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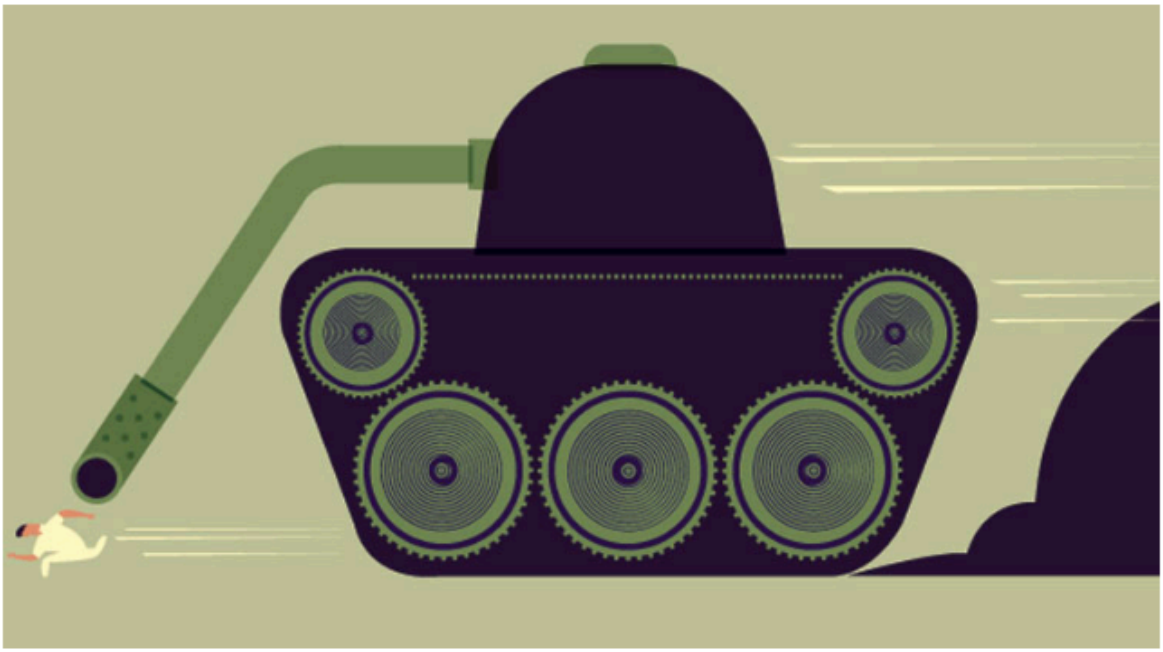
Who defends the defenders?

Serving soldiers have approached SC over AFSPA. They must not be made to pay for governments' failures.

Written by Arun Prakash | Updated: August 22, 2018 12:16:00 am



The imposition of AFSPA is not a requirement of the army, but a fig leaf used by successive governments to hide egregious failures of governance. (Illustration: C R Sasikumar)

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On India's 72nd Independence Day, while all and sundry were paying saccharine tributes to the armed forces, a development that will have a deep and long-lasting impact on the morale, cohesion, and integrity of India's military, went unnoticed. In an unprecedented and hitherto inconceivable step, 356 serving officers and jawans of the Indian army filed a

writ petition in the Supreme Court seeking relief for officers and troops serving on counter-insurgency duties from "persecution and prosecution" for performing their "bona fide duties carried out in good faith". The very notion of proud Indian soldiers, ranging in rank from serving brigadier to rifleman, seeking the protection of the courts in the discharge of their duties represents a national shame. This development has several far-reaching and serious implications, not only for the military and its leadership, but also for the Indian state, which appears to have, yet again, failed in its responsibilities vis-à-vis the military as well as governance.

Focusing first on the armed forces, a collective action of this nature by serving personnel has legal and moral/ethical connotations for the military. By jointly filing a writ petition, this 356 serving personnel could be considered as violating the Constitution, which denies armed force personnel the right to form "associations" and the Army Act, which forbids collective petitions or representations. However, the petitioners face action under the civil criminal law and, astonishingly, received no advice, guidance or legal assistance from the Army HQ or the Ministry of Defence (MoD).

Hence their representation before the court that, "a situation of confusion has arisen with respect to their protection from prosecution… while undertaking operations in … proxy war, insurgency, ambushes and covert operations", is justified. Their petition pertinently asks whether they should continue to engage in counter-insurgency operations (CIO) as per military orders and standard procedures "… or act and operate as per the yardsticks. of the Criminal Procedure Code (CrPC)?"

From the moral/ethical angle, soldiers approaching courts of law used to be an infringement of the "fauji" ethos. Resort to litigation, once rare and considered distasteful has, however, became common amongst military personnel mainly due to judicial activism. Any residual stigma that may have clung to litigation in the military was erased by a former serving chief who went over the head of the MoD to seek remedy from the apex court for a personal grievance. While the feeble and fumbling government of the day looked the other way, the succeeding government seemed to have approved such conduct by rewarding him with a ministerial berth. Against this background, is there any

justification — legal or moral — for faulting the 356 officers and soldiers who face the fury of criminal law for seeking succour from the apex court?

But let us address the root of this whole problem, which is the deployment of the army in disturbed areas under the Armed Forces Special Powers Act (AFSPA). Counter-insurgency operations, worldwide, tend to become "dirty" and difficult because they are waged against one's own citizens. The army happens to be a "blunt instrument", trained and motivated to destroy the nation's enemies through extreme violence and, therefore, normally must not be used against one's own citizenry. However, when the elected government does deploy the army for "aid to the civil power", the law requires each detachment to be accompanied by a magistrate who authorizes, in writing, when fire may be opened on civilians.

Most insurgencies, rooted in alienation and socio-economic factors, are aggravated by political venality and apathy. After the serial failure of the elected government, civil administration and police, the area is declared as "disturbed" and the military asked to restore order, invoking AFSPA. Even when the army restores relative peace and normalcy, the local police and administration repeatedly fail to resume their normal functioning. The prolonged imposition of AFSPA is, therefore, not a requirement of the army, but a fig leaf used by successive governments to hide egregious failures of governance knowing full well that deployment of the army without AFSPA would be illegal, and any orders issued would constitute "unlawful commands".

Soldiers, being human, do make mistakes and violations of human rights have occurred from time to time. But the army as a highly disciplined body is acutely conscious that violation of human rights is a crime that sullies the organisation's good name. Strict and comprehensive codes of conduct have been laid down by the army's leadership and drastic punishments are meted out under the Army Act where infringements are proved. A fact not generally known is that the strength of the Central Armed Police Forces (CAPF) has been steadily boosted and is now almost on par with our 1.3 million-strong army, and they have been designated the home ministry's "lead counter-insurgency force". This provides the government with some obvious choices: One, withdraw AFSPA and the army and

hand over CI operations to CAPFs. Two, withdraw AFSPA, deploy the army and ensure that each patrol, ambush and covert operation has an embedded magistrate to authorise opening/returning fire. Three, retain AFSPA and trust your army.

Above all, let us remember that soldiers are equal citizens with equal rights and not sacrificial lambs for those with a confused national perspective. The actions of our soldiers, when acting on behalf of the state, must be dealt with under the Army Act and not the CrPC. The state must also react with urgency to insulate its soldiers from over-zealous NGOs and excessive judicial activism.