

AFSPA: A COMPARATIVE PERSPECTIVE IN INDIA

Written by KS Luckyson James

Pursuing Ph.D In The Department Of Political Science, Delhi University

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The AFSPA is one of the many special laws passed by the parliament provides policing responsibility to deal with the special situation of waging a war against the state. The reason of which the special laws go beyond the normal laws is that the state considers the existing legal framework is not enough to deal adequately with threats to the national security. At the same time, the legal security regime and defence mechanism of the state has violated the rights of the citizens conferred by the constitution by misusing the special powers.

This paper is an attempt to comparative analysis of Armed Forces (Special Powers) Act, 1958 (AFSPA) and some of the special laws that existed in India are necessary to show the differences and similarities among them. The purpose of the study is to draw a conclusion for the better and more effective implementation of special laws in the country. It is to filter the negative aspects of the law and to keep the positive ones to serve the interest and welfare of the society. The republic of India adopted the colonial laws to suppress the rebellion and dissent that arose in north-eastern part of the country. The logic behind the act was to successfully solve the law and order problems through military means within the short span of time. Initially, the Armed Forces (Assam and Manipur) Special Powers Act, 1958 enforced as a temporary measures to deal with the Naga insurgency in the Naga Hills District of Assam including the three sub-divisions of the tribal hill areas in the then Union Territory of Manipur. The provision of the AFSPA which designated any specific areas as disturb or dangerous place is a unique legislation. The critiques of some of the rights bodies and civil society organizations describe it as discriminatory. In the following sections, the comparative analyses of these laws with brief elaborations have to be discussed.

COMPARATIVE ANALYSIS

Special Powers provided to the Armed Forces: An army officer equivalent to the rank of Havaldar or non-commissioned officer under AFSPA has a right to shoot and kill a suspected terrorist by exercising maximum use of force. Any person acting in contravention of law is not necessarily an act of terrorism. Reasonable and least force should be used for maintenance of law and order in public sphere. Section 4 of AFSPA states: “Special Powers 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,-

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 of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;”

This provision is clearly in violation of Article 6 of the International Covenant on Civil and Political Rights. Article 6 paragraph 1 of the ICCPR says every person has an inherent right to life. “This right shall be protected by law. No one shall be arbitrarily deprived of his life”.¹

Destruction of property, arms dump, fortified buildings or any structure: The armed forces can destroy any structures or houses according to their own discretion. Section 4(b) of AFSPA allows the army to destroy any structure, arms dump or buildings if according to their judgment “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”. Under the policy of regrouping of villages, for instance in Mizoram, entire villages were uprooted and displaced. Houses, schools and churches in the disturbed areas were dismantled during army operation. Under this Act, there is no provision for compensation for any destruction of properties. As a result people were denied the right of natural justice.

Detention of person without warrant: Section 4(c) of AFSPA provides that a person can be arrested without warrant “who has committed a cognizable offence or against whom a

¹ Article 6(1) of the International Covenant on Civil and Political Rights
<http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (accessed on January 8, 2016).

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”.

Section 20 of the TADA provides for detention of a person up to 180 days for investigation. The designated court on reviewing the report of the Public Prosecutor on the progress of investigation can extend the period up to two years in prison, if the investigation is unable to complete within the said period.² This far exceeds the period prescribed in the provision of Cr. Pc section 167(2) (a) which permits only 90 days for death sentence and 60 days for other crime- related cases as well.³ Section 49 (b) of the Prevention of Terrorism Act, 2002 and 43D of The Unlawful Activities (Prevention) Act, 1967 can also extend the duration of detention up to 180 days for investigation by the special court. These provisions can be applicable to AFSPA even though there are no specific sections mentioned.

This provision has violated the Article 9 of the International Covenant on Civil and Political Rights of which no person shall be arrested or detained arbitrarily except in agreement with the procedure established by law. It stated that “everyone has the right to liberty and security of person”.

Enter and search without warrant: The “enter and search any premises without warrant” by the member of the armed forces to arrest a person, confiscate any suspected items or property has been legitimized under Section 4(d) of AFSPA. It has provided that “enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrong fully 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”.

Under AFSPA, all the members of security forces are authorized to enter the premises and search without any restriction. A search without warrant can be carried out anytime according to the discretion of the armed forces. The innocent civilians and local populations in the ‘disturbed areas’ are totally at the mercy of security forces. They can confiscate any property inside the premise without the consent of the occupier.

² Section 20 of the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987. <http://www.satp.org/satporgtp/countries/india/document/actandordinance/TADA.HTM>.

³ Code of Criminal Procedure, 1973, Section 167 (2a)

There is no provision in AFSPA that the search shall be necessarily carried out by the same-sex. If this provision was included into AFSPA, incident of misuse of the Act would be greatly reduced. A search warrant issued by the High Court or magistrate or search in the presence of certain people as eye-witnesses like the village headmen and elders does not arise.

Arrested person to be made over to the Police: An arrested person shall be produced “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” as per Section 5 of AFSPA.

The arrested persons may not be handed over to the Magistrate’s Court or nearest police station within 24 hours as required by the Act and Cr. Pc Section 57. Sometimes it takes longer time even to make it to the nearest police station. The Cr. Pc section 167(2) (b) requires the arrested person to be brought before the magistrate to get the order for detention.⁴ Section 43B of Unlawful Activities (Prevention) Act, prescribes the procedure of arrest and seizure, etc. sub-section (1) says that any person detained shall be informed as soon as possible the ground of his arrest.⁵ Sub-section (2) states that arrested person shall be reported to the nearest police station without unnecessary delay.⁶

Section 5 of AFSPA, Section 43B of UAPA 1967, Section 50 (1), Section 50A and Section 57 of the Cr Pc provides that any person arrested and detained shall be reported to the nearest police station as soon as possible and shall inform him on the ground of arrest with the least possible delay. Entry 9 in List I of the Seventh Schedule of the Constitution provides that any person may be subject to arrest or detained on the grounds of defence, foreign affairs or security of the State.

Immunity of Law Enforcement: Section 26 of TADA provides that Central Government or State Government or any other authorities may be protected from legal suit or prosecutions as what they have done are in ‘good faith’ under this Act.⁷ At the same time, Cr Pc section 45 (1) and (2), section 57 of POTA, section 18 of National Investigation Agency Act, 2008, section 49 of UAPA 1967 and Section 6 of AFSPA provide protection from legal suits. In Section 6 of

⁴ Ibid, Section 167 (2b)

⁵ Section 43B (1) of the Unlawful Activities (Prevention) Amendment Act (UAPA), 1967. <http://nia.gov.in/acts/The%20Unlawful%20Activities%20%28Prevention%29%20Act,%201967%20%2837%20of%201967%29.pdf>

⁶ *Ibid.*, section 43B (2)

⁷ *Ibid.*, Section 26.

AFSPA, the expression - the act done in 'good faith' is completely absent as it is very broad and dangerous. 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".⁸

In contrast, under AFSPA both the military superiors and subordinates are not accountable or responsible for any offences and crime against humanity as they are effectively protected from prosecution. Perhaps the chances of getting a prior sanction of the Central Government are not reliable because most of the accused of human rights violation have not been prosecuted in the history of more than 50 years of its existence. Under AFSPA, the provisions related to the grievances mechanism and institutions are not effective.

Definition of 'Terrorism': Anti-terror laws allow the executive power to restrict on civil liberties and limit the oversights of judicial system. Therefore, anti-terror laws should be drafted narrowly and "proportionate to the legitimate aim pursued – protecting national security". The UN Human Rights Committee in its Concluding Observations in 2005 criticized the member countries for its definition of 'terrorism'. The Committee recommended that "the State party should adopt a more precise definition of terrorist offences, so as to ensure that individuals will not be targeted on political, religious or ideological grounds, in connection with measures of prevention, investigation and detention."⁹

To define certain statutory language and the use of phrases in the TADA were controversial and ambiguous. For instance, the 'terrorist act' has been defined here as, 'alienate any section of the people' or 'adversely affect the harmony amongst different sections of the people',¹⁰ shows that even the slight mistake or any kind of minor activities against the sentiments of the community or a group of people can be tagged as an act of terrorist. Another term used is

⁸ Section 6 of the Armed Forces (Special Powers) Act, 1958 (AFSPA).
[Http://artassam.nic.in/Political%20Dept/Armed%20forced%20Assam&%20Manipur%20Special%20Power%2012958%20.pdf](http://artassam.nic.in/Political%20Dept/Armed%20forced%20Assam&%20Manipur%20Special%20Power%2012958%20.pdf)

⁹ Concluding observations of the Human Rights Committee, Canada, 2 November 2005, UN Doc. CCPR/C/CAN/CO/5, par. 12.

¹⁰ Section 10 of TADA.

‘disruptive activities’ which pertains to any action or speech that ‘question, disrupt, or intend to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India.’¹¹

The definition of the word ‘terrorism’ under POTA is so broad and vague that it can encompass all kinds of activities such that voluntary act of abetting or promoting can be considered as an act of terrorism. Sometimes, the Act can be misused by the political parties against their opponents or disrupt the constitutional provisions of fundamental rights of the citizens.

The Armed Forces (Special Powers) Act, 1958 and the Ordinance of 1942: The Armed Forces (Special Powers) Ordinance 1942 is the predecessor of the Armed Forces (Special Powers) Act, 1958. The present Act is more draconian or severe as it provides ‘special powers’ from the commissioner to the rank of havaldar as almost every soldier can take decision to use force with impunity. But the former conferred power to a more competent officer such as captain or equivalent rank to take decision. The provision to enter and search any premises without warrant was absent in the Ordinance of 1942. It extended to the entire part of British India¹² as it was not targeted to any specific or distinct geographical regions. The term ‘emergency’ has been replaced by the word ‘disturbed areas’ in the 1958 Act.¹³

The Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987: The Terrorist and Disruptive Activities (Prevention) Act, 1987, (TADA) was introduced in the parliament in 1985. The Act was first used to counter the tendencies of Khalistan movements in Punjab. The TADA was misused several times by targeting thousands of innocent civilians and minorities especially those belonging to religious minorities. They were arrested without any reasonable cause and put in jail without trial in the court. Meanwhile, fresh charges under different provisions of the Act would be put up against them before the date of their release. The trial process of the special courts can be held in the prison or some other places.¹⁴ Article 22(1) and (5) of the Constitution states the right of detainees to get informed of the reason for detention

¹¹ Ibid, Section 4(2) (i).

¹² *The AFSPA: Lawless Law Enforcement According to the Law? A Representation to the Committee to Review the Armed Forces Special Powers Act, 1958.* Asian Centre for Human Rights, 2005

¹³ *The Armed Forces Special Powers Ordinance, 1942.* Government of India, Legislative Department, New Delhi, the 15th August, 1942. Subramaniam, K.S. (2016) *State, Policy and Conflicts in Northeast India.* New Delhi: Routledge Publication, p. 84

¹⁴ Section 10 of TADA.

‘as soon as may be’ and the right to get the earliest opportunity to represent with the legal practitioner to challenge the order of detention.¹⁵

In another instance, initially in the case of Rajiv Gandhi assassination all the 26 accused were indiscriminately handed down capital punishment by the judge of special court, Navaneethan. But later on, the Supreme Court acquitted 19 of them from life sentence. In the judgment the Court pointed out that ‘the object of the conspiracy was to kill Rajiv Gandhi; that no offence under section 3 or 4 of TADA had been committed’.¹⁶ Despite an act of murder, the intentions of the accused were not to commit an act of terrorism, so that the TADA is not applicable. This shows that the application and interpretation of the TADA was too broad and overreached.

The Act was a failure because of providing inappropriate immunity to the police and security personnel leading to various unabated abuses of human rights violations. In 1994, the Supreme Court upheld the constitutionality of the Act in *Kartar Singh v. State of Punjab*.¹⁷ But TADA was repealed in 1995 on account of strong opposition by the public.

Prevention of Terrorism Act (POTA), 2002: Prevention of Terrorism Act of 2002 (POTA) was enacted under the intense pressure of the United States on the pretext of combating global terrorism in the aftermath of September 11, 2001 attacks. It was the modified version of TADA. The National Democratic Alliance (NDA) government entrusted the Law Commission of India to come out with the plan to legislate anti-terror mechanism. The Law Commission came up with the recommendation for enactment of Prevention of Terrorism Act, a new version of Criminal Law Amendment Bill, 1995.¹⁸ Even though Congress has the history of conceiving legislation of extraordinary laws such UAPA of 1967, TADA of 1987 etc., this time, they were not supportive and strongly protested and voted against the bill. POTA was finally passed in both the houses of parliament in the Budget Session of 2002 after the third previous attempts. POTA replaced POTO of 2001, after six years the TADA had lapsed. Just as TADA, application of POTA is very oppressive and arbitrary resulting in abuses and violation of human rights.

¹⁵ The Constitution of India, Article 22 (1) and (5).

¹⁶ *State of Tamil Nadu through Superintendent of Police, CBI/SET v. Nalini and 25 Others*, 11 May 1999, available at <http://www.indiankanoon.org/doc/194120/> (accessed on June 9, 2015).

¹⁷ *Kartar Singh v. State of Punjab*, (1994) 3 SSC 569.

¹⁸ Law Commission of India, 173rd Report on Prevention of Terrorism Bill, 2000, Chapter 2.

The Unlawful Activities (Prevention) Amendment Act (UAPA), 2004: The Unlawful Activities (Prevention) Act, 1967 was repealed and re-introduced and passed in the parliament in 2004 and 2008. The Unlawful Activities (Prevention) Amendment Act, 2004 is shorn of all the sub-sections and some words, making it more precise. In this Amendment, section 15 of UAPA has defined the phrase “Terrorist Act”. The Act prescribes the punishment of terrorist act with death penalty or life imprisonment with fine under section 16(a).¹⁹ Sub-section (b) prescribes five years’ imprisonment or extended to life imprisonment and liable with fine for other lesser offences.²⁰

Section 16A was inserted as a new section by the Unlawful Activities (Prevention) Amendment Bill, 2008 which prescribes punishment of imprisonment for up to 10 years and liable with fine for the use or demands of radioactive materials or substances, nuclear devices, bombs etc.²¹ This amendment made some changes in section 15 along with the insertion of the new section 16A.

In this process, Manipur has the highest number of UAPA cases being registered across the country in 2014. Out of 975 cases; 630 cases are from Manipur which accounted for 60 percent of UAPA cases. Assam recorded 148 cases which occupy second position and seven cases are recorded in Meghalaya. Manipur has also the highest number of banned organisations as well of which six organizations ²²are banned under UAPA. Moreover, the Central government has intended to make some amendments to this legislation to designate individual terrorists under the “banned list of entities.”²³

Conclusion

In the nutshell, by winning the hearts and minds (WHAM) of the people is the most effective doctrine for fighting insurgency around the world. It should not be at the cost of unarmed civilian by unleashing the reign of terror in the name of fighting against insurgency which

¹⁹ Section 16 (a) of the Unlawful Activities (Prevention) Act, 1967.

²⁰ *Ibid.*, section 16 (b)

²¹ The Unlawful Activities (Prevention) Amendment Bill, 2008 Section 16 (A)

²² The banned organizations are People’s Liberation Army (PLA), the United National Liberation Front (UNLF), the People’s Revolutionary Party of Kangleipak (PREPAK), the Kangleipak Communist Party (KCP), the Kanglei Yaolu Kanba Lup (KYKL), and the Manipur People’s Liberation Front (MPLF).

²³ Sahay Singh, Shiv (2015) ‘Manipur has highest number of UAPA cases.’ *The Hindu*, 21 August.

threatens the integrity of the State. At the same time, only an authorized officer is to search a person and restricts the search of a person's body cavities. The search of any person shall be carried out by the same-sex. Those responsible for any atrocities or crime should be accountable to the rule of law. In this context, the reform of section 6 of the Act is needed with a political will into a more humanized legislation to prevent further alienation of people. It is worth mentioning here that the military commanders should be effectively responsible for any offences committed by forces under his authority and control. It is also pointed out that the forces committed a crime as the superior failed to take all necessary measures to prevent from omission or commission of offences. Whether civilian or military commander shall not be escape from responsibility for a crime against humanity.

