

# ANALYSIS OF AFSPA IN KASHMIR VISA-VIS NATIONAL, INTERNATIONAL AND MULTIPLE ORGANIZATIONS FRAMEWORK

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**Abstract:** Since 1990, Kashmir has been subject to a range of legislative provisions. Among them, three are germane to this discussion, namely, the Jammu and Kashmir Armed Forces Special Power's Act (AFSPA), the Disturbed Areas Act (DSA), and the Public Safety Act (PSA). All three pieces of legislation are the outcome of the privileging executive and military authority over legal and judicial process in Kashmir; their selective application in Kashmir underscores the great chasm in law and legal process between Kashmir and India.

The Jammu and Kashmir Armed Forces Special Powers Act (AFSPA) is linked to the Disturbed Areas Act; both have been in force in Kashmir since September 1990. The AFSPA grants the power to declare an area 'disturbed' to the central government and the state Governor. The declaration that an area is disturbed is based entirely on the government's subjective understanding of what constitutes disturbance—the sole requirement of which is that such authority be 'of the opinion that whole or parts of the area are in a dangerous or disturbed condition such that the use of the Armed Forces in aid of civil powers is necessary.' In contrast to the Emergency provisions of the Constitution (wherein fundamental rights may be suspended) that mandate a Presidential proclamation and subsequent endorsement by Parliament, no such constitutional pre-requisites are necessary for promulgating the AFSPA. In an area declared 'disturbed' under the AFSPA, security forces have unrestricted and unaccounted power to undertake operations in order to 'maintain public order.'

In Jammu and Kashmir, ensuring accountability would include ensuring access to information for victims and families during police investigations, and guaranteeing due process when victims attempt to bring complaints against their abusers. Addressing Jammu and Kashmir's impunity problem, and indeed India's attitude towards impunity, is a challenge; but it is essential to ensure justice to victims of human rights violations, and facilitate the healing process for those who have suffered during the course of Jammu and Kashmir's decades of struggle and alienation.

**Keywords:** Disturbed Areas, Human Rights, Immunity, Security Forces.

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**Introduction:** Since 1990, Kashmir has been subject to a range of legislative provisions. Among them, three are germane to this discussion, namely, the Jammu and Kashmir Armed Forces Special Power's Act (AFSPA), the Disturbed Areas Act (DSA), and the Public Safety Act (PSA). All three pieces of legislation are the outcome of the privileging executive and military authority over legal and judicial process in Kashmir; their selective application in Kashmir underscores the great chasm in law and legal process between Kashmir and India.

Both the DSA and the AFSPA use identical language to provide immunity to members of the security forces guilty of the human rights violations. Although Supreme Court has clarified that the immunity conferred by this Act does not cover criminal acts, the record of the central government in this regard is poor: it has repeatedly refused legal proceedings even in those cases where there is substantive and clear evidence to prove the charges. In cases where the state government has indicated willingness to initiate prosecution proceedings against state personnel, it was overruled by the central government. In 2005, the state government in Kashmir made almost 300 requests for permission to prosecute public servants, including members of the security forces: none were granted. Since the AFSPA is exempt from judicial review, citizens have no legal remedy to challenge the law or their detention within it.

**Laws Covering Security Force Operations in Jammu and Kashmir:** The state of Jammu and Kashmir (with the exceptions of Leh and Ladakh districts) is classified as a “disturbed area” under section 3 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, according to the state government. Section 4 of the AFSPA empowers officers (both commissioned and non-commissioned) in a “disturbed area” to “fire upon or otherwise use force, even to the causing of death” not only in cases of self-defence, but against any person contravening laws or orders “prohibiting the assembly of five or more persons.” The classification of “disturbed area”, has allowed the army and paramilitary forces to argue that they are on “active duty” at all times and that therefore all actions carried out in the state including human rights violations are carried out in the course of official duty, and are to be treated as service-related acts instead of criminal offences. The Army Act, 1950, and similar legislation governing the internal security forces, contain provisions that prohibit security forces from investigating or trying “civil offences” such as murder or rape in the military justice system unless the act was committed “a) while on active service, or (b) at any place outside India, or (c) at a frontier post specified by the Central Government by notification in this behalf.” The classification of an area as “disturbed” has allowed the military and other security forces to claim that even serious human rights violations – extrajudicial executions, enforced disappearance, rape and torture can only be tried by military courts, as the soldiers are considered to be on “active service” at all periods in such areas.

Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act enhances the protection provided to members of the security forces by requiring sanction or permission from the central government before members of the military or other security forces can be prosecuted in civilian courts. In the Army’s case, the concerned authority is the Ministry of Defence. For cases involving members of the internal security forces, permission has to be obtained from the Ministry of Home Affairs.

**Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act 1990:** Protection to 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.

The classification of Jammu and Kashmir as a “disturbed area” has allowed for the broad interpretation of the phrase in Section 7: “anything done or purported to be done in the exercise of the powers conferred by this Act.” In several cases, victims’ families and their lawyers have argued that prosecuting civil offences such as murder or rape should not require sanction from the central government as such offences do not fall under the “exercise of the powers conferred” by the AFSPA . However, the army and internal security forces have successfully countered that all acts must be considered done in “good faith” since security force personnel are constantly on active duty and under threat in “disturbed areas”.

**The Armed Forces (Special Powers) Act - A History of Challenges:** In 1997, the constitutional validity of the AFSPA was challenged in the Supreme Court of India in the *Naga People’s Movement of Human Rights vs. Union of India* case. The Court, after hearing petitions challenging it, all filed in the 1980s and early 90s, upheld the constitutional validity of the AFSPA, ruling that the powers given to the army were not “arbitrary” or “unreasonable.”

In doing so, however, the Court failed to consider India’s obligations under international law The Court further ruled that the declaration of an area as “disturbed” a precondition for the application of the AFSPA should be reviewed every six months. Concerning permission to prosecute, the Court ruled that the central government had to divulge reasons for denying sanction. In 2005, a committee headed by B P Jeevan Reddy, a former Supreme Court judge, which was formed by the Supreme Court to review the Armed Forces (Special Powers) Act, 1958 after the alleged rape and murder of Thangjam Manorama Devi in Imphal, Manipur by security forces, said in its report that the law had become “a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness.” In 2012, a committee headed by J S Verma, a former Chief Justice of India, was established by the central government to review laws against sexual assault, following the gang-rape of a young woman in Delhi. The committee said that sexual violence against women by members of the armed forces or uniformed

personnel should be brought under the purview of ordinary criminal law. To ensure this, the committee recommended the AFSPA be amended to remove the requirement of sanction to prosecute from the central government for prosecuting security force personnel for crimes involving violence against women. In interviews with the media, J S Verma said that sexual violence could not in any way be associated with the performance of any official task, and therefore should not need permission to prosecute from the government. Although new laws on violence against women were passed in April 2013, including the removal of the need for sanction to prosecute government officials for crimes involving violence against women, the recommended amendment to the AFSPA was ignored. In January 2013, a commission headed by N Santosh Hegde, a former Supreme Court judge, was appointed by the Supreme Court in response to a public interest litigation seeking investigation into 1,528 cases of alleged extrajudicial executions committed in Manipur between 1978 and 2010. The Commission was established to determine whether six cases randomly chosen by the court were 'encounter' deaths where security forces had fired in self-defence against members of armed groups or extrajudicial executions. It was also mandated to evaluate the role of the security forces in Manipur.

The Commission, whose report was submitted to the Supreme Court in April 2013, concluded that all the cases it had investigated involved "fake encounters" (staged extrajudicial executions). It also found that the AFSPA was widely abused by security forces in Manipur. Notably, it reported that only one request for sanction to prosecute a member of the Assam Rifles under Section 7 of the Act had been made since 1998. The Justice Hegde Commission proposed that all cases of "encounters" resulting in death should be immediately investigated and reviewed every three months by a committee. It also recommended the establishment of a special court to expedite cases of extrajudicial killings within the criminal justice system, and that all future requests for sanction for prosecution from the central government be decided within three months, failing which sanction would be deemed to be granted by default. In November 2014, the Vice-President of India in a speech noted that serious human rights violations including extrajudicial executions, torture, and enforced disappearance were particularly acute in areas such as Jammu and Kashmir. He stated that "serious complaints are frequently made about the misuse of laws like the Armed Forces (Special Powers) Act", which "reflects poorly on the state and its agents." The AFSPA has also been subject recently to severe criticism by several independent United Nations human rights experts, including the Special Rapporteurs on violence against women; on extrajudicial, summary or arbitrary executions; and on the situation of human rights defenders. Rashida Manjoo, the UN Special Rapporteur on violence against women, its causes and consequences, said in her official report to the UN Human Rights Council following her visit to India in April 2013 that the AFSPA "allows for the overriding of due process rights and nurtures a climate of impunity and a culture of both fear and resistance by citizens." She called for the urgent repeal of the law. Legal provisions which facilitate immunity from prosecution for security forces also exist in other special legislation in force in Jammu and Kashmir, which extend the powers of the state to use force or detain individuals. For example, Section 22 of the Jammu and Kashmir Public Safety Act, 1978 provides a complete bar on criminal, civil or "any other legal proceedings against any person for anything done or intended to be done in good faith in pursuance of the provisions of this Act."

The requirement of sanction to prosecute police or security forces also exists in the ordinary criminal law. Section 197 of the Code of Criminal Procedure, 1973 provides that when a public servant is accused of any offence "alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction" of the Central Government or relevant State Government (depending who the public servant is employed by at the time). Section 197(2) specifically provides for the granting of sanction by the Central Government in relation to members of the armed forces. There are instances where the Ministry of Home Affairs has denied sanction to prosecute internal security force personnel under section 197(2) of the CrPC.

A similar clause exists within the Jammu and Kashmir Code of Criminal Procedure, 1989. Section 197(1) of the Code protects Jammu and Kashmir state police personnel from prosecution in civilian courts unless sanction to prosecute is obtained from the Jammu and Kashmir Home Department.

**Criminal Investigation of Human Rights Violations:** Criminal investigations by Jammu and Kashmir state police into human rights violations, as with other offences, are typically initiated by the registration of a case (filing of a First Information Report (FIR)) against security force personnel by the victim or the family. Investigations are then conducted according to normal procedure under the Jammu and Kashmir Code of Criminal Procedure, 1989 (similar to the Code of Criminal Procedure, 1973 operative in the rest of India).

**Criminal Prosecution of Human Rights Violations:** While legal provisions protect members of the security forces from prosecution, ordinary criminal law also fails to specifically criminalize crimes under international law such as torture and enforced disappearance. As the law does not specifically recognize the offence of 'enforced disappearance,' allegations of enforced disappearances are registered, according to First Information Reports (FIR) on record with Amnesty International India, under section 364 of the Ranbir Penal Code (RPC) – "Kidnapping or abducting in order to murder," or section 346 "Wrongful confinement in secret," or section 365 "Kidnapping or abducting with intent secretly and wrongfully to confine person." Each of these provisions carry a sentence of imprisonment of seven to ten years. Alleged extrajudicial executions, including deaths in custody, are typically registered under section 302 of the RPC – "murder".

**India's International Obligations to Ensure Truth, Justice and Reparation:** Whenever serious human rights violations and abuses are committed (including torture, extrajudicial executions and enforced disappearances, which are crimes under international law and violations against the international community as a whole) States are obligated to ensure truth, justice and full reparation to victims. These measures are not discretionary. They form part of the duty of all States to provide an effective remedy to victims as recognized in international human rights law and standards, including Article 8 of the Universal Declaration of Human Rights, The Basic Principles and Guideline on the Right to a Remedy and Reparation or Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR), to which India is a state party.

**The Right to Truth:** Ensuring the right to know the truth about past human rights abuses for victims, family members as well as the general public is recognized in international human rights law as part of a state's obligation to investigate and provide remedy for violations of human rights.

- States must take measures to: establish the truth about human rights abuses, including their reasons, circumstances and conditions;
- the progress and results of any investigation;
- the identity of perpetrators, and in the event of death or enforced disappearance, the fate and whereabouts of the victims.

**The Right to Remedy:** The right to a remedy is recognised in virtually all major international human rights treaties, including the International Covenant on Civil and Political Rights, to which India is a state party.

The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law clarify that remedies include:

- equal and effective access to justice;
- adequate, effective and prompt reparation for harm suffered and
- access to relevant information concerning violations and reparation mechanisms. International law requires that remedies not only be available in law, but accessible and effective in practice.

**The Right to Reparation:** Victims of human rights abuses, including crimes under international law, have a right to full and effective reparation. The right to reparation includes restitution, rehabilitation, satisfaction and guarantees of non-repetition. Reparation should seek to "as far as possible, wipe out all

the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”

**Sanction: Evidence of the Use of Sanction Provisions:** The requirement of sanction for prosecution is a colonial-era provision designed to protect then-largely British public servants from unnecessary and frivolous litigation. In practice it has led to impunity for serious human rights violations. While acknowledging that “civilians” have been killed by security forces, the Army has been known to publicly dismiss complaints of human rights violations and label the families and human rights activists who have brought them as “vested” or “motivated” by anti-national interests.

Authorities maintain that sanction provisions are necessary to prevent the filing of false cases against security force personnel by militant or terrorist groups. This refusal to acknowledge the legitimacy of complaints against the security forces is also reflected in the government’s blanket denial of sanction for members of the security forces to be prosecuted in civilian courts. This report documents several individual cases of victims and their families denied justice through the sanction process. Information made available to Amnesty International India indicates that since 1990, the Ministry of Defence (MoD) has denied, or kept pending, all applications seeking sanction to prosecute army personnel for alleged human rights violations in civilian courts.

Sanction provisions violate India’s obligations under international law to prosecute and punish perpetrators of gross human rights violations, to combat impunity and uphold fair trial standards and maintain equality before the law.

**Sanctions: A Violation of International Human Rights Law:** Article 14 of the International Covenant on Civil and Political Rights, to which India is a state party, states that all persons are equal before courts and tribunals. The Human Rights Committee expands on this by stating that the right to equality before the courts and tribunals is “a key element of human rights protection and serves as a procedural means to a safeguard the rule of law.” Article 14 of the Constitution of India also guarantees to all persons equality before law and equal protection of the law. A system of sanctions or executive permission to prosecute, which confers special status upon security force personnel and allows them effective immunity for crimes committed, violates India’s obligation under Article 14 of the ICCPR to uphold fair trial standards. The primary institutional guarantee of a fair trial is that decisions will not be made by political institutions but by competent, independent and impartial tribunals established by law. The individual’s right to trial in court, with guarantees for the accused in criminal proceedings, lies at the heart of due process of law.

Under the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, India has the obligation to “investigate violations effectively, promptly, thoroughly and impartially and where appropriate, take action against those responsible in accordance with domestic and international law.” The requirement for executive permission to prosecute human rights violations - including crimes under international law such as torture, enforced disappearances, extrajudicial killings, and rape - serves as an impediment to due process, fair trial, and in the case of Jammu and Kashmir, access to justice, truth and reparation.

**Conclusions:** Impunity is a long-standing problem in Jammu and Kashmir. The lack of political will to account for past and present actions of the security forces, including the state police, is fortified by legislation and aggravated by other obstacles to justice, especially for those who lack financial resources or education. To date, not a single alleged perpetrator of a human rights violation has been prosecuted in a civilian court. Victims and their families routinely face intimidation and threats from the security forces when attempting to bring cases against soldiers. Faith in the government and judiciary is almost non-existent in Jammu and Kashmir. Although human rights defenders and activists say that levels of violence from armed groups have gone down. The climate of impunity encourages human rights violations to continue. In recent years, as have direct threats and intimidation by the army and other

security forces, obtaining justice continues to remain out of reach. Trust in the judiciary is low among families of victims. Families repeatedly frustrated by the process now refuse to pursue cases as they feel that attempting to bring cases against the state is a pointless venture. Lawyers and activists speak out against impunity in the system, but their protests are met with little action by the state.

There are policy changes that would increase accountability – such as repealing provisions requiring sanction to prosecute members of the security forces, granting sanction in previously denied and currently pending cases, ensuring independent investigations, and excluding the option for trial by military courts in cases of human rights violations by security forces; but political will to enact them remains mercurial.

In Jammu and Kashmir, ensuring accountability would include ensuring access to information for victims and families during police investigations, and guaranteeing due process when victims attempt to bring complaints against their abusers. Addressing Jammu and Kashmir's impunity problem, and indeed India's attitude towards impunity, is a challenge; but it is essential to ensure justice to victims of human rights violations, and facilitate the healing process for those who have suffered during the course of Jammu and Kashmir's decades of struggle and alienation.

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