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BSF Jurisdiction Revision: Protection from external threat or initiation of internal unrest?

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Under the Border Security Force Act, 1968, the Ministry of Home Affairs of the Indian government has issued a revised notification altering the authority of the Border Security Force to 50 kilometers inside some states sharing international borders.¹ On the one hand, while the Centre continues to argue that this legislation should be enthusiastically welcomed, a few states are concerned that such an act is a direct assault on federalism, as it is not merely an invasion of state authorities and jurisdiction. It is critical to understand: Is this conduct genuinely harming Federalism? Is the structure of the federal government too stiff to be shattered by national security concerns? Or is this just a political gimmick to garner attention in the press? The article will examine whether the due process of law followed when amending the jurisdiction. The article will also address the optimistic and pessimistic reasons for how BSF can be effective in the current context, as well as how the expansion of BSF will lead to a power struggle between the Centre and the States.

Keywords: *federalism, jurisdiction, legislation, garner.*

¹ Vijita Singh, 'Explained: enhanced powers of Border Security Force' *The Hindu* (New Delhi, 15 October 2021)

INTRODUCTION

As stated by the Centre, this act does not affect or limit the power of state police,² but rather serves as a supplement to ensure optimum protection.³ The greatest irony is that in 2012, then-Gujarat Chief Minister Narendra Modi opposed a request by the Central Government to increase the jurisdiction of the BSF.⁴ He wrote to then-Prime Minister Manmohan Singh, accusing the Centre of weakening the country's federal structure and describing the move as an attempt to "create a state within a state".⁵ However, given recent demographic changes in countries such as Afghanistan and their implications for Indian borders, it is critical to secure trans-border activity while maintaining state harmony.⁶

At present, India has faced dangers along its foreign boundaries in recent years, whether from terrorism, smuggling, or infiltration; there has been friction along the boundary lines, and such an amendment might assist India by bringing security and settling these problems. Given that India is a union of states, each of which forms a nation, and each of which is not an entity in itself, the nation's welfare must take precedence over the country's security, and no state should stand in the way. India, a vast and culturally diverse country, has two primary levels of government at the federal and state levels, with a separation of powers written in the constitution to prevent conflicts. India's federal system ensures that laws and initiatives are applied and managed efficiently. However, it is feared that the move by the Centre may result in enclaves of states, states inside states, and the strengthening of centralized federalism. Although the notification has caused fears and criticism in newspapers and news outlets, the matter remains unresolved and unheard in this political ruckus. On the one hand, this decision is beneficial for a nation as a whole and it should be supported by all states whereas, on the other hand, the problem, however, is the perceived weaponization by the Centre of central agencies such as the enforcement directorate, Central Bureau of Investigation and even the Narcotics Control Bureau which has led to opposition-ruled states becoming distrustful of any

² *Ibid*

³ Deeptiman Tiwary, 'Explained: BSF powers and Jurisdiction' *The Indian Express* (New Delhi, 15 October 2021)

⁴ *Ibid*

⁵ *Ibid*

⁶ *Ibid*

moves towards expanding the central roles within the boundaries. It is critical to understand: Is this act harming Federalism? When politicians and ministers are engaged in a verbal battle, rationalizing their logic?

HISTORY OF BSF

The BSF was formed in response to external aggression against India and is administered by the Union Ministry of Home Affairs.⁷ The BSF was created in 1965 in response to Pakistan's invasion of the Indian Kutch region and was intended to replace the inefficient State Armed Police Battalion that had previously patrolled India's border with Pakistan.⁸ The Border Security Force Act of 1968, unlike the Special Service Bureau (now known as the Sashastra Seema Bal or the SSB), was passed shortly after the BSF was established (the BSF Act).⁹ The BSF Act created the BSF as an armed force tasked with "ensuring the security of India's frontiers" and "any member of the force... [being] liable to service in any area of India as well as outside India."¹⁰

Elaborating on Section 4(1)¹¹ of the BSF Act, the Border Security Force Rules, 1969 (the BSF Rules) establish that "the Force shall: (i) promote a sense of security among the people living in the border areas; (ii) prevent trans-border crimes, unauthorised entry into or exit from the territory of India; and (iii) prevent smuggling and any other illegal activity." "Enemy" is defined under the Sashastra Seema Bal Act, 2007 (the SSB Act) and the BSF Act as "all mutineers, armed rebels, armed rioters, pirates, terrorists, and any person in arms against whom any person subject to this Act to take action."¹²

⁷ Ravi Nair, 'Shifting the border inland: Policing powers of Border Security force' *The Leaflet* (New Delhi, 21 October 2021)

⁸ *Ibid*

⁹ *Ibid*

¹⁰ *Ibid*

¹¹ Border Security Act 1968, s 4(1)

¹² *Ibid*

BSF & ITS CASES OF HUMAN RIGHTS VIOLATIONS

Evidence suggests that BSF records of Human Rights violations have increased over the past few years. For example, a 2010 Human Rights Watch report titled "Trigger Happy"¹³ records multiple incidences of torture and executions carried out by the BSF against both Bangladeshi and Indian nationals.¹⁴ There was also an alleged case where the Asian Human Rights Commission (AHRC)¹⁵ has received information about an instance of sexual harassment allegedly committed by two BSF constables from MASUM, a local human rights organisation in West Bengal, India. The facts were, two policemen stationed at Chor Moirosi Border Security Force Camp contacted Ms. Renuka Mondal on February 11, 2008, demanding sexual favours,¹⁶ which Renuka declined. Officers allegedly assaulted Renuka and attempted to rape her in public after she refused. Renuka went to the Raninagar Police Station on February 11 to file a complaint. Further, Renuka's complaint was documented and a General Diary entry with the number 469 was made at the police station. Although the complaint discloses a crime, the police have so far declined to register it as a First Information Report (FIR) and conduct any further investigation, according to reports.¹⁷ Most of the cases which are against the BSF are not proved so there is a high probability that these cases are highlighted to defame the BSF and at the same time, we cannot also make assumptions that there cannot be any cases of human rights violations which most of the independent investigations of the various group suggests. The pivotal question here is, the State is terrified about the consequences which may arise because of the increase in BSF jurisdiction but at the same time because of geopolitical changes we must protect our borders and its people from the external enemies and refresh our past when BSF and other military were always there to protect our border from all the threats.

¹³ Human Rights Watch Report, 'Trigger Happy: Excessive use of Force by Indian Troops at Bangladesh Border' (Human Rights Watch, 9 December 2010) <<https://www.hrw.org/report/2010/12/09/trigger-happy/excessive-use-force-indian-troops-bangladesh-border>> accessed 13 December 2021

¹⁴ *Ibid*

¹⁵ AHRC, 'BSF sexually harassed women in West Bengal' (Human Rights Asia, 26 March 2008) <<http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-060-2008/>> accessed 15 December 2021

¹⁶ *Ibid*

¹⁷ *Ibid*

So whether questioning the efficiency of BSF in protecting our motherland from the past several years is valid in itself?¹⁸

AMENDMENT FOR THE NATIONAL INTEREST OR TO ESTABLISH THE CENTRAL HEGEMONY?

The BSF's jurisdiction has been extended only in terms of the powers it has under the Criminal Procedure Code (CrPC), the Passport (Entry into India) Act, 1920, and the Passport Act, 1967, according to the Amendment. Under these provisions, the BSF currently has the authority to arrest and search people. Under the NDPS Act, the Arms Act, the Customs Act, and other legislation, it has the authority to arrest, search, and seize. Its authority under these regulations has not changed, which means that its power will continue to be limited to 15 kilometers within the border in Punjab, Assam, and West Bengal, and as far as 80 kilometers in Gujarat. The goal of the Jurisdiction, according to sources, is to provide uniformity and boost operational efficiency. It is true that previously, we had separate jurisdictions in different states, and this was done to bring uniformity to our Jurisdiction. While providing an explanation, the MHA stated that the move was necessary due to an increase in the number of drones dropping weapons and drugs in Jammu and Kashmir, and Punjab, but it must also be explained why the BSF's jurisdiction has not been expanded under the Arms Act, Customs Act, and NDPS Act, which cover the majority of border offences and deal with far more serious offences. The most important question which arises here is whether Police Jurisdiction will be impacted by it? and in my analysis according to this Amendment BSF cannot prosecute offenders in any case. They cannot file Chargesheets. They had to hand over every arrested individual and every seized item to the State Police or Customs. It should also be noted that the Northeast BSF's jurisdiction extends to all states (excluding Assam); does this indicate that State Police are unable to operate there?¹⁹

It is important to understand that Assam, West Bengal, and Punjab all share international boundaries. In light of recent developments in the Af-Pak area, the danger perception from

¹⁸ *Ibid*

¹⁹ *Ibid*

beyond international borders has shifted dramatically. Radical groups of many stripes will make a serious effort to destabilise Punjab, where drones have been used to drop weapons on multiple occasions. The interception of 3,000 kilograms of heroin from Afghanistan²⁰ on September 14 and the killing of five Army personnel²¹ in Surankote (Jammu and Kashmir)²² on October 11 are two straws in the wind.²³ Terrorist organisations will almost certainly renew their onslaught at border states. West Bengal has already undergone a huge demographic change due to an increase in illegal migrant Terrorist groups will probably certainly resume their attacks on border states. West Bengal has already seen a significant demographic shift as a result of the influx of illegal migrants²⁴.

Under normal circumstances, state police in border states should have been able to deal with these issues.²⁵ However, police units across the country are in a state of atrophy, and even maintaining peace and order requires aid from the Central Armed Forces. As a result, their ability to protect against the trans-border threat is questioned. Under Section 139 of the BSF Act, which authorises members of the force to exercise certain responsibilities and duties within the local limits of the area indicated in the schedule, the new amendment merely seeks to strengthen the State Police's capabilities in securing the state.²⁶ The state police's jurisdiction has not been limited, and their authority has not been diminished in any way. It's only an enabling provision intended at bolstering and supplementing State Police activities. State police retain the authority to investigate the case.²⁷

²⁰ Devesh K Pandey, 'NIA arrests one more Afghan National in 3000 kg Drug haul case' *The Hindu* (Delhi, 14 December 2021)

²¹ *Ibid*

²² Peerzada Ashiq, 'In Jammu Kashmir 5 Army Men, 2 Ultras, killed in gunfight in 12 hours' *The Hindu* (Delhi, 11 October 2021)

²³ *Ibid*

²⁴ ET Bureau, 'Bengal, Tripura clocks highest number of illegal Migrants' *The Economic Times* (Delhi, 6 February 2020)

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ Prakash Singh, 'Securing the State' *The Indian Express* (Delhi, 16 October 2021)

THE STATES' CONCERN

Constitution is the supreme law of the land; power is distributed focusing on the country's federal system; a country where states may have different governments than the centre,²⁸ where state legislatures have the power to make laws, where states are strong enough but still reliant on the centre, where states may formulate different laws, but nothing shall override the fundamental principles or basic structure of the constitution. However, the Centre has encroached on the state's jurisdiction and called into doubt its competency as a result of this act. The Indian Constitution's 7th Schedule²⁹, Article 246³⁰ deals with the division of powers between the Union government and state governments.³¹ List 2 contains subject matter over which states have legislative authority, such as state security and police³², but the Centre's notification has incensed the basic structure doctrine³³ by violating the notions of Federalism and separation of powers, which is a blatant abuse of power and unconstitutional.³⁴ Federalism prevents states from interfering with the Centre's jurisdiction and vice versa, allowing the nation to function in a more discrete and reliable manner. However, the center's involvement in state functions has harmed the essential framework of the constitution.³⁵

India's Border Security Forces have always defended the country from external threats, maintaining watch and removing terrors that endanger the country, in great tragedies, and during festivals, protecting us from perils that may befall us. However, tragedies such as Pulwama and 26/11 have soon become apparent that we need to keep a tight check on the borders themselves, and the BSF has failed to prevent such incidents in the past. When such episodes occurred, however, there was no finger-pointing or questions were raised before BSFs; contrary, precautions were taken, plans were made, and forces were bolstered. However, this core step calls into question, not just the state's authority, but also the

²⁸ *Ibid*

²⁹ Constitution of India, schedule VII

³⁰ Constitution of India, art 246

³¹ *Ibid*

³² Constitution of India, list 2

³³ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461

³⁴ *Ibid*

³⁵ *Ibid*

competency of the state police. Until war breaks out, border security forces are assigned to always protect the borders, while state security is the responsibility of the state police and that shall remain so.³⁶ There are risks that the BSF's extended jurisdiction and if it is not supplemented by proper oversight. There has also been concern that this power can also be administrated to political wargame and may lead to human rights violation as well. If it is felt that security along the borders must be tightened, state police will be given the task, and necessary steps will be taken to ensure the proper functioning and security of the nation.³⁷

Following the killing of 14 people by security personnel in Nagaland³⁸, West Bengal Chief Minister Mamata Banerjee instructed police in districts that cross borders with neighboring nations to keep an eye on BSF activities.³⁹ She also told cops not to let the Border Security Force go beyond its designated jurisdiction, and she insisted that law and order is a state issue. The purposes with which this notification was made may collide with this conflict of powers, causing public peace and security to be compromised also this action was denounced by the Punjab government⁴⁰:

“I strongly condemn the GoI’s unilateral decision to give additional powers to BSF within 50 KM belt running along the international borders, which is a direct attack on the federalism.⁴¹ I urge the Union Home Minister @AmitShah to immediately roll back this irrational decision,” chief minister Charanjit Singh Channi tweeted.⁴²

Section 139 (ii)⁴³ of the BSF Act gives the BSF broad arrest powers,⁴⁴ It has the authority to make preventive arrests under Section 139 (1)⁴⁵ and to make post-conviction arrests under

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ Tora Agarwal, ‘Nagaland: 14 civilian killed by forces; soldier dies of Injuries as violence erupts’ *The Indian Express* (Delhi, 6 December 2021)

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ S Channi, ‘Status’ (*Twitter*, 13 October 2021)

<https://twitter.com/CHARANJITCHANNI/status/1448283386942873606?ref_src=twsrc%5Etfw> accessed 01 December 2021

⁴² *Ibid*

⁴³ Border Security Act 1968, s 139(ii)

⁴⁴ *Ibid*

⁴⁵ Border Security Act 1968, s 139(1)

Section 139 (2)⁴⁶. (ii) There's no indication of consulting with the state police.⁴⁷ The Act's scheme and implementation regime must be examined. This power vested in hands of the center is causing stress in state politics as also pointed by MP Manish Tewari.

When BSF is deployed in villages, cities, and towns alongside the police, will the public benefit or will it merely prove to be a hindrance? Is it even possible for BSF to act entirely without the assistance of the police?

IS FEDERALISM IN JEOPARDY?

The new notification has ignited a power struggle between the federal government and state governments over jurisdiction and authority. While the centre intends to remove national hazards through its state, it considers that its implementation will be an infringement on the state's jurisdiction. The state believes this notification will create a "state inside a state" and be an obstacle to federalism, whereas the centre hopes to use it to combat terrorism and infiltration. However, the question is whether this conflict is just political or if it is truly undermining the Constitution's essential ideas and structure.

The Indian Constitution establishes a federal framework, a dual polity, and a two-tier government system in which the central government is more powerful than the states. In addition, the constitution divides power in favour of the centre. Because of the country's size and intricacy, reaching the full range of its borders would have been difficult, and proper administration would have been impossible. In India,⁴⁸ federalism was selected for ease of administration rather than to establish two levels of government. That is why, unlike the United States, it is a 'union' of states rather than a 'federation.'⁴⁹ Despite the fact that the country and its people are divided into distinct States for administrative purposes, the country

⁴⁶ Border Security Act 1968, s 139(2)

⁴⁷ *Ibid*

⁴⁸ MP Jain, *Indian Constitutional Law* (8th edn, LexisNexis 2018) 1027

⁴⁹ *Ibid*

and its people are one integrated whole,⁵⁰ living under a single imperium originating from a single source.⁵¹

Because India is a quasi-federalism rather than a true federal republic, it does not precisely adhere to the classic or orthodox federal system. The state may engage in political maneuvering in the name of federalism and constitutionalism, but the Border Security Force Act of 1968 empowers the federal government to enact laws in this regard, and if the central government has issued certain guidelines for the good of the country the state has no reason to object.⁵² The Directive principal tries to achieve a Uniform Civil Code⁵³, or a set of laws and regulations that govern the entire country, similar to the Uniform Criminal Code. In India, states have the authority to make laws independent of the centre, but only to meet local needs and requirements. The centre, on the other hand, is responsible for international and national affairs in order to maintain the nation's peace and prosperity, and in this case, the centre felt the need to implement such guidelines for national security reasons.⁵⁴ India, as a nearly centralized Federalism, has full jurisdiction over such standards, which are both constitutional and exercise of power.⁵⁵

CONCLUSION

The Security forces play paramount importance in protecting our border areas and the national interest of the country should always prevail over state interests. It is the duty of every state to thinking for national interest and at the same time, it is their duty to maintain dissent for valid reasons because dissents act as a valve in a pressure cooker if not done properly pressure cooker can be burst hence, healthy democracy cannot be maintained. Any initiative to improve the country's security should be welcomed by all states. The issue, however, is the perception that central agencies like the Enforcement Directorate, the Central Bureau of Investigation, and even the Narcotics Control Bureau have been weaponised by the

⁵⁰ *Ibid*

⁵¹ *Hinsa Virodhan Sangh v Mirzapur Moti Juresh Jamat* (2008) 5 SCC 33

⁵² *Ibid*

⁵³ Constitution of India, art 44

⁵⁴ MP Jain (n 48)

⁵⁵ *Ibid*

government. As a result, opposition-ruled governments have become wary of any move to expand the central role within their borders in recent years. Instead of issuing a bland notification announcing the modifications, the Union Home Ministry might have taken the governments of the States where the BSF area of operation has been expanded into and avoided dragging a key paramilitary force into a political brawl. The BSF's operations would be hampered if the state government did not cooperate. The paramilitary requires the assistance of the local police force in order to carry out its duties effectively, particularly because it must hand over arrested persons and seizures to the police and leave the rest of the procedures to them, including the filing of FIR and the preparation of charge-sheet. Coordination with state police is also necessary for both forces to understand their accountability and avoid blame games in the events of mistakes. These were sufficient reasons to enlist the help of the state government in such a crucial issue. Even now it is not too late for the Centre to convene a conference of border states and brief them on security consideration that leads to this decision.