come in and test “doctrine of proportionality” and the court mentioned this principle as review of court to check validation on any legislation.

In the AFSPA, the doctrine of proportionality has been violated in section 4(a), it provides the armed forces the power to use forces when any person is part of unlawful assembly or anyone who violates prohibitory order which is in places and here the term ‘force’ means officer is empowered to use force according to his own discretionary as he may deem necessary, even leading to cause of death of the person. Article 21 of Indian constitution guarantee a person right to live and but this kind of force is contrary to that, especially because this kind of

¹¹ AIR 2000 SC 3689

¹² (1983) 1 WLR 151 (UK)

¹³ *ibid*

punishment are highly disproportionate to kinds of offence committed, these are offences which usually attract a simple offence under IPC. Further in Indian law the court have said that right to life is one of important fundamental right and even in times of emergency the state cannot not be allowed to impose danger on its own people. A.G. Noorani¹⁴ termed it as extra ordinary and brutal power which gives license to kill its own people and it is out of any sense of proportionality.

A major issue in the section 4(a) would be absence of accountability of armed forces, as they may disproportionately use the force without any restrictions. If looked into the use of force by police there are enough manual and procedures as how they should act upon it and even in the North eastern states still police follow these procedures. Before use of any firearms or explosives first there needs to minimal force used for dispersion of unlawful assembly and for further use of force as per section 129 of Cr.P.C order needs to be taken from officers and after in spite of repeated request and persuasion if it doesn't produce any result use of force is permitted but however section 4(a) doesn't contain any of procedures to be followed and even the warning to shoot would be given by armed personal only if he feels it is necessary as it is obligatory and even under section 4(c) which is about arresting of person on suspicion, the armed forces can use the force as they seem necessary and section 4(d) provides that army can enter and search any place and for that too they can use the force, in both the instances there is no limitation as what would amount force, as there been cases of brutal beatings by army during such search activities. In the absence of proper definition, the power to shoot a person and use force during the searches and arrest on mere suspicion would be disproportionate.

Therefore section 4 of AFSPA would cause grave dangers to the innocent people which may either be potential death or brutal force on the mere ground of people disobeying orders or suspicion. And hence number of innocent people who would face danger under this Act is disproportional to activities which are aimed to be eliminated.

IV. NATURAL JUSTICE AND AFSPA

One of the important concepts in administrative law is natural justice. The principles of natural justice are needed to be safeguarded by administrative setup of any country. As the doctrine of natural justice means fairness in action. The two important principles of natural justice are "Nemo judex in causa sua" and "Audi Alteram Partem". In the case of *Syndicate Bank v. Wilfred*¹⁵, the court said if unacceptable decision is taken by the government or there is any

¹⁴ Noorani, A. G. "Draconian Statute: Armed Forces (Special Powers) Act, 1958." Pg 9, Economic and Political Weekly, vol. 32, no. 27, 1997

¹⁵ AIR 2003 Kant 337

breach of natural justice the court would come in and correct wrong done. Justice Krishna Iyer has said in the case of *Mohinder v chief election commissioner*¹⁶ that natural justice has various forms and shape and would in come in whenever law excludes it and save those affected by authority. The supreme court in the case of *Union of India v Tulsiram*¹⁷ had said that principles of natural justice come under article 14 and if there is any violation of natural justice it mean would lead to arbitrariness and inequality against the law which would directly mean violation of article 14. Therefore, natural justice would come under fundamental right and state cannot go against its principles.

In administrative setup, the departmental bias is inherited and always there would be some sort of biasness in it and if not properly checked it would lead to negate every aspect of natural justice. In the state of UP v RS Sodhi¹⁸, relating fake encounter in which allegation were made against state police and if state police investigate the same, there may be biasness in it, so the court in order to ensure principles natural justice had directed the case to CBI.

AFSPA is in violation of natural justice and there is departmental bias in it as section 6 of the act says that no legal proceeding or suit can be brought against armed forces who exercised the power as conferred by the act. As this provision of act now gives legal immunity and protecting armed forces from all kinds of transgression as the court cannot take in case except with approval from the central government. It provides that only central government has the authority to sanction legal proceeding against armed officers and if the looked into that it is central government who has stationed the armed forces in the states. If both are done by the same authority there would biasness and it might be in favour of the armed forces, as any violations are to be found by the forces in prosecution it would lead to condemnation of government and ultimately would result in the political backdrop for the ruling government. Also, there are no standard procedure or guidelines for initiating legal proceeding against armed forces. As the act provides that there needs to be approval from central government but it doesn't state who is authority to take such decision as it simply states central government. And second, there is no limit as to whether sanction application would be taken in to consideration or not, in lack of such provision it would lead to not taking any decision. Third as process of approval of sanction would be based on internal rules within the setup, so does it mean whether a person would be able to present his case for approval of sanction or it would be arbitrary decision by the government. Since there are wide scope of arbitrariness and biasness in the section it would

¹⁶ AIR 1978 851

¹⁷ 1985 SC 1416

¹⁸ AIR 1959 SC 1376

be against the principles of natural justice.

V. NAGA PEOPLE MOVEMENT CASE LAW AND COMMITTEE REPORTS

Naga People's Movement of Human Rights V. Union of India¹⁹

In this case, Petition was filed to check constitutional validity of the act and petitioner's side made claims of constant human rights abuse from armed forces due to AFSPA and pleaded the court to check arbitrariness in regard to declaring disturbed areas and challenged the act on the basis of violation of article 14, 19 and 21.

The court termed that disturbed area would be judged, according to geographical area, situation and each circumstance. And termed disturbed area would be area where there is public order problem. And area needs to termed disturbed only when it feels it such situation cannot be controlled without the help of armed forces. And court stated that for a area to be declared a disturbed area there must exist grave situation and union government, governor of the state and state government can form opinion on such issue and therefore such powers cannot be termed arbitrary in nature. The court said that words in section 2(b) mentions "time being", so declaration area of as disturbed areas should be within a limited time period and not operating indefinitely. So situation in such areas needs to be timely reviewed and if such situation still exist, it can again submit report and continue its status as disturbed area

The court in regard to unlawful assembly and powers given to security officers to deal with such, mentioned that Cr.P.C is to applied in situation involving particularly about breach of security but the same cannot dealt in state where whole part of state is disturbed area and it would impose danger to the lives of the security personnel as Cr.P.C would be applied in areas which is in the hands of civil power and not where Armed forces aid is needed. The court in regard to non-commissioned officer having the right to shoot said that when operating in specific counter terrorism operation they need to take their own decision and they are enough matured to take such decision since working for more than 10 years and said such claims of arbitrariness wouldn't apply.

The court in regard to section 6 of the act where immunity is granted to armed forces and requiring sanction of central government to initiate legal proceeding said that its only protection in form of sanction from government before any prosecution and that sanction from central government to anything done in excess of power cannot be arbitrariness and if the government refuse such sanction, the orders of government would be under judicial review.

¹⁹ (1998) 2 SCC 109

The court in this case said the guidelines issued by army on dos and don'ts and use of forces were legally binding and ordered that anyone who violates it would be strictly prosecuted. The court importantly highlighted that "serious note should be taken on violation of these instructions and the persons found responsible for such violation should be suitably punished under the Army Act, 1950". And the court declared that act to be constitutionally valid.

And many criticised the judgement as court have been said to have reiterated the point simply mentioned in act and asked the armed forces to use forces less stringently. As the court looked into validity of act but forgot people rights being violated.

(A) Justice Jeevan Reddy Committee

In 2005 justice Jeevan Reddy committee²⁰ was setup to review AFSPA and report to the government, so that a decision can be taken regarding it. The report stated that act is "symbol of oppression, hatred and discrimination and act is too bald and sketchy". And further stated that act altogether needs to be repealed. The report stated that AFSPA needs to be repealed and amendment needs to be brought in UAPA 1967 so as to include "Public Order". The committee said that armed forces did not follow court order on prosecution of forces those who didn't follow armed forces guidelines of do's and don'ts. And said that Act being in place of more than 60 years hasn't brought any peace in the state and UAPA as more comprehensive terms for dealing with terrorism so that would be useful. The act said that armed forces should not be deployed unless it is of more than necessary as deployment for longer period would lead to it becoming another police force and temptation in such environment would lead to brutalization of forces. And second administrative reforms²¹ committee of Veerappan molly in 2007 also asked the government to repeal act.

(B) Justice Verma Committee

Justice Verma committee²² was a three-member committee headed by retired supreme court judge and it was formed in year 2012, after there was a case of sexual assault and it led to wide spread protest. The committee in its report said that sexual offences made by armed forces should come under normal criminal law and committee suggested that in case of sexual offences and crime against women the prior approval of central government needs to be removed. But the committee report was ignored and no change was made in the act.

²⁰ Report of the Committee to review the Armed Forces (Special Powers) Act, 1958, Government of India, Ministry of Home Affairs (June 2005).

²¹ Public Order, Second Administrative Reforms Commission, Fifth Report, Government of India, June 2007

²² The Committee on Amendments to Criminal Law, 2012

(C) Justice Hegde Committee

The SC appointed a three-member committee headed by retired SC judge Santosh Hegde. The committee was appointed to review encounter death where the security forces had shot in respect of self-defence and it was also asked to look into role of security forces deployed in Manipur²³. In the report, the commission has mentioned that all 7 deaths in six instances were extra judicial killings and said powers were by abused by the forces. And reported that continuation of this Act in the state is a mockery of law and the going beyond limits of legal bounds for their operations.

The hedge committee in its report criticised lack of any enforceable provision against abuse of armed forces in AFSPA. This act provides wide ranges of power to armed forces to extent of causing death with legal immunity but act doesn't provide any rights to citizens when there is misuse of act. As the report said greater power, greater restraint and stricter mechanism, but such things are not followed in this act nor by the armed forces. The death of 12 -year boy was one of six cases to be examined by the committee, the killing was found be extra- judicial and security forces called it as self-defence. When his post modem report was analysed all the bullets upon were hit in critical points which would cause death but he did not injure any of the forces. The committee reported that it is unbelievable for 20 security personnel with lethal weapons not able to overpower a 12-year-old boy without killing. Justice Verma in report mentioned that in all six cases by no imagination it is minimal force by all means it is maximum force used in all instances. Then in one case, the 86 bullets were fired against the person . in all the cases there was no attack on army personnel nor on their vehicles.

The committee reported that army guidelines of dos and don'ts and use of minimal force were only in paper and mostly followed in contrary to that. The committee mentioned that senior officers were surprised to listen to guidelines while junior officers had no idea about guidelines. And committee recommended sanction application for prosecution to be replied within 3 months, failing to do so mean approval on default and committee said that AFSPA in Manipur for years had no effect on situation while only leading to abuse.

VI. CONCLUSION

The AFSPA in place for more than 65 years, and if normalcy can't be brought in north eastern states after these many years, then nothing in for AFSPA to remain in place, as the sections of the act provides wide discretionary powers and has many administrative flaws in it which have

²³ Justice Sanjay Hegde Committee, Report of the Committee on AFSPA, (2013)

been dealt in this paper. The supreme court in the case of Naga people movement decided on the basis of constitutional validity of the act and centre power but it didn't rightly look into angle of people's fundamental rights and with various committee report, it provides Hindsight about the magnitude of human rights abuses due to the Act and all the committee report have reiterated that the act is very dangerous and abusive and have recommended for AFSPA to be repealed, so it is right time for the government to act on it and repeal AFSPA.
