

COMPARING AFSPA WITH Cr.P.C

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ABSTRACT

This paper is an attempt to capture the crime controlling activities in Jammu and Kashmir and comparing them to the situation in the rest of India, reaching a conclusion about whether such official activities are justified or not.

“Kashmir mein upar khuda hai, aur neeche fauj” (“In Kashmir, there is God at the top, and the army at the ground level”). This quote from the movie ‘Haider’ⁱ perfectly encapsulates the arbitrary and unchecked power that the army enjoys in the valley under the Armed Forces (Special Powers) Act, 1990 (hereinafter referred to as the “AFSPA”). Almost three decades later, the AFSPA continues to be a haunting statute for Kashmiris who have experienced brutalities such as the Patrixhal encounter and the mass rapes in Kunan and Poshpora, without getting any justice due to the existence of the very same statute. This paper aims at drawing a parallel between the AFSPA in Kashmir and the Code of Criminal Procedure (hereinafter referred to as the “Cr.P.C.”) in India in order to determine how far the former statute derogates from the latter, and to ascertain whether such derogation can be satisfactorily justified. The first part of the essay will address various instances of human rights violation which have been justified and protected by the AFSPA, and the opinions of several activists, lawyers, and Kashmiris on the same. The second half will view the same instances through the lens of the Indian Cr.P.C. to test whether the same level of discretion is given to investigating authorities. Later, the paper will examine particular provisions of both statutes in order to compare and contrast similarities and differences. Lastly, combining case studies, scholarly opinions, and comparisons with the Cr.P.C., a conclusion will be drawn stating whether having an Act like the AFSPA has done more harm than good in the valley.

CASE STUDY ONE: PATRIBHAL FAKE ENCOUNTER

The Patribhal fake encounter took place on 20th March, 2000. It all started when 36 Sikh men were shot dead in the village of Anantag, Kashmir. The Senior Superintendent of Police, Farooq Khan claimed that the deceased were killed by “foreign militants” who had in turn been killed by the Army. It was later found out that a few days prior to the massacre, a few men were abducted from a neighboring village and then identified as the alleged foreign militants. This incident was later termed as ‘The Patribhal Fake Encounter’, and when people came out for a peaceful protest, they were fired upon by the CRPF and the SOG. In total, 49 civilians were killed, but there was no compensation given to any of their families. Furthermore, DNA samples were tampered with by the authorities, and when the case was later handed over to the CBI, it was established that “the killed persons sustained about 98 per cent burn injuries in addition to the bullet injuries indicating use of excessive and unwarranted force. It is impossible for the killed persons to have suffered such extensive burn injuries in a genuine encounter. The encounter was stage managed with a view to obliterate the identity of the killed persons with an oblique motive.”

The CBI filed a charge sheet stating the above-mentioned findings, and the army moved the Supreme Court which passed an order allowing them to choose between a court martial and a criminal court for the purpose of trial. The army, not surprisingly opted for a court martial; essentially, they were judges in their own case, using AFSPA to grant immunity to themselves. It has been two decades, and this matter is still unresolved, a testimony to the fact that the army enjoys insurmountable power and privilege in disturbed areas.ⁱⁱ

CASE STUDY TWO: KUNAN-POSHPORA MASS RAPE

On the 23rd of February, 1991, an alleged mass rape by the army took place in the villages of Kunan and Poshpora. As many as 150 women, including some children were brutally raped. In a documentary entitled ‘Ocean of Tears’ directed by Billal A. Janⁱⁱⁱ, some of the victims explain how they had to have their uterus’ removed because they suffered internal bleeding after being raped. Since this incident, several official reports have been drafted by various committees such as the Justice Verma Committee Report (2013)^{iv}. This report categorically stated that the

army gets away even after committing acts of sexual violence simply because the same are being legitimized by the AFSPA. The Committee also stated that “Sexual violence against women by members of the armed forces or uniformed personnel must be brought under the purview of ordinary criminal law”. Adding further, “we notice that impunity for systematic or isolated sexual violence in the process of Internal Security duties is being legitimized by the Armed Forces Special Powers Act,” the committee recommended a review of the AFSPA.^v Even after the Criminal Law (Amendment) Act, 2013 has been passed, and S.376(2)(c) which is a category of aggravated rape committed by an official has been added to the Indian Penal Code, the army is still not even remotely accountable, especially in military courts.^{vi} According to Ayesha Pervez, a prominent human rights researcher, “Impunity serves as substratum to the invincible military occupation of Kashmir”. She opines that such violence is “neither incidental, nor is it a question of sex”, rather it is a “systemic military practice”.^{vii} I completely agree with this viewpoint, as it is evident that an Act of this nature has been giving the army a freehand to commit blatant atrocities riding on the knowledge that they will receive immunity because of their official position.

WOULD THE PATRIBHAL FAKE ENCOUNTER HAVE BEEN POSSIBLE IN A NON-DISTURBED AREA?^{viii}

Most of India is governed by the Cr.P.C., which makes accountability and documentation compulsory at almost every level of investigation. In cases of arrest, as per S.46(3), police officers are not permitted to cause death unless the person being arrested is suspected of having caused the death of another. Furthermore, there are hierarchies established within the Code which make instances of police brutality and pre-planned killings of this nature extremely difficult. Reasons for arrest have been categorically stated under S.41 so that the police cannot misuse their powers and randomly arrest persons as was done by the army in the Patribhal fake encounter. S.41(ba) as inserted by the Act 5 of 2009 categorically states that information related to a cognizable offence must be credible. Once the arrest has been made, the accused is still entitled to certain rights enshrined both in the Cr.P.C. as well as in the Constitution. These include, the right against self-incrimination, the right to consult a lawyer, right to medical examination, right to be informed the grounds of arrest and the right to be informed of bail.

Several judgements such as *D.K. Basu v. State of West Bengal*^{ix} and *Joginder Kumar v. State of U.P.*^x have reinforced the fact that the pendulum has shifted in favour of citizens and that the exercise of powers is incidental to the rights of personal liberty of the Constitution. The police officer must be able to justify the arrest apart from his or her power to do so. Since all of these measures are in place, fake encounters in non-disturbed areas are the exception rather than the norm. Even though cases like that of *Sohrabuddin Sheikh*^{xi}- an underworld member who was killed in a fake encounter on the 23rd of November, 2005 while travelling from Hyderabad to Sangli exist, they are much less in number than fake encounters in Kashmir. The number of fake encounters reported in Jammu and Kashmir is only 22, while the ground reality is that on an average, 5 persons go missing every day. There is a large percentage of these disappearances which the United Nations Convention Against Torture has classified as “forced disappearances”^{xii}; a device used by armed forces to prevent people from becoming militants. Such disappearances have led to the coinage of a term called “half-widow” used to describe women whose husbands have been forcefully taken as a result of the conflict. No remedy other than protests and ineffective missing persons reports exists for these half widows.^{xiii} Contrasting this with the case of *Nilabati Behera v. State of Orissa*^{xiv}, wherein the victim of custodial torture leading to death was the sole breadwinner as a result of which his mother was given compensation, it is evident that the Cr.P.C. has started to lean towards the due process model, keeping in mind the victims as well as the accused in matters of law enforcement whereas the AFSPA is modeled entirely on the crime control paradigm.

WOULD RAPES SUCH AS THE ONES IN KUNAN-POSHPORA HAPPEN IN NON-DISTURBED AREAS?

According to S.51 (2) of the Cr.P.C., search of a female person must be made by a female officer with “strict regard to decency”. Cases of police misusing their authority such as the Mathura rape case have led to a plethora of amendments to safeguard women in pursuit of justice. S.46 (4) stipulates that women cannot be arrested after sunset and before sunrise except under exceptional circumstances and by female police officers. In an exceptional circumstance, the female police officer must mandatorily obtain permission from the Judicial Magistrate of the first class. These added levels of procedure protect women from licentious members of the

police force and ensure that custodial rapes do not occur. Due to the existence of such provisions and increasing awareness about sexual offences, I believe that the amendments made to the Cr.P.C. have proved to be beneficial to women and that mass rape of the kind that occurred in Kunan-Poshpora would not be possible at all because even during search and seizure operations, the police have a high degree of accountability and the procedures themselves have a tendency to give women preferential treatment keeping in mind past instances of police brutality against women.

COMPARING PROVISIONS

AFSPA S. 4(a) v. Cr.P.C. S.129

S.4(a) of the AFSPA stipulates any commissioned, non-commissioned or warrant officer or anyone of equivalent rank in the armed forces may, if he is of the opinion that such an act is necessary for the maintenance of public order, give due warning as per what he sees for and then fire upon or use other kinds of force even of the nature that causes death to any person who is acting in opposition to any law which prohibits the assembly of more than five people or carrying weapons or things capable of being used as weapons. The wording of this section clearly gives a very wide ambit of discretion to the army officials.^{xv} The phrase, “otherwise use force” has not been defined anywhere in the section or the act, which is indicative of the fact that there is no balance between the perceived threat and the official measures to curb it. The form of warning has also not been specified, which means that an army official can arbitrarily shoot or use force upon people and even kill them.

S.129 of the Cr.P.C. on the other hand, contemplates dispersal of an assembly using civil force. This section stipulates that a police officer may disperse an unlawful assembly or an assembly of more than give people likely to cause disturbance to public peace by first commanding them to do so and only if they demonstrate that they are not likely to comply with such a command, the police may use force to disperse them. This provision has also been misused in cases like the Thoothukudi massacre^{xvi} in which 13 anti-Sterlite protesters were killed by the police personnel. Following this incident, the Madras High Court ordered that FIRs be registered against the police officers and members of civil administration who were involved. The CBI

has booked some of these public servants under S.166 and 167 of the Indian Penal Code which pertain to public servants disobeying law with intent to cause injury and public servant framing an incorrect document with intent to cause injury.^{xvii} Thus, even though the possibility of misuse and arbitrary exercise of force exists under S.129 of the Cr.P.C., the level of accountability and repercussions are far more serious than in the case of S.4 of the AFSPA. Such kind of blatant human rights violations are quickly condemned in the rest of India and cognizance is taken almost immediately, unlike the case of Kashmir where public servants and members of administration are the ones who bury evidence and prevent justice from being served because of the unchecked immunity that they enjoy.

AFSPA S.4(d)^{xviii} v. Cr.P.C. S.47, 52, 97, and 100

S.4(d) of the AFSPA allows for members of the armed forces enter any premises for the purpose of search and seizure or for the purpose of arresting an individual reasonably suspected of committing a cognizable offence or to recover a person believed to be wrongfully restrained or stolen property or arms to be unlawfully kept. The army officials are permitted, under this section to use as much force as necessary in order to fulfil the above-mentioned purposes and seize any property or weapons. Search of a place in which the accused person is thought to be in, as per S.47 of the Cr.P.C. has to be done by first demanding ingress with an appropriate arrest warrant and only if such ingress is denied to the police officer, he can break open a window or a door and obtain ingress. It is specified in sub clause (2) that demand of admittance must be duly made before the police officer resorts to breaking in. Unlike in the case of S.4(d) of the AFSPA wherein officials are not directed to deliver weapons to the court, S.52 of the Cr.P.C. clearly stipulates that in case offensive weaponry is obtained from the person sought to be arrested, the same must be delivered to the relevant court whereas S.6 of the AFSPA stipulates that seized property and arrested persons be handed over to the police. This means that the same level of neutrality does not exist as both the army and the police work for the executive wing. As far as recovering persons thought to be held in wrongful confinement is concerned, as per S.97 of the Cr.P.C., search for such a person can only happen after a Magistrate issues a search warrant and if upon the issuing of such a warrant, it is found that a person was in fact wrongfully confined, that person must be produced before the same

Magistrate. In S.4(d) of the AFSPA, there is no such procedural hierarchy or check on the army's actions.

Under S.100 of the Cr.P.C., in case the police need to search a closed place, they must show the owner or the person in charge the search warrant and then only demand free ingress. Sub clause (4) of the same section is an attempt to prevent the police from planting evidence. It stipulates that two or more independent witnesses must be present during the search and the subsequent sub clause provides that a list of all the seized items will be made and signed by the aforementioned witnesses. Thereafter, as per sub clause (6), the occupant who will be permitted to be present during the search will receive a copy of the list of items seized. Such a procedure is completely absent in S.4 (d) of the AFSPA, which is probably why the army was able to commit mass rape in the guise of search and seizure in Kunan and Poshpora.

AFSPA S.7^{xix}

After the killing of three civilians in a firing by the army in Shopian, an FIR was filed against Major Aditya Kumar of 10 Garwhal Rifles under S.302 (murder) and S.307 (attempt to murder) of the Ranbir Penal Code. The army claimed to have acted in self-defence against a violent mob. The accused's father, Colonel Karamveer Singh consequently filed an application seeking the quashing of this FIR. In this case, the SC stated that "After all, it is a case of an Army officer, not an ordinary criminal," and that as per S.7 of the AFSPA, previous sanction of the Central Government should have been obtained before legal proceedings were initiated.^{xx}This proves that even members of the judiciary believe that a "disturbed area" is sufficient justification for brutality on the part of the army and that even if they overstep their powers, they cannot be treated like ordinary citizens at the stage of trial.

CONCLUSION: IS THE AFSPA A "NECESSARY" EVIL?

S.3 of the AFSPA^{xxi} gives the Governor or the Central Government the power to declare an area of disturbed such that the presence of the army is required to aid the civil law enforcing agencies in order to prevent overthrowing of the government and activities promoting cessation

from the territory of India or those which compromise the sovereignty and territorial integrity of India. This is further reinforced by Article 370 of the Constitution^{xxii} which stipulates that except for matters pertaining to defence, finance, and foreign affairs, the Parliament needs the State Government's approval before any legislation is passed. The compendium of laws governing ownership of property, citizenship and even fundamental rights vary in J&K. This is a highly controversial article, which, in my opinion must be repealed. This is because such an article allows the State Government in Kashmir to allow a statute like the AFSPA to prevail for decades in spite of backlash from several activists within the State, all over the country as well as from foreign countries on account of human rights violations. Furthermore, it is contradictory to state in the AFSPA that the criteria for declaring an area to be disturbed is the compromising of territorial integrity when the Constitution itself has separated Kashmir from the rest of India through Art.370. I believe that the amount and manner in which the AFSPA derogates from the Cr.P.C. is far too much and violative of the basic fundamental rights of the accused as well as victims. It is ironic that an act which aims to control a disturbed area in order to maintain public peace ends up perpetuating and aggravating the root causes of disturbance. *As Haider puts it, "Pura Kashmir ek qaidkhana hai" (all of Kashmir is a prison).*^{xxiii}

ENDNOTES

ⁱ *Haider*. Directed by Vishal Bharadwaj. Performed by Shahid Kapoor and Tabu. Haider. Accessed April 20, 2019. <https://www.netflix.com/watch/70303432?trackId=13752289&tctx=0,0,6efbef79-8d72-4a69-a87b-e13e5baf18db-21870149>

ⁱⁱ "How Army Misuses Structural Immunity: 18 Years After Chattisinghpura Massacre, Pathribal Fake Encounter, Brakpora Shootings." NewsClick. Last modified March 24, 2018. <https://www.newsclick.in/how-army-misuses-structural-immunity-18-years-after-chattisinghpura-massacre-pathribal-fake>.

ⁱⁱⁱ "Ocean of Tears (2012)." *YouTube*. March 16, 2015. <https://www.youtube.com/watch?v=a2dmS-ASVzo>.

^{iv} Available at

<https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>

^v "When It Comes to Rape by Men in Uniform, the Media Forgets the Victim is Also Part of the 'Nation'." *The Wire*. Accessed April 22, 2019. <https://thewire.in/culture/rape-security-forces-afspa>.

^{vi} "26 Years After Kunan Poshpora, Army Still Enjoys Immunity for Sexual Violence." *The Wire*. Accessed April 22, 2019. <https://thewire.in/rights/26-years-after-kunan-poshpura-army-still-enjoys-immunity-for-sexual-violence>.

^{vii} Pervez, Ayesha. "Politics of Rape in Kashmir." *The Hindu*. Last modified February 19, 2015. <https://www.thehindu.com/opinion/lead/lead-article-politics-of-rape-in-kashmir/article6909603.ece>.

^{viii} An area where the AFSPA is not in force.

^{ix} (1997) 1 SCC 416

^x UP 1994 SCC (4) 260

^{xi} "Sohrabuddin Fake Encounter Case: A Timeline of Events." The Wire. Accessed April 24, 2019.

<https://thewire.in/law/sohrabuddin-fake-encounter-case-timeline-events>.

^{xii} Association of Parents of Disappeared Persons |. Accessed April 24, 2019. <http://apdpkashmir.com>.

^{xiii} Qutab, Souidiya. "Women Victims of Armed Conflict: Half-widows in Jammu and Kashmir." *Sociological Bulletin* 61, no. 2 (2012): 255-78. <http://www.jstor.org/stable/23620967>.

^{xiv} AIR1993SC1960

^{xv} Noorani, A. G. *The Kashmir Dispute, 1947-2012*. New York: Oxford University Press, USA, 2014.

^{xvi} "Thoothukudi Firing Victims Killed by Shots to Head, Chest; Half from Behind: Postmortem Reports." The New Indian Express. Last modified December 2018. <http://www.newindianexpress.com/states/tamil-nadu/2018/dec/22/thoothukudi-firing-victims-killed-by-shots-to-head-chest-half-from-behind-postmortem-reports-1915164.html>.

^{xvii} Correspondent, Legal. "Won't Interfere with HC Order for CBI Probe into Thoothukudi Firing, Says SC." The Hindu. Last modified February 19, 2019. <https://www.thehindu.com/news/national/tamil-nadu/wont-interfere-with-hc-order-for-cbi-probe-into-thoothukudi-firing-says-sc/article26307032.ece>.

^{xviii} Ministry of Home Affairs | GoI. Accessed April 24, 2019.

https://mha.gov.in/sites/default/files/The%20Armed%20Forces%20%28Jammu%20and%20Kashmir%29%20Special%20Powers%20Act%2C%201990_0.pdf.

^{xix} *Ibid.*

^{xx} "'He's An Army Officer, Not Criminal,' Says Supreme Court, Puts Shopian Probe On Hold." NDTV.com. Last modified March 5, 2018. <https://www.ndtv.com/india-news/shopian-firing-investigation-against-army-officer-put-on-hold-by-supreme-court-till-april-24-1819720>.

^{xxi} Ministry of Home Affairs | GoI. Accessed April 24, 2019.

https://mha.gov.in/sites/default/files/The%20Armed%20Forces%20%28Jammu%20and%20Kashmir%29%20Special%20Powers%20Act%2C%201990_0.pdf.

^{xxii} Mustafa, Faizan. "Understanding Articles 370, 35A." The Indian Express. Last modified March 5, 2019.

<https://indianexpress.com/article/explained/understanding-articles-370-35a-jammu-kashmir-indian-constitution-5610996/>.

^{xxiii} *Haider*. Directed by Vishal Bharadwaj. Performed by Shahid Kapoor and Tabu. Haider. Accessed April 20, 2019. <https://www.netflix.com/watch/70303432?trackId=13752289&tctx=0,0,6efbef79-8d72-4a69-a87b-e13e5baf18db-21870149>