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Critical Analysis of the Federal Dichotomy Surrounding Armed Forces (Special Powers) Act, 1954

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ABSTRACT

The Armed Forces (Special Powers) Act, 1958 (hereinafter AFSPA), unveiled the huge center-state dichotomy in areas of "supremacy", "legislative power", "discretionary power" of the governor, ambit of "disturbed areas" and an armed personnel's' immunity; "inquiry" under AFSPA and finally differential center-state treatment when ironically they are working on same lines and under similar circumstances. How this enactment of 1958 formulated to deal temporarily with "disturbed areas" transformed itself to an almost permanent barbaric legislation and the federal conflicts surrounding this legislation, are precisely the areas that this article ponders upon.

INTRODUCTION

AFSPA was enacted as a short term measure for the "disturbed areas" of North East and Kashmir. For Kashmir, the enactment was enforced retroactively from July 05, 1990. The ruthless powers of having immunity while shooting anyone, the power to conduct a search without a warrant, unbridled power to comment sexual crimes, torture, killing without fear of accountability casts a doubt on the enforceability of Fundamental Rights enshrined in part III f the Indian Constitution as well as on the Parliament's legislative competence to enforce this Act. The Supreme Court upheld the validity of this brutal Act on a combined reading of article 355 and Entry 2A in List I of the Seventh Schedule of the Indian Constitution[1]. In fact, in the AFSPA related dispute, the Supreme Court only restricted itself to the question of Parliament's legislative competency to formulate this enactment, to which the Apex Court answered in positive[2].

The relation between Centre and Union is enumerated in part XI of the Constitution. Further, while the Centre can legislate for the entire territory of India, the States may legislate for the whole of the state or any part of it[3]. The division of subjects between the Centre and the States depending on the level of significance, i.e., national and local, respectively does not provide a clear cut demarcation for the allocation of subjects. The impossibility of a priori division of subjects as being of national or local importance, give rise to this dichotomy. As for the subjects who fall in the purview of Concurrent List, if any conflict arises, the decision of Centre prevails.

In the absence of a stable and definitive structure of federalism[4], India was confronted with a unique problem as opposed to other federations[5]. Depending on the peculiar exigencies and particular contour of the anion, a policy of "pick and choose" was used to mold a new form of federalism, called "cooperative federalism"[6]. The Constitution creates a unique Centre exclusive area[7], State exclusive area[8], and finally a concurrent area belonging to both the center as well as the state[9]. The Centre's dominance is assured via the phraseology of Article 246. Entry 2A of List 1 reads as:

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[1] Naga People's Movement of Human Rights v Union of India AIR 1998 SC 431
[2] Ibid
[3] The Constitution of India, 1950, Art. 245
[4] Constituent Assembly Debates XI, 11, 950, T.T.Krishnamachari
[5] Constituent Assembly Debates V, 1, 38, N.G.Ayyangar
[6] A.H.Birch, Federalism, Finance and Social Legislation in Canada, Australia, and the United States, 305 (Oxford University Press, London, 1955)
[7] Supra n.3, Article 246(1)
[8] Supra n.3, Article 246(3)
[9] Supra n.3, Article 246(3)

"Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any state in aid of the civil power, powers, jurisdiction, privileges, and liabilities of the members of such forces while on such deployment". The phrase "in aid" implies the Central and state forces need to work in consonance and harmony. The expressionism a by-product of internal regulations in a political society resulting in tranquility and hence synonymous with public peace and safety[10].

Also, the wide ambit of the phrase "public order" of Entry 1 List II was enunciated by the Apex Court in Madhu Limaye v S.D.M.Monghyr[11]:

"…the expression 'public order' includes absence of all acts which are danger to the security of the State and also acts which are comprehended by the expression '*ordre publique'* …but not acts which disturb only the serenity of others…"

DECODING THE ARMED FORCES (SPECIAL POWERS) ACT, 1958

The combined reading of Article 246 (1), Entry 2A of List 1, and article 355 provides legitimacy to AFSPA. Article 355 of the Constitution as well as the language of this particular act provides a window for the states to maintain tranquility via the aid of the Central Government. While the legislative construction provides a broad meaning to "public order"[12], the construction of this term in instances where fundamental rights of all the people get infringed, has been made somewhat narrowly by the Apex Court[13].

The tentacles of this brutal act spread to several areas classified as "disturbed areas"[14] in the northeastern region. Not only does the Act legally allow infringement of core fundamental rights including the right to life, right to seek remedy[15]; but also provides umbrella protection to army personnel in instances of "inhuman treatment" of civilians, which runs contrary to the basic tenet enshrined in article 7 of ICCPR. For an area to classify as "disturbed area" only the opinion of

[10] Ramesh Thappar v State of Madras, AIR 1950 SC 124; Brij Bhushan v Delhi, AIR 1950 SC 129
[11] AIR 1971 SC 2486; 1970 (3) SCC 746, para 16
[12] M.P.Jain, Indian Constitutional Law, 548 (Lexis Nexis Butterworths Wadhwa, 6th edn., 2006)
[13] Ibid
[14] Extrajudicial execution, disappearance, abduction, rape and torture are commoonplace human rights violations under the AFSPA regime
[15] AFSPA, 1958, S. 6: Prosecution cannot be initiated against any defaulting personnel while discharging his duty under the Act without express sanction from the Central Government.

Central Government matters[16]. Even the Supreme Court opined that the understanding of the government was sufficient to classify an area as "disturbed area"[17].

While S.3 allows shooting of probable violators of existing law, S.4 allows arrest without warrant that too via the use of all means necessary for the purpose. One of the most criticized provisions of this act is S.6 which requires prior approval of the Central Government to commence any legal action for any action of the army. There is no room for procedural safeguards provided under CrPC and the only protection that gets some breathing space is the handing over of the accused to the police station with "least possible delay"[18], this leaves huge room for deciding what amount of delay would be least. Contrary to the mandate of 24hrs for production before the magistrate, the criteria under s.6 provide a breeding ground for torture before the accused is brought to the police.

FEDERAL TENSION SURROUNDING AFSPA

Human rights atrocities have gained attention with the increasing focus on individualistic approach. Also, the calculated elite political tactics directed towards the gullible, have resulted in under-emphasis on the federal tension surrounding this act. The legislative power of the State with respect to AFSPA is narrowed to only "public order" under List II Entry 1. Hence, the use of armed forces, in this case, is made exclusively Parliament's prerogative under Entry 2A of List 1. The exigencies in a particular state and ground realities are better understood by the state concerned. The state is left at mercy of the center to determine if the aid of the forces need be given and once such forces are deployed the states' turn toothless even when these forces deviate from standard operating procedures or violate personal life and liberty of citizens under the act. Neither the states can knock the doors of the court to fix liability nor suo moto start inquiry and investigation in cases of even glaring human rights atrocities.

The federal tension concerning supremacy can arise in only 2 scenarios when either an area is proclaimed by the Centre as "disturbed area" while the states oppose it or when State via the Governor agrees that that area is disturbed but the Centre does not opine the same. Because of the Centre's omnipresence in this matter, the act is said to make "mockery of the federal structure"[19]. Also, there are instances where though the governor is supposed to act in consonance with the

[16] Ibid, S.3
[17] Indrajit Barua v State of Assam, AIR 1983 Delhi 513
[18] AFSPA, 1958, S. 6
[19] See "Political slugfest over AFSPA", The Arunachal Times, July 06, 2015

decision of the state, his sole discretion in certain exceptional circumstances might take priority, and even then the exercise of such discretion cannot be questioned in the court of law[20]. In fact the constituent assembly itself justified the discretionary power of the Governor on the ground that:

"…the governor will reserve certain things in order to give the President opportunity to see that the rules under which the provincial governments are supposed to act according to the constitution or in subordination to the Central Government are observed…"[21]

Thus, the Governor's decision if exercised arbitrarily or fancifully in furtherance of the Centre's agenda, disregarding the opinion of the state, further deepens the federal rift. Apart from this an additional major area of loggerhead arises if the executive discretion at deciding the "disturbed area" sees the opinion of the Centre differing from that of that state as then the decision of center prevails and that hampers the true spirit of cooperative federalism.

Another major area of conflict is the de facto as well as de jure immunity Sovereign immunity granted to all violators of human rights by the virtue of S.6 of the act[22]. Thus, even an appeal for CBI inquiry in cases of gross human rights violation would fail if there is no prior sanction of the central government to take away this immunity. But the Apex Court has clearly stated that the allegation of a dreaded element of the society, irrespective of his designation, be it a militant, terrorist or an insurgent, invites a thorough investigation because in a society based on rule of law individual liberties are of utmost importance[23]. The Court further stated that[24] :

"…Each instance of alleged extra- judicial killing of even such a person would have to be examined or thoroughly inquired into to ascertain and determine the facts. In an enquiry, it might turn out that the victim was in fact an enemy and an unprovoked aggressor and was killed in an exchange of fire. But the question for enquiry would still remain whether excessive or retaliatory force was used to kill that enemy…"

S.6 also creates huge room for differential treatment which provides umbrella protection to forces deployed by Centre but no equivalent protection of guaranteed to the State police forces. Further,

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[20] Jaykar Motilal C.R. Das v Union of India, AIR 1999 Pat 221
[21] Constituent Assembly Debates VII, 502, Dr. B.R.Ambedkar
[22] AFSPA, 1958, S.6 requires previous sanction of the Central Government for prosecution, suit or other legal proceeding against any person in respect of anything done or purported to be done in exercise of powers conferred by this act
[23] Extra Judicial Execution Victim Families Association v Union of India Writ Petition (Criminal) No.: 129 of 2012
[24] Ibid , para 144

the question of inquiring about any armed personnel does not arise without the stamp of the central government.

CONCLUSION

The ruthless provisions under the AFSPA act are a mockery of the fundamental rights guaranteed under the constitution. The act creates an unnecessary rift between the center and the state. The rift provides huge room for the political considerations to creep in even at the expense of poor innocent citizens. Thus, the need of the hour is keeping the concerns of the populace at the epitome of justice. Few suggestions in this regard are made by the author:

1. The Indian criminal justice system needs to be synchronized with the international humanitarian laws and human rights. In this regard, the Indian government should ratify and strictly adhere to the Genocide Convention and Convention against Torture.

2. Comprehensive laws concerning the victim and witness protection including the reparation rights need to be formulated.

3. Appropriate security laws should guarantee the accountability and liability of the armed forces. Such laws should be formulated in sync with the Jeevan Reddy Committee report which vocalizes more humane laws. For this, a training manual on human rights needs to be created and strictly adhered to by both the police as well as the army personnel.

4. The common law concept of sovereign immunity should be read in the light of cooperative federalism and the changing times where individualistic approach in cases of basic human rights violation is gaining prominence.

5. An organic center-state functioning needs to ensure that there is no unnecessary victimization. Precision in the definition of "disturbed area" would act as a check on politically motivated actions.

6. Finally, the absolute immunity clause under S.6 needs to be adorned with a more humane cloak. An inbuilt mechanism of checks can be introduced with the act itself to ensure that grave violation of human rights does not go unpunished.