THE ARMED FORCES SPECIAL POWER ACT AND THE QUESTION OF HUMAN RIGHTS

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INTRODUCTION

The Armed Forces Special Powers Act, 1958 (hereinafter referred to as the AFSPA) has been a contentious one since its very inception. Its application and justification in the north-eastern states of India has put it under the scanner time and again bringing with it the debate on human rights, their nature and the question of violation of such rights.[1] The aim of this paper is not concentrated on a critique of the AFSPA, rather the aim here is to highlight the issue surrounding the discourse on Human Rights, in the modern context, which is exceedingly nuanced and complex. The AFSPA an ongoing issue serves to characterize in stark hues the very nature of this discourse. It shows that the nature of the discourse is a 'cross-talking' of human rights, a lack of synthesis on what human rights are and how such conceptions differ in differing paradigms and the dominant paradigm in today's context is the perspective of the state. This facet is brought to clearer focus by applying Emanuel Wallerstein's Core-Periphery theory to the problem of AFSPA and thereby shows how the state is at the very Centre of the human rights dynamism.

This argument is juxtaposed in the context of the idea of collective rights and minority rights as human rights as naturally the claim of moral stance and repugnancy of the AFSPA are made by the ethnic minority as a collective.[2] It is this fascinating aspect of their claim of human rights violation in the larger landscape of issues of universality of human rights and who orders the discourse today that makes intriguing reading, bringing into sharp focus a concept of human rights that I call 'personal' as opposed to a universal notion of human rights and thereby suggesting a need to rethink what human rights actually is. I do not make a claim as to how to aind the minimum standard of human rights but rather the objective is to trace and an attempt to highlight a new understanding of the nature of human rights discourse and show that how the problem of its qualities, or lack thereof, of universality and commonality can be traced to an individual paradigm that is often unique to each individual situation.

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[1] Rupert Emerson, *The Fate of Human Rights in the Third World*, 27(02) World Politics 201 (1975)

[2] Id. The author points out that there are more than sixty international treaties and conventions dealing with human rights issues, thus showing the evolution of human rights into a concrete force.

The Armed Forces (Special Powers) Act of 1958 (AFSPA) is one of the more draconian legislations that the Indian Parliament has passed in its 45 years of Parliamentary history. Under this Act, all security forces are given unrestricted and unaccounted power to carry out their operations, once an area is declared disturbed. Even a non-commissioned officer is granted the right to shoot to kill based on mere suspicion that it is necessary to do so in order to 'maintain the public order'.

This argument is juxtaposed in the context of the idea of collective rights and minority rights as human rights as naturally the claim of moral stance and repugnancy of the AFSPA are made by the ethnic minority as a collective. It is this fascinating aspect of their claim of human rights violation in the larger landscape of issues of universality of human rights and who orders the discourse today that makes intriguing reading, bringing into sharp focus a concept of human rights that I call 'personal' as opposed to a universal notion of human rights and thereby suggesting a need to rethink what human rights actually is. I do not make a claim as to how to find the minimum standard of human rights but rather the objective is to trace and an attempt to highlight a new understanding of the nature of human rights discourse and show that how the problem of its qualities, or lack thereof, of universality and commonality can be traced to an individual paradigm that is often unique to each individual situation.

PROBLEMS OF INTEGRATION

Much of this historical bloodshed could have been avoided if the new India had lived up to the democratic principles enshrined in its Constitution and respected the rights of the nationalities it had taken within its borders.[3] But in the over-zealous efforts to integrate these people into the 'national mainstream', based on the dominant brahminical Aryan culture, much destruction has been done to the indigenous populations.[4]

[3] To elaborate further, a lot of the demand for human rights is seen from the basis of the natural rights argument that certain rights are absolutely essential for humans and therefore they must have them. Contrast this with the social justice argument which traces human rights origin to the need to do social justice. Who does social justice? It is the state, and it is the very same state which determines the nature of the rights acceded to. See Jack Donelly, "Human Rights as Natural Rights", 4(03) Human Rights Quarterly 391 (1982), who discusses Charles Beitz's hypothesis that the aspiration of social justice is the root of human rights.

[4] Robert McCorquodale, "Self-Determination: A Human Rights Approach", 43(04) The International and Comparative Law Quarterly 857 (1994)

Culturally, the highly caste ridden, feudal society is totally incompatible with the ethics of North-East cultures which are by and large egalitarian. To make matters even worse, the Indian leaders found it useful to club these ethnic groups with the adivasis (indigenous peoples) of the sub- continent, dubbing them 'scheduled tribes'. As a result, in the casteist Indian social milieu, indigenous peoples are stigmatized by higher castes.

Politically dependent, the North East is being economically undermined; the traditional trade routes with South East Asia and Bangladesh have been closed. It was kept out of the Government of India's massive infrastructural development in the first few five-year-plans. Gradually, the region has become the Indian capitalist's hinterland, where local industries have been reduced to nothing and the people are now entirely dependent on goods and businesses owned predominantly by those from the Indo- Gangetic plains. The economic strings of this region are controlled by these, in many cases, unscrupulous traders.

IMPUNITY TO THE ARMED FORCES

Under Section 6 of the Armed Forces Special Powers Act, "No prosecution, suit or other legal proceedings 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 powers conferred by this Act."

This provision violates India's treaty obligation under Article 2(3) of the ICCPR according to which: "Each State Party to the present Covenant undertakes:

To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;[5] To ensure that the competent authorities shall enforce such remedies."

[5] See Louis Henkin, "The Universality of the Concept of Human Rights", 50(06) Annals of the American Academy of Political and Social Science 10 (1989).

What is more worrying is the fact that Section 6 of the AFSPA has been overtaken by Section 197 of the Criminal Procedure Code102 (CrPC) amended in 1991 to provide virtual impunity to the armed forces. Impunity has been made a feature of normal criminal jurisprudence. In fact Section 197 of the CrPC has made section 6 of the AFSPA redundant. If the Central government were to give permission under section 197 of the Cr P.C., there is no reason as to why the same permission will not be granted under Section 6 of the AFSPA. In its Concluding Observations, the United Nations Human Rights Committee noted "with concern that criminal prosecutions or civil proceedings against members of the security and armed forces, acting under special powers, may not be commenced without the sanction of the central Government. This contributes to a climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2, paragraph 3, of the Covenant".

There are adequate legal guarantees for preventing vexatious and frivolous actions. However, by making it mandatory to seek prior permission of the Central government to initiate any legal proceedings against the armed forces, the Executive has expressed its lack of faith in the judiciary of the country.

LEGAL ANALYSIS

The Armed Forces Special Powers Act contravenes both Indian and International law standards.

This was exemplified when India presented its second periodic report to the United Nations Human Rights Committee in 1991. Members of the UNHRC asked numerous questions about the validity of the AFSPA,[6] questioning how the AFSPA could be deemed constitutional under Indian law 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 the AFSPA is a necessary measure to prevent the secession of the NorthEastern states. He said that a response to this agitation for secession in the North East had to be done on a "war footing." 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 dutyunder international law to allow secession.

[6] Stamatopolou, "Indigenous Peoples and United Nations - Human Rights as a developing Dynamic", 16(01)Human Rights Quarterly 58 (1994) at 62

This reasoning exemplifies the vicious cycle which has been instituted in the North East due to the AFSPA. The use of the AFSPA pushes the demand for more autonomy, giving the peoples of the North East more reason to want to secede from a state which enacts such powers and the agitation which ensues continues to justify the use of the AFSPA from the point of view of the Indian Government.

INDIAN LAW

There are several cases pending before the Indian Supreme Court which challenge the constitutionality of the AFSPA. Some of these cases have been pending for over nine years. Since the Delhi High Court found the AFSPA to be constitutional in the case of Indrajit Barua and the Gauhati High court found this decision to be binding in People's Union for Democratic Rights, the only judicial way to repeal the act is for the Supreme Court to declare the AFSPA unconstitutional.

It is extremely surprising that the Delhi High Court found the AFSPA constitutional given the wording and application of the AFSPA[7]. The AFSPA is unconstitutional and should be repealed by the judiciary or the legislature to end army rule in the North East.

- **Violation of Article 21 - Right to life**

Article 21 of the Indian Constitution guarantees the right to life to all people. It reads, "No person shall be deprived of his life or personal liberty except according to procedure established by law." Judicial interpretation that "procedure established by law means a "fair, just and reasonable law" has been part of Indian jurisprudence since the 1978 case of Maneka Gandhi. This decision overrules the 1950 Gopalan case which had found that any law enacted by Parliament met the requirement of 'procedure established by law'.

Under section 4(a) of the AFSPA, which grants armed forces personnel the power to shoot to kill, the constitutional right to life is violated. This law is not fair, just or reasonable because it allows the armed forces to use an excessive amount of force. This directly contradicts Article 14 of the Indian Constitution which guarantees equality before the law. This article guarantees that "*the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*" The AFSPA is in place in limited parts of India. Since the people residing in areas declared "disturbed" are denied the protection of the

[7] See H.K.Barpujari, The Comprehensive History of Assam, Vol. 1, (Gauhati: Publicaton Board Assam, 1990).

right to life, denied the protections of the Criminal Procedure Code and prohibited from seeking judicial redress, they are also denied equality before the law. Residents of non-disturbed areas enjoy the protections guaranteed under the Constitution, whereas the residents of the Northeast live under virtual army rule. Residents of the rest of the Union of India are not obliged to sacrifice their Constitutional rights in the name of the "greater good".

- **Protection against arrest and detention - Article 22**

Article 22 of the Indian Constitution states that "(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."[8] The remaining sections of the Article deal with limits on these first two sections in the case of preventive detention laws. On its face, the AFSPA is not a preventive detention law therefore the safeguards of sections (1) and (2) must be guaranteed to people arrested under the AFSPA.[9]

THE VOLATILE NATURE OF HUMAN RIGHTS: QUESTIONABLE FOUNDATIONS?

A review of literature on the nature of what human rights are suffices to show the very volatility of the concept. It is commonly accepted that there exists this notional entity called human rights but proscribing boundaries to it seems to be a fool's task. Let us as the starting point take the fundamentals of human rights and dignity as is embellished in the United Nations Charter. Oppression has always taken the form of denial of human rights. These emerging states have in their early existence stressed on the need to protect the human rights and have looked to champion their cause. This posits interesting connotations in the context of this paper – considering that it is the objective of the state to protect the human rights of its people but what happens when it is the question of the power and continued dominance and legitimacy of the state versus the space needed for human rights to prosper especially

[8] David R. Penna & Patricia J. Campbell, 19(01) Thirdly World Quarterly 7 (1998

[9] Federic L.Kirgis, Jr., "The Degrees of Self-Determination in the United Nations Era", 88(02) The American Journal of International Law 304 (1994)

amongst the marginalised sections? In such a situation, what are the human rights that are in question? Are human rights a necessary subset and gift of obligation to the state

AFSPA & THE HUMAN RIGHTS OBLIGATION: WHAT OBLIGATION?

The AFSPA was enacted in 1958 with the objective of suppressing the brazen naga insurgency and rebellion. The Act was meant to be valid for a period of one year only. The reason behind this was that the Act was known to be a tough measure and if it could not cure the problem facing it in that span of time, continued use would in all likelihood lead to excesses. That the AFSPA has failed in its objective is a stark reality. The tension has only further escalated with the ethnic militant groups on one side and the army on the other. The harsh nature of the act has led to a series of human rights violations being perpetrated by the army which has seen the local populace become all the more hostile to them. The demand for separation and autonomy from the regime of what they conceive to be an apathetic and vengeful state has only grown since the inception of the act. Clearly then there are two things prima facie wrong. First, it is the fact that the act in its application seems to have long been run to the ground and secondly, the nature of questions that have evolved out of its application do not seem to meet a common consensus. Section 4 posits a major problem in that it allows the state machinery to deprive any citizen of their live if they are suspected to be carrying anything that can be used as a weapon. The language is ambiguous and leads to long shadows for violators to hide in. Furthermore the sole qualification is that the armed force officer only has to give "such due warning as he may consider necessary." When force of such kind is authorized, it must be within prescribed limits. These limits do not exist in this case and a strong case for arbitrariness may be made out.

The Act in its provision has created further resentment and a sense of injustice in that it provides for legal immunity to members of the armed forces forcing the notion that the guilty may often go scotfree and appearing to give a blank chit to engage in excesses. The reasons for the 'alleged' human rights abuses perpetrated by the armed forces under this act can be traced to the wide powers that the act vest in the armed forces to arrest people without warrants, and to shoot to kill in order to maintain public order. What can be enumerated here is that the situation at the time of enactment was not one where the public order in terms of the people of the territory was under danger rather the state's ability to remain in control and legitimate that was in danger by the attempts of denial of the existing state structure by these groups. Let us take an example of the implementation of this draconian law.

HUMAN RIGHTS OBLIGATIONS - WHAT, WHEN, WHY?

Human Rights have attained a significant position in the International discourse today. As such, in India remains a signatory to the ICCPR amongst others. Article 4 of the ICCPR provides for the framework within which emergency may be declared. What is required is that there must be a 'public state of emergency' and must threaten the very life of the state and the state must also proclaim such emergency situation. According to the United Nations Human Rights Committee, measures so taken must be of an exceptional and temporary nature. Manipur has been declared a disturbed area on September 8, 1980 justifying the application of the AFSPA there. Under our legal norms, this has to be reviewed every six months with the effect that Manipur has been a disturbed area for the last twenty years and the number of secessionist/separatist outfits have grown from five to twenty five in that period. There has also in addition been external pressure from other non-state actors on the nature of the AFSPA. The United Nations Human Rights Committee for example after examining India's third periodic report expressed its regret on the approach of the state to the 'disturbed area situation' in Manipur and its continued usage of the AFSPA.

LEGAL ARTICULATION: ONE OF BLIND DEFIANCE?

In Naga Peoples Movement for Human Rights v. Union of India, the supreme court held that the act was valid given the context in which it was enacted and where it was implemented, it was a reasonable and justified means even though it may appear to be harsh on the face of it, it was a necessity. The legal machinery is but an extension of the state – the state in disguise. The reliance on the competency of the Parliament dealing with matters of public Order under Entry I of List II has already been disputed in this paper. Another contention upheld by the Court is that the deployment of the Army is mean to supplement and not replace the existing state machinery.[10] The larger issue here is that the army does not seem to be doing any 'supplementing'; rather its excesses has propagated further violence and resentment towards state structure. Rather than trying to achieve public order it is actively contributing to public enragement.

RECOMMENDATIONS

[10] H.K.Barpujari, The Comprehensive History of Assam, Vol. 1, (Gauhati: Publicaton Board Assam, 1990).

The only way to guarantee that the human rights abuses perpetrated by the armed forces in the North East cease is to both repeal the AFSPA and remove the military from playing a civil role in the area. Indeed with 50% of the military forces in India acting in a domestic role, through internal security duties, there is a serious question as to whether the civil authority's role is being usurped. [11]As long as the local police are not relied on they will not be able to assume their proper role in law enforcement. The continued presence of the military forces prevents the police force from carrying out its functions. This also perpetuates the justification for the AFSPA.

Among the recommendations made by the Working Group on Arbitrary Detention, from 1994 was the statement that "*Governments which have been maintaining states of emergency in force for many years should lift them, limit their effects or review the custodial measures that affect many persons, and in particular should apply the principle of proportionality rigorously.*"

The National Human Rights Commission is now reviewing the AFSPA. Hopefully, the NHRC will find that the AFSPA is unconstitutional and will submit this finding to the Supreme Court to influence its review of the pending cases. However, the NHRC has a very limited role. In past cases, the Supreme Court has not welcomed such intervention by the NHRC. This was evident when the NHRC attempted to intervene in the hearing against the Terrorist and Disruptive Activities (Prevention) Act.

CONCLUSIONS

The Supreme Court of India reached a low for its lack of enforcement of fundamental rights in the Jabalpur case of 1975. The country was in a state of emergency and the high courts had concluded that although the executive could restrict certain rights, people could still file habeas corpus claims. The Supreme Court rejected this conclusion and said the high court judges had substituted their suspicion of the executive for "*frank and unreserved acception of the proclamation of emergency.*" Noted Legal luminary, H M Seervai notes that this shows the lack of judicial detachment. Indeed, it exemplifies deference to the executive which leaves the people with no enforcement of their constitutional rights. Jabalpur has since been deemed an incorrect decision, but it remains an apt example of the judiciary's submission to the executive.

[11] David R. Penna & Patricia J. Campbell, 19(01) Thirdly World Quarterly 7 (1998)

The Supreme Court has avoided a Constitutional review for over 9 years, the amount of time the principal case has been pending. The Court is not displaying any judicial activism on this Act. The Lok Sabha in the 1958 debate acknowledged that if the AFSPA were unconstitutional, it would be for the Supreme Court to determine. The deference of the Delhi High Court to the legislature in the Indrajit case also demonstrates a lack of judicial independence. Moreover, there is an absence of creative legal thinking. When the Guwahati High Court was presented with international law argument in People's Union for Democratic Rights, the court ignored it. Justice Raghuvir said in a personal interview that the court could not use international law. If the government has signed an international convention like the ICCPR which requires the government to guarantee rights to its citizens, how can these are enforced if the judiciary does not turn to the text of the convention in its rendering of decisions? The courts are not turning to the spirit of the law which guarantees the fundamental right to life to all people and as a result violations of human rights go unchecked.