

THE ARMED FORCES (SPECIAL POWERS) ACT, 1958, AND FEDERAL CONFLICTS

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Abstract

Enactment of the Armed Forces (Special Powers) Act, 1958, has led to bitter Centre-State conflicts. This paper attempts to analyse some of such conflicts by categorising them into: (1) conflict with respect to 'legislative power' under the Constitution; (2) Centre-State conflict on supremacy; (3) question with regard to the "discretion" of the Governor of a State while administering the terms of AFSPA; (4) question with regard to the scope of "disturbed areas"; (5) conflict on account of 'immunity from prosecution' granted to armed forces' personnel; (6) conflict on account of differential treatment between central and state forces working under the same conditions and performing the same tasks; and (7) conflict with respect to 'inquiry' as specified in the AFSPA.

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I INTRODUCTION

ON 15 AUGUST, 2017, India shall be blessed with seventy years of independence and democracy. Concurrently, however, India shall also bear witness to the 59th year of promulgation of the Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958) [hereinafter 'AFSPA']. The AFSPA was enacted in 1958, as a short term measure, vouchsafing special powers upon members of the armed forces in "disturbed areas" in the then State of Assam and Union Territory of Manipur.¹ However, it still continues to remain in force in five North-Eastern States of India.

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¹ Ramchandra Guha, *India After Gandhi: the History of World's Largest Democracy* 326 (Harper Collins), New Delhi, 2007). AFSPA was intended as an immediate response to curb the movements of Naga rebels prevalent in the southern hills of the State of Assam.

In fact, even the Indian state of Jammu and Kashmir has not been spared. In September 1990, Parliament passed the Armed Forces (Jammu and Kashmir) Special Powers Act which was deemed to have come into force retrospectively from July 05, 1990 and has remained in force since.²

Equipped with unbridled powers, which include powers to shoot to kill with impunity, arrest on flimsy pretext, conduct warrantless searches, and demolish structures in the name of “aiding civil power”, soldiers have raped, tortured, and killed citizens for the past fifty-nine years without fear of being held accountable, consequently resulting in a fierce discourse focused on the constitutional validity of AFSPA with respect to: (i) part III (*i.e.*, Fundamental Rights) of the Constitution of India, 1950 [hereinafter ‘Constitution’]; and (ii) legislative competence of the Parliament to enact AFSPA.³ However, this conflict in the centre-state relationship has often been neglected and ignored by the academia.

Before discussing centre-state conflicts ensuing from the enactment and promulgation of AFSPA it is imperative that the legislative scheme under the Constitution is briefly discussed.

II LEGISLATIVE SCHEME UNDER THE CONSTITUTION OF INDIA, 1950

The basic provisions laying down the scheme for distribution of powers between the Union and the States are found in part XI of the Constitution, entitled “Relations between the Union and the States”. Part XI is divided into two chapters: (a) “Legislative Relations” – which establishes the list system; and (b) “Administrative Relations”. From the territorial point of view, Parliament may legislate for the whole of India, or a part thereof while the respective state legislatures may

² Muzamil Jalil, “Explained: AFSPA - Disturbed Areas Debate in J&K” *The Indian Express*, available at: <http://indianexpress.com/article/explained/explained-afspa-disturbed-areas-debate-in-jk/> (last visited on May 11, 2017).

³ The Supreme Court of India while adjudging the dispute regarding the Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958), restricting itself to an analysis of the legislative competence of the Parliament to enact AFSPA, was pleased to uphold its constitutional validity and astoundingly did not by any means allude to Article 21 of the Constitution of India, 1950 which recognises the right to life of every person (See *Naga Peoples’ Movement of Human Rights v. Union of India*, AIR 1998 SC 431). The Supreme Court held that the Act draws its legitimacy from a combined reading of art. 355 and Entry 2A, List I (Seventh Schedule) of the Constitution. While it is admitted that the Act was not challenged as being violative of the constitutional provisions such as arts. 14, 19 and 21, but it is pertinent to note that as far back as in 1952 it had been remarked by the Supreme Court in *State of Madras v. V.G. Row*, (1952) SCR 597, that in so far as fundamental rights are concerned “this court has been assigned the role of a sentinel on *qui vive*” by the Constitution.

legislate for the whole or any part of the state.⁴ The very basis of a federal constitution is the division of powers and functions between the centre and the states.⁵

A basic analysis activated to adjudge what subjects ought to be designated to the different levels of government in a federation is that functions of national significance ought to go to the centre, and those of local interest should remain with the states. It is a broad assessment, an array of *ad hoc* formula, and does not prompt to any uniform pattern of allocation of subjects between the two tiers of government in all federal countries. The lack of uniformity stems from the inability to decide, on any *a priori* basis, as to which subjects are of general or national importance, and which of them are of local importance.⁶

Certain subjects like defence, foreign affairs, and currency are regarded as being of national importance *everywhere* and are thus given to the Centre. But, beyond this, what other subjects should be allocated to the Centre depends on the exigencies of the situation existing in the country, the attitudes of the people and the philosophy prevailing, at the time of constitution-making, and the future role which the Centre is envisaged to play.

There is a third area in which both the centre and the states may operate simultaneously. This unique feature, however, is subject to the overall supremacy of the centre in so far as any law enacted on any subject which falls under the concurrent list shall prevail over any law enacted by any State.

The seventh schedule to the Constitution of India

An elaborate scheme of allocation of powers and functions between the Centre and the States is expounded in the Constitution.

The members of the constituent assembly believed that India was peculiarly faced with uniquely extraordinary issues which had not “confronted other federations in history.”⁷ Recourse to theory was not an avenue for the solution of these problems because “federalism” lacked a “stable

⁴ The Constitution of India, 1950, art. 245.

⁵ In this connection see also *Dharam Dutt v. Union of India*, (2004) 1 SCC 712.

⁶ M.P. Jain, *Indian Constitutional Law*, 531 (Lexis Nexis Butterworths Wadhwa, Gurgaon, 6th edn., 2006).

⁷ See, Constituent Assembly Debates V, 1, 38, N.G. Ayyangar.

meaning” and was “not a definite concept”.⁸ Our Constitution-makers, therefore, pursued “the policy of pick and choose” to carefully determine as to what would “suit the genius of the nation best ...”⁹ “This process produced new modifications of established ideas about the construction of federal governments and their relations with the governments of their constituent units.”¹⁰ The Constituent Assembly shaped a new variant of federalism – ‘cooperative federalism’¹¹ – whereby the framers of the Constitution apportioned functions between the Centre and the States in a way as to suit the peculiar exigencies.

The Constitution seeks to create three functional areas: (i) an exclusive area for the centre *vide* article 246(1); (ii) an exclusive area for the states *vide* article 246(3); and, (iii) a common or concurrent area in which both the centre and the states may operate simultaneously subject, however, to the overall supremacy of the centre *vide* article 246(2). These three functional areas enlisted in the seventh schedule, as: (a) list i of the seventh schedule (‘union list’); (b) list ii of the seventh schedule (‘state list’); and list iii of the seventh schedule (‘concurrent list’), contain corresponding entries which demarcate the fields of legislation within which respective legislature can operate.¹²

The phraseology of the various clauses of article 246 is such as to secure the principle of Union supremacy. The legislative power conferred on the centre under article 246(1) [union list] and article 246(2) [concurrent list] predominates over the power conferred on the state legislature under article 246(3) [state list]. Under article 246(4), Parliament is given power to make a law on any matter in any list for any territory not included in a state.

Allocation of subjects to the lists is by way of a mere enumeration of broad categories.¹³

⁸ See, Constituent Assembly Debates XI, 11, 950, T.T. Krishnamachari.

⁹ See, Constituent Assembly Debates XI, 5, 654, L.K. Maitra.

¹⁰ G. Austin, *The Indian Constitution: Cornerstone of a Nation*, 231(Oxford University Press, New Delhi, 2nd edn., 2013).

¹¹ A.H. Birch, *Federalism, Finance, and Social Legislation in Canada, Australia and the United States*, 305 (Oxford University Press, London, 1955).

¹² *Supra* note 4, art. 246.

¹³ *Supra* note 11, at 305.

Central legislative sphere *vide* entry 2A, list I

Entry 2A, List I reads:¹⁴ “Deployment of any armed force of the Union or any other force subject to 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 Centre may, in order to ensure the maintenance of public order, choose to deploy its armed forces or any other force under its control “in aid of the civil power.”¹⁵ The phrase “in aid of the civil power” in this entry indicates that in order to help and supplement the efforts of the state forces in restoring public order, Centre may deploy its forces. It is required that the Central forces and the state authorities act in tandem for this purpose.

States’ legislative sphere *vide* entry 1, list II

Entry 1, list II reads:¹⁶ “Public order (but not including [the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof] in aid of the civil power).”

The term “public order” is of very wide import.¹⁷ The Supreme Court has explained the term “public order” in *Madhu Limaye v. S.D.M. Monghyr* as:¹⁸

‘Public order’ no doubt requires absence of disturbance, of a state of serenity in society, but it goes further. It means what the French designate ‘*ordre publique*’, defined as an absence of insurrection, riot, turbulence, or crimes of violence. The expression ‘public order’ includes absence of all acts which are a danger to the security of the State and also acts which are comprehended by the expression ‘*ordre publique*’ explained above but not acts which disturb only the serenity of others.

¹⁴ *Supra* note 4, schedule vii, list i, entry 2A.

¹⁵ *Supra* note 6, at 534.

¹⁶ *Supra* note 4, schedule VII, List II, entry 1.

¹⁷ *In Re Natrajan*, AIR 1965 Mad 11.

¹⁸ AIR 1971 SC 2486; 1970 (3) SCC 746, para 16.

The expression “public order” signifies that state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the government. It may thus be equated with public peace and safety.¹⁹

Enactment of AFSPA

The Parliament enacted the AFSPA which draws legitimacy from a combined reading of Article 246(1), Entry 2A of List I and article 355 of the Constitution. The AFSPA provides for the “deployment of any armed force of the Union ... in aid of the civil power”²⁰ to maintain “public order.”²¹

It has often been argued that towards the fulfilment of the duty cast upon the Centre *vide* article 355 of the Constitution, to protect states from internal disturbances, the Centre has aided the civil forces of the states concerned by enacting the AFSPA. Besides, it has also been insisted that the Act provides a window to the states to seek the assistance of the Centre in ensuring peace and tranquillity.

III TOWARDS UNDERSTANDING THE ARMED FORCES (SPECIAL POWERS) ACT, 1958

The AFSPA, a law in force in “disturbed areas”, which includes ample locations in North-East India, has facilitated grave human rights abuses²² by vouchsafing, across-the-board, vast powers on the armed forces deployed by the Centre in these areas. The Act violates the non-derogable provisions of the Constitution, including the right to life, the right to remedy²³ and the right to be free from arbitrary deprivation of liberty. In addition, it accords no protection from “inhuman treatment” as enshrined in article 7 of the International Covenant on Civil and Political Rights (ICCPR) to which India is a state party since 1979, besides added treaties and standards.

¹⁹ *Romesh Thappar v. State of Madras*, AIR 1950 SC 124; *Brij Bhushan v. Delhi*, AIR 1950 SC 129; *Supdt., Central Prison v. Ram Manohar Lohia*, AIR 1960 SC 633.

²⁰ *Supra* note 4, schedule VII, List I, entry 2A.

²¹ *Id.*, schedule VII, List II, Entry 1.

²² Extrajudicial execution, disappearance, abduction, rape and torture are commonplace human rights abuses under the AFSPA regime.

²³ Armed Forces (Special Powers) Act, 1958 (Act 28 of 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, which in itself is a rare eventuality.

It is pertinent to note that “for purposes of legislative entries the term ‘public order’ is given a broad meaning.”²⁴ The Supreme Court has, however, underscored that the state cannot violate fundamental rights of citizens in the garb of maintaining “public order.” The term “public order” has been consistently “interpreted somewhat narrowly” in matters concerning violation of fundamental rights of all individuals.²⁵

Section 2 of the Act sets out definitions, but leaves abundant undefined, viz (a) “disturbed area”; (b) material particulars for objective assessment of disturbance in an area for its proclamation as a “disturbed area”; and (c) such acts as would constitute offences by armed forces personnel acting beyond or contrary to the intent of AFSPA.

A “disturbed area” is any area declared as such under section 3 of the Act.²⁶ The governor of that state or the administrator of that union territory or the central government, in either case, is empowered to declare any area to be a “disturbed area”.²⁷ Astoundingly, it falls short of describing the circumstances under which the authority would be justified in making such a declaration. Rather, the Act only evinces the fanciful and merely requires such authority to be “of the opinion”²⁸ that either the whole or part of the area “is in such a disturbed or dangerous condition such that the use of armed forces in aid of the civil power is necessary.”²⁹ Still more grotesque was the judgment in *Indrajit Barua v. State of Assam*³⁰ where the Supreme Court was pleased to declare that the lack of precision in the definition of a “disturbed area” was not an issue because “the government and people of India understand its meaning.” As such, since the declaration depends on the satisfaction of the Central Government or the state executive, it is only the government’s understanding which classifies an area as disturbed. There is no mechanism for the people to challenge this opinion!

²⁴ *Supra* note 6, at 548.

²⁵ *Ibid.*

²⁶ *Supra* note 23, s. 2(b).

²⁷ *Id.*, s. 3.

²⁸ Surprisingly, in the present scheme of AFSPA, formation of “opinion” as regards the concerned area being “in such a disturbed or dangerous condition such that the use of armed forces in aid of civil power is necessary” need not be premised on any material requirement.

²⁹ *Supra* note 23, s. 3.

³⁰ AIR 1983 Delhi 513.

The armed forces personnel (including non-commissioned officers), upon any such declaration under section 3 of the Act, are vested with unbridled powers extending to shoot to kill³¹ any person suspected to be violating any existing law or order prohibiting assembly of more than five persons.³² And, to justify the invocation of this provision, the officer need only be ‘of the opinion that it is necessary to do so for the maintenance of public order’ and only give “such due warning as he may consider necessary.” Further, the armed forces have the power to arrest without warrant, even on the basis of any suspicion,³³ besides employing such force as may be necessary to effect arrest.³⁴

What is still worse is that the armed forces are guaranteed a virtual impunity as no person can start a legal action against any member of the armed forces for anything done or purported to be done under the Act, without the permission of the Central Government.³⁵ There is no mechanism to ensure checks as the Act does not define even a single offence while vouchsafing such wide discretion. Thus, at odds are each of the provisions of the Act with liberal principles and fundamental rights.³⁶

None of the procedural safeguards³⁷, provided for under the Constitution or the Code of Criminal Procedure, 1973 (Act 2 of 1974) [hereinafter ‘Cr PC.’], are afforded to an arrestee under AFSPA. Additionally, under section 5 of AFSPA it is only required that an arrested person should be handed over to the police station with “the least possible delay” while the Act is completely silent on what constitutes least possible delay. The main purpose of specifying 24 hours for

³¹ The power to shoot to kill with impunity extends even in circumstances where the security personnel are not at approaching risk.

³² *Supra* note 23, s. 4(a).

³³ *Id.*, s. 4(c).

³⁴ *Id.*, s. 4(d).

³⁵ *Id.*, s. 6.

³⁶ Provisions of AFSPA are antithetical, *inter alia*, to democratic principles, constitutional rights, rule of law, right to a free and fair trial (in so far as AFSPA has been used and misused to summarily execute people even on mere suspicion), freedom from oppression.

³⁷ Extensive safeguards keep check, on the power to arrest, with the aim to uphold the avowed fundamental right to liberty. Safeguards on preventive and punitive detention – right to be informed of the grounds of arrest, right to consult and to be defended by a lawyer of choice, the right to be produced before the magistrate within 24 hours, and freedom from detention beyond the said period except by an order by the magistrate – are laid down by Article 22 of the Constitution. In keeping with the Constitutional guarantees, sections 50A, 54 and 176 of the Code of Criminal Procedure, 1973 (Act 2 of 1974) lay down several checks and balances in order to reduce scope for arbitrary arrests and detention by the State.

production before the Magistrate, as mandated under the Constitution and the Cr PC., was to avoid any scope of torture in police custody and bring the police power of arrest under judicial scrutiny at the earliest. In practice, therefore, AFSPA is in violation of the right to be free from torture, and cruel and degrading treatment.³⁸

IV AFSPA AND FEDERAL CONFLICTS

The enactment of AFSPA has, over the years, resulted in the emergence of centre-state conflicts. However, discussions on this aspect of the consequence arising from the enactment of AFSPA failed to seize widespread attention perhaps because of two reasons: (a) with the growing individualistic approach and self realisation gaining prominence, the natural tendency is to direct focus towards the violation of human rights; and (b) calculated and deliberate attempt, by the political class, to sustain quandary which conveniently permit high-yielding rhetoric directed towards the gullible.

Various centre-state conflicts arise on account of declaration of select regions as “disturbed area” under section 3 of AFSPA. These are discussed below under separate heads.

Conflict with respect to ‘Legislative Power’ under the Constitution

The “use of armed forces in aid of the civil power” falls under the central legislative sphere vide entry 2A, list I and not under “public order” – a matter falling under the competence of the States under Entry 1, List II. As such, AFSPA has been enacted by the Parliament under entry 2A, list I. The States have power to legislate only with respect to “public order” under entry 1, list II:³⁹

Out of this entry [i.e., Entry 1, List II], the field encompassing the use of armed forces in aid of the civil power has been carved out and, thus, legislative power with respect to that field has been excluded from states’ purview. The states have no power to legislate with respect to the use of the armed forces of the Union in aid of the civil power for the purpose of maintaining public order in the State. The

³⁸ See for example *Extra Judicial Execution Victim Families Association (EEVFAM) and Anr. v. Union of India and Anr.*, Writ Petition (Criminal) No.: 129 of 2012, on July 08, 2016. In this judgment the Hon’ble Supreme Court of India has recognized excesses by armed forces in 62 documented instances. Additionally, the Apex Court has also ordered documentation of additional 1466 cases of excesses by the armed forces.

³⁹ *Supra* note 6, at 590.

legislative competence with respect to the matter vests exclusively in Parliament under Entry 2A of List I.

The above scheme of the Constitution renders centre-state conflict looming. While law and order is a state subject, and while concerned states are always in a better position to carry out proper and direct assessment of the situation on ground zero, the legislative domain of the centre under entry 2A, list I vests such vast discretionary legislative power in the Central Government so as to undermine states' autonomy even in times of peace, for example by use of legislations such as AFSPA which allow the Centre to proclaim areas as "disturbed areas". The civil forces of the concerned State are bound to work together with the central forces if the Centre chooses to deploy armed forces or any other force under its control under any law enacted under entry 2A, list I against the will, even when backed by reasoned analysis, of the state concerned.

Alternatively, there may arise situations when, in the absence of any law such as the AFSPA, concerned states may be of the opinion that an exigency exists and civil forces of the State need to be aided by the armed forces of the Centre. However, it may be noted that *there is no mechanism by which the concerned State may secure the aid of forces under the control of the Union by enacting a State law*. The discretion with regard to the deployment of central armed forces vests with the Centre.⁴⁰ The states are only left with the option to request the Centre to deploy its forces to aid the civil forces. In case the centre chooses to ignore the request and does not enact a law providing for the deployment of armed forces of the Union "in aid of the civil power," states are left to battle their own situation.

Finally, there arise many situations in which the central forces, operating under the authority of the [law]⁴¹ enacted by the centre and providing for deployment of central forces, cause violations including: (a) violations of standard operating procedures; and (b) violations of the right to life and personal liberty of citizens. Even under these circumstances the states have no power to

⁴⁰ This unjustified one-sided tilt in favour of the Centre prejudices and undermines the States which are supposedly co-equals in their own sphere. Central legislative sphere (vide entry 2A, list I) with respect to the "deployment of any armed forces of the Union" is qualified by the phrase "use of armed forces **in aid of civil power**". This, however, is antithetical to the purport of proclamation of any area as a "disturbed area" in so far as in practice it is the civil forces which are bound to aid the armed forces of the Union at any time a proclamation of "disturbed area" is made. Only exceptionally, when the Centre accepts the request of a State to enact a law providing for deployment of armed forces of the Union "in aid of civil power", will the armed forces of the Union aid the civil forces.

⁴¹ Read 'law' as Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958).

bring such armed forces under the jurisdiction of Courts or to fix liabilities of defaulting armed forces personnel even by way of enacting a law to this effect as the same is outside the legislative domain of the states. Also, the impunity guaranteed to the personnel of the central forces under section 6 of the Act compromise with states' autonomy as States do not even have any power to initiate investigation and trial.

Centre-state conflict on supremacy

All remains well between the central and state governments except when: (a) the centre chooses to unilaterally declare an area as "disturbed area" while the state government is opposed to such moves; or (b) the governor of the concerned State, acting on the advice of the council of ministers, has proclaimed an area to be a "disturbed area" while the Centre is opposed to such proclamations.

The centre may unilaterally proclaim any area as "disturbed or dangerous",⁴² to deploy its armed forces while the State concerned may be of the contrary opinion, thereby compelling compliance and assistance resulting in central supremacy. It has often been argued by the states concerned that "the very existence of AFSPA is making a mockery of the federal structure of the country."⁴³ "The agenda of the Central Government is unearthed by the declaration of certain areas to be disturbed which has effectively come to mean bringing such areas, as the centre may want according to its whims, effectively under central rule without declaring the same publicly or under the Constitution of India."⁴⁴

The legislative scheme provided for by the Constitution, as discussed above, is an instrument which has been exploited to this end and to undermine states' autonomy even in times of peace. AFSPA is an apt example.

There may arise situations where, irrespective of the centre's unwillingness to deploy its forces in "disturbed areas" (for considerations political or otherwise), the Governor, acting on the aid and advice of the Council of Ministers, proclaims certain areas as "disturbed" and thereby

⁴² *Supra* note 23, s. 3.

⁴³ See "Political slugfest over AFSPA" *The Arunachal Times*, Jul. 06, 2015.

⁴⁴ Suhas Chakma, "Acts that don't meet an end" *Tehelka*, available at:

http://archive.tehelka.com/story_main51.asp?filename=Ws301111Actsthat.asp (last visited on May 20, 2015).

compels deployment of central forces under the Act. Such a situation may well see the centre in the eye.

Much bitterness develops in centre-state relationship on account of the enactment and promulgation of laws like the AFSPA and the same have been well evident in very recent times.⁴⁵

Conflict with regard to the “discretion” of the governor of a state under the provisions of AFSPA

As a general rule the governor acts on the aid and advice of the council of ministers and not independently or contrary to it. As such, any proclamation, by the governor of any state, of any area as ‘disturbed area’, would generally mean that such proclamation has been done in accordance with the will of the state cabinet.

However, there are exceptions under which the governor may act in his discretion. And whether a function falls within his “discretion” or not is the subject matter of governor’s discretion. If any question arises on whether a matter falls within the governor’s discretion or not, the decision of the governor in his discretion is final, and the validity of anything done by the governor in his discretion cannot be called in question on the ground that he ought or ought not to have acted in his discretion.⁴⁶

⁴⁵ Much tension has been witnessed between the state of Jammu and Kashmir and the Centre during the tenure of Mr. Omar Abdullah as the chief minister. The central and the state governments were at loggerheads. See, Nitin Gokhale, ‘Defence Ministry opposed to withdrawal of Armed Forces Special Powers Act: Sources’ *NDTV*, available at: <http://www.ndtv.com/india-news/defence-ministry-opposed-to-withdrawal-of-armed-forces-special-powers-act-sources-565683> (Last Modified Oct. 22, 2011); ‘Decision on Armed Forces Special Powers Act: Omar sets deadline’ *NDTV*, available at: <http://www.ndtv.com/india-news/decision-on-armed-forces-special-powers-act-omar-sets-deadline-571942> (Last Modified Oct. 25, 2011); Nazir Masood, ‘Tension between Omar, Congress over Armed Forces Special Powers Act (AFSPA)’ *NDTV*, available at: <http://www.ndtv.com/india-news/tension-between-omar-congress-over-armed-forces-special-powers-act-afspa-569902> (Last Modified Oct. 27, 2011); Nitin Gokhale, ‘AFSPA meet inconclusive; Omar Army talk tough’ *NDTV*, available at: <http://www.ndtv.com/india-news/afspa-meet-inconclusive-omar-army-talk-tough-572043> (Last Modified Nov. 09, 2011); ‘AFSPA revocation: Govt, Army in no mood to relent; deadlock continues’ *NDTV*, available at: <http://www.ndtv.com/india-news/afspa-revocation-govt-army-in-no-mood-to-relent-deadlock-continues-566193> (Last Modified Nov. 12, 2011).

⁴⁶ See, *Supra* note 4, Art. 163(2); See also, *Jaykar Motilal C.R. Das v. Union of India*, AIR 1999 Pat 221.

Vesting the governor with discretionary powers was justified in the constituent assembly on the ground that:⁴⁷

The provincial governments are required to work in subordination to the Central Government ... 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.

Be that as it may, the governors being political appointee have, in many instances, acted in their discretion either fancifully or to further the agenda of the centre. Such circumstances evidently give rise to centre-state conflicts.

If the governor of any state proclaims any area as “disturbed area” while acting either fancifully or in furtherance of the agenda of the centre and shielding such proclamation by the rath of “Governor’s discretion”, then there certainly shall emerge a centre-state conflict.

Conflict with regard to the scope of “disturbed areas”

Neither AFSPA nor any other law defines what constitutes “disturbed areas.” It is thus left to the discretion of the executive (central as well as state) to decide that the law and order situation in an area in a State has become disturbed or dangerous enough to call for the deployment of the army.⁴⁸ The vested discretionary power, however, tends to be arbitrarily exercised in absence of any guideline or requirement of fulfilment of material particulars for intelligible proclamation of a “disturbed area”.⁴⁹ This leaves ample scope for variation in opinion of the centre as well as the States with regard to the classification, recognition and proclamation of “disturbed areas”.

This discretionary power vested in the executive may keep the central and provincial governments at loggerheads in case either is of the opinion contrary to the others’, as regards the scope of “disturbed areas” which is the premise of force deployment.

⁴⁷ See, Constituent Assembly Debates VIII, 502, Dr. B. R. Ambedkar.

⁴⁸ As a matter of general rule, Governors of States and the President act on the advice of the Council of Ministers of the concerned State and the Union Cabinet respectively.

⁴⁹ See also, *Supra* note 28.

Conflict on account of ‘immunity from prosecution’ granted to armed forces’ personnel

Among the most controversial clauses of AFSPA is the one that 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 the powers conferred by this Act.”⁵⁰ Its roots lie in the common law doctrine of sovereign immunity and the idea that public officials are entitled to the presumption of good faith *vis-à-vis* acts performed in the course of their official duties.⁵¹ This immunity provision stands in the way of the prosecution of security officials for human rights abuses.

The immunity granted to armed forces’ personnel working under the Act provides that no prosecution can be launched against them without sanction from the Central government. Section 6 of the Act prohibits even the State governments from initiating legal proceedings against the armed forces on behalf of their aggrieved population without sanction from the Central Government. This requirement confers *de facto* as well as *de jure* impunity on all transgressors.⁵² Thus, any agency (such as the CBI) may indict army officers for the murder of innocent civilians but their trial cannot take place because the Central Government refuses to give sanction. What is worse, the minister concerned does not even have to give any reasons.⁵³ In such circumstances, the state concerned is reduced to a position of helplessness which leads to discontentment and conflict in the centre-state relationship. The States concerned are over-powered by the centre.

However, the Supreme Court was pleased to hold in *Extra Judicial Execution Victim Families Association (EEVFAM) v. Union of India*,⁵⁴ that excesses by forces cannot be countenanced in the name of maintaining discipline or dealing with anti-national elements in a society governed by rule of law. Further, the Supreme Court categorically noted that *a fortiori* allegations of excesses must be inquired into:⁵⁵

It must be held, and there can be no doubt about it, that in view of the consistent opinion expressed by this Court, that an allegation or complaint of absence of a

⁵⁰ *Supra* note 23, s. 6.

⁵¹ Aparna Sundar and Nandini Sundar (eds.), *Civil Wars in South Asia: State, Sovereignty, Development* 189-211 (SAGE Publications India Pvt. Ltd., 2014).

⁵² Siddharth Vardarajan, “A modest proposal on AFSPA” *The Hindu*, Sept. 06, 2010.

⁵³ *Ibid.*

⁵⁴ Writ Petition (Criminal) No.: 129 of 2012, on July 08, 2016.

⁵⁵ *Id.*, para 135.

reasonable connection between an official act and use of excessive force or retaliatory force will not be countenanced and an allegation of this nature would always require to be met regardless of whether the State is concerned with a dreaded criminal or a militant, terrorist or insurgent. ... such an allegation must be thoroughly enquired into . This is the requirement of a democracy and the requirement of preservation of the rule of law and the preservation of individual liberties.

The court went on to further observe that:⁵⁶

... it is not possible to accept the contention of the learned Attorney General that a person carrying weapons in violation of prohibitory orders in the disturbed area ... is *ipso facto* an enemy Each instance of an alleged extra-judicial killing of even such a person would have to be examined or thoroughly enquired into to ascertain and determine the facts. In the 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.

Thus, the Supreme Court has attempted to show the way forward which will most certainly yield justice to the victims and reduce federal conflicts if proper cue is taken by the concerned government.

Conflict on account of differential treatment between central and State forces working under the same conditions and performing the same tasks

Section 6 of the Act reinforces and perpetuates a differential treatment between the central and state forces. While both the State police force and the armed forces of the Union work in the same area, the former do not get the powers and protection that AFSPA provides to the central forces. The central forces work under impunity whereas the civil forces of the State do not enjoy any such protection irrespective of the fact that they work under same conditions and threat (if any). This causes widespread disenchantment among the personnel of civil forces of the State while also leading to centre-state conflicts.

⁵⁶ *Id.*, para 144.

Conflict with respect to ‘inquiry’

Section 6 of AFSPA, which mandates that any legal proceeding, against any defaulting armed forces’ personnel, can be instituted only after a previous sanction from the Central Government, acts as a hurdle in the conduct of an inquiry. In effect, without a previous sanction, no agency can even inquire or interrogate any armed personnel deployed and functioning under the Act. Thus, any agency of the concerned State may indict any public official under the AFSPA for the murder of innocent civilians with no effect at all for want of the previous sanction by the Central Government.

V CONCLUSION

AFSPA compromises and restricts the rights of people. This in turn affects the interest of states and the centre thereby dawning a rift between them. Alternatively, actions and conduct of the state parties (centre and the states concerned), tainted with political considerations and motivations, tend to lead towards a collision course between them resulting in politically motivated implementation of AFSPA. Ultimately, sufferers are the innocent citizens who live in the areas affected. As such exigency demands immediate formulation of a mechanism to at least minimise, if not eliminate, such federal-conflicts.

Mechanism⁵⁷ to ensure organic functioning of the Centre and the States (*viz.*, co-operative federalism) should be worked out so that the concerns of populace are placed at the highest pedestal and are not eclipsed by federal conflicts and tensions.

It must, at any cost, be ensured that the people do not end up as victims of the centre-state conflicts and that their non-derogable rights remain preserved under all circumstances.

It is imperative that the lack of precision in the definition of a “disturbed area” under the AFSPA, which is the matter of highest concern, is addressed immediately. This would prevent arbitrary proclamation of any area as “disturbed area” while keeping a check on politically motivated actions. Further, the circumstances and material particulars which would justify formation “of the opinion” as regards the concerned area being “in such a disturbed or dangerous condition

⁵⁷ The functioning of the mechanism should keep in line with the minimum standards necessary to protect the safety and integrity of individuals.

such that the use of armed forces in aid of civil power is necessary” and subsequent proclamation of “disturbed area” should be enlisted to ensure curbing misuse of AFSPA.

Finally, a review of the impunity clause as contained in section 6 of AFSPA, to hold accountable reckless and errant officers, could help rebuild confidence of the people in the armed forces besides ensuring a check on the excesses committed by the armed forces on its own people.

All these would also go a long way in upholding the non-derogable human right, *i.e.*, the right to life while instilling a sense of responsibility in the officers acting under the Act besides narrowing down the space for centre-state conflicts to colossal extents.