

The Armed Forces Special Powers Act – Need for Review?

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Justice Verma Committee (JVC) was constituted in the wake of widespread public protests that followed the ghastly gang rape in December 2012. The committee examined over 80,000 suggestions and produced a voluminous report in just 29 days. They deserve our collective compliments.

The JVC was asked to review existing laws and suggest amendments to effectively deal with instances of sexual violence. It made wide ranging recommendations with a view to ensuring the women's right to equality and to dignity. While examining the issue the committee also delved into areas that were not strictly within its charter. Among the subjects covered was the Armed Forces Special Powers Act (AFSPA).

The AFSPA was passed by the Parliament in 1958. It is a legal enabling act of a sovereign parliament which is essential for the security forces to enforce the constitutional authority of the State under subversion by hostile elements. Under the Act, Central government sanction is needed before an alleged offender can be tried by a civil court. Over the years the AFSPA has become a favourite whipping boy for certain vested interests. Unfortunately even the JVC joined that fringe chorus of populism. This article proposes to discuss the recommendations made by JVC vis-à-vis the AFSPA and the armed forces.

The Committee recommends that sexual offences by the Army personnel be tried by ordinary criminal law without needing sanction of the Central government. Unfortunately, this is based on the false assumption the Army lets off its members found guilty of sexual misconduct. It is stressed, one agency which has the

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highest stake in ensuring that soldiers adhere to the strictest norms of discipline, is the Army. It has its internal mechanisms to enforce discipline and ensures justice is imparted with speed and the guilty are punished severely. This is borne out by statistics where guilty officers, JCOs and men have been dismissed, cashiered or awarded rigorous imprisonment. There is an ill conceived notion that an Army court martial is a totally in-house affair implying that members of the court can be influenced. Apart from the fact that members come from different external units, in a court martial the accused has the freedom of engaging a civilian lawyer. There are numerous examples of Army courts having given quick and effective judgments. Unfortunately the Army keeps low visibility and these cases do not get publicised. If the JVC recommendation is accepted, it will lead to soldiers being involved in litigation endlessly as false accusations particularly in J&K are galore. It is empirically known that witnesses can be threatened and coerced by militants into giving false evidence. Many such instances can be quoted.

JVC observation that "The brutalities of the armed forces faced by residents in the border areas have led to a deep disenchantment and the lack of mainstreaming of such persons into civil society" is indeed strange. Willy nilly it makes the Army the cause of the problem and not a part of the solution. It also overlooks the fact that the Army gets inducted only after the 'residents' are alienated. The JVC comment leads to a simplistic but tempting inference that if we withdraw the Army, everyone would join the mainstream and the situation would be hunky-dory. How one wishes that were true. I believe alienation is a far more complex subject that requires examination by experts from political, economic, administrative, social, psychological and other related fields. Legal luminaries are not the best qualified to pass judgmental comments on alienation. Additionally, to term Army's functioning as brutalisation is unfair and betrays ignorance. The role played by the Army in building roads, playgrounds, creating civic amenities like water supply and sanitation and running schools etc is well known and is appreciated by the locals. The JVC's ill-advised comment must indeed sound music to the ears of the detractors and to those across the border.

The JVC has also recommended criminal liability of commanders for breach of command responsibility. They have

said “...not exercising control or supervision over persons under his command if they commit offences”. They might not have been aware that the commanding officers indeed already have an administrative liability. Not only serious offences like rape and fratricide, even for others like noticeable number of malaria cases, vehicle accidents, absentees without leave etc, a commanding officer is held responsible and is liable for administrative action that also seals his career. But to make him criminally liable for an offence committed by one of the 800 odd subordinates would be counterproductive. With the large number of false accusations being made, the commanding officer would spend more time in attending courts instead of doing his operational duties. The JVC recommendation also ignores the fact that in a counter-insurgency grid, battalions are deployed in small subunits of companies and platoons over a wide area and teams of 5-7 men are on patrols on 24X7 basis. He cannot obviously be present everywhere to exercise control and supervision. In an off the record discussion with a legal expert and backer of the JVC recommendation, I asked why the criminal liability of a commander is confined only to the defence forces. Giving example of the Punjab and Haryana High Court judge who is under trial for a ‘cash on the doorstep’ offence I asked: Why the Chief Justice of the court should also not be made criminally liable being technically the ‘commander’? He agreed it should be so, provided the Chief Justice had advance knowledge that the offence would be committed. The JVC of course has not used any such qualifier in their recommendation. Even otherwise it is unthinkable that a potential rapist would make known his intentions in advance. And after the unfortunate action takes place, no commander has been found wanting in trying and punishing the guilty. Any suggestion of criminal liability entailing imprisonment up to seven years seems highly misplaced.

In commenting that ‘training and monitoring of armed forces personnel be reoriented to include and emphasise strict observance by the armed forces personnel of all orders issued in this behalf’, again the JVC has erred on facts. I wish the committee had called for a copy of the training syllabi of recruits or officer cadets to know how much emphasis is being laid on this aspect. Additionally, in daily roll calls, patrol briefings, sainik sammelans and on every other occasion it is emphasised that countering insurgency is not a battle of bombs and bullets but of hearts and minds. The Army

Chief himself has issued 'Ten Commandments' to be followed by all officers and men deployed in counter-insurgency role. Respect for local women comes high in the list. These commandments form the very military anthem of every uniformed person. The few cases of sexual offences that do take place are not because of lack of training but due to human failing.

Another facetious argument that is often raised against continuation of AFSPA is that despite its operation the Army has not been able to solve the insurgency problem. It ignores the fact that solving insurgency has never been and, in a democracy, can never be the task of the Army. The armies can only solve problems that are of military nature. In the Indian context the Army can and does keep the insurgency suppressed down to a level where the civil administration can carry out its functions. For that to be achieved, AFSPA is essential.

The Indian Army must be unique in having been deployed in counter-insurgency scenario almost continuously since Independence. The continued involvement in a difficult and complicated environment is not of Army's volition; it is a national compulsion. Soldiers need legal cover to operate in these circumstances. AFSPA serves a very useful purpose and should not be misconstrued as a licence for sexual offences. Undeniably aberrations do occur but the Army always takes necessary punitive and preventive action. The Army has been performing its task with admirable success. There are and will always be anti national elements out to defame, demoralise and finally drive out the Army from affected areas. Let us not contribute to their designs by constantly throwing darts at the Army. It makes little sense to keep picking at one's healthiest tooth.

Reference

Shivam Vij, Justice Verma Committee Report, Kafila.org. <http://kafila.org/2013/01/27/the-justice-js-verma-committee-report/>. Accessed on 19 February 2013.