

## Revisiting AFSPA: A Moral Analysis and Beyond

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### Abstract

Armed Forces (Special Powers) Act, 1958 has been in place in the Jammu and Kashmir and certain regions in the North East for decades. The Act has been misused from time to time, resulting in harming civilians' lives. The controversy surrounding the Act generally viewed as draconian law has been doing the rounds in academic and political circles for long. Army excesses under the garb of AFSPA have been noted vociferously by several commissions of inquiry. However, the immunity provided by the AFSPA has prevented prosecution of the erring security personnel. The Act has legal status. But is it morally and ethical okay to bestow such sweeping powers onto the army when its misuse has been a common knowledge? This paper argues that the problem in disturbed areas, especially in the North East region, requires going beyond empowering the army to protect the territory. It requires a different imagination of what India is – or ought to be.

**Keywords:** AFSPA, Security Personnel, Governance, Moral Obligation

### Introduction

On 26<sup>th</sup> February, 1826, at the end of first Anglo-Burmese war, under the Treaty of Yandaboo signed between the British empires and Burma, the latter was made to give up its brief occupation of Assam, Manipur, Cachar, Jaintia and other territories in present day Myanmar. Until then, the territories in present day India were neither under the British rule nor the Burmese kingdom. In 1885, at the end of the third Anglo-Burmese war, Myanmar became a Province of British India. It was only in 1937 that Burma Province was sliced off from British India, culminating in attaining independence from the British Empire in 1948. When Burma Province separated in 1937, had territories Burma gave up in 1826 were separated too, it is highly unlikely that Nehru or anyone would have objected to it. However, ten years later, in the mid-forties when the Nagas under the leadership of Naga National Council (NNC) asserted their right to self-determination, declaring independence on 14 August 1947, Nehru was unwilling to accept this development. Nehru was perhaps led to take this stand to ensure the survival of the newly formed Union then.

After all, if one group is allowed to leave, another group might too ask for similar provision. But the political development then led Nehru to send in the army to quash Naga nationalism. The Parliament passed the Armed Forces Special Powers Act (Assam and

Manipur) in 1958, and that same year the President of India gave his assent on 11 September and empowered the army to quell the Naga nationalists who are in Assam and Manipur. (Nagaland as a state had not yet come into existence then.) Thus for the last fifty six years now, it is the quasi-military rule that has guided the political narrative in Nagaland. However, over a period of few decades, due to different political developments, the Act got implemented in different states with an altered name – Armed Forces (Special Powers) Act, 1958, commonly known by its acronym AFSPA.

### **Misusing AFSPA**

The Act has seven sections. The controversial clauses of the Act are in section four and section six. Section four gives different kind of power to the armed forces; and the different kinds of action to be performed by the armed forces is granted immunity in order to prevent the armed forces personnel from being dragged to the Court. Thus section six says '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.'<sup>1</sup>

Had the security personnel strictly acted within the power granted by the AFSPA, the controversy perhaps would not have surfaced to this magnitude as it is today. Unfortunately, it has so happened that even when there was gross violation of the limit set by the Act, no security personnel has ever been prosecuted for the last fifty six years. This has led the people in the 'disturbed area' to interpret the Act as giving the security personnel the license to do virtually every possible action the security personnel could imagine. In September 2012, Human Rights group submitted to the Supreme Court a list of 1,528 cases of killing in Manipur alone since 1979. In January 2013, Supreme Court set up a Judicial Commission on AFSPA headed by retired Supreme Court Judge Santosh Hedge, with J M Lyngdoh, former Chief Election Commissioner and A K Singh, a retired IPS officer as members to investigate six sample cases of fake encounter deaths. Interestingly the Commission found that all the sample cases of encounters were fake ones thus giving credence to the public perception about high-handed and arbitrary behaviour of armed forces personnel deployed in disturbed areas.

On 15 July 2004, a group of elderly women, with their clothes totally stripped off, came out to the street in Manipur to protest against the killing of Thangjam Manorama. Manorama was picked up on 11 July by security forces for her association with an outlawed group Revolutionary People's Front. The same day her dead body was found by a villager. Forensic tests later confirmed that she was raped before spraying bullets on her private parts. She was also brutally tortured.

Irom Sharmila has been on fast unto death since 5 November 2000. She began her fast to demand lifting of AFSPA after 10 civilians, while waiting for bus at Malom, were killed by security forces on 2 November 2000. The security forces claimed that the firing that led to the death of the civilians was in response to the bomb attack by a local militant group. Whether the civilians were caught in cross firing as the security forces retaliated in self-defence or whether the security forces projected their anger on the civilians and shot them after the bomb attack, the truth would never be known as the Court would never give its judgement. These are sample instances where the actions of the armed forces require

critical scrutiny and yet the immunity provided by the Act apparently comes in to protect the erring security personnel.

### **A Moral Inquiry**

Article 3 of Geneva Conventions make provisions for the protection of non-combatants, surrendered armed forces and wounded soldiers in times of armed conflict. In the context of AFSPA, though it is a case of armed conflict, it is rather a counter-insurgency measure taking place within a nation-state. Since it is only a counter-insurgency measure, protection for the lives and property of the non-combatants (civilian population) must be given top priority. After all, the reason for the existence of the state is to protect the lives and property of the citizens. Given these circumstances, there are some moral issues that must be raised: Section 6 of the Act does not provide immunity to those security personnel who commit rape or kill innocent people through fake encounter. However, the fact that there has been no prosecution of the security personnel who rape and kill by means of fake encounter surely raise a moral question: Is the dignity and lives of the people of the 'disturbed area' lesser than those of other region? If such vices take place in other regions of the country, whether one is in the army or judiciary or whatsoever, the perpetrators of the crime would be booked and brought to the Court for trial. The inability of the judiciary to act even when the army personnel acted beyond their power given to them is morally untenable.

AFSPA has been in place for 56 years now. If strong armed tactic is to work, it is plausible to suppose that it should have worked. One of the reasons why it has not worked is because strong armed tactics tends to feed public anger against the security personnel. Given this inadequacy, it is high time to put effort on to winning the trust of the local people, a key tactic in counter-insurgency, instead of providing such sweeping power to the armed forces. Fifty six years of strong armed tactic, resulting in the loss of innocent lives in term of several thousand and a huge expense of tax payers' money, is long enough to indicate that the Act is politically inexpedient and morally unjustifiable.

In Chhatisgarh alone, from January 2008 till June 2013, 485 security forces lost their lives due to Maoist violence; besides 696 civilians were killed<sup>2</sup>. From 2005 to May 2010, altogether 10,268 civilians and security forces have lost their lives due to violence related to Maoist activities in the country<sup>3</sup>. Despite such recurring violence and killings, there is no AFSPA in the Maoist-hit areas. Compare this with Nagaland which has no death of security forces for over fifteen years now due to militancy related activities. This discriminatory policy between different regions makes present AFSPA morally untenable.

### **Way Forward**

The status of AFSPA as it is today requires a change. Given the kind of power permitted by the Act, will the security personnel necessarily cross the limit and act beyond the power given by the Act? If the answer is positive, then one must insist that the Act as it is, cannot be sustained. A society built on the pillar of liberal democracy cannot justify an Act that will necessarily prompt security personnel to act beyond the powers given, and then provide immunity for the illegal action committed on the civilians.

However, say, rape or fake encounters are not a necessary outcome of the Act, and then punish those personnel who acted beyond the power given to them. Any security personnel

who commit rape or kill innocent people through fake encounter, should be court martialled or be brought to the Civil Court. Cases of rape or fake encounter deaths are not granted immunity by AFSPA. The recent ruling that sentenced seven soldiers to jail for killing three Kashmiri youth by luring them with the promise of jobs is a major landmark in providing justice to the victims of army excesses. No one would seriously raise voice had the security personnel acted only against the armed militant groups. Security personnel engaging in an armed combat to kill the armed militant groups is a fair fight. It is such cases of fake encounter killing or rape that bring bad name to the army and also the AFSPA for providing immunity to the erring army personnel.

Need of the hour is to ensure creative engagement of armed forces in combating separatist violence without putting common people under any kind of harassment. More space about North East needs to be given in mainstream Indian imagination and remaking of modern India. Thus pursuing a more inclusive policy must include taking that which comes out from the North East –both thoughts and practice –as authentic Indian. Unless such a more robust state's policy and public imagination are pursued, political resentment and discriminatory tone will dominate the political narrative of those who belong to the North East region.

Maintaining status quo and letting the armed forces guide the political narrative of the North East region is a indolent and politically inexpedient way of providing governance in the region. As of today the main emphasis is on protecting the territorial integrity; the human or the cultural element of the people in the region is not given significance. More and more educated young of the region are aware of the rights provided by international law and the Constitution to the people unlike it was in the past. And when such discriminatory policy of the government are read and observed, it is the tone of resentment that begins to shape the thinking of the educated younger generation. It is high time for New Delhi to review the Act and begin providing multi-pronged governing policy instead of continuing lackadaisical policy for the North East region.

Given that the North East region has become part of the nation-state called India, addressing the economic and political discomfort prevailing in the region is a moral obligation on the part of the government in New Delhi. The historical baggage cannot be ignored. The different ethnic groups which enjoyed significant measure of freedom to exercise its way of life before the arrival of the British Raj and its subsequent incorporation into the Raj has to be taken into consideration, and therefore providing space to allow the people to retain and reconstruct their way of life is a moral obligation the state must bear in mind in addressing the economic and political matters in the North East region.

#### **End-notes**

1. [http://www.mha.nic.in/sites/upload\\_files/mha/files/ArmedforcesAct1958-290813.pdf](http://www.mha.nic.in/sites/upload_files/mha/files/ArmedforcesAct1958-290813.pdf) ( Accessed on 14.09.2014).
2. <http://ibnlive.in.com/news/over-1100-killed-in-naxal-attacks-in-last-6-years-chhattisgarh-govt/407206-3-235.html> ( Accessed on 20.9.14)
3. [http://zeenews.india.com/news/nation/naxal-violence-over-10000-people-killed-in-past-five-years\\_636453.html](http://zeenews.india.com/news/nation/naxal-violence-over-10000-people-killed-in-past-five-years_636453.html) ( Accessed on 20.9.14)