Extraordinary Military Powers and Right to Self Determination in Kashmir

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Abstract

This thesis examines the implications of the operation of the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 (“Act”) on Kashmir from human rights perspective. It draws a comparison between the Act and the existing penal legislations in India. It proposes that the Act should be repealed and actions of the armed forces should be governed by the already existing penal legislations. It suggests amendment of similar state and central legislations conferring immunity to the armed forces. The precondition of approval of the Central Government for instituting a legal proceeding should be removed. It proposes constitution of special grievance cells at district levels to adjudicate cases against the armed forces before being referred to the higher courts. The thesis urges the Indian Government to approach the issue of Kashmir following principles of Ahimsa (“non-violence”) and Satyagraha (“insistence on truth”) adopted by Mahatma Gandhi during the Indian independence struggle.
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Chapter 1
Introduction

My thesis ventures into the unanswered questions regarding the justification for continued use of extraordinary military powers by the Indian government in the state of Jammu & Kashmir since 1990. On 5th July 1990, the Government of India invoked Armed Forces (Jammu & Kashmir) Special Powers Act, 1990 (“Act”) in order to fight growing insurgency as well as cross border militancy from Pakistan. The Act was originally brought into force in the North Eastern states of India in 1958 as Armed Forces (Special Powers) Act 1958 to deal with insurgency situation there.

This Act has been in operation in Jammu & Kashmir for over two decades conferring widespread extraordinary powers to the military in the state over the civilians. Rampant and unaccountable use of the powers under the Act has resulted in numerous cases of human rights abuse of the civilians in the hands of the armed forces. There are some important questions that arise when analyzing the situation in Jammu & Kashmir. For how long can these special legislations be allowed to supersede the inherent right to live without any fears?

In this thesis, I will try to analyze the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 in the background of rampant human rights abuses against civilians by the armed forces in Jammu & Kashmir. I will draw a comparison between the provisions of the Act and the existing penal legislations operating in Jammu & Kashmir as well as international legislations. My thesis will explore the Gandhian approach of fight for independence and whether that approach can still
stand the test of time against insurgents, cross border militants as well as the state’s armed forces in the ‘disturbed areas’ of India.

It proposes that the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 should be repealed in Kashmir and acts of the members of the armed forces should come under the ambit of the already existing penal legislations. At the same time it is imperative to amend the provisions of the existing legislations that confer immunity to the armed forces in cases of misuse or abuse of powers. The requirement of approval of the Central Government before instituting a legal proceeding against the armed forces should be done away with. Further, there is a need to constitute special grievance cells at district levels to adjudicate such cases against the armed forces before they are referred to the higher courts.

1.1 Outline

The first chapter of the thesis includes an introduction to the thesis and explains the situation in Kashmir with respect to human rights under the operation of Armed Forces (Jammu & Kashmir) Special Powers Act 1990 (“Act”). The second chapter presents the historical background of the Act and its invocation in Jammu and Kashmir in 1990. Chapter three lays provides a critical analysis of the provisions of the Act. Chapter four reviews the extent of violence and human rights abuses caused by the armed forces under the unfettered powers of the Act. Chapter five lays down a comparative analysis of the Act against the existing legislations as well as the international conventions India is signatory to. Chapter six studies the past interventions initiated by the Indian government as well as the Supreme Court of India’s judgment with respect to the
validity of the Act\(^1\). Chapter seven attempts to find a possible solution by comparing the existing situation in Kashmir to the Indian independence movement against the British government and analyzes the role of Mahatma Gandhi in the independence movement through his principles of non violence and self determination. It endeavors to find feasible and peaceful means of resolution of the social uprising in Kashmir by taking lessons from the political strategies adopted by Mahatma Gandhi during Indian independence. Chapter eight explores the role of judiciary in addressing the issue by ensuring accountability against the members of armed forces responsible for such violations.

\(^1\) The terms ‘Central Government’ and ‘State Government’ are used in India in the same context as ‘Federal Government’ and ‘Provincial Government’ in countries like Canada.

2.1 Origin

On May 22, 1958, the *Armed Forces (Assam and Manipur) Special Powers Ordinance* was invoked by the North Eastern state of Assam to tackle the insurgent movement brewing in the region to demand an independent state for the ‘Naga tribe’ out of Assam. This ordinance was later adopted by the Indian parliament as a central legislation on September 11, 1958 to deal with the anti-government uprising which had spread to other North Eastern states of India. The North Eastern states that originally came under the operation of the act included Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura.

In July 1990, this Act of 1958 was extended to the Kashmir region by introduction of *The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990*.4

The *Armed Forces (Jammu and Kashmir) Special Powers Act of 1990* (AFSPA) has been in force in Kashmir for more than two decades now. The act gives absolute powers to the armed

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3 Ibid.
forces to arrest, search and shoot, even to the extent of causing death based on a mere suspicion of commission of certain offences.\textsuperscript{5} With the authority to arrest without warrant, blatant human rights violations have become the order of the day.\textsuperscript{6}

### 2.2 History

The operation of the Armed Forces Act in Kashmir and the consequent social uprising amongst the people can be directly traced back to the historical events that took place at the time of Indian independence and eventual partition into two separate states in 1947, India and Pakistan. The Kashmir conflict is a territorial dispute between India and Pakistan over Kashmir region. The two states have fought at least three wars in the past over this territorial dispute. India claims the entire state of Jammu and Kashmir and administers approximately 43\% of the region. Pakistan administers control on over 37\% of the region and calls it ‘Azad Kashmir’.\textsuperscript{7} There is also a part of Kashmir region, called Aksai Chin, which was acquired by China during the 1963 war. China states that Aksai Chin is a part of China and does not recognize the addition of Aksai Chin to the Kashmir region. Regardless of the territorial claims of India, Pakistan and China, there are various Kashmiri independence groups within the state of Jammu & Kashmir that believe Kashmir should be independent of both India and Pakistan.

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\textsuperscript{5} Armed Forces (Jammu and Kashmir) Special Powers Act 1990, S. 4(a), 4(b), 4(c) and 4(d).
\textsuperscript{8} Atiq Durrani, "Pak-India Dialogue: Single-Point-Agenda: Kashmir" (4 February 2013) PKKH.
Since the 18\textsuperscript{th} century, Kashmir has been ruled by various dynasties, starting from the Pashtun Durrani Empire conquered by the Sikh ruler named Ranjit Singh in 1819. This was followed by the Anglo–Sikh wars of 1845 – 46 which brought the control of Kashmir under the East India Company. The region was eventually sold to the Raja of Jammu, Gulab Singh, under the Treaty of Amritsar. This brought Kashmir, a Muslim dominated region within the administration of Hindu Maharajas.

2.2.1 Instrument of Accession to India\textsuperscript{10}

During the time of partition of British India into two dominions, India and Pakistan in 1947, there also existed 565 princely states that were not part of the British rule directly but were tied to it in a system of subsidiary alliances. As these were not a part of the British India, the British government could not decide as to which dominion these princely states should annex to between India and Pakistan or whether to stay independent. Under the Indian Independence Act 1947\textsuperscript{11}, the suzerainty of the British government over the princely states would get terminated effective 15 August 1947 after which the princely states would become completely independent unless the rulers of the princely states decide to be a part of either of the dominions, India or Pakistan. Hence an instrument of accession was designed to be signed by the Government of India and the rulers of each of the princely states who were willing to be a part of India. Before partition, the

\textsuperscript{10} Instrument of Accession executed by Maharajah Hari Singh on October 26, 1947, online: \url{http://www.jammu-kashmir.com/documents/instrument_of_accession.html}.

\textsuperscript{11} Indian Independence Act 1947 (10 & 11 Geo 6 c. 30).
princely states had been dependent on India for matters related to defense, and finance. Understandably, many of these princely states decided to be a part of India after partition.\textsuperscript{12}

Initially, after the partition, the Maharaja of Kashmir wanted to constitute a separate state of Kashmir. However, Pakistan expected Kashmir to be annexed to Pakistan as the majority population in the state was of Muslims. Fearing that the Hindu Maharaja may decide instead to annex with India, Pakistan resorted to aggressive measures of conducting armed invasions to acquire control over the regions. This led to grave communal violence in the region where minorities were targeted.\textsuperscript{13} The Maharaja initially fought back, but later requested India’s assistance which agreed on the condition that ruler accedes to India.\textsuperscript{14} The Maharaja of Kashmir, Raja Hari Singh, signed the Instrument of Accession to be a part of India on 25 October 1947.\textsuperscript{15} That was accepted by the government of India on 27 October 1947.\textsuperscript{16} This started a series of conflicts between Pakistan and India as well as the Kashmiri revolutionaries seeking independence.

Later India requested United Nations intervention with respect to the Kashmir issue. The UN passed a resolution under which both India and Pakistan were required to vacate the areas they had occupied and hold a referendum under UN observation.\textsuperscript{17}

\textsuperscript{15} Interview of Field Marshal Sam Manekshaw, online: http://www.rediff.com/freedom/0710jha2.htm.
\textsuperscript{16} “Death in the Vale”, Time, 10 November 1947, online: http://www.time.com/time/magazine/article/0,9171,793895,00.html.
\textsuperscript{17} UN Security Council, Resolution 91 (1951)of 30 March 1951, 30 March 1951, S/RES/91 (1951)
The holding of plebiscite was initially supported by India but subsequently India dismissed the requirement due to various concerns with respect to the demography of the region as well as the fact that the 1952 elected Constituent Assembly of Jammu and Kashmir voted in favour of confirming the Kashmir region's accession to India.\textsuperscript{18} There had been huge demographic changes in both Pakistan administered Kashmir as well as Jammu & Kashmir State of India after the 1947Partition. Pakistan had allowed generations of Pakistani individuals non-native to the region to take residence in Pakistan-administered Kashmir.\textsuperscript{19,20} Furthermore, demographics of the Kashmir Valley in the Jammu & Kashmir state of India had also been altered after separatist militants coerced 250,000 Kashmiri Hindus to leave the region.\textsuperscript{21} Moreover, Pakistan failed to withdraw its troops from the Kashmir region as was required under the same U.N. resolution which discussed the plebiscite.\textsuperscript{22}

Disputes on the results of the 1987 State legislative assembly elections in Kashmir resulted in the formation of militant wings and consequent insurgent activities in the region in 1989.\textsuperscript{23} Consequently, in 1990, India introduced the Armed Forces (Jammu & Kashmir) Special Powers Act in Kashmir.

\textsuperscript{18} United Nations High Commissioner for Refugees, "With Friends Like These...": Human Rights Violations in Azad Kashmir online: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country\&category=&publisher=HRW\&type=COUNTRYREP\&coi=PAK\&rid=&\&docid=4517b1a14\&skip=0

\textsuperscript{19} United Nations High Commissioner for Refugees, "With Friends Like These...": Human Rights Violations in Azad Kashmir online: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country\&category=&publisher=HRW\&type=COUNTRYREP\&coi=PAK\&rid=&\&docid=4517b1a14\&skip=0


\textsuperscript{22} United Nations High Commissioner for Refugees, "With Friends Like These...": Human Rights Violations in Azad Kashmir online: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country\&category=&publisher=HRW\&type=COUNTRYREP\&coi=PAK\&rid=&\&docid=4517b1a14\&skip=0

India contends that the insurgency was largely started by Pakistan supported Afghan Mujahedeen who entered the Kashmir valley following the end of the Soviet-Afghan war. Pakistan claims these insurgents are Jammu and Kashmir citizens, and are rising up against the Indian army in an independence movement.

Amnesty International accused security forces in Indian-controlled Kashmir of exploiting the draconian Armed Forces Act that enables them to "hold prisoners without trial". The group argues that the law, which allows security to detain individuals for as many as two years "without presenting charges, violating prisoners’ human rights".24

In 2011, the State Human Right Commission said it had evidence that 2,156 bodies had been buried in 40 graves over the last 20 year.25 Though the security forces claimed that most of these bodies were those of militants from outside India including terrorist groups from Pakistan-administered Kashmir and Afghanistan, according the Commission’s report, among the identified bodies, atleast 574 were those of "disappeared locals".26

2.2.2 Article 37028 and Special Status of Kashmir:

Under Part XXI of the Constitution of India, which deals with “Temporary, Transitional and Special provisions, Kashmir has been accorded a special status under Article 370. As per this Article, though Jammu and Kashmir is a constituent State of the Indian Union, no law enacted by

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26 Ibid.
28 Constitution of India 1950, Article 370.
the parliament of India, except for those mentioned in the instrument of accession including in the field of defense, communication and foreign policy will be extendable in Jammu and Kashmir unless it is ratified by the state legislature of Jammu and Kashmir. Though the fundamental rights enshrined in the Indian Constitutions are applicable to Kashmir, fundamental duties and directive principles of state policy do not apply in the region. Thus the state's residents lived under a separate set of laws, including those related to citizenship, ownership of property, as compared to other Indians.

The Indian Penal Code is known as Ranbir Penal Code in Jammu & Kashmir.\(^{29}\)

However the jurisdiction of the Supreme Court of India had been extended over to Jammu and Kashmir.\(^{30}\)

### 2.3 Consequences of Military Operations in Other Countries

Countries across the globe have from time to time enacted various laws and regulations to bring about social control in regions declared as ‘disturbed areas’ or under emergency situations.\(^{31,32,33}\) These countries believe that militarization or surrendering control of the region to the army would help in bringing about social order.\(^{34}\) For example, in 2005 the Sri Lankan government in order to combat an insurgent group, *Liberation Tigers of Tamil Eelam* (LTTE) launched its military campaign paralyzing the investigative and prosecution powers of the executive and the

\(^{29}\) [http://www.ipc.in/](http://www.ipc.in/)


judiciary. The security forces conducted large indiscriminate arrests of Tamils under emergency regulations. What followed was the government’s more brutal and indiscriminate counter-insurgency campaign.\(^{35}\) The government gave authority to its law enforcement officers to commit extra-judicial killings by removing laws relating to autopsies, and reporting of all suspicious deaths to courts. This resulted in an official figure of 30,000 disappearances in the south regions alone and large numbers in the North too.\(^{36}\) In Malaysia, during the operation of the Internal Security Act (ISA) in 1960, thousands of civilians, including trade unionists, student leaders, labour activists, politicians, academicians, non-government organizations (‘NGO’) activists and members of religious groups, were arrested and detained without trial for indefinite periods. The ISA provided for "preventive" detention without charge or trial, solely on the basis of the opinion of the Minister for Home Affairs that the detention is necessary in order to safeguard the security of the nation.\(^{37}\)

Similarly, after assuming powers in Egypt\(^{38}\), The **Supreme Council of the Armed Forces** (the SCAF), arbitrarily restricted people’s right to freedom of expression, association and assembly prohibiting any form of protest or debates on social or political issues. The military courts have imprisoned thousands of civilians.\(^{39}^{40}\)


\(^{36}\) Human Rights Watch, “War on the Displaced: Sri Lankan Army and LTTE Abuses Against Civilians in the Vanni” (February 2009).

\(^{37}\) “Are such otherwise illegal acts allowed under international law?”, Human Rights Correspondence School, Asian Human Rights Commission, online: http://www.hrschool.org/doc/mainfile.php/lesson16/218/.


Chapter 3
The Armed Forces (Jammu & Kashmir) Special Powers Act 1990

3.1 Invocation of the Act

Under the Constitution of India, the power and obligation of the state government to maintain public order is incorporated in Entry 1 of State List in the Seventh Schedule to the Constitution. However, the said entry read with Entry 2A of the Union List means that -

“(a) where the State Government finds that it is not able to maintain public order and it is of the opinion that the aid of the armed forces / forces under the control of the Union is necessary for maintaining or restoring the public order, it can request the Union Government to send the armed forces to maintain and restore the public order;

(b) even where the State Government does not so request but the Union Government is satisfied that for protecting the State from "internal disturbance" i.e. to save it from domestic chaos or internal commotion, it is necessary to deploy armed forces of the Union, it can do so under Art.355.41”

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3.2 Provisions of the Act

3.2.1 Disturbed Areas

Under the Act, there is no clear definition of what constitutes a “dangerous or disturbed condition.” As per Section 2 (b) of the Act, “disturbed area” means “an area which is for the time being declared by notification under section 3 to be a disturbed area.”

The power to declare an area as disturbed depends on the decision of federally appointed government officials and is not subject to judicial review.42 Under Section 3 of the Act, “If, in relation to the State of Jammu and Kashmir, the Governor of that State or the Central Government, is of opinion that the whole or any part of the State is in such a disturbed and dangerous condition that the use of armed forces in aid of the civil power is necessary…. the Governor of the State or the Central Government, may, by notification in the Official Gazette, declare the whole or any part of the State to be a disturbed area.”

This implies that when the Central Government makes an order for declaring a region as a ‘disturbed area’, an elected state government cannot oppose the order of the Central Government and refuse deployment of federal armed forces. Further, the state government has no authority to reprimand or prosecute those members of the armed forces that commit human rights violations against civilians of that state as this power is reserved for the central government.43

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This has left the state government of Jammu & Kashmir with no teeth with respect to decision making powers for the disturbed areas of the state. Central government’s indifference to Jammu & Kashmir’s chief minister, Omar Abdullah’s repeated requests for at least partial revocation of the Act manifests state government’s handicap with respect to decision making powers.⁴⁴

3.2.2 Extraordinary Military Powers under the Act

According to Section 4 of the Armed Forces (Jammu & Kashmir) Special Powers Act 1990, in an area that is proclaimed as "disturbed", an officer of the armed forces, including even a non-commissioned officer⁴⁵, has powers to:⁴⁶

a. After giving such due warning, shoot to the extent of causing death, on the basis of a mere suspicion that person is acting against law or order in the disturbed area⁴⁷,

b. Destroy any arms dump, hide-outs, prepared or fortified position or shelter or training camp from which armed attacks are or may be committed by the armed volunteers or armed gangs or absconders wanted for any offence⁴⁸

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c. To arrest without a warrant anyone who has committed cognizable
offences or is reasonably suspected of having done so and may use force if
needed for the arrest.\textsuperscript{49}

d. To enter and search any premise in order to make such arrests, or to
recover any person wrongfully restrained or any arms, ammunition or
explosive substances and seize it.\textsuperscript{50}

e. Stop and search any vehicle or vessel reasonably suspected to be carrying
such person or weapons.\textsuperscript{51}

As per Section 6 of the Act, “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 \textit{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.”

While the security forces are required to file a report with the police when a combatant is killed
in an armed exchange, there have been widespread allegations that people are actually killed
after they have been taken into custody and false claims are filed with the police, constructing
what is commonly known as a fake encounter.\textsuperscript{52}

\textsuperscript{49} The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, Section 4(c).
\textsuperscript{50} The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, Section 4(d).
\textsuperscript{52} Human Rights Watch, “These Fellows Must be Eliminated” – Relentless Violence and Impunity in Manipur”
(September 2008) at page 61.
Powers under the Act have also been routinely abused by the armed forces amid allegations of enforced disappearances. The power to arrest without warrant also leads to increased risk of torture or extrajudicial execution.\textsuperscript{53}

*The loopholes*

The Act however does not stipulate what a ‘least possible delay’ implies. There are no provisions to provide guidelines as to what an unreasonable delay would be in a particular circumstance. This leaves the whole requirement of presenting the arrested person or the seized property before the officer—an officer—in charge, as toothless.

Furthermore, Section 4 (a) not only authorizes to arrest without warrant, but also authorizes the armed forces to shoot to the extent of causing death even in the event of a suspicion of commission of an offence as described under the Act. If this authorization is studied in light of the requirement to present the arrested person before an officer-in-charge with ‘least possible delay’ under Section 6 of the Act, it explains why armed forces would be more inclined towards shooting the suspect dead under the veil of an encounter rather than bringing them to the police station exposing themselves to procedural inquiries.

3.2.3. **Legal Immunity to Armed Forces**

Under Section 7 of the Act\textsuperscript{54}, “No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in

\textsuperscript{53} ibid
The above provision makes clear that army officers have legal immunity for their actions under the Act. There can be no prosecution, suit or any other legal proceeding against anyone acting under that law, except with previous sanction of the Central government.\textsuperscript{55} Nor is the government's judgment on why an area is found to be disturbed subject to judicial review.\textsuperscript{56} As of 2011, there were no clear records available of acts committed by the armed forces under the AFSPA.\textsuperscript{57}

This provision provides blanket impunity to the armed forces against any charges of human rights abuses. Considering the sweepings powers the armed forces is vested with respect to the authority over life and freedom of civilians and the lethal nature of these powers operative for more than 20 years in the state, it is a complete violation of human rights as well as the fundamental rights of the civilians of Kashmir to be barred from instituting legal proceedings in a court of law against the injustices inflicted on them. The option of sanction from Central Government is nothing more than a mirage. This requirement makes accountability almost completely out of bounds for the civilians. Where the armed forces are vested with responsibilities of the highest order to protect the state against security threats and maintain public peace and order, this should however not act as a shield against accountability at the cost of the lives and fundamental rights of the civilians.

\textsuperscript{55} Ibid.
\textsuperscript{56} “Armed Forces Special Powers Act: A study in National Security tyranny”, South Asia Human Rights Documentation Centre, online: \url{http://www.hrdc.net/sahrdc/resources/armed_forces.htm}.
This provision, allegedly necessary to protect the armed forces from undue harassment, displays a complete lack of faith in the judiciary. Judiciary has been vested with the authority to decide whether any charges are vexatious, abusive, or frivolous. While the judiciary is deemed capable of making such decisions in cases involving ordinary citizens, armed forces are given special status and provided immunity from prosecution, leaving victims of abuses without any remedy.\(^{58}\)

Although the Central Government may waive immunity under the act to permit a prosecution on a case by case basis, this provision is still routinely used to protect members of the armed forces who have been found responsible for serious crimes. For example, in the year 2000, the Central Bureau of Investigation (CBI) charged five soldiers responsible for the murder of villagers in Kashmir in what the army claimed was an armed encounter with Pakistan-based militants. As per CBI’s investigations, the victims had been deliberately abducted and murdered by the soldiers, and thus murder charges could be filed in this case. Yet the army cited the immunity provisions in the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, which is based on the 1958 law.\(^{59}^{60}\)

In 2007, police investigations found that the police and army in Kashmir had plotted to abduct and kill civilians and falsely identify them as foreign militants because they wanted rewards or promotions. While the police officers involved have been charged with murder, the army has

\(^{58}\) Human Rights Watch, “These Fellows Must be Eliminated” – Relentless Violence and Impunity in Manipur (September 2008).

\(^{59}\) Human Rights Watch, “Everyone Lives in Fear,” chapter IV, part E.

\(^{60}\) Human Rights Watch, “These Fellows Must be Eliminated” – Relentless Violence and Impunity in Manipur, (September 2008) at page 63.
refused to produce the soldiers for trial.\textsuperscript{61} This is another example of unfair impunity against all criminal charges under the Act.

\textsuperscript{61} Riyaz Wani, “NBW Against 5 Army Personnel in Valley Encounter case,” \textit{The Indian Express} (April 3, 2008) online: http://www.indianexpress.com/story/291641.htm. Also see, \textsuperscript{61} Human Rights Watch, “These Fellows Must be Eliminated – Relentless Violence and Impunity in Manipur” (September 2008) at page 63.
Chapter 4
Human Rights Abuses under Armed Forces Act

4.1 Human Rights Abuses

There have been large scale human rights abuses against the civilian population in Kashmir as well as the North Eastern regions of India under the operation of the Armed Forces Act. The extent and nature of these abuses can be said to meet the definition of crimes against humanity. This violence is not accidental, but a continuing and essential element of Indian control in these regions. Institutionalized lawlessness forms the bedrock of Indian control in both Kashmir and the northeast. The imperative of territorial control thus supplants not only democratic rights,

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but also the principle of self-determination. The basic human right to self-determination is represented as an illegitimate demand for secession.\footnote{Shubh Mathur, “Life and death in the borderlands: Indian sovereignty and military impunity”, (July 2012) Race & Class 54 (1), pg. 33-49.}

The Armed Forces Act legitimizes indiscriminate and unlimited military powers of search, arrest, seizure, destruction of houses and the right to shoot to kill to maintain public order, without civilian or judicial oversight. Though it is impossible to maintain the exact statistics of the extent of human rights abuses occurred under the operation of the Act, there are a number of cases brought to public domain by means of various fact finding reports. There are numerous cases of rape, murder, forced disappearances, random firing and mass arrests filed against the security forces in the Kashmir region.

The Indian military’s presence in Kashmir since 1989 has been estimated at over half a million, fighting insurgents who have never numbered more than 3,000.\footnote{Ibid.} Villages and towns are surrounded by razor wire, inhabitants need permission to travel outside the fences, to bring visitors in, to walk to their fields, to graze their animals, to gather firewood. Kashmiri civilians are cast as the suspects; they must carry identity cards at all times, are subject to search and arrest, crackdowns, blocked roads and official and ‘undeclared’ curfews.\footnote{Ibid.}

\footnote{Shubh Mathur, “Life and death in the borderlands: Indian sovereignty and military impunity”, (July 2012) Race & Class 54 (1), pg. 33-49.}

\footnote{Ibid.}

\footnote{Ibid.}
4.1.1 North East States - Manipur

On 11 July 2004, 32-year-old Manorama Thangjam was arrested by a unit of the 17 Assam Rifles on suspicion of being a ‘guerilla sympathiser’. A few hours later, her mutilated body was found in a field by the roadside. She had been raped, tortured and killed, her lower body shredded with bullet wounds to cover evidence of rape.67 68

Forced to respond, the state government of Manipur ordered a judicial enquiry by retired district judge C. Upendra Singh. Judge Upendra Singh submitted his report in November 2004. The report is yet to be made public. As court proceedings continue, no action has been taken.69

4.2 Other Cases of Human Rights Abuse

4.2.1 Unmarked Graves

The Jammu and Kashmir State Human Rights Commission submitted an interim report, titled “The Enquiry Report of Unmarked Graves in North Kashmir”, to the state government. As per this report, there were documented findings of 2,156 bodies in unmarked graves at 38 different sites in districts that had been at the epicenter of the insurgency during the 1990 internal conflicts.70

On August 8, 2011, a Special Police Officer (SPO) and a territorial army soldier took a mentally
disabled civilian to Surankot forest in Jammu and Kashmir and then launched an operation with
the police and the 25 Rashtriya Rifles unit to eliminate a “dreaded terrorist” in the area. It was
later found to be a fake encounter. Both armed personnel were arrested and charged with murder
for the fake encounter.  

As per a report published by Tehelka, the Indian government has not granted prosecution in even
a single case of human rights violations that occurred in Kashmir from 1990 – 2011. As per the
report, there are a total of 50 cases, out of which 31 have been filed against the army and 19
against the paramilitary forces. The charges include rape, custodial murders as well as fake
encounters. In the 50 cases, sanction for prosecution has been declined in 26 cases while as it is
awaited in 16 cases.

In March 2013, The UN's Special Rapporteur on Violence against Women, Rashida Manjoo, appealed to the Indian government to repeal the controversial Armed Forces Special Powers Act (AFSPA) and the Public Safety Act (PSA) from Jammu and Kashmir and the north-east states stating that "the acts violate international laws India has signed and ratified".

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4.2.2 Kunan Poshpora Incident

On 21 February 1991, units of Indian army launched a search and interrogation operation in the village of Kunan Poshpora in Kashmir. As per the complaints of the villagers, at least 53 women were gang raped by the armed personnel that night.  

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Chapter 5

Armed Forces (Jammu & Kashmir) Special Powers Act 1990 and Other Legislations:

The Armed Forces (Jammu & Kashmir) Special Powers Act 1990 allows the authorities to detain a person for an unspecified amount of time, and thus without review by a magistrate. Under Article 22 (2) of the Indian Constitution, anyone taken into custody has to be “produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.”

5.1 Right to Kill

5.1.1 Armed Forces (Jammu & Kashmir) Special Powers Act 1990

Under Section 4(a) of the Armed Forces (Jammu & Kashmir) Special Powers Act 1990, any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces has the authority to shoot a person, even to the extent of cause death if the officer based on a mere suspicion that the person is acting against any law for the time being in force in the state.

78 Constitution of India 1950, Art. 22 (2).
This provision blatantly violates the fundamental right to life guaranteed and forming the basic structure of the Indian constitution. Neither the constitution of India nor any other central or state legislation authorizes killing a person except in circumstances like self defense\(^79\) or mistake of fact to be bound by law\(^80\).

5.1.2 Indian Constitution 1950

**Article 21** of the Constitution expressly declares that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. It has time and again reiterated that ‘procedure established by law’ means a fair and unbiased procedure.

5.1.3 Indian Penal Code 1860\(^81\)

The Indian Penal Code does not specifically provide any provision conferring a right to open fire except when a person is bound by law or believes himself to be bound by law as a mistake of fact.\(^82\)

Also under **Section 100 of the Indian Penal Code**, “a person’s right to self defense extends to causing death when;

- **First**- Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

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\(^{79}\) *Indian Penal Code 1860*, Section 100.

\(^{80}\) *Indian Penal Code 1860*, Section 76.

\(^{81}\) *Indian Penal Code 1860*, Act No XLV of 1860.

\(^{82}\) *Indian Penal Code*, Section 100.
Secondly- Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly- An assault with the intention of committing rape;

Fourthly- An assault with the intention of gratifying unnatural lust;

Fifthly- An assault with the intention of kidnapping or abducting;

Sixthly- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

Except the above mentioned provisions, the Indian Penal Code does not authorize killing a person acting in contravention of law.

Authorization to kill coupled with the legal immunity against any legal proceedings under the Armed Forces (Jammu & Kashmir) Special Powers Act 1990, gives armed forces a license to kill which could be used either to escape accountability or to fabricate fake encounters.

5.1.4 **International Covenant on Civil and Political Rights 1976 (‘ICCPR’)***

India ratified the ICCPR on 10th April 1979 and is bound by the provisions of the covenant under the international law.

**Article 6(1)** of ICCPR states that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

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As per Article 7 prohibits any act of torture or cruel, inhuman or degrading treatment or punishment against any person.”

**Article 4** of the Convention stipulates that even in the event of a public emergency, the State Parties shall not derogate from Article 6 and 7 of the Covenant.

It is very clear that Section 4 (a) of the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 violates the principles of right to life both under the Indian constitution as well as the international covenants.

### 5.2 Powers of Arrest

Power to arrest as provided under the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 is a very loosely construed provision. On the other hand comparable provisions authorizing arrests without warrant are included in existing penal legislations like the Indian Penal Code. Providing a separate and vaguely construed legislation for a disturbed area like Kashmir indicates that the government of India is not interested in approaching violence situations in Kashmir in the same manner as in any other state of the country. It is required that Kashmir be governed by the same penal legislations as any other state in India.

#### 5.2.1 Armed Forces (Jammu & Kashmir) Special Powers Act 1990

“**Section 4(c)** - Any commissioned officer, warrant officer, non commissioned officer or any other person of equivalent rank in the armed

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forces may, in a disturbed area - 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;”

5.2.2 Indian Penal Code 1860

Section 41 and 42 – Power to Arrest without Warrant

Section 41 - When police may arrest without warrant –

“(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or (b) who is in possession any implement of house-breaking without lawful excuse; or (c) who is a proclaimed offender (d) whose is in possession of a stolen property and is suspected of having committed an offence with reference to such thing; or (e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or (f) who is a suspected deserter from any of the Armed Forces of the Union; or (g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his
having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or (h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or (i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.”

Section 42. This section authorizes the police officer to arrest a person accused of committing a non-cognizable offence on refusal to give name and residence

5.3 Powers of Search and Seizure

5.3.1 Armed Forces (Jammu & Kashmir) Special Powers Act 1990

Section 4(d): “Any commissioned officer, warrant officer, non commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area-enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any
arms, ammunition or explosive substances believed to be unlawfully kept in such premises and may for that Purpose use such force as may be necessary.

5.3.2 Indian Penal Code 1860

Section 47 - Search of place entered by person sought to be arrested.

“(1) If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, any person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress to such place cannot be obtained under sub-section (1), it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance;
(3) Any police officer or other person authorised to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.”

Section 52 - Power to seize offensive weapons.-

“The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

Where the Indian Penal Code requires the officer to first demand ingress into a place to search or arrest a person, and only when the ingress is not allowed, to forcefully enter the premises, the Armed Forces (Jammu & Kashmir) Special Powers Act 1990, on the other hand allows the armed forces to directly enter the premises without first requesting a peaceful ingress. This provision allows unnecessary use of force by the armed forces. Where under the Indian Penal Code, power to conduct search and seizure is conferred only to a person under warrant or to an officer authorized to arrest, such power is conferred even to a non commissioned officer under the Armed Forces (Jammu & Kashmir) Special Powers Act 1990.
5.4 Duty upon Arrest

5.4.1 Indian Constitution 1950

Unlike Article 22 (1) of the Indian constitution, the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 does not require an arrested person to be informed of the grounds for his arrest nor is he guaranteed a right to consult and be defended by a legal practitioner.

Article 22 (2) of the Indian Constitution requires that anyone taken into custody has to be "produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."\(^{85}\)

5.4.2 Armed Forces (Jammu & Kashmir) Special Powers Act 1990

Armed Forces (Jammu & Kashmir) Special Powers Act 1990 on the other hand requires that arrested persons and seized property be made over to the officer-incharge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest or seizure as the case may be.

There is no requirement to produce the arrested person before a magistrate nor does the provision clearly indicate what ‘least possible delay’ implies. Its questionable that where arrested persons in any other state of India have access to some basic safeguarding rights upon

\(^{85}\) Constitution of India, Art. 22 (2).
arrest, arrested persons in Kashmir are denied such rights. With this huge gap in accountability, this raises concerns over the credibility of arrests made by the armed forces in Kashmir and the treatment meted out to the civilians.

5.5 Legal Immunity

As for conferring legal impunity to the armed forces, both the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 as well as legislations like the Indian Penal Code and the Code of Criminal Procedure consists of provisions which make it almost impossible for the civilians to file a legal proceeding against a member of the armed forces leading to rampant human rights abuses.

5.5.1 Armed Forces (Jammu & Kashmir) Special Powers Act 1990

Section 7 of the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 provides that – “No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

5.5.2 Indian Penal Code

Section 45 - “Protection of members of the Armed Forces from arrest.- (1) Notwithstanding anything contained in sections 41 to 44 (both inclusive), no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government…”
5.5.3 Code of Criminal Procedure 1973

Section 197 (1) of the Code of Criminal Procedure provides legal impunity to Judges and public servants acting or purporting to act in discharge of their official duty,

As per Section 197 (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.

Thus, with regards to conferring blanket protections to the armed forces, Armed Forces (Jammu & Kashmir) Special Powers Act 1990 is not a standalone legislation.” Both, Section 7 of the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 as well as Section 197(2) of the Code of Criminal Procedure violate the basic right to equality of the people of Kashmir.

Though legal impunity is important for the armed forces in discharge of their duties, blanket impunities without any mechanism for accountability encourages irresponsible and widespread violations of the human rights of the people residing in the regions rather that facilitate achieving the purpose of such legislation.

5.5.4 International Covenant on Civil and Political Rights (‘ICCPR’) 1966

Article 2(3) of the ICCPR obligates State Parties to:
a) “To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c) To ensure that the competent authorities shall enforce such remedies.”

Even though India is a signatory to the ICCPR and is bound by Article 2(3) of the Covenant, none of the central or state legislations provide any provisions with respect to judicial proceedings against the acts committed by members of armed forces. It is important that there be some kind of judicial accountability of the acts of the armed forces either by way of constituting grievance cells at the district level and an eventual access to the superior courts.

5.5.5 Safeguards under IPC and CrPC

Where the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 as well as the other existing legislations have various similar provisions with respect to arrest, search and seizure operations, the legislations like Indian Penal Code 1860 and Code of Criminal Procedure 1973 cover the loopholes that exists in the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 by way of its exhaustive safeguarding provisions. There are various provisions under the Criminal Procedure Code (CrPC) as well as the Indian Penal Code (IPC) that ensure that procedural safeguards are followed by the security forces on an arrest as well as during custody of a person.
Sections 330 and 331 of the Indian Penal Code forbid the causing of “hurt” or “grievous hurt” to extract a confession, and prescribe prison terms and fines for officers found guilty of torture.\(^{86}\) The Code of Criminal Procedure also contains clauses to protect detainees from torture under Section 54, which provides the right to a medical examination. Section 164 requires a magistrate to ensure that a confession is voluntary whereas Section 176, which requires a magisterial inquiry into any death in custody.\(^{87}\)

The Supreme Court of India laid down extensive guidelines for the police personnel for the protection of arrestees under police custody in the case of *D.K. Basu v. State of West Bengal*.\(^{88}\) As per the court guidelines, all police personnel involved in arrests and interrogations should display accurate and clear identification; a register should be created to record the names of those responsible for individual interrogations; and the arrestee should be subjected to a medical examination at the time of arrest to record all major or minor injuries, and then subjected to further examinations every 48 hours during detention.\(^{89}\)

5.5.6 The United Nations Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions summarized the impunity and extra-judicial executions in her report to the 57th session of the United Nations Commission on Human Rights by saying that:

“Impunity for human rights offenders seriously undermines the rule of law, and also widens the gap between those close to the power structures and others who are vulnerable to human rights abuses. In this way, human

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\(^{86}\) *Indian Penal Code 1860*, Sections 330 and 331.


\(^{88}\) *D K Basu v. State of West Bengal*, AIR 1997 SC 610.

\(^{89}\) Guidelines Laid by the Supreme Court in *D.K. Basu vs State of Bengal*, online: http://chandigarhpolice.nic.in/spcourt.htm.
rights violations are perpetuated or sometimes even encouraged, as perpetrators feel that they are free to act in a climate of impunity. ...., extrajudicial killings and acts of murder may sometimes also go unpunished because of the sex, religious belief, or ethnicity of the victim. Long-standing discrimination and prejudice against such groups are often used as justification of these crimes.”

It was further stated that –

“The increasing difficulties in securing justice alienate the people from the State and may drive them to take the law into their own hands, resulting in a further erosion of the justice system and a vicious circle of violence and retaliation. If unaddressed, such situations may easily degenerate into a state of anarchy and social disintegration. Human rights protection and respect for the rule of law are central to lasting peace and stability. It is, therefore, crucial that conflict prevention strategies and post-conflict peace-building efforts include effective measures to end the culture of impunity and protect the rule of law.”

Chapter 6
Past Interventions

6.1 Administrative Interventions

6.1.1 Jeevan Reddy Commission

In 2004, in wake of the intense agitation launched by civil society groups against the rape and murder of a woman named Manorama Thangjam in the North Eastern state of Manipur, the Indian government appointed a commission headed by former Supreme Court Judge, Justice Jeevan Reddy to investigate the workings of the Armed Forces (Special Powers) Act 1958 operating in the North Eastern states of India. The Reddy commission submitted its recommendations to the parliament on June 6, 2005. While the Jeevan Reddy Commission report was not made public, the contents were leaked, and it is now known that the committee recommended repeal of the AFSPA. However, the recommendations are yet to be implemented by the Indian government.

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93 Human Rights Watch, “These Fellows Must be Eliminated” – Relentless Violence and Impunity in Manipur, (September 2008) at page 5.
Recommendations of the Committee

The Committee made the following recommendations in its report -

1. “The Armed Forces (Special Powers) Act, 1958 should be repealed. Therefore, recommending the continuation of the present Act, with or without amendments, does not arise. The Act is too sketchy, too bald and quite inadequate in several particulars. It is true that the Hon'ble Supreme Court has upheld its constitutional validity but that circumstance is not an endorsement of the desirability or advisability of the Act. … the Act, for whatever reason, has become a symbol of oppression, an object of hate and an instrument of discrimination and highhandedness. It is highly desirable and advisable to repeal this Act altogether, without, of course, losing sight of the overwhelming desire of an overwhelming majority of the region that the Army should remain (though the Act should go).

For that purpose, an appropriate legal mechanism has to be devised.”

This is a logical recommendation of the Committee keeping in mind the fact that some of the provisions of the Act are inconsistent with not just the international conventions India is signatory to, but also to the provisions of the Indian constitution and criminal laws. As recommended by the committee, keeping in mind the present situation in Kashmir, the army should remain in the region, however acts of the members of the armed forces should be the governed by the existing central and state legislations of the country and not any special legislation. Also, there is a need to stipulate a fixed anticipated period for the army’s presence in
the region probably for six months, which should be reviewed periodically as per the existing situation in Kashmir.

2. “The Committee is also of the firm view that it would be more appropriate to recommend insertion of appropriate provisions in the Unlawful Activities (Prevention) Act, 1967 (as amended in the year 2004).”

In the presence of already existing Indian Penal Code and Code of Criminal Procedure and well as provisions of the Indian constitution, retaining any separate act for the purposes of conferring special powers to the armed forces would render the very purpose of repealing The Armed Forces Act futile. In the present scenario what is required is that the issues of accountability and special powers of the armed forces be dealt with using the same legislations that are applicable to ordinary citizens. The purpose of requesting the armed forces to intervene may logically be to use their high level expertise in handling a situation of public order which the state police could not handle on their own. This however should not become a means of paralyzing the fundamental rights of the civilians and basing all actions of the armed forces on the assumption of ‘guilt’ even before that guilt has been proven.

This does not mean that the armed forces should not be conferred with any special enabling powers in dealing with terrorist activities. Provisions dealing with terrorism and their corresponding powers for the armed forces should be incorporated in the criminal procedure code and penal code itself by way of an amendment.
3. “Necessity of creating a mechanism, which we may designate as the "Grievances Cell". There is need for a mechanism which is transparent, quick and involves authorities from concerned agencies as well as civil society groups to provide information on the whereabouts of missing persons within 24 hours… The Grievances Cells will be composed of three persons, namely, a senior member of the local administration as its chair, a Captain of the armed forces/security forces and a senior member of the local police.”

Though the formation of a ‘Grievance Cell’ would serve multiple purposes and should be welcomed, the constitution of the cell as suggested by the Committee smells inherently biased and impractical. Formation of the grievance cell at district level especially for the purposes of filing complaints of human rights abuses by members of armed forces will help deal with human rights matters against the armed forces in a fast track and specialized manner as well as infuse a renewed confidence amongst the people. Grievances cells should function as the first point of redress before the matters reach superior courts. It will also impart the required impunity to the armed forces by not being directly exposed to the civilian courts at the preliminary stages of adjudication. At the same time, it will help filter out all frivolous and vexatious complaints before they reach the courts to be tried under the common criminal laws.

However, it is important that the constitution of the grievance cell reflects the interests of both the complainants as well as the armed forces. For this purpose, the cell should be seated upon by a representative from non – governmental organizations working at the grass roots levels in the
area, a retired member of the armed forces or police, and presided over by a retired judge of the high court of the state.

4. “The Central Government shall, by a notification published in the Gazette, specifying the State or the part of the State in which the forces would operate and the period (not exceeding six months) for which the forces shall operate. At the end of the period so specified, the Central Government shall review the situation in consultation with the State Government…”

This is again a welcomed suggestion. It is important to make the requirement of periodic review of the declaration a mandatory process of law by way of an amendment to the existing laws. This amendment should however be made to the existing central and state legislations.

5. “The deployment of armed forces for the said purposes should be undertaken with great care and circumspection. Unless it is absolutely essential for the aforesaid purposes, the armed forces of the Union should not be so deployed, since too frequent a deployment, and that too for long periods of time, carries with it the danger of such forces losing their moorings and becoming, in effect, another police force, a prey to all the temptations and weaknesses such exposures involve. Such exposure for long periods of time may well lead to the brutalization of such forces - which is a danger to be particularly guarded against.”

“While providing protection against civil or criminal proceedings in respect of the acts and deeds done by such force while carrying out the
duties entrusted to them, it is equally necessary to ensure that where they knowingly abuse or misuse their powers, they must be held accountable therefore and must be dealt with according to law applicable to them.”

This is perhaps the main reform goal for the situation in Kashmir. Army should be deployed in the region keeping in mind that overarching purpose to reach a public consensus in the regions who would then allow removing army deployment eventually. For working towards reaching that reform goal, there is a need to promote peaceful negotiations with the people and make the legislations more civilian friendly instilling a feeling of protection rather than being targeted.

An important change that is indispensable to achieve this reform goal is to make the armed forces more accountable. This can only happen when matters of abuse or misuse of powers under the Act are judicially tried in the civilian courts.

6.1.2 Moily Commission

In 2007, the Moily Commission submitted its fifth report of the Second Administrative Reforms Commission on ‘public order’ to the Prime Minister. Upholding the findings of the Jeevan Reddy Committee, the Moily Commission recommended repealing the Armed Forces (Special Powers) Act 1958 operating in the North Eastern states of India and providing for an enabling
legislation like the already existing Unlawful Activities (Prevention) Act 1967 for deployment of armed forces in the North Eastern states.\textsuperscript{94}


Mohammad Hamid Ansari, chairman of the National Minorities Commission, was asked by Prime Minister Manmohan Singh to head the Working Group on Confidence-Building Measures in Jammu and Kashmir. In April 2007, the Working Group submitted its report, making several recommendations for the protection of human rights.\textsuperscript{95} The Working Group said that “certain laws made operational during the period of militancy (for example the Armed Forces Special Powers Act or the Disturbed Areas Act) impinge on [the] fundamental rights of citizens and adversely.”\textsuperscript{96}

6.1.4 Justice Verma Committee Recommendations 2013\textsuperscript{97}

In January 2013, another committee set up by the government of India under the Chairmanship of retired judge of Supreme Court, Justice Verma, recommended that the requirement of sanction of the Central Government for initiating prosecution against the armed forces personnel, needs to be dispensed with, especially in the cases where sexual offence is alleged.\textsuperscript{98} Also, complainants of sexual offences should mandatorily be accorded witness protection. Besides, there should be

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\textsuperscript{95} The Prime Minister's Office, “PM’s Opening remarks at Third Roundtable Conference on Jammu & Kashmir,”, (24 April 2007) online: http://pmindia.nic.in/speech/content.asp?id=529.


\textsuperscript{98} “Civil society welcomes Justice Verma's suggestions on AFSPA” \textit{Tehelka} (2013, Jan 28), online: http://search.proquest.com/docview/1282016832?accountid=14771.
appointment of special commissioners in conflict area to prosecute sexual offences. The committee also emphasized the need to train armed personnel to encourage strict observance of orders in this regard.99

The report of Justice Verma Committee goes a long way in understanding the real concerns with respect to the extraordinary military powers accorded under the Armed Forces (Jammu & Kashmir) Special Powers Act 1990. A major bottleneck in holding the errant members of armed forces accountable for abuse of their powers is the requirement to get the prior approval of the Central Government to institute legal proceedings against the armed forces. Doing away with this requirement will make the whole process of justice much more achievable and tangible.

6.2 Naga People’s Movement of Human Rights v. Union of India

The Armed Forces (Special Powers) Act 1958 has been challenged in the courts several times. In 1980, a Manipuri group named the Human Rights Forum filed public interest litigation in the Supreme Court, challenging the constitutional validity of the Armed Forces (Special Powers) Act 1958. The Naga People’s Movement for Human Rights and the People’s Union for Democratic Rights also moved separate writ petitions on the same issue in 1982. In 1997, a five-member bench headed by Chief Justice J.S. Verma finally ruled on the petitions challenging the Act.

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The various petitions were combined into the case of Naga People’s Movement of Human Rights, etc. vs. Union of India. The five judges’ bench in its decision held that the above Act cannot be regarded as a colorable legislation or a fraud on the Constitution. The powers conferred under Sections 4 and 5 of the Act are not arbitrary and unreasonable are not violative of the provisions of the Constitution.

6.2.1 Court’s Observations and Recommendations:

*Declaration of ‘disturbed areas’*

On the issue of absence of guidelines for declaring a region as ‘disturbed area’, the court was of the view that “for an area to be declared as 'disturbed area' there must exist a grave situation of law and order on the basis of which the Governor/Administrator of the State/Union Territory or the Central Government can form an opinion that an area is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary. It cannot, therefore, be said for arbitrary and unguided power has been conferred in the matter of declaring an area as disturbed area under Section 2(b) read with Section 3 of the Central Act.”

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100 *Naga People’s Movement of Human Rights, etc. vs. Union of India*, Supreme Court of India, Writ petition (Crl) 550 of 1982 with Writ Petition (C) Nos. 5328/80, 9229-30/82, Civil Appeals Nos. 721 to 724 of 1985, 2173-76/1991,2551/81 and Writ Petition (C) Nos. 13644-45/84.

101 Human Rights Watch, “These Fellows Must be Eliminated” – Relentless Violence and Impunity in Manipur, (September 2008) at page 66.

102 AIR 1998 SC 431.

Periodic Review

It was submitted by the petitioners that the Armed Forces Act does not contain any provision specifying a fixed period for periodic review of the status in an area declared as ‘disturbed area’. However, the court disagreed with this submission and stated that, “the definition of 'disturbed area' in Section 2(b) of the Central Act talks of "an areas which is for the time being declared by notification under Section 3 to be a ‘disturbed area’ (emphasis supplied). The words "for the time being" imply that the declaration under Section 3 has to be for a limited duration and cannot be a declaration which will operate indefinitely. It is no doubt true that in Section 3 there is no requirement that the declaration should be reviewed periodically. But since the declaration is intended to be for a limited duration and a declaration can be issued only when there is grave situation law and order, the making of the declaration carries within it an obligation to review the gravity of the situation from time to time and the continuance of the declaration has to be decided on such a periodic assessment of the gravity of the situation.”

The court however recommended that “periodic review of the declaration made under Section 3 of the Central Act should be made by the Government/Administration that has issued such declaration before the expiry of a period of six months.”

List of Dos and Don’ts to be followed by armed forces

While concluding that parliament had the right to enact such a law, the judges ordered measures for the protection of human rights, ruling that the armed forces should “use minimal force

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105 Ibid.
106 Ibid.
required for effective action” and “strictly follow the instructions contained in the list of “Do’s and Don’ts” issued by the army authorities which are binding.”

6.3 India’s Report to Human Rights Council


As per Para 25, 26 and 27 of the report\textsuperscript{109}

\begin{quote}
“25. This Act is considered necessary to deal with serious terrorist and insurgency/ militancy situation arising in certain parts of the country and uphold the duty of the state to protect and secure its citizens. It provides necessary powers, legal support and protection to the Armed Forces for carrying out proactive operation against the terrorists in a highly hostile environment. An analysis of the ground realities shows that the violence levels and the fighting ability of terrorists have reduced over the years. Nevertheless, they still possess sophisticated weapons and modern communication equipment and the terrorist infrastructure across the borders is still active. The terrorists continue to intimidate the public. In such a challenging environment, where the very lives of its citizens and
\end{quote}

\textsuperscript{107} Human Rights Watch, “These Fellows Must be Eliminated” – Relentless Violence and Impunity in Manipur, (September 2008) at page67.

\textsuperscript{108} Ibid.

\textsuperscript{109} National report submitted by India to Human Rights Council in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, (May – June 2012).
the unity and integrity of India is at stake, as long as deployment of armed forces is required to maintain peace and normalcy, AFSPA powers are required.”

In Para 25, where the Indian government cites the need to continue operation of the Armed Forces act in order to combat terrorist activities, it nowhere mentions the internal disturbance and violence existing due to the demands of the people of Kashmir for self–determination.

It is quite possible that the Act is being operated not just against the terrorist activities but also to suppress the demands of the people of Kashmir.

“26. The Army maintains continuous vigilance to prevent human rights violations by its forces. Human Rights Cell in the Army Headquarters was established in March 1993, even before the NHRC was constituted. These cells have been established at various levels. The investigations of violations are carried out swiftly and in a transparent manner and exemplary punishments are meted out to those involved.”

There is no doubt that any kind of investigations mechanism operating from within the army headquarter to enquire into charges against the armed forces themselves will result in biased and manipulation interests and cannot be seen as a fair due process.

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110 Asian Centre for Human Rights, “India Fails UN Human Rights Test” (March 2013).
112 Ibid.
“27. Since January, 1994 until December, 2011, out of 1,429 complaints of human rights excesses received against the personnel of Army and Central Para Military Forces, 1,412 have been investigated and 1,332 found false.”

Para 26 and 27 of the report exemplifies the need to constitute an independent investigation and judicial authority to decide upon such matters of abuse by the armed forces.
Chapter 7
The Gandhian Approach

While the Indian Constitution is a remarkable expression of liberal democratic values, the legal system today still remains entrapped in the framework of the colonial past. We are, thus, faced with the paradox of a newly independent state, styling itself as a ‘sovereign, democratic republic’, and drawing upon colonial law premised upon the absolute power of the ruler to maintain control of its new citizens. This approach has led to unrest amongst the people of Kashmir owing to longstanding oppression under the armed forces rule. The rare criticism of the Armed Forces Act by the UN Human Rights Commission is dismissed by the Indian media and officials as encroaching on India’s sovereignty.

Even in the insurgency struck North Eastern parts of India, the State is taking counter-measures and developing strategies to reduce the influence of Maoists by force. But how feasible is the approach of aiming to end violence by means of counter violence? Let us look if Mahatma Gandhi can answer the question.

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Mahatma Gandhi believed that, "An eye for an eye leaves the whole world blind". Gandhi emphasized on two important pillars for successful governance, which are Satyagraha and Non-violence. Satyagraha literally means devotion to truth, remaining firm on the truth and resisting untruth actively but nonviolently. Since for Gandhi, the only way for to the truth is by nonviolence (love), it follows that Satyagraha implies an unwavering search for the truth using nonviolence. Satyagraha according to Michael Nagler literally means ‘clinging to truth,’ and that was exactly how Gandhi understood it: “clinging to the truth that we are all one under the skin, that there is no such thing as a ‘win/lose’ confrontation because all our important interests are really the same, that consciously or not every single person wants unity and peace with every other”\(^{115}\). Satyagraha is a moral weapon and the stress is on soul force over physical force. It aims at winning the enemy through love and patient suffering. It aims at winning over an unjust law, not at crushing, punishing, or taking revenge against the authority, but to convert and heal it. Though it started as a struggle for political rights, Satyagraha became in the long run a struggle for individual salvation, which could be achieved through love and self-sacrifice.

AFSPA is closely modeled on the Armed Forces (Special Powers) Ordinance originally introduced by the British colonial government in 1942 to suppress the Quit India movement which was headed by Mahatma Gandhi and was a mass movement that sought to throw off British rule through a series of popular protests (civil disobedience).\(^{116}\) It was a short Ordinance with only two provisions and British government had a successful stint with it in their own country during the Second World War\(^{117}\). It was during this time, that Mahatma Gandhi’s


\(^{117}\) During the Second World War, just under two thousand British citizens were detained without charge, trial, or term set, under Regulation 18B of the wartime Defence Regulations. Most of these detentions took place in the
approach of Satyagraha (Truth force or soul force) or freedom by means of non-violence and peaceful negotiations became popular and served a long way in realizing Indian independence. Even in face of a draconian legislation like Armed Forces (Special Powers) Ordinance, Gandhi’s Quit India movement remained largely a non-violent movement. More than 100,000 people were arrested and the movement was apparently crushed but the message of Indian resistance was imprinted in the mind of the colonial government. Five years after Quit India movement on 15th August 1947, India gained Independence from British. More importantly, Quit India movement is considered to be the last largest protest against the British rule before the Independence. So definitely, though the movement was crushed, its importance cannot be undermined. Similarly, in the present context, though many peaceful talks would have failed in the disturbed areas of Jammu & Kashmir and other North Eastern States of India, but their significance or ramifications cannot be undervalued. Though Gandhi is no more with us, but his principles of Satyagraha and Non-violence can never be infructuous. But the complex question is, Gandhi used his weapon of Satyagraha and Non-violence against an autocratic/colonial government; how does the Indian government use the same course of action in the disturbed areas to restore the rule of law?

For Gandhi, ‘ahimsa’ or non-violence was the expression of the deepest love for all humans, including one’s opponents; this non-violence therefore included not only a lack of physical harm to them, but also a lack of hatred or ill-will towards them. Gandhi rejected the traditional dichotomy between one’s own side and the “enemy;” he believed in the need to convince

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summer of 1940, soon after Winston Churchill became Prime Minister, when belief in the existence of a dangerous Fifth Column was widespread. Churchill, at first an enthusiast for vigorous use of the powers of executive detention, later came to lament the use of a power which was, in his words, ‘in the highest degree odious’. - A.W.B. Simpson, “The Proudest Day: India's Long Road to Independence” (1998) WW Norton. p. 330.

118 Fisher D; “In the Highest Degree Odious; Detention without Trial” in Wartime Britain (ISBN-10: 0198259492).

opponents of their injustice, not to punish them, and in this way one could win their friendship and one’s own freedom.\textsuperscript{120}

With Gandhi, the notion of nonviolence attained a special status. He not only theorized on it, he adopted nonviolence as a philosophy and an ideal way of life. He made us understand that the philosophy of nonviolence is not a weapon of the weak; it is a weapon, which can be tried by all.

Nonviolence was not Gandhi’s invention. He is however called the father of nonviolence because according to Mark Shepard, “he raised nonviolent action to a level never before achieved.”\textsuperscript{121} Krishna Kripalani again asserts “Gandhi was the first in Human history to extend the principle of nonviolence from the individual to social and political plane.”\textsuperscript{122} While scholars were talking about an idea without a name or a movement, Gandhi is the person who came up with the name and brought together different related ideas under one concept: Satyagraha.

If we go by the Gandhi approach in dealing with the social uprisings in North Eastern India, we’ll realize that their demands are nothing but fundamental rights conferred by the Constitution to every citizen; Right to Equality, Expression, Speech, Movement and Choice of Occupation. The government should make a serious effort in reaching out to the people to understand their grievances and increase allocations in education, employment, healthcare and infrastructure, and effectively implement the same through efficient delivery mechanisms and proper governance.

\textsuperscript{120} Mahatma Gandhi Lectures on Non Violence, McMaster University, online: http://www.humanities.mcmaster.ca/gandhi/lectures/index.html
\textsuperscript{121} M. Shepard, “Mahatma Gandhi and his Myths, Civil Disobedience, Nonviolence and Satyagraha in the Real World”, (Los Angeles, Shepard Publications, 2002), online: http://www.markshep.com/nonviolence/books/myths.html .
Government schemes like Bharat Nirman and MGNREGA can be utilized for creating adequate infrastructure for development and generating employment for the tribals. The government should motivate its ground staff to work towards developing those backward areas. This approach may not be an easy route and will have its own set of complexities; however this will definitely involve a more peaceful means of reaching a permanent solution to the issue as suppressing the demands of the people by means of violence and military power cannot be seen to provide a permanent resolution to the issue. This will bring about a perceptible change in their mindset.

As far as the issue of Kashmir is concerned, again we can try to give peace a chance. For instance during the partition of British India, while the Indian National Congress and Mahatma Gandhi called for the independence of India from British rule, the Muslim League insisted on division of India. Gandhi, believing in his principles of self determination and non violence was of the opinion that the issue of partition could be resolved by means of plebiscite post independence in the districts with a Muslim majority. Gandhiji wrote: “There must be no impatience, no barbarity, no insolence, no undue pressure. If we want to cultivate a true spirit of democracy, we cannot afford to be intolerant. Intolerance betrays want of faith in one's cause.”

Though Gandhi’s ideology was not taken well by Hindu fanatics and many other right wing leaders, but it was again Gandhi who played a role in minimizing the violence caused post partition.

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123 Mahatma Gandhi National Rural Employment Guarantee Act, 2005
124 "Treat the Disease, not the Symptoms", Financial Express (India), (6 September 2010), online:
125 Keen, Shirin, “The Partition of India”, Emory University, 198, See http://postcolonialstudies.emory.edu/partition-of-india/
In a nutshell, Satyagraha is itself a movement intended to fight social and promote ethical values. It is a whole philosophy of nonviolence. It is undertaken only after all the other peaceful means have proven ineffective. At its heart is nonviolence. An attempt is made to convert, persuade or win over the opponent. It involves applying the forces of both reason and conscience simultaneously, while holding aloft the indisputable truth of his/her position. The Satyagrahi also engages in acts of voluntary suffering. Any violence inflicted by the opponent is accepted without retaliation. The opponent can only become morally bankrupt if violence continues to be inflicted indefinitely.

Of course, we cannot expect the Government to sit with folded hands when they face violence. But we can definitely expect that the Government should get to the root of such unrest or violence to reason out, to fight only with force of truth (Satyagraha), to introspect, to talk and in Gandhi’s language, the Government can carry some experiments with truth.128

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There is no doubt that the armed forces operate in difficult and trying circumstances in the areas afflicted by internal armed conflicts. It is in these situations that the supremacy of the judiciary and the primacy of the rule of law need to be upheld. However, if the law enforcement personnel stoop to the same level as the non-state actors and perpetrate the same unlawful acts, there will be no difference between the law enforcement personnel and the non-state actors whom the government calls “terrorists”.

Indian judiciary has always been considered to be proactive and equipped with adequate authority. The strength of any country claiming itself as “democratic” lies in upholding the supremacy of the judiciary and primacy of the rule of law. It requires putting in place effective criminal-law provisions to deter the commission of offences against the innocents and punishment for breaches of such provisions while exercising executive powers; and not in providing the arbitrary powers to the law enforcement personnel to be law unto themselves. The AFSPA violates basic tenets of criminal justice system in any civilized society. First, it provides special powers which tantamount to awarding heavier penalty to the suspects than convicted persons would get under normal court, a clear violation of the cardinal principle of criminal justice system - nullum crimen, nulla poena sine lege. Second, non-application of due process of law makes the armed forces to be their own judge and jury. Most importantly, by giving virtual impunity to the armed forces under Section 6 of the AFSPA as well as the Code of Criminal

Procedure, which makes its mandatory to seek prior permission of the Central Government to initiate any legal proceedings, the Executive has expressed its lack of faith in the judiciary. Otherwise, it would have been left to the judiciary to decide whether the charges are vexatious, abusive or frivolous.\textsuperscript{130}

Mahatma Gandhi’s non violent approach to independence struggle influenced and inspired many later peaceful struggles, for example the civil rights movement of Martin Luther King, Jr.

It is important that the Armed Forces (Jammu & Kashmir) Special Powers Act 1990 is repealed in Kashmir and acts of the members of the armed forces are brought under the ambit of the already existing penal legislations. At the same time it is imperative to amend the provisions of the existing legislations that confer immunity to the armed forces in cases of misuse or abuse of powers. The requirement of approval of the Central Government before instituting a legal proceeding against the armed forces should be done away with. Further, there is a need to constitute special grievance cells at district levels to adjudicate such cases against the armed forces before they are referred to the higher courts.

As per Article 1 of the ICCPR\(^{131}\), all people have the right to self determination including the right to determine their political status and freely pursue their economic, social and cultural development. The State Parties have a duty to promote the realization of the right to self – determination.

Drawing analogies between the pre – independence conflict and the current Kashmir conflict, it can be said that there is a need to introduce a more peaceful means of developmental and negotiation based approach. Small steps towards this goal have already been taken in various forms. In 1994, the Jammu and Kashmir Liberation Front’s (JKLF) jailed leader Muhammad

Yasin Malik denounced the use of violence to achieve political goals in Kashmir. He proclaimed that he would use non-violent means to further his cause. He quickly became the part of pro-freedom political alliance, the All Parties Hurriyat Conference (APHC), and started his political activities. Malik’s move towards non violent means of independence was widely resisted by his former militant comrades but he continued to champion his cause through various tools such as signature campaigns and Safar-e-Azadi.(the journey to freedom). He also conducted a six-month-long campaign in the Valley to involve people and create awareness among them about the dialogue process between India and Pakistan in 2007.\footnote{E. Mahmud, “Kashmir: The challenges to non-violent movement.” (2012) Strategic Studies, XXXII(2-3) online: http://search.proquest.com/docview/1313161377?accountid=14771.}

On the other hand, India and Pakistan also initiated a dialogue process that saw a huge impact inside Kashmir and people got some relief promising a peaceful and permanent solution. A bus service was also started between Srinagar (India) and Muzaffarabad (Pakistan) to provide divided families of Jammu and Kashmir the opportunity to have reunion in early 2005. That was considered a major confidence building measure.\footnote{Ibid.}

There have been ongoing efforts from both Islamabad and New Delhi to encourage Kashmiri stakeholders to generate a consensus in both sides of Jammu and Kashmir to devise a doable and acceptable strategy for the resolution of Kashmir problem. Consequently, a broad consensus has emerged that the use of force either by state or non-state actors to settle this conflict was out of
the question. Instead, a creative, out of the box solution, which could be acceptable to the people of Kashmir had to be pursued through sustained dialogue and continuous engagement.\textsuperscript{134}

Mahatma Gandhi was the first leader on earth to propagate the culture of non-violence to attain national independence. The goal of independence also included democracy rooted in rule of law to protect and promote human rights, development, peace and progress. He believed that spreading culture of non-violence is a sine-qua-non for extinction of terrorism rooted in violence.\textsuperscript{135}

In the 21st century, we are living in a global village, where reason and conscience prevail. It is difficult to think of our country in isolation in the matter of terrorism, which has engulfed the world.\textsuperscript{136} Hence, it is important that both India and Pakistan address the root cause of the conflicts in Kashmir. Only when the concerns of the people of Kashmir are considered and their right to self determination is respected, can there be a possibility peaceful resolution of the conflict, where through complete independence of the region or by means of partial autonomy and shared administration.

\textsuperscript{134} Ibid.
\textsuperscript{136} Ibid.
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APPENDICES


The Gazette of India

EXTRAORDINARY

PART II-Section 1

PUBLISHED BY AUTHORITY

NEW DELHI, TUESDAY, SEPTEMBER 11, 1990/ BHADRA 2O, 1912

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

New Delhi, the 11th September, 1990/Bhadra 20, 1912 (Saka)

The following Act of Parliament received the assent of the President on the 10th September 1990, and is hereby published for general information:

THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 1990
No. 21 OF 1990

[10th September, 1990.]

An Act to enable certain special powers to be conferred upon members of the armed forces in the disturbed areas in the State of Jammu and Kashmir.

BE it enacted by Parliament in the Forty-first Year of the Republic of India as follows:

1. Short title, extent and commencement. (1) This Act may be called the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.

(2) It extends to the whole of the State of Jammu and Kashmir.
(3) It shall be deemed to have come into force on the 5th day of July, 1990.

2. Definitions. In this Act, unless the context otherwise requires,—

   (a) "armed forces" means the military forces and the air forces operating as land forces and includes any other armed forces of the Union so operating

   (b) "disturbed area" means an area which is for the time being declared by notification under section 3 to be a disturbed area;

   (c) all other words and expressions 'used herein, but not defined and defined in the Air Force Act, 19501, or the Army Act, 19502, shall have the meanings respectively assigned to them in those Acts.

3. Power to declare areas to be disturbed areas. If, in relation to the State of Jammu and Kashmir, the Governor of that State or the Central Government, is of opinion that the whole or any part of the State is in such a disturbed and dangerous condition that the use of armed forces in aid of the civil power is necessary to prevent—

   (a) activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people;

   (b) activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India front the Union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution of India,

the Governor of the State or the Central Government, may, by notification in the Official Gazette, declare the whole or any part of the State to be a disturbed area.

Explanation.- In this section, "terrorist act" has the same meaning as in Explanation to article 248 of the Constitution of India as applicable to the State of Jammu and Kashmir.

4. Special powers of the armed forces. Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,—
(a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of firearms, 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 training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders wanted for any offence;

(c) arrest, without warrant, any persons 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 wrongful restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawful 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 persons 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.

5. Power of search to include powers to break open locks, etc. 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 thereof is withheld.

6. 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.

7. 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.


(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.
2. **Instrument of Accession executed by Maharajah Hari Singh on October 26, 1947**

**INSTRUMENT OF ACCESSION**

Instrument of Accession executed by Maharajah Hari Singh on October 26, 1947

Whereas the Indian Independence Act, 1947, provides that as from the fifteenth day of August, 1947, there shall be set up an independent Dominion known as INDIA, and that the Government of India Act 1935, shall with such omissions, additions, adaptations and modifications as the Governor General may by order specify, be applicable to the Dominion of India.

And whereas the Government of India Act, 1935, as so adapted by the Governor General, provides that an Indian State may accede to the Dominion of India by an Instrument of Accession executed by the Ruler thereof.

Now, therefore, I Shriman Inder Mahinder Rajrajeswar Maharajadhiraj Shri Hari Singhji, Jammu & Kashmir Naresh Tatha Tibbet adi Deshadhipati, Ruler of Jammu & Kashmir State, in the exercise of my Sovereignty in and over my said State do hereby execute this my Instrument of Accession and

1. I hereby declare that I accede to the Dominion of India with the intent that the Governor General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall by virtue of this my Instrument of Accession but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the State of Jammu & Kashmir (hereinafter referred to as "this State") such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India, on the 15th day of August 1947, (which Act as so in force is hereafter referred to as "the Act").

2. I hereby assume the obligation of ensuring that due effect is given to provisions of the Act within this State so far as they are applicable therein by virtue of this my Instrument of Accession.

3. I accept the matters specified in the schedule hereto as the matters with respect to which the Dominion Legislature may make law for this State.

4. I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor General and the Ruler of this State whereby any functions in relation to the administration in this State of any law of the Dominion Legislature shall be exercised by the Ruler of the State, then any such agreement shall be construed and have effect accordingly.

5. The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or the Indian Independence Act, 1947, unless such amendment is accepted by me by Instrument supplementary to this Instrument.
6. Nothing in this Instrument shall empower the Dominion Legislature to make any law for this State authorizing the compulsory acquisition of land for any purpose, but I hereby undertake that should the Dominion for the purpose of a Dominion law which applies in this State deem it necessary to acquire any land, I will at their request acquire the land at their expense, or, if the land belongs to me transfer it to them on such terms as may be agreed or, in default of agreement, determined by an arbitrator to be appointed by the Chief Justice of India.

7. Nothing in this Instrument shall be deemed to commit in any way to acceptance of any future constitution of India or to fetter my discretion to enter into agreement with the Government of India under any such future constitution.

8. Nothing in this Instrument affects the continuance of my Sovereignty in and over this State, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.

9. I hereby declare that I execute this Instrument on behalf of this State and that any reference in this Instrument to me or to the Ruler of the State is to be construed as including a reference to my heirs and successors.

Given under my hand this 26th day of October, nineteen hundred and forty seven.

Hari Singh

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ACCEPTANCE OF ACCESSION BY THE GOVERNOR GENERAL OF INDIA

I do hereby accept this Instrument of Accession. Dated this twenty seventh day of October, nineteen hundred and forty seven.

Mountbatten of Burma
Governor General of India.

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SCHEDULE OF INSTRUMENT OF ACCESSION
THE MATTERS WITH RESPECT TO WHICH THE DOMINION LEGISLATURE MAY MAKE LAWS FOR THIS STATE

A. Defence
1. The naval, military and air forces of the Dominion and any other armed forces raised or maintained by the Dominion; any armed forces, including forces raised or maintained by an acceding State, which are attached to, or operating with, any of the armed forces of the Dominion.

2. Naval, military and air force works, administration of cantonment areas.

3. Arms, fire-arms, ammunition.

4. Explosives.

B. External Affairs

1. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's Dominions outside India.

2. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India or subjects of any acceding State; pilgrimages to places beyond India.

3. Naturalisation.

C. Communications

1. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication.

2. Federal railways; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and services terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.

3. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.

4. Port quarantine.

5. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.

6. Aircraft and air navigation; the provision of aerodromes; regulation and organisation of air traffic and of aerodromes.
7. Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft.

8. Carriage of passengers and goods by sea or by air.

9. Extension of the powers and jurisdiction of members of the police force belonging to any unit to railway area outside that unit.

D. Ancillary

1. Election to the Dominion Legislature, subject to the provisions of the Act and of any Order made thereunder.

2. Offences against laws with respect to any of the aforesaid matters.

3. Inquiries and statistics for the purposes of any of the aforesaid matters.

4. Jurisdiction and powers of all courts with respect to any of the aforesaid matters but, except with the consent of the Ruler of the acceding State, not so as to confer any jurisdiction or powers upon any courts other than courts ordinarily exercising jurisdiction in or in relation to that State.