

## AFSPA IN JAMMU AND KASHMIR: A NECESSITY OR A TOOL OF OPPRESSION?

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### ABSTRACT

The paper puts forth certain statistics and lesser known facts regarding the situation in the Jammu and Kashmir region with the aim to understand if AFSPA is really a need of the hour or not. The paper further highlights the various limitations on the powers of the armed forces under AFSPA and the functioning of the Human Rights Cell of the Indian Army. Though the need of AFSPA owing to the situation in the region is unavoidable, it is emphasised that such legislations are not desirable. There needs to be greater political will to change the situation of the region and bring about development so that AFSPA can be repealed and the people in the region have the peace and progress that they have long deserved and needed.

*Keywords* : *Terrorism, J&K, AFSPA, Limitations, Human Rights Cell (HRC).*

- I. Introduction**
- II. International Organisations and AFSPA**
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### I. Introduction

INDIA BY and large remains one of the worst terrorism affected countries in the world. In 2019, more than 50% of the terrorist attacks occurred in five counties: Afghanistan (21%), Yemen (9%), Iraq (8%), India (7%) and Nigeria (6%),<sup>1</sup> it is interesting to note how countries like Syria, Pakistan and Somalia also had fewer terrorist attacks than India.

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<sup>1</sup> National Consortium for the Study of Terrorism and Responses to Terrorism, "Global Terrorism Overview: Terrorism in 2019" 3 (2019), *available at*: [https://www.start.umd.edu/pubs/START\\_GTD\\_GlobalTerrorismOverview2019\\_July2020.pdf](https://www.start.umd.edu/pubs/START_GTD_GlobalTerrorismOverview2019_July2020.pdf) (last visited on Jul. 5, 2021).

In India, the total number of terrorism related casualties from 1994 to 2020 have been more than 74,127.<sup>2</sup> In Jammu and Kashmir (*hereinafter* referred to as ‘J&K’) from 1988 to 2020, about 47,805<sup>3</sup> lives have been lost in total. From 2015 to 2020 there have been more than 2,292<sup>4</sup> terror related incidents in the region of which 842 involved killings wherein more than 1,855 people lost their lives.<sup>5</sup> A glance at the statistics indicates how J&K is grappling with the crisis of terrorism even today.

The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (*hereinafter* referred to as ‘AFSPA’) was enacted in September, 1990 and has been modelled after the Armed Forces (Special Powers) Act, 1958 (*hereinafter* referred to as ‘1958 Act’). The Act, as per section 4, primarily grants special powers to the Indian Armed Forces to maintain public order in disturbed areas.

The power to declare an area as “disturbed area” lies with the government. Having AFSPA in place signifies poor governance in the region. Former home secretary, G. K. Pillai has expressed that:<sup>6</sup>

In a democracy the army must be employed for a limited period and its deployment cannot be prolonged indefinitely and it is only an excuse and an alibi for poor governance, and the failure of the Central and State governments to enforce law and order and provide security to the local population.

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<sup>2</sup> South Asia Terrorism Portal, “Ddatasheet India: Yearly Fatalities”, *available at*: <https://www.satp.org/datasheet-terrorist-attack/fatalities/india> (last visited on Mar. 31, 2021); South Asia Terrorism Portal, “Ddatasheet India: Fatalities between 1994-2000”, *available at*: <https://www.satp.org/datasheet-terrorist-attack/india/india-fatalities-1994-2000> (last visited on Mar. 31, 2021).

<sup>3</sup> South Asia Terrorism Portal, “Ddatasheet Jammu and Kashmir: Yearly Fatalities” *available at*: <https://www.satp.org/datasheet-terrorist-attack/fatalities/india-jammukashmir> (last visited on Mar. 31, 2021); South Asia Terrorism Portal, “Ddatasheet Jammu and Kashmir: Fatalities between 1988-2000” *available at*: <https://www.satp.org/datasheet-terrorist-attack/india-jammukashmir/J-and-K-Fatalities-1988-2000> (last visited on Mar. 31, 2021).

<sup>4</sup> South Asia Terrorism Portal, “Ddatasheet Jammu and Kashmir: Number of Terror Related Incidents”, *available at*: <https://www.satp.org/datasheet-terrorist-attack/incidents-data/india-jammukashmir> (last visited on Mar. 31, 2021).

<sup>5</sup> *Supra* note 3.

<sup>6</sup> Vivek Chaddha (ed.), *Armed Forces Special Power Act: The Debate 7* (Lancer’s Books, New Delhi, 2013).

AFSPA and the 1958 Act are central to any debate on India's counter insurgency and counter-terrorism strategy. Some may view the Act as "draconian" while some defended them as having been unwarrantedly "demonised"<sup>7</sup> and a "functional requirement" of the army.<sup>8</sup>

AFSPA is not intended to be a permanent legislation. In 2018, application of the 1958 Act was revoked from Meghalaya and certain parts of Arunachal Pradesh as a result of the stability in the region.<sup>9</sup>

No doubt legislations like AFSPA are not desirable, however, article 355<sup>10</sup> of the Constitution mandates that the union government is bound to protect the sovereignty and integrity of the nation. In the current situation where the country is still riddled with terrorism, one needs to consider that repealing AFSPA from regions with high level of terrorist infestation may pose a serious threat to the sovereignty and territorial integrity of the country.

It is pertinent to note that the aim of all those debating against the Act is the same, *i.e.*, peace in the region. The single point of contention is that while some believe that repealing AFSPA will help the cause of peace, others believe that AFSPA is what is preventing the situation from getting worse. There is absolutely no stakeholder who believes that AFSPA should be in place indefinitely. It is merely seen as a circumstantial requirement by those who support it. Pradip Phanjoubam summarises the sentiments of those who favour AFSPA, "who believe the act must continue agree that it remains a choice because there is no other choice, and as soon as the conditions that led to the imposition of this draconian Act recede, the AFSPA would die its natural death."<sup>11</sup>

The topic at hand will be dealt under seven heads in this paper. The first part laid down the introduction to the topic. The second part attempts to introduce the reader to the stand of international organisations against AFSPA. Thereafter, third part of the paper will dwell in to the lesser known narrative regarding the circumstances in the valley. There is no dearth of

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<sup>7</sup> "Minister argues for AFSPA, says army being 'demonised' in Kashmir" *The Hindu*, Sept. 21, 2010.

<sup>8</sup> "AFSPA required by armed forces in certain areas" *The Indian Express*, April 16, 2012.; U.C. Jha, *Armed Forces Special Power Act: A Draconian Law?* (Vij Books India Pvt. Ltd., New Delhi, 2015).

<sup>9</sup> HRW, "World Report 2019 - India" (January, 2019), available at: <https://www.ecoi.net/en/document/2002249.html> (last visited on Jul. 31, 2021).

<sup>10</sup> Duty of the Union to protect States against external aggression and internal disturbance: It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.

<sup>11</sup> Pradip Phanjoubam, "AFSPA: A Demonstration of the Poverty of Liberal Imagination", in Vivek Chaddha (ed.), *Armed Forces Special Power Act: The Debate* 31 (Lancer's Books, New Delhi, 2013).

literature on how AFSPA is undesirable; however, a holistic picture regarding the challenges faced by the administration, local population and security forces are not divulged in these works. The fourth part of the paper would deal with the relationship between AFSPA and Cr.P.C and how certain provisions of AFSPA are actually covered under Cr.P.C as well. The fifth part would lay down the various limitations on the powers of AFSPA which have been mandated by the Supreme Court as well as the Army administration itself. The sixth part of the paper will deal with the human rights cell of the army, its functioning and recent proposal of reform in its structuring. The last part of the paper would lay down the conclusion and suggestion. It will also highlight the humanitarian activities carried on by the Army such as organising health camps, establishing schools, etc. under operation Sadbhavana.

## II. International organisations and AFSPA

One common perception regarding the security forces in J&K is that they are responsible for widespread human right violations in the region. And despite these violations there is no accountability because laws like AFSPA are in place to “protect” security forces for any atrocities that they commit in the region. To substantiate this stand one does not have to dig deep as there are plethora of papers and reports that discuss the brutality committed by the security forces. Some of the international reports substantiating the above point of view have been highlighted in this part.

Amnesty international has done a commendable job by investing insurmountable time and resources to bring international attention to the issue of brutality of security forces in the region. It has vociferously advocated over the decades that the Act be repealed absolutely.<sup>12</sup> Amnesty considers AFSPA to be violative of non-derogable provisions of international human rights law, “including the right to life, the right to remedy and the rights to be free from arbitrary deprivation of liberty and from torture and cruel, inhuman or degrading treatment or punishment (ill-treatment) as enshrined in the International Covenant on Civil and Political Rights (ICCPR), to which India is a state party since 1979, and other treaties and standards.”<sup>13</sup>

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<sup>12</sup> Amnesty International, “The Armed Forces Special Powers Act: Time For A Renewed Debate in India on Human Rights and National Security” AI Index: ASA 20/042/2013 (November, 2013); Amnesty International, “‘Denied’: Failures in Accountability for Human Rights Violations by Security Force Personnel in Jammu and Kashmir” AI Index: ASA 20/1874/2015 (2015).

<sup>13</sup> Amnesty International, “Briefing on the Armed Forces (Special Powers) Act, 1958” AI Index: ASA 20/025/2005 1 (2005).

Another international NGO of repute, Human Rights Watch (hereinafter referred to as HRW), has described AFSPA as “ a symbol of abuse, oppression, and discrimination. Its application and misuse has fueled a cycle of atrocity and impunity and inflamed passions for militancy in various parts of the country.”<sup>14</sup> Like Amnesty international, HRW also has been calling for repeal of AFSPA after having documented the atrocities in the region and gross failure of state machinery in bringing justice to the region.<sup>15</sup>

Even the UN has taken note of serious violations on part of the security forces in J&K and North-Eastern part of India. For instance, in 2012, Christof Heyns, Special Rapporteur on extrajudicial, summary or arbitrary executions, on his 12-day mission to India opined that “AFSPA runs counter to the principles of democracy and human rights”.<sup>16</sup> In his report, he recommended that:<sup>17</sup>

India should repeal, or at least radically amend, AFSPA and the Jammu and Kashmir AFSPA, with the aim of ensuring that the legislation regarding the use of force by the armed forces provides for the respect of the principles of proportionality and necessity in all instances, as stipulated under international human rights law. It should also remove all legal barriers for the criminal prosecution of members of the armed forces.

Office of the United Nations High Commissioner for Human Rights (*hereinafter* referred to as ‘OHCHR’) in June 2018 published first of its kind “Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan”<sup>18</sup> (*hereinafter* referred to as the ‘2018 report’). This report focused on allegations of serious human rights violations by the security forces on the Indian side. It focussed on issues like excessive use of force by Indian security forces, impunity for human rights violations, arbitrary detention and human rights abuses committed by terrorist groups sponsored by Pakistan. The report also examined the situation in Pakistan briefly. It recommended that an

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<sup>14</sup> HRW, “Getting Away With Murder: 50 Years of the Armed Forces (Special Powers) Act” 18 (August, 2008).

<sup>15</sup> HRW, “‘Everyone Lives in Fear’ Patterns of Impunity in Jammu and Kashmir” (September, 2006).

<sup>16</sup> UN Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/23/47/Add.1 pg. 7 (April 26, 2013).

<sup>17</sup> *Id.*, at 19.

<sup>18</sup> OHCHR, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan* (June 14, 2018).

international commission of inquiry be set up to conduct investigation into allegations of human rights violations in Kashmir. In 2019, a second updated report was published by OHCHR.<sup>19</sup>

In the context of AFSPA, both these reports recommended that the Act be repealed.<sup>20</sup>

Urgently repeal the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990; and, in the meantime, immediately remove the requirement for prior central government permission to prosecute security forces personnel accused of human rights violations in civilian courts;

OHCHR failed to gather information regarding Pakistan occupied Kashmir (*hereinafter* referred to as 'PoK') because of the "limited the ability of observers, including OHCHR, to assess the human rights situation there."<sup>21</sup>

The recommendations of all these international organisations are apt, as has been noted above that AFSPA is not a desirable legislation. It surely must be repealed, but one has to view the situation holistically with consideration for the ground level reality.

All these UN reports have acknowledged the violations of human rights by terrorist outfits in the region.<sup>22</sup> In 2012, Christof Heyns in his report noted that:<sup>23</sup>

A range of non-State actors in various parts of India, including in Jammu and Kashmir, resort to deadly violence which threatens the lives and security of civilians as well as the security of the State. The State has a duty to protect its people and the right to defend itself against such acts, in accordance with international human rights standards. The callous nature in which lives are taken by these non-State actors is strongly condemned.

The 2019 OHCHR report while documenting the violence committed by the terrorist organisations noted that:<sup>24</sup>

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<sup>19</sup> OHCHR, *Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019* (July 8, 2019).

<sup>20</sup> *Id.*, at 41; *Supra* note 18 at 48.

<sup>21</sup> *Supra* note 19 at 3.

<sup>22</sup> *Id.*, at 30-33; *Supra* note 18 at 28-41; *Supra* note 16 at 9-10.

<sup>23</sup> *Supra* note 16 at 9.

<sup>24</sup> *Supra* note 19 at 30.

since the late 1980s, a variety of armed groups has been actively operating in the Indian state of Jammu and Kashmir, and there has been documented evidence of these groups committing a wide range of human rights abuses, including kidnappings, killings of civilians and sexual violence

Amnesty international has also expressed its concern regarding the human rights violations perpetuated by terrorist organisations.<sup>25</sup> It has noted that “Armed groups have been responsible for thousands of human rights abuses in Jammu and Kashmir. Victims of these abuses too have been unable to obtain justice.”<sup>26</sup>

HRW has noted that “Many militant groups have been responsible for human rights abuses, including torture, indiscriminate killings with bombs and landmines, hostage taking, and targeted attacks upon civilians regarded as ‘enemies.’”<sup>27</sup> HRW has highlighted that the key reason for not enough attention on attention on human rights violations by the terrorists outfits is that:<sup>28</sup>

But a key reason for the lack of attention is less widely discussed: people are afraid that they too will be targeted. In interviews with Human Rights Watch, ordinary Kashmiris, as well as journalists and human rights defenders, said that there was deep fear in Jammu and Kashmir of the militants. Militant abuses have been brutal, plentiful, and continuous against anyone seen to be opposed to their agenda.

In 2018, HRW noted that terrorist groups killed 32 policemen, kidnapped family members of police personnel and killed a 17 year old boy as they suspected he was a police informer; Shujaat Bukhari, a famous journalist, was killed by terrorist because his reporting did not sit right with the terrorists.<sup>29</sup>

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<sup>25</sup> *Supra* note 13.

<sup>26</sup> Amnesty International, “‘Denied’: Failures in Accountability for Human Rights Violations by Security Force Personnel in Jammu and Kashmir” AI Index: ASA 20/1874/2015 17 (2015).

<sup>27</sup> *Supra* note 14 at 8; *Supra* note 15 at 116-146.

<sup>28</sup> *Supra* note 15 at 118; HRW, “The Human Rights Watch Global Report on Women's Human Rights” 70 (August, 1995).

<sup>29</sup> *Supra* note 9.

HRW<sup>30</sup> and amnesty international<sup>31</sup> have also acknowledged that the terrorism in J&K is sponsored by Pakistan. It is a well-known fact that Pakistan has been employing this tactic of using non-state actors to cause unrest in the valley with the aim of seizing it from India.<sup>32</sup>

Repealing AFSPA in such a case, where the local population lives in constant fear of terrorists and terrorism is sponsored by the government of another country, may lead to exacerbation of terrorism in J&K. Thereby making the situation worse for the local populace as well as threatening the territorial integrity of the country. It is important to repeal AFSPA, but one needs to take a step forward to foresee the consequences it can have in a region riddled with terrorism.

### III. Jammu & Kashmir: the lesser known perspective

Time and again it has been portrayed by the media that there is no support for the security forces in the region, but this isn't the truth in entirety. There are anti-India pockets in the region, but at the same time there has always been a varying measure of public support. What is overlooked is that most locals reject the terrorist and separatist agenda, but cannot afford to showcase their support for India or the security forces as they are silenced by the terrorist bomb and bullet.<sup>33</sup> A case in point is the murder of Umar Fayaz, who was killed by terrorists because he joined the army.<sup>34</sup> Further, a person fearing loss of life and property has no option but to remain quiet if a terrorist enters a person's house.<sup>35</sup>

The will of the people to join the mainstream is further evidenced from the fact that even after the abrogation of the special status of J&K, in September 2019, an estimated 29,000 youth from Jammu and Kashmir's Chenab Valley and Pir Panjal region; 2,500 youth from Ramban and

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<sup>30</sup> *Supra* note 15 at 121-128.

<sup>31</sup> Amnesty International, "Pakistan: No protections against targeted killings", AI Index: ASA 33/030/2002 (October, 2002).

<sup>32</sup> C. Christine Fair, *Fighting to the End The Pakistan Army's Way of War* (New York, Oxford University Press, 2014).

<sup>33</sup> South Asia Terrorism Portal, "Jammu and Kashmir: Assessment 2017" (2011), available at: <https://www.satp.org/terrorism-assessment/india-jammukashmir-2017> (last visited on Mar. 31, 2021); *Supra* note 15 at 119.

<sup>34</sup> Gaurav C. Sawant, "Ummar Fayaz killing: Army officer was betrayed by people he grew up with" *India Today*, May 12, 2017.

<sup>35</sup> Wion News, *An immersive look into today's Kashmir (Part 2)*, 2017, available at: <https://www.youtube.com/watch?v=IHqTS8YbXgA&list=LLIkLtVOlqnRiH7VKBfeQAwh&index=10&t=0s> (last visited on Mar. 31, 2021).

Kishtwar districts; 3,600 from Doda; 8,000 youth from Udhampur; 8,000 youth from Rajouri district and over 4,000 from Poonch and Reasi districts queued up to join the Indian Army.<sup>36</sup>

AFSPA is a highly misrepresented legislation in the mainstream media and it is important to highlight the other perspective of the situation prevalent in the region to understand its need. A Kashmiri journalist, Mr. Gazanfar Butt, reported that the objective of Pakistan Intelligence agency is to malign the name of the Indian security force and for the purposes of the same terrorist outfits issue directions to the locals to register cases in local police stations and to accuse the army of committing excesses and rapes wherever search operations are carried out. Further, the villagers are often threatened with death if they assist the Army.<sup>37</sup> Mr. Dinesh Sharma, a journalist, has reported how militants often rape women and some of them have also been tortured with hot iron rods and weapons.<sup>38</sup> HRW has also highlighted that terrorist organisations often indulge in rape, but the fear instilled in people by terrorists inhibits them from bringing forth such violations.<sup>39</sup> OHCHR in its 2019 report also noted that terrorist organisations indulge in sexual violence in the valley.<sup>40</sup> In PoK, it is reported that Kashmiri women are subjected to sexual slavery in the name of Jihad.<sup>41</sup> Young girls in the valley are now indulging in drugs as they are subjected to rapes by terrorists.<sup>42</sup> Terrorism has also led to the flourishing of hawala transactions and drug trade in the valley, affecting the youth gravely, both boys and girls, beyond imagination.<sup>43</sup> Terrorists in the region have long been responsible for destruction of schools and recruiting children.<sup>44</sup>

<sup>36</sup> Arun Sharma, “Chenab Valley and Pir Panjal youth line up to join Army” *Indian Express*, Sept. 5, 2019.

<sup>37</sup> Narender Sehgal, *Memorial of Mistakes Converted Kashmir: A bitter saga of Religious Conversion* (Utpal Publications, New Delhi, 2003), available at: <https://mea.gov.in/in-focus-article.htm?18968/chapter+29++pakistans+isi+and+kashmiri+terrorists+from+the+book++memorial+of+mistakes+converted+kashmir++a+bitter+saga+of+religious+conversion+by+narender+sehgal> (last visited on Mar. 31, 2021); *Supra* note 15 at 116-146.

<sup>38</sup> *Ibid.*

<sup>39</sup> HRW, “The Human Rights Watch Global Report on Women's Human Rights” 69-71 (August, 1995).

<sup>40</sup> *Supra* note 19 at 30.

<sup>41</sup> Senge H. Sering, “In Pakistan Occupied Kashmir, ‘Jihad’ Encourages Sexual Slavery” *The Quint*, July 6, 2020, available at: <https://www.thequint.com/voices/opinion/pok-gilgit-baltistan-jihad-sexual-assault-rape-kashmiri-women#read-more#read-more>; “Pakistan Army, Sharif govt using Pashtun women as sex slaves, says activist” *India Today*, January 14, 2017, available at: <https://www.indiatoday.in/world/story/pashtun-umar-daud-khattak-pakistan-army-nawaz-sharif-sex-slave-lahore-954978-2017-01-14>; Anam Zakaria “Why don't Kashmiri women want to hide in bunkers during cross-border firing?” *Dawn*, March 26, 2019, available at: <https://www.dawn.com/news/1472015> (last visited on July 31, 2021).

<sup>42</sup> Wion News, *An Immersive Look in Today's Kashmir (Part 3)*, 2017, available at: <https://www.youtube.com/watch?v=ygBWRk0RZHs&list=LLIkLtVOlqnRiH7VKBfeQAhw&index=12&t=0s> (last visited on Mar. 31, 2021).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Supra* note 15 at 144.

As is evidenced from the interviews of a few former terrorists, often locals are kidnapped and are forced to join the training as terrorists, and when they wish to surrender they are threatened with death.<sup>45</sup> However, sometimes the security forces assist them in rehabilitation.<sup>46</sup> Last year when article 370 was struck down, various terrorist outfits threatened locals with death if they dared to go to work or carry out their routine activities.<sup>47</sup> But, unfortunately a major section of the media “chooses” to remain oblivious to the constant militant threats<sup>48</sup> under which the locals have to live.

Umong Sethi has explained how the role of political leadership is diminished when the insurgency in the region rises, and in order to reinstate themselves and reclaim the space post insurgency, the leadership encourages media and people to focus on ‘perceived’ wrong doings of the forces.<sup>49</sup> Umong Sethi, like Gazanfar Butt, highlights that insurgents pressurise the locals to fabricate allegations to damage the credibility of the forces and the politicians use these false allegations to reclaim political space. He further elaborates that:<sup>50</sup>

These cases are lodged either to placate the militants or some other vested interests or in some cases by victims to claim compensation for the damage to their property during a legitimate action against the terrorists. Most are not pursued, as the authorities after initial inquiries were aware that they lacked substance and in almost all cases compensation, where due, was paid in full.

South Asian Terrorism Portal’s 2017 assessment of J&K highlights that the crisis in the region is because of the failure of the governments to conduct themselves suitably. It is because of the ‘intentional’ political mischief that there is disturbance in the region, despite efforts by the

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<sup>45</sup> 101 India, *Into The Minds Of Militants*, 2016, available at: <https://www.youtube.com/watch?v=gYvRU0rG47g&list=LLIkLtVOlqnRiH7VKBfeQAhw&index=33&t=0s> (last visited on Mar. 31, 2021).

<sup>46</sup> 101 India, *Imran Ali: Real Interview With Militants In Kashmir*, 2016, available at: <https://www.youtube.com/watch?v=bjBYSOBhHNw&list=LLIkLtVOlqnRiH7VKBfeQAhw&index=12> (last visited on Mar. 31, 2021).

<sup>47</sup> Ashraf Wani, “Terror group puts up posters in Srinagar, asks local to observe shutdown, boycott police” *India Today*, Sept. 19, 2019.

<sup>48</sup> *Supra* note 15 at 116-146; *Supra* note 39; Wion News, *An immersive look into today's Kashmir (Part 1)*, 2017, available at: <https://www.youtube.com/watch?v=uciDmBrN0II&list=LLIkLtVOlqnRiH7VKBfeQAhw&index=12&t=0s> (last visited on Mar. 31, 2021).

<sup>49</sup> Umong Sethi, “Armed Forces Special Powers Act: The Way Ahead”, in Vivek Chaddha (ed.), *Armed Forces Special Power Act: The Debate* 45 (Lancer’s Books, New Delhi, 2013).

<sup>50</sup> *Ibid.*

security forces.<sup>51</sup> K.C. Dixit in his paper<sup>52</sup> has explained how the separatists and politicians function in the region by facilitating terrorism for their own profits and political vendetta. He has also highlighted that the locals are sick and tired of the *bandhs* and protest by the separatists,<sup>53</sup> the same has also been highlighted in a documentary wherein interviews of locals were taken to understand their perception of the situation.<sup>54</sup> Another issue is the motive behind separatists' "azaadi". The term azaadi is what is used as a tool by Hurriyat to create unrest in the valley for their ulterior monetary and political gains.<sup>55</sup> A former terrorist has explained how the local population does not understand the meaning of azaadi and it is propaganda of Pakistan to keep India troubled.<sup>56</sup> Former terrorists have also highlighted how Hurriyat is hand in glove with Pakistan, and the main agenda is to merge with Pakistan.<sup>57</sup> Young children are often lured with guns and money to join the terrorist organisations,<sup>58</sup> the politicians do not want the people to get educated and rise above all this, as unrest in the valley serves their interest.<sup>59</sup>

Stone pelting and protests are also organised by the high and mighty for their political vendetta. As uncovered by India Today, stone pelting is a "means of livelihood" for many and is a highly organised sector.<sup>60</sup> Big financiers are involved and individuals were paid about Rs. 7,000 a month in 2017, the rates may be different now. Platforms such as WhatsApp are used to organise such peltings. A stone pelter quoted his 'daily income' to be "Rs 1,000, 2,000, 3,000 or even Rs 5,000". Another pelter quoted that he makes up to Rs 20,000 a month. Extra money is provided for making petrol bombs/Molotov cocktail. Young children are recruited for pelting with minimum wage fixed at Rs. 4,000 and it goes up to Rs 7,500. Former stone pelters have named the Hurriyat leaders to be behind the financing and how some are even forced to pelt stones against their wishes.<sup>61</sup> Former terrorists have also stated how children are made to participate in such protests on the forefront by terrorists for media coverage and as a means to

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<sup>51</sup> *Supra* note 33.

<sup>52</sup> K.C. Dixit, "Revoking AFSPA Blown out of Proportion" 4 *Journal of Defence Studies* 124 (2010).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Supra* note 35.

<sup>55</sup> *Supra* note 52 at 125.

<sup>56</sup> Wion News, *An immersive look into today's Kashmir (Part 1)*, 2017, available at: <https://www.youtube.com/watch?v=uciDmBrN0II&list=LLIkLtVOlqnRiH7VKBfeQAhw&index=12&t=0s>;  
*Supra* note 42.

<sup>57</sup> *Supra* note 35.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Supra* note 56.

<sup>60</sup> Jamshed Adil Khan, "Stone pelters on hire in Kashmir: India Today nails Valley's insidious villains" *India Today*, Mar. 29, 2017.

<sup>61</sup> *Supra* note 56.

malign the name of security forces.<sup>62</sup> Children as young as 11 years old are also paid in drugs to participate in these protests.<sup>63</sup>

Shruti Pandalai<sup>64</sup> has elaborated how the issue has been politicised so much that instead of facts, it is the perceptions that are ruling the debates. She cautions that locals and media confuse army with other security forces, and, all human rights violation are attributed to the army. But, for those locals who understand the difference, the army is “relatively disciplined and worthy of respect”<sup>65</sup> in comparison to other security forces. The army being a media shy organisation is often misrepresented. Ajai Shukla writes in the Business Standard:<sup>66</sup>

In its opposition to loosening AFSPA, the army has been painted as an unreasoning bully with an aversion to Kashmiris and a pernicious addiction to violence. This is not true. The army has, in fact, offered a persuasive counter-argument in meetings of the Unified Command Headquarters with Omar Abdullah, listening in. But since the military seldom leaks or tweets, its viewpoint remains unreported.

Shruti Pandalai while highlighting the problem of perception says that:<sup>67</sup>

In a world, where perception makes or breaks political fortunes we need to hear more from the armed forces. When the army says it has court martialled personnel in 90 per cent of the cases of human rights violations brought to its notice, we need to see and hear more about those indicted. People need to know that those guilty cannot hide behind the garb of olive green.

A crucial point made by Umong Sethi is that since the media is non-empathetic towards the forces, it is highly unlikely that any genuine case would not have been investigated.<sup>68</sup> Gen. Bipin Rawat has pointed out that terror attacks remain unaccountable in international law, unlike the operations of the state forces.<sup>69</sup> Further, Aarti Tikoo Singh in a US Congressional

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<sup>62</sup> *Supra* note 35.

<sup>63</sup> *Supra* note 42.

<sup>64</sup> Shruti Pandalai, “AFSPA: A Case of Perceptions and the Losing Battle of Public Diplomacy”, in Vivek Chaddha (ed.), *Armed Forces Special Power Act: The Debate* 91-92 (Lancer’s Books, New Delhi, 2013).

<sup>65</sup> Ritu Dewan, “Humsheera, Humsaya: Sisters, Neighbours: Women’s Testimonies from Kashmir” 29 *Economic and Political Weekly* 2654 (1994).

<sup>66</sup> Ajai Shukla, “Reassure the Army on AFSPA” *Business Standard*, Dec. 13, 2011.

<sup>67</sup> *Supra* note 64 at 93.

<sup>68</sup> *Supra* note 49.

<sup>69</sup> National Human Rights Commission, “Indian armed forces have utmost respect for human rights, says Army Chief General Bipin Rawat: Human Rights Cell upgraded to the level of a Directorate in Army Headquarters”

hearing said that the Western press and a section of the Indian press present a distorted reality of Kashmir. Though being a member of the Kashmiri Pandit refugee community she didn't represent her community rather she highlighted the plight of the Muslims:<sup>70</sup>

In the last 30 years, militants killed more Kashmiri Muslim civilians than the members of any other community in Kashmir... There is no human rights activist and no press in the world that feels it is their moral obligation to talk or write about the victims of Pakistani terror in Kashmir.

Aarti Tikoo Singh also highlighted how Lashkar-e-Taiba terrorists killed Shujaat Bukhari, a senior Kashmiri journalist and peace activist only because he “wanted Pakistan to end the violence and human rights abuse in Kashmir”.<sup>71</sup>

The debate on AFSPA has created various impressions, predominantly one that the security forces have no regard for the local populace and use AFSPA as a tool to function without judicial scrutiny. This is far from the truth, and for this it is important to study the various checks and balances in place and to analyse how it is different from other existing legislations.

#### IV. CODE OF CRIMINAL PROCEDURE AND AFSPA

Often the need of AFSPA is questioned in light of the existing provisions of Criminal Law. Under sections 130<sup>72</sup> and 131<sup>73</sup> of the Code of Criminal Procedure, 1973 (*hereinafter* referred

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(December, 2019) *available at*: <https://nhrc.nic.in/media/press-release/indian-armed-forces-have-utmost-respect-human-rights-says-army-chief-general> (last visited on Mar. 31, 2021).

<sup>70</sup> “Pakistan Sponsored Terrorism hurt Kashmiri Muslims Most: Journalist to Congressional Panel” *Economic Times*, Oct. 23, 2019.

<sup>71</sup> *Ibid.*

<sup>72</sup> 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 to 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.

<sup>73</sup> Power of 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

to as ‘CrPC’) the armed forces may be called in to disperse an assembly. Primarily, the need for special legislations like AFSPA arises because CrPC is a general legislation meant for maintenance of law and order, whereas AFSPA is a special legislation which is enacted for the purpose of tackling terrorism and insurgency. The Constitution Bench of the Supreme Court in *Naga People’s Movement of Human Rights v. Union of India*<sup>74</sup> held that, “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.”

Under section 130 of CrPC, the armed forces act under the direction of the magistrate. Under section 131, due to absence of an executive magistrate the armed forces act on their own accord till contact is established with the magistrate. Only commissioned or gazetted officers have the power to give orders under section 131. However, under section 4<sup>75</sup> of AFSPA this power is entrusted upon non-commissioned officers (NCO) as well. What one needs to understand is that the NCO commands a responsible position, when sections of troops go for patrolling, they are commanded by the NCO. An NCO is further required to make decision while dealing with terrorists in isolated areas, and he is trained for the same. It is interesting how one conveniently

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shall thenceforward obey the instructions of the Magistrate, as to whether he shall or shall not continue such action.

<sup>74</sup> AIR 1998 SC 431.

<sup>75</sup> 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 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 a training camp for armed volunteers or utilised as a hide-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, and seize any such property, arms, ammunition or explosive substances;

(e) stop, search and seize any vehicle or vessel reasonably suspected to be carrying any person who is a proclaimed offender, or any person who has committed a non-cognizable offence, or against whom a reasonable suspicion exists that he has committed or is about to commit a non-cognizable offence, or any person who is carrying any arms, ammunition or explosive substance believed to be unlawfully held by him, and may, for that purpose, use such force as may be necessary to effect such stoppage, search or seizure, as the case may be.

questions their credibility in such situations but it is never so when they operate in situations of natural calamity.<sup>76</sup>

Section 130 specifies that minimum force is to be used, section 131 does not specify the limit on force but the power is limited to arrest and confinement. Though AFSPA does not provide for such limitations in the statute, the same is followed as a matter of rule diligently, as is discussed in the next part of the paper. However, it is pertinent to note that minimum force in a region infested with terrorism may be more than what it is in other regions. The Constitution Bench of the Supreme Court in *Naga People's Movement of Human Rights v. Union of India*<sup>77</sup> held that:

The Powers conferred under Section 4 and Section 5 of the Central Act on the officers of the armed forces, including a Non- Commissioned Officer are not arbitrary and unreasonable and are not violative of the provisions of Articles 14, 19 or 21 of the Constitution.

The constitutional validity of the 1958 Act was also challenged in this case. However, it is rather unusual that though both the 1958 Act and AFSPA have similar powers, yet the constitutional validity of AFSPA has not been brought in question before the Supreme Court.

Section 197<sup>78</sup> of the CrPC provides that prior to taking cognizance against any public servant a sanction needs to be obtained, which is similar to the protection provided for in section 7<sup>79</sup>

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<sup>76</sup> U.C. Jha, *Armed Forces Special Powers Act: A Draconian Law?* (Vij Books, New Delhi, 2015).

<sup>77</sup> *Supra* note 74.

<sup>78</sup> Prosecution of Judges and public servants-

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government: 1 Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression " State Government" occurring therein, the expression " Central Government" were substituted.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

<sup>79</sup> Protection of persons acting in good faith 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 purported to be done in exercise of the powers conferred by this Act.

of AFSPA, *i.e.*, section 6 of the 1958 Act. Hence, even if section 7 was not in place, CrPC would provide the armed forces with the same immunity.

In 2004, a committee headed by Justice Jeevan Reddy<sup>80</sup> was appointed to review the 1958 Act, the issue of AFSPA as applicable in J&K was not taken up in the committee. Though the committee found that the powers conferred under the Act are not absolute, it nevertheless concluded that the Act should be repealed in the north-east. However, it recommended that essential provisions of the Act be inserted into the Unlawful Activities (Prevention) Act, 1967 (*hereinafter* referred to as 'UAPA').

The 5th report of the Second Administrative Reforms Commission<sup>81</sup> on public order, headed by Mr. Veerappa Moily, also dealt with the 1958 Act. It was again recommended that the 1958 Act should be repealed and its essential provisions should be incorporated in the UAPA. It is interesting how even in this commission AFSPA as applicable in J&K was not discussed.

Both the reports opposed AFSPA, yet, stated that the essential provision be incorporated in UAPA. One needs to note that technically AFSPA has only one essential provision that is not covered by CrPC, *i.e.*, action by forces to tackle terrorists. It seems like the reports are only recommending changing the placement of this provision from one legislation to another.

Further, one needs to realise that the power to act in section 4 is not absolute and there are various limitations on the same and the various recommendations by the commissions to check the abuse of power are already in place.

## V. LIMITATIONS ON THE AFSPA PROVISIONS

For any counter terrorism force to operate in a region, it is essential that they have requisite freedom of action and that the forces are protected from frivolous and motivated prosecution. AFSPA provides with these functional requirements under sections 4 and 7. These two provisions have been heavily criticised without realising that these provisions are not absolute. Supreme Court approved guidelines, as well as, various other internal checks and balances have been adopted to prevent misuse of these provisions.

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<sup>80</sup> Government of India, "Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958" (Ministry of Home Affairs, 2005).

<sup>81</sup> Government of India, "Second Administrative Reforms Commission-fifth report-Public Order" (2007).

#### Section 4: Special Powers of the Armed Forces

Section 4 of AFSPA provides the armed forces with the requisite freedom of operation. At the outset it is important to note that unlike the 1958 Act, section 4 of AFSPA has an additional clause *i.e.*, clause (e).<sup>82</sup>

It is often wrongly assumed that the powers in section 4 are unfettered and there is absolutely no limitation on the security forces, but the Constitution Bench of the Supreme Court in *Naga People's Movement of Human Rights v. Union of India*<sup>83</sup> while upholding the constitutional validity of the 1958 Act held that the guidelines laid down by army headquarters were legally binding on all security forces, and that the Act is to be read in along with these guidelines.

Further the Supreme Court mandated Army headquarter guidelines, following are some of the important guidelines which limit the power under section 4:

1. Before firing or using force one has to not only ensure that a prohibitory order is in place against such an assembly, but, also that action is required to maintain public order.
2. Before any action is taken, it is absolutely mandatory that a due warning is given to the crowd.
3. Arrest can only be made if a person has committed a cognizable offence or a reasonable suspicion regarding the same exists.
4. A raid can only be conducted if some definite information exists.
5. Minimum force should be the *modus operandi* even during a counter terror operation.
6. CrPC provisions are to be followed while dealing with search and seizure of a woman.
7. All the supervising officers will be responsible for the conduct of his troops. It is his responsibility to ensure that innocent people are not harassed, houses are not entered unnecessarily and no property is destroyed.
8. It is mandatory that proper records of arrests and releases are maintained.
9. Detailed report of the operation carried out and records of other relevant facts should be duly maintained.

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<sup>82</sup> Special powers of the armed forces-

(e) stop, search and seize any vehicle or vessel reasonably suspected to be carrying any person who is a proclaimed offender, or any person who has committed a non-cognizable offence, or against whom a reasonable suspicion exists that he has committed or is about to commit a non-cognizable offence, or any person who is carrying any arms, ammunition or explosive substance believed to be unlawfully held by him, and may, for that purpose, use such force as may be necessary to effect such stoppage, search or seizure, as the case may be.

<sup>83</sup> *Supra* note 74.

10. All arrested persons should be handed over to the police so that he can be produced before the magistrate within 24 hours. Any delay that happens has to be justified.
11. Receipts shall be obtained by the forces from the local police regarding the people and ammunition handed over for the purposes of maintaining records.
12. Security forces shall see to it that medical relief is made available to all those injured.
13. It has been specifically laid down that no third degree methods are to be used and no force shall be used after a person has been arrested except when he is trying to escape.

Section 6<sup>84</sup> of AFSPA is a caveat to section 4 as it provides that the individual and all the recovered substances along with a report regarding circumstances that occasioned the arrest shall be handed over to the local police at the earliest possible opportunity.

The above are just some of the mandatory guidelines that are to be observed by all the security forces when acting under section 4. Further there are certain other guidelines that are issued by the security forces from time to time. Some of the other instructions issued by the army are as follows:<sup>85</sup>

1. Operations should be carried out on basis of hard intelligence rather than on prophylactic basis, so as to minimise inconvenience to the locals. There should be no abuse of authority.
2. When operations result in inconvenience to locals, steps should be taken in consultation with state administration to address their basic needs.
3. “Iron Fist with Velvet Glove” should govern the nature of conduct of all ranks. The customs, traditions and local sensitivities should always be respected.
4. Strict compliance of the ten commandments of the Chief of The Army Staff and the Do’s and Don’ts lists promulgated by the Army Headquarters must be done.
5. Civil police personnel should be co-opted during operations.
6. All contacts and dealing with women folk should only be done through mahila police. Further in October 2019, the army decided to deploy lady jawans in the region,<sup>86</sup> to ensure that under no circumstances the local women are dealt with by men.

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<sup>84</sup> Arrested persons and seized property to be made over to the police- Any person arrested and taken into custody under this Act and every property, arms, ammunition or explosive substance or any vehicle or vessel seized 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, or as the case may be, occasioning the seizure of such property, arms, ammunition or explosive substance or any vehicle or vessel, as the case may be.

<sup>85</sup> Integrated Headquarters of Ministry of Defence (Army), “Doctrine for Sub Conventional Operations” (2006).

<sup>86</sup> *Supra* note 69.

7. The use of force should hinge on the principle of minimum force.
8. The endeavour should be to neutralise terrorists instead of seeking elimination.
9. The operations should be planned and executed with precision so as to obviate collateral damage.
10. All ranks must be on guard against any provocations induced by the terrorists or their sympathisers.
11. Human rights are undoubtedly of utmost importance and all complaints alleging any misconduct shall be thoroughly inquired and appropriate action shall be taken.
12. A court of inquiry is set up after every counter terror/insurgency operation as a matter of routine now.<sup>87</sup> The purpose of the same is to ensure that the conduct of the troops was proper and there was no mischief involved. This step also helps in maintaining detailed records regarding the operation as well as the troops involved.

What needs to be understood is that with these guidelines in place, the armed force personnel cannot open fire unless they need to do so in self-defence or for defending others. Even when more than hundred troops are deployed in an area they often withdraw without retaliation when facing protests from the civilian population.<sup>88</sup> Gurmeet Kanwal further states that:<sup>89</sup>

The army's instructions are that fire 'may' be opened in towns and villages only in self-defence 'and' that too when the source of terrorist or militant fire can be clearly identified. If soldiers had been opening fire indiscriminately, there would have been hundreds of more civilian casualties in J&K.

On the basis of the above mentioned restrictions, it can be safely argued that the power of the armed forces within the scope of section 4 is not absolute. However, one must understand that there is a need to change the situation in the region so that the need for any kind of special power to the security forces can be eliminated.

### **Section 7: Protection of Persons against Prosecution**

Section 7 of the AFSPA provides for immunity to armed forces personnel from malicious prosecution. Section 197 CrPC too provides for a similar protection to all government

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<sup>87</sup> *Ibid.*

<sup>88</sup> *Supra* note 56.

<sup>89</sup> Gurmeet Kanwal, "AFSPA: The Army Needs it" *Institute for Defence Studies and Analyses*, Sept. 6, 2016, available at: [https://idsa.in/idsanews/afspa-army-needs\\_gkanwal\\_060916](https://idsa.in/idsanews/afspa-army-needs_gkanwal_060916) (last visited on Mar. 31, 2021).

functionaries. In *General Officer Commanding v. Central Bureau of Investigation*<sup>90</sup> the Supreme Court observed that the rationale behind the immunity, “is to protect them on the presumption that acts performed in good faith are free from malice or ill will.” The Supreme Court further has further held that though it is mandatory to obtain a sanction, but as was reiterated in *Extra Judicial Execution Victim Families Association v. Union of India*<sup>91</sup> there is “no concept of absolute immunity from trial by the criminal court constituted under the CrPC.” Therefore, the only protection that the security forces get is from malicious prosecution, the requirement of a sanction only ensures that cases which are based on false and frivolous allegations are not pursued in the court of law.

In *Naga People’s Movement of Human Rights v. Union of India*<sup>92</sup> the constitution bench in context of section 6 the 1958 Act held that:

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 2013, the “Report of the Committee on Amendments to Criminal Law, 2013”<sup>93</sup> (*hereinafter* referred to as ‘Verma committee report’) was formed in 2013 as a dire need to strengthen the criminal law for protection of women was felt after the December 2012 Delhi gangrape case. It was also noted that AFSPA has been legitimising sexual violence in the region.<sup>94</sup> On a related note, it recommended that, “there is an imminent need to review the continuance of AFSPA and AFSPA-like legal protocols in internal conflict areas as soon as possible.”<sup>95</sup>

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<sup>90</sup> AIR 2012 SC 1890.

<sup>91</sup> (2016) 14 SCC 536.

<sup>92</sup> *Supra* note 74.

<sup>93</sup> Justice J.S. Verma, “Report of the Committee on Amendments to the Criminal Law” (2013).

<sup>94</sup> *Id.*, at 149.

<sup>95</sup> *Id.*, at 151.

Various retired high officials of the Indian army criticised the committee report.<sup>96</sup> The main theme being that frivolous litigation would have a demotivating impact on the forces and make it further difficult for them to tackle terrorism in the region.

The Shopian double rape-cum-murder case substantiates the need for sanction before initiating litigation. This case created unrest in the valley for months, but as it turned out it was based on fabricated medical reports. The women drowned because of increase in the rivulet water level, but a whole story was made up. Fabricated medical evidence of rape and murder were created to malign the security forces and create unrest in the valley. The same was subsequently established by the CBI report.<sup>97</sup> India Today further uncovered that the post-mortem reports were fudged at the behest of Majlis Mashawarat. The taped conversations between the doctors and Majlis representative document how and why the medical records were fudged. However, given the sensitivities and politics in the Valley, it is a challenge to bring out the undoctored truth, though the audio clip can be found on the India Today story.<sup>98</sup> International organisations failed to report these updated facts of the case and painted an anti-state narrative.<sup>99</sup>

This is just the tip of the iceberg, there are many cases wherein the army is asked to defend itself against allegations but the chance to put forth their version is never given, or even if they give their version the same is not highlighted. Umong Sethi has elaborated upon certain famous cases and explained the army perspective of the same.<sup>100</sup> He dealt with the case of Major Rehman Hussain wherein the DNA tests proved there was no rape, yet, the Court Martial proceedings continued. Though Major Rehman was pronounced ‘not guilty’ of rape, however he was found guilty on other counts of misconduct and use of force, and was dismissed from service.

Another instance which depicts the efficiency of the army in investigation and strict compliance to use of minimum force is showcased in the timely inquiry of the recent Shopian encounter. In this encounter three militants were killed and within two months the army concluded its inquiry and held that the soldiers had exceeded the powers vested in them under

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<sup>96</sup> Harwant Singh, “AFSPA in J&K: Selective withdrawal may be harmful.” *Indian Defence Review*, Jan. 8, 2013 available at: <http://www.indiandefencereview.com/afspa-in-jk-selective-withdrawal-may-be-harmful/> (last visited on July 31, 2021).

<sup>97</sup> “No Rape or Murder in Shopian: CBI”, *The Economic Times*, Dec. 15, 2009; The original report could not be retrieved.

<sup>98</sup> Harinder Baweja, “Exclusive: Shopian truth nailed”, *India Today*, Feb. 13, 2010.

<sup>99</sup> *Supra* note 39 at 60-67.

<sup>100</sup> *Supra* note 49 at 46-50.

AFSPA.<sup>101</sup> Hence, it is important to note that the rule of minimum force is strictly followed even with respect to terrorists and in case of violation there are consequences. As discussed above, the aim is to neutralise and not use force to eliminate the terrorists; the same has also been demonstrated in a recent video wherein the soldiers facilitated surrender of a terrorist who expressed his desire for the same during an ambush.<sup>102</sup>

The problem with a lot of cases inquired into by the army is that they are misrepresented outside even if there is conviction. As has been discussed in the previous part of this paper, there is immense pressure to make false allegations and it has a politically motivated propaganda as well. If the requirement of taking sanctions is done away with, it would lead to the military leadership being caught up with legal work for every false allegation instead of working on counter-terrorist operations. In such circumstances and with serious threats to the national security it becomes important to protect the security forces so that they can do their job effectively without fear of harassment and litigation.

However, it is important to note that section 7 does not bring anything substantially new to the table of criminal law. Even if the provision is repealed, section 197 of the CrPC would still entail the same requirement of a sanction before prosecution. Further, one must keep in mind that by no stretch of imagination do AFSPA or CrPC provide for absolute immunity, they only entail a need of a sanction prior to prosecution.

## VI. HUMAN RIGHTS CELL IN THE ARMY

With growing number of complaints regarding human rights violations the Human Right Cell (*hereinafter* referred to as 'HRC') was established at the Army Headquarter in 1993 with the aim of investigating complaints regarding such violations.<sup>103</sup>

HRC is a part of Adjutant General's Branch and functions under Additional Directorate General, Discipline & Vigilance. The cell functions under the Discipline and Vigilance Directorate which has a Major General at its head, with a Brigadier managing the human rights

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<sup>101</sup> Peerzada Aashiq, "AFSPA mandate exceeded in Shopian encounter: Army probe", *The Hindu*, Sept. 18, 2020.

<sup>102</sup> Nazir Masoodi, "Nobody Will Shoot: Dramatic Video Of J&K Terrorist's Surrender", *NDTV*, Oct. 16, 2020.

<sup>103</sup> Indian Army, "Human Right Cell and Handling of Human Rights Violation Cases in the Army", *available at*: <https://indianarmy.nic.in/Site/FormTemplete/frmTempSimple.aspx?MnId=pZKbKMe07wQrev+glwflWQ==&ParentID=kXH5Q6DYk1gobq7RpAhTHg==&flag=RuYiEBuELEulxfll7XTuhQ==> (last visited on Mar. 31, 2021).

issue. At the Command, Corps and division level, human rights cells are managed by Colonel rank officers.

The HRC receives allegations of human rights violations from the National human rights commission, ministry of home affairs, ministry of external affairs, media, reports of various organisations and even *suo moto* cognizance by the army. An investigation is done with respect to all the allegations by the concerned Command headquarters and a detailed report is prepared. This report along with recommendations of the commanders in chain is vetted in the HRC. Thereafter, these reports are then sent to the Ministry of Defence.

The enquiry of alleged misconduct is done by a body comprising of officers of other units and not of the unit to which the accused troop belongs. Civilian witnesses are also examined and the report prepared does not contain only the army version but also includes the police report and reports by village headman/ elders. However, statistically over 96% allegations have been found to be false.<sup>104</sup> The status on allegations updated up to 31 Dec 2011 are as following:<sup>105</sup>

S. No	Items	J&K	NE	Other	Total
1.	Number of Allegations Received	1048	640	111	1799
2.	Number of allegations Investigated	1026	613	102	1741
3.	Number of allegations under investigation	22	27	09	58
4.	Number of allegations false/baseless	995	582	96	1673
5.	Number of allegations found true	31	31	06	68
6.	Number of personnel punished	70	75	08	153
7.	Number of cases awarded compensation	18	34	1	53

Umong Sethi has thrown light on some interesting statistics regarding investigation of the complaints:<sup>106</sup>

According to the available statistics, 72 per cent of the cases have been closed at the behest of the civil administration, police, courts and victims, complainants or

<sup>104</sup> *Ibid.*

<sup>105</sup> Indian Army, “Human Right Cell and Handling of Human Rights Violation Cases in the Army: Annexure 1” <https://indianarmy.nic.in/Site/FormTemplete/frmTempSimple.aspx?MnId=NE3ASv8oNFMertzDJKDhfg=&ParentID=BG6MLnbqb1fKzJbOZ59v4Q=&flag=8CKP966uzg96kLov0aWdfQ> (last visited on Mar. 31, 2021).

<sup>106</sup> *Supra* note 49 at 50.

their relatives. Of the 28 per cent cases closed by the army, 15.6 per cent were more than 10-12 years old. Their details were either not available or if available, too sketchy. Even police investigations were inconclusive and no headway could be made. The balance 12.5 per cent cases of human rights allegations are those filed by the next of kin of army personnel killed in action against terrorists. However, the army works on the premise that one case is one too many and cannot be left uninvestigated. Hence to say that AFSPA gives the security forces the licence to kill, rape, torture and humiliate is far from true.

Continuous reinforcement is done regarding the importance of human rights and sensitisation of the forces towards the same in the training module of the Army. The training herein means not only the induction level training but also the training that one receives in various courses throughout his/her career.<sup>107</sup> Whenever a Unit is moved to these sensitive areas a special intensive reorientation training is done in Counter Insurgency Training schools. Various orders from time to time by the Headquarters, including but not limited to the Chief of Army Staff's Ten Commandments as well as the Do's and Don'ts list lay down the conduct which is to be observed by all troops.

A restructuring of the current HRC is underway,<sup>108</sup> it is now being upgraded to the level of a Directorate to be headed by an Additional Director General.<sup>109</sup> Police officers will also be members of the same and will facilitate inquiry of alleged violations along with the members of armed forces. However, the role of various media houses in this area has been misleading too, the news channels have portrayed it as if it is the 'first time' a HRC is being set up, without acknowledging that there has been one for the past 26 years.<sup>110</sup>

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<sup>107</sup> *Supra* note 103.

<sup>108</sup> Abhishek Bhalla, "Army HQ restructuring: Rajnath Singh approves setting up of human rights cell, moving 200 officers to field", *India Today*, Aug. 21, 2019.

<sup>109</sup> *Supra* note 69.

<sup>110</sup> Snehash Alex Philip, "Indian Army gets a human rights cell, IPS officer to be a part of it", *The Print*, Aug. 21, 2019; Shreya Dhoundial, "Armed Forces to Get Human Rights and Vigilance Cell after Rajnath Singh Approves Restructure", *News 18*, Aug. 21, 2019; Krishn Kaushik, "Defence Ministry approves reorganisation of Army HQ", *The Indian Express*, Aug. 21, 2019.

## VII. CONCLUSION AND SUGGESTIONS

Human rights have to a large extent shaped the AFSPA debate. To strengthen the human rights regime it is crucial that they are protected both “in fact” and “in law”. For the purposes of the same, following suggestions by Vivek Chadha<sup>111</sup> are important:

1. Humanitarian principles can be incorporated in the form of amendments, such as incorporating the do’s and don’ts to the Act or by framing a new Act, given the psychological imperatives and perceptions associated with AFSPA.
2. Committees need to be formed at the district level with representatives of army, police, civil administration and the public to report, assess and track complaints in the area.
3. All investigations should be strictly time bound, and the aggrieved party should be kept in loop regarding the progress of the same. Older cases should be fast tracked on a priority basis.
4. The army’s principle of minimum force must therefore remain a fundamental guideline for conduct of operations and should be included in AFSPA.
5. The lacunae in the Act, as a result of definitional voids with respect to terms like “disturbed”, “dangerous” and “land forces” need to be amplified to ensure greater clarity.
6. The language and context of law becomes questionable, because of flawed elucidation of certain terms. Amongst the foremost is, “fire upon or otherwise use force, even to the causing of death.” Suitable amendments need to be incorporated to correct similar objectionable textual and contextual anomalies in the law.

It is not only important to understand the need of an AFSPA like legislation in the current scenario, but it is crucial that the perception regarding the same changes till the need remains and at the same time it is also important to look for policies that can change the current scenario in the region so that the need of an AFSPA like legislation does not exist. Some other suggestions for the purposes of the same include:

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<sup>111</sup> *Supra* note 6 at 98-100.

1. As police is responsible for handling internal disturbances, it is high time the police is modernised and other security forces are withdrawn from the region.
2. All the central and state security forces, whether or not operating under AFSPA, should have transparent and stringent mechanism to deal with any complaint regarding human right violation.
3. There is an imminent need for perception management. The police force derives its powers from CrPC, which is a far more balanced legislation, yet, as per Asian Centre for Human Rights, during a period of 11 months 1,674 custodial deaths took place, which translates to an average of five deaths per day.<sup>112</sup> If despite these realities AFSPA still remains the villain then, one need to think harder. It is about how strictly the safeguards are implemented, and it seems the safeguards in AFSPA are implemented more diligently as compared to those in CrPC.
4. AFSPA though is needed in the current scenario but it is not a desirable legislation for a longer term. To reduce its need, it is imperative for the government to take initiative to bring about development in the region, to provide opportunities for the youth and prevent radicalization by opening avenues for the people. J&K accounts for 1% of the country's population yet, between 2000-2016 it received 10% of Central government. However, U.P. received only 8.2% grants despite of the fact it makes up 13% of the population. This translates to mean that J&K received Rs.91,300 per person while Uttar Pradesh received Rs.4,300 per person over the same period.<sup>113</sup> There needs to be accountability regarding the money spent by the administration.
5. Another important policy which can help is better rehabilitation policy for surrendered terrorists. Under the current rehabilitation policy, a terrorist receives an immediate grant of Rs. 1.5 lakh in fixed deposit for three years, along with Rs. 2,000 as monthly stipend. Vocational training is also provided free of cost to all those desirous of the same.
6. Many believe that since the advent of militancy in the valley, attempts have been made to radicalize the youth,<sup>114</sup> various former terrorists have elaborated that during the course of their training they were radicalized by being taught a highly misinterpreted

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<sup>112</sup> Arijit Sengupta, "High Numbers of Custodial Deaths: Police Butchering Basic Human Rights", *News Click*, Jun. 28, 2018, available at: <https://www.newsclick.in/high-numbers-custodial-deaths-police-butchering-basic-human-rights> (last visited on Mar. 31, 2021).

<sup>113</sup> TCA Sharad Raghavan, "J&K gets 10% of Central funds with only 1% of population" *The Hindu*, Jul. 24, 2016.

<sup>114</sup> *Supra* note 56.

version of Islam.<sup>115</sup> This issue desperately needs to be tackled by providing quality education and employment opportunities.

It is the prerogative of the civil administration and the government to work for the upliftment of masses, but very little is done by the civil administration in these regions. The army carries on outreach programs such as “operation sadbhavana” and “Operation Samaritan” in terrorism/insurgency hit regions for the upliftment of these regions and these have been very well received by the people.<sup>116</sup> Development of the region is what will help in revoking AFSPA, and the security forces are playing an instrumental role in the same.

Operation Sadbhavana<sup>117</sup> with the aim of developing the region started in 1998 with a budget of Rs. 4 crore, but over a period of time more than Rs. 550 crores have been invested in this program by the army. Under the scheme various infrastructure development projects aimed at improving the quality of life and improving connectivity are regularly taken up. In field of education the army runs 46 goodwill schools in the region, along with a few schools for children of migratory tribes and it also provides assistance to 1900 state schools. ‘Kashmir super 40’ is another initiative wherein children are coached to crack IIT-JEE.<sup>118</sup> The army also organises 70-100 educational tours each year for students with the aim of providing them with exposure to other parts of the country.<sup>119</sup>

In an attempt to develop the skills and provide for vocational training to the youth of J&K, ‘Chinar 9 Jawan Club’<sup>120</sup> has been established by the army in Baramulla; various Youth Guidance Employment Nodes have also been established across the State to create awareness about job opportunities and exams. In an endeavour to empower the women, various vocational training centres have been set up and training is provided for of computers, knitting, weaving, tailoring, bag making, etc. Along with these initiatives, interactions with bank and government officials are also organised to assist people with financial management.<sup>121</sup>

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<sup>115</sup> *Supra* note 35.

<sup>116</sup> *Ibid.*

<sup>117</sup> Indian Army, “Operation Sadbhavana”, available at: <https://indianarmy.nic.in/Default3.aspx?MenuId=mqGNS4QgaAgf62u8ahFFXw==> (last visited on Mar. 31, 2021).

<sup>118</sup> “Army’s Super-40 in Kashmir Strike Big”, *Press Information Bureau*, June 13, 2017, available at: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=165592> (last visited on Mar. 31, 2021).

<sup>119</sup> *Supra* note 117.

<sup>120</sup> “Army dedicates ‘Chinar 9 Jawan Club’ to people” *Daily Excelsior*, Apr. 2, 2016, available at: <https://www.dailyexcelsior.com/army-dedicates-chinar-9-jawan-club-people-2/> (last visited on Mar. 31, 2021).

<sup>121</sup> *Supra* note 117.

To cater for the medical needs of population living in remote and inaccessible areas, a number of medical health centers have been constructed by the army. In 2014-15 about 1,27,019 people were provided with free medical treatment in 283 medical camps that were organised. Mobile medical teams are also dispatched regularly to provide medical care and medicines at the doorstep of those in need. While conducting such camps, motivated youth willing to work in medical care are identified and are trained for the same by the Army Field Hospitals.<sup>122</sup> Veterinary Camps too are organized regularly, a total of 149 such camps were organized wherein 1,66,728 animals were treated.<sup>123</sup>

Due to the grave menace of drugs in the valley, the army has also established drug de-addiction centre in the valley<sup>124</sup> and conducts various seminars regarding the same.<sup>125</sup> However, it is not as easy as it seems, people who assist in uplifting the area end up being on the wrong side of militants and the drug mafia. Arjumand Hussain was shot dead with five bullets in his head,<sup>126</sup> the reason being that he worked vociferously in the battle against drug abuse.<sup>127</sup>

It is high time that instead of just focusing on whether AFSPA is good or bad, we look at other alternatives to tackle the problem in the region. AFSPA undoubtedly is an undesirable legislation, but contrary to the belief of many, AFSPA isn't the problem in the region, the problem is terrorism. One needs to find new approaches to tackle terrorism instead of fixating on a legislation which already has so many limitations set out by the organisation itself. Owing to the situation in the region AFSPA is the need of the hour. However, instead of portraying the security forces as the villains one must dig deeper and see the picture in entirety, and analyse how the situation must change, so that the Act can be abrogated and the region is developed. In 2011, when terrorism had been declining in the valley the defence minister A. K. Antony claimed that 30,000 troops had been withdrawn from J&K.<sup>128</sup> However, the placement of security forces in the region is subject to the level of existing militancy. Militancy exists because the youth is misguided and unemployed, once there is development in the region

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<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> "Army opens drug de-addiction centre", *Daily Excelsior*, Feb. 23, 2014, available at: <https://www.dailyexcelsior.com/army-opens-drug-de-addiction-centre/> (last visited on Mar. 31, 2021).

<sup>125</sup> "Army organises drug de-addiction seminar in Baramulla", *Business Standard*, Feb. 27, 2018.

<sup>126</sup> Sameer Yasir, "Arjumand Majid Bhat, shot dead by 'unidentified gunmen', was a de-addiction campaigner who helped many youth", *Firstpost*, Apr. 1, 2019, available at: <https://www.firstpost.com/india/arjumand-majid-bhat-shot-dead-by-unidentified-gunmen-was-a-de-addiction-campaigner-who-helped-many-youth-6364991.html> (last visited on Mar. 31, 2021).

<sup>127</sup> Anil Raina, "Drug counsellor shot by militants in Valley", *Ahemdabad Mirror*, Mar. 31, 2019.

<sup>128</sup> South Asia Terrorism Portal, "Jammu and Kashmir: Assessment 2011" (2011), available at: <https://www.satp.org/terrorism-assessment/india-jammukashmir-2011> (last visited on Mar. 31, 2021).

and the youth is guided in the right direction, the military can conveniently be withdrawn from the region. Development of the region will play a fundamental and crucial role in elimination of militancy from the region, which in turn will result in repeal of AFSPA.