Writ Petition (Civil) No. 5328/80, 9229-30/82 CIVIL APPEALS NOS. 721/85, 722/85, 723/85,
724/85, 2173-76/91, 2551/91 AND WRIT PETITIONS (C) NOS. 13644-45/84 S.C. AGRAWAL, J.:

Petitioner		Respondent
NAGA PEOPLE'S MOVEMENT, OF HUMAN RIGHTS ETC. ETC.	Versus	UNION OF INDIA

Date of Judgment	27/11/1997
Bench	CJI, M.M. PUNCHHI, S.C. AGARWAL, A.S. ANAND, S.P. BHARUCHA
Judgment	Hon'ble the Chief Justice Hon'ble Mr. Justice M.M. Punchhi Hon'ble Mr. Justice S.C. Agarwal Hon'ble Dr. Justice A.S. Anand Hon'ble Mr. Justice S.P. Bharucha Ashok H. Desai, Attorney M.S.Usgaouncar, Additional Solicitor General, Kapil Sibal, Sr. Adv. (A.C.), Ms. Indra Jaising, Prashant K. Goswami, Shanti Bhushan, S.N. Choudhary, Dr. Rajeev Dhawan, Sr. Advs., S.R. Bhat, Rakesh Shukla, MS. Neeru Vaid, Lalit Mohan Bhat, Naveen R. Nath, Ms. Hetu Arora, Ms. Anita Shenoy, Ms. Anita George, P.H. Parekh, N.K. Sahoo, Ms. Deepa, Pravir Choudhary, Ms. Renu George, M.K. Giri, Dr. S.C. Jain, Wasim A. Qadri, Ms. Anu Bindra, Krishnan Venugopal, Shakil Ahmed Syed, S.K. Nandi, Ranjan Mukherjee, Kailash Vasdev, C.K. Sasi, Sunil Kumar Jain, Vijay Hansaria, Jatinder Kumar Bhatia, Navin Prakash, ms. S.Janani, S. k. Bhattacharya, R.S. Sodhi, Advs. with them for the appearing parties.

These writ petitions and appeals raise common questions relating to the validity of the Armed Forces (Special Powers) Act, 1958 (as amended) enacted by Parliament (hereinafter referred to as 'the Central Act') and the Assam Disturbed Areas Act, 1955 enacted by the State Legislature of Assam. (hereinafter referred to as 'the State Act'). The Central Act was enacted in 1958 to enable certain special powers to be conferred upon the members of the armed forces in the disturbed areas in the State of Assam and the Union Territory of Manipur.

By Act 7 of 1972 and Act 69 of 1986 the Central Act was amended and it extends to the whole of the State of Arunachal Pradesh, Assam, Manipur, Meghalya, Mizoram, Nagaland

and Tripura. The expression "disturbed area" has been defined in Section 12(b) to mean an area which is for the time being declared by notification under section 3 to be a disturbed area. Section 3 makes provision for issuance of a notification declaring the whole or any part of State or Union Territory to which the Act is applicable to be a disturbed area. In the said provision, as originally enacted, the power to issue the notification was only conferred on the Governor of the State or the Administrator of the Union Territory. By the Amendment Act of 1972 power to issue a notification under the said provision can also be exercised by the Central Government. Under Section 4 a commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces has been conferred special powers in the disturbed areas in respect of matters specified (n clauses (a) to (d) of the said section. Section 5 imposes requirement that a person arrested in exercise of the powers conferred under the Act must be handed over to the officer incharge of the nearest police station together with a report of the circumstances occasioning the arrest. Section 6 confers protection to persons acting under the Act and provides that no prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by the act.

The state Act was enacted with a view to make better provision for the suppression of dis-order and for restoration and maintenance of public order in the disturbed areas in Assam. Section 2 of the Stat Act also defines disturbed area to mean an area which is for the time being declared by notification under Section 3 to be a disturbed area. Section 3 days down that the State Government may, by notification in the official gazette of Assam, declare the whole or any part of any district of Assam, as may be specified in the notification, to be a disturbed area. Sections 4 and 5 confer on a Magistrate or police officer not below the rank of sub-Inspector or Havildar in case of Armed Branch of the police r any officer of the Assam Rifles not below the rank of Havildar/Jamadar powers similar to those conferred under clauses (a) and (b) of Section 4 of the Central Act. Section 6 confers protection similar to that conferred by Section 5 of the Central Act. C.A. Nos. 721-724 of 1985 arose out of the writ petitions [Civil Rule Nos. 182 of 1980,192 of 1980 and 203 of 1980] filed in the Gauhati High Court. In Civil Rule Nos.182 of 1980 and 192 of 1980 the validity of the Central Act as well as the State Act. And the notifications dated April 5, 1980 Issued thereunder were challenged, while in civil Rule No. 203 of 1980 the proclamation dated December 14,1979 issued by the President under Article 356 the Constitution and the Assam Preventive Detention Ordinance, 1980 were challenged. In Civil Rule No. 182 of 1980 a learned Single Judge of the High Court passed an ex-parte order staying the notification dated April 5, 1980 issued by the Government of Assam under the Central Act. An appeal was filed against the said order of the learned Single Judge before the Division Bench of the High Court. All these three Civil Writ petitions and the appeal were transferred to the Delhi High Court by this Court and were registered as Civil Writ Petitions Nos. 832-34 of 1980 and L.P.A. No. 108 of 1990 in the Delhi High Court. All these matters were disposed of by a Division Bench of the said High Court by judgment dated June 3, 1983. The High Court has observed that in C.W.P. No. 834/80 [Civil Rule No. 203 of 1980] the challenge was to the validity of the Assam prevention Detention Ordinance, 1980, which had been replaced by Assam Preventive Detention Act, 1980 and the validity of the said Act had not been challenged. The said Writ petition was, therefore, dismissed on the ground that it will be an exercise in futility to deal with the vires of the Ordinance. As regards L.P.A. No. 108 of 1980 it was observed that since the main Writ petition was being disposed of on merits, the said decision would govern the L.P.A. The High Court has examined Civil Writ petitions Nos. 832-33 of 1980 on merits. The High Court has upheld the validity of the Central Act and has held that parliament was competent to enact the Central Act in exercise of statutory power conferred under Entries 1 and 2 of List I read with Article 246 of the Constitution. The High Court has also held that the provisions of the Central Act cannot be held to be violative of Articles 14, 19 and 21 of the Constitution. As regards the State Act the High Court has held that the Assam Rifles is a part and parcel of other armed forces of Union of India as postulated in Entry 2 of List 1 of the

Constitution and the State Legislature of Assam could not legislate with regard to Assam Rifles. Sections 4 and 5 of the State Act, to the extent they confer certain powers on the personnel of Assam Rifles, have been held to be beyond the legislative power of the State legislature and the words " or any officer of the Assam Rifles not below the rank of Havildar" in Section 4 and the words "or any officer of the Assam Rifles not below the rank of Jamadar" in Section 5 of the State Act have been struck down and rest of the provisions of the State Act have been upheld. The declarations issued by the Governor Assam under Section 3 of the Central Act and Section 3 of the State Act have also been upheld by the Act. Civil Appeals Nos. 721-24 of 1985 have been filed by the petitioners in the writ petitions against the said judgment of the Delhi High Court. The State of Assam has not filed any appeal against the decision of the High Court striking down the aforementioned words in Sections 4 and 5 of the State Act. Civil Rule Nos. 2314, 2238 and 2415 of 1990 and Civil Rule No. 11 of 1991 were filed in the Gauhati High Court wherein proclamation dated November 27, 1990 promulgated by the Government of India under Article 356 of the Constitution as well as declaration dated November 27, 1990 issued under Section 3 of the Central Act and declaration dated December 7, 1990 issued under Section 3 of the State Act were challenged. In these writ petitions the Validity of the Central Act as well as the State Act was also challenged. All these Writ petitions were disposed of by a Division Bench of the Gauhati High Court by Judgment dated March 20, 1991. Since the proclamation dated November 27, 1990 issued under Article 356 of the Constitution of India had expired during the pendency of the Writ petitions the High Court observed that the relief sought in that regard had become infructuous. The High Court has held that the questions regarding the validity of the Central Act and the State Act were concluded by the earlier Judgment of the Delhi High Court and the same cannot be reopened. Taking note of the report of the Governor of Assam to the president of India which led to the proclamation Under Article 356 of the Constitution the High Court has held that only some of the districts in the state of Assam as mentioned in the said report could be declared as disturbed areas. The High Court has, therefore, directed that notification dated November 27,1990 issued under the Central Act and notification dated December 7,1990 issued under the Central Act and notification dated December 7,1990 issued under the State Act shall apply only in respect of the districts of Dibrugarh, Tinsukia, Sibsagar, Jorhat, Nagaon, Dhemaji, Lakhimpur Sonitpur, Darrang, Nalbari Barpeta and the city of the Gauhati and shall not apply in the districts of Golaghat, Morigaon, Dhubri, Kokrajhar, Bongalgaon, Goalpara, Kamrup (except the city of Gauhati), Karbi Anglong, North Cachar Hills, Cachar, Karimganj and Hailakandi. The High Court has also directed the Central Government under the Central Act and the State Government under the State Act to review every calendar month whether the two notifications are necessary to be continued. The High Court has also directed that legal points decided by the High Court in the earlier decisions in Nungshi Tombi Devi V. Rishang Keishang, 1982(1) GLR 756, and The Civil Liberties and Human Rights Organisations (CLAHRO) V. P.K. Kukrety, 1988 (2) GLR 137, be made known to Commissioned officers, Non-commissioned Officers, warrant Officers and Havildars and has further directed the Central Government and Government of Assam to issue the following instructions to the above mentioned officers:-

(a) Any person arrested by the armed forces or other armed forces of the Union shall be handed over to the nearest police station with least possible delay and be produced before the nearest magistrate within 24 hours from the time of arrest.

(b) A person who either had committed a cognizable or against whom reasonable suspicion exist such persons alone are to be arrested, innocent persons are not to be arrested and later to give a clean chit to them as is being 'white'.

Civil Appeals Nos. 2173--76 of 1991 have been filed by the Union of India, the State of Assam and other respondents in the writ petition against the said judgment of the Gauhati High Court dated March 20, 1991 in Civil Rules Nos. 2314, 2238 & 2415 of 1990. Civil Appeal No. 2551 of 1991 has been filed by the petitioner in Civil Rule No. 11 of 1991 against

the said judgment. The appellant in the Civil Appeal No. 2551 of 1991 has died and the said appeal has abated. In the Writ petitions filed under Article 32 of the Constitution the validity of the Central Act and the State Act as well as the notifications issued the said enactments declaring disturbed areas in the States of Assam, Manipur and Tripura have been challenged. In these writ petitions allegations have been made regarding infringement of human rights by personnel of armed forces in exercise of the powers conferred by the Central Act. The notifications regarding declaration of disturbed areas have ceased to operate. The allegations involving infringement of rights by personnel of armed forces have been inquired into and action has been taken against the persons found to be responsible for such infringements.

The only question that survives for consideration in these Writ petitions is about the validity of the provisions of the Central Act and State Act. We have heard Shri Shanti Bhushan, Ms. Indira Jaisingh, Shri Kapil Sabil on behalf of the petitioners in the writ petitions and in the civil appeals we have heard Shri P.K. Goswami on behalf of the petitioners in the writ petitions filed in the High Court. The learned Attorney General has addressed the Court on behalf of the Union of India. The National Human Rights Commission has been permitted to intervene and Shri Rajiv Dhavan has addressed the Court on its behalf.

As noticed earlier, the provisions contained in the State Act are also found in the Central Act which contains certain additional provisions. The Submissions on the Validity of the provisions of the Central Act would cover the challenge to the validity of the State Act. We would, therefore, first deal with the questions relating to the validity of the Central Act. But before we do so we will briefly take note of the earlier legislation in the field. The Police Act of 1861, in sub-section (1) of 15, empowers the state Government to issue a proclamation declaring that any area subject to its authority has been fond in a disturbed or in a dangerous state and thereupon in exercise of the power conferred under sub-section (2) the Inspector General of Police or other officer authorised by the State Government in that behalf can employ and police force in addition to the ordinary fixed complement, to be quartered in the area specified in such proclamation. Sub- section(6) of Section 15 prescribes that every such proclamation issued under sub-section (1) shall indicate the period for which it is to remain in force, but it may be withdrawn at any time or continued from time to time for a further period or periods as the State Government may in each case think fit to direct. The police Act makes no provision for deployment of armed forces. To deal with the situation arising in certain provinces on account of the partition of the country in 1947 the Governor General issued four Ordinances, namely, (1) The Bengal Disturbed Areas (Special Powers of Armed forces) Ordinance, 1947 (11 of 1947); (2) The Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (14 of 1947); (3) The East Punjab and Delhi Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (22 of 1947). These Ordinances were replaced by the Armed Forces (Special Powers) Act, 1948 (Act No. 3 of 1948). Sections 2 and 3 of the said Act provided as follows:- "section 2. Special powers of officers of military or air forces.- Any commissioned officer, warrant officer or non-commissioned officer of His Majesty's Military or air forces may, in any area in respect of which a proclamation under Sub-section (1) of Section 15 of the Police Act, 1861 (V of 1861) is for the time being in force or which is for the time being by any form of words declared by the provincial Government under any other law to be disturbed or dangerous areas,-

(a) If in his opinion it is necessary so to do for the maintenance of public order, after giving such warning, if any, as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the said area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons;

(b) Arrest without warrant any person who has committed a recognizable offence, or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence;

(c) enter and search, without warrant, any 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 property, or any arms believed to be unlawfully kept, in such premises.

Section 3. Protection of persons acting under this Act,- No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purporting to be done in exercise of the powers conferred by

Section 2."

This Act was a temporary statute enacted for a period of one year. It was, however, continued till it was repealed by Act 36 of 197.

Thereafter the Central Act was enacted by Parliament. it was known as the Armed Forces [Assam and Manipur] Special powers Act, 1958 and it extended to the whole of the State of Assam and the Union Territory of Manipur. As a result of the amendments made therein it is now described as the Armed Forces [Special Powers] Act, 1958 and it extends to the whole of the Stat of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. Under Section 3 of the Act as originally enacted the power to declare an area to be a disturbed area was conferred on the Governor of Assam and the Chief Commissioner of Manipur. Section 3 was amended by Act 7 of 1972 and power to declare an area to be a 'disturbed area' has also been conferred on the Central Government. In the Statement of Objects and Reasons of the Bill which was enacted as Act 7 of 1972 the following reason is given for conferring on the Central Government the power to make a declaration under Section 3:- "The Armed Forces [Assam and Manipur] Special Powers Act, 1958, empowers only the Governors of the States and the Administrators of the Union Territories to declare areas in the concerned State or Union Territory as "disturbed". Keeping in view the duty of the Union Under article 355 of the Constitution, inter alia, to protect every State against internal disturbance, it is considered desirable that the Central Government should also have power to declare areas as "disturbed", to enable its armed forces to exercise the special powers."

The relevant provisions of the Central Act are as under:-

2. Definitions.- In this Act,
unless the context otherwise requires,-
xxxxx xxxxx xxxxxx
(b) "disturbed area" means an area which is for the time being declared by notification under Section 3 to be a disturbed area;
xxxx xxxxx xxxxxxx

3. 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 the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union Territory, as the case maybe, is in such a disturbed or dangerous condition 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.

4. Special powers of the armed forces.- Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,-

(a) If he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;
(b) If he is of opinion that it is necessary so to do, destroy and arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as training camp for armed volunteers or utilised as a hid-out by armed gangs or absconders wanted for any offence;
(c) arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;
(d) enter and search without warrant any 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 property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary.

5. Arrested persons to be made over to the police.- Any person arrested and taken into custody under this Act 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.

6. Protection to persons acting under Act.- No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act."

In addition to the powers conferred under the Act, provision is made for use of armed forces in the following provisions contained in Sections 130 and 131 of the Criminal Procedure Code, 1973 (for short Cr. P.C.):- "Section 130. use of armed forces to disperse assembly.- (1) If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces.
(2) Such Magistrate may require any officer in command of any group of persons belonging to the armed forces o disperse the assembly with the help of the armed forces under his command, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.
(3) Every such officer of the armed forces shall obey such requisition in such manner, as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

Section 131. Power to certain armed force officers to disperse assembly.- When the public security is manifestly endangered by any such assembly and no Executive
Magistrate can be communicated with, any commissioned or gazetted officer of the armed forces may disperse such assembly with the help of the armed forces under his command, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law, but if, while he is acting under this section, it becomes practicable for him to communicate with an Executive Magistrate, he shall do so, and henceforward obey the instructions of the Magistrate, as to whether he shall or shall not continue such acting."

Provisions on the same lines were contained in Sections 129 to 131 of the Criminal procedure

Code, 1898. In this context, it may be mentioned that under Section 23(1) of the Reserve Forces Act, 1980 in England power has been conferred on the Secretary of the State, at any time when occasion appears to require, to call out the whole or so many as he thinks necessary, of the members of the Army or Air Force Reserve to aid the civil power in the preservation of the public peace. In sub-section (2) of Section 23 of the said Act it is provided that for the same purpose, on the requisition in writing of a justice of the peace, any officer commanding her Majesty's forces or the regular air force in any town or district may call out the men of the Army Reserve or Air Force Reserve, as the case may be, who are there resident, or so many of them as he thinks necessary. Under the Queen's Regulations for the Army 1975, para III 0002, a service commander who received a request from the civil power for assistance in order to maintain peace and public order is under a duty at once to inform his immediately superior service authority and the Ministry of Defence, but if, in very exceptional circumstances, a grave and sudden emergency arises which, in the opinion of the commander present, demands his immediate intervention to protect life and property, he must act on his own responsibility, and report the matter as soon as possible to the chief officer of police and to the service authorities. [See: Halsbury's Laws of England, Fourth Edition, Vol. 41, pp. 27-28, para 25].

The learned counsel for the petitioners in the writ petitions filed in this Court as well as in the writ petitions filed in the High Court and the learned counsel for the intervener has assailed the validity of the Central Act on the ground that it is beyond the legislative competence of parliament. They have also challenged the validity of the various provisions of the Act on the ground that the same are violative of the provisions of Articles 14, 19 and 21 of the constitution. We would first examine the submissions of the learned counsel regarding legislative competence of parliament to enact the Central Act. For that purpose it is necessary to take not of the relevant entries in the Union List (List I) and the State List (List II) in the Seventh Schedule to the Constitution. Prior to the Constitution (Forty-Second Amendment) Act, 1976, the relevant entries were as follows:- "List I-Union List, Entry 2. Naval,

Military and air forces, any other armed forces of Union. List II-State List, Entry 1. 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 Constitution (Forty-Second Amendment) Act, 1976, Entry 2A was inserted in the Union List. The said entry roads as follows :-

"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."

Entry 1 of the State List was amended to read as under:-
"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."

By the said amendment Article 257A was also inserted which was in the following terms:-
"Article 257-A. Assistance to States by deployment of armed forces or other forces of the Union. -(1) the Government of India may deploy any armed force of the Union or any other force subject to the control of the Union for dealing with any grave situation of law and order in any State.
(2) Any armed force or other force of any contingent or unit thereof deployed under clause (1) in any State shall act in accordance with such directions as the Government of India may issue and shall not, save as otherwise provided in such directions, be subject to the superintendence or control of the State Government or any officer or authority subordinate to the State

Government.
(3) Parliament may, by law, specify the powers, functions privileges and liabilities of the members of any force or any contingent or unit thereof deployed under clause (1) during the period of such deployment."
Article 257A was deleted by the Constitution (Forty- Forth Amendment) Act, 1976 but no change was made in Entry 2A of the Union List.

While examining the legislative competence of parliament to make a law what is required to be seen is whether the subject matter falls in the State List which Parliament cannot enter. If the law does not fall in the State List, Parliament would have legislative competence to pass the law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the question whether it falls under any entry in the Union List or the Concurrent List. [See : Union of India v. H.S. Dhillon, 1972(2) SCR 33 at pp. 61 and 67- 68; S.P. Mittal v. Union of India, 1983(1) SCR 729 at p. 769-770; and Kartar Singh v. State of Punjab, 1994 (3) SCC 569 at pp. 569 at pp. 629-630]. What is, therefore, required to be examined is whether the subject matter of the Central Act falls in any of the entries in the State List. The submission of the learned counsel for the petitioners and the Intervener is that the Central Act is a law with respect to "Public Order" and falls under Entry I of the State List. The learned Attorney General of India has on the other hand, submitted that the Central Act does not fall under any entry in the State list and, as originally enacted in 1958, it was a law made under Article 248 read with Entry 97 of the union List and after the Forty-Second Amendment of the Constitution it is a law falling under Entry 2A of the Union List.

Shri Shanti Bhushan has urged that under Entry 1 of the State list the State Legislature has been conferred the exclusive power to enact a law providing for maintenance of public order. This power does not, however, extend to the use of armed forces in aid of the civil power and that parliament has been empowered to make a law in that regard and this position has been made explicit by entry 2A of the Union List. The submission is 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 of the State concerned. It has been urged that the Central Act does not make provision for use of armed forces in aid of the civil power in this sense and it envisages that as soon as the whole o any part of a State has been declared to be disturbed area under Section 3 of the Central Act members of armed forces get independent power to act under Section 4 of the Central Act and to exercise the said power for the maintenance of public order independent of the control or supervision of any executive authority of the state. The learned counsel has submitted that such a course is not permissible inasmuch as it amounts to handing over the maintenance of public order in a State to armed forces directly and it contravenes the constitutional restriction of permitting use of armed forces only in aid of civil power., It is further urged that the expression "civil power" in Entry 1 of the State List as well as in Entry 2A of the Union List refers to civil power of the
State Government and not of the Central Government. Shri Dhavan has submitted that the power to deal with "public order" in the widest sense vests with the States and that the Union has the exclusive power to legislate and determine the nature of the use for which the armed forces may be deployed in aid of the civil power and to legislate on an determine the conditions of deployment of the armed forces and the terms on which the forces would be so deployed but the State in whose aid the armed forces are so deployed shall have the exclusive power to determine the purposes, 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 retains a final directorial control to ensure that the armed forces act in aid of civil power and do not supplant or act in substitution of the Civil power. A perusal of Entry 1 of the State List Would show that while power to legislate in order to maintain public order has been assigned to the State Legislature,

the field encompassing the use of armed forces in aid of the civil power has been carved out from the said Entry and legislative power in respect of that field has been expressly excluded. This means that the State Legislature does not have any legislative power with respect to the use of the armed forces of the Union in aid of the Civil power for the purpose of maintaining public order in the State and the Competence to make a law in that regard vests exclusively in parliament. Prior to the Forty-Second Amendment to the Constitution such power could be inferred from Entry 2 of the Union List relating to naval, military and air forces and any other armed forces of the Union as well as under Article 248 read with Entry 97 of the Union List. After the Forty-Second Amendment the legislative power of parliament in respect of deployment of armed forces of the Union or another force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil powers flows from Entry 2-A of the Union List. 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. 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 the purpose, the time period and the areas within which the armed forces should be requested to act in aid of civil power. In our opinion, what is contemplated by Entry 2-A of the Union List and Entry I of the State List is that in the event of deployment of the armed forces of the Union in aid of the civil power in a State, the said forces shall operate in the State concerned in cooperation with the civil administration so that the situation which has necessitated the deployment of the armed forces is effectively dealt with and normalcy is restored.

Does the Central Act enable the armed forces to supplant or act as substitute for civil power after a declaration has been made under Section 3 of the Central Act? In view of the provisions contained in Sections 4 and 5 of the Central Act the question must be answered in the negative. The power conferred under clause (a) of Section 4 can be exercised only when any person is found acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire arms, ammunition or explosive substances. In other words, the said power conditional upon the existence of a prohibitory order issued under a law, e.g. Cr. P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order the power conferred under clause (a) of Section 4 cannot be exercised. Similarly, under Section 5 of the Central Act there is a requirement that any person who is arrested and taken into custody in exercise of the power conferred by clause (c)) of Section 4 of the Act 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. Maintenance of public Order involves cognizance of offences, search, seizure and arrest followed by registration of reports o offences [FIRs], investigation, prosecution, trial and, in the event of conviction, execution of sentences. The powers conferred under the Central Act only provide for cognizance of offences, search, seizure and arrest and destruction of arms dumps and shelters and structures used as training camps or as hide-outs for armed gangs. The other functions have to be attended by the State Criminal Justice machinery, viz., the police, the magistrates, the prosecuting agency, the courts, the jails, etc. This would show that the powers that have been conferred under Section 4 of the Central Act do not enable the armed forces of the Union t supplant or ac as substitute for the civil power of the State and the Central Act only enables

the armed forces to assist the civil power of the State in dealing with the disturbed conditions affecting the maintenance of public order in the disturbed area.

Under Section 3, as amended by Act 7 of 1972, the Central Government has been empowered to declare an area to be a disturbed area. There is no requirement that it shall consult the State Government before making the declaration. As a consequence of such a declaration the power under section 4 can be exercised by the armed forces and such a declaration can only be revoked by the Central Government. The conferment of the said power on the Central Government regarding declaration of areas to be disturbed areas does not, however, result in taking over of the state administration by the Army or by other armed forces of the Union because after such declaration by the Central Government the powers under Section 4 of the Central Act can be exercised by the personnel of the armed forces only with the cooperation of the authorities of the State Government concerned. It is, therefore, desirable that the State Government should be consulted and its co-operation sought while making a declaration. It would be useful to refer to the report of the Sarkaria Commission on Central-States Relation which has also dealt with this aspect. The Commission has observed:

7.5.01 .... Clearly, the purpose of deployment which is to restore public order and ensure that effective follow up action is taken in order to prevent recurrence of disturbances, cannot be achieved without the active assistance and co-operation of the entire law enforcing machinery of the State Government. If the Union Government chooses to take unilateral steps to quell an internal disturbances without the assistance of the State Government, these can at best provide temporary relief State Government, these can at best provide temporary relief to the affected area and none at all where such disturbances are chronic.
7.5.02 Thus, practical considerations, as indicated above, make it imperative that the union Government should invariably consult and seek the cooperation of the State Government, if it proposes either to deploy suo motu its armed forces in that State or to declare an area as need hardly be empasised that without the state Government's cooperation, the mere assertion of the of the Union Government's right to deploy its armed forces cannot solve public order problems.
7.5.03 We recommend that, before deploying Union armed and other forces in a State in aid of the civil power otherwise than on a request from the State Government, or before declaring an area withina State as a "disturbed area", it is desirable that the State Government should be consulted, wherever feasible, and its cooperation sought by the Union Government. However, prior consultation with the State Government is not obligatory." [Part I, pp. 198, 199]

It is, therefore, not possible to accept the contentions urged by Shri Shanti Bhushan and Shri Dhavan that the Central Act is ultra vires the legislative power conferred on Parliament inasmuch as it s not an enactment providing for deployment of armed forces in aid of the civil power, but is an enactment with respect to maintenance of public order which is a field assigned to the State legislature under entry 1 of the State List. Another contention that has been advanced by Ms. Indira Jaisingh to Challenge the legislative competence of parliament is that the Central Act is, in pith and substance, a law relating to 'armed rebellion' and that the subject of armed rebellion falls within the ambit of the emergency powers contained in Part XVIII (Articles 352 to 360) of the Constitution and that in exercise of its legislative power under Entry 2A of the Union List Parliament has no power to legislative on the subject of armed rebellion. It has also been urged that Article 352 incorporates certain safeguards which are sought to be by passed by the Central Act., Shri Sibal has also adopted the same line and has urge that the Central Act was enacted to deal with a disturbed or dangerous condition which is no less than armed rebellion and the parliament is seeking to by-pass Article 352 or Article 356 of the Constitution and the Central Act is, therefore, unconstitutional. The submission of Shri Dhavan is that the Central Act deals with the situation and the circumstances which are broadly similar to the circumstances of 'internal disturbance' and armed rebellion' in which a proclamation under Article 352 would be made for a part of the

territory of India and that such a proclamation under Article 352 would be made for a part of the territory of India and that such a proclamation under Article 352 is the only and exclusive method to deal with such circumstances and the parliament is dis-empowered from enacting legislation dealing with 'armed rebellion', terrorism or insurgency in any part of India. It has also been submitted that since the circumstances covered by the Central Act and Article 352 are similar, the Central Act is a colourable legislation and a fraud on the Constitution since it does not incorporate within it constraints similar to those contained in Article 352 which have the effect of limiting its application within stringent limits and enabling a responsible and effective monitoring of its use and abuse.

The learned Attorney General, on the other hand, has urged that the proclamation of Emergency under Article 352 has a far reaching consequence and can affect very seriously the legislative and executive powers of the State and that the power that has been conferred under the Central Act is of a very limited nature. It has been pointed out that after the insertion of "armed rebellion" in Article 352 by the Constitution (Forty-fourth Amendment) Act, 1978; a clear distinction had been drawn between 'internal disturbance' and 'armed rebellion' and the power under Article 352 can be invoked only when there is a threat to the security of India by armed rebellion or war or external aggression and the situation of internal disturbance would not justify invocation of Article 352. Nor would it justify the invocation of the drastic provisions of Article 356 by the president. But, at the same time, the situation would entitle the Union Government to invoke its power and indeed perform its duties under Article 355.

While considering the submissions of the learned counsel in this regard, it has to be borne in mind that Articles 352 and 356 contain emergency powers which can be invoked by the president exercising the executive power of the Union subject to such action being approved by both the House of parliament within a specified period. The Central Act, on the other hand, has been enacted by parliament in exercise of its legislative power under Articles 246 and 248.

Prior to the amendment of Article 352 by the Forty- fourth Amendment of the Constitution it was open to the president to issue a proclamation of Emergency if he was satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or `internal disturbance'. By the Forty-fourth Amendment the Words `internal disturbance' in Article 352 have been substituted by the words `armed rebellion'. The expression `internal disturbance' has a wider connotation than `armed rebellion' in the sense that `armed rebellion' is likely to pose a threat to the security of the county or a part thereof, while `internal disturbance', thought serious in nature, would not pose a threat to the security of the country or a part thereof. The intention underlying the substitution of the word `internal disturbance' by the word `armed rebellion' in Article 352 is to limit the invocation of the emergency powers under Article 352 only to more serious situations where there is a threat to the security of the country or a part thereof on account of war or external aggression or armed rebellion and to exclude the invocation of emergency powers in situations of internal disturbance which are of lesser gravity. This has been done because a proclamation of emergency under Article 352 has serious implications having effect on the executive as well as the legislative powers of the States as well as the Union. As a result of a proclamation under Article 352 parliament can make a law extending the duration of the House of the People [Article 83(2) Proviso]; Parliament gets the power to legislate with respect to any matter in the State List [Article 250]; the executive power of the Union is enlarged so as to extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised [Article 353(a)]; power of parliament to make laws with respect to any matter is enlarged to include power to make laws, conferring powers and imposing duties authorising the conferring of powers and the imposition of duties upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List [Article 353(b)]; the president can pass an order directing that all or any of the provisions of Articles 268 to 279

relating to distribution of revenues shall have effect subject to such exceptions modifications as he thinks fit [Article 354]; the provisions of Article 19 are suspended (Article 358); and the enforcement of other rights conferred by part III (except Articles 20 and 21) can be suspended by the President [Article 359]. The consequences of a proclamation of emergency under Article 352 are thus much more drastic and far reaching and, therefore, the Constitution takes care to provide for certain safeguards in Article 352 for invoking the said provision. There is no material on the record to show that the disturbed conditions in the States to which the Central Act has been extended are due to an armed rebellion. Even if the disturbance is as a result of armed rebellion by a section of the people in those States the disturbance may not be of such a magnitude as to pose a threat to the Security of the country or part thereof so as to call for invocation of the emergency powers under Article 352. If the disturbance caused by armed rebellion does not pose a threat to the security of the country and the situation can be handled by deployment of armed forces of the Union in the disturbed area, there appears to be no reason why the drastic power under Article 352 should be invoked. It is, therefore, not possible to hold that the Central Act, which is primarily enacted to confer certain powers on armed forces when deployed in aid of civil power to deal with the situation of internal disturbance in a disturbed area, has been enacted to deal with a situation which can only be dealt with by issuing a proclamation of emergency under Article 352. The contention based on the provisions of Article 356 is also without substance. Reference in this context may be made to Article 355 of the Constitution where under a duty has been imposed on 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 the Constitution. In view of the said provision the Union Government is under an obligation to take steps to deal with a situation of internal disturbance in a State. There can be a situation arising out of internal disturbance which may justify the issuance of a proclamation under Article 356 of the Constitution enabling the President to assume to himself all or any of the functions of the Government of the State. That would depend on the gravity of the situation arising on account of such internal disturbance and on the President being satisfied that a situation has arisen where the Government of the State cannot be carried on in accordance with provisions of the Constitution. A proclamation under Article 356 has serious consequences affecting the executive as well as the legislative powers of the State concerned. By issuing such a proclamation the President assumes to himself all or any of the functions o the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State and declares that the powers of the Legislature of the State shall be exercisable by or under the authority of parliament. Having regard to the drastic nature of the consequences flowing from a proclamation under Article 356 it is required to be approved by both Houses of Parliament within a prescribed period and it can be continued only with the approval of both Houses of Parliament and it cannot remain in force for more than three years. The provisions of the Central Act have been enacted to enable the Central Government to discharge the obligation imposed on it under Article 355 of the Constitution and to prevent the situation arising due to internal disturbance assuming such seriousness as to require invoking the drastic provisions of Article 356 of the Constitution. The Central Act does not confer of the Union the executive and legislative powers of the States in respect of which a declaration has been made under Section 3. It only enables the personnel of armed forces of the Union to exercise the power conferred under Section 4 in the event of a notification declaring an area to be a disturbed area being issued under Section 3. Having regard to the powers that are conferred under Section 4, we are unable to appreciate how the enactment of the Central Act can be equated with the exercise of the power under Article 356 of the Constitution. As regards the submission that the Central Act is a colourable legislation and a fraud on the Constitution, it may be mentioned that as far back as in 1954 this Court in K.C. Gajapati Narayan Deo & Anr.v. The State of Orissa, 1954 SCR 1, had said:-

"It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine

resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not it thus always a question of power." [pp. 10, 11]

The same view was reiterated in R.S. Joshi, S.T.O. Gujarat Etc. Etc. v Ajit Mills Ltd., Ahmedabad & Anr. Etc. Etc., 1978 (1) SCR 338, decided by a Special Bench of Seven Judges in the following observations:-
"In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law, although the label of competency is stuck on it, and then it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. To put it more relevantly to the case on hand, if a legislation, apparently enacted under one Entry in the list, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. In other words, the letter of the law notwithstanding, what is the pith and substance of the Act? Does it fall within any entry assigned to that legislature in pith and substance, or as covered by the ancillary powers implied in that Entry? Can the legislation be read down reasonably to bring it within the legislature's constitutional powers? If these questions can be answered affirmatively, the law is valid. Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of mala fides." [pp. 349, 350]

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.

As regards the competence of Parliament to enact the Central Act, we have already found that keeping in view Entry 1 of the State List and Article 248 read with Entry 97 and Entries 2 and 2A of the Union List Parliament was competent to enact the Central Act in 1958 in exercise of its legislative power under Entry 2 of the Union List and Article 248 read with Entry 97 of the Union List and, after the forty-second amendment of the Constitution, the legislative power to enact the said legislation is expressly conferred under Entry 2A of the Union list and that it cannot be regarded as a law falling under Entry 1 of the State List. 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.

Having dealt with the question of legislative competence of Parliament to enact the Central Act, we would now proceed to deal with the submissions of the learned counsel assailing the provisions contained in the Act. The expression 'disturbed area' has been defined in Section 2(b) to mean an area which is for the time being declared by notification under Section 3 to be a disturbed area. Ms. Indira Jaising has assailed the validity of the said provision on the ground that it is vague inasmuch as it does not lay down any guidelines for declaring an area to be a 'disturbed area'. We do not find any substance in this contention. Section 2(b) has to be read with Section 3 which contains the power to declare areas to be a 'disturbed area'. In the said section declaration about disturbed area can be made where the Governor of that State or the Administrator of that Union Territory of the Central Government is of the opinion that the whole or any part of such Stat or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the Civil power is necessary. Since the use of armed forces of the Union in aid of the civil power in a state would be in discharge

of the obligation imposed on the Union under Article 355 to protect the State against internal disturbance, the disturbance in the area to be declared as 'disturbed area' has to be of such a nature that the Union would be obliged to protect the State against such disturbance. In this context, reference can also be made to Article 257A which was inserted by the Forty-Second Amendment along with Entry 2A of the Union List. Although Article 257A has been deleted by the Forty-Fourth Amendment, it can be looked in to since it gives an indication regarding the disturbance which would be required for deployment of armed forces of the union for use of the Civil power. The said article provided that the Government of India may deploy any armed forces of the Union for dealing with any grave situation of law and order in any State. It can, therefore, be said that for an area to be declared as 'disturbed area' there must exist a grave situation of law and order on the basis of which the Governor/Administrator of the State/Union Territory or the Central Government can form an opinion that area is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary. It cannot, therefore, be said for arbitrary and unguided power has been conferred in the matter of declared an area as disturbed area under Section 2(b) read with Section 3 of the Central Act. The provisions of Section 3 of the Central Act have been assailed y the learned counsel for the petitioners on the ground that there is no requirement of a periodic review of a declaration issued under Section 3 and that a declaration once issued can operate without any limit of time. We are unable to construe Section 3 as conferring a power to issue a declaration without any time limit. The definition of 'disturbed area' in Section 2(b) of the Central Act talks of "an areas which is for the time being declared by notification under Section 3 to be a disturbed area". (emphasis supplied) The words "for the time being" imply that the declaration under Section 3 has to be for a limited duration and cannot be a declaration which will operate indefinitely. It is no doubt true that in Section 3 there is no requirement that the declaration should be reviewed periodically. But since the declaration is intended to be for a limited duration and a declaration can be issued only when there is grave situation law and order, 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. During the course of the arguments, the learned Attorney General has made the following statement indicating the stand of the Union of India in this regard:-

"It is stated on behalf of the Government of India that it keeps all notifications it has issued under the Armed Forces (Special Powers) Act, under constant review. It states that even in future while the notifications themselves may not mention the period it will review all future notifications within a period of at the most one year from the date of issue, and if continued, within a period of one year regularly thereafter. As far as the current notifications are concerned, their continuance will be reviewed within a period of three months from today. The Government may also review or revoke the notifications earlier depending on the prevailing situation."

The learned counsel for the petitioners have urged that the period of one year is unduly long and have invited our attention to the provisions contained in Articles 352 and 356 which postulate periodic review of a proclamation issued under the said provisions after every six months. It has been urged that there is no reason why a longer period should be required for review of a declaration under Section 3 of the Central Act. Keeping in view the fact that the declaration about an area being declared as a 'disturbed area' can be issued only in a grave situation of law and order as well as the extent of the powers that can be exercised under Section 4 of the Central Act in a disturbed area, we are of the view that a periodic review of the declaration made under Section 3 of the Central Act should be made by the Government/Administration that has issued such declaration before the expiry of a period of six months.

There is one other aspect which cannot be ignored. The primary task of the armed forces of the Union is to defend the country in the event of war or when it is face with external

aggression. Their training and orientation defeat the hostile forces. A situation of internal disturbance involving the local population requires a different approach. Involvement of armed forces is handling such a situation brings them in confrontation with their countrymen. Prolonged or too frequent deployment of armed forces for handling such situations is likely to generate a feeling of alienation among the people against the armed forces who by their sacrifices in the defense of their country have earned a place in the hearts of the people. It also has an adverse effect on the morale and discipline of the personnel of the armed forces. It is, therefore, necessary that the authority exercising the power under Section 3 to make a declaration so exercises the said power that the extent of the disturbed area is confined to the area in which the situation is such that it cannot be handled without seeking the aid of the armed forces and by making a periodic assessment of the situation after the deployment of the armed forces the said authority should decide whether the declaration should be continued and, in case the declaration is required to be continues, whether the extent of the disturbed area should be reduced. Shri Sibal has urged that the conferment of power to issue a declaration under Section 3 of the Central Act on the Governor of the State is invalid since it amounts to delegation of power of the Central Government and that for the purpose of issuing a declaration the application of mind must be that of the Central Government with respect to the circumstances in which such deployment of armed forces is to take place and that conferment of the power to make a declaration on the Governor of the State cannot be held to be valid. There is a basic infirmity in this contention. There is a distinction between delegation of power by a statutory authority and statutory conferment of power on particular authority/authorities by the Legislature. Under Section 3 of the Central Act there is no delegation of power of the Central Government to the Governor of the State. What has been done is that the power to issue a declaration has been conferred by Parliament on three authorities, namely, (1) the Governor of the State ;(2) the Administrator of the Union Territory, and (3) the Central Government. In view of the information available at the local level the Governor of the State or the Administrator of the Union Territory is in a position to assess the situation and form an opinion about the need for invoking the provisions of the Central Act for use of the armed forces of the Union in aid of the Civil power for the purpose of dealing with the situation that has arisen in the concerned State or the Union Territory. Moreover the issuance of a declaration, by itself, would not oblige the Central Government to deploy the armed forces of the Union. After such a declaration has been issued by the Governor/Administrator the Central Government would have to take a decision regarding deployment of the armed forces of the Union in the area that has been declared as a 'disturbed area'. The conferment of power on the Governor of the State to make the declaration under Section 3 cannot, therefore, be regarded as delegation of power of the Central Government.

Shri Dhavan has taken a difference stand. He has assailed the conferment of power to issue a declaration under Section 3 on the Central Government on the ground that the words 'in aid of the civil power" postulates that the state alone should consider whether the public order requires armed forces of the Union to be called in aide of civil power and that the conferment such a power on the Central Government is destructive of the federal scheme which is a part of the basis structure of the Constitution. We are unable to accept this contention. Whether a situation has arisen which requires the making of a declaration under Section 3 so as to enable the armed forces of the Union to be deployed in aid of the Civil power is a matter which has to be considered by the Governor of the State/Administrator of the Union Territory as well as Central Government because the cooperation of both is required for handling the situation. By virtue of Article 355 the Union owes a duty to protect the States against internal disturbance and since the deployment of armed forces in aid of civil power in a State is to be made by the Central Government in discharge of the said constitutional obligation, the conferment of the power to issue a declaration on the Central Government cannot be held to be violative of the federal scheme as envisaged by the Constitution.

As regards the provisions contained in Section 4 of the Central Act, Shri Shanti Bhushan has urged that adequate provisions are contained in Sections 130 and 131 of the Cr.P.C. to deal

with a situation requiring the use of armed forces in aid of civil power and that there is no justification for having a special law, as the Central Act, unless it can be shown that the said provisions in sections 130 and 131 Cr. P.C. are not adequate to meet the situation. it has been submitted that Sections 130 and 131 Cr.P.C. contain several safeguards for the protection of the rights of the people and that the powers conferred under Section 4 of the Central Act are much more drastic in nature. The submission is that if there are adequate provisions to deal with the situation in the general law (Cr.P.C.) the enactment of more drastic provisions in Section 4 of the Central Act to deal with the same situation is discriminatory and unjustified. In our opinion, this contention is devoid of any force. Section 130 makes provisions for the armed forces being asked by the Executive magistrate to disperse an unlawful assembly which cannot be other wise dispersed and such dispersal is necessary for the public security. The said provision has a very limited application inasmuch as it enables the Executive magistrate to deal with a particular incident involving breach of public security arising on account of an unlawful assembly and the use of the armed forces for dispersing such unlawful assembly. The Central Act makes provisions for dealing with a different type of situation where the whole or a part of a state is in a disturbed or dangerous condition and it has not been possible for the civil power of the State to deal with it and it has become necessary to seek the aid of the armed forces of the Union for dealing with disturbance. Similarly, under Section 131 Cr.P.C. a commissioned or gazetted officer of the armed forces has been empowered to deal with an isolated incident where the public security is manifestly endangered by any unlawful assembly. The provisions in Section 130 and 131 Cr.P.C. cannot thus be treated as comparable and adequate to deal with the situation requiring the continuous use of armed forces in aid of the civil power for certain period in a particular area as envisaged by the Central Act and it is not possible to hold that since adequate provisions to deal with the situation requiring the use of armed forces in aid of civil power are contained in Sections 130 and 131 CR.P.C. the conferment of the powers on officers of the armed forces under Section 4 of the Central Act to deal with a grave situation of law and order in a State is discriminatory in nature and is violative of Article 14 of the Constitution. The provisions of Section 4, in general, have been assailed by the learned counsel for the petitioners on the ground that the said powers can also be exercised by a non- commissioned officer who is much inferior in rank and that ass a result of the conferment of these powers on a junior officer, there is likelihood of the powers being misused and abused. The learned Attorney General has, however, pointed out that an infantry battalion in the area is required to cover large areas wherein it is deployed on grid pattern with special reference to sensitivity of certain areas and important installations/vital points. The deployment is either in sections or platoons which are commanded by Commissioned Officers and Junior Commissioned Officers respectively. Any operation in a counter insurgency environment is normally under a commissioned officer/junior Commissioned officer, depending on the nature of the operation. However, during an operation the group is required to be further sub divided into teams which are commanded by Non Commissioned Officers. As regards Non Commissioned Officers it has been pointed out that a Jawan is promoted to the rank of Naik after approximately 8 to 10 years of service and to the rank of Havildar after 12 to 15 years or service and that a Non Commissioned Officer exercising powers under Section 4 is a mature person with adequate experience and is reasonably well versed with the legal provisions. This aspect of the case has been considered by the Delhi High Court in the judgment under appeal in Civil Appeals Nos. 721-24 of 1985 (reported in AIR 1983 Delhi 513) Wherein it has been observed:- "The argument is based on unawareness of the rank and responsibilities of officers like Havildars. In army setup or setups following the army pattern Havildar is not such a junior official or such an irresponsible officer as Mr. Salve apprehends. The usual organisational set up is that three or more battalions constitute a Regiment. Three or more companies constitute a battalion. Each company is commanded by a commissioned officer or an officer of an equivalent rank. The company itself is divided into platoons; each platoon is again commanded by a commissioned officer or an officer of equivalent rank. Each platoon is divided into three sections. The Sections Commanders are usually Naiks. The noncommissioned officer incharge of the platoon or a section of the platoon is a Havildar. He

is the direct link between the commissioned officer and the jawans as well as section Commanders. A jawan first becomes a Lance Naik, then a Naik and thereafter a Havildar. The classes of ranks, apart from the commissioned officers or officers of equivalent rank, are Subedar Major, Subedar, Jamadar, Havildar Major, Havildar/defenders, Naik and Lance Naik and a soldier. In the hierarchy, therefore, a Havildar's fairly high and certainly holds a very responsible position. When troops or forces are deployed the sections or the petrols are by and large commanded by havildars. That is why the Havildars are treated as and recognised as non-commissioned officers. The three categories of officers generally are commissioned officers junior commissioned offices and non-commissioned officers. Havildars are noncommissioned officers." [pp. 533, 534]

Having regard to the status and experience of the Non- Commissioned Officers in the Army and the fact that when in command of a team in a counter insurgency operation they must operate on their own initiative, it cannot be said that conferment of powers under Section 4 on a Non-Commissioned Officer renders the provision invalid on the ground of arbitrariness.

We may now examine the submissions of the learned counsel for the petitioners assailing the validity of clauses (a) to (d) of Section 4 of the Central Act. A regards clause (a) of Section 4 the submission is that it empowers any commissioned officer, warrant officer or non-commissioned officer or any other person of equivalent rank in the armed forces to fire upon or otherwise use force even to the causing of death against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or things capable of being used as weapons or of fire arms, ammunition or explosive substances. It has been urged that the conferment of such a wide power is unreasonable and arbitrary. We are unable to agree. The powers under Section 4(a) can be exercised only when (a) a prohibitory order of the nature specified in that clause is in force in the disturbed area; (b) the officer exercising those powers forms the opinion that it is necessary to take action for maintenance of public order against the person/persons acting contravention of such prohibitory order; and (c) a due warning as the officer considers necessary is given before taking action. The laying down of these conditions gives an indication that while exercising the powers the officer shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order. In the circumstances, it cannot be said that clause (a) of Section 4 suffers from the vice of arbitrariness or is reasonable. Shri Dhavan has submitted that the power conferred under Section 4(a) must be so construed that it can be exercised only against armed persons and that the word "or" between the words "assembly or five or more persons" and the words "carrying of weapons" should be read as "and". The language of Section 4(a) does not support the said construction. Clause (a) of Section 4 empowers the use of force against any person who is acting in contravention of any law or order for the time being in force in the disturbed area. It contemplates two types of such orders, viz., (a)) an order prohibiting the assembly of five or more persons, and (b) an order prohibiting the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances. The two orders are different in nature in the sense that an order prohibiting the assembly of five or more persons can be issued under Section 144 Cr.P.C., while an order prohibiting the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances has to be passed under the Arms Act, 1959 or other similar enactment. The word "or" links the two prohibitory orders and if it is read as "and', as suggested By Shri Dhavan, the result would be that action could only be taken under clause (a) where both the prohibitory orders and if it is read as "and", as suggested by Shri Dhavan, the result would be that action could only be taken under clause (a) where both the prohibitory orders were contravened by a person/persons. Such a construction would defeat the purpose of the provision and cannot be accepted. Section 4(b) confers the power to destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made or any structure used as training camp for armed volunteers or utilised as a hide out by armed gangs or absconders

wanted for any offence. It is urged that the said power is very wide in its scope and that apart from destruction of any arms dump, fortified positions, shelters and structures used by armed groups for attacks, it extends to destruction of a structure utilised as a hide-out by absconders wanted for any offence and that, to that extent, it is invalid. We do not find any merit in this contention. Absconders wanted for an offence are persons who are evading the legal process. In view of their past activities the possibility of their repeating such activities cannot be excluded and the conferment of the power to destroy the structure utilised as a hide-out by such absconders in order to control such activities cannot be held to be arbitrary or unreasonable. Under clause (c) of Section 4 power has been conferred to arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and the concerned officer is empowered to use such force as may be necessary to affect the arrest. The Said power is not very different from the power which has been conferred on a police officer under Section 41 Cr.P.C. Clause (c) has to be read with Section 5 of the Central Act which requires that any person arrested and taken into custody 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. It has been urged that there is nothing in Section 5 to indicate that the officer exercising the power of arrest Under Section 4(c) is obliged to comply with the requirements of clauses (a) and (2) of Articles 22 of the Constitution. There is no basis for this contention. The power conferred under Section 4(c) read with Section 5 has to be exercised in consonance with the overriding requirements of clauses (1) and (2) of Article 22 of the Constitution which means that the person who is arrested by an officer specified in Section 4 has to be made over to the officer in charge of the nearest police station together with a report of the circumstances occasioning the arrest with the least possible delay so that the person arrested can be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person can be detained in custody beyond the said period without the authority of a magistrate.

In clause (d) of Section 4 power has been conferred to enter and search without warrant any 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 property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and the concerned officer may for that purpose use such force as may be necessary. Similar powers of search are conferred on a police officer under Section 47 Cr. P.C. It has been urged that in respect of property or arms, ammunition or explosive substances which are seized during the course of search under clause (d) there is no provision similar to Section 5 requiring the officer exercising the said power to hand over this property and arms, ammunition or explosive substances that are recovered in the search to the officer in charge of the nearest police station. It is no doubt true that there is no provision similar to Section 5 requiring the handing over of the property or arms, ammunitions etc. that are seized during the course of search under Section 4(c) but since such seized property or material will be required in the proceedings to be initiated against the culprits from whose possession the same was recovered. it is implicit in the power that has been conferred under Section 4(d) that it should be exercised in accordance with the provisions relating to search an seizure contained in the Criminal Procedure Code and the Property or the arms ammunitions, etc. that is seized during the course of search under Section 4(d) must be handed 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 search and seizure.

An argument was raised that in view of the proviso to sub-section (2) of Section 1 Cr.P.C. the provisions of Cr.P.C., other than those relating to Chapters VIII, X and XI thereof, are not applicable to the state of Nagaland and tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram. The inapplicability of the provisions of Cr.P.C. in those areas, in our opinion, is of little consequence because in the context of Nagaland this court has laid down

that even though the provisions of Cr.P.C are not applicable in certain districts of the State of Nagaland, it only means that the rules of the Cr.P.C. would not apply but the authorities would be governed by the substance of these rules. [See: State of Nagaland v. Ratan Singh, etc., 1966(3) SCR 830, at pp. 851, 852]. In the circumstances, it must be held that that the provisions of Cr.P.C. governing search and seizure have to be followed during the course of search and seizure under Section 4 (d) and the property or arms, ammunitions, etc. seized during the course of such search has to be produced by the officer of the armed forces before the officer in charge of the nearest police station with the least possible delay along with a report of the circumstances occasioning such search and seizure. Under Section 6 protection has been given to the persons acting under the Central Act and it has been prescribed that no prosecution, suit or other legal proceeding shall be instituted against any person in respect of anything dine or purported to be done in exercise of the powers conferred by the said Act except with the previous sanction of the Central Government. The conferment of such a protection has been assailed on the ground that it virtually provides immunity to persons exercising the powers conferred under Section 4 inasmuch as it extends the protection also to "anything purported to be done in exercise of the powers conferred by this Act". It has been submitted that adequate protection for members of armed forces from arrest and prosecution is contained in Sections 45 and 197 Cr.P.C. and that a separate provision giving further protection is not called for. If has also been submitted that even if sanction for prosecution is granted, the person in question would be able to plead a statuary defense in criminal proceedings under Section 76 and 79 of the Indian Peal Code. The protection given under Section 6 cannot, in our opinion, be regarded as conferment of an immunity on the persons exercising the powers under the Central Act. Section 6 only gives protection in the form of previous sanction of the Central Government before a criminal prosecution of a suit or other civil proceeding is instituted against such person. In so far as such protection against prosecution is concerned, the provision is similar to that contained in Section 197 Cr.P.C. Which covers an offence alleged to have been committed by a public servant "while acting or purporting to act in the discharge of his official duty". Section 6 only extends this protection in the matter of institution of a suit or other legal proceeding. In MataJog Dobey v. H.C. Bhari, 1955 (2) SCR 925, the validity of Section 197 of the Code of Criminal procedure, 1898 (which was in pari materia with Section 197 of the Code of Criminal Procedure, 1973) was challenged on the ground of violation of Article 14 of the Constitution and it was urged that it vested an absolutely arbitrary power on the government to grant or withhold sanction at their sweet will and pleasure, and the legislature did not lay down or even indicate any guiding principles to control the exercise of the discretion. Negativing the said contention this Court observed: "It has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where discretion is vested in the government and not in a minor official". [p. 932] we, therefore, do not find any merit in the challenge to the validity of Section 6. But, at the same time, we are of the view that since the order of the Central Government refusing or granting the sanction under Section 6 is subject to judicial review, the Central Government shall pass an order giving reasons.

Before we conclude the consideration of t he questions regarding the constitutional validity of the Central Act, we may refer to the grievance of the petitioners that there has been wide spread abuse of powers conferred under the Central Act by the personnel of the armed forces while such forces were deployed in the areas declared as ' disturbed areas' under the Central Act. In the Writ Petitions reference has been made to a number of instances. Mrs. Indira Jaising has also placed before us the reports of the commission of Inquiry headed by Shri Justice D.M. Sen, a retired Judge of Gauhati High Court in respect of some of those instances. On behalf of Union of India it has been submitted that an inquiry is made whenever any complaint about mis-use of powers conferred under the Central Act is received and that on enquiry most of the complaints were found to be false, and that whenever it is found that there is substance in the complaint, suitable action has been taken against the person concerned under the provisions of the Army Act. The learned Attorney General has placed before us instructions in the from of a list of "Do's and Don'ts" that are issued by the Army

Headquarters from time to time. The instructions contained in the said list which must be followed while acting under Armed Forces (Special Powers) Act, 1958 are in these terms :-

"LIST OF DO'S AND DON'TS WHILE ACTING UNDER ARMED FORCES (SPECIAL POWERS ACT, 1958

Do's

1. Action before Operation

(a) Act only in the area declared 'Disturbed Area' under Section 3 of the Act.

(b) Power to open fire using force or arrest is to be exercised under this Act only by an officer/JCO/WO and NCO.

(c) Before launching any raid/search, definite information about the activity to be obtained from the local civil authorities.

(d) As far as possible co-opt representative of local civil administration during the raid.

2. Action during Operation

(a) In case of necessity of opening fire and using any force against the suspect or any person acting in contravention to law and order, ascertain first that it is essential for maintenance of public order. Open fire only after due warning.

(b) Arrest only those who have committed cognizable offence or who are about to commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit cognizable offence.

(c) Ensure that troop under command do not harass innocent people, destroy property of the public or unnecessarily enter into the house/dwelling of people not connected with any unlawful activities.

(d) Ensure that women are not searched/arrested without the presence of female police. In fact women should be searched by female police only.

3. Action after operation

(a) After arrest prepare a list of the persons so arrested.

(b) Handover the arrested persons to the nearest Police Station with least possible delay.

(c) While handing over to the police a report should accompany with detailed circumstances occasioning the arrest.

(d) Every delay in handing over the suspects of the police must be justified and should be reasonable depending upon the place, time of arrest and the terrain in which such person has been arrested. Least possible delay may be 2-3 hours extendable to 24 hours or so depending upon particular case.

(e) After raid make out a list of all arms, ammunition or any other incriminating material/document taken into possession.

(f) All such arms, ammunition, stores, etc. should be handed over to the police State alongwith the seizure memo.

(g) Obtain receipt of persons arms/ammunition, stores etc. so handed over to the police.

(h) Make record of the area where operation is launched having the date and time and the persons participating in such raid.

(i) Make a record of the commander and other officers/JCOs/NCOs forming part of such force.

(k) Ensure medical relief to any person injured during the encounter, if any person dies in the encounter his dead body be handed over immediately to the police alongwith the details leading to such death.

4. Dealing with Civil Court

(a) Diretions of the High Court/Supreme Court should be promptly attended to.

(b) Whenever summoned by the courts, decorum of the court must be maintained and proper respect paid.

(c) Answer questions of the court politely ad with dignity.

(d) Maintain detailed record of the entire operation correctly and explicitly.

Don'ts
1. Do not keep a person under custody for any period longer than the bare necessity for handing over to the nearest Police Station.
2. Do not use any force after having arrested a person except when he is trying to escape.
3. Do not use third degree methods to extract information or to extract confession or other involvement in unlawful activities.
4. After arrest of a person by the member of the Armed forces, he shall not be interrogated by the member of the Armed force.
5. Don not release the person directly after apprehending on your own. If any person is to be released, he must be released through civil authorities.
6. Do not temper with official records.
7. The Armed Forces shall not take back person after he is handed over to civil police."
The instructions in the List of "Do's and Don'ts" which must be followed while providing aid to the civil authority are as under:-

"LIST OF DO'S AND DON'TS WHILE PROVIDING AID TO CIVIL AUTHORITY
DO'S
1. Act in closest possible communication with civil authorities throughout.
2. Maintain inter-communication if possible by telephone/radio.
3. Get the permission/requisition from the Magistrate when present.
4. Use the little force and do as little injury to person and property as may be consistent with attainment of objective in view.
5. In case you decide to open fire:-
(a) Give warning in local language that fire will be effective.
(b) Attract attention before firing by bugle or other means.
(c) Distribute your men in fire units with specified Commanders.
(d) Control fire by issuing personal orders.
(d) Control fire by issuing personal orders.
(d) Note number of rounds fired.
(f) Aim at the front of crowd actually rioting or inciting to riot or at conspicuous ring leaders, i.e, do not fire into the thick of the crowd at the back.
(g) Aim low and shoot for effect.
(h) Keep Light Machine Gun and medium Gun in reserve.
(i) Cease firing immediately once the object has been attained.
(j) Take immediate steps t secure wounded.
6. Maintain cordial relations with civilian authorities and Para Military Forces.
7. Ensure high standard of discipline.

Don'ts
8. Do not use excessive force.
9. Do not get involved in hand to hand struggle with the mob.
10. Do not ill treat any one, in particular, women and children. 11.
No harassment of civilians.
12. No torture.
13. No meddling in civilian administration affairs
14. No meddling in civilian administration affairs
15. No military disgrace by loss/surrender of weapons.
16. Do not Accept presents, donations and rewards
17. Avoid indiscriminate firing."

The learned Attorney General has submitted that these instructions provide an effective check against any misuse or abuse of the powers conferred under the Central Act on an officer in the armed forces inasmuch as contravention of these instructions is punishable under Sections 41, 42(e), 63 and 64(f) of the Army Act, 1950.

In State of Uttar Pradesh v. Chandra Mohan Nigam & Ors., 1978 (1) SCR 521, this Court, while considering the validity of Rule 16(3) of the All India Services (Death-Cum-Retirement Benefits) rules, 1958, which empowered the Central Government to compulsorily retire a member of the All India Service, took note of the instructions issued by the Government and observed :- "Since rule 16(3) itself does not contain any guidelines, directions or criteria, the instructions issued by the Government furnish an essential and salutary procedure for the purpose of securing uniformity in application of the rule. These instructions really fill up the yawing gaps in the provisions and are embedded in the conditions of service. These are binding on the Government and cannot be violated to the prejudice of the Government servant." [p. 531]

In Supreme Court Advocates-On-Record Association & Ors. v. Union of India, 1993 (4) SCC 441, one of us, Verma j., as the learned Chief Justice then was, speaking for the majority, after pointing out that in actual practice, the real accountability in the matter of appointments of superior Judges is of the Chief Justice of India and the Chief Justice of the High Courts and not of the executive, has said:-

"If that is the position in actual practice of the constitutional provisions relating to the appointments of the superior judges, wherein the executive itself holds out that it gives primacy to the opinion of the Chief Justice of India, and in the matter of accountability also it indicates the primary responsibility of the Chief Justice of India, it stands to reason that the actual practice being in conformity with the constitutional scheme, should also be accorded legal sanction by permissible constitutional interpretation." [pp. 694-695]

The instructions in the form of "Do's and Don'ts" to which reference has been made by the learned Attorney General have to be treated as binding instructions which are required to be followed by the members of the armed forces exercising powers under the Central Act and a serious note should be taken of violation of the instructions and the persons found responsible for such violation should be suitably punished under the Army Act, 1950. While considering the submissions assailing the validity of clauses (a) to (d) of Section 4 and Section 5, we have construed the said provisions as containing certain safeguards against arbitrary exercise of power. In this context, reference may also be made to the order dated July 4, 1991 passed by this Court in Civil Appeal No. 2551 of 1991 wherein, after taking note of the list of "Do's and Don'ts" referred-to-above, this Court gave the following direction :-

"The Army Officers while affecting the arrest of woman or making search of woman or in searching the place in the actual occupancy of a female shall follow the procedure meant for the police officers as contemplated under the various provisions of the Code of Criminal Procedure, namely, the proviso to sub-section (2) of Section 47, subsection (2) of Section 51, Subsection (3) of Section 100 and provision to sub-section (1) of section 160 of the Code".

The safeguards against an arbitrary exercise of powers conferred under Section 4 and 5 as indicated above as well as the said direction should be incorporated in the instructions contained in the list of "Do's and Dont's " and the instructions should be suitably amended to bring them in conformity with the guidelines contained in the decisions of this Court in this regard.

In order that t he people may feel assured that there is an effective check against misuse or abuse of powers by the members of the armed forces it is necessary that a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act should be thoroughly inquired into and, if it is found that there is substance in the allegation, the victim should be suitably compensated by the state and the requisite sanction under Section 6 of the Central Act should be granted for institution of prosecution and/or a civil suit or other proceeding against the person/persons responsible for such violation.

Having dealt with the submissions on the validity of the Central Act, we would now proceed to deal with the submissions on the validity of the State Act. The challenge is confined to Section 3 to 6 of the State Act. Section 3 contains the power to declare an area is a "disturbed area" and is similar to Section 3 of the Central Act. Section 4 contains provisions similar to those contained in Section 4(a) of the Central Act, while Section 5 contains provisions similar to those contained in Section 4(b) of the Central Act. The only difference is that the powers under Section 4 and 5 of the State Act are not conferred on an officer of the armed forces but are conferred on any Magistrate or Police Officer not below the rank of Sub-Inspector or Havildar in case of the Armed Branch of the police or any officer of the Assam Rifles not below the rank of Havildar/Jamadar. The words "or any officer of the Assam Rifles not below the rank of Havildar/jamadar" have been struck down by the Delhi High Court in the judgment dated June 3, 1983 on the view that Assam Rifles are part of the armed forces of the Union and the State legislative is not competent to legislate in that regard. Since no appeal has been filed by the State of Assam against the said part of the judgment of the Delhi High Court it has become final. Section 6 contains protection regarding institution of prosecution and a suit or other civil proceeding in the same terms as Section 6 of the Central Act.

The construction placed by us on the provisions of Sections 3 and 6 of the Central Act and the reasons given for upholding the validity of the same equally apply to Sections 3 and 6 of the State Act and on the same basis the said provisions of the State Act must be upheld as valid. The validity of Sections 4 and 5 of the State Act has been assailed by Shri Goswami on the ground that they are inconsistent with the central legislation on the same subject, viz. Criminal procedure Code, 1973 and the Arms Act, 1959 and that the State Act was, therefore, liable to be struck down in view of the provisions of Article 254 of the Constitution. The validity of sections 4 and 5 is also assailed by Shri Goswami on the same grounds on which the validity of Sections 4(a) and 4(b) of the Central Act was assailed. The reasons given by us for upholding the said provisions of the Central Act would equally apply in so far as the said challenge to the validity of Sections 4 and 5 of the State Act is concerned.

As regards the submission of Shri Goswami that the provisions of Section 4 and 5 of the State Act are repugnant to the provisions contained in Cr.P.C. and the Arms Act, it may be said that in pith and substance the State Act is a law enacted in exercise of powers under Entry 1 of List II relating to public order. It is not a law enacted under any of the entries in the Concurrent List (List III). The question of invalidity of the said provisions in the State Act on the ground of being repugnant to a central legislation, e.g., Cr.P.C. enacted under Entry 2 of List III under Article 254 of the Constitution does not, therefore, arise and Section 4 and 5 of the State Act cannot be assailed on the ground that the same being repugnant to the provisions of Cr.P.C. are unconstitutional in view of Article 254 of the Constitution. The contention of Shri Goswami that the provisions of Sections 4 and 5 of the State Act are inconsistent with the provisions of Arms Act enacted by Parliament also cannot be accepted because the said provisions only provide for effective enforcement of the provisions of the Arms Act in the disturbed areas and it cannot be said that they, in any way, encroach upon the field covered by the Arms Act. The challenge to the validity of Sections 4 and 5 of the State Act is, therefore, negatived.

As noticed earlier, the Gauhati High Court in its judgment dated March 20, 1991 (under challenge in Civil Appeals Nos. 2173-76 of 1991) has directed that notification dated November 27, 1990 issued under the Central Act and notification dated December 7, 1990 issued under the State Act shall apply only in respect of the districts of Dibrugarh, Tinsukia, Sibsagar, Jorhat, Nagaon, Dhemaji, Lakhimpur, Sonitpur, Barrang, Nalbari and Barpeta and also the City of Guwahti and shall not apply in the districts of Golaghat, Morigaon, Dhubri, Kokrajhar, Bongaigaon, Goalpara, Kamrup (except the city of Guwahati), Karbi Anglong, North Cachar Hills, Cachar, Karimganj and Hallakandi. In taking the said view the high Court has placed reliance on the Report sent by the Governor Of Assam to the President of India wherein he had expressed the view that the Government of the State cannot be carried on in

accordance with the constitution of India. On the basis of the said Report the High Court has held that only certain districts are disturbed areas and since the Central Government has stated that there is no other material except the Governor's Report, there was no justification to declare other districts as disturbed areas or any dangerous conditions under the Central Act. The High Court has, therefore, held that there the notifications shall not apply in those districts.

The learned Attorney General has submitted that the High Court was in error in striking down the notification date November 27, 1990 in its application to rest of the districts placing reliance on the decision of special Bench of this Court in S.R. Bommai v. Union of India, 1994 (3) SCC 1, the learned Attorney General has urged hat in exercise of the power of judicial review in respect of a notification issued under Section 3 of the Central Act it was not open to the High Court to assess the material on the basis of which the Central Government formed the opinion for the purpose of making declaration under Section 3 of the Central At. All that the High Court could see is whether the material on the basis of which the opinion is formed is relevant but the Court could not go into the sufficiency of that material. We find merit in the aforesaid submission of the learned Attorney General. We have carefully perused the Report sent by the Governor of Assam. On the basis of the said Report it cannot be said that the districts which have been excluded from the notification by the High Court could not be declared as "disturbed areas" inasmuch as in his Report the Governor has referred to the entire State of Assam and has said:-
"Apart from killings, according to reports received, many people were kidnapped and released after the ransom was paid. The extortion, to begin with, was on a limited scale, magnitude of loot and plunder, however, became colossal in due course of time, presumably in view of the State Government's failure to act."

The Governor has mentioned that the districts of Tinsukia, Dibrugarh, Sibsagar, Jorhat and Nagaon on the South Bank of Brahmaputra dn those of Dhemaji, Lakhimpur, Sonitpur, Darrang, Nalbari and Barpeda on the North Bank of Brahmaputra are the worst sufferers. But that does not mean that other areas were not affected. In the concluding part of his Report the Governor has said:-

"The Cumulative consequence of all this is that the entire State is gripped by fear psychosis. The holders of public offices have been rendered totally ineffective. The statutory authorities are in a state of panic incapable of discharging their function. The holders of constitutional offices stand totally emasculated so much so that the State Cabinet cannot even discuss the situation." "The loss of faith in the efficacy and the credibility of the Government apparatus is so great that the thin distinction between ULFA, AASU and AGP which existed at some stage, stands totally obliterated. Glooms hang over the whole state. By the fall of the dusk, the people are huddled in their homes. Nobody's life, property or honour is safe. The basic attributes of a civilised and orderly society stand annibilated."

It cannot, therefore, be said that there was no material before the Central Government on the basis of which it could form the requisite opinion of the purpose of making a declaration under Section 3 of the Central Act covering the entire State of Assam. The impugned direction given by the High Court that the notifications dated November 27, 1990 issued under Section 3 of the Central Act shall not apply to the districts aforementioned cannot, therefore, be sustained and has to be set aside.

In support of the notification dated December 7, 1990 issued under Section 3 of the State Act the State

Government had relied upon the intelligence reports that were received by the State Government with regard to prevailing conditions. The High Court has, however, struck down the said notification in relation to the districts aforementioned for the reason that the

notification issued by the Central Government under the Central Act was being struck down in respect of those districts and the notification of the State Government could not also be sustained in respect of those districts. In the circumstances we are unable to uphold the direction of the High Court [direction No. (i)] that notification dated November 27, 1990 issued under the Central Act and notification dated December 7, 1990 issued under the State Act shall apply not in the districts of Golaghat, Morigaon, Dhubri, Kakrojhar, Bongaigaon, Goalpara, Kamrup (except the city of Gauhati), Karbi Anglong, North Cachar Hills, Cachar, Karimganj and Hailakandi and the said direction is , therefore, set aside.

The High Court has also directed [direction No. (ii)] that the Central Government, under the Central Act, and the State Government, under the State Act should review every calendar month whether the two notifications are necessary to be continued. In the context of Section 3 of the Central Act we have considered this question and have expressed the view that such periodic review should take place before the expire of six months. The said requirement for a periodic review would also apply to a notification issued under Section 3 of the State Act. In the circumstances, we are unable to uphold this direction given by the High Court. The other direction [direction No. (iii)] given by the High Court is that the Central Government and the State Government should issue following instructions to the officers who have been conferred the powers under the Central Act and State Act :-
(a) any person arrested by the armed forces or other armed forces of the union shall be handed over to the nearest police station with least possible delay and be produced before the nearest magistrate within 24 hours from the time of arrest.
(b) a person who either had committed a cognizable or against whom reasonable suspicion exists, such persons alone are to be arrested, innocent persons are not to be arrested and later to give a clean chit to them as is being 'white'.

The said direction is in consonance with the construction placed by us on the provisions of Sections 4(c) and 5 of the Central Act and the same is, therefore, upheld. Civil Appeals Nos. 2173-76 of 1991 have, therefore, to be allowed to the extent that the directions Nos. (i) and (ii) given by the High Court in the impugned judgment are set aside.

In the light of the above discussion we arrive at the following conclusions :-

(1) Parliament was competent to enact the Central Act in exercise of the legislative power conferred on it under Entry 2 of List I and Article 248 read with Entry 97 of List I. After the insertion of Entry 2A in List I by the Forty-Second Amendment to the Constitution, the legislative power of Parliament to enact the Central Act flows from Entry 2A of List I. It is not a law in respect of maintenance of public order falling under Entry I of list II.
(2) The expression "in aid of the civil power" in Entry 2A of List I and in Entry 1 of List II 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.
(3) 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.
(4) the power to make a law providing for deployment of the armed forces of the Union in aid of the civil power of a State does not include within its ambit 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. The armed forces of the Union would operate in the State concerned in co-operation with the civil administration so that the situation which has necessitated the deployment of armed forces is effectively dealt with and normalcy is restored.
(5) The Central Act does not displace the civil power of the state by the armed forces of the Union and it only provides for deployment of armed forces of the Union in aid of the Civil Power.
(6) The Central Act cannot be regarded as a colourable legislation or a fraud on the Constitution. It is not a measure intended to achieve the same result as contemplated by a

Proclamation of Emergency under Article 352 or a proclamation under Article 356 of the Constitution.
(7) Section 3 of the Central Act does not confer an arbitrary or unguided power to declare an area as a "disturbed area" for declaring an area as a "disturbed area" under Section 3 there must exist a grave situation of law and order on the basis of which the Governor/Administrator of the State/Union Territory of the Central Government can form an opinion that the area is in such a disturbed or dangerous condition that the use of the armed forces in aid of the civil power is necessary.
(8) A declaration under Section 3 has to be for a limited duration and there should be periodic review of the declaration before the expiry of six months.
(9) Although a declaration under Section 3 can be made by the Central Government suo moto without consulting the concerned State Government, but it is desirable that the State Government should be consulted by the Central Government while making the declaration.
(10) The conferment of the power to make a declaration under Section 3 of the Central Act on the Governor of the State cannot be regarded as delegation of the power of the Central Government.
(11) The conferment of the power to make a declaration under Section 3 of the Central Act on the Central Government is not violative of the federal scheme as envisaged by the Constitution.
(12) The provisions contained in Sections 130 and 131 Cr.P.C. cannot be treated as comparable and adequate to deal with the situation requiring the use of armed forces in aid of civil power as envisaged by the Central Act.
(13) The Powers conferred under clauses (a) to (d) of Section 4 and Section 5 of the Central Act on the officers of the armed forces, including a on- Commissioned Officer are not arbitrary and unreasonable and are not violative of the provisions of Articles 14, 19 or 21 of the Constitution.
(14) While exercising the powers conferred under Section 4(a) of the Central Act, the officer in the armed forces shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order.
(15) A person arrested and taken into custody in exercise of the powers under Section 4(c) of the Central Act should be handed over to the officer-in- charge of the nearest police station with least possible delay so that he can be produced before nearest magistrate within 24 hours of such arrest excluding the time taken for journey from the place of arrest to the court of magistrate.
(16) The property or the arms, ammunitions, etc. seized during the course of search conducted under Section 4(d) of the Central Act must be handed over to officer- in-charge of the nearest police station together with a report of the circumstances occasioning such search and seizure.
(17) The provisions of Cr.P.C. governing search and seizure have to be followed during the course of search and seizure conducted in exercise of the powers conferred under Section 4(d) of the Central Act.
(18) Section 6 of the Central Act in so far as it confers a discretion on the Central Government to grant or refuse sanction for instituting prosecution or a suit or proceeding against any person in respect of anything done or purported to be done in exercise of the powers conferred by the Act does not suffer from the vice of arbitrariness. Since the order of the Central Government refusing or granting the sanction under Section 6 is subject to judicial review, the Central Government shall pass an order giving reasons.
(19) While exercising the powers conferred under clauses (a) to (d) of Section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of "Do's and Don'ts" issued by the army authorities which are binding and any dis- regard to the said instructions would entail suitable action under the Army Act, 1950.
(20) The instructions contained in the list of "Do's and Don'ts " shall be suitably amended so as to bring them in conformity with the guidelines contained in the decisions of this Court and to incorporate the safeguards that are contained in clauses (a) to (d) of Section 4 and Section 5 of the Central Act as construed and also the direction contained in the order of this Court dated July 4, 1991 in Civil Appeal No. 2551 of 1991.

(21) A complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act shall be thoroughly inquired into and, if on enquiry it is found that the allegations are correct, the victim should be suitably compensated and the necessary sanction for institution of prosecution and/or a suit or other proceeding should be granted under Section 6 of the Central Act.
(22) The State Act is, in pith an substance, a law in respect of maintenance of public order enacted in exercise of the legislative power conferred on the State Legislature under Entry 1 of List II.
(23) The Expression "or any officer of the Assam Rifles not below the rank of Havildar" occurring in Section 4 and the expression "or any officer of the Assam Rifles not below the rank of Jamadar" in Section 5 of the State Act have been rightly held to be unconstitutional by the Delhi High Court since Assam Rifles are a part of the armed forces of the Union and the State Legislature in exercise of its power under Entry of List II was not competent to enact a law in relation to armed forces of the Union.
(24) The rest of the provisions of Sections 4 and 5 of the State Act are not open to challenge under Article 254 of the Constitution on the ground of repugnance to the provisions contained in Cr.P.C. and the Arms Act.
(25) The considerations governing the exercise of the powers conferred under Sections 3 to 6 of he Central Act indicated above will also apply to exercise of powers conferred under Sections 3 to 6 of the State Act.
(26) The directions Nos. (i) and (ii) given by the Gauhati High Court in its judgment dated March 20, 1991 cannot be sustained and must be set aside. In the result, Civil Appeals Nos. 721-24 of 1985 filed against the judgment of Delhi High Court are dismissed, Civil Appeals Nos. 2173-75 of 1991 filed against the judgment of the Gauhati High Court are allowed to the extent indicated above and Civil Appeal No. 2551 of 1991 filed against the said judgment is dismissed. Writ petitions Nos. 550 of 1982, 5328 of 1980, 9229-30 of 1982 and 13644-45 of 1984 will stand disposed of in terms of this judgment. No order as to costs.