

THE ARMED FORCES (SPECIAL POWERS) ACT 1958

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In 1958, because of the insurgency in the North East, Parliament enacted the Armed Forces (Special Powers) Act in order to give the armed forces operating in the North Eastern States certain legal powers which could enable them to act independently under the protection of law. Under section 3 of the Act the Governor of the State, the Administrator of an Union Territory or the Central Government could declare all or any of the part of the State or Territory to be a disturbed area and thereafter the use of armed forces in aid of the civil power would be covered by section 4 of the Act, which conferred certain special authority on the armed forces.

For the State of Jammu & Kashmir Parliament enacted a law called the Armed Forces (Jammu & Kashmir) (Special Powers) Act 1990. The provisions of sections 3 and 4 of the 1958 Act applied to Jammu & Kashmir. The State Government has declared that it would like to withdraw the operation of the Act from some parts of the State by cancelling the notification declaring them to be disturbed areas. There is strong objection to this from the Army and the Ministry of Defence, though the Ministry of Home Affairs is quite willing to accept the decision of the Jammu & Kashmir Government. Under item 2A of List 1 of the Seventh Schedule of the Constitution Parliament may legislate on the powers, jurisdiction, privileges and liabilities of members of the armed forces of the Union when deployed in aid of civil power in any State. Provided that the Armed Forces (Special Powers) Act and the Armed Forces (Jammu & Kashmir) (Special Powers) Act lie within the ambit of Entry 2 A of List 1 of the Seventh Schedule, such Acts could be constitutionally valid and the Supreme Court has so ruled.

We are not concerned here with the constitutional validity of the law. What we are concerned about is the need for such a law. Under section 3 of the Act government may declare an area to be so disturbed that it requires the deployment of the armed forces in aid of civil power. The minute such a notification is issued the armed forces acquire the following powers :- (1) Any officer of the armed forces, commissioned, holding a junior commission, a warrant officer or a non-commissioned officer may use force, including lethal force, against any person who is part of an unlawful assembly, that is, an assembly of five or more persons, or is carrying weapons, including fire arms, explosives, etc. (2) Such officer may destroy or cause to be destroyed arms dumps, a fortified position or shelter which could be used as the base for making an attack, a training camp or hideout, without seeking an order of a Magistrate. (3) Arrest without warrant a person alleged to have committed a cognisable offence or against whom there is suspicion that he might commit a cognisable offence. (4) Enter and search without a warrant any premises which might have any connection with any offence. Section 5 of the Act says that a person arrested shall be made over to the officer incharge of the nearest police station with the least possible delay. Section 6 gives immunity from prosecution and other legal proceedings, except with the previous sanction of the Central Government, for any act purporting to be done in pursuance of the law. The question is whether the Armed Force (Special Powers) Act confers on the armed forces any authority which they do not possess under the existing normal laws, especially the Code of Criminal Procedure.

The British ruled India for over two hundred years and except in 1857 and its aftermath when any officer of the British Government virtually had the power of life and death over any one suspected of having participated in an act of rebellion, the British functioned under two doctrines: - (1) The Code of Criminal Procedure (2) Army to the aid of civil power. Both of these doctrines are contained in Chapter X of the Code of Criminal Procedure, in particular section 130. Under section 130 Cr.P.C. any Executive Magistrate, including one of the rank of Naib Tehsildar, may call upon the armed forces to

come to the aid of civil power in order to disperse any assembly which the use of civil force under section 129 Cr.P.C. cannot manage. The Magistrate may require the officer commanding the unit of the armed forces to disperse the assembly, use necessary force for this purpose and to arrest and confine members of such assembly who fail to disperse or to carry out orders. Under section 131 Cr.P.C. if public security is manifestly endangered by an assembly and no Executive Magistrate can be communicated with, then any commissioned or gazetted officer of the armed forces may disperse such assembly and in doing so use necessary force. He may also arrest and confine members of such assembly. However, as soon as practical such officer shall report the matter to the Executive Magistrate having jurisdiction and thereafter act only on the instructions of the Magistrate regarding whether or not he may continue his action against the assembly. Section 132 Cr.P.C., provides complete protection to an Executive Magistrate, a police officer, an officer of the armed forces doing his duty, against prosecution or other legal action except with the prior approval of the Central Government in the case of Central armed forces and the State Government in the case of other officers. Incidentally, under section 132 (3) (b) the word 'officer' in the context of the armed force includes a commissioned officer, a gazetted officer, a junior commissioned officer, a warrant officer, a petty officer, a non-commissioned officer and a non-gazetted officer.

The powers given under the Armed Forces (Special Powers) Act and Chapter X of the Code of Criminal Procedure in the matter of dispersing an unlawful assembly are identical, including the immunity enjoyed by security forces against legal action without prior approval. The only difference is that under the Code of Criminal Procedure the armed forces are normally expected to act under orders from an Executive Magistrate, whereas under section 4 (a) of the Armed Forces (Special Powers) Act they may act independently. This they may do under section 131 Cr.P.C. also. However, whether it is in a disturbed area or in a normal area the principle of operating in aid of civil power under the control of an Executive Magistrate is a wise one. In 1938 the British still ruled India, when there was a major communal riot in Benares. R.V. Vernede was the District Magistrate and he had very small police force of less than five hundred men available to him. He called in the army to the aid of civil power and one company of British troops was deployed. The army acted independently so far as the use of force was concerned, but it is the Executive Magistrate who permitted the army to use force. This was the normal relationship between the magistracy, the police and the army in British days and this did give additional protection to civilians who were law abiding.

Quite apart from legal powers under the Armed Forces (Special Powers) Act, under Chapter IV of the Indian Penal Code bearing the title General Exceptions, if a soldier obeys an order of a superior officer to use force, including lethal force, against a mob he commits no offence. Under section 81 an act done without criminal intent and to prevent other harm is no offence. An act done in exercise of the right of private defence is no offence. Under section 100 IPC the right to private defence of the body extends to causing of death under the circumstances given in this section. Under section 103 IPC, under circumstances given in the section, the right of private defence of property also extends to the causing of death. In other words, a soldier may use force under the General Exceptions without committing an offence. The powers given under section 4 (a) of the Armed Force (Special Powers) Act, 1958, therefore, are redundant.

Leave alone the army, even the police sometimes has to act in a situation which is war like, when it is under attack by terrorists, insurgents, dacoits and other armed offenders. If the attack is made from behind the shelter of any structure the security forces can certainly retaliate, upto and including destruction of such structure or any structures which could be used as shelters by the criminals. What they cannot do is to destroy a whole locality or cluster of buildings by way of reprisal. That was the

method of Nazi Germany when dealing with a resistance movement in occupied territories. The Indian Armed Forces cannot be given any power of reprisal and section 4 of the Special Powers Act does not confer any such powers on the armed forces. We should remind the armed forces that Israel used such powers in Gaza and the West Bank against Palestinians and this has come under severe international criticism.

Two entries in the Armed Forces (Special Powers) Act, section 4 (c) and (d) have some under heavy criticism. This relates to arrest without warrant and search without warrant. As soon as the armed forces come to the aid of civil power in a way they act as an extension of the police. Under section 41 of the Code of Criminal Procedure a police officer may arrest without a warrant any person who has been concerned in a cognisable offence, against whom there is reasonable complaint or there is credible information that he may have been concerned in such offence, who possesses an implement for house breaking, is a proclaimed offender, is in possession of stolen property, is a deserter from the armed forces and in the other circumstances given in section 41. Therefore, in the matter of arrest without warrant, if the army exercises the same powers as the police and does not go beyond them, then when acting in aid of civil power there is nothing wrong with the armed forces being given the power of arrest.

This brings us to section 4 (d), the wording of which is reproduced below: “Enter and search without warrant premises to make any such arrest as aforesaid, or to recover any person believed to be wrongfully restrained or confined, or any property reasonably suspected to be stolen, or any arms, ammunition or explosive substance believed to be unlawfully kept in such premises and may for that purpose use such force as may be necessary”. Under section 47 Cr.P.C. a police officer having authority to arrest a person may, if he has reason to believe that the person to be arrested had entered a building, enter such building, if necessary by using force, search it and apprehend the person suspected of having committed an offence. Section 4(d) of Armed Force (Special Powers) Act has stronger provisions than those of the Code of Criminal Procedure Code, especially because neither does the officer conducting the search need to have himself searched, nor are witnesses to seizure mandatory as they are under the Code of Criminal Procedure. This increases the possibility of the persons conducting a search to plant weapons and other objectionable items in the premises searched and thereafter making a seizure. This power needs to be brought under magisterial scrutiny.

The armed forces claim that without the Armed Forces (Special Powers) Act it is not possible for them to come to the aid of civil power. If they could do so for two hundred years why not now? The Code of Criminal Procedure already provides adequate powers to the magistracy, the police and the armed forces to maintain public order. In a situation in which there is militancy or war both the police and the armed forces are free to take all necessary steps both to defend themselves and to neutralize the enemy or offenders. For this no special powers are needed. Adequate immunity is also available under law to members of the armed forces acting under orders. Section 6 of the Armed Forces (Special Powers) Act confers no greater immunity on them than is available under the Code of Criminal Procedure. In any case the operation of any security force without accountability to an authority other than itself is not acceptable in a democratic society. If amendments to the Code of Criminal Procedure are needed to give the armed forces some additional powers this can be considered. Ultimately, except under martial law, for which there is no provision in our Constitution, the armed forces can only act in aid of civil power and not in substitution of civil power. It is about time our Generals learnt this lesson. I am not a supporter of activism of the so-called civil society because I am firmly of the opinion that our magistracy, our police, our armed forces must feel free to deal with a law and order situation according

to best judgement. My complaint is that they are excessively restrained. Nevertheless I consider the Armed Forces (Special Powers) Act to be totally redundant and would favour its scrapping.

I shall conclude with an incident which has imprinted itself in my mind. I was an international observer of four elections in Sri Lanka. During the elections in which Chandrika Kumaratunga became Prime Minister I had charge of Matara District, the southernmost district in Sri Lanka. During the elections the state of Emergency had been lifted, a condition under which Sri Lanka normally operated ever since JVP and LTTE operated as major organisations of Sinhala and Tamil insurgency. The officers had become used to operating under Emergency regulations and forgotten the normal laws, including the Penal Code and the Code of Criminal Procedure. The Government Agent (District Magistrate) and the Senior Superintendent of Police of Matara were sitting in the G.A.'s office when I dropped in and both were bemoaning the fact that in the absence of Emergency regulations they were unable to handle goondaism. I told them to produce a copy of the Code of Criminal Procedure and showed them the provisions similar to those of our own Cr.P.C. contained in Chapter VIII, viz., security for keeping the peace and for good behaviour. The Sri Lankan Cr.P.C. had a provision equivalent to section 151 of our Cr.P.C, which permits the police to make an arrest in order to prevent the commission of a cognisable offence. It also has the equivalent of our section 107 which permits a Magistrate to bind over a person to keep the public peace and in lieu thereof to detain him for a period of upto one year. The Sri Lankan Cr. P.C has also the equivalents of sections 108, 109 and 110. The G.A. and SSP, habituated as they were to the shortcut of Emergency regulations, had not even read their own Code of Criminal Procedure and they were very pleasantly surprised that the normal law gave them the power of arrest and detention of persons disturbing the peace, disseminating seditious material, being suspected of preparing to commit a cognisable offence or being habitual offenders. Acts such as the Armed Forces (Special Powers) Act lull our security personnel, including the armed forces, into a state of laziness in which they forget normal law and only apply extraordinary laws. We have to guard against such laziness if India is to be a society of laws.
