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Annexure 6

Armed Forces Special Powers Act

Introduction

The Armed Forces (Special Powers) Act of 1958 (AFSPA) is one of the most draconian laws in India. The Government justifies this legislation by insisting that it is needed to stop the North East states from seceding. Under this Act, once an area is declared disturbed, security forces are given unrestricted and unaccounted power to carry out their operations.

Historical Background

At partition, the North East was cut off from what is now Bangladesh. As the British pulled out of the region, the inhabitants of the Naga Hills came together under the banner of the Naga National Council (NNC). The NCC aspired for self-governance. When the NNC proclaimed independence Indian authorities arrested the leaders. An armed struggle ensued. Furthermore, as famine broke out in Assam, in the 1960s, a relief team organized themselves into the Mizo National Front (MNF) and called for an armed struggle, "to liberate from Indian colonialism." The Government reacted to these uprisings in the North East by passing a series of repressive laws including the Armed Forces Special Powers Act.

The Act and Its Provisions

Section 3: Grants the Central Government¹and the Governor of the State, the power to declare an area disturbed. The Act only requires that the official be "of the opinion that whole or parts of the area are in a dangerous or disturbed condition such that the use of the Armed Forces in aid of civil powers is necessary." It does not describe specific circumstances to qualify for the declaration.

¹(1972 Amendment)

SAHRDC submission

The vagueness of this definition was challenged in *IndrajitBarua v. State of Assam*, but the court found it acceptable stating that the people and government both understand it. As a result, there is no safeguard in place to challenge the government's declarations.

Section 4: Grants the use force, in disturbed areas, to commissioned officers, warrant officers, and non-commissioned officers – only a private does not have them.

Under section 4(a), the army can shoot to kill for the commission or suspicion of the commission of the following offenses: acting in an assembly of five or more persons, carrying weapons, or carrying anything which is capable of being used as a fire-arm. The officer need only be "of the opinion that it is necessary to [act] for the maintenance of public order" and only give "such due warning as he may consider necessary."

Under section 4(b), the army can destroy property if it is a fortified shelter from where armed attacks are made or are suspected of being made, if it is an arms dump, if it is being used as a training camp, or if it is being used as a hideout.

Under section 4(c), the army can use any amount of force to arrest someone, without a warrant, if they have committed, are suspected of having committed, or are about to commit a cognizable offense.

Under section 4(d), the army can enter and search a structure, without a warrant and use force when necessary, to make an arrest or to recover any property, arms, or explosives.

Section 5: States that after a military arrest an individual must be handed over to the nearest police station with the "least possible delay". There is no definition for this phrase. Some case law has established that four to five days is too long, but the measure is circumstance dependent –no precise time has been established.

Section 6: Establishes that no legal proceeding can be brought against any member of the armed forces acting under AFSPA without the permission of the Central Government.

Legal Analysis

The declaration of a disturbed area effectively amounts to a state of emergency, but it bypasses the related Constitutional safeguards. Emergency rule can only be declared for a specified period of time, and the President's proclamation must be reviewed by Parliament. In contrast, the AFSPA is in place for an indefinite period of time and there is no legislative review. Nevertheless, the Delhi High Court found the AFSPA to be constitutional in *IndrajitBarua*.

When India presented its second periodic report to the United Nations Human Rights Committee (UNHRC) members of the UNHRC asked numerous questions about the constitutionality of the AFSPA and how it could be justified in light of Article 4 of the ICCPR. The Attorney General of India relied on the sole argument that AFSPA is necessary to prevent secession. He argued that the Indian Constitution, in Article 355,

made it the duty of the Central Government to protect the states from internal disturbance, and that there is no international duty to allow secession.

Violation of Article 21 - Right to Life

Article 21 of the Indian Constitution states that, "No person shall be deprived of his life or personal liberty except according to procedure established by law." The judiciary has interpreted that "procedure established by law" means a "fair, just and reasonable law."

Section 4(a) of the AFSPA, which grants Armed Forces personnel the power to shoot to kill violates Article 21. This law is not fair, just, or reasonable. It allows the armed forces to use an amount of force that is grossly out of proportion with the offenses committed. As pointed out by the UN Human Rights Commission, since "assembly" is not defined, it could well be a lawful assembly, such as a family gathering, and since "weapon" is not defined it could include a stone. Under section 4(a), the use of force is many times disproportionate, unjust, and arbitrary.

In the *IndrajitBarua* case, the Delhi High Court couched in the rhetoric of the "greater good," made it clear that Article 21 is not a fundamental right for all people. While people residing in disturbed areas are denied their right to life for the "greater good," residents of non-disturbed areas are not obliged to sacrifice their rights. This holding directly contradicts Article 14 of the Indian Constitution, which guarantees that, "the State shall not deny to any person equality before the law."

Article 22 - Protection Against Arrest and Detention

Article 22 of the Indian Constitution states that "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours."

Under the AFSPA, the use of "least possible delay" language has allowed security forces to hold people for days and months at a time. In *Nungshitombi Devi v. RishangKeishang*, CM Manipur (1982), the petitioner's husband was arrested under AFSPA, on 10 January 1981, and was still missing on 22 February 1981. The court found this delay unreasonable. In *Civil Liberties Organisation (CLAHRO) v. PL Kukrety*, (1988), people arrested in Oinam were held for five days before being handed over to magistrates. The court found this unjustified as well.

In *Bacha Bora v. State of Assam*, (1991) the court analyzed the language "with least possible delay." The court did not use Article 22 of the Constitution to establish a twenty-four hour rule, but rather said that "least possible delay" is defined by the circumstances of each case. In this case, section 5 was violated since the army had provided no justification for a two-week delay.

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Article 22 also states that a person must be informed about the grounds for their arrest as soon as possible. In contrast, under AFSPA section 4(c) a person can be arrested without a warrant and the armed forces are not obliged to communicate the grounds for arrest.

The Indian Criminal Procedure Code ("CrPC")

Chapter X of the CrPC discusses public order. Specifically, section 129 allows the police to disperse an assembly by use of force, but places limits on the extent of force to be used and the officers who can use it. Section 130 of the CrPC requires the Armed Forces to use as little force as necessary. In comparison, section 4(a) of the AFSPA grants the power to use maximum force to commissioned and non-commissioned military officers.

Section 131 limits the armed forces power to that of arrest and confinement and sections 129-131 defines unlawful assemblies as ones which "manifestly endanger" public security. Under the AFSPA these safeguards are nonexistent and assembly is merely classified as "unlawful" leaving open the possibility that peaceful assemblies could be dispersed with force.

Under Chapter V, Section 46, a police officer may only use "all means necessary" to ensure an arrest, if a person attempts to evade it. Furthermore, sub-section (3) limits this force to non-life threatening measures unless the offence committed is punishable by death or life imprisonment. On the other hand, Section 4(a) of the AFSPA allows officers, in pursuit, to shoot individuals suspected of lesser offenses. Section 4(a) violates the UN Code of Conduct for Law Enforcement Officials.

Military's Immunity: A Lack of Remedies

Section 6 of the AFSPA provides members of the Armed Forces with immunity for acts committed under it. In the North East, there has not been a single case where someone sought Central Government permission to file a suit. Additionally, when the armed forces are tried by a military court-martial, the public is not informed of the proceedings and the judgments are not published.

Habeas corpus cases have been the only remedy available for those arrested under the AFSPA - a remedy which forces the military/police to hand a person over to the court. Although useful these petitions will not lead to the Act's repeal nor will they directly punish offenders. Furthermore, in all seven North East states only the Guwahati High Court in Assam can hear habeas petitions.

Recent Jurisprudence

In May 2007, in *Masooda Parveen v. Union of India*, the Supreme Court undercut its ruling in *Naga People's Movement of Human Rights (NPMHR) v. Union of India*. In *NPMHR*, the Supreme Court upheld the constitutionality of AFSPA, but also placed checks on its power. Specifically, the Court held that the armed forces cannot 'supplant

or act as substitute' for a state's civilian authorities in the maintenance of public order, but are strictly required to act in cooperation with them.

The *Masooda* case was initiated by the widow of advocate, Ghulam Mohi-ud-din Regoo, who had been arrested, tortured and killed by security forces in Jammu and Kashmir. In 1998, an army unit searched his house and took him to the local headquarters as a suspected militant. According to his widow, Regoo was tortured mercilessly leading to his death where after explosives were placed on his dead body and detonated to hide the murder. The Army completely excluded the local administration and violated AFSPA when they failed to inform the State police of Regoo's arrest. The Army, however, argued that since Regoo's interrogation revealed information on hidden arms and ammunition, their first priority was to recover these weapons rather than to inform local police of the arrest. The Supreme Court failed to appreciate the gravity of the Army's failure and found the 6-hour time gap between arrest, death, and notification inconsequential. The Court echoed the Army's argument that the recovery of arms was a first priority taking precedence over the transfer of custody.

In May 2012, the Supreme Court heard the case *General Officer Commanding (Army) vs. CBI*. This case concerned two incidents of allegedly staged encounters where a total of ten people were killed. The CBI investigated both incidents and moved the court to initiate prosecution. The officers argued that they could not be prosecuted without prior sanction from the Central Government. At this stage the CBI had presented a charge sheet and the appeal focused on whether or not this presentation required government sanction and if the acts committed fell under AFSPA. Notably, the office of the Solicitor General of India represented both sides in both cases. The Army and the Union of India were appellants and the CBI were respondents. The court did not allow parties representing the deceased victims to intervene, they were not formally represented in this case and for that alone the Indian court grievously erred.

The court's judgment touched on three major issues: if sanction was required to prosecute the officers for this act, at what stage sanction is required, and if the sanction is required for a military court-martial. In regards to the first issue, the court held that there must be a 'reasonable nexus' between the action and the powers/duties conferred under the Act, and found such a nexus in this case. In regards to the second issue, the court held that sanction is only required once the offense becomes cognizance i.e. when prosecution begins, not merely when investigation commences and a charge sheet is presented. Lastly, the court held that sanction is not required for a court-martial, and that the Army could choose to prosecute through that avenue instead of the criminal court. If the Army chose a court-martial the trial would commence immediately, if criminal court were chosen and full prosecution commenced the CBI would have to apply to the Central Government for sanction.

Recommendations & Review

In November 2004, a five-member committee, chaired by a former Supreme Court judge, Justice B.P. Jeevan Reddy, was set up to review AFSPA. The Committee observed that

the Act was quite inadequate. While it acknowledged that the Supreme Court found the Act constitutional, it asserted that constitutional validity is not an endorsement of the desirability or advisability of the Act. The review stated that the Act had become a symbol of oppression, an object of hate, and an instrument of discrimination, and recommended repeal. The Committee suggested the creation of Grievances Cells located in every state where the Armed Forces are deployed, where citizens could acquire information on missing persons' whereabouts. The Committee's recommendations were presented to the Central Government in June 2005. While supported by the Administrative Reforms Commission and the United Nations, there has been no official government action.

In June 2007, the Second Administrative Reforms Commission (ARC), chaired by Mr. M. Veerappa Moily², published its fifth report on Public Order. In its assessment of AFSPA, the ARC relied heavily on the findings of Reddy's committee and also recommended repeal. The ARC's recommendations were submitted to the Government in June 2007 and were met with immediate resistance.

Recent Updates

In 2000, the Act prompted 24-year-old Irom Sharmila to begin a hunger strike. She was detained and force-fed by the State until 9 August 2016 when she gave up the fast.

On 27 May 2015, after 18 years the Tripura government decided to lift AFSPA. Chief Minister Manik Sarkar said, "We have reviewed the situation of the disturbed areas of the state after every six months and have discussed the issue with the state police and other security forces working in the state... they suggested that there is no requirement of the Act now as the insurgency problem has largely been contained." However, no public notification to date has been issued.

On 6 June 2016, the Army stated that there have been no recent cases of AFSPA misuse in the North East region. "In Eastern Command, during the time I have spent here, there has not been a single incident which has been reported," Eastern Army Commander Lieutenant General Praveen Bakshi said. He went on to ensure that any breach of AFSPA is dealt with firmly by the Army and that, "If the Army is required to handle insurgency, we require AFSPA... It is an enabling provision and not a draconian provision."

On the other hand in Ashok Agrawal's recent paper on Indian Human Rights, he stated that, "in several cases it was reported that the police explicitly said that irrespective of what the courts might say, their instructions were very clear: they were not to investigate or take any action on complaints against security forces." In that case, it seems that the Army Commander's statement would be true, since reports are never documented as formal complaints and instead just swept under the rug. This *de facto* immunity serves as another layer of protection atop the formal *de jure* immunity dictated in the AFSPA.

²Member of Lok Sabha, Ministry of Environment and Forests

Moreover, Agrawaal insisted that since cases that are actually initiated tend to die out in the perpetrator's favor we must, "commit to follow up on cases," we cannot let them weaken to a point where justice is never served.

On July 8, 2016 in *Extra Judicial Execution Victim Families Association (EEVFAM) v. Union of India*, the Supreme Court handed down a decision discussing fake encounters in Manipur, and "the illegality of the use of excessive and retaliatory force by the army, security forces, and police."³The Supreme Court noted that, the rule of law applies "even when dealing with the enemy," however this commitment is breached daily in Kashmir, Manipur, and other states under martial law.⁴ The Court went on to hold that an unending state of unrest could not, "be a fig leaf for prolonged, permanent or indefinite deployment of the armed forces as it would mock at our democratic process."⁵ As the recent 2016 Citizens' Statement on Kashmir dictated, "The time is long past, if ever there was when a solution to Kashmir problems could be achieved through force... urgent review of the AFSPA, leading to its repeal (is necessary)... We urge all political parties to pressure the Government to open a political dialogue in good faith."⁶In the *EEVFAM v. Union of India* decision, the Supreme Court stated, "We respectfully follow and reiterate the view expressed... in *Naga People's Movement of Human Rights* that an allegation of excessive force resulting in the death of any person by the Manipur Police or the armed forces in Manipur must be thoroughly enquire into."⁷ The Supreme Court concluded that further information was needed for the 1528 cases of alleged fake encounters brought before them and that once such information was collected by petitioners the cases would be reexamined.⁸ 62 of the 1528 cases had been documented and the NHRC had informed the Court that 31 of the 62 were not genuine encounters.⁹ The status of official charges against Army officers and compensation for victims is halted until the information for each case is collected.

Conclusion

The AFSPA is a lawless law. It does not behove any democratic polity to have such a law on the statute books.

³Aditya Nigam, Citizens' Statement on Kashmir, 12 July 2016, <https://kafila.org/2016/07/12/citizens-statement-on-kashmir/>; *Extra Judicial Execution Victim Families Association (EEVFAM) v. Union of India*, 2016 SCC OnLine SC 685.

⁴Id.

⁵ Id.

⁶Aditya Nigam, Citizens' Statement on Kashmir, 12 July 2016, <https://kafila.org/2016/07/12/citizens-statement-on-kashmir/>.

⁷*Extra Judicial Execution Victim Families Association (EEVFAM) v. Union of India*, 2016 SCC OnLine SC 685 at 180(c).

⁸Id. at 182.

⁹Id. at 181.