

AFSPA needs another hard look

03, May 2019 The Tribune



Sankar Sen

It's not possible to combat insurgency in the North-East or Kashmir without the armed forces. However, over-exposure and over-deployment of the Army in aid of civil power has to be avoided. It tends to brutalise the Army, making it vulnerable to temptations and allurements.



Sankar Sen

Former Director, National Police Academy

In its election manifesto, the Congress has promised review of the controversy-surcharged Armed Forces Special Powers Act (AFSPA). The BJP has said that any such move will take away the shield from the Army and weaken the architecture of national security. It bears recall that during the UPA rule, Prime Minister Manmohan Singh promised to consider amendments to the Act with a view to making it more humane. But this could not be effectuated because of reservations from the Army. The Act was passed in 1958 to counter the growing insurgency in the North-East, and later, extended to Jammu and Kashmir.

Indeed, some of the provisions of the Act are draconian. Section 4 authorises the arrest of any person who has committed a cognisable offence, or against whom there is a reasonable suspicion that he is about to commit such an offence. It also grants special powers to the armed forces to destroy structures used as hideouts, or training camps, or a place from where attacks are likely to be launched. It provides power to the armed forces to open fire, even to the extent of causing death, if prohibitory orders banning the assemblage of five or more persons, or carrying of arms and weapons are in force in the prohibited area. Section 6 gives immunity to the armed forces discharging duties under the Act from prosecution, or other legal proceedings, except with the permission of the Central government.

Many human rights activists and civil society groups have denounced the Act as regressive, and very often it has been abused and misused by the armed forces. And, it has shielded extra-judicial killings, rape and torture by the personnel of the armed forces and fuelled public anger and disaffection towards the Indian state. In March 2012, the UN pronounced AFSPA as violative of international law. Some other UN treaty bodies have expressed the same view.

The armed forces, on the other hand, are of the clear view that diluting the provisions of the Act will be counter-productive and adversely affect operations of the security forces in hostile areas. Without the protection of the Act, the security forces will not be able to function effectively and proactively in the insurgency-prone areas.

The constitutionality of the Act had earlier been questioned before the apex court on the ground that it is repugnant to the rights to equality and federal structure of the Constitution. A five-member Constitution Bench of the Supreme Court in *Naga Peoples' Movement for Human Rights vs Union of India* (1998) held that the legislation was constitutionally valid. "It was harsh in the face of it, but it was a necessity." The court concluded that declaration under Section 3 of the Act has to be of a limited duration and subject to periodic reviews before expiry of six months, and a person arrested under Section 4(c) of the Act should immediately be handed over to the officer in charge of the nearest police station, so that he can be produced within 24 hours before the Magistrate, after such an arrest.

There was widespread agitation against the Act following the custodial death of a woman in Manipur. Against its backdrop, the Government of India set up a committee under Justice Jeevan Reddy, a retired SC judge, to review the Act. It was a recognition by the government that the provisions of the impugned legislation needed a hard and careful look. The Justice Reddy Committee, after examining various stakeholders, came to the conclusion that the Act should be withdrawn. It recommended that it will be necessary to insert appropriate provisions in the Unlawful Activities (Prevention) Act (1957) to provide the mechanism through which the security forces can be deployed in areas, as and when necessary. The committee also recommended the creation of a grievance cell in each district where armed forces are deployed. This can be an independent body that will be empowered to enquire into violation of rights by the citizens. The proposed Chapter 6(a) in AFSPA should contain dos and don'ts for the armed forces during operations, as embodied in the apex court judgment.

The second Administrative Commission (5th Report, June 2007) endorsed the recommendations of the committee that AFSPA should be repealed and provisions of law needed for the effective operation of the security forces can be incorporated in the Unlawful Activities (Prevention) Act (1957).

Time has now come to take a clear decision on the continuance of the Act, without further dithering. The hard fact has to be acknowledged that it is not possible to combat insurgency

in the North-East or Kashmir without the presence of the armed forces. The truth of the matter is that the state police forces with inadequate strength and insufficient weaponry will be unable to overcome the challenges posed by the trained insurgents aided and abetted by foreign powers. At the same time, over-exposure and over-deployment of the Army in aid of civil power has to be avoided. It tends to brutalise the Army, making it vulnerable to temptations and allurements. The personnel of the armed forces require clear and specific provisions for their effective functioning and operations, even as aberrant officers, responsible for violation of human rights, have to be made accountable and brought to book with a view to keeping the Army's morale and discipline up.

The Supreme Court has now ended the immunity of the armed forces from prosecution by laying down that they should be subjected to a thorough inquiry if they have committed any serious offence.

Numerous allegations of brazen misuse of AFSPA, and serious violations of human rights by the security forces, in many instances, have come before the NHRC. The NHRC cannot directly probe into the complaints because of the restrictions imposed by Section 19 of the Protection of Human Rights Act (PHRA). It calls for reports from the authorities of the armed forces, and makes recommendations for punishment of aberrant officers, and payment of compensation to the victims. This vicarious system of enforcing accountability does not function satisfactorily. Amendment to the PHRA to allow the NHRC to directly probe allegations against the armed forces is necessary.

Tripura, bounded on three sides by Bangladesh, withdrew AFSPA in 2015. The state police, without the umbrella of the Act, have been able to successfully combat insurgency. Protection accorded to the public servants under the provisions of Criminal Procedure Code (CrPC) has been found to be sufficient. Indeed, it has been found that wherever AFSPA is operational, the Army's role becomes pivotal, and the police are relegated to the backstage.

A clear decision on the Armed Forces Special Powers Act brooks no delay. Experience bears out that replacement of AFSPA by Unlawful Activities (Prevention) Act will not pose problems for dealing with insurgency except in a very problematic area like Jammu and Kashmir. In such states, it should be implemented only in problematic and insurgency-torn areas, instead of being extended to the whole state.