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## DEPLOYMENT OF ARMED FORCES IN INTERNAL SECURITY: CONSTITUTIONAL PROVISIONS

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### **Abstract:**

Article 355 of the Constitution places an obligation upon the Union of India to protect every state against external aggression and internal disturbance and to ensure that the government of every state is carried on in accordance with the provisions of this Constitution. Under the Constitution, law and order as well as public order are both within the exclusive province of the states. Even where the armed forces of the Union are deployed in aid of the civil power of the state to maintain public order, whether on the basis of a request for such armed forces from the state or whether such deployment is made by the Union government acting under a law made under Entry 2 A of the Union List, the law and order and public order yet remain within the domain of the states.

**Keywords:** Constitution, law and order, internal disturbance, armed forces.

Article 355<sup>1</sup> of the Constitution places an obligation upon the Union of India to protect every state against external aggression and internal disturbance and to ensure that the government of every state is carried on in accordance with the provisions of this Constitution. Prior to the Constitution (44th Amendment) Act, Article 355 was relevant both for the purpose of Article 352 as well as Article

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<sup>1</sup>Constitution of India, Article 55. It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution.



356. Under Article 352 (as it obtained prior to the said Amendment Act), The President could proclaim emergency and assume the powers mentioned in the said Article. The expressions external aggression and internal disturbance were common to both Article 355 and Article 352. Similarly, if the government of a state was not carried on in accordance with the provisions of the Constitution, the President could take action under Article 356 and assume to himself the powers of the government of that state and exercise other powers mentioned in that Article. However, by Constitution (44th Amendment) Act, the expression internal disturbance in Article 352 (1) was substituted by the expression armed rebellion. With this the connection between Articles 355 and 352 got snapped partially. In other words, in case the security of India or a part thereof is threatened by internal disturbance in a State, the power under Article 352 may not be available. Even then, the obligation of the Union government to protect every State from internal disturbance remains. It is now an independent obligation to be performed in such a manner as the Union government thinks appropriate. By the Constitution (42nd Amendment) Act, the Parliament brought in the following provisions/amendments. Article 257A<sup>2</sup> was introduced providing for assistance to the states by deployment of armed forces or other forces of the Union. The said Article which was deleted by the Constitution (44th Amendment) Act. Along with Article 257A, Parliament had also introduced Entry 2A<sup>3</sup> in the Union List in the Seventh Schedule to the Constitution. This entry has not been deleted by the Constitution (44th Amendment) Act. It states about deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit

<sup>2</sup>Constitution of India Article 257A. [Assistance to States by deployment of armed forces or other forces of the Union.] Rep. by the Constitution (Fortyfourth Amendment) Act, 1978, s. 33 (w.e.f. 20-6-1979).

<sup>3</sup>Constitution of India Union List 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 power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.



thereof in any State in aid of the civil power, and powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment. Entry 1 in List II (State List) read as follows before the Constitution (42nd Amendment) Act that Public order (but not including the use of naval, military or air force or any other armed force of the Union in aid of the civil power). By the said Amendment however, the said Entry was amended and states that public order (but not 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). It may be noticed that Entry 2A in the Union List does not refer to or use the expression public order. Article 257 contemplated Government of India deploying the armed forces of the Union for dealing with any grave situation of law and order in any state. Under the Constitution, law and order as well as public order are both within the exclusive province of the states. Even where the armed forces of the Union are deployed in aid of the civil power of the state to maintain public order, whether on the basis of a request for such armed forces from the state or whether such deployment is made by the Union government acting under a law made under Entry 2 A of the Union List, the law and order and public order yet remain within the domain of the states. Of course, these words were there in Entry 1<sup>4</sup> of the State List even prior to the Constitution (42<sup>nd</sup> Amendment Act) and they remain even now. In this connection, the difference between the concepts law and order, public order, internal disturbance and armed rebellion, all the expressions employed by our Constitution, there is a distinction between public order (State List, item 1) and internal disturbance referred to in Article 355. For this purpose, the meaning and content of both the expressions must be

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<sup>4</sup>Constitution of India State List 1-Public order (but not including 3[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 the civil power).



examined. As pointed out by the Supreme Court in the case of Ram Manohar Lohia (1966 S.C), law and order are a larger circle within which public order constitutes a smaller circle. The concept of security of the state was said to be a yet another smaller circle within public order as concentric circles. For example, a simple murder is a law and order problem but where a murder is committed on communal grounds, which is meant to or designed to create a fear and a feeling of insecurity in one or more communities, it becomes a public order issue. A communal clash is a public order problem but where the communal clashes take place on a large scale, affecting an entire state or a part of the state, paralyzing the administration, it would be a case of internal disturbance. Once a militant group decides to engage in indiscriminate violence against civilians for political ends, it crosses a certain moral threshold that sets it apart from other groups.<sup>5</sup> The distinguishing features include such elements as the targeting of unarmed civilians, the use of extra-normal violence, the desire by the terrorists to instil fear in the target population, or the intent to influence a broader audience beyond the immediate victims of the terrorist attack.<sup>6</sup>

Now, coming to the meaning and content of the expression internal disturbance, it is necessary to turn to Constituent Assembly debates in the absence of a judicial pronouncement. The reference to the speech of Dr B. R. Ambedkar<sup>7</sup> in the Constituent Assembly, explaining the principle behind Article 355. He said that if the centre is to interfere in the administration of provincial affairs, it must be by and under some obligation which the Constitution imposes

<sup>5</sup>Boaz Ganor, interview with the authors, Herzliya, Israel, 12 February 2014.

<sup>6</sup>Schmid, A.P. (Ed.), *The Routledge Handbook of Terrorism Research*; Hoffman, Bruce. *Inside Terrorism* Columbia University Press, 2013; on approaches to definition of terrorist groups see Phillips, Brian J. "What is a Terrorist Group? Conceptual Issues and Empirical Implications." *Terrorism and Political Violence* (2014): 1-18; De la Calle, Luis and Ignacio Sánchez-Cuenca. "In Search of the Core of Terrorism." Chap. 3, *In Killing Civilians Or Holding Territory? how to Think about Terrorism*, edited by Victor Asal, Luis De la Calle, Michael Findley and Joseph Young. Vol. 14, 475-497: Wiley Online Library, 2012.

<sup>7</sup>C.A.D.Vol.IX. P. 133



upon the Centre. The article says that it shall be the duty of the Union to protect every unit. Similar clauses appear in the American Constitution. They also occur in the Australian Constitution where the Constitution provides that it shall be the duty of the Central Government to protect the units or the states from external aggression or internal commotion that we propose to do is to add one more clause to the principle enunciated in the American and Australian Constitutions namely that it shall be the duty of the Union to maintain the Constitution in the provinces as enacted by this law. The provisions of the American and Australian Constitutions, which Dr. Ambedkar referred to, may also be set out for a clear understanding of the meaning of the expression internal disturbance. Article VI (4) of the US Constitution states that the United States shall guarantee to every state in the Union a republican form of government and shall protect each of them against invasion and on application of the Legislature or of the Executive when the Legislature cannot be convened against domestic violence. Similarly, Section 119 of the Australian Constitution Act states that the Commonwealth shall protect every state against domestic violence. It would be seen that both the American and Australian Constitutions use the expression domestic violence though under the US Constitution, the federal government steps in the case of domestic violence only at the request of the state or Legislature of the state concerned. As against these provisions, Article 355 empowers the Union to act on its own i.e. without a request from the state government, to protect the state from internal disturbance. The reference in this connection can be given by the speech of Sri Alladi Krishnaswami Ayyar<sup>8</sup> in the Constituent Assembly as well. Speaking upon this Article, Sri Alladi said that it is the duty of the Union Government to protect the states against external aggression, internal disturbance and domestic chaos and

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<sup>8</sup>C.A.D. Vol.IX.P.150.



to see that the Constitution is worked in a proper manner both in the states and in the Union. It would therefore be legitimate to infer that the expression internal disturbance means internal commotion (the expression used by Dr Ambedkar in the above speech), domestic violence (expression used in both the American and Australian Constitutions), and domestic chaos (the expression used by Sri Alladi Krishnaswami Ayyar in the Constituent Assembly during the debate on the said Article) and internal security in current scenario. The members of the constituent assembly believed that India was peculiarly faced with uniquely extraordinary issues which had not confronted other federations in history.<sup>9</sup> It therefore follows that every public order problem does not necessarily amount to internal disturbance while the converse may be true i.e., in case of internal disturbance, public order is bound to be affected. The duty and power of the Central Government under Article 355 comes into play only in case of internal disturbance i.e., domestic chaos or internal commotion or internal insecurity. The said power is not available in each and every problem of public order. Internal disturbance means failure of public order on a large scale and in a sustained manner for whatever reason it may be affecting the entire state or part of the state. The expression internal disturbance itself is expressive of the level of disturbance, chaos, commotion and insecurity it contemplates. It must be remembered that prior to the 44<sup>th</sup> Amendment, internal disturbance was one of the grounds on which the President could proclaim emergency under Art.352. This consideration also induces to hold that internal disturbance connotes disturbances on a large, on a sustained and serious level and is distinct and different from issues of public order which arise from time to time in one or the other place, village, town or city of a state. In the latter type of cases, it is for the state government to tackle it. It is for the state government to decide whether

<sup>9</sup>Constituent Assembly Debates V, 1, 38, N.G. Ayyangar.



it requires the help of armed-forces/para-military forces of the Union to help and tackle it. Indeed, if it is of a purely local level, the Executive Magistrate (of the highest rank) can deal with it under Section 130 of the Code of Criminal Procedure. The above distinction between the public order in entry 1 of List II of the Seventh Schedule to the Constitution and internal disturbance referred to in Article 355 has to be kept in mind and observed that in the interest of preserving the federal character of our Constitution and to ensure that the field reserved to the states and to the Union under our Constitution. In recent years a growing number of actors traditionally labelled terrorist groups are increasingly relying on a combination of tactics that fall squarely within the predominant understanding of both terrorism and guerrilla tactics.<sup>10</sup> it is relevant to point out that entry 2A in the Union List speaks of deployment of the armed forces of the Union in any State in aid of civil power but it does not speak of or refer to public order. It only empowers the Union to make a law providing for such deployment and their powers and procedures. It does not and cannot make the law to maintain public order. It is important to notice how entry 1 in the State List reads about public order but not including the use of the army, naval, military or air force in aid of civil power. It means that the state cannot make a law with respect to the deployment of the armed forces, while it can legislate with respect to public order. The State can no doubt request the Central Government to send its armed forces for maintaining public order but it cannot itself direct such deployment. Twenty-first-century India faces multitude of security challenges. At the core of India's security concerns is its internal security a major national security challenge.<sup>11</sup> India does not face an external threat in the conventional sense but only internal security threats from external

<sup>10</sup>Berger, "War on Error

<sup>11</sup>In Kautilya's 'mandala' conception, a ruler conceives of security in a series of concentric circles around his/her domestic realm. At the core is 'internal security'; in the next circle, there are neighbours; and in the outermost circle, distant great powers. Any security strategy has to deal with these three circles.



sources.<sup>12</sup> Pakistan's conflict with India cannot be reduced simply to resolving the Kashmir dispute. Its problems with India are much more capacious than the territorial conflict over Kashmir<sup>13</sup>. For the Pakistani Army too, the Kashmir conflict offers an excuse for perpetuating a war-like scenario to enjoy a special status with superior privileges in Pakistani society.<sup>14</sup>

It is worthwhile to note that while no provision in the Unlawful Activities Prevention Act specifically refers to the deployment of any armed force or para military force for achieving any of the objectives of the Act, clause (b) of Section 49 expressly gives protection to any serving or retired member of the armed forces or para military forces in respect of any action taken or purported to be taken by him in good faith in the course of any operation directed towards combating terrorism. Now, it is a well-established presumption which is affirmed by innumerable decisions of the courts that the Parliament does not make any provision without a purpose. None of the provisions in an Act can be understood or construed as superfluous. If so, a question arises why did the Parliament introduce clause (b) of Section 49 of UAPA? The reason to think it necessary to provide a protection to any serving or retired member of the armed forces or para military forces in respect of any action taken in good faith in the course of any operation directed towards combating terrorism. the considered opinion is that this provision does contemplate by necessary implication, use of armed forces/para military forces for combating terrorism and also contemplates the armed forces / para military forces conducting operations towards combating terrorism. Terrorism is usually mentioned as one of the tactics of insurgency, together with propoganda, demonstrations, political

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<sup>12</sup>Interaction with Mr K. Subrahmanyam, New Delhi, 16 March 2010

<sup>13</sup>Christine Fair, *Fighting to the End: the Pakistan Army's Way of War*, Oxford University Press, 2014, Chapter 1.

<sup>14</sup>Mohan C.Bhandari, *Solving Kashmir*, Lancer Publishers, 2006, Chapter 8,p. 295





mobilization of constituencies, subversion, insurrection, guerrilla warfare, and conventional warfare.<sup>15</sup> Conventional wisdom holds that the secret nature and small size of terrorist organizations generally prevents them from holding territory, while their focus on extreme violence prevents them from enjoying much popular support.<sup>16</sup> This intent must be read in the context of the Schedule appended to the Act wherein there are specifically included quite a few organisations engaged in insurgency /militancy in the States of Assam, Manipur and Tripura. As a matter of fact, the Act makes it clear that the terrorist activity is not restricted to the activities of the organisations mentioned in the Schedule. This section indicates that the Parliament did take note of the fact that in many cases it may be necessary to employ the armed forces or para military forces to combat terrorism and terrorist activities. Indeed, the Parliament must have taken note of the fact that armed forces and para-military forces were already engaged in such operations against the organisations listed in the Schedule and others engaging in similar activities. At the same time, it must be noted that the protection extended by Section 49 is not unconditional. Both the clauses in (a) and (b) qualify and restrict the protection only to acts done in good faith. The specific language in which terrorist act is defined and the terrorist activity is sought to be fought and curbed by use of armed forces and para-military forces also, wherever necessary, coupled with the fact that several organisations in the States of Assam, Manipur and Tripura are expressly listed as terrorist organizations, induces us to call the ULP Act a cognate enactment.

<sup>15</sup>O'Neill, *Insurgency & Terrorism: Inside Modern Revolutionary Warfare*, 23-27; Kilcullen, "Countering global insurgency," 603; Metz, Steven. "Rethinking Insurgency." In *The Routledge Handbook of Insurgency and Counterinsurgency*. Edited by Paul B. Rich and Isabelle Duyvesteyn. London: Routledge, 2012, 38.

<sup>16</sup>Khalil, "Know Your Enemy: On the Futility of Distinguishing between Terrorists and Insurgents." For a traditional description of terrorist groups, see Crenshaw, Martha. "An Organizational Approach to the Analysis of Political Terrorism." *Orbis-a Journal of World Affairs* 29, no. 3 (1985): 465-489; See also Hoffman, *Inside Terrorism*, Chapter 1.



**Involvement of the state bureaucracy, army and the grass root civil society organisation in the developmental activities of the state.** These issues of accountability also apply to the civilian bureaucracy of J&K. It has close ties to elite economic actors, linked by murky bank loans, land usage deals, and shared interest in government patronage.<sup>17</sup> Insurgency describe it as a struggle between a non-ruling group and a ruling government or authority, where the former uses a combination of political and military means to challenge governmental power and legitimacy, while striving to obtain or maintain control over a particular area.<sup>18</sup> The state's prime function is to provide that political good of security to prevent cross-border invasions and infiltrations and any loss of territory or to eliminate domestic threats to or attacks upon the national order and social structure or to prevent crime and any related dangers to domestic human security and to enable citizens to resolve their disputes with the state and with their fellow inhabitants without recourse to arms or other forms of physical coercion.<sup>19</sup> Unlike previous generations of warfare, it does not attempt to win by defeating the enemy's military forces. Instead, via the networks, it directly attacks the minds of enemy decision makers to destroy the enemy's political will. Fourth-generation wars are lengthy measured in decades rather than months or years.<sup>20</sup>

<sup>17</sup> Recent examples can be found in Nazir Masoodi, "Jammu & Kashmir: Patronising Corrupt Officials?" NDTV, March 12, 2010, <<http://www.ndtv.com/article/India/jammu-kashmir-patronising-corrupt-officials-17610>> and Altaf Baba, "Baramulla Land Scam: PMO Directs JK Govt to Conduct Probe," Greater Kashmir, July 30, 2013, <http://www.greaterkashmir.com/news/2013/Jul/30/baramulla-land-scam-pmo-directs-jk-govt-toconduct-probe-63.asp>

<sup>18</sup>O'Neill, Bard E., *Insurgency & Terrorism: Inside Modern Revolutionary Warfare*. Washington DC: Brassey's, 1990, 13; Kilcullen, David. "Countering Global Insurgency." *The Journal of Strategic Studies* 28, no. 4 (2005): 597-617; Morris, Michael F. "Al-Qaeda as Insurgency." U.S. Army War College Carlisle Barracks (2005); Byman, Daniel. "Understanding Proto-Insurgencies." *The Journal of Strategic Studies* 31, no. 2 (2008): 165-200.

<sup>19</sup>Robert I. Rotberg, "Failed States, Collapsed States, Weak States: Causes and Indicators," in *State Failures and State Weakness in a Time of Terror*, ed. Robert I. Rotberg (Washington, D.C.: The World Peace Foundation & Brookings Institution Press, 2003

<sup>20</sup>Thomas X. Hammes, *The Sling and the Stone: On War in the 21st Century* (New Delhi: Zenith Press & Manas Publishers, 2006), 2.



**The various provisions of the AFSPA emanate firmly from within the spirit of the constitution and vision of our founding fathers.** A split has occurred between a traditional twentieth-century state-centred paradigm and a new set of sub-state and trans-state strata, resulting in the rise of a new spectrum of warfare that reflects the merging of complex and overlapping modes of armed conflict.<sup>21</sup> The outbreak of the global war on terrorism from 11 September 2001 would provide the ultimate example of a fourth-generation enemy and battlefield.<sup>22</sup>

the Indian Army's counter-insurgency strategy has acknowledged the impossibility of achieving any final military victory in an asymmetric war. The strategy instead emphasizes the political resolution of insurgencies, and places severe limitations on the use of military force in counter-insurgency operations.<sup>23</sup> There is no permanent military solution to counterinsurgency problems which ultimately have to be resolved politically.<sup>24</sup> **This will make the army pro-development than a mere law and order agency.** These efforts have been linked to the counterinsurgency offensives by rhetorically emphasizing the healing touch of development and population-centric counterinsurgency, which are intended to appeal to civilians by mixing security reassurance and economic progress.<sup>25</sup> Confidence-building measures (CBMs), such as efforts at greater cross-LoC trade, with Pakistan

<sup>21</sup>Michael Evans, "Elegant Irrelevance Revisited: A Critique of Fourth-Generation Warfare," *Contemporary Security Policy* 26:2 (2005): 245.

<sup>22</sup>Simon Murden, "Staying the Course in Fourth-Generation Warfare," in *Dimensions of Counter-Insurgency: Applying Experience to Practice*, eds. Tim Benbow and Rod Thornton (New York: Routledge, 2008), 192.

<sup>23</sup>Rajesh Rajagopalan, "'Restoring Normalcy': The Evolution of the Indian Army's Counterinsurgency Doctrine," *Small Wars & Insurgencies* 11:1 (2000): 44.

<sup>24</sup>Rajesh Rajagopalan, "Fighting Fourth Generation Wars: the Indian Experience," in *Global Insurgency and the Future of Armed Conflict: Debating Fourth-Generation Warfare*, eds. Terry Terriff, Aaron Karp, and Regina Karp (London: Routledge, 2007), 263–66.

<sup>25</sup>Aditi Malhotra, "Operation Sadbhavana: Winning Hearts and Minds," *Centre for Land Warfare Studies* (January 26, 2012), <[http://www.claws.in/index.php?action%4details&m\\_id%41060&u\\_id%4119](http://www.claws.in/index.php?action%4details&m_id%41060&u_id%4119)>



have been sporadically explored as an external form of stabilization.<sup>26</sup> The Indian state, as ShamuelTharu argues, has over time incorporated into the legal system a whole array of legislation and ordinances that prolong its right to exercise exceptional powers indefinitely.<sup>27</sup>

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<sup>26</sup>ICG, Steps Towards Peace: Putting Kashmiris First, Asia Briefing, no. 106 (Brussels: ICG, June 2010).

<sup>27</sup>ShamuelTharu, "Insurgency and the State in India: The Naxalite and Khalistan Movements," South Asian Survey 14:1 (2007): 98.