

Understanding AFSPA and its Implications

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Abstract:

AFSPA and violence cannot be seen in isolation. The law with such extraordinary power and impunity has led to the increase in extra judicial killings making violence part of everyday life in Kashmir, Punjab and particularly in the North Eastern region. However, the bone of contention is the rationality behind the implementation of such law in society and the resistances of the people for its 'misuse' of power. This paper will, thus, explore the debate as to why AFSPA is still considered as necessary and important today while others consider it as totally 'draconian' impinging on the basic rights of the people.

Key words:

Draconian law, disturbed area, extra-judicial killing, repeal.

I. Introduction:

History is evident that whenever there is law and order situation in any given society, the State and its institution is always in questioned. This means that the study of State and Society will help to understand social life and its political environment. To explain the symbiotic relationship, Armed Forces (Special Powers) Act is used in the contextualization and thus the paper aims at looking how State responds to social issues and how society reciprocated to the way State functions its coercive power.

The Armed Forces (Special Powers) Act (AFSPA), 1958ⁱ is an Act of the Parliament of India which confers special powers to the Armed forces and the Central Armed Police Forces deployed in the "disturbed areas" of India's North East since 1958 and in Jammu and Kashmir (J&K) since the 1990s. As specified under the Act, it allows killing anyone acting in contravention of law, arrest and searching any premises without a warrant and ensures protection from prosecution and legal suits.

The term "disturbed area" is mentioned in the Section 3 of the Act. Factors like caste, race, language, region or religion are used to declare 'disturbed area' which disrupts the peaceful co-existence of a particular place or region and causing law and order problem issues thereon. This means, the Central Government or the Governor of the State or administrator of the Union Territory can declare the whole or part of the State or Union Territory as a disturbed area. The declaration is made in the Official Gazette.

AFSPA and its origin are rooted with the coming of colonialism. It was during the then Viceroy Linlithgow who promulgated the Armed Forces (Special Powers) Ordinance in 1942. During this time, there was strong resistance movement against the British rule in the form of the Quit India Movement started by Mahatma Gandhi. Not only coercive force was used to contain the political unrest in the country, many Nationalists were detailed and sent to jail. Again, in 1947, to deal with the internal security issues and unrest arising due to the Partition, the Indian Government had promulgated four Ordinances in four Provinces of Bengal, Assam, East Bengal and the United Provinces. The post Independent India is no exception. To deal with the rise of Naga insurgency in the Assam region, Armed Forces Special Powers (Assam and Manipur) Act, 1958 was enacted. When the situation got worsened, the State government of Assam deployed the Assam Rifles in the Naga Hills and enacted the Assam Disturbed Areas Act of 1955. This Act gave legal immunity to the armed forces to combat the growing insurgency in the periphery of India's North East. Special mention can be made about Manipur State as well when 'the Armed Forces (Assam and Manipur) Special Powers Ordinance', 1958 was promulgated in 1958 by the then President of India in that period. It was later replaced by the Armed Forces (Assam and Manipur) Special Powers Act of 1958. It was later extended to all North-Eastern states.

In the 1980's, we see Khalistan movement gaining momentum in Punjab (Bhattacharya 2023)ⁱⁱ. The Central government enacted the Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 with the same objective to handle the social and political unrest. However, two sections, which provided for additional powers to the armed forces –

- i. Sub-section (e) was added to Section 4 stipulating that any vehicle can be stopped, searched and seized forcibly if it is suspected of carrying proclaimed offenders or ammunition.
- ii. Section 5 was added to the Act specifying that a soldier has the power to break open any locks if there was no cooperation given during the operation.
As the Khalistan movement died down AFSPA was withdrawn in 1997, roughly 14 years after it came into force. Similarly, an unprecedented rise in militancy and insurgency in Jammu and Kashmir was witnessed in 1990 and subsequently, the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 was imposed upon. What is important to note is that Jammu and Kashmir has its own Disturbed Areas Act (DAA) 1992 to curb any internal disturbances. However, the State declared as 'disturbed area' under Section (3) of AFSPA.

The Problem and the Contested Aspects

The AFSPA of 1958 begins with the introductory line defining 'Violence as the "way of life and that the State can no longer maintain its internal disturbances"'.
Whereas, the starting point is the presumption that 'violence' is a new reality and inevitable in the region which is seen as already given and take for granted kind. If one analyses, the ground for giving excess power to the armed forces is laid and legitimised in its operations in the name of counter-insurgency. The Act therefore, confers a 'special power' to certain officers of the Armed Forces, a 'license to kill' in the so called 'world's largest democratic country. In the words of Binalakshmi Nepram (in the interview given to Cultural Survival, an NGO on September 15, 2023), "the imposition of martial law on Indigenous Peoples in Manipur and Northeast India has led to at least 20,000 killed in Manipur and over 50,000 in Northeast India, in addition to numerous incidents of rape, arrests, torture, and extra-judicial executions". In the similar lines, Rosemary Dzuwichu (Advisor of Naga Mothers' Association told Deutsche Welle, a German broadcaster on 12/08/2021) said, "the protection provided to the security forces is a major obstacle to justice in the troubled region". Many Human Rights groups have called the law 'draconian' and urged for its repeal on many occasions.

Section 1 of the Act gave its name as "The armed Forces (Special Powers) Act", 1958 and extends to all States of North East India except Sikkim.
Here, it must be mentioned that prior to AFSPA, there were other laws existed to address both internal and external disturbances. Special mentioned may be made about "Disturbed Areas Act (DAA)", 1992; Assam Disturbed Areas Act of 1955; Punjab Disturbed Areas Act, 2008 etc.
While Disturbed Area Acts are the mini version of the AFSPA; it almost confers the same powers to the armed forces to take control of the state in order to curb the violence except that the DAA is conferred as the power of the state but AFSPA can be invoked either by the Governor of the state or the Central Government.

The term "armed forces" is defined in the Section 2 of the Act. It includes the forces operating in land, air and water etc.

Section 3 of the Act describes how it should declare "disturbed areas"-to any State or Union Territory or any part of the State or region within the Indian Union. Though the State Government/s can give opinion on such declaration of the Act, this Section gives power to over-rule the decision of the State by the Governor or the Administrator of that Union Territory or the Central Government.

Section 4 of the Act deals with the authority and the official rank of the State who can or vested with the 'special powers' to shoot, or use coercive forces upon the civilians. Thus, any Commissioned Officer, Warrant Officer or Equivalent Officer are vested with such power to arrest, search or entry at any premises, be it private or religious.

Section 5 of the Act made the arrested persons to be made over to the police in the nearest police station without any delay with a detailed report of the arrest.

Section 6 refers 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 by this Act.

Section 7 deals with Repeal and Saving – by the Repealing and Amending Act, 1960 (58 of 1960), sec.2 and the First Schedule (w.e.f. 26.12.1960).

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II. Analysis and Conclusion:

While AFSPA is seen as an important instrument of power for the Armed Forcesⁱⁱⁱ, many critics described it as encroachment and violation to human rights leading to rise in violence and use of excessive force. The critics have argued that the Act can be misused and enjoys total legal impunity by the armed forces. The following points are used to critique the Act:

- (i) Violating human rights and anti-people.
- (ii) Terms such as "disturbed areas" and public order" suffers from clarity and need more elaboration.
- (iii) In terms of fixing accountability, the Act is vague.

(iv) AFSPA should be amended and keep more flexible to protect fundamental rights and basic rights of the people.

(v) The Supreme Court judgements against the use of excessive powers of the State; the report of the Jeevan Reddy Commission in 2005; a committee headed by the Supreme Court Judge Santosh Hegde Committee report of 2013; and similarly, the Supreme Court judgements of 2016 and 2017 should be the guiding tools for a democratic country like India.

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ⁱ For details, visit <https://www.mha.gov.in> (Official website of the Ministry of Home Affairs, Government of India).

ⁱⁱ Bhattacharya, R. 2023. The Punjab Khalistan Movement: A History of separatism and Violence, and Amritpal Singh's Controversial Role in the Struggle for Sikh Independence. (March 13 Online publication). Also, read Kuldip Nayar and Khushwant Singh . 1985. Tragedy of Punjab: Operation Bluestar & After. Delhi: Vision Books Pvt Ltd India.

ⁱⁱⁱ Read, Goyal, Y. 2023. Armed Forces Special Powers Act (AFSPA): Necessity of Law Reformation Rather than Absolute Retention or Repeal. Policy Analysis Project. FLAME University.