

AN INSIGHT OF THE ARMED FORCES (SPECIAL POWERS) ACT, 1958

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Abstract

The Armed Forces (Special Powers) Act, 1958 is one of the first anti-terrorism legislation which was passed by the Parliament to counter terrorism and insurgency in the north eastern states of India.

This Act was enacted to bring under control, the areas that government recognized as "disturbed". AFSPA empowers the Governor of a state to declare any area within the territory of a state as "disturbed" and the army will be deployed in the region and Armed Forces (Special Powers) Act, 1958 will be implemented in that region.

Earlier the Act was implemented in Assam and Manipur but later, due to the creation of new states and union territories the Armed Forces (Special Powers) Act, 1958 was enacted in other north eastern states in the year 1971. Those states are Manipur, Tripura, Meghalaya, Mizoram and Arunachal Pradesh.

This Act has been facing a lot of criticism due to immunity which has been provided to the deployed army personnel in the north eastern states of India.

They have not even to keep in purview the International Law which provides that the inflicting of injury can be held valid only if it perpetuated by the principles of necessity, self-defense, proportionality and last resort.

Apart from the northeastern states "The Armed Forces (Special Power) Act, 1958 is imposed in two other states which are Jammu and Kashmir and Punjab with certain exceptions. However, all the three Acts which are imposed in three different states with respect to special powers granted to armed forces is mostly similar in all the aspect although due to language barrier and composition of the states they are slightly different.

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Introduction

The British had promulgated the Armed Forces Special Powers Ordinance in 1942 to suppress the Quit India Movement. On the lines of this ordinance, the Government of India promulgated four ordinances in 1947 to deal with internal security issues arising due to partition in Bengal, Assam, East Bengal and United Provinces. These ordinances, which later became acts, were repealed in 1957 but a year later, re-enacted in Assam and Manipur as Armed forces (Assam & Manipur) Special Powers Act 1958 due to growing Naga insurgency. Gradually, the scope of the act was extended to all seven states of North East. Later, the act was extended to Punjab and Chandigarh via Armed Forces(Punjab and Chandigarh) Special Powers Act in 1983. This act was withdrawn in 1997. In 1990, the Armed Forces (Jammu and Kashmir).

- Governor of the State and Central Government are empowered to declare any part or full of any state as disturbed area if it is in their opinion that it is necessary to prevent terrorist activity or any such activity that might disrupt the sovereignty of India or cause insult to the national flag, anthem or India's Constitution.
- Section 4 of the act gives special powers to army officers in disturbed area to shoot (even if it kills) any individual who violates law / or is suspected to violate law (this includes assembly of five or more people, carrying of weapons) etc. The only condition is that the officer has to give warning before opening fire.
- Arrest anybody without a warrant, and carry out searches without consent. Once a person is taken into custody, he / she has to be handed over to the nearest police station as soon as possible.
- Prosecution of the officer on duty needs prior permission of the Central Government.

The act has been justified by the security forces by citing the need for armed forces to have extraordinary powers to deal with militancy. However it has been a subject of intense criticism by the civil society, intellectuals and human rights organizations. The criticism of the act is based on the following premises:

Firstly, the provisions of the act are inherently flawed. The impunity provided by the law against any prosecution (except by central government permission) is manifested in cruelty and violation of human rights. There have been many cases of rape,

torture etc. by the army personnel but none has been prosecuted so far. The most brutal case was of the Thangjam Manorama Devi, a 34-year-old Manipuri, who was arrested by Assam Rifles in 2004 on grounds of being a member of the banned organization. It was claimed by her family members that she was raped and murdered by the security officers. A commission was also formed to investigate the case but the personnel of the Assam Rifles repeatedly denied appearing before the commission and justice is still awaited.

Secondly, the grounds of declaration of a disturbed area have not been defined in the act. Moreover, once an area has been declared disturbed it cannot be subjected to judicial review. Critics say that the law does not provide adequate safeguards in application of AFSPA.

Thirdly, the power to shoot to the extent of causing death, and search without warrant are in contravention to the Article 21 of the constitution, the right to life, which forms the foundation of all other fundamental rights.

The History of the Armed Forces (Special Powers) Act in North Eastern States of India

Originally, the Armed Forces (Special Powers) Act, 1958 has been traced to the Armed Forces (Special Powers) Act, 1948 which was enacted on the basis of the Armed Forces Special Powers Ordinance 1942 promulgated by the British on August, 15 1942 to suppress the "Quit India" movement. As per as the title suggest, that 'special powers' has been bestowed on 'special officers' of the Armed Forces to deal with an 'emergency'.¹ These 'special powers' include the power to use force (even to cause death) on any person who does not stop when challenged by a sentry or causes damage to property or resists arrests.² Specifically, the Ordinance gives complete immunity to the armed officers it provides that the act of an army personnel cannot be challenged in court by anyone except with the prior approval of a Central Government.³

The Armed Forces (Special Powers) Act, 1948 was enacted to replace four ordinances, 'The Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance', "The Assam Disturbed Areas

¹ *The Armed Forces (Special Powers) Ordinance, 1942*, 15 August 1942, at http://indianarmy.nic.in/Site/RTI/rti/MML/MML_VOLUME_3/CHAPTER__01/452.htm, accessed on August 17, 2016.

² "Section 2, *ibid.*

³ "Section 3, *ibid.*

(Special Powers of Armed Forces) Ordinance”, “East Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance, “The United Provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance”. All the subsequent ordinances were invoked by the Central Government to deal with the internal security situation in the country in the year 1947.⁴

The Armed forces (Special Powers) Act, 1948 was repealed in 1957 but it was implemented again with certain amendments in the year 1958 the reason for the implementation of the Armed Forces of the (Special Power) Act, 1958 was the cumbersome internal security situation which has arisen in the Naga Hills of the Assam and Manipur where Nagas were inhabited as they have opposed the merger of the Naga Hills to India on the ground that are different from Indians in the following context which is racially, socially and politically and they have even voted in the favor of the referendum declaring Independence of themselves in the year 1951 and have raised the banner of revolt. They have shown their non-acceptance to bear the citizenship of India by doing violent acts towards Indian states and chosen not to vote in the first general election in the year 1952 and also to boycott the Indian Constitution.

In order to deal with the rebellion which were created by the Naga the Assam Government has imposed the Assam Maintenance of Public Order Act in the Naga Hills in the year, 1953 and intensified police action against the rebels. After the situation of the effected area in Assam was worsened then the Assam Government has brought into effect military action of Assam Rifles in the Naga Hills and Assam Disturbed Areas Act, 1955 was enacted to bring a positive legal framework for the paramilitary forces as well as the armed state police to combat insurgency in the region.⁵The Assam Disturbed Areas Act, 1955 gave autonomous powers to the armed forces as Section 4 and Section 5 of the Assam Disturbed Areas Act, 1955 “A magistrate or police officer not below the rank of sub-inspector or havildar in case of the armed branch of the police or any officer of the Assam Rifle not below the rank of havildar/jamadar” have the power to arrest, shoot or kill any person on suspicion.

⁴ Report of the Committee to Review the Armed Forces (Special Powers) Act of 1958, Ministry of Home Affairs, Government of India, 2005, p 10.

⁵ Dinesh Kotwal, “The Naga Insurgency: the Past and the Future,” *Strategic Analysis*, Vol 24 (4), July 2000, p 751.

Section 6 of the Act provides protection against any kind of prosecution without the consent of Central Government.⁶ After the Assam Rifles and armed police could not control the Naga rebellion then the state administration asked the Central Government for its assistance then the central government sent the army to control the troublesome situation and to restore peace in the region.

Later, the President of India promulgated the Armed Forces (Assam and Manipur) Special Powers Ordinance on May 22, 1958 to confer 'special powers' on the armed forces as well as provide them with legal framework to function in the 'disturbed areas' of Assam and the Union Territory of Manipur.⁷

A bill was introduced in the Parliament on seeking to replace an ordinance with a bill on August 18, 1958 it was said in favor of the bill that it will enable the armed forces to function effectively in a situation which was marked by arson, looting and dacoity.⁸

The Armed Forces (Assam and Manipur) Special Powers Act, 1958 it was enforced in the Naga inhabited region. Section 3 of the Act empowers the governor and administrator of the state and union territories to use the armed forces to aid the civilian power if he was of the opinion that the situation was disturbed to demand such an action. He could do so by declaring an area/state or union territory as disturbed area through the notification issued in the official gazette.⁹

Section 4 confers upon the armed forces to any commissioned officer, warrant officer, non-commissioned officer, or any other person of equivalent rank in the armed forces, the power to shoot, to kill and arrest without warrant, any person he suspects, as well as to enter and search without warrant or destroy any premises he believes as sheltering the rebels.

Section 5 of the said act, mentions that any person who is arrested should be handed over to the nearest police station within 24 hours of the person's arrest.

⁶ The Naga Peoples' Movement for Human Rights vs. the Government of India, *The Supreme Court Judgment*, 27 November 1997, at <http://judis.nic.in/supremecourt/helddis.aspx>, accessed on 17 August 2016.

⁷ *The Armed Forces (Special Powers) Act, 1958* at http://mha.nic.in/pdfs/armed_forces_special_powers_act1958.pdf, Accessed on 17 August 2016).

⁸ Home Minister G B Pant as quoted in *The AFSPA: Lawless Law Enforcement According to the Law?* (New Delhi: Asian Centre For Human Rights, 2005), p 3.

⁹ *Report of the Committee to Review the Armed Forces (Special Powers) Act 1958*, edn 4, p 13.

Ultimately, section 6 provides the immunity to the armed forces personnel against the arrest or prosecution of the armed personnel for anything done or alleged to be done in the discharge of his official duties except after obtaining the consent of Central Government.

Further, amendments were brought into the Armed Forces (Assam and Manipur) Special Powers Act, 1958 a power to declare an area to be “conferred as disturbed” is upon the center and the state. The reason for this amendment was that since Article 355 of the Constitution of India stipulates that Central Government “protect every state against internal disturbance, it is considered desirable that Central Government should also have the power to declare areas as disturbed to enable its armed forces to exercise the special powers.”

Apart from the northeastern states “The Armed Forces (Special Power) Act, 1958 is imposed in two other states which are Jammu and Kashmir and Punjab with certain exceptions. However, all the three Acts which are imposed in three different states with respect to special powers granted to armed forces is mostly similar in all the aspect although due to language barrier and composition of the states they are slightly different.

Armed Forces (Special power) Act, 1958 and Human Rights

With the consent, of the Central Government and the Governor of a state any area within the territory of a state can be declared as a “disturbed” based on their judgment of “disturbed or dangerous situation” warranting used of armed forces. After the declaration of a territory of a state as “disturbed” then as per section 4(a) of the armed forces any commissioned officer, any warrant officer, non-commissioned officer or any other person of the equivalent rank in the armed forces have the power to fire upon, use force, even to cause death against any person who is acting in contravention of any law and order for the time being in force in the disturbed area prohibiting the assembly of five persons or more than that or carrying of weapons, or of things capable of being used as weapons, or of things capable of being used as weapons or of firearms, ammunitions or explosive substances.¹⁰As

¹⁰ The Armed Forces (Special Powers) Act, 1958, Section 4 – 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,-

Section 4(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

per section 4(c) any commissioned officer, any warrant officer, non-commissioned officer or any other person of the equivalent rank in the armed forces can arrest any such person who has committed cognizable offence without warrant or against whom reasonable suspicion exists that he has committed or about to commit a cognizable offence then any mentioned officer can use such force as may deem to fit to effect the arrest.¹¹ According to section 4(d) any commissioned officer, any warrant officer, non-commissioned officer or any other person of the equivalent rank in the armed forces can enter and search without warrant any premises to make any such arrest as aforesaid or to recover, save any person who is believed to be wrongfully restrained or confined, to restore any property which is reasonably suspected to be a stolen property or any arms, ammunitions or explosive substances believed to be unlawfully kept in such premises in these situations any mentioned officer can enter and search the premises without warrant and can use force which are necessary to effect the arrest.¹²

These special powers are provided to the armed force officers with complete immunity in the Act and there are not even single offences under which they can be charged and a wide discretion power is given to them to exercise their powers which can be used excessively and arbitrarily.

As per section 6 of the Armed Forces (Special Powers) Act, 1958 the persons and officers who are protected under this Act if anything is done by them or anything is purported to be done by them in exercise of the powers conferred under this Act, they cannot be prosecuted, neither they can be held under any suit nor

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;

¹¹ The Armed Forces (Special Powers) Act, 1958, Section 4(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;

¹² The Armed Forces (Special Powers) Act, 1958, Section 4(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.

there shall institute any legal proceeding except with the prior sanction of the Central Government.¹³

There are various provisions, which are enshrined in the Constitution of India, Criminal Procedure Code and International Covenant of Civil and Political Rights, 1978 that have been violated because of this Act.

- Use of Force

The Supreme Court has interpreted “the right to life” to include to live life with human dignity whereas, the term “dignity” as used in the provision, is something more than mere freedom from physical restraints or the bounds of prison.¹⁴ If an army personnel exercising his right to use of force and then as per section 6 of the AFSPA, 1958 and kills a person then the deceased person is denied of his right to live with dignity as the deceased person was not given the appropriate judicial remedy of hearing the case. Thus, if an army personnel who exercised his right under section 6 and killed a person then it makes him a judge of people’s life and the life of deceased person as a puppet in the hands of an army officer.

International law has laid down a comprehensive framework as per which the officer/person using a force or an excessive force has to justify himself that he did it because necessary for the self-defense and it is governed by the principles of necessity, proportionality and last resort.¹⁵ It imposes a duty on Government to prohibit by law all illegal, arbitrary and summary executions as well as to ensure that such specified executions are recognized as criminal offences and punished with penalties.¹⁶ However, under the Armed Forces (Special Powers) Act, 1958 the powers of the armed forces are arbitrary and excessive in nature and in the Act no offence is mentioned under which the officer inflicting the harm can be charged. Also, if we read the section 4(a) of the

¹³ The Armed Forces (Special Powers) Act, 1958, Section 6– Protection to persons acting under Act – 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.

¹⁴ *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295; *Sunil Bhatra v. Delhi Administration*, AIR 1978 SC 1675.

¹⁵ These include the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990; UN Code of Conduct for Law Enforcement Officials, 1979; and Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, 1989.

¹⁶ Ralph Crawshaw and Leif Holmstrom, *Essential Cases on Human Rights for the Police*, The Netherlands, 2006, p 40.

Armed Forces (Special Powers) Act, 1958 "...the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons..." In this, section the Army officer, State police officer and Central police officer has the power to use force upon, use of force and to even cause death too of that person who the officer thinks is acting in contravention of law and order or is causing unlawful assembly of five people or more than five people. In such situation it does not necessarily invoke the clause of self-defence because apparently the common citizen do not inflict the injury or pose as a danger to the officers. Therefore, the army officers do not require the force to deal with in such a situation.

Justice also requires that every individual accused be given all the protections of due process of law. Fair, just and reasonable procedure has been interpreted to include the right of speedy trial.¹⁷ This right encompasses all the stages of trial: investigation, inquiry, trial, appeal, revision and retrial. If the victim is killed on the basis of suspicion then he is deprived of all the protections of due process and it leads to direct subversion of the rule of law. These principles requires that the government exercise strict control, including putting in place a clear chain of command for all officials responsible for apprehension, arrest, detention, custody and imprisonment as well as those officials authorized by law to use of force and firearms. As in the case of the right of self-defence accorded to civilians, the onus of proof lies with the person operating under this clause. But the protection provided to armed forces against prosecution under section 7 renders this impossible and thereby violates the protection of the right to life.

- Power of Arrest and Detention

Article 22 of the Constitution of India has laid down that several safeguards on preventive and punitive detention including the right to be informed on the grounds of arrest, right to consult and to be defended by a lawyer of one's choice, right to be produced before a magistrate within 24 hours of arrest and freedom from the detention beyond the said period except by order of the magistrate. In keeping with constitutional guarantees, CrPC 1973 lays down several checks and balances in order to reduce the scope for arbitrary arrests and detention by the State, including the mandatory medical examination of the arrested person as per

¹⁷ *Hussainara Khatoon & Othrs. v. Home Secretary, State of Bihar*, AIR 1979 SC 1360.

Section 54¹⁸ and a magisterial inquiry of every case of death in police custody as per section 176.¹⁹

According to Human Rights Committee, if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. "It must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given, and court control of the detention must be available, as well as compensation in the case of a breach."²⁰

- Immunity

Under the Armed Forces (Special Powers) Act, 1958 blanket immunity is being provided to the commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area. No person can be prosecuted, neither a suit can lie nor shall any legal proceeding shall be instituted except with the prior 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. Also, the armed forces have certain level upto which services are provided and that level exists to prevent the misuse by armed forces however in context of uncertainty and

¹⁸ Criminal Procedure Code, 1973, Section 54 – Examination of arrested person by medical practitioner at the request of the arrested person. When a person who is arrested, whether on a charge or otherwise alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.

¹⁹ Criminal Procedure Code, 1973 Section 176(1) – Inquiry by Magistrate into cause of death

(1)When any person dies while in the custody of the police or when the case is of the nature referred to in clause (i) or clause (ii) of sub-section (3) of section 174] the nearest Magistrate- empowered to hold inquests shall, and in any other case mentioned in sub-section (1) of section 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.

²⁰ United Nations, Human Rights Council, General Comment No 8, Right to Liberty and Security of Persons (Article 9), ICCPR, 30 June 1982, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument) Accessed on August 19, 2016

harm which occur to the people of north eastern states the army is incapable to bring the main culprit into the public domain.

The drawback is that even if a case gets registered, the armed forces have used the immunity clause to refuse to cooperate with the investigations. To invoke section 7 of the AFSPA, 1958 the army claimed that the High Court does not even have the power or jurisdiction to entertain habeas corpus petition against it, without ascertaining whether the victim's family have obtained the Government permission to institute it.²¹

International law is absolutely clear in its rejection of such an immunity clause. In its concluding report on India, the UN Human Rights Council stated that the immunity clause "contributes to a climate of impunity and deprives people of remedies to which they may be entitled in accordance with Article 2, Paragraph 3, of the Covenant. It went on to recommend that the requirement of governmental sanction for civil proceedings be abolished and that it be left to the courts to decide whether proceedings are vexatious or abusive."²²

Conclusion

Towards the end, it is concluded that Armed Forces(Special Powers) Act, 1958 do not meet the requirement of both the domestic and international law. But it is acted as a tool to combat the undefined offences committed by the any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area. As per as the recommendation by the Justice B.P. Jeevan Committee which was appointed in 2004, to review the provisions of the said Act. The committee has recommended that the AFSPA, 1958 should be repealed and it should be included in the UAPA. Moreover, the powers of army personnel should be demarcated which is to keep strictly in adherence. Secondly, the committee provided that the grievance cell should be created in each district where such law is in force. However, since there were no improvement made in the north eastern states the report was laid down as futile by the Central Government.

In 2003 Supreme Court has appointed Santosh Hedge Committee to investigate six possible cases and abuse of AFSPA in Manipur.

²¹ Ashok Agrwaal in Search of Vanished Blood: The Writ of Habeas Corpus in Jammu and Kashmir: 1990-2004, South Asia Forum for Human Rights, Kathmandu, Nepal, 2008, p 65.

²² United Nations (1997), Human Rights Council, Concluding observations CCPR/C/79/Add.81 accessed on August 19, 2016

According to the report of the committee, five out of six killings were encounters fabricated by both the Assam Rifles and the Manipur Police. The committee also reported the use of disproportionate force and intrusion of security forces in areas which are not notified as disturbed areas. Even the local police was found to be encroaching its domain in using lethal force thus misusing the immunity granted to security forces. The Commission even went to the extent of saying that AFSPA was an impediment to achieving peace in regions such as Jammu and Kashmir and the northeast. However the government is yet to act on these recommendations.

Recently Tripura in May 2016 has withdrawn AFSPA which was imposed in Tripura in 1997 in the aftermath of several kidnappings by the National Liberation Front of Tripura (NLFT). It was being renewed every time for the last 18 years. This time when it came for renewal, the state government sought advice of all state departments including the security establishments. Since Tripura has not seen violence for many year by now and also doing well on economic front and has been one of the best governed states in the country, the act has been withdrawn. The outcomes will be certainly positive. Tripura now can promote itself as insurgency free-state and thereby try to attract larger investments for development and upliftment of the people. Given that law and order is a state subject and Tripura has established its reputation for good governance.

