

A CRITICAL ANALYSIS OF THE PROSPECTS OF AFSPA WITH REFERENCE TO INSURGENCY PROBLEM IN NORTH EAST INDIA

Prasenjit Borkakoti¹

I. Introduction

Insurgency and ethnic conflict leading to violence in the region is not a new concept. Problem of insurgency in the North-East has existed for more than half a century. Overwhelming presence of insurgents causes grave insecurity to the common people. It creates a situation where people have to live under constant fear and anxiety. Frequent declaration of bandh, forcible extortion and shelter by militants are sources of insecurity to the people. These conflicts and growth of insurgent groups are the result of the deprivation of north east India in comparison to the rest of India. If we look back into the history of north east India we will find that this region was never part of either the Hindu dominated kingdoms or the Mohammedan dominated empire. It was only the Britishers who for the first time were successful in bringing part of this region under the British dominion. However, again when the Britishers left India as an independent state the then Indian government did not gave much importance to this region which ultimately lead to the growth of insurgency and ethnic conflict. One of the first pieces of legislation enacted by the Indian government was the Armed Forces (Special Powers) Act of 1958 (AFSPA), which extended to the troubled Northeastern states of Assam and Manipur initially and entire north east India lately. It is also criticized on the ground that under the veil of insurgency problem, the state is taking away the fundamental rights provided by our constitution such as Article 14, 19, 20, 21 & 32² and few other rights such as rights provided under section 41D, 50, 50A, 54 & 57 of Criminal Procedure Code, 1973. The researchers in this paper will make effort to find out whether the powers provided under AFSPA are excessive in nature and if yes whether it is the demand of the situation.

II. Reasons for the growth of insurgency in North East India

A few of the reasons which led to the growth of anti-India tendency in the mind of the ethnic people of this region are as follows:

¹ Asst. Professor, Dr. R.K.B Law College, Dibrugarh, Assam

² Jain, M.P. (2008): *Indian constitutional law*; Nagpur: Wadhwa & Co.

(i) When the British left India, The Asiatic power compromised with each other as to who will occupy which part of the British colony. The new rulers assimilated and cooperated owing to their satisfaction and finally, the issues were settled in distant capitals. But the people who predominantly inhabited in the hilly areas and valleys for thousands of years were prevented from any consultation.

(ii) The kingdom of Manipur was re-constituted as a constitutional monarchy after the departure of the British from India by passing the Manipur Constitution Act, 1947. Under the new constitution elections were held and a legislative assembly was formed. In 1949, Mr. V.P. Menon, a senior representative of the Government of India invited the king to a meeting on the pretext of discussing the deteriorating law and order situation in the state of Shillong. Upon his arrival, the King was allegedly forced to sign under duress the merger agreement. This agreement was never ratified in the Manipur Legislative Assembly. Rather, the Assembly was dissolved and Manipur was kept under the charge of a Chief Commissioner.³ There were protests, but the carrot-and-stick policy launched by the Indian Government successfully suppressed any opposition.

(iii) Shortly, after the Britishers departed India, independent India proclaimed the Naga territory as a part of the new Republic. In the meantime, the NNC proclaimed Nagaland's independence since they wanted to unfold a legend of their own.⁴ Moreover, the NNC had signed an agreement namely, the Hydari Agreement between them and British Administration which accorded Nagaland a protected status for ten years, after which the Nagas would decide whether they should stay in the Union or not.⁵ In retaliation, the Indian authorities arrested the Naga leaders.⁶ This led to the occurrence of an armed struggle whereby large casualties befallen on either side.

(iv) The Tibeto Chinese language of the north east was initially not adopted as Indian language but it was only at the later stage that the Tibeto Chinese language of north east India was recognized as Indian language that too after the insertion of the eight schedule of the Indian constitution.

(v) The traditional trade routes with south East Asia and Bangladesh have been closed exacerbating isolation of the North eastern

³ Gen V K Singh, "AFSPA required by armed forces in certain areas", *The Indian Express*, 16 April 2012, <http://www.indianexpress.com/news/afspa-required-by-armed-forces-in-certain-areas-gen-v-k-singh/937486>

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

⁵ Ibid, p 752.

⁶ Dr. Pushpita Das, "The History of Armed Forces Special Powers Act", pp 10-21.

states which led them to become politically dependent and economically undermined.

(vi) In the first few five years plan North east India was kept completely out the Government of India's massive infrastructural development.

(vii) The region is also largely unconnected to India's vast rail system.

(viii) Assam produces one fourth of all the petroleum for India, but due to low technology it is processed outside of Assam so the state does not receive the revenues.

(ix) In the early sixties, a famine broke out in the Lushai hills of Assam. A relief team cried out for help from the Government of India but there was little help. This facilitated the formation of the Mizo National Front (MNF) and they called for an armed struggle, "to liberate Mizoram from Indian colonialism."

(x) The entire North-East has witnessed lots of illegal migrants from Bangladesh and Nepal which imposed a threat to the region by reducing the indigenous population. In lieu of this the student leaders of Assam formed a political party called the Assam Gana Parishad (AGP) and contested state elections and won. In 1984, the Assam Accord was signed with the Central Government. However, the provisions of the Accord were never implemented. Thus, due to the failure of the AGP to bring about a change in the state of Assam fostered the growth of the armed and overtly secessionist United Liberation Front of Assam (ULFA).

(xi) Another cause of insurgency in Manipur is the crisis of identity. The identity crisis among the Meitei youth has an important cause for the emergence of underground organisation in Manipur.

III. International Law on Human Rights *vis-à-vis* National Security Laws

The international human rights framework, conventions or treaties to which India was a signatory or ratifying party, also justified the limitations on governmental powers. However, the contemporary reality of Indian executive governance demonstrates the weaknesses and inadequacies of the treaties and conventions. As a result, police, military and Para-military forces continue to violate human rights. This problem underscores the need to develop a culture amongst law enforcement officials that respects human rights as a sine qua non for the preservation of the rule of law.⁷ Passing

⁷ Agarwal, H.O, (2011): Human Rights; Allahabad: Central Law Publication

certain laws under the guise of protecting national security in India offers an occasion to examine the human rights understanding in a constitutional sense. These laws granted significant powers to the Indian executive, thus providing greater opportunity for abuse and violation of fundamental rights.

Under relevant international human rights and humanitarian law standards there is no justification for such an act as the AFSPA. The AFSPA, by its form and in its application, violates the Universal Declaration of Human Rights (the "UDHR"), the International Covenant on Civil and Political Rights (the "ICCPR"), the Convention Against Torture, the UN Code of Conduct for Law Enforcement Officials, the UN Body of Principles for Protection of All Persons Under any form of Detention, and the UN Principles on Effective Prevention and Investigation of Extra-legal and summary executions.

IV. Role of Government in combating Insurgency & Enactment of AFSPA

The Government of India's primary interest in the North East was strategic, and so was its response to the problems. A series of repressive laws were passed by the Government of India in order to deal with this uprising. In 1953, the Assam Maintenance of Public Order (Autonomous District) Regulation Act was passed. It was applicable to the then Naga Hills and Tuensang districts.⁸ It empowered the Governor to impose collective fines, prohibit public meetings and detain anybody without a warrant.

On 22 May 1958, a mere 12 days after the Budget Session of Parliament was over, the Armed Forces (Assam-Manipur) Special Powers Ordinance was passed. A bill was introduced in the Monsoon session of Parliament that year. Amongst those who cautioned against giving such blanket powers to the Army included the then Deputy Chairman of the Rajya Sabha, Mr P N Saprú.⁹ In a brief discussion that lasted for three hours in the Lok Sabha and for four hours in the Rajya Sabha, Parliament approved the Armed Forces (Assam-Manipur) Special Powers Act with retrospective from 22 May, 1958.

V. Critical analysis of the provisions of AFSPA

AFSPA is a legislative tool enacted in 1958 in order to quell the ethnic uprising in Naga Hills district of the erstwhile state of Assam. After

⁸ 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

⁹ Report of the Committee to Review the Armed Forces (Special Powers) Act of 1958, Ministry of Home Affairs, Government of India, 2005, p 10.

four decades, the Black Law like a nuclear-chain reaction spread over the conflagration with dominion effect in all the seven states of North- East.

The Act confers special powers on armed forces personnel deployed in areas declared as disturbed or dangerous by the government. It confers on a warrant officer, or a non-commissioned officer, or any other person of equivalent rank of the armed forces the power to:

- Fire upon or otherwise force, even to the point of causing death of any person disregarding orders against unlawful assembly.
- Arrest without a warrant and using such force as may be necessary, any person who has committed a cognizable offence or against whom a reasonable suspicion exist that he had committed, or was likely to commit, such an offence.
- Enter and search any premises without an warrant only on mere suspicion.
- Destroy any arms dumps.
- Stop, search and seize any vehicle.

This vary act has various criticism from the time of its application. A few of the criticism are discussed below:

- The act empowers the armed forces to shoot to the extent of causing death if they think that the persons are carrying weapons and such an act is necessary to do so for the maintenance of public order. This power is unlimited and it can be used on mere suspicion. Secondly, the only condition imposed on the exercise of this power is that the person using it should give due advance warning as he may consider necessary. Thirdly, the words "carrying on of weapons" is not defined due to which it can be easily misused by the armed forces, because weapons may also include the '*daw*' or a '*knife*'¹⁰

- Again the powers given to the armed forces can be easily used only on mere suspicion such as, arrest, search, seize and even shoot to death. Thus this power is based on intention, but the question is that how can one challenge the act of armed forces on the basis of intention.

- The act does not require an army officer to inform the arrested person of the grounds of his or her arrest. Such a requirement is mandatory under ordinary law as provided under section 50 of the code of criminal procedure, 1973.

¹⁰ Amnesty International, India: '*Operation Bluebird*'- A Case Study of Torture and Extra Judicial Execution Manipur, London, October 1990

- Although the act cast a duty on the members of the armed forces exercising arrest powers under it to hand over any arrested person to the officer -in- charge of the nearest police station 'with the least possible delay' but the term 'with the least possible delay' seems to be vague because the term has not been defined and no fixed hour is prescribed.

- The Act also provides legal immunity to military personnel for their actions. Their prosecution cannot be initiated without the prior permission of the central government.

VI. Protest against the Act

There have been wide spread allegations of extra judicial killing, rape, torture, disappearance, harassment and other abuses committed by members of the armed forces acting under the protection of the act in different parts of the country.¹¹ An example of the impunity with which the armed forces have acted under cover of the act is provided by the following complaint from the state government of Manipur to the home minister of India, in the following words:

*"The civil law has unfortunately cease to exist in senapapti district of Manipur due to the excesses committed by the Assam rifles with complete disregard shown to the civil administration. The Assam rifles are running a parallel administration in the area. The deputy commissioner and superintendent of police were wrongfully confined, humiliated and prevented from discharging their duties by the security forces...."*¹²

This complaint has been endorsed by the joint secretary for home who, after visit to the area wrote as follows:

*"The Assam rifles authorities have been behaving with the civil administration in an extremely contemptuous manner and treat virtually every civil functionary as anti-national. This has led to the collapse of civil administration in the area as the government official visiting the area are scared of torture at the hands of Assam rifles."*¹³

Proposals have been made to amend section 4 which gives Armed forces powers to search premises and make arrests without warrants, use force, even to extent of causing death, destroy arms dumps, hideouts and to

¹¹ Devyani Srivastava, "Rights-based Critique of AFSPA", pp 64-78.

¹² Iyer, Venkat. (2000): *States of Emergency- The Indian Experience*; New Delhi: Butterworths India

¹³ Ibid

stop, search and seize any vehicle.¹⁴ In Manipur, Irom Sharmila Chanu is on a hunger strike since 2 November 2000 demanding the repealing of the Act from the state. Several high committee recommendations for repealing AFSPA have been rejected. Justice Jeevan Reddy Committee and Administrative Reforms Committee recommended that the Act should be scrapped.

VII. Judicial Response to the Act

The Armed Forces (Special Power) Act 1958 has been the subject of judicial challenge at both the High Court and Supreme Court levels. The judicial process had resulted in upholding the legal validity of AFSPA asserting that Parliament had the powers to enact such an Act. However, having decided to ask for its repeal it went onto to suggest that provisions of the Act could be incorporated in the Unlawful Activities Prevention Act, 2004. Thus, the Supreme Court in its 1997 judgment have upheld the need to empower the Armed Forces of the Union when they are deployed for prolonged period in an area declared to be “Disturbed”. The validity of AFSPA was challenged before the Supreme Court in the case of the *Naga People’s Movement of Human Rights vs. Union of India*.¹⁵ The five judge bench¹⁶ concluded that the above Act cannot be regarded as a colorable legislation or a fraud on the Constitution and the powers conferred under Sections 4 and 5 of the Act are not arbitrary and unreasonable and therefore not in violation of the provisions of the Constitution. However in this judgment the court issued some guidelines which had modified and made the act a bit humanitarian. Some of those important guidelines are discussed below:

- the court recognized that there was an implied duty cast on the government to review periodically the gravity of any situation which may give rise to a declaration of disturbed area and ruled that such review must be made at least once in every six months.

- the court held that every arrested person would have to be produced to the nearest police station soon enough as to enable him to be produced before nearest magistrate within 24 hours of arrest, as required by article 22 of the constitution.

¹⁴ Amnesty International, India: '*Operation Bluebird*'- A Case Study of Torture and Extra Judicial Execution Manipur, London, October 1990

¹⁵ 1998 2 SCC 109

¹⁶ The Supreme Court bench comprising Chief Justice, M.M. Punchhi and Justices, S.C. Agarwal, A.S. Anand and S.P. Bharucha passed their judgment on the case of *Naga People’s Movement of Human Rights Vs. Union of India*.

- the court laid down the requirement that any order of the government granting or refusing sanction regarding proceeding against any armed force acting under this act must be reasonable and should be accompanied by reasons'

Next round of collective effort was made by appointment of Justice Jeevan Reddy Committee (2004-05)¹⁷ which called for repeal of AFSPA.

VIII. Conclusion and Suggestions

The insurgency problem of north east India is a creation of government politics leading to the gross human rights violation of ethnic people and the other non-ethnic peoples residing in the region. However, the insurgency situation in the North East has worsened since the enforcement of various dominating acts such as the AFSPA since 1950. From the last five decades, the extra judicial executions of the innocent civilian populace and other forms of naked human rights violations remain a fact of life in the North Eastern states in India. The draconian law AFSPA also violates the vital provisions of the International covenants to which India is a party, infringes upon the basic tenets of civilized norms and 'Rule of Law' for the last half a century. Therefore, it ought to be scrapped from the statute book once and for all. And now even as the demand grows for repeal of AFSPA, to coincide with years of Irom Sharmila's fast-unto-death, there are efforts afoot to persuade us that we become pragmatic/realistic and settle for dilution of some provision or amendments to certain sections of AFSPA or for its step-by-step withdrawal from a state.

However, the defenders of human rights always defy the apparent legitimacy of such a law and raise the politico-historical basis of the upsurges that characterize the North East life. AFSPA is a crude recrudescence and revival of the British colonial statute and it should not be re-enacted in the post – colonial scenario under any circumstances. AFSPA is the best evidence of sustaining colonial law in a new post- colonial era.

Suggestions:

Recommendations of B.P. Jeevan Reddy committee should be accepted as soon as possible.

- (i) The members of the armed forces deployed in these areas should be given human rights training before deploying them.

¹⁷ The Jeevan Reddy committee was set up to review the AFSPA pursuant to the agitations in Manipur over the alleged rape and killing of Th. Manorama Devi by the Assam Rifles in 2004-05. Text available at <http://www.hindu.com/nic/afa/>

- (ii) If the AFSPA is not repealed, it must at a bare minimum comply with international law and Indian law standards. For example, Section 5 should clearly state that persons arrested under the Act are to be handed over to the police within twenty-four hours. Section 6 should be completely repealed so that individuals who suffer abuses at the hands of the security forces may prosecute their abusers.
- (iii) If the Indian Government truly believes that the only way to handle the governance of the North Eastern states is through force, then it must allow the ICRC to intervene. This can only have a calming influence. Acceptance of ICRC services would demonstrate that the fighting parties want to bring an end to the violence. The ICRC's involvement could help protect the residents of the North East who are currently trapped in the middle between insurgents and the military. *The AFSPA has become a symbol of oppression. Despite serious attempts at preventing its misuse, it will continue to remain a psychological barrier between the local people and the government in general and the army in particular.*