MARTIAL LAW IN INDIA: THE DEPLOYMENT OF MILITARY UNDER THE ARMED FORCES SPECIAL POWERS ACT, 1958

Khagesh Gautam*

ABSTRACT :

The question for inquiry in this article is whether the key provisions of the Armed Forces Special Powers Act, 1958 ("AFSPA"), an Indian Parliamentary legislation, amount to ade facto proclamation of Martial Law in India. The constitutional validity of AFSPA has been upheld by a unanimous constitution bench of five judges of the Supreme Court of India. But the AFSPA has not yet been examined from the Martial Law perspective. In order to engage in this inquiry, this article briefly traces the development of the idea of Martial Law and argues that military acting independent of the control of civilian authorities is the most important feature of Martial Law. This article also argues that in order for a geographical area to be under Martial Law, there is no need to have a formal promulgation of the same. In other words, an area can be under Martial Law without formally being so declared. They key feature to note is whether the military is acting independent of the civilian control or not. The AFSPA is then analyzed from this angle and it is concluded that when the AFSPA becomes applicable to any area in India, that area is under de facto Martial Law. The question of whether or not the Indian Constitution impliedly or expressly authorizes the proclamation of Martial Law is

* Stone Scholar, LL.M. (Columbia); LL.B. (Delhi), Associate Professor of Law & Assistant Dean (Research and Publications); Assistant Director, Center on Public Law and Jurisprudence, Assistant Director, Mooting and Advocacy Program, Jindal Global Law School, O.P. Jindal Global University, Sonipat, India. The author can be reached at kgautam@jgu.edu.in. The author is grateful to Alexander Fischer, Sarbani Sen, Satya Prateek, Aditya Swarup and other faculty members and students of the Center on Public Law and Jurisprudence for their helpful comments and criticisms, and to Raunaq Jaiswal for excellent research assistance. All the errors remain that of the author.

a natural follow-up question that is left for future examination. However, the Supreme Court's decision upholding the constitutional validity of the AFSPA is criticized on the ground that the Court should have recognized and called the AFSPA as what it truly is–a legislation authorizing a de facto proclamation of Martial Law in India.

has not yet been examined from the Martial Law perspective.[4] In order to engage in this inquiry, this article briefly traces the development of the idea of Martial Law and argues that the military acting independent of the control of civilian authorities is the most important feature of Martial Law. This article also argues that in order for a geographical area to be under Martial Law, there is no need to have a formal promulgation of the same. In other words, an area can be under Martial Law without formally being so declared. The key feature to note is whether the military is acting independent of civilian control. The AFSPA is then analyzed from this angle and it is concluded that when the AFSPA becomes applicable to any area in India, that area is under *de facto* Martial Law. The question of whether or not the Indian Constitution impliedly or expressly authorizes the proclamation of Martial Law, which is the natural follow-up question that arises from this inquiry, is left for future examination. However, the Supreme Court's decision upholding the constitutional validity of the AFSPA is criticized on the ground that the Court should have recognized the AFSPA for what it truly is–a legislation authorizing a de facto proclamation of Martial Law in India.

Part II argues that the most important feature of Martial Law is the military acting independent of civilian authority and control. When a geographical area is put under Martial Law, the military is called out and the military commander is under no legal obligation to take his orders from the civilian authority of the area. The military commander might be required to cooperate with the civilian authorities in the area, but he is allowed to make his own decisions. To that extent, the military acting independent of any civilian supervision clearly distinguishes an area under Martial Law from the military merely acting as an aid to civilian authority (where the military acts under the supervision and command of the civilian authority). Having identified this key feature of Martial Law in Part II, Part III then applies this rule to the AFSPA. The Indian Parliament enacted the the AFSPA and, as previously mentioned, a constitutional bench of five judges of the Supreme Court of India unanimously upheld its constitutional validity.[5] However, the AFSPA has never been examined, either academically or judicially, from the Martial Law angle. Part III discusses the key provisions of the AFSPA and the Supreme Court

4. Use of the AFSPA has been described as 'martial law regime' by only one commentator and that too was done in passing and without any detailed legal analysis that the subject deserves. See Hiren Gohain, Post-Colonia Trauma?, 41 ECON. & POL. WKLY. 4537, 4537 (2006).

5. Naga People, (1998) 85 AIR at 431.

decision that upheld the constitutionality of the AFSPA. After this, it applies the rule set out in Part II to the AFSPA and concludes that the 'disturbed area notification'[6] issued under the AFSPA that authorizes the calling out of the military to the disturbed area so notified is a de facto proclamation of Martial Law. Part IV concludes by briefly restating the key arguments made in the article. This paper concludes that the 'disturbed area notification' under the AFSPA amounts to a de facto proclamation of Martial Law and the Supreme Court should have recognized it and called it for what it truly was. Again, whether or not the Indian Constitution expressly or impliedly gives the authority to proclaim Martial Law is a natural follow-up question that arises from this discussion. This Paper leaves that inquiry for further examination in the future.

II. MARTIAL LAW

A. Inability of Civilian Authorities and Courts to Function Effectively–A Precondition for Martial Law

It has been understood for a long time now that Martial Law and Military Law are not the same things.[7] Expounding the nature of Martial Law, Sir Matthew Hale in 1713[8] observed that Martial Law, owing to the circumstances that make it necessary, "in Truth and Reality [is] not Law, but something indulged rather than allowed as Law."[9] Sir Matthew also observed that the exercise of Martial Law,

---

6. Armed Forces (Special Powers) Act, No. 28 of 1958, INDIA CODE, § 3, http://indiacode.nic.in ("Power 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 Administrator of that Union Territory, as the case may be, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that 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."), amended by Armed Forces (Assam Manipur) Special Powers (Amendment) Act, No. 7 of 1972, INDIA CODE, § 4.

7. See, e.g. Charles M. Clode, The Law Military as Distinct from Martial Law, 29 L. MAG. & L. REV. Q. J. JURIS. 24, 25-27, 32 (1870). See generally J. V. Capua, The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right, 36 CAMBRIDGE L. J. 152, 152 (1977), for an early history (from 1300 to 1628) of Martial Law in England.

8. See SIR MATTHEW HALE, THE HISTORY OF COMMON LAW OF ENGLAND 26 (Charles M. Gray ed., 3rd ed. 1971) (1739); Mark Neocleous, From Martial Law to the War on Terror, 10 NEW CRIM. L. REV.

owing to its nature, is not to be permitted when civilian courts are functioning, "for Martial Law, which is rather indulg'd than allowed, and that only in Cases of Necessity, in Time of Open War, is not permitted in Time of Peace, when ordinary Courts of Justice are open".[10]

ple manner by the law of England."[20] Incidentally, we may note that the incorrectness of Dicey's position, at least to the extent it was to be of any comparative use, was demonstrated in 1812 by General Jackson when he declared Martial Law in New Orleans during the war with Dicey's countrymen. Jackson proclaimed, "Why is martial law ever declared? Is it to make the enlisted or drafted soldier subject to it? He was subject to it before."[21] Dicey's view gives the military, "a mandate for extensive action in situations of emergency, without the need for parliamentary approval, and with questionable regard to the wishes of the elected government."[22] Willoughby, in 1929, compounded the difficulty by defining Martial Law as inclusive of Military Law and calling Martial Law as understood in 1902 as 'Martial Lawin sensu strictiore'[23] In England, a similar description was provided by Chalmers and Asquith in 1936.[24] Later, Willoughby did for US constitutional Law what Dicey had done for English constitutional law almost a decade and a half earlier, stressing on the circumstances that make the proclamation of Martial Law in sensu strictiorenecessary.[25]

making the authority to proclaim Martial Law a part of constitutional law or public law.[36] In fact, the proclamation of Martial Law by General Jackson during the war (against the British) of 1812 in New Orleans and its continued operation, even after the British having been defeated and peace being restored, was justified by General Jackson by a direct reference to the US Constitution that allows the suspension of the writ of habeas corpus.[37] Once proclaimed, the military takes complete control and as the threat becomes bigger, necessity becomes graver and therefore discretion becomes freer.[38]

At least since 1713, and certainly since 1731, the inability of the civilian authorities and courts to properly or effectively discharge their functions has been the hallmark of the necessity that makes a proclamation of Martial Law necessary.[39] Thus, if the civilian authorities and courts are open and able to effectively discharge their functions, Martial Law cannot be imposed for it is not necessary to do so.[40] In reverse, if Martial Law has been imposed, it stands to reason that civilian authorities and courts were not able to discharge their functions. We can therefore examine the genuineness of a proclamation of Martial Law by examining whether or not the civilian authorities and courts were able to carry out their functions.[41] General Jackson's con-

---

that law, but is merely a statement of facts, which of their own force have already rendered that law necessary.").

36. SeeW

B. Military Acting Independent of Civilian Authorities and Courts–A Consequence of Martial Law

In a state when the military acts independent of the civilian authorities and courts, the civilian authorities and courts may be allowed to function, but they function not "as of right" but, "in subordination to the military authority and to the will of the general or other officer in command, by whose permission it is exercised, and under whose direction they conduct judicial business and administer the law."[46]

The decision was reversed on appeal by the Privy Council on the ground that just because civilian courts are sitting by themselves is not enough to conclude that a state of Martial Law does not exist because the key determining factor is whether the courts are sitting in their own right or as mere licensees of the military power.[53]

The second is the 1901 case from another British colony, Ex parte Marais.[54] In 1901, during the Boer War, the petitioner Marais was arrested without warrant and detained in a town 300 miles away from where he was arrested.[55] When Marais petitioned the Supreme Court in Cape Town for his release, the jailer filed an affidavit before the Court stating that he was, "detained by an order of the military authorities for contravening martial law regulations."[56] His lawyers argued that, since "civil courts were still exercising uninterrupted jurisdiction, which went to show that the 'ordinary course of law could be and was being maintained[,]' . . . a state of war did not exist and martial law could not be applied to civilians."[57] The Privy Council was not impressed and held that, only on the basis of the fact that civilian courts have been permitted to pursue their ordinary course, it cannot be concluded that a proclamation of martial law is invalid.[58] The fact that Marais conceded in his petition that war was raging did not help either.[59] In the words of Frederick Pollock, "the absence of visible disorder and the continued sitting of the courts are not conclusive evidence of a state of peace."[60] Therefore, the functioning of civilian authorities and courts does not mean we are not in a state of Martial Law.[61] Rather, the important question is whether the military is under the control of the civilian authority or whether it is acting independent of the civilian authority.[62] If the military is acting independent of the civilian authority and the courts, such would be a state of de facto Martial Law whether or not it is so called.

---

53. Id. at 130.

54. Ex parte D. F. Marais [1902] AC 109 (PC) (appeal taken from Sup. Ct. of the Cape of Good Hope).Thd7).

C. Military Acting-in-Aid of Civilian Authority v. Martial Law

Short of a proclamation of Martial Law, whereby the will of the military commander is supreme, there exists another concept of 'Military Acting-in-Aid of Civilian Authority.' The first traces of this concept may be found in the writings of William Birkhimer in 1914 when he observed that, "in time[s] of peace statutes authorizing the exercise

declaration of martial law, and the troops act in entire subordination to the civil authorities.[71]

Rankin provides the key distinction between Martial Law (which

The danger arises as follows: If overwhelmed and under distress, the choice of calling out the military for assistance in law enforcement functions is a choice available to the local civil authorities. However, if the deployment of the military is authorized by a statute and in such a deployment the local civil authorities have no say, and once deployed the military and civil authorities both continue to function but the military acts independent of the civilian authorities and courts, we come dangerously close to a situation where we have in fact, knowingly or unknowingly, proclaimed Martial Law, although we call it Military Acting-in-Aid of Civilian Authority. [89] Consequently, we are liable to make the error of reviewing the legality of this act by applying an incorrect and inapplicable judicial standard of review. In other words, we end up reviewing the legality of a proclamation of Martial Law by analyzing whether or not it is a statutorily valid calling-out of the military to come and aid the civilian authorities. Meanwhile, the military, acting independent of the civilian authorities, continues to exercise its authority in complete disregard of the local civilian authorities, something that it can only do once Martial Law is proclaimed.[90]

There is another problem. If the troops (as well as their officers) are not clear as to why they have been called out, they will be unclear as to whether they are supposed to enforce the law (i.e. act strictly as assistants of the local civilian authorities and courts, in other words, take their orders from civilian authorities) or maintain peace and order (i.e. act independently and exercise discretion in use of force), and the extent to which they are allowed to go in enforcing the law.[91] One

---

his superior, unless such order bears upon its face the marks of its own invalidity or want of authority.").

89. This point is illuminated by a similar scenario in Canada. The military could be called for assisting in law enforcement functions by the provincial Attorney General, but in 1998 the Canadian Parliament amended the law and vested this authority in the federal authorities. This was criticized as, "Unlike the traditional aid of civil power, there is no requirement that the provinces be consulted before the troops are called out." Editorial, Calling out the Troops, 48 CRIM. L.Q. 141, 142 (2003). The Canadian Supreme Court also expressed its concerns as this move impinged the provincial jurisdiction over administration of justice. See R v. Nolan, [1987] 1 S.C.R. 1212 (Can.). These issues have been raised in Australia as well. See, e.g. Michael Head, Calling out the Troops – Disturbing Trends and Unanswered Questions, 28 UNSW L.J. 479, 480 (2005). The definition of Martial Law in a 1967 Michigan statute also supports this point. Here Martial Law is defined as, "exercise of partial or complete military control over domestic territory in time of emergency because of public necessity." Mich. Compiled L. § 32.505(sec. 105)(j) (West 2013).

90. See, e.g. Campbell & Connolly, supra note 1, at 349.

91. This point has been noted by Colonel Robin Evelegh (who was the Commanding Officer of an infantry battalion in Belfast, Ireland) in his book PEACE-KEEPING IN A DEMOCRATIC SOCIETY (1978) reviewed in, and quoted by, Book Review, 8 ANGLO-AM. L. REV. 65, 66 (1979).

whereby, "any person arrested and taken into custody under [the AFSPA] shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest."[107] This is consistent with the view that when acting under the color of Martial Law, "It is the function of the military forces to hold the prisoner until order is restored and he can be safely turned over to the civil authorities for trial. Martial law prevents but it does not punish."[108] However, the AFSPA does provide full legal immunity to any person who acts under its authority.[109]

The Governor of the State, Administrator of the Union Territory, or the Union Government in New Delhi can issue a Disturbed Area Notification, which in turn triggers the deployment of the military under the AFSPA to aid civilian authority.[110] The Disturbed Area Notification is not required to be reviewed periodically, but one legal commentator has argued that, given the nature of this notification, "the making of the declaration carries within it an obligation to review the gravity of the situation from time to time and the continuance of the declaration has to be decided on such a periodic assessment of the gravity of the situation."[111]

B. The Constitutionality of the Armed Forces Special Powers Act, 1958

In Naga People[112] the constitutional validity of the infamous Armed Forces Special Powers Act, 1958 (AFSPA) was challenged before the Supreme Court of India.[113] Since the case involved a 'sub-

107. Armed Forces (Special Powers) Act § 4(d), http://indiacode.nic.in.

108. RANKIN , supra note 21, at 179 (citing L. K. Underhill, Jurisdiction of Military Tribunals in the United States over Civilians

stantial question of interpretation' of the Indian Constitution and, as required by the Indian Constitution, [114] the case was referred to a Constitution Bench of five judges of the Supreme Court.[115] The Court delivered a unanimous opinion. Justice Agrawal delivered the opinion of the Court in which all four other judges concurred.[116] The unanimous Court upheld the validity of the AFSPA and rejected all constitutional challenges raised in the case.[117]

In Naga People, out of the several grounds on which the constitutionality of the AFSPA was assailed, a key ground was the vesting of the control and supervision of the military.[118] It was argued in this case that the military cannot act independent of the control and supervision of the civilian state authority.[119] Since the military has been called out to act in aid of the civilian authority, which has been overwhelmed with the violence and thus has not been able to contain such violence, the military, during its deployment in the state, must always be under the control and supervision of the civilian state authority. In other words, the civilian state authority will always retain, "a final directorial control [over the military] to ensure that the armed forces act in aid of civil power and do not supplant or act in substitution of the civil power." [120] These arguments were rejected, and the unanimous Court held that:

> We are, however, unable to agree with the submission of the learned counsel for the petitioners that during the course of such deployment the supervision and control over the use of armed forces has to be with the civil authorities of the State concerned, or that the State concerned will have the exclusive power to determine

---

Disturbed Areas Act, 1955 (which was enacted by the State Legislature of Assam) was also challenged. Naga People, (1998) 85 AIR at 440.

114. INDIA CONST. art. 143, § 2.

115. The Constitution Bench comprised of Chief Justice J. S. Verma, Justices M. M. Punchhi, S. C. Agrawal, Dr. A. S. Anand, & S. P. Bharucha. See Naga People, (1998) 85 AIR at 431.

116. Id. at 440.

117. Id. at 462-64.

118. Id. at 446 (On behalf of the petitioners, Shanti Bhushan argued that, "the use of the Armed Forces in aid of the civil power contemplates the use of Armed Forces under the control, continuous supervision and direction of the executive power of the State and that Parliament can only provide that whenever the executive authorities of a State desire, the use of Armed Forces in aid of the civil power would be permissible but the supervision and control over the use of armed forces has to be with the civil authorities . . . .") (emphasis added).

119. Id.

120. Id. (On behalf of the petitioners, Dr. Rajiv Dhavan argued that, "the State in whose aid the Armed Forces are so deployed shall have the exclusive power to determine that purpose, the time period and the areas in which the Armed Forces should be requested to act in aid of civil power and that the State remains a final directorial control to ensure that the armed forces act in aid of civil power and do no supplant or act in substitution of the civil power.").

> the purpose, the time period and the areas within which the armed forces should be requested to act in aid of civil power.[121]

However, the Court unanimously interpreted the phrase 'in aid of civil power' in the AFSPA.[122] Incidentally, this phrase is also mentioned twice in the Indian Constitution.[123] The Court held that:

> The expression "in aid of the civil power" in Entry 1 of the State List and in Entry 2A of the Union List implies that deployment of the Armed Forces of the Union shall be for the purpose of enabling the civil power in the State to deal with the situation affecting maintenance of public order which has necessitated the deployment of the Armed Forces in the State. The word "aid" postulates the continued existence of the authority to be aided. This would mean that even after deployment of the Armed Forces the civil power will continue to function. The power to make a law providing for deployment of the Armed Forces of the Union in aid of the civil power in the State does not comprehend the power to enact a law which would enable the Armed Forces of the Union to supplant or act as a substitute for the civil power in the State.[124]

We may in passing also note that the AFSPA was not examined on the touchstone of the Life and Liberty Clause of the Indian Constitution.[125] The AFSPA needs to be re-reviewed so as to determine

---

121. Id. at 447.

122. Armed Forces (Special Powers) Act, No. 28 of 1958, INDIA CODE, § 3, http://indiacode.nic.in.

123. See generally INDIA CONST. sched. 7, list I, entry 2A. ("Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil powers; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.") (emphasis added); Id. at list II, entry 1 ("Public Order but not including the use of naval, military or Air force or any other armed force of the Union or any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power.") (emphasis added).

124. Naga People's Movement of Human Rights v. Union of India, (1998) 85 AIR 431, 447 (India) (emphasis added).

125. See generally INDIA CONST. art. 21. ("No person shall be deprived of his life or personal liberty except according to procedure established by law."); see Maneka Gandhi v. Union of India, (1978) 2 SCR 621, 668 (India) (the Supreme Court held that the 'procedure established by law' under article 21 must be a 'just, fair and reasonable' procedure); see also State of Punjab v. Dalbir Singh, (2012) 99 AIR 1040, 1060 (India) (holding that, "in our Constitution the concept of 'due process' was incorporated in view of the judgment of this Court in Gandhi."); Selvi v. State of Karnataka, (2010) 97 AIR 1974, 2009 (India) (where the Supreme Court interpreted the "right against self-incrimination" through the ethos of "substantive due process" and "right to fair" trial); Sunil Batra v. Delhi Admin., (1978) 67 AIR 1675, 1690 (India) (holding that, "[t]rue, our Constitution has no 'due process' clause . . . ; but, in this branch of law, after [R. C. Cooper v.

ing independent of the civilian authorities continues to exercise its authority in complete disregard of the local civilian authorities,[134] something that it can only exercise once Martial Law is proclaimed.[135] Martial Law can be invoked in circumstances where the civilian authority, for all practical purposes, has ceased to exist and there is no other option left but to call out the military to maintain peace and order. Civilian authority will then be allowed to function but that is completely dependent on the will of the military commander. In fact, it has been shown that, when the AFSPA is invoked, civilian authorities "start playing second fiddle" and, "instead of 'coming to the aid of civil administration', the armed forces virtually replace it."[136] Courts have held consistently that the continued existence of civilian authority is no basis to conclude that a proclamation of Martial Law was invalid.[137] Thus, the presence or absence of civilian authority is not helpful in determining whether or not an area is under Martial Law. The key factor is the degree of control that the civilian authority exercises over the military. As per *Naga People*, once deployed, subsequent to the issuance of a 'disturbed area notification,' the military is not required to act under the civilian authority.[138] This holding of the Court therefore amounts to a de facto sanctioning of a proclamation of Martial Law.

The deployment of the military to aid the civilian authority under section three of the AFSPA is triggered by the issuance of a Disturbed Area Notification, which can be issued by the Governor of the State, Administrator of the Union Territory or the Union Government in New Delhi.[139] The difficulty with section three is that it does not

134. The abuses of the AFSPA are too numerous and well recorded, several of those allegations have been denied by the Army whereas in several other instances the Army has been forced to take action. See, e.g. Uttam Sengupta, 'The ULFA Boys are not amateurs', INDIA TODAY (Dec. 31, 1990, 11:15 AM), http://indiatoday.intoday.in/story/ulfacertainlyhavethebenefitofverygoodintelligenceltgenbaljitsingh/1/316031.html (where Lieutenant General Baljit Singh, then Chief of Staff of Eastern Command, denied allegations of power abuse by the Army under the AFSPA). But see, Gohain, supra note 4, at 4537 (describing at least three events of power abuse where in one incident of custodial torture, specifically that "[t]here was such a public outrage that the army general in charge of operations in Assam was forced to visit the bereaved family and apologise.").

135. See, e.g. Campbell & Connolly, supra note 1, at 349.

136. Navlakha, supra note 99, at 26.

137. Campbell & Connolly, supra note 1, at 348-49.

138. See *Naga People's Movement of Human Rights v. Union of India*, (1998) 85 AIR 431, 447 (India).

139. Armed Forces (Special Powers) Act, No. 28 of 1958, INDIA CODE, § 3, http://indiacode.nic.in ("Power 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 Administrator of that Union Territory, as the case may be, is of the opinion that the whole or any part of such State or Union

clearly describe the circumstances under which the issuance of a Disturbed Area Notification is justified. [140] So long as the Notification is statutorily valid, and the statute's constitutionality is already upheld, it will be very difficult to examine the true nature of this Notification. [141] This is exactly what we found in our analysis in the preceding part, i.e. we are in a situation where we end up reviewing the legality of a proclamation of Martial Law by analyzing whether or not it is a statutorily valid call-out of the military to come and aid the civilian authorities. Meanwhile, the military, acting independent of the civilian authorities, continues to exercise its authority in complete disregard of the local civilian authorities, something that it can only exercise once Martial Law is proclaimed.[142] Furthermore, the use of the military in a situation that does not warrant a proclamation of Martial Law is bound to have adverse impact on the military itself that has, in this case, led to soldiers committing suicide and killing their own, prompting the army generals to urge a political solution.[143] Some retired officers have also

failure to act. . . . The holders of public [offices] have been rendered

IV. CONCLUSION

Use of the military in a domestic crisis is nothing new.[167] In Moyer,[168] even though there was no formal declaration of Martial Law by the Governor of Colorado, he still had the petitioner "Moyer summarily arrested and imprisoned."[169] The Governor had determined, though, that a state of insurrection existed because of a violent labor strike. In such circumstances, the US Supreme Court held that the Governor's determination of the state of insurrection was conclusive.[170] Much water has flown under the proverbial bridge since Moyer was decided in 1909. However, compared with the facts in context of the AFSPA noted above, clearly the situation was much more critical as compared to Moyer. Whether it is still the same situation is, however, arguable.

The AFSPA authorizes the deployment of the military in any area that has been so notified under the disturbed area notification issued under section three of the AFSPA. When the military is so deployed, it is supposed to cooperate with the civilian authorities but there is no need for the military to act under their command and control. Clearly then, the military acts independent of the civilian authority in the area where the military is deployed. Is the issuance of a disturbed area notification, therefore, a de facto proclamation of Martial Law? This article argues that it is. The existence of civilian authority in an area where the military has been deployed to maintain law and order is no ground to conclude that the area is not under Martial Law. The key factor is whether the military is acting under the command and control of the civilian authority or independent of it. Obviously, the military will act in cooperation with the local civilian authority once it is deployed in the area, but there is no legal obligation for the military to do so. In the case of a conflict, the military commander will clearly outrank and out-command the civilian authority. If such is the situation, then the area is under Martial Law, by whatever name we call it.

---

167. See Note, Rule by Martial Law in Indiana: The Scope of Executive Power, 31 IND. L. J. 456, 456 (1995); Note, Martial Law and the National Guard, 18 N.Y. L. F. 216, 220-223 (1972). These two articles document the extensive use of Martial Law by State Governors in the United States where they declared Martial Law and called in the National Guard to handle domestic situations like strikes and other like instances of public unrest. See also Note, Constitutional Law – Martial Law – Preserving Order in the State: A Traditional Reappraisal, 75 W. VA. L. REV. 143, 144 (1972) [hereinafter Preserving Order] (citing KERNER, supra note 75).

168. Moyer v. Peabody, 212 U.S. 78 (1909).

169. Preserving Order, supra note 167, at 158.

170. Moyer, 212 U.S. at 83 (1909).

Given the grave circumstances that necessitate putting an area under Martial Law, this is not only desirable but necessary–it would not work otherwise. But calling it what it truly is, is important to ensure that the proper standards of judicial review are applied when the matter reaches the courts. When the Supreme Court upheld the constitutionality of the AFSPA, it failed to realize the disturbed area notification for what it truly was–a de facto