

**PERPETUAL MORASS IN JAMMU & KASHMIR: A
CRITIQUE ON ARMED FORCES (JAMMU & KASHMIR)
SPECIAL POWERS ACT, 1990 & THE STATE OF HUMAN
RIGHTS IN THE LANDLOCKED STATE**

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ABSTRACT

Right from its accession to India in 1948, Kashmir has been an intractable issue between India and Pakistan which has been the fundamental reason for continual violence and perpetual massacres of innocent inhabitants of Kashmir over the past decades. Hoping to arrest the rising unrest in the state, the government in 1990 enacted the Armed Forces (Jammu & Kashmir) Special Powers Act but, the center's efforts have not only failed miserably but the advent of this act has also put the basic necessary rights of the Kashmiris at stake. This paper, has analyzed the situation in the valley post 1990 taking into consideration the severe violation of human rights by the forces. The analysis has been endorsed by means of first hand information collected via survey forms. Further the provisions of the benign act which, has been implemented in a draconian way have been scrutinized. This paper further aims to portray the perpetual chaos in the landlocked state and how the forces are justifying their sexual assaults on women and, firing of pellets on a myriad of people, as a measure to maintain public order. The primary aim and focus of the paper is to suggest amendments to the act and other measures which could be taken by the center to ensure the residents that they enjoy their basic rights.

Keywords- Armed Forces (Jammu and Kashmir) Special Powers Act, Chaos, Sexual Assault, Pellets, Human Rights, Kashmir.

INTRODUCTION

Seven decades have passed since we gained independence from the British Crown, India has continued to transform and gain reverence from across the globe but one issue which has continued to exist as an intractable problem is farce and morass in the state of Jammu & Kashmir. Even if the government decides to ignore the daily theatrics happening across the state it cannot possibly put a wet blanket on the state of human rights in the valley. Sexual assaults against innocent Kashmiri girls most of them below the age of 21, unwarranted house searches at odd hours, incessant firing of pellets most of which have either turned the peaceful protestors blind or ended up causing them grievous injuries which, have in some or the other way incapacitated them are a few such instances which the government justifies as imperative to maintain amity in the state. In a statistical report, which mentions the death of 43 people in a clash between the military and the protestors only one was found to be a soldier and the rest minors¹, students, elderly people, four pregnant women who were visiting the market. To counter all of this the center came up with the legislation, Armed Forces (Jammu & Kashmir) Special Powers Act, 1990.²³ The preceding acts in the North Eastern states have attracted scathing attacks on the government of India from many nations and international bodies and Amnesty International⁴, has even gone up to the extent of repeatedly requesting India to repeal this draconian legislation, but nothing has materialized and since its inception in 1990, the act continues to be in full execution in the landlocked state. The forces under the excuse of terminating separatists and radicals endorsed by Pakistan, are massacring several innocent beings who are just asking for their basic rights and for a referendum to decide about what they actually need. Home minister, Rajnath Singh iterated at the parliament, and said, a referendum is an outdated way to deal with such things⁵, and the best the government could do was to think

¹ Statistics obtained from report issued by Ministry of Home Affairs.

² Act giving discretionary powers to the armed forces applicable to disturbed areas in a state of the whole state, also applicable to a few parts of Assam, Manipur, Nagaland, Arunachal Pradesh as of February 2019.

³ Rabbani A, "Jammu & Kashmir and the Armed Forces Special Powers Act", South Asian Survey, Volume 8, Issue 2, 2011.

⁴ Amnesty International, is a London based UN recognized NGO which is focused on human rights and its violations.

⁵ Navlakha Gautam; Kashmir: When ignorance begets farce and tragedy; 2016; Vol 51, issue number 32; Economic & Political Weekly.

of a rational solution once amity was restored in the valley. The Kashmiris have outrightly been denied of their civil, political and cultural liberties and rights. India, being a signatory to the ICCPR along with ICESCR is under myriad of obligations to ensure the basic minimum rights necessary for developing the faculties but in this case the government is neither taking any measures to resolve their issues neither is their stance improving so at a juncture where the government is outrightly denying them autonomy by way of a referendum to decide the fate of the act and refusing to get into a dialogue to ease their conditions the situation can only be expected to turn volatile and it appears highly unlikely that this morass over there is going to end anytime soon. The unchecked, arbitrary power given to the forces have acted as a catalyst and has ended up making the life of the residents even worse than what used to be before the inception of the act. The ethos of the issue is the government has failed to offer this delicate issue a more personal touch. It is not being claimed arbitrarily rather this is what the residents of the state consider would improve the stance of the government and would bridge the gap between them and their basic rights which they so richly deserve and have been devoid of the same for more than two decades. Without offering this issue a more personal touch and by offering not to speak with an open heart, political battles will be won, unfortunately though the war for a united democracy would be lost.

SITUATION IN THE VALLEY POST 2012

Seven states come under the scope of the Armed Forces (special powers) Act but, in a report published by the wire which provides an insight into the audit done on the state of human rights across the seven states by the Commonwealth Human Rights Initiative, it was discovered in their reports which have been endorsed by the Ministry of Home Affairs that out of the total influx of complaints received the state of Jammu & Kashmir accounted for 49.7%⁶ of it alone. The observations from the above investigation has also pointed out that it's not the central paramilitary forces who can be deemed culpable for such impunity but the defence forces present in the valley. Out of the numerous complaints a staggering 117 complaints were made in context of forceful detention followed by sexual assaults over girls mostly below the age of

⁶ Bhatnagar Gaurav Vivek, Half of human rights violations reported from Jammu & Kashmir, The Wire.

21. Neither is the current state of such complaints known nor has the Ministry of Home Affairs commented on the same. Moving on to the next alarming issue which is use of pellet guns over the protesters. The pellet guns for the first time drew the attention of the United Nations when the Israeli forces used them against the protestors from Palestine. Owing to sanctions from the Security Council and by constant deliberations from France and the United Kingdom they are not in use anymore rather tear gas and rubber bullets are used to ward off the protesters. In India, a whole new scenario has been witnessed as even after repetitive complaints to the Centre and deliberations between USA and India the forces have reiterated that they will continue to use pellets until they do not get their desired ends.⁷ In another article by the Economic & Political Weekly, the union Home Minister was quoted stating that talks between the concerned bodies would be commenced once, “peace and normalcy is restored”⁸, three years have passed since this statement was made but it is indeed farcical enough on the face of the government that it was another of its notorious empty promises. The state legislature which remains empathetic to the use of pellet guns has been compared to the twelfth man in the cricket team as it has got no say in that regard as the discretion lies with New Delhi. The generic excuse which has been cited for unwarranted killings of Kashmiris by the forces has been a mere suspicion of reconnaissance and unarmed gatherings protesting for their civil rights from which, they have been alienated over the decades. The Kashmir Reporter, in a press release after the encounter of Burhan Wani, mentioned that the insurgency operations across the state of which the youth happens to be a considerable part had nothing to do with people of other faith and in one such instance the article went onto quote Wani that the pilgrims of Amarnath need not worry as they had nothing against a group of innocent pilgrims, rather support was extended to them by a small group of militants and few Kashmiri farmers when a bus on its way to Pehelgam, caught fire. The survivors present their own account by stating it was not the forces but the militants and the locals who jeopardised their own lives in order to save theirs. These indications have been more than enough to the Centre that the issue in the state will not be solved by draconian legislations such as the act, currently in full execution in the state

⁷ Press release, 2016, Kashmir Reader.

⁸ Ibid. p.3

premises. Section 3⁹ 10 of the said act, gives the Centre discretion to tag any area as disturbed area, and may by a notification in the official gazette declare it to be one where strong militarisation is required. One may come down to conclude that this farce exponentially grew during the post 2012 period but, the disappearing of thousands of unaccounted civilians started back in 2007. Mass disappearance of thousands of civilians still remains an unsolved issue as neither the government of Jammu & Kashmir or for that matter the agencies which are authorised by the state, is wilfully taking any step towards this issue instead of mounting pressure from several NGOs and International organisations such as the Human Rights Watch along with Amnesty International, nor are the families of the disappeared backed by such resources which would empower them to initiate such an investigation. In a report released by South Asian Human Rights Documentation Centre, approximately 3000 bodies were discovered in between 2009 to 2011 in unmarked graves and so far the state authorities have acted behind closed doors and have continued to refuse to declare the identities of the discovered dead by labelling them as foreign militants.¹¹ Similar acts in gross defiance of International Law and Human Rights have continued since the inception of the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990; have been on the rise and have been ignored by the centre, state, paramilitary forces, local administration, with impunity all in the name of maintaining sovereignty and public decency within the state. The act has not only provided the armed forces with unparalleled power but also fails to leave in the hands of the victims any remedy of sorts to vindicate their basic rights of which they have been devoid of, over the past few decades. Lastly the abysmal & atrocious act of rape against Kashmiri women, used as a “Weapon of War”¹² in the ongoing struggle of counter insurgency across the valley. There have been reports compiled by several scholars many of them associated with International bodies which have reiterated the downtrodden condition of Kashmiri women whose complaints, have never been taken seriously as the security forces are immune to prosecution under the

⁹ Governor or the central government has absolute discretion to take such actions which they deem fit is necessary to prevent terrorist activities, activities trying to undermine the sovereignty, causing to insult the national flag etc.

¹⁰ Armed Forces (Jammu & Kashmir) Special Powers Act, 1990.

¹¹ Ignoring the Disappeared of Kashmir with Impunity, report by South Asian Human Rights Documentation Centre,

Vol. XLVII of 45, Economic & Political Weekly, 2012.

¹² Report released by HUMAN RIGHTS WATCH, 1996; giving a detailed account of how Kashmiri women have been the victims of rape committed by the armed forces to showcase their might over the Kashmiri populace in order to intimidate them and on mere suspect that they are providing refuge to the insurgents.

provisions of the draconian legislation. As stated by professor William Baker, during the 52nd summit of United Nations Commission on Human Rights¹³, rapes in the valley does not have any psychological or deviant behaviour attached with it but, it's a deliberate measure openly adopted by the military forces garrisoned over there to protect the inhabitants of the valley, to intimidate them, belittle them, and as a tool for extraction of information the forces consider valuable.¹⁴ The farcical state of Human Rights violations is indeed a slap on the face of the government of India, as they have unequivocally voiced their concerns for the Kashmiris but have continued to portray themselves as a redressal agency which more likely appears to be a spent force.

A WALK THROUGH THE PROVISIONS OF THE ACT

The act¹⁵ in itself is a nightmare for the Kashmiris as it gives the security forces a carte blanche to execute their powers as per their discretion. They are free to do as they please without being answerable to a superior body functioning under the state from whom these security forces derive their powers. As a result of such discretion accorded to the myriad of troops spread over the valley, the inhabitants have been prima facie robbed of their civil and political liberties. Section 4(a), of the said act, gives any commissioned officer or any other authorised personnel power to use such force which may eventually cause death, if such person employing force has got an apprehension pertaining to a possible contravention of law and order in force in the disputed area. Another severely abused provisions under the act is dealt with under section 5 of the act which states, "every person making a search under this act shall have the power to break open the lock of any door, almirah, safe, box, cupboard, drawer, package or other thing if the key is withheld".¹⁶ Various national and local newspapers in their press releases have thrown light on the fact as to how this section has been and is continued to be used arbitrarily by the forces to encroach the privacy of the locals residing in the so called disturbed areas where the Act is in force. The Act in discussion, fails to provide a concrete manifestation of the phrase, "Disturbed Area", enumerated by Section. 3 of the Act. Declaring any area under

¹³Schmitt Michel N & Arimatsu Louise, Yearbook of International Law, Volume 14, 2014.

¹⁴Ranjan, Amit; A Gender Critique on AFSPA: security for whom?, 2015.

¹⁵Ibid.

¹⁶Section 5, Armed Forces (Jammu & Kashmir) Special Powers Act, 1990.

the state, as a disturbed area, is the discretion of the central government along with the governor of the state, a prerogative which has come to be used arbitrarily in most of the cases. This not only violates their civil liberties but also contradicts the position accorded to any state to deal with issues of “public order”, in the state list¹⁷. Furthermore, section 4(a) of the said Act empowers even a non-commissioned officer to order his forces to use force and if necessary, cause death of any individual for preservation of public order and, as per a report by Human Rights Watch, such apprehensions are mostly actuated by malice.¹⁸ Section 7 of the Act, puts a wet blanket over the actions of the forces as it expressly mentions there can be no prosecution initiated against anyone associated with the force in respect of any action, done in the exercise of the powers conferred by the Act.

A WALK WITH THE RESIDENTS

As per an online survey concluded exclusively for the purpose of getting the views in context of this research paper, 9 out of 10 people suggested there is a definite scope of the government of India improving its stance on the situation in the valley. The data obtained showcases an abhorrence towards the forces not because they have been stationed there which have robbed them of their fundamental freedoms and rights but because of arbitrary use of pellet guns. Even for that matter scientific research has indicated that tear gas shells are less harmful and twice as effective as pellets which have ended up dooming the future of a myriad of youths who are just voicing their concerns to the central government as to what needs to be done for restoring normalcy in the valley. The feelings interpreted from the answers provided in the survey forms at no instance exhibit anti national comments or even something latent which would endanger the sovereignty of the state. The survey has been of immense utility as it has provided first hand data which in its entirety contradicts as to what has been portrayed by the media so far which, has been successful in painting the canvas of the valley as anti-national. The youths do want to cooperate, but the government is misled by the fallacious claims. All what is being asked unanimously by the survey takers, all of them residents of the valley for at least 20 years,

¹⁷ Seventh schedule, Constitution of India.

¹⁸ Press Release, Human Rights Watch, 12th July 2015.

is that the government applies a more personal touch to this fragile issue and stop treating them as enemy aliens.

PELLETS & UNMARKED GRAVES

Security forces in Jammu & Kashmir, deployed the use of pellet guns post 2010, when unrest grew exponentially across the state. The use of pellet guns is itself a gross inhuman act as there is no control over its trajectory and once released it bursts in multidirectional projections, causing irreversible & grievous injuries to anyone intersecting its trajectory. Pellet guns gained notoriety worldwide for the first time when, the Israeli forces used it against the Palestinian protestors to ward them off. Owing to subsequent criticism and social sanctions, Israel banned the use of pellet guns by its forces however, India is yet to take such a step and after several reports it appears highly unlikely that any such prospect is even being considered by the government. As per the credible sources of Amnesty International¹⁹, it has appeared on the surface that somewhere between June 2016 to October 2018, approximately 6500 people have been severely injured by pellets out of which approximately 800 have lost their eyesight either partially or completely²⁰. A doctor from a government hospital in Srinagar expressed his concerns that the forces could easily target the mob by shooting at their feet or using teargas shells but, the devastating injuries have pointed towards the unscrupulous methods of the forces by deliberately targeting for sensitive areas of the human body such as the face, eyes, forehead and even the most sensitive targeted area being the lower abdominal area, which has eventually led to the death of several youths. The use of pellet shotguns is not only against principles of human integrity but also directly contradicts the UN code of conduct for law enforcement officials. Hence, use of pellet shotguns to intimidate the protestors is simply not in consonance because of its inherently dangerous nature and its omnipotent nature to cause death. However, the CRPF issued a statement in May 2018, stating that they would continue to use the pellet shotguns and they cannot possibly do anything about the injuries caused by the same. Amnesty International, with an aspiration to unite the country, to raise their voices against the gross acts by the forces began a benevolent campaign through postcards back in 2016. The sole end of

¹⁹ Press release, Amnesty International, 2018.

²⁰ Losing sight in Kashmir: the impact of pellet firing shotguns

this campaign is to mount pressure on the government to find an alternative to the pellet shotguns and ban them altogether. However, the most this campaign could do was causing a ripple in an ocean and their futile efforts went down in no time owing to political propagandas across the nation. Instead of making use of the provision of preventive detention, the forces, ex cathedra are going on assaulting the people all over the valley. Another prominent issue which surfaced back in 2009 was an array of unmarked graves filled with approximately 4000²¹ bodies which the state claimed were of foreign militants, but the agencies and the natives feared it's their beloved who disappeared mysteriously. The residents of the state are in an oblivious state as to seek redress as according to the credible sources of Amnesty International, those who initiated or even tries to initiate investigation in order to find out about the whereabouts of their loved once, were harassed, thrashed and later several cases did surface up where it was claimed by the victims that they were molested by the inquiry officials for trying to initiate such an inquiry²². The authorities by resorting to the like acts are not only robbing the people of their basic liberties but the Centre, is also violating a number of International laws & conventions²³. The direction in which the things controlled by the forces are heading within the state exponential unrest is the only pliable thing to be expected in future.

A REVIEW OF PROVISIONS

If one reasonably takes into account, the instances of human rights violations in the state, the only feasible solution to this after a rigorous scrutiny points towards a rigid committee allowed to independently function within the state for a reasonable timespan in order to come up with a viable plan for restoring normalcy and peace in the unrest prone state. As per the data from the archives of the state human rights bodies, clashes continued to break out in between June 2016 and March 2018 and the figures point out that approximately 105 civilians were killed

²¹ 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, 2014.

²² Amnesty International; Denied: Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir, 2015.

²³ India, is a signatory of International Convention for Protection of Persons from Enforced Disappearance 2006. Though there might not be any concrete manifestation that the state is culpable for such disappearance but even the active denial to the family and friends in matters concerning the whereabouts of the disappeared is in gross violation of the provisions of the said convention which India has ratified in 2007.

during those protests. There have been various instances across the globe from time to time where the forces were left with no other alternative than using force such force was calculated enough not to cause grievous harm to the mob. Herein the force used has been disproportionate not once but perpetually over the years which, has witnessed a sharp rise post 2016²⁴. If one focusses on section 7 of the Act, it gives a carte blanche to the forces as it expressly states that there cannot be any prosecution if any member of the force is doing something in furtherance of the Act. For that matter, states are under a string of obligations to investigate into such gross violation of fundamental freedoms and human rights. Though as per the reports of the state human rights commission, there were a few initiations for such investigation the commissions remain oblivious over the current state of such investigation and are barred from being informed under an issue concerning national security. According to the sources which were successful in extracting several post mortem reports of the unidentified and defiled bodies from the unmarked graves it was discovered, approximately 67%²⁵ of the deceased, died out of severe wounds resulting out of pellet injuries.

THE AFTERMATH

India has continued to gain fame from across the globe for being signatories to most of the conventions and also has ratified them with due effect, but the glaring issue of the landlocked state has pointed out serious flaws in its execution. India being a state party of a number of conventions, one being the International Convention on Civil and Political Rights, binds India to ensure legality in matters concerning the liberty along with security accorded to the citizens²⁶ and liberty, within the meaning of the convention, includes in its sphere right not to be detained or arrested in an arbitrary manner²⁷. Though the area has been prone to severe demagoguery, political propagandas it would be outrightly gullible if one were to believe it's an impossible puzzle to solve. The historical events strongly point out towards a greater autonomy which must be accorded to the citizens of the state and Article 370²⁸, should not just be a dead letter

²⁴ Annual Human Rights Review, State Human Rights Commission, 2017.

²⁵ Ibid.

²⁶ Article 15(1), International Convention on Civil and Political Rights.

²⁷ Article 9(1), International Convention on Civil and Political Rights.

²⁸ Initially a temporary article which grants special autonomy to the state in certain matters.

rather, the inhabitants of the valley should be allowed to develop the faculties in consonance of the said article of the Indian Constitution. This issue is now more urgent than ever, and the centre must pay heed to the ongoing hue and cry and act on it. Not only should the Kashmiris be entitled to lead a respectable and a dignified life as mentioned under Article 21, of Constitution of India, there should be numerous and effective amendments in the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990, one such amendment being repealing of Section 7 of the Act which provides a carte blanche to the soldiers. The government should entertain suggestions regarding setting up of an unbiased and efficient women's panel which would deal with the numerous instances of sexual assault against the women in the state. Finally, the government should provide them with economic security as a consequence of the perpetual morass in the state the collective rights of the residents are also being trifled with. Considering the seriousness of the issue its time that the government should take serious measures to restore amity back in the valley and allow the citizens of the state some autonomy, as the geographical diversity of the area requires them to enjoy their basic minimum rights. Keeping political propaganda aside, the centre must take immediate steps for, in winning the political battle, the war for Kashmir would be lost which would be an irreparable loss to the union.

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