



## **The Armed Forces (Special Powers) Act, 1958 and Fundamental Rights: A Discourse**

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### *Abstract*

*Fundamental Rights are enshrined in Part-III of the Indian Constitution. These rights are justifiable and its violation is punishable. At the same time, there is one controversial Act in India i.e. the Armed Forces (Special Powers) Act, 1958 also known as AFSPA. Once the area is declared as 'disturbed area' then the AFSPA, 1958, is operative. Under this Act, all security forces are given unrestricted and wide powers to shoot, arrest and search, all in the name of 'aiding civil power' to carry out their operations. It was first applied to the North Eastern States of Assam and Manipur and was amended in 1972 to extend all the seven States of the North Eastern region. In 1990, it was also extended to the State of Jammu & Kashmir. This paper analyses the AFSPA 1958 and its contradiction with Fundamental Rights and democratic spirit.*

**Keywords:** *North East India, Insurgency, AFSPA, Fundamental Rights, Violation of Human Rights.*

### **Introduction**

The enforcement of Armed Forces Special Powers Act, 1958 (AFSPA) is still one of the hottest debatable topics. Several intellectual scholars, media, lawyers, citizens, politicians have criticized this Act on several grounds. No doubt, most critics have been vociferous in one common point that is the AFSPA took away the Fundamental Rights of the citizens where this Act has been enforced. It is apparent that Fundamental Rights are very important and essential rights for the citizens of India. However, there are reports of violation of these important rights under the AFSPA, 1958. So, one should analyse the AFSPA, 1958 and its contradiction with Fundamental Rights of the Constitution of India.

The North East India has bordered four countries, namely China and Bhutan on its North, Myanmar on its East and Bangladesh on its South and West. It has an area of 2.6 lakh Sq. Km (7.6% of India's land area). It has around 475 ethnic groups and 400 languages.<sup>1</sup> Despite several parts of North East India have been infested by insurgent activities, the report

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of Second Administrative Reforms Commission stated that the State of Manipur is presently the most insurgency ridden State. It seems that the popular support for insurgency in NE region is slowly drying up compared to the past years. All States except Sikkim already faced the problems of insurgency and several parts of the region have witnessed the activities of insurgent groups till today. The Central and State Governments have already implemented various measures to check or control the menace of insurgency in North East India. But, several parts of the region witness the insurgent activities till the present time particularly the activities are intensive in four States like Manipur, Meghalaya, Assam, Nagaland and Arunachal Pradesh.

### **Insurgency**

The common definition of an insurgency is “a rebellion against authority when those taking part in the rebellion are not recognized as belligerents.”<sup>2</sup> In fact, the nature of insurgency is very complex and an ambiguous concept. The Department of Defence (DoD) in the US Military Academy defines insurgency “as an organised resistance movement that uses subversion, sabotage, and armed conflict to achieve its aims. Insurgencies normally seek to overthrow the existing social order and reallocate power within the country. They may also seek to (1) Overthrow an established government without a follow on social revolution. (2) Establish an autonomous national territory within the borders of a State. (3) Cause the withdrawal of an occupying power. (4) Extract political concessions that are unattainable through less violent means.”<sup>3</sup>

### **Historical Background**

In the beginning of the 20<sup>th</sup> century the people of North East got the political and ethnic consciousness. In fact, it was the product of British colonialism. During the British era there was a clever move to politically de-link the hill areas from the Indian mainland, when a 'North East Frontier Province' comprising the hills of Assam and some contiguous hill areas of Burma as well as Chittagong Hill Tract, then in Bengal, was conceived as a crown colony to be under the direct rule of the British Parliament. This plan was first officially mooted by J. H. Hutton, the Deputy Commissioner of Naga Hills district and then was strongly supported by Robert Neil Reid, the then Governor of Assam. It was revived again in 1941 with strong support from Andrew Clow, the then Governor of Assam and Sir Reginald Coupland. The same idea was supported and discussed by Dorman Smith, Governor of Burma with Lord Wavell, Viceroy of India, in Shimla as stated in a dispatch by Wavell to the Secretary of State for India, Amery, on July 27, 1944. Coupland emphasized similarities in race and culture of the hills and their differences with the Indians. Therefore, the people of this region had never good connections with the rest of India.<sup>4</sup> When the British was about to leave the Indian Sub-continent, the indigenous people of the North East began to think about their future. The Naga wanted independent status. During the time Naga National Council (NNC) argued that throughout the Naga history, the Naga people were independent. They did not surrender their sovereignty to the British. The British subjugated them and when the British left India, the Naga got back their lost freedom.

So, the Naga National Council (NNC) declared independent one day ahead of India i.e. 14<sup>th</sup> August, 1947. It created a unique situation in Naga Hills and the story of insurgency in the North East region begins from there. The situation in the Naga Hills became worse day after day. As a result, the Government imposed the Assam Disturbed Areas Act, 1955. This Act is the copy of the Armed Forces (Special Powers) Ordinance, 1942 (AFSP) which was promulgated by Linlithgow Viceroy and Governor-General of India to suppress the Indian freedom movement. The Armed Forces (Assam and Manipur) Special Powers Ordinance was promulgated by the President on 22<sup>nd</sup> May of 1958. The Ordinance provides some special powers to the members of armed forces in disturbed areas in the State of Assam and the then Manipur. Later the Ordinance was replaced by the Armed Forces Special Powers Bill. The Bill was passed by both the Houses of Parliament and the President of India gave his assent on September 11, 1958 and known as “THE ARMED FORCES (SPECIAL POWERS) ACT, 1958 (28 OF 1958)”.<sup>5</sup> Under this Act, all security forces are given unrestricted and uncensored power to carry out their operations, once an area is declared as ‘disturbed Area’ and it is one of the more draconian legislations. It was amended in 1972 to extend all the seven states in the North Eastern region of India. The main aim and objective of this Act is to contain or counter the rise of insurgency in the North East region of India. It was also extended in the State of Jammu & Kashmir in 1990 because of the rising insurgency in the region.<sup>6</sup> The enforcement of the AFSPA, 1958, has resulted in innumerable incidents of arbitrary detention, torture, rape, and looting by security personnel. This legislation is justified by the Government of India, on the plea that it is required to check the separatist movement in the North East India. Unfortunately, the very purpose of the Act is yet to achieve. Instead, the number of insurgent organization increases after the imposition of the Act.

### **Analysis of the Armed Forces (Special Powers) Act 1958 and Its Provisions<sup>7</sup>**

**Section 1:** This section states the name of the Act and the areas to which it extends (Assam, Manipur, Meghalaya, Tripura, Arunachal Pradesh, Nagaland and Mizoram).

**Section 2:** This section sets out the definition of the Act, but leaves much un-defined. Under part (a) in the 1972 version, the armed forces were defined as, “the military and Air Forces of the Union so operating”. In the 1958 version of the Act the definition was of the “military forces and the air forces operating as land forces”.

**Section 3:** This section defines “disturbed area” by stating how an area can be declared disturbed. The Central Government and the Governor of the State have the power to declare an area ‘disturbed’, but does not clearly explain the circumstances under which the authority would be justified in making such a declaration. In the 1958 version of the AFSPA only the State Government had this power, but in 1972 amendment to the AFSPA extended the power to declare an area ‘disturbed’ to the Centre.

**Section 4 - Special Power of the Armed Forces:** Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area –

(a) If he is of opinion that it is necessary so to do for the maintenance of Public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, 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 on 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 so to do destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempt 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 offences;

(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 force as may be necessary to effect the arrest;

(d) Enter and search without 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 substances believed to be unlawfully kept in such premises and may for that Purpose use such force as may be necessary.

**Section 5 -Arrested Persons to be made over to the Police:** Any person arrested and taken into custody under this Act shall be made over to the officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest. However, there is no definition of what constitutes the least possible delay in the Act. The holding of the arrested person, without review by a magistrate, constitutes arbitrary detention.

**Section 6 – Protection to Persons acting under Act:** No persecution, 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 to be done in exercise of the powers conferred by this Act. This section establishes that no legal proceeding can be brought against any member of the armed forces acting under the AFSPA, without the permission of the Central Government. If so, this section is in contradiction with one of the constitutional objectives i.e. ‘equality before law’.

### **Violation of Law and Human Rights under AFSPA**

There are several cases pending before the Indian Supreme Court which challenge the constitutionality of the AFSPA. Some of these cases have been pending for over nine years. Since the Delhi High Court found the AFSPA to be constitutional in the case of Indrajit Barua and the Guwahati High Court found this decision to be binding in People’s Union for Democratic Rights, the only judicial way to repeal the act is for the Supreme Court to declare the AFSPA unconstitutional.<sup>8</sup> Some of the areas where the AFSPA influences:

- Violation of Article 21 (Protection of life and Personal Liberty): As already mentioned above, Section 4(a) of the AFSPA grants armed forces personnel the power to shoot or to kill. Hence, this section has violated the constitutional right to life, Article 21 of the Constitution of India which states that “no person shall be deprived of his life or personal liberty except according to procedure established by law. This right is available to both citizens and non-citizens”. Article 20 & 21 are given utmost importance and they cannot be suspended even under National Emergency.

- Protection against Arrest and Detention – Article 22: Under section 4(c) of the AFSPA, a person can be arrested by the armed forces without a warrant and on the mere suspicion that they are going to commit an offence. The Article 22 grants protection to persons who are arrested or detained under a preventive detention law. This protection is available to both citizens as well as aliens and includes the following; (i) the detention of a person cannot exceed three months unless an advisory board reports sufficient cause for extended detention. The board is to consist of judges of a High Court, (ii) the grounds of detention should be communicated to the detent. However, the facts considered to be against the public interest need not be disclosed, (iii) the detent should be afforded an opportunity to make a representation against the detention order. Hence, it is apparent that the enforcement of this section violates the preventive detention sections of Article 22.
- The Indian Criminal Procedure Code (“CrPC”): The CrPC establishes the procedure where the police officers are to be followed for arrest, searches and seizures, a procedure which the army and other Para-military are not trained to follow. Therefore when the armed forces personnel act in aid of civil power, it should be clarified that they may not act with broader power than the police and that these troops must receive specific training in criminal procedure. Under CrPC section 130, the armed forces officers have to follow the directives of the magistrate and as little force as necessary in doing so. Under section 131, when no magistrate can be contacted, the armed forces may disperse the assembly but if it becomes possible to contact an Executive Magistrate at any point, the armed forces must do so. Section 131 only gives the armed forces the power to arrest and confine. Moreover, it is only commissioned or gazetted officers who may give the command to disperse such an assembly, whereas in the AFSPA even the non-commissioned officers are also given this power. The AFSPA grants wider power than the CrPC for dispersal of an assembly. Moreover, dispersal of assemblies under Chapter X of the CrPC is slightly more justifiable than dispersal under Section 4(a) of the AFSPA. Sections 129-131 refer to the unlawful assemblies as one which “manifestly endanger” public security. Under the AFSPA the assembly is only classified as “unlawful” leaving open the possibility that peaceful assemblies can be dispersed by use of force.<sup>9</sup>
- Immunity of Members of Armed Forces: Section-6 establishes that no legal proceeding can be brought against any member of the armed forces acting under the AFSPA, without the permission of the Central Government. Hence, this section of the AFSPA provides any member of the armed forces with absolute immunity for all atrocities committed under the AFSPA. There is no exaggeration to state that it is virtually impossible to file suit against a member of the armed forces for abuses under the AFSPA as it is not so easy to get the permission of Central Government to file suit against its armed forces personnel. Hence, does this section make armed forces personnel not punishable by court of law?
- The army act of 1950 was a revision of the 1911 Indian Army Act: One of the goals of this revision was “to bridge the gap between the Army and civil laws as far as possible in the matter of punishments of offenses.” The soldiers operating under the AFSPA will, if

tried at all, be tried by court-martial, leaving no civil law remedy for the victims. Section 6 of the AFSPA only further reinforces the army's immunity.<sup>10</sup> Hence, the army personnel, operating under the AFSPA, are given special protection from the interference of court of law when they openly violate the fundamental rights of innocent citizens.

- Under emergency in India, fundamental rights may be suspended (Art.359). However, according to 1978 amendment to this article, rights under Articles 20 and 21 cannot be suspended even under emergency. The Protection of Life and Personal Liberty under Article 21, declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. This right is available to both citizens and non-citizens. In Menaka case (1978), the Supreme Court overruled its judgment in the Gopalan case (1950) by taking a wider interpretation of the Article 21. It ruled that the right to life and personal liberty of a person can be deprived by a law provided the procedure prescribed by that law is reasonable, fair and just. In other words, it has introduced the American expression 'due process of law'. In effect, the protection under Article 21 should be available not only against arbitrary executive action but also against arbitrary legislative action.<sup>11</sup> The AFSPA results in the suspensions of Article 21 right to life, so, AFSPA is more dangerous and draconian than emergency rule. Moreover, Emergency rule can only be declared for a specified period of time and must be reviewed by Parliament, but the AFSPA can be placed for an indefinite period of time without any legislative review and this is undemocratic spirit.
- International Covenant on Civil and Political Rights (ICCPR): India was a signatory of the ICCPR in 1978 that means Indian Government takes the responsibility of securing the rights guaranteed by the Covenant to all its citizens. During emergency, the ICCPR foresees that some rights may have to be suspended. However, the ICCPR remains operative even under such circumstances since certain rights are non-derivable. The AFSPA violates both derivable and non-derivable rights.<sup>12</sup>
- Thangjam Manorama, a 32 year-old woman was arrested on 11<sup>th</sup> July, 2004 by Assam Rifles personnel as she was suspected to be a member of the People's Liberation Army, and when she was arrested they recovered nothing from her and she was healthy also. But she was found dead next morning with signs of brutal torture all over her body from Ngariyan Mapao Maring village. Unfortunately, the Assam Rifles personnel had initially refused to appear before the Justice Upendra Commission instituted by the Manipur Government to probe the circumstances that led to Manorama's death on the ground that the State Government had not taken prior permission from the Central Government. Showing their discontent on Manorama's death and demand to repeal of AFSPA, women protested without cloths in front of the Assam Rifles headquarters at Kangla Fort in Imphal on 15<sup>th</sup> July, 2004.<sup>13</sup>
- Irom Sharmila Chanu who is also known as Iron Lady of Manipur, has been on a fast unto death around 16 years demanding the repeal of the AFSPA, 1958. Sharmila's crusade began after the troops of 8<sup>th</sup> Assam Rifles allegedly killed 10 civilians at Malom near Imphal airport on 2<sup>nd</sup> November, 2000. Sharmila wants repeal of AFSPA which gives troops sweeping powers to kill suspected rebels and immunity from prosecution.



Virtually, the Central Govt has ignored Sharmila's decade old struggle to repeal AFSPA while they pay immediate full attention to Anna Hazare's strike in Delhi in the past.<sup>14</sup>

- Between 1992 and 2000, more than 1,000 civilians have fallen victim to militants' bullets across the State. Many people have been killed by security forces in Manipur and many of them had no known links with insurgent groups.<sup>15</sup>

### **Some Problematic Issues**

The first controversial point is that the AFSPA, 1958, makes no distinction between a peaceful gathering of five or more people and a berserk mob. Hence, innocent civilians who are not responsible in creating a situation being called 'disturbed' in that region are also under the purview of AFSPA. No doubt, it contradicts with the Right to Freedom under Article 19, i.e. the right to assemble peacefully and without arms guaranteed to all citizens of India.

Secondly, Section-6 of the AFSPA states that "no prosecution can be initiated against an officer without the previous sanction of the Central Government". This section deprived the right of the citizens guaranteed by Article 32, i.e. the right to remedies for the enforcement of the fundamental rights of an aggrieved citizen. It means when there are certain violations of fundamental rights of the innocent civilians, the army personnel are given special protection as no case can be filed against them without approval of the Centre. Is this section to protect an officer of armed forces from frivolous and misguided allegations? Thirdly, the decision of the Government to declare a particular area 'disturbed' cannot be challenged in a court of law. This has been the heart of the problem. If the threat has indeed been neutralized, then why not declare the region as 'not disturbed'. Even now, the power to declare the region 'disturbed' rests upon the Central Government and the Governor of the State. In this regard, the State Government has no more power to say within its particular area. So, there is no exaggeration to state that this section is really undemocratic spirit and practice.

### **Reforms/Recommendation in the Act**

The committees to review the Armed Forces (Special Powers) Act, 1958 was setup by the Union Home Minister led by Justice Jeevan Reddy, a former Justice of the Supreme Court in 2004, include the Second Administrative Reforms Commission, headed by the then union law minister, Veerappa Moily; and the Working Group on Confidence-Building Measures in Jammu & Kashmir led by the then Vice President of India, Honourable Hamid Ansari, had all recommended the repealing of AFSPA. The Committee also suggested the creation of "Grievances Cells" located in the premises of the District or Sub-Divisional Magistrates in every state where the armed Forces are deployed whereby citizens can acquire information on the whereabouts of missing persons within 24 hours. Furthermore, the Committee insisted on a periodic review every six months, with any extension of deployment approved by both Houses of Parliament.

The Committee's recommendations were presented to the Prime Minister and the Central Government in June of 2005, seven months after review began. While supported by the Administrative Reforms Commission and the United Nations, in the four years since the recommendations, there has been no official acceptance and government action was not taken.

In June 2007, the Second Administrative Reforms Commission (ARC) chaired by Veerappa Moily the ex- Union Law Minister, published its fifth report on Public Order. The ARC recommended the Armed Forces (Special Powers) Act, should be abolished and Unlawful Activities Prevention Act, 1967 impose in place of it. The Commission's recommendation was submitted to the Government of India on 1<sup>st</sup> June 2007. Regrettably, the then Defence Minister A.K Antony rejected the ARC's recommendation, stating "the time had not come to scrap the law, but there is always scope for improvement".<sup>16</sup>

To conclude it, it has been apparent that the Armed Forces (Special Powers) Act, 1958 is not a solution of insurgency in the region. Hence, it is very urgent to carefully study the region again so as to follow a practicable approach to minimize the problems of insurgency as well as to change the mind-set of the people of North East India. No doubt, equitable developments and good governance would be important instruments to diminish insurgency problem.

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## Endnote and References

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<sup>8</sup> North East Sun. Vol. X. No. 8. Nov. 30th. 2004.

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