The Jeevan Reddy Committee Report on AFSPA: The evil is left intact.

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There has always been a school of thought which has held that what is primarily wrong with special repressive laws is that they are special, and only secondarily that they are repressive. This school has among its ranks a number of retired judges. At various points of time, the NHRC and the Law Commission have said about anti-terrorist laws that whatever is necessary in such legislation should be made part of the general law of the land, rather than have TADAs and POTAs. It shows good sense from the State's point of view. A special law engenders a sense of being discriminated against among the people who are targeted by it. Make the law in general bad, and nobody is specially aggrieved, and hence nobody gets emotional about it.

The Jeevan Reddy Committee on the Armed Forces Special Powers Act (AFSPA) gives a slight twist to this. Suppose that, while incorporating what is 'necessary' of the repressive provisions of a special law into the general law, you make it slightly more repressive, then too nobody will notice it. So, while suggesting that AFSPA as modified by the Committee be brought into the Unlawful Activities (Prevention) Act (ULP) as amendments to Sec.40 of the latter Act, the nature of the satisfaction required for doing so is changed from the objective to the subjective. In its original version, AFSPA contemplated deployment of the army only on the request of the State government. Later, the Union Government too was permitted to deploy the armed forces without any request from the State Government. But in either case, the requirement was conditional on the opinion being formed that 'the use of armed forces in aid of civil power is necessary' in view of 'the disturbed or dangerous conditions'. This requirement, at least in principle, could be some kind of a limit, since the parameters of judicial review as accepted at present would then require the presence of some material with the State or Central Government which would show that 'civil power' on its own is unable to handle the situation.

The amendment suggested by the Jeevan Reddy Committee removes this criterion, namely the incapability of civil power to handle the situation on its own. The State Government may make a request for sending the armed forces to 'restore public order' if that is necessary 'in its opinion'; or the Central Government may, if it is of the opinion that 'deployment of a force under its control' is necessary to quell internal disturbance in a State, deploy the army notwithstanding that the State has made no request. The objective satisfaction that the State's civil power which ought to maintain order is unable to do so is replaced by the subjective satisfaction that it is necessary to deploy the armed forces. This is done by a sleight of hand without at any place arguing why it is necessary.

It is being said that the Jeevan Reddy Committee's suggested incorporation of provisions of AFSPA into the ULP comes with safeguards. None of these is new. They are deemed to already be there in AFSPA by virtue of the judgement of the Supreme Court in NPMHR vs Union of India, where it read these safeguards into AFSPA to make it constitutionally valid; and the judgement of the Supreme Court in D.K.Basu vs State of West Bengal, where procedures for making arrest and interrogation have been laid down. It no doubt makes sense to make explicit what is implicit, so long as the law has to be there, but it did not require the labour of two years to say this little. In fact, so far as the D.K.Basu guidelines are concerned, only one of them, namely preparation of arrest memo has been incorporated in the proposed law.

The real issue is not whether the armed forces can be deployed against civil disturbances. The ordinary law too permits it, in Sec.130 and 131 of the Cr.P.C. The real question is under what circumstances, and with what powers. The ordinary law permits the armed forces to be used only against an unlawful assembly which cannot otherwise be dispersed, only in individual instances, and normally at the order of an Executive Magistrate. What is contemplated by AFSPA is the continuous use of the armed forces over an area of land, with the power to open fire on suspicion on individuals and not just riotous mobs, and under its own authority. *The power to open fire at persons on suspicion, the power to arrest a person on suspicion that he/she is likely to commit an offence, and the power to destroy buildings on suspicion, is the extraordinary power that has led to extensive human rights violations in the areas under AFSPA*. The Jeevan Reddy Committee leaves these powers intact. They are limited by the requirement to use minimum force and to maim rather than kill. But that, firstly, is what the Supreme Court had any way read into AFSPA in the NPMHR case, and secondly it would have made real difference if punitive steps against transgressors had been mandated. Instead the Jeevan Reddy Committee sets up a strange creature called Grievances Cell to enquire into allegations of abuse of powers against the armed forces and communicate its result to the complainant! Any abuse of powers by the armed forces is a criminal offence, and it should promptly be investigated into by an agency that is in fact independent of the armed forces, followed by impartial prosecution. So long as that is not provided for, safeguards have little meaning.

But the Jeevan Reddy Committee is conscious of what it is saying. Its major premise is that National Security is of paramount importance and all else must be read subject to it. May be that is where the problem with the report lies, but a fuller discussion of that will have to await another occasion.

AFSPA Review Commission: Comments on AI's draft critique.

As AI wants only comments within the legal framework, I will confine my comments accordingly

1. There is a mistaken assumption in the critique that a decision to extend the deployment of armed forces beyond six months, or beyond the originally proposed area, needs Parliament's approval. Sec.40A(3) of the proposed amendment to UAPA (I am using AI's abbreviations) only says that the notification must be tabled in Parliament. There is no inference either in general or in the draft amendment to UAPA that Parliament must approve of it for the extension to be valid. Tabling is only for Parliament to discuss it. The same is the case with the State Government's request for extending the period of deployment beyond the initial six months. The request is to be merely tabled in the Legislative Assembly and Council. It does not need their approval to be valid.

2. Though the Commission gives the impression that while suggesting incorporation of the provisions of AFSPA into UAPA it has toned down the arbitrary character of those provisions to some extent, there is one basic area where it has made it worse. This is in the matter of the pre-requisites for seeking or deciding on deployment of the armed forces. In AFSPA, there should be a 'disturbed or dangerous' condition, and the formation of the opinion that the condition is such that 'the use of armed forces in aid of civil power' is necessary. These are two objective circumstances. There should be material to indicate that the condition in the concerned State is disturbed or dangerous, and that the civil power, left to itself, is unable to control it. In the proposed amendment to Sec. 40 of UAPA, insofar as the State Government's request for deployment of armed forces is concerned, roughly the same two pre-requisites are needed (Sec.40A(1)(a)). But when it comes to the discretion of the Central Government (Sec.40A(3)) to unilaterally deploy the armed forces, it is enough if there is satisfaction that 'a situation has arisen' where deployment of 'forces under its control…has become necessary' to 'quell internal disturbance'. The only objective circumstance needed is that there is 'internal disturbance'. Satisfaction that the civil power of the concerned State is not in a position to handle it is not a pre-requisite. That the force so deployed is nevertheless required to act in aid of the civil power, by virtue of Sec. 40A(4), is no answer to this. That comes after the decision has been taken and the forces deployed.

This is of considerable significance, since the law of Judicial Review of executive action as obtaining in India (mostly following English administrative law) is that while Courts will not sit in Appeal over executive decisions, if a decision must in law be preceded by objective prerequisites, the Courts will see whether there was some material before the decision making authority to have enabled it be satisfied that the prerequisites are met. By reducing

the range of objective pre-requisites, the scope for challenging deployment of the armed forces in a Court of law have been reduced. Jeevan Reddy, the retired judge of the Supreme Court who headed the Commission, was a judge of considerable scholarship. There is very little doubt that he knew what he was doing: he was intentionally enlarging the area of subjective discretion in the hands of the Union Government in the matter of deployment of armed forces to control civil disturbances.

3. The other provisions suggested by the Commission for incorporation in the amended Sec.40 of UAPA are not new. They are deemed to already be there by virtue of two judgements of the Supreme Court. One is the judgement in NPMHR vs Union of India, AIR 1998 SC 431 in which AFSPA was read subject to conditions and limitations to make it Constitutionally valid. And the other is D.K.Basu vs Union of India, AIR 1997 SC 610, where general conditions to be complied with in the course of arrest and interrogation have been laid down. By virtue of Art 141 (and, in the case of the D.K.Basu judgement, Art. 142 too) of the Constitution of India, these conditions and limitations are already deemed to be inscribed in AFSPA. But while it is not a bad idea to make that explicit, the selective incorporation of the D.K.Basu judgement is cause for unease. Only one of the 'D.K.Basu guidelines', as they are called, namely preparation of arrest memo indicating a detenu's arrest, has been included in the proposed Annexure to Sec. 40A(5)(c) of UAPA. The other salutary provisions, such as informing the detenu's relatives, taking their signature on the arrest memo, having the detenu medically examined etc., do not find place in the proposed Annexure.

4. But the most serious point is that the gist of AFSPA remains, notwithstanding the effort in the proposed Annexure to Sec.40A(5)(c) to limit its draconian character. Even under ordinary law the army can be called in to assist civil power, but only for specific tasks, namely to disperse riotous mobs which the police find unable to handle (Secs.130 and 131 of the Code of Criminal Procedure). AFSPA was intended to enable deployment of the armed forces on the job of policing over whole areas for long periods. And not merely to handle riotous mobs but individual persons too. The power to shoot on suspicion and destroy dwellings on suspicion are the twin powers of the armed forces under AFSPA that have caused immense harm and injury. These powers are at the root of human rights violations in areas governed by AFSPA. *The proposed incorporation of select provisions of AFSPA in UAPA preserves these two powers intact.*

The limitations that the exercise of these powers is claimed to be hedged by, in the proposed amendment to UAPA, would make a difference only if every injury caused in the course of exercise of such power is deemed to be an offence, and investigated into impartially, resulting in prosecution where the Court is to see whether the limiting conditions are

transgressed. Instead of mandating that, the Commission's report suggests the setting up of a Grievances Cell, which is to consist of an army officer, a police officer and a sub-divisional magistrate, who will inquire into allegations and give a report to the complainant. If the 'inquiry' referred to in directive No.24 in the Annexure to the proposed Sec. 40A(5)(c) is this inqury, then prosecution will follow only if this Grievances Cell finds the allegation proved. This is a very retrograde suggestion that destroys all the limits and conditions said to have been brought in to temper the harshness of AFSPA.