



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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ASSESSING THE CONSTITUTIONAL COMPATIBILITY: AN ANALYSIS OF AFSPA PROVISIONS IN RELATION TO ARTICLE 14 OF THE INDIAN CONSTITUTION

AUTHORED BY: GEIA NATRAJ

ABSTRACT

The constant sound of soldiers patrolling all around the village, the eternal fear of being arrested without a warrant, the impending interrogation and violence one will be subjected to for non-cooperation for searches despite not being involved in any suspicious activities, the trauma of several hours of interrogation in military camps are some of the very few cruelties and human rights violations people residing in areas declared as disturbed are subjected to.

The root of why our countrymen and women are subjected such inhumanity lies in the ambiguous definition of what is known as “disturbed area” under section 2 clause b of The Armed Forces (Special Protection) Act, 1958. The Act provides the armed forces deployed in areas declared as disturbed immunity to carry on searches, arrests and kill without warrants in the view of prohibiting and obstructing any terrorist or anti-national propaganda. The Act is claimed to be essential for the protection of public order and national security purposes. The armed forces are deployed in aid of civil power in cases where the governor of the state or the administrator of the union territory or the central government have declared the whole or any part of a state or union territory as disturbed. However, it has led to several human right violations.

The author of this research paper aims to identify the shortcomings of the definition of disturbed area under the said Act and scrutinize it with the lens of Article 14 non-arbitrariness principle.

KEY WORDS

Disturbed area, armed forces, non-arbitrariness, delegated legislation, excessive delegation.

INTRODUCTION

Armed Forces (Special Powers) Act, 1958 is a parliamentary legislation which is the successor of a pre-constitutional colonial legislation that was put in place in order to suppress the Quit India Movement in the year of 1942. The Act has been through several remodelling and reshaping to reach its current form. The AFSPA enshrines unique but excessive powers to the Indian army in areas declared as “disturbed”. The AFSPA gives the armed forces sweeping powers to arrest, detain, and shoot without a warrant.

It is contended that the definition of disturbed area is too vague and lacks a framework with regards to the procedure of declaring a certain area as “disturbed”. The act vaguely mentions the persons/ authorities who can declare an area as “disturbed” while not clearly defining the circumstances under which an area is designated as “disturbed”. The vagueness in defining “disturbed” area confuses and doesn’t clearly demarcate the ambit of the law which may lead to arbitrary usage. It is contended that the Act is violative of Article 14 of the Constitution and that it has not been subjected to constitutional standards. In essence, such great power has been built on flimsy foundations.

This paper intends to explore the current situation and prominence of AFSPA. Further, how effective the definition of the term “disturbed” area under Section 2(b) of AFSPA and to what extent is the Act in line with Article 14 of the Constitution of India.

This paper is a doctrinal research paper. The methodological approach adopted to write this paper is the qualitative method. The qualitative method examines rich and detailed data thus allowing the formulation of an in depth understanding of the area of interest. As the objective here is to analyse the efficacy and effects of a certain provision of a statute and aims at evolving a more organic and subjective answer the qualitative method proves to be the most suitable approach. In the qualitative method the paper adopts the secondary method as a mode of data collection. The secondary method involves collecting existing data from sources already available. This method is opted here due to technical constraints of time, manpower and resources. Moreover, there are several available sources of data available to conduct a qualitative study by way of secondary method of data collection. The research adopts the grounded theory wherein rich data on the interest is collected and used to arrive at narrower theories and conclusions.

The author has opted for the discourse method to analyse the collected data. The discourse theory basically studies the language of a particular text and analyses its effects in specific contexts. Since the objective of this paper is to analyse the efficacy of the definition of “disturbed area” in relation to Article 14 of the Indian Constitution the discourse method is most apt to employ.

While the use of armed forces in aid of civil power to protect any part of or the entire state from a dangerous or disturbed condition is necessary to maintain peace and public order, the definition of “disturbed area” given under the Act is too vague, which is essentially excessive delegation of power to the executive and may lead to arbitrary usage. The Delhi HC in the case of *Indrajit Barua v. State of Assam*¹ has held that the Governor is empowered to declare any area of the State as a “disturbed area”. It could not be arbitrary on the ground of the absence of legislative guidelines, but it is contended by the author that the roots of the arbitrariness lie in the vague definition of ‘disturbed area’ and not in the power conferred to the governor. The author contends that the definition should itself be inclusive of the meaning of “disturbed area” upon which the governor may on his discretion issue a notification for the armed forces’ deployment else it would amount to excessive delegation of essential legislative powers to the executive.

CURRENT SITUATION

“The primary task of the armed forces of the Union is to defend the country in the event of war or when it is faced with external aggression. Their training and orientation is to defeat the hostile forces. A situation of internal disturbance involving the local population requires a different approach. Involvement of armed forces in handling such a situation brings them in confrontation with their countrymen. Prolonged or too frequent deployment of armed forces for handling such situations is likely to generate a feeling of alienation among the people against the armed forces who by their sacrifices in the defence of their country have earned a place in the hearts of the people. It also has an adverse effect on the morale and discipline of the personnel of the armed forces.”²

Since 1990 the state of Assam has been continuously subjected to the confines of The Armed Forces (Special Powers) Act³. Only recently in 2022 did the declaration of “disturbed area” was removed partially, 8 districts and part of another district were still under the rule of AFSPA since

¹ *Indrajit Barua v. State of Assam*, 1983 SCC OnLine Del 188.

² *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109.

³ See Garima Tiwari & Karthik Sarma, *Armed Forces Special Powers Act, 1958: A National Necessity or a Stain on the World's Largest Democracy?*, 10 NLIU L. REV. 380 (2021).

April 2022. However, in March of 2024, The Ministry of Home Affairs extended AFSPA in 3 districts of Arunachal Pradesh bordering the state of Assam and five other states of Nagaland which was to have effect from April 1st 2024 “unless withdrawn earlier”.⁴

In 2012 a writ petition was filed in the Supreme court on the allegations of extra-judicial killings and rape against the armed officers deployed in Manipur by virtue of AFSPA. “*The petitioners claim to have compiled 1528 alleged extra-judicial executions carried out by the police and security forces in Manipur. It is alleged that a majority of them have been carried out in cold blood while the victims were in custody and allegedly after torturing them.*”⁵ “*According to the police and security forces, the encounters are genuine and the victims were militants or terrorists or insurgents killed in counter insurgency or anti-terrorist operations*”⁶. The court then ordered the central government to investigate into such allegations made by human rights organizations. The Indian government's investigation found that there was credible evidence to support allegations of rape committed by armed forces personnel in Assam. The investigation also found that the AFSPA had created a climate of impunity for these crimes. In 2015, the Supreme Court of India ordered the Indian government to pay compensation to the families of 1,528 people who were killed in extrajudicial killings in Assam and Manipur between 1998 and 2012. The court's order also included compensation for victims of rape and other sexual violence.

Despite the Supreme Court's orders, allegations of rape and other sexual violence committed by armed forces personnel in areas of Assam and Manipur continue to be reported.

The United Nations Human Rights Council during the 4th Cycle of the Universal Periodic Review (UPR) review meeting of India's record on human rights before the United Nations Human Rights Council (UNHR), which took place in Geneva on November 10, 2022, called on the Indian government to repeal the AFSPA, citing concerns about human rights abuses, including rape and other sexual violence.

The Indian government has taken some steps to address the issue of rape and other sexual violence committed by armed forces personnel in Assam. For example, the government has set up a special cell to investigate these crimes. The government has also issued guidelines to the

⁴ See “AFSPA extended in parts of Arunachal, Nagaland for six more months”, THE HINDU, MAR 28 2024, 07:02 pm IST. <https://www.thehindu.com/news/national/centre-extends-afspa-in-three-districts-three-police-stations-of-arunachal-pradesh-for-six-months/article68001962.ece>.

⁵ Extra Judicial Execution Victim Families Assn. v. Union of India, (2017) 8 SCC 417.

⁶ *id.*

armed forces on how to prevent and respond to sexual violence. Along with which the supreme court has also laid down certain 'Do's and Don't's' for the armed personnel while operating in disturbed areas.

However, all of the above measures have proven to be insufficient as allegations of rape, sexual violence and extra-judicial killings still continue to be made. The primary questions one must address is whether there is a genuine requirement of declaring these areas as disturbed, and if so, how are they determined, what are the grounds to declare an area as disturbed, how can one be held accountable for deviating from the law, how much power should really rest in the armed personnel.

PRESENT STANDING OF LAW

The definition of 'disturbed area' under section 2(b) the Act is as follows "*'disturbed area' means an area which is for the time being declared by notification under section 3 to be a 'disturbed area'*"⁷ subsequently section 3 of the Act states as follows "*Powers to declare areas to be disturbed areas – If, in relation to any state or Union Territory to which this act extends, the Governor of that State or the administrator of that Union Territory or the Central Government, in either case, if of the opinion that the whole or any part of such State of Union territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may by notification in the Official Gazette, declare the whole or such part of such State or Union territory to be a disturbed area*]." ⁸

The above definition is violative of the fundamental right to equality guaranteed by the supreme legislation of the country under Article 14 due to how vague it is. Justice J.S.Verma in the case of *Naga People's Movement of Human Rights v. UOP*⁹ has argued that the Act is arbitrary and does not have the necessary guidelines for its implementation. The contention here is not that the armed forces have been given excessive powers without adequate safeguards or that the Act in its entirety is arbitrary as that will form an entirely different argument, rather it is the aim of the author to show that the definition of 'disturbed area' under the Act is leading to its arbitrary usage thus violating Article 14 rights.

⁷ The Armed Forces (Special Powers) Act, [1958, No. 28, Acts of Parliament, 1958.](#)

⁸ *id.*

⁹ *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109.

In the case of *Indrajit Barua v. State of Assam*, 1983¹⁰ the Delhi High Court has decided that the legislation, both the central and the Assam ones are provided with sufficient guidelines and that its usage will not result in arbitrariness. It has clarified that since the area is declared as disturbed by the highest authority of the state, that is, the governor of the state, there is sufficient protection needed to the Article 14 rights. The author, however, is not contending that the usage of the legislation itself is arbitrary rather, the definition of “disturbed area” due to its vagueness could lead to arbitrary declaration of disturbed area by the “highest authority of the state”. The author wishes to strike at the very radix of the issue, to prove that the entire legislation is resting on very flimsy foundations and that there is imminent need of some reinforcement.

ARTICLE 14 NON-ARBITRARINESS PRINCIPLE

The SC in the case of *E.P.Royappa v. State of Tamil Nadu*¹¹ laid down that “*equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.*”

“*There can be no doubt that Article 14 is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic and, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. It cannot be imprisoned within traditional and doctrinaire limits. The principle of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.*”¹²

¹⁰ *Indrajit Barua v. State of Assam*, 1983 SCC OnLine Del 188.

¹¹ *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3.

¹² *Indrajit Barua v. State of Assam*, 1983 SCC OnLine Del 188.

To understand how the definition leads to arbitrary usage it is pre requisite to know of the concept of excessive delegation which is an extreme form of delegated legislation.

DELEGATED LEGISLATION

According to Sir John Salmond, *"Subordinate legislation is that which proceeds from any authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority."*¹³

Justice P.B. Mukherjee has stated; *"Delegated legislation is an expression which covers a multitude of confusion. It is an excuse for the legislators, a shield for the administrators and a provocation to the constitutional jurists. It is praised as a necessity and felt as inevitable in our world where social economic technological psychological and administrative speed outstrips the spacious and placid traditional legislative ideals and processes. It is criticized as an abdication of power by legislators and an escape from the duty imposed on them by voters of democracy."*¹⁴

THE DOCTRINE OF EXCESSIVE DELEGATION

This doctrine encompasses that the delegation of essential legislative functions to another authority shall be held to be unconstitutional. According to Wanchoo, C.J., speaking for himself and Shelat, J., in *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. CST*¹⁵

*"A review of these authorities therefore leads to the conclusion that so far as this Court is concerned the principle is well established that essential legislative function consists of the determination of the legislative policy and its formulation as a binding rule of conduct and cannot be delegated by the Legislature. Nor is there any unlimited right of delegation inherent in the legislative power itself. This is not warranted by the provisions of the Constitution. The Legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act. Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the Courts should not interfere."*¹⁶

¹³ Megha Mahesh, Excessive Delegation, 5 Int'l J.L. Mgmt. & Human. 2043 (2022).

¹⁴ Sanjana Nayak, Administrative Law and Doctrine of Excessive Delegation, International Journal of Legal Science and Innovation Vol. II Issue II 568-574 (2020).

¹⁵ *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. CST* (1974) 4 SCC 98.

Further, in the case of *Ajoy Kumar Banerjee v. Union of India*¹⁷ it has been laid down that “*The Legislature must retain in its own hand the essential legislative function which consists in declaring the legislative policy and lay down the standard which is to be enacted into a rule of law, and what can be delegated in the task of subordinate legislation which by very nature is ancillary to the statute which delegates the power to make it effective provided the legislative policy is enunciated with sufficient clearness or a standard laid down.*”¹⁸

It is to be noted that the legislative policy we have at hand, that is The AFSPA may have laid down a policy but lacks sufficient clearness or standard which warrants the court’s interference as it amounts to excessive delegation.

In the case of *Delhi Laws Act, 1912, In Re*¹⁹ the court held that only in emergencies like war can the wide latitude of rulemaking power is conferred on a non-legislative body. The issue is that the executive’s power to demarcate an area as disturbed is essentially eating into the legislative power due to the lack of any guidelines and ambiguity in the wording of the law. It is also to be noted that no such emergency having the same level of threat as a war exists in these situations.

WAY FORWARD

In order to remove the shackles of ambiguity and unconfine the legislation from the fuzziness of the definition of “disturbed area” it is essential that the power shared to the executive by the legislature needs to be reclaimed to some extent. Delegated legislation is undisputedly an extremely powerful tool to distribute the burden of authority over two organs of the government. But it must also be borne in mind that excessive delegation can lead to devastating outcomes, as the lawmakers essentially are not fulfilling their obligation.

The author is of the opinion that having a non-exhaustive but inclusive definition for the term “disturbed area” under section 2 clause b of the Armed Forces (Special Powers) Act will help guide the executive to declare which areas are disturbed but at the same time will allow sufficient flexibility while making such decision. Inclusion of phrases such as “in the interest of public order” gives sufficient room for interpretation and also effectively restricts possible arbitrary usage.

¹⁷ *Ajoy Kumar Banerjee v. Union of India* (1984) 3 SCC 127.

¹⁹ *Delhi Laws Act, 1912, In Re* 1951 SCC 568.

CONCLUSION

To sum up everything that has been said before, it has been shown that the definition provided under the said Act amounts to excessive delegation as the ambiguity in the definition proves to be a lack of the fulfilment of essential legislative function. The author for reasons listed above and discussions carried on prior, proposes an amendment to the present legislation as a first step towards protecting the rights of people residing in “disturbed areas”. It is the first step to mend the mistake of our colonial rulers, and to effectively remove this stubborn stain from the founding principle of our Indian constitution, that is, Article 14.

