

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 5 | Issue 3**

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**2022**

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# AFSPA: The Rule

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## ABSTRACT

*AFSPA stands for Armed Force Special Powers Act. AFSPA is a parliamentary Act that provides about exceptional rights and powers to the Special Forces in order to keep the public in control in the upset areas like Kashmir, Manipur, Assam, etc... States like Assam, Nagaland, Manipur, Arunachal Pradesh, and Meghalaya, Jammu and Kashmir, these places have dispute as a result of contrasts in religion, language and race. The people living in these states have been facing about various humanitarian issues, every now and then.*

*Kashmir is a mountainous region in the extreme north of Indian subcontinent. It is a state that cherishes a vital geo-political situation and circumstances with China in its east and Pakistan in its west, a state well known for its beautiful nature and abundance of resources. However, dirtied with blood and violence. The uprising terrorist organizations and the external tension from Pakistan have resulted to AFSPA; the Act has been a criticism from numerous personal and organizations of human rights for the violation of human rights. However, the Act even serves about great purpose in bringing the situation under control of the Government. Above anything else the Act has succeeded in keeping away the international intervention in the governance of Jammu and Kashmir.*

## I. INTRODUCTION

***“When zero prone to reach infinity, the limit of their love got undefined as for then, their love no more remained theirs, it was now the asset of the universe.” KS.*** AFSPA was introduced in India in order to deal with communal disparities and other such problems in the community; the Act was used as a measure. The Act consists of special provisions that provide special powers and rights in order to take actions as they deem fit. In 1900s, Kashmir was very hostile state due to which AFSPA was enforced in Kashmir and Jammu. The Act was enforced in simmering the militancy in states. However, the Act has been criticized over years as it has caused various human rights violation or arbitrary and unreasonable acts of the armed forces. And this Act is one of the least known or popular Act though the violations of human rights and infringement of fundamental rights are at a heightened rate.

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In 1990's, Jammu and Kashmir was exposed to uprising terrorist organizations, such changes has put on risk to the so called heaven on earth. Most of the terrorist organizations have been set up and funded by Pakistan, these terrorist organizations were mainly set up in disrupt peace and harmony in India and indeed the peace and harmony was shattered such that the death tolls and violation of human rights increased. The Kashmiri Pandits were mercilessly killed which was no less than the genocide, the Nazi concentration camp for Jews. During those times, people were exposed to the worst nightmare, the state was so in their bad days such that the basic fundamental and human rights were infringed or violated. Since then the terrorist organizations has increased such that the terrorist groups would walk around the villages armed in the day light and wouldn't mind killing anyone regardless of their religion. Even to these days, various terrorist organizations are set up and creating lots of problems in Jammu and Kashmir. While on the other side, AFSPA is another threat to the life and livelihood of mankind for people in Kashmir.

This research paper emphasizes or cover various topics such as the establishment of AFSPA, the objective of the Indian government to set up the Act, the salient features of the Act, important provisions of the Act, landmark judgments related to the Act, various incidents of inhuman Act of the Act, constitutional validity of the Act, the negative impact or drawbacks of removing AFSPA in Kashmir, views of the victim of the act and great personalities, etc...related about the Act.

### **(A) Hypothesis**

AFSPA is an Act enforced by Indian government in Kashmir in order to suppress the voice raised by the people of Kashmir for independence of their state. The Act empowers the armed forces based in Kashmir to react or take actions as per the need of the circumstances. This power is misused by the armed forces and is indulged into acts that infringe the livelihood and basic fundamental rights of the people in Kashmir.

### **(B) Objectives of the Act**

*Article 355 of the Constitution of India confers power to the Central Government to protect every state from internal disturbance.* The need for the society and situation has given a way to the birth and implementation of AFSPA. AFSPA may have been a disaster to the peoples of those disturbed areas but in a wider scope or for the overall wellbeing of the nation, this Act was a success. Especially in Kashmir, the situation and the controversial status between Pakistan and India has given a great stand to this Act in safeguarding the sovereignty of the nation and uplift of the economy of the nation.

There are various objectives of the Indian government behind the enforcement of the Act in the state of Jammu and Kashmir, they are as follows;

- To protect states against internal disturbances.
- To retain the power of Indian occupied Kashmir into the central government of India.
- To keep the JKLF doings in Kashmir under control.

### **(C) Salient Feature of the Act**

The salient features or the attributes of the Act are mentioned as follows;

- The section 3 of AFSPA empowers the governor of any state or administrator of a union territory to enforce the Act if he or she thinks the need for the society.
- The Act empowers the armed forces to kill anyone, search houses without warrant and to destroy all sort of properties upon mere suspicions and no report shall be made to do so and after doing such as stated under **section 4** of AFSPA.
- The Act plays a vital role in cases of emergencies, militancy and insurgencies in the disturbed states of Indian subcontinent in retaining power or situation.
- The Act provides protection from law to the Special Forces such that they won't be tried for their unreasonable acts as stated under **section 6** of AFSPA.<sup>3</sup>

### **(D) Applicability of the Act**

The applicability of AFSPA was content to only those disturbed areas (those areas where Special Forces are vested with powers to take actions as per the need of the situation) of the Indian subcontinent.

The section 3 of the AFSPA 1958 empowers state government or administrator of a union territory to declare states or part of states or the entire nation as a disturbed area if they deem fit or as per the need of the time and situation.

The act is applicable into the sates of Jammu and Kashmir since 1990 and states of Nagaland, Assam and Manipur.

## **II. HISTORICAL BACKGROUND OF AFSPA IN KASHMIR**

The origin of AFSPA or the idea of such act dates back from 15<sup>th</sup> August, 1942 when the British Government in India has passed the Special powers of Armed Force ordinance in order to keep

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<sup>3</sup> Byjusexamprep.com. 2022. *Armed Forces Special Powers Act: Know History, Features about AFSPA*. [online] Available at: <<https://byjusexamprep.com/armed-forces-special-powers-act-i>> [Accessed 29 May 2022].

control of the Quit India Movement which has been a barrier to the British rule in India. The ordinance was passed in disturbed areas of Bengal, Assam, east Bengal and United Province. However, the ordinance was removed when the country was in chaos during the partition of the nation into India and Pakistan in 1947. Then in the year 1951, the violence and communal rivalry in the north-eastern states of India sub-continent especially Naga, Assam started to increase such that the first general election in the nation was being boycotted due to which the government had tough time controlling the states order. The situation in Naga has worsened that it was getting out of state government of Assam even upon the enforcement of numerous Acts and Ordinances. Hence, in order to maintain the peace and order or retain the control of these states, the Government of India came up with AFSPA (Armed Force Special Powers Act) which was promulgated by the then President Dr.Rajendra Prasad.

The Article 355 of the Indian Constitution has played about a vital role in shielding AFSPA as a measure to suppress the dispute in the disturbed areas recognized as empowered by the Act. The Armed force (special powers) act 1958 was enforced in the north-east states that extended to seven states of North-east India namely; North-east Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram. On 15<sup>th</sup> October, 1983 AFSPA was enforced in states of Punjab and Chandigarh with two additional provisions as follows;

1. Section 4 (e) implies that the armed force can stop any vehicle, search and seize on mere suspicion of carrying offenders, arms, etc...
2. A new section was added to the act i.e. section 5 which implies that the special force can break or open any locks.

The tension in the states of Jammu and Kashmir has begun since the partition of India and Pakistan in 1947. Until then the two nations was involved in number of wars and attacks on each other. The land of Jammu and Kashmir has been divided among the three nations of India, Pakistan and China, the states of Jammu and Kashmir was the main issue with regards to the war between India and Pakistan. The Pakistan occupied Kashmir and the Indian occupied Kashmir are have been marked or divided by LOC (the line of control). The LOC is exposed to contentions, firing, attacks, etc... between the two nations, even to these days there arise contentions and dispute in the LOC between the two nations.<sup>4</sup>

In the year 1989, the militancy and revolt grew in Kashmir which was very wide in dimension

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<sup>4</sup> India Today. 2022. *25 years on, AFSPA remains a dirty word in Jammu and Kashmir*. [online] Available at: <<https://www.indiatoday.in/india/story/afspa-disagreement-jammu-and-kashmir-armed-militancy-cmp-bjp-pdp-281441-2015-07-09>> [Accessed 29 May 2022].

as it would not only bring about internal issues in the country but also attract the international interest in knowing the situation and thereby bringing concern to the sovereignty of the nation, especially from Pakistan. The growth in militancy and revolts from various terrorist organizations or JKLF was caused a concern to the peace and order in the state and the sovereignty of the nation from Pakistan as Pakistan taking advantage of the situation causing proxy wars. Hence, the Armed Force (Jammu and Kashmir) Special Powers Act 1990 was enforce in the States of Jammu and Kashmir with two new provisions added to the Act, the Act extended to the entire states of Jammu and Kashmir.

The AFSPA or the inhuman acts of the special force of such nature are usually invoked when the hostile situation of the state or region is retained back to normal. The enforcement of such Act is mainly to retain the order and peace of particular region and the harsh provisions of Act is acquires huge interest and need for such situations. During the times of militancy, revolt or proxy wars from the outer world, such Act serve great purpose in bring about the situation under control and eventually resulting to peace and harmony.<sup>5</sup>

### **IMPORTANT PROVISIONS OF AFSPA 1990 (JAMMU AND KASHMIR)**

The Armed Force (Jammu and Kashmir) Special Powers Act 1990 is an Act that empowers the Special Forces based Jammu and Kashmir with various rights and powers as provided by the provisions of this Act. The Act was enacted on 5<sup>th</sup> July, 1990 and it consists of eight sections, the most important sections or provisions of this Act are as follows:

- ***Section 3- Power to declare areas to be disturbed areas***

This provision empowers the Governor of Jammu and Kashmir or the governor of the central government to declare a particular region or the entire state as disturbed area if the area fulfils certain conditions or has terrorist acts that brings disharmony or adverse affect on a section or various sections of people and acts that affects or cause concern to the sovereignty of the entire nation or nay part of nation.

- ***Section 4-Special powers of the armed forces.***

This provision implies that the special force personal or officers to use force or shoot to cause death or to destroy house or shed that is likely to become a house to attack or training camps or any such place of threat or to arrest anyone without warrant upon a mere suspicion or to search, seize or destroy anyplace or vehicle without warrant upon a mere suspicion of threat

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<sup>5</sup> WANI, A., 2022. *The road to peace in Kashmir: Public perception of the contentious AFSPA and PSA*. [online] Observer Research Foundation. Available at: <<https://www.orfonline.org/research/43363-the-road-to-peace-in-kashmir-public-perception-of-the-contentious-afspa-and-psa/>> [Accessed 29 May 2022].

from the house or vehicle. These acts can be done by the officers deployed in Jammu and Kashmir and he shall not be questionable to law and order.

- **Section 5- Power of search to include powers to break open locks, etc.**

This provision of the Act implies that the special force can break open the locks of any door or anything if he is of the opinion of any threat or suspicion.

- **Section 6- Arrested persons and seized property to be made over to the police**

The persons arrested or the seized properties by the special force shall be handed over to the nearest police station as soon as possible with a report stating the reason for arrest or seizure of the property.<sup>6</sup>

### III. CONSTITUTIONAL VALIDITY OF THE ACT

The constitution of India is the mother of all the laws and regulations in India; each and every law has to be set as per the constitution. The article 355 of the Indian constitution in the greater surface has always been a guardian deity like or a support to an Act like AFSPA. This provision imposes a duty upon the union government to protect every nook and corner of the India from both internal and external militancy and hostilities. The Act has been a great measure to the hostile situations in Jammu and Kashmir both from internal and external militancy.

During the times of hostile situations or chaos like the situation as in Jammu and Kashmir, the fundamental rights of the people will obviously be compromised. However, the fundamental rights shall remain suspended only for a certain period of time as per the Article 352 of the Indian Constitution. While in Jammu and Kashmir the situation is so worse and is of a huge concern that the Act remained for over 30 years and it still exists.

The provisions such as **Article 14-18, Article 19-22, Article 23-24, Article 25-28, Article 29-30, Article 32** of the Indian constitution provides about various fundamental rights to the people of India that shall not be compromised unless during the emergency situations. The Special Forces misuses the powers that conferred by the provisions of AFSPA. People get killed without any reason and no such interrogations or investigations are made for those loss. However, if there was no such Act, the situation of Jammu and Kashmir would not have been as good as today.

The **Article 21 of the Indian constitution** provides about right to life and liberty while the section 4 (a) of the AFSPA 1990 gives right to the special force to shoot or kill anyone upon

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<sup>6</sup> The Armed force special powers act 1990

mere suspicion to maintain public order. Moreover, the section 100 of the IPC implies that right to self defense which is made baseless by provisions of AFSPA. The article 22 of the constitution implies that the person arrest shall be presented to a magistrate within 24 hours while the Act does not even mandate the special force to do so. Moreover, the Article 13 of the constitution implies that the laws that violates or infringes the fundamental rights are invalid or void.

There are various landmark cases and judgments that challenge the constitutional validity of the Act, the act though it violates the fundamental rights and human rights of the people in Kashmir. But such brutal Act is the need for the hostile situation in Kashmir to keep low or keep in control.

- In the *Minerva Mills v. Union of India*, the Hon'ble apex court implied that every individual or government bodies shall respect the constitution of India and abide by the provisions of the Constitution.
- In *Sisubad v. the State of Delhi*, the Hon'ble court has stated that the principles of criminal law namely; inquest, investigation, arrest, search of places and trial shall be followed while the provisions of section 4 of AFSPA are inconsonance to it.<sup>7</sup>
- In *Extra-Judicial Execution Victim Families Association v. Union of India*; the Hon'ble court has held that the fake encounters and influence of government for such encounters shall be enquired in the state of Manipur. The case eve challenged the unreasonable and unconstitutional privileges and powers; the Act empowering the power to shoot was also challenged. The landmark case or the judgement was successful in coming up with some obligations for the Special Forces, they were as follows; anyone arrested person shall be handed over to the nearest police station at the earliest. Special force shall not use physical forces if the arrested person does not try to run way, special person can only arrest person but cannot use of third-degree punishments to arrested ones who are not proven guilty.
- In *IndrajitBarua v. State of Assam and Anr*, the Hon'ble court has held that the states shall ensure protection of fundamental rights provided by article 21 of the Indian Constitution in those disturbed areas where AFSPA exists. As the killing of the two raped women by the special force was very brutal.

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<sup>7</sup> Supra note 6

- In *Luithukla v. RishangKeishing*, the Hon'ble Guwahati High court has highlighted that the Special Forces to avoid by the provisions of the CrPC which was instead rebutted by the army officers deployed in the disturbed regions of North-east India.<sup>8</sup>

#### IV. INCIDENTS OF INHUMAN ACT BY SPECIAL FORCE

Ever since 1989, the situation in Jammu and Kashmir was really bad as an effect of the conflict between the armed militancy groups which were mostly funded and helped by the Government of Pakistan and the Indian Armed forces. The clashes or rival between the two has caused numerous deaths to the residents of Jammu and Kashmir, caused over 20000 deaths of the people in J&K. the conflict between the Indian armed force and the militancy have caused a lot of deaths and inhuman activities or human rights violation acts. Not only this, the militants captured are neither presented before the trial nor imprisons, they are rather killed mercilessly.

Ever since the conflict and the enforcement of AFSPA in Jammu and Kashmir, thousands of people went missing such that neither their dead body nor any of their living could be traced. And on the other hand the Special Forces bury bodies every single day claiming those to be the bodies of the killed militants. The Special Forces have also shot many civilians without any reason and are not even interrogated as they are empowered by the Act.<sup>9</sup>

There are various incidents or massacre where the Special Forces were traced for being cruel or brutal, incidents such as follows;

- **Gawakadal Massacre;** this incident got its name when the special forces have open fired on a group of people protesting the searching of homes and arresting civilians in search of the kidnapped daughter of the then home minister, Mufti Mohammad Sayeed. Over 300 innocent civilians were arrested in the mission. The open fire took place on the Gawakadal Bridge on a large mob. The Massacre has caused over 300 deaths and many more injured.
- **Handwara massacre;** this incident took place in the Handwara town when over 10,000 people marched in the town protesting the **Gawakadal Massacre** of 21<sup>st</sup> January, 1990. The protester blocked the way of the Special Forces vehicle; thereby the armed force has open fired on the mob causing 21 deaths and 75 injuries.
- **Zakura And Tengpora Massacre;** this incident took place on 1<sup>st</sup> March, 1990 when the protestors were crossing Zakura and tengpora road. The protestors were claiming for the

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<sup>8</sup> Desi Kaanoon. 2022. *Constitutional Validity Of Armed Forces Special Powers Act - Desi Kaanoon*. [online] Available at: <<https://desikaanoon.in/constitutional-validity-of-armed-forces-special-powers-act/>> [Accessed 29 May 2022].

<sup>9</sup> Hrw.org. 2022. *Getting Away With Murder: 50 Years of the Armed Forces (Special Powers) Act*. [online] Available at: <<https://www.hrw.org/legacy/backgrounder/2008/india0808/>> [Accessed 29 May 2022].

enforcement of plebiscite of the land of Kashmir. The incident has caused 26 deaths and 14 injuries.

- **Hawal massacre;** on 21<sup>st</sup> May, 1990 the followers and supporters of **Mirwaiz Moulana Muhammad Farooq** were carrying his dead body for from Soura to Mirwaz Manzil for funeral rites after he was being assassinated by an unknown gun man. The incident was an unprovoked however, the Indian armed force of Central Reserve Police Station has open fired those unarmed people who came for funeral rites. The incident caused over 60 deaths and 200 injuries.
- **Sopore Massacre;** this incident took place on 6<sup>th</sup> January, 1993 when a group of armed militant has attacked into the border security force based baba Yousuf, an Indian soldier was killed. The special force then locked shopkeepers and people staying in Sopore town, burned them alive, the Special Forces even open fired. The incidents has burned down over 450 buildings and caused over 55 deaths.

## V. REBEL ON AFSPA

- The very establishment of such an Act itself is a violation of human rights as the Act empowers the Special Forces to infringe those fundamental rights that are provided under the constitution of India.
- The inhuman Acts and violence of the Special Forces have given rise to numerous protests which were though simmered, but with violence causing so many deaths.
- The chief spokesperson Mehboob Beg has stated that, *"Our position about the AFSPA is clear. The government of India should take a call on it immediately and revoke this draconian law, which no civilised country would like to have. This law is obnoxious and India being a democratic country should not allow its continuation in any part of the country"*
- The Human Rights Watch believes that AFSPA is stands for exploitation of innocents, killing and brutality. The brutality of the Act has given rise to the militancy and protest in the states of Jammu and Kashmir and other part of the country even.
- Various human rights activist and organizations worldwide has repealed the Act ever since few decades. Organizations or human rights groups such as **B.P. Jeevan Reddy Committee, Administrative Reforms Committee, Working Group on Confidence-Building Measures in Jammu and Kashmir, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Committee on the Elimination of**

**Discrimination against Women, Committee on the Elimination of Racial Discrimination** have been fighting for humanity since few decades and the still keep going.<sup>10</sup>

## VI. NEED FOR AFSPA IN KASHMIR

- **AFSPA** has served its great purpose especially in the states of Jammu and Kashmir. When the ordinary law and order of the State could not retain the order in Jammu and Kashmir, AFSPA was a success in keeping the situations under control.<sup>11</sup>
- Armies are always well trained for all the difficult situations; they are made very tough to tackle all sort of difficult situations that arise. There are no such trainings or programmes where they are taught to be tough and less tough. They are only trained to take orders and do the needful. Armies will always be merciless, only then people and external threats will fear army.<sup>12</sup>
- There is a need for the army to be brutal and merciless in the states of Jammu and Kashmir based on the situation. AFSPA was mainly enforced in order to retain the public order in Jammu and Kashmir when the ordinary laws and obligations of the state government are not able to do so.<sup>13</sup>
- MP Hasnain Masoodi said, *“I think AFSPA may ultimately be a device to promote and protect an ideology but I find it essentially a Defence Act giving a free hand to the armed forces to trample upon the rights with impunity and thereby kill dissent and disagreement and above all aspirations”*
- Kashmir is an active line of Control where clashes between the Pakistan and Indian troops occur quite often, it is must for the Act to still continue as external threat is quite eminent.<sup>14</sup>

## VII. SUGGESTIONS AND CONCLUSIONS

The **Former Minister PDP spokesperson Naeem Akhtar** stated that *“Many analysts, observers have said it has turned into a vested interest. Given their ever-increasing footfall*

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<sup>10</sup> Hrw.org. 2022. *Getting Away With Murder: 50 Years of the Armed Forces (Special Powers) Act*. [online] Available at: <<https://www.hrw.org/legacy/backgrounder/2008/india0808/>> [Accessed 29 May 2022].

<sup>11</sup> WANI, A., 2022. *The road to peace in Kashmir: Public perception of the contentious AFSPA and PSA*. [online] Observer Research Foundation. Available at: <<https://www.orfonline.org/research/43363-the-road-to-peace-in-kashmir-public-perception-of-the-contentious-afspa-and-psa/>> [Accessed 29 May 2022].

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Ibid

***it would be safe to conclude that this war is nowhere near the end with goalposts changing regularly.***<sup>15</sup>

Personally, I feel that the need for AFSPA in the states of Jammu and Kashmir is reasonable as the state serves great importance to the nation. The geopolitical importance of Jammu and Kashmir, the rich natural resources that uplift the economy of the nation shall always be protected. Without such an Act in such a situation or region, the order of the people and sovereignty of the state shall be on risk. But the brutality of Special force shall be reasonable. Army person shall always be tough to tackle any kind of situation that arises. The Act has empowered the Special force but the forces shall be accountable and questioned for their Acts if it was done for their own interest. Every Acts shall be done for the benefits of the society. After all, laws are meant for safety and security of the people.

The nature of law is dynamic such that it changes with the change in situation, the Act shall also transform with situation. Outdated techniques become mere failure to do away with the obligations of the Act. Special forces shall Act accordingly in order to succeed.

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<sup>15</sup> Ganai, N., 2021. *Why AFSPA In Jammu And Kashmir Is Not Just A Defence Act*. [online] Available at: <<https://www.outlookindia.com/website/story/india-news-why-afspa-in-jammu-and-kashmir-is-not-just-a-defence-act/404114>> [Accessed 29 May 2022].