

ARMED FORCES SPECIAL POWERS ACT- A NEED AND NOT A WEED

Written by Dr. Deepti Kohli,

Associate Professor, Vivekananda Institute of Professional Studies, GGSIP University

The Special Power Act was the brain child of British India. It was enacted to discourage many of the rebellious activities of freedom fighters at the time of independence. Many of the Indian Leaders were imprisoned under the Act including Mahatama Gandhi, Pandit Jawahar Lal Nehru and leaders of National Congress for destructing police offices, railways and telegraph lines. Even after independence, the continuity of insurgent strikes by rebellions led to the formation of Armed Forces Special Act in 1958 for Naga Hills, in 1983 for Punjab and Chandigarh and in 1990 for Jammu and Kashmir. The Act has been criticised for its arbitrary and draconian provisions. Pleas have been made to repeal this Act. In this paper an attempt is made to see whether the Act is arbitrary as alleged and whether it should be continued despite various oppositions.

Key words – insurgency, special powers, disturbed area, misuse

The Quit India movement spread a wave of ending British rule in India. The wave was so strong that it immediately affected the British Government. There were hartals and demonstrations all over the country. People attacked public property such as railway stations, courts and police stations. Railway lines were damaged and telegraph lines were cut. The movement was most widespread in Uttar Pradesh, Bihar, Bengal, Bombay, Odisha and Andhra Pradesh. In order to counter this movement the then Viceroy Lord Linlithgow declared emergency all over British India and promulgated the Armed Forces (Special Powers) Ordinance, 1942¹, on 15 August 1942. The Act extended to the whole of Bangladesh.² The ordinance conferred special powers

¹ Ordinance No. XLI Of 1942

² Armed Forces (Special Powers) Ordinance, 1942, 1(2).

to the armed forces to arrest and use force (even kill) civilians on mere suspicion.³ Armed forces were also provided with virtual immunity from legal actions.⁴

In 1947, the central government invoked four ordinances namely; the Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance, the Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance, the East Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance, and the United Provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance in order to deal with the internal security matters in the country.

In 1948, the Armed Forces Special Powers Act of 1948 was promulgated, which replaced all the four abovementioned ordinances. It was modelled on the Armed Forces Special Powers Ordinance of 1942. The Armed Forces (Special Powers) Act of 1948 was repealed in 1957.⁵

1. Armed Forces Special Powers Act after Independence

Independence brought more incidents of internal disturbance in some state. It was found that violence became the way of life for some states of India. State administration became incapable to maintain its internal disturbance. Therefore Armed Forces (Special Power) Acts were promulgated by the President in order to declare an area as a 'disturbed area' and to exercise 'special powers' by the officers to control aggression of the rebellions and to maintain peace.

1.i. Armed Forces (Special Powers) Act, 1958

The first Act after independence was the Armed Forces (Special Powers) Act of 1958. In the Naga Hills of Assam and Manipur, the Naga inhabitants opposed their merger with India for the reason of their racial and socio-political difference. They even voted in favour of a referendum declaring independence in 1951. They boycotted the first general election of 1952, thereby demonstrating their non-acceptance of the Indian Constitution and started committing

³ *Id.*, 2(1)

⁴ *Id.*, 4. See also Nursyahbani Katjasungkana and Saskia E. Wieringa, ed. *The future of Asian Feminisms: Confronting Fundamentalism, Conflicts and Neo Liberalism*, 276 (Cambridge Scholars Publishing, 2012)

⁵ Pushpita Das, *The History Of Armed Forces Special Powers Act*, in Vivek Chadha ed., *Armed Forces Special Power Act The Debate*, 11-12 (S Kumar for Lancers Books 2013)

violent acts against the Indian state. In order to deal with the situation, the Assam government forced the Assam Maintenance of Public Order (Autonomous District) Act in the Naga Hills in 1953 and strengthen police action against the rebels. At the same time, Assam deployed the Assam Rifles in the Naga Hills and enacted the Assam Disturbed Areas Act, 1955, to provide a legal framework for the paramilitary forces as well as the armed state police to combat insurgency in the region.⁶ The Act of 1955 could not stop the violence in the Naga Hills.

As a result the President of India promulgated the Armed Forces (Assam and Manipur) Special Powers Ordinance on May 22, 1958 which confers 'special powers' on the armed forces to function in the 'disturbed areas' of Assam and the Union Territory of Manipur. While introducing the Armed Forces Special Powers Bill, the then home minister, G. B. Pant, argued that the bill would enable the armed forces to function effectively in a situation marked by arson, looting and dacoity.⁷ The bill received the President's assent on September 11, 1958 and was printed in the Statute Book as The Armed Forces (Special Powers) Act, 1958.⁸

The Act empowered the Governor of the State/Union Territory to use the armed forces to aid the civilian power if he was of the opinion that the situation was disturbed enough to demand such an action.⁹ The Act conferred 'Special Powers'¹⁰ upon any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces, the power to shoot, kill and arrest without warrant, any person he suspects; as well as enter and search without warrant or destroy any premises he believes are sheltering the rebels. This was not unfettered. It was qualified by two clauses. First, the power to open fire is given in a disturbed area where the assembly of five or more persons or the carrying of weapons is forbidden.¹¹ Second, if a person is seen as violating such a law.¹²

⁶ Dinesh Kotwal, *The Naga Insurgency: the Past and the Future*, 751, Vol 24 (4) (Strategic Analysis, July 2000)

⁷ Home Minister G B pant, *The AFSPA: Lawless law Enforcement According to the Law?*, 3 (Asian Centre for Human Rights, 2005, New Delhi)

⁸ Act 28 of 1958

⁹ *Id.* Sec. 3

¹⁰ *Id.* Sec. 4

¹¹ *Id.* Sec. 4(a)

¹² *Ibid*

1.i.a. Comparison between the Ordinance of 1942 and Act of 1958

Under the the Armed Forces (Special Powers) Ordinance of 1942, the British Indian government placed the burden of taking crucial decisions relating to the use of force on a well trained and 'responsible' officer, who was not below the rank of a Captain of military, naval and air forces¹³ so that the special powers were not misused. The Armed Forces Special Powers Act of 1958 however, lowered the rank of the 'competent' officer to that of a commissioned or non-commissioned officer like havaldar.¹⁴ In *Inderjit Barua v. State of Assam*, Court held that conferment of power on non-commissioned officers like a Havaldar cannot be said to be bad and unjustified.¹⁵

The years 1964 to 1966 saw the liberation movement by the United National Liberation Front (UNLF) and Mizo National Front (MNF). As a result, the Assam state government declared the entire Mizo district a disturbed area and the Armed Forces (Assam and Manipur) Special Powers Act was imposed upon it in 1966. Similarly the tribal movement against Bengali migrants from Bangladesh led to the imposition of the Armed Forces (Assam and Manipur) Special Powers Act in Tripura in November 1970. The Act was amended as the Armed Forces Special Powers (Extension to Union Territory of Tripura) Act in 1970 to enable its enforcement in Tripura which was declared as 'disturbed area'.¹⁶ The North-Eastern Area (Reorganisation) Act of 1971¹⁷ provided for the creation of states of Manipur, Tripura and Meghalaya and the union territories of Mizoram and Arunachal Pradesh. In 1972, the Armed Forces (Special Powers) Act of 1958 was amended as the Armed Forces Special Powers (Amendment) Act, 1972. The amendment included Meghalaya, Nagaland and Tripura and Union Territories of Arunachal Pradesh and Mizoram. The amendment conferred the power of declaring an area to be a disturbed area concurrently upon the centre and the state under article 355 of the

¹³ Armed Forces (Special Powers) Ordinance of 1942, 2(1)

¹⁴ *Id.*, Sec. 4

¹⁵ AIR 1983 Del 514

¹⁶ *Supra* note 5 p-17

¹⁷ The North-Eastern Areas (Reorganisation) Act, 1971, Act No. 81 of 1971, 30th December, 1971,

Constitution¹⁸. In 1990, following large scale violence perpetrated by the United Liberation Force of Assam (ULFA) in Assam, the entire state was declared as a disturbed area.

1.ii. The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983

It was a short lived Act in the state of Punjab. Its imposition was surrounded by the issues over religion, demands for larger share of water for irrigation and the return of Chandigarh to Punjab. The struggle for hegemony amongst various Sikh factions led the state forcing the Punjab and Chandigarh governments to declare the state and union territory as a 'disturbed area' in 1983. Under the Act special provisions were made whereby any vehicle can be stopped, searched and seized forcibly if it is suspected of carrying proclaimed offenders or ammunition.¹⁹ Secondly, the special power was conferred on a soldier who had the power to break open any locks "if the key thereof were withheld".²⁰ It was finally withdrawn from the state after 14 years in 1997, when the peace and security was maintained in the state.

1.iii. The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990

In 1990, the central government enacted the Armed Forces (Jammu and Kashmir) Special Powers Act. The armed forces would be used to aid the civil administration in the disturbed area to prevent terrorist acts directed towards striking terror in the people as well as any activity that endangered the territorial integrity of the country or sought the secession of a part of the territory of India or insulted national symbols such as the Constitution, the national anthem or flag.²¹ The Act was enforced in six districts i.e., 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.²² In 2001, six more districts namely, Jammu, Kathu, Udhampur, Poonch, Rajouri and Doda were brought under the purview of the Act.

¹⁸ Art. 355 of the Constitution stipulates that the central government: "protect every state against internal disturbance, it is considered desirable that the Central government should also have power to declare areas as 'disturbed', to enable its armed forces to exercise the special powers.

¹⁹ The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 (34 of 1983), 8 December 1983, Section 4 (e).

²⁰ *Id.*, Section 5

²¹ The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, Section 3 (a) & (b),

²² The Jammu and Kashmir Government Gazette, Vol 103, Srinagar, July 6, 1990, Civil Secretariat Home Department, Government of Jammu and Kashmir.

2. Provisions of the Armed Forces (Special Powers) Act

We have seen the imposition of Armed Forces (Special Power) Act in Assam and Nagaland, Punjab and Chandigarh, and Jammu and Kashmir. Now we will see the provisions of these Acts which have been criticised as been draconian or against human rights.

2.i. Disturbed Areas

1. Disturbed Areas - Disturbed Areas has been defined under all the Acts as an area which is for the time being declared by notification to be a disturbed area.
2. Power to declare disturbed area- rests with the Governor of the State or the administrator of that Union Territory or the Central Government.
3. Exercise of power- if in the opinion of the Governor of the State or the administrator of that Union Territory or the Central Government, 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, then the area will be declared as 'disturbed area'.

2.ii. Special powers

1. Power to fire- In a "disturbed area", any Officer not below the rank of Sub-Inspector or Head Constable in case of the Armed Branch of the Police may, if he is of opinion that it is necessary so to do for the maintenance of public order and after giving due warning, as he may consider necessary may fire upon, or otherwise use force, or may cause death, of any person who is indulged in any act which may result in serious breach of public order or is acting in contravention of any law or order for the time being in force, or 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.
2. Powers to destroy- arms dump, fortified positions of shelter from which aimed 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 utilised as a hideout by armed gangs or absconders wanted for any offence.

3. Power to arrest- without a warrant anyone who has committed cognizable offences or is reasonably suspected of having done so and may use force if needed for the arrest.
4. Power to enter and search- any premise in order to make such arrests, or to recover any person wrongfully restrained or any arms, ammunition or explosive substances and seize it.
5. Stop and search any vehicle or vessel reasonably suspected to be carrying such person or weapons.
6. Power to put in custody- 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.

2.iii. Protection of armed forces against prosecution

1. The Act provides legal immunity to military personnel for their actions. Their prosecution cannot be initiated without the prior permission of the central government. As the provision states – ‘No suit, prosecution, or other legal proceedings shall be instituted except with the previous sanction of the State Government against any person in respect of anything done or purporting to be done in exercise of the powers conferred by Sections 4-and5 of the Act’.

3. The validity of provisions under the Armed Forces (Special Powers) Act and the controversy

The Armed Forces (Special Powers) Act has often been called as an Act of ‘Right to Kill’. It has been alleged of giving draconian powers to military personnel. That the Act is a tool in the hands of security forces to perpetrate human rights violations; that the central government has retained the Act for decades without any valid justification; and that all cases against military personnel for grave offences reported by state governments to the Ministry of Defence, have failed to initiate prosecution. Further, there exists a lack of clarity amongst the general public

at large regarding the authority of the state government to revoke The Armed Forces (Special Powers) Act from the state or a part thereof.²³

The validity of The Armed Forces (Special Powers) Act was challenged before the Supreme Court in the case of the *Naga People's Movement of Human Rights v. Union of India*.²⁴ The five judge bench concluded that the Act cannot be regarded as a colourable legislation or a fraud on the Constitution and the powers conferred under Sections 4 and 5 of the Act are not arbitrary and unreasonable and therefore not in violation of the provisions of the Constitution.

Section 6 of The Armed Forces (Special Powers) Act is also criticized under the wake of section 45 and section 197(2) of CrPC. A perusal of Section 45 shows that it provides limited protection against arrest, whereas the one under Section 6 of The Armed Forces (Special Powers) Act it is much wider. Section 197(2) of CrPC only restricts the taking of cognizance by a court. On the other hand, protection under Section 6 of The Armed Forces (Special Powers) Act is wider and extends over institution of any prosecution, suit or other legal proceedings. Thus, the criticism appears to be misplaced. Further, if the umbrella of section 6 was to be withdrawn, then adequate protection to the armed forces, which is called out to bring normalcy in a state witnessing dangerous situation, would stand diluted and making them vulnerable to legal and criminal harassment.

4. Human Rights and existence of The Armed Forces (Special Powers) Act

There has been instance of misuse of the provisions under the Act. Many human right activists and organisations too have been demanding its removal from north-east as well as Kashmir. Be it the ending Irom Sharmila's hunger strike in Manipur or the protesters out on candle marches against the Act in capital or anywhere else, Armed Forces (Special Powers) Act has

²³ Nilendra Kumar, *To A Humane Face To AFSPA*, 58 in Vivek Chadha ed., *Armed Forces Special Power Act The Debate*, (S Kumar for Lancers Books 2013)

²⁴ AIR 1998 SC 431

been under severe criticism from all quarters of the society for being a draconian law widely misused by the armed forces.²⁵

In a landmark decision, *Extra Judl.Exec.Victim Families v. Union Of India & Anr*,²⁶ the Supreme Court said that all the encounters carried out by armed forces including police under AFSPA too should be subjected to inquiry.

Paragraph. 163. The law is therefore very clear that if an offence is committed even by Army personnel, there is no concept of absolute immunity from trial by the criminal court constituted under the Cr.P.C. To contend that this would have a deleterious and demoralizing impact on the security forces is certainly one way of looking at it, but from the point of view of a citizen, living under the shadow of a gun that can be wielded with impunity, outright acceptance of the proposition advanced is equally unsettling and demoralizing, particularly in a constitutional democracy like ours.

The decision came after hundreds of Manipur families filled a plea that over the years more 1500 cases of fake encounters have taken place. Many human right activists and organisations too have been demanding its removal from north-east as well as Kashmir.

5. Conclusion

The Armed Forces (Special Powers) Act is applied to an area only when the ordinary laws of the land are found to be inadequate to deal with the extraordinary situation carried out by insurgents with the intention of spreading terror. It becomes a necessity in the terror-stricken area, when the police force is found inadequate and powerless of dealing with the terrorists and, the induction of the army becomes essential to combat the terrorists and maintain the territorial integrity of the country. The army has been accused of causing custodial deaths and torture. However, it must be understood that extracting information from arrested terrorists often requires the use of third-degree methods. There have also been incidents of misuse of 'special powers' by the army, and for that the courts have always stood up to guard the rights

²⁵ AFSPA - Necessity Or A Misused Power? Everything You Need To Know About The Controversial Act, <http://www.indiatimes.com/news/india/afspa-necessity-or-a-misused-power-everything-you-need-to-know-about-the-controversial-act-258238.html> visited on 28th April 2017

²⁶ Writ Petition (Criminal) No.129 of 2012, decided on 13th July 2016

of the innocent victims. But at the same time it must not be forgotten that terrorism would never have been rooted out in Punjab or Mizoram without the AFSPA and without the tough measures that were taken by the security forces operating under the protection of the Act. If Manipur is still a part of India, it is because the army has been successful in preventing the terrorists there from taking over the state and proclaiming it to be a sovereign country. Therefore despite the arguments against the AFSPA, the basic objective of the Act should be given predominance for its continuity.

