

THE ARMED FORCES SPECIAL POWERS ACT (AFSPA) 1958: AN ANALYSIS

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ABSTRACT

Law is nothing but concretised common sense. Laws are there to maintain the level of justice in the society. Laws are there to serve the society. But the concept of law did not just come out of thin air. It came into being through a series of events having one thing in common, the concept of ethics. Ethics is the very basis for the existence of law. Law is an instrument for social change. It helps people to live life in a structured manner. Law efficiently enables people to meet their respective requirements overseeing that nobody steps on anybody else's path to meet his personal goal. Law is the reflection of the wish and the will of the society.

Social transformation acts as a pedestal to a law.

INTRODUCTION

The Armed Forces Special Powers Act (AFSPA), 1958 is an act of the Parliament of India that grant special powers to the Indian Armed Forces the power to maintain law and public order in “disturbed areas”. It is a combination of various acts passed by the parliament of India giving special powers and privileges to the Indian Armed Forces officers. This act also provides legal immunity to the forces.

A “disturbed area” is basically a domestic territory where the situation has reached such a point that the local authorities such as the police, para-military etc force are not able to tackle and handle the day to day issues. Section (3) of the AFSPA act empowers governor of the respective state or union territory to issue an official notification on The Gazette of India, following which the centre approves for the instatement of the act and gives the command to send in armed forces for civilian aid. Once declared disturbed, the area has to maintain status quo for a minimum of 3 months.

It has been implemented in the Seven Sister States, Punjab and Chandigarh and is the core of the crux issue in Kashmir.

BACKGROUND

AFSPA is more of an improvised act derived from The Armed Forces Special Powers Ordinance of 1942. This act was drafted and promulgated by the British Empire to suppress the Indian uprising struggle for freedom. The act was passed and implemented during the Quit India Movement when the situation had worsened with the second world war at the backdrop. This act was needed at that time as there was a lot of internal dynamics going on within the state and simultaneously, the British Empire was also fighting a war against Nazi Germany.

The mentioned ordinance was invoked by the then central govt. to deal with the internal security situation in the country in 1947 which emerged due to Partition of India. According to Article 355 of the Constitution of India, AFSPA confers power to the central govt. to protect every state from internal disturbance.

These days, AFSPA is still in effect in many states and going to be so for some time considering the geo-political situation of those areas. The question at hand is that, “will it bring a change socially which leads to the betterment of society or worsen the condition?”

AFSPA: AN ANALYSIS

Over the years, AFSPA has been and is still is a topic of debate, controversy, arguments, discussions and deliberations. It has been severely criticised for many of its provisions from several sections of the society for alleged concerns about human right violations in the regions where it has been enforced. It has been cited as a necessary evil by the people of society who are against its revocation, and to much a surprise contradicts the view of the Armed Forces, who believe it is the need of the hour but is definitely not an evil entity.

Most of people against the act are more or less civic societal activists who argue for its abrogation on the grounds that it violates human rights, ethical and moral code. Those who argue for and are against its revocation stand dominantly on the fact that it safeguards our nation of her interests, maintains the level of national security and preserves our integrity.

AFSPA has been implemented in states where the geo-politics of that place have not been limited to the internal issues but also a touch of external influence in the background. The security forces assert that the law is critical for the conduct of counter insurgency operations and in minimising militancy in the valley.

AFSPA has often been stated as a form of martial law but that is certainly not the case here. In the procedure of following AFSPA, an officer is abiding by the Constitution of India and he acts well within his rights. But in the case of martial law, the concept of Constitution is thrown out of the window and a military officer becomes the acting body of the state.

If the Act is diluted, military personnel will hesitate to engage with militants or get killed during confrontations. No personnel want to spend time running around in civil courts to justify his actions while dealing with insurgents and terrorists, where for sure, witnesses from local, alienated population will align against him. During firefights with insurgents, locals gather at the location and often terrorists who fire at them. They do this because they know that any

casualty could be pinned on the military. Let us not forget that to date, the Indian Army has lost more than 700 officers and 9,000 soldiers to the insurgency. AFSPA is looked upon as a draconian law but it's easier said than done. There is no gainsaying the fact that political necessity drives deployment of the security forces for internal security duties. The forces are aware that they cannot afford to fail when called upon to safeguard the country's integrity. Hence, they require the minimum legislation that is essential to ensure efficient utilisation of combat capability.

PROVISIONS

Not only have the best lawyers in India have criticised the law but the United Nations Organisation have also stepped in by saying that it results in gross human right violations.

Following are the powers that are made available to an officer of the armed forces under AFSPA-

An officer is authorised to use any kind of force including fire power in case of any dispute after giving a clear-cut warning. If the use of force eventually leads to the death of an individual trying to break the law or causing any disturbance, the officer won't be held accountable for his actions.

The power to search, obliterate and destroy any hide-out, dumps, fortified or for that matter any place where there is suspicion that a militant is hiding without any approved command.

An officer is vested with the powers to arrest any person he suspects to be involved in militancy without any warrant or proof and he's allowed to use any kind of force in doing the same.

The power to stop and search any vehicle that is suspected to be carrying any weapon or a person who has violated or deemed to have broken the law.

The act also empowers any officer to protect any person who he believes acted in good faith under AFSPA itself from being prosecuted in any legal or judicial proceeding.

Army officers with been provided with full protection and legal immunity with regards to their actions implementing AFSPA. There cannot be any prosecution, suit or legal proceeding

against anyone acting under the law. Nor is the govt. questioned in any manner about why it declares an area disturbed and is not subject to any judicial inquiry.

Armed forces are authorised to detain any suspected person on the grounds of militancy for a matter of 2 years before he's brought before a judge and is denied with every legal aid. The act also empowers the armed forces to not conceal about the whereabouts of the suspected person and allows them to interrogate him thoroughly even in an undisclosed location.

The Act does not define or even lay down precisely the grounds for declaring an area as a disturbed area. This has vested an uncontrolled power with the Government on which no limitation is prescribed. The law also doesn't even allow judicial review with regards an area being declared as disturbed.

JUSTIFICATION WITH NEGATIVE IMPACTS

Before we take up the discussion of justifying the act's importance along with the havoc that it has created in the society, let us try to understand that why was even there a need for its implementation in the first place.

The Articles in the Constitution of India empower state governments to declare a state of emergency due to one or more of the following reasons:

Failure of the administration and the local police to tackle local issues.

Return of (central) security forces leads to return of miscreants/erosion of the "peace dividend".

The scale of unrest or instability in the state is too large for local forces to handle.

All the points mentioned above need a too kept on a strict check otherwise it can lead to the result of a disastrous altercation. Under such circumstances, it becomes the prerogative of the govt. to take drastic measures to prevent any sort of conflicts as conflicts turns to violence and violence breeds catastrophe.

It may not be written anywhere but it is quite clear that the law has been made for the Indian Army. Though the armed forces consist of all three forces of air, land and water namely the Indian Air Force, Army and Navy, both the Air Force and Navy find themselves in no position to be implementing such an act as any situation has never risen for them to take such steps. Then an argument is made that why can't the Army maintain law and public order in disturbed areas without the protection of AFSPA act?

For answer the aforementioned question, we'll need to take a deeper insight of how the Indian Army functions.

First let us try to understand something. Army is looked upon to resolve the dispute of an area only when the police along with BSF, CRPF and other para-military forces are not able to resolve the ongoing disputes. So, the situation without any hesitation will be messed up in those areas. Now, the Army needs protection and immunity for their actions for only because of one reason, the way they are trained. The Indian Army is not an organisation that is there to cater for peace keeping of our society. They are a lethal force that are there and have been trained to protect and fight for our motherland at whatever cost. The police for that matter is a civilian force that has been trained for resolving issues involving internal dynamics in a peaceful and smooth manner. But the army isn't trained that way.

If they see the view in accordance with the psyche of a soldier, he's not been trained to resolve disputes happening within the state. A soldier is trained with lethal intent. An intention to fight and kill. There are no second thoughts about it. He knows that if need be, he'll be required to make the supreme sacrifice upon the motherland. This is the way that Army is trained. Now, you can't have soldiers maintaining order in a civic society, which at first is not their job, without giving them any legal immunity. In any counter insurgency operation, when a soldier's line, you can't expect him to think the consequences of his actions before he takes a decision. Its only because of AFSPA that the army is able to efficiently maintain order in disturbed areas.

Also, every place where AFSPA is or has been in the past, the situation of that place is not limited to internal dynamics, but external involvement is always there. All these places had the following things in common. There was infiltration and insurgency going on at a rapid pace through increasing cross border activities, an anti-national feeling was prevailing in the air due

to manipulation of the people as the literacy rate in all those areas was relatively less. The absence of such a legal statute would adversely affect organisational flexibility and the utilisation of the security capacity of the state.

AFSPA has helped the army in preventing insurgency and tremendously uplifted the level of national security especially by minimising cross border infiltration. In the absence of legal provisions, the state and the soldier would be vulnerable, and in turn fail to provide the security, development and governance needed to prevent the insurgency affected states from descending into greater chaos.

AFSPA also has its demerits.

The Act has not been able to achieve its objectives as the law and order situations are said to have worsened in the areas where this draconian law is in force. This Act has further also created a rift between the people of the area and the armed forces due to the abuse of the power by the forces. The prime purpose for enacting such a law was to maintain law and order and protect the life of the innocent. But the abuse of the power has further threatened the life of the innocent and resulted in various atrocities.

SOCIAL TRANSFORMATION

Though AFSPA has helped the armed forces by giving them the necessary means to tackle the various problems faced in disturbed areas, it also deeply affected the society. There was a time in Kashmir when insurgency had grown so much that there was a concept of disappearance going on. At that time, there were about 2500-3000 active terror cells present in the valley. Terrorism was at its peak. The army was left with no choice but to take drastic measures to stop it from happening. The option was not to minimise militancy in the valley but to completely prevent it. An era of ruthlessness began. The army went on a killing spree, executing anyone and everyone whom they suspected to be militant or a close associate. Many people whom the army would arrest on suspicion would simply disappear only never to be found again. This was also an era of torture, intimidation and terror. The army absolutely massacred anyone who came on their path. Since, the army was protected with full legal immunity, this led to happening of fake encounters, rapes, kidnapping, murders and gross

human right violations. All this eventually changed the perception of the people of Kashmir towards India and our judicial system. Since India's independence in 1947, Kashmir has been a sensitive area. From earlier times, the people of Kashmir were with India and very much against Pakistan, but AFSPA is allegedly called upon as a game changer. Due to AFSPA, terrorism has been stopped to quite an extent but innocent people have also paid the price for it. Young children have seen their parents brutally being beaten by the Indian Army. All these events have massively resulted in an anti-national feeling in the valley which is why the issue of Kashmir hasn't been resolved till now. We may want to review AFSPA after going through the facts but the truth is that the Army was also not wrong on their stand. They did what was needed to be done for a better tomorrow.

Nobody in this world is perfect, which is why it'll be fair enough to say that the army in fact did a lot of blunders while handling their problems. AFSPA made the people of Kashmir give up their hopes on the judicial system of the country as they were always denied justice at every step. It is believed that AFSPA paved the way for internal terrorism as the localities of the Kashmir Valley themselves volunteered for the insurgency operations against the Indian Army cause of their hatred towards the same. Before insurgency began in Kashmir, the situation was really pleasant as tourism was at its peak and no internal disputes were there but after 1987, AFSPA is said to have aggravated the problem by worsening the perception of the people towards the Indian Army.

THE ARMY

Though AFSPA is responsible for loss of innocent lives, families separated, ignorance of human rights, it has also taken a toll on our soldiers. The rush of battle is often a potent and lethal addiction, for war is a drug. It affects our soldiers both physically and mentally. Many of the army officers are themselves against the act. They feel it is doing nothing good but creating a rift and dividing the people apart from them. Many soldiers have questioned the morality of the act as it enables them to act against the very people whom they had sworn to protect and fight for. The army is pelted stones upon by the same people for whom they have been deployed to protect. All these things take a mental toll on our soldiers. They get

demotivated and frustrated of the fact that nobody appreciates what they do for the country and how much they sacrifice.

In 1987, insurgency had just begun and reached an alarming pace in matter of months. Pakistan was very successfully able to infiltrate terrorists from its line of control over to the Indian territory. The Kashmiri Pandits were being targeted upon and many of them were also killed.

The army also wasn't in the way they tried to resolve the problem. But they did it thinking it would lead subsequently to the better tomorrow that started then.

The army needs to find new ways to stop the people from having an animosity towards them.

In the end, I would say that AFSPA is an important law that protects the integrity of our country but keeping in sight of the wrongdoings done under the same, it would be no shame in saying that a review of the act could be given a thought.

