

## **The Armed Forces (Special Powers) Act 1958 and Armed Forces (Jammu & Kashmir) (Special Powers) Act 1990**

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The insurgency in the North East led to the enactment of the Armed Forces (Special Powers) Act 1958 and in 1990 a similar Act was enacted for Jammu & Kashmir. Under these two Acts the Governor of the State, the Administrator of a Union Territory or the Central Government can declare an insurgency hit area as disturbed and thereafter the armed forces, acting in aid of civil power acquire the powers given in section 4 of the Act. These include (1) dispersal of an unlawful assembly by use of force including lethal force (2) the destruction of arms dumps, fortified positions or shelter used as a base for attacking security forces (3) arrest of a person against whom there is ground to believe that he has committed a cognizable offence (4) the power to enter premises, conduct searches and seize persons or materials found in the building. The only restriction is that the armed forces do not have the power of detention and, therefore, an arrested person must be handed over to the officer incharge of the nearest police station without any delay. The Act also gives immunity from prosecution and other legal proceedings to personnel of the armed forces purporting to have acted in pursuance of law without prior sanction of the Central Government.

The question is whether we need the Armed Forces (Special Powers) Act or whether normal laws have adequate provisions to deal with all law and order situations. The argument of the Army is that it refuses to act under orders of a Magistrate or any civil authority and, therefore, if it is to be used in aid of civil power it must have special legal authority. The British ruled India for over two hundred years without any Special Powers Act. It is true that in 1857 and its aftermath British officers had the power of life and death over any person suspected of rebellion, but this was an extraordinary situation in which the British were fighting for the very existence of their empire in India. 1857 apart, the British acted under the doctrine of Army to the aid of civil power, as also the provisions of the Code of Criminal Procedure. Chapter X, Cr.P.C covers both these doctrines. Under section 130, Cr.P.C. an Executive Magistrate, if he finds that under section 129, Cr.P.C. he cannot control a situation by civil force alone, he can requisition the services of armed forces under section 130, Cr.P.C. and direct the commanding officer to disperse an unlawful assembly and to arrest persons who are members of such assembly. Under section 131, Cr.P.C. any commissioned or gazetted officer of the armed forces may, if public security is manifestly endangered and in the absence of an Executive Magistrate because he cannot be contacted, take all necessary steps, including use of extreme force to restore order. He will, however, report the matter to an Executive Magistrate as soon as he can be contacted and thereafter act on the instructions of the Magistrate as to whether he may continue his action against the assembly or not. Section 132, Cr.P.C. gives complete immunity from any legal proceedings to an Executive Magistrate, a police officer or a member of the armed forces.

The power of dispersing an assembly or arresting a person given under section 4 of the Armed Forces (Special Powers) Act is identical with the one given in Chapter X, Cr.P.C. The difference is that under the Armed Forces (Special Powers) Act the Army acts independently of an Executive Magistrate.

The General Exceptions given in Chapter IV of the Indian Penal Code provide that if a soldier obeys an order of a superior officer to use force against a mob he commits no offence. Under sections 100 and 103 IPC action taken in right of private defence of the body or property permits even the causing of death under given circumstances. Therefore, because he is covered by the General Exceptions, a soldier does not need the powers given under the Armed Forces (Special Powers) Act.

There are two other provisions which call for comment. One relates to destruction of structures, arms dumps, etc. Even the police quite often faces a situation when it is under armed attack from behind shelter. There is nothing to prevent the police from destroying such shelter, both as an act of self-preservation and a means of killing or capturing the criminals attacking it. This power is available to the Army also when acting in aid of civil power. However, destroying a shelter is different from destroying a whole locality or a cluster of buildings by way of reprisal. That is the way of Nazi Germany and of Israel in Gaza and the West Bank. In a civilised society the power of reprisal cannot be given to the Army or to other security forces.

There is also the question of independent arrest without warrant. The Army in aid of civil power becomes an extension of the police force and under section 41 Cr.P.C. and section 151 Cr.P.C. if the power of the police to arrest is extended to the armed forces there is nothing objectionable in this. What is, however, more controversial is the power of entry, search and seizure without warrant. Under section 47 Cr.P.C. a police officer also has such powers if there is reason to believe that the building is being used as a shelter by a person alleged to be involved in a cognisable offence. However, under section 100 Cr.P.C. a police officer conducting a search has to call upon at least two independent witnesses before whom a panchnama is drawn up. This is to ensure that he does not plant incriminating material on the premises in order to affect an arrest. Under section 4 (d) of the Armed Forces (Special Powers) Act no independent witnesses are needed, which means that the officer conducting the search can plant evidence. It is necessary to bring search and seizure under some form of magisterial scrutiny.

The argument of the armed forces that they cannot act without the Armed Forces (Special Powers) Act and they will not place themselves under magisterial control is unacceptable. Under Entry 2 (d) of List 1 of the Seventh Schedule of the Constitution Parliament may legislate on how the armed forces will come to the aid of civil power. The wording is not 'in substitution of civil power'. Regarding immunity from legal action, that is already provided by section 132 Cr.P.C. and section 197 Cr.P.C. and the provisions of the Army Act. Section 6 of the Armed Forces (Special Powers) Act confers no greater immunity. Unfortunately all security forces feel that they need special laws in dealing with an emergency because such laws provide short cuts which are easier than working under normal laws. But when our normal laws have all the provisions for dealing with a law and order situation why have another law which is actually redundant? Even Cr.P.C. can have a provision for declaring an area to be disturbed and conferring additional powers on the armed forces. Therefore, I consider the Armed Forces (Special Powers) Act to be totally redundant and would favour its scrapping.

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