Military power and the constitution

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CIVILIAN control over the use of armed force is widely accepted as a key constitutional principle for a modern liberal democracy. Like any other branch of executive government, the military and police establishments are subject to constitutional and statutory limits on their powers. Most constitutions invariably go further and pay special attention to the problem of securing and maintaining civilian control over the armed forces, and establish an elaborate system of institutional checks and balances to this end. A failure to properly institutionalize, and thereafter maintain, these constitutional arrangements can have a dramatic impact on the durability of national constitutions.

There are several types of failures that we notice in our South Asian neighbourhood. First, the military may displace civilian authority through a coup d'état and assume greater powers under the constitution. Pakistan and Bangladesh are two examples of such a constitutional failure. Second, the civil and military administration may be unable to enforce their writ in various parts of the country against armed local militia which run a parallel government. The Maoist movement in Nepal, and to a lesser extent in parts of India-demonstrate such a failure. Third, the military leadership may often enjoy the capacity and political legitimacy to intervene in times of crisis. The recent history of Thailand and Sri Lanka provide us with contrasting examples of such a failure. Despite several ways in which constitutions may fail to adhere to this key constitutional principle that governs the relationship between civilian and military power, the principle has received little critical attention in Indian constitutional analysis.

In this essay, we remedy this lack of attention with a brief sketch of the manner in which the Indian Constitution organizes civil and political control over the use of armed force and focus on one instance of the judiciary's failure to recognize and maintain these controls. The primary mode through which the Indian Constitution regulates the use of armed forces is by distinguishing between military powers and law and order powers which are conferred on the Union and state governments respectively. This distinction is ostensibly about the use of armed force outside and within the territory of the Union and the states. In recent times, the Union has been increasingly involved in the maintenance of law and order within the territory of India.

The second mode through which the Union's use of armed force is regulated is legislation. The army, navy and air force are governed by separate legislation and the new paramilitary

forces raised by the Union like the Border Security Force, Central Reserve Police Force, and the Central Industrial Security Force are constituted under their respective statutes. The Cantonments Act regulates the territorial application of these legislation and rules. The state's law and order powers are primarily regulated by the pre-constitutional criminal legislation: The Indian Penal Code 1860 and the Code of Criminal Procedure 1973. Some provisions in such legislation (for instance, Sections 130 and 131 of the Code of Criminal Procedure) allow for the use of military power to aid ordinary law and order in special circumstances. The states have enacted Police Act's which regulate the functioning of the law and order machinery. The Union and the states have enacted various special criminal laws dealing with particular offences such as the Domestic Violence Act or the Organized Crime Acts.

The third mode by which the constitution regulates the use of armed force is by distinguishing between ordinary and emergency situations. Where a national emergency is proclaimed under Article 352 or a regional emergency is proclaimed under Article 356, the Union acquires the power to deploy armed force within the territory of India. However, the constitution strictly regulates the circumstances when such a proclamation may be issued and allows the legislature to override these executive proclamations. Under Article 355, the Union is enjoined with the special responsibility to maintain civil government in the territory of India and may use armed force in support of such civil government.

In recent years, two types of Union legislation have blurred the distinction between the Union's use of armed force in ordinary times and during an emergency: the Armed Forces (Special Powers) Act 1958, and anti-terror legislation such as the Terrorist and Disruptive Activities (Prevention) Act 1985 and the Prevention of Terrorist Activities Act 2002. There has been significant civil society protest and executive agency review of the rationale and justification for these legislation. Before we return to the Supreme Court's response to this legislation, we briefly survey the other prominent discourses on the Armed Forces (Special Powers) Act 1958 (hereafter the act).

The moral and political core of civil society protest against the act has been the fast-unto-death by Manipuri activist Irom Sharmila against the abduction and killing of her friend Thangjam Manorama. Civil society activists have emphasized that the act is an endorsement of extra-judicial military executions by the army and a violation of the constitutionally guaranteed right to life. Further, they suggest that the act results in the imposition of a de facto emergency without a constitutional basis. The government response to this debate has been fitful. The UPA-I government established a committee to review the Armed Forces (Special Powers) Act, 1958 headed by Retired Justice B.P. Jeevan Reddy in November 2004.

The committee raised considerable hopes as it heard a wide variety of civil society and government opinion. However, when it finally presented its report to the government in June 2005, these hopes were only partially realized. The report may be divided into two parts: the first, which substantially accepts the arguments against the use of the act and recommends its repeal and the second, which recommends that the Unlawful Activities (Prevention) Act 1967 may be suitably amended to reinstate some of these powers. The conclusions of this report were endorsed in June 2007 by the fifth Report of the Second Administrative Reforms Commission on Public Order. However, this momentum has flagged and the government has taken no action on these reports.

The government's failure to act may be explained in two unrelated but relevant criticisms. The first relates to the reaction of the armed forces, which are apparently dissatisfied with the proposed changes as they are concerned that the government may impair their operational ability. The second explanation for the government's failure to act on these reports is the strong criticism of these proposals by sections of civil society. It is argued that the proposed changes are merely cosmetic window dressing and that the impunity of the armed forces will remain unchecked.[1] Amnesty International in its Briefing Paper concludes that the proposed changes do not eliminate the key weakness in the existing act: the ability of the government to use military force to quell an undefined 'internal disturbance' without the ordinary checks and balances of the civil and criminal law of the land. As the report's proposals maintain these islands of impunity, it is argued that these proposals need to be radically revised before implementation.[2] To the extent that these criticisms are accurate, there is little to be gained by the implementation of the report as it stands.

In this paper, we relocate the debate on the act institutionally and conceptually by focusing on the role of the judiciary and revisiting the constitutional debates on the validity of the act. It is essential for the courts to revisit the Indian Supreme Court's decision in *Naga People's Movement of Human Rights* v. *Union of India*[3] that examined the constitutional validity of the Armed Forces (Special Powers) Act 1958.[4] We argue that while such legislation have been primarily understood as giving rise to competence and rights-based challenges, they should be viewed in the larger structural sense of the boundaries between military power and civilian power. The decision in *Naga People's* only briefly addresses the latter issue, illustrating the limited extent to which the relationship between military power and the constitution has been addressed by Indian courts.

The Armed Forces (Special Powers) Act 1958 originally conferred certain powers on military personnel in areas of Assam and Manipur. It was subsequently amended and the scope of the act was extended to the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. Originally, only the Governor of the state could

declare an area to be a ‘disturbed area’ (i.e., an area to which the act would be applicable), but subsequently this power was also conferred upon the central government. They were two primary challenges to the act: first, that the act was beyond parliament’s legislative competence; and second, that it violates several fundamental rights under the constitution.

The Seventh Schedule to the constitution provides instruction on how power shall be distributed between the Centre and the states. The Forty-Second Amendment to the constitution amended Entry 1 of the State List to exclude control over military power from the states, and included Entry 2-A in the Union List to vest the power to deploy armed forces with the central government. Entries 2-A of the Union List and Entry 1 of the State List read as follows:

2-A: 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 power, powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.

1: Public order (but only including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of civil power).

The central contention challenging parliament’s competence was that the act gave the military inde pendent power in a ‘disturbed area’ whereas the aforementioned entries only stipulate that military power shall operate ‘in aid of civil power.’ Thus, it was argued that the import of the Entries was that parliament may enact legislation for the use of military power but that such power must be exercised under the supervision of state authorities, and not independently and exclusive of the state machinery. Hence military power may not substitute state control, but merely assist it.

The court held that the Entries do not require military personnel to operate under the control of the state; they envision a more coordinated effort to secure law and order. The court accepted that military personnel could not supplant state control, but concluded that the impugned act did not create such a situation. It required the state’s assent and involvement at various levels. For instance, certain provisions under the act (Section 4) could only be exercised upon orders issued by the state. Since the state’s involvement would be necessary for the operation of the act, the court rejected challenges on the ground that the central government could declare an area to be a ‘disturbed area’ without any consultation with the concerned state.

The second important challenge to the legislation was a rights-based one. The court examined several provisions of the act, examining whether they conferred arbitrary and unreasonable powers on the military.[5] Under the Indian Constitution, the arbitrariness standard of review

takes place under Article 14, which guarantees the right to equality. Surprisingly, the court does not engage in any rigorous analysis of whether the impugned legislation violates Article 21, which guarantees the right to life and personal liberty, and since the 1970s has been understood to provide for substantive due process.

This brief discussion allows us to observe that the court's primary concern in *Naga People's* was legislative competence – the relationship between the Centre and the states. On the other hand, we find that much public discourse surrounding the Armed Forces (Special Powers) Act has concentrated on rights-based issues, focusing on how the act has led to human rights violations in the North East. The court's standard of review on this issue is visibly narrow. But the court pays far too little attention to a third important aspect of factual circumstances that arise in cases such as *Naga People's*: how such legislation alters the role of the military under our constitutional framework.

This issue did appear in *Naga People's* in a roundabout fashion: the petitioners contended that the act was a colourable piece of legislation. It was argued that the legislation, in effect, aims to respond to situations which are contemplated for by the emergency provisions (Articles 352 and 356) of the constitution. The act, it was posited, seeks to entrust authorities with the same powers as emergency provisions without the same guidelines that the latter outline, thus achieving the same purpose through an indirect route. The petitioners emphasized that Articles 352 and 356 were the exclusive routes to vesting authorities with such powers.

One is unable to ascertain the degree to which the court appreciated this point. On the one hand, the court passionately emphasized the difference between emergency related provisions and those of the impugned legislation.[6] On the other hand, one is made to believe that the court failed to appreciate the issue:

'The use of the expression "colourable legislation" seeks to convey that by enacting the legislation in question the legislature is seeking to do indirectly what it cannot do directly. But ultimately the issue boils down to the question whether the legislature had the competence to enact the legislation because if the impugned legislation falls within the competence of the legislature the question of doing something indirectly which cannot be done directly does not arise… Since Parliament is competent to enact the Central Act, it is not open to challenge on the ground of being a colourable legislation or a fraud on the legislative power conferred on Parliament.'[7]

Much is captured in the challenge based on the doctrine of colourable legislation: emergency-related provisions under the constitution allow for a modification of ordinary notions of executive power and citizens rights for exceptional circumstances where such

modification is necessary. Undoubtedly such provisions are vulnerable to abuse, but amendments after the Indira Gandhi era have provided a robust framework of checks and balances to ensure that such modifications are limited to circumstances that are truly exceptional. Emergency powers, moreover, attempt to temporarily alter the constitutional framework until the original framework may be restored.

The petitioner's argument relating to colourable legislation is, at its core, an argument about the role of the military under the constitution. It is an argument that rests on the correct assumption that the constitution envisions an extremely limited role for the military. By refusing to consider the issue on the ground that if parliament would be competent to enact the legislation then a challenge based on the doctrine of colourable legislation could not be made confuses the matter. Legislative competence is an issue that relates to how legislative power must be shared between the Centre and the states. It focuses on the relationship between the two, and is concerned with nothing more. The challenge based upon the act being colourable is an entirely distinct challenge. It poses a more fundamental concern: emergency powers under the constitution have been subverted by a statute.

The failure to recognize the role and significance of the constitutional principles that maintain the subordination of military power to civilian control has had significant consequences for Indian constitutional practice. While there is no significant threat to the endurance of the constitution from the military, inadequate attention to this principle may inadvertently lead us down that path. To be sure the endurance of a constitution is closely tied to environmental and constitutional design factors. In this paper, we have shown that there is an urgent need to pay more careful attention to this aspect of our constitutional practice to preserve elements of our constitutional design that maintain the subordination of military power to civilian control.

Footnotes:

1. *See* Colin Gonsalves, 'The Fake Repeal of AFSPA', *Combat Law* 5(5), November-December 2006.

2. Amnesty International, India Briefing, 'The Armed Forces Special Powers Act (AFSPA) Review Committee Takes One Step Forward and Two Backwards', 23 November 2006, *available at:* http://asiapacific. amnesty.org/library/Index/ENGASA 200312006?open&of=ENG-2AS.

3. (1998) 2 SCC 109.

4. The case also examined the constitutional validity of the Assam Disturbed Areas Act 1955, but we ignore that challenge in our analysis and focus on the central legislation.

5. See, for example, note 3 at 143 (evaluating Section 4a of the impugned legislation).

6. Note 3 at 134-136.

7. Note 3 at 137-138.