

2023

INDIA'S REPRESSIVE REGIME IN KASHMIR: AN ANALYSIS OF THE AFSPA

Diya Kotak

Recommended Citation

Diya Kotak, 'India's Repressive Regime in Kashmir: An Analysis of the AFSPA' (2023) 2 IJHRLR 188-196.

Available at www.humanrightlawreview.in/vol-2-issue-5/.

This Art. is brought to you for free and open access by the International Journal of Human Rights Law Review by an authorized Lex Assisto Media and Publications administrator. For more information, please contact info@humanrightlawreview.in.

INDIA'S REPRESSIVE REGIME IN KASHMIR: AN ANALYSIS OF THE AFSPA

Diya Kotak¹

ABSTRACT

This research paper examines how the Indian Government follows a policy of oppression in Jammu and Kashmir, by imposing repressive laws throughout the state. The Sections of the Armed Forces (Special Powers) Act, 1990, will be examined in order to substantiate the claims made in this paper. The paper will also focus on the implications of these laws on civilians, women and children. Finally, the paper explains the concept of “*half-widows*”, one of the biggest victims of the conflict between the Kashmiris and the Armed forces.

KEYWORDS

Jammu and Kashmir; Armed Forces (Special Powers) Act, 1990; Repressive Law; Half-widows.

INTRODUCTION

In 1990, The Armed Forces (Special Powers) Act was implemented in the state of Jammu and Kashmir to counter the insurgency in the region. The socio-political dynamic in the state has been the core of many debates, especially with regard to the exploitation and torture of civilians by the armed forces. This paper seeks to examine India's repressive regime and its impact on society in Indian administered Kashmir.

The insurgency in Kashmir primarily stems from the conflict between India and Pakistan. Pakistan's claim on Kashmir is based on the state's

¹ Law Student, 3rd Year, B.A. LL.B. (Hons.), Jindal Global Law School, O.P. Jindal Global University.

“Muslim-majority population and its geographic contiguity”,² which has often prompted them to militarily seize the state. India, which is said to be a democratic, secular state, had tightened its grip on Kashmir, since the Muslim-majority state is symbolic of their secular identity. The fact that a Muslim-majority state could thrive under a Hindu-majority government was important for the image of the country. However, as time passed, this notion of secularity began fading. The insurgency that began as a response to the conflict between two nations was perceived by Indians as Pakistani propaganda. The history of the two nations has made it impossible for there to not be conflict over Kashmir. The leaders of the country want to maintain their hold on Kashmir because they fear that “*Kashmir’s exit from the Indian Union would set off powerful centrifugal forces in other parts of the country*”.³ While the government wants Kashmir to be part of the Union of India, every step they take to ensure the same pushes the Kashmiris towards a struggle for separatism; for an independent Kashmir, free of militarism and war.

The Indian government has been following a policy of repression in Jammu and Kashmir since the insurgency began in 1990. Repressive law is a concept of where social relations are regulated unilaterally in a manner that “*it accords all power and rights to one party*”.⁴ The Indian Armed Forces have been long criticized for violence and torture that is rampant in Kashmir, however, not many are aware of the Armed Forces (Special Powers) Act, 1990, or the “AFSPA”.

The Armed Forces (Special Powers) Act, 1990, was implemented in the state of Jammu and Kashmir on 10 September 1990, after Kashmir Valley was declared a disturbed area. According to Section 3 of the AFSPA, the

² Ganguly Ś, ‘Explaining the Kashmir Insurgency: Political Mobilization and Institutional Decay’ (1996) 21 *International Security* 76.

³ Ganguly Ś, ‘Explaining the Kashmir Insurgency: Political Mobilization and Institutional Decay’ (1996) 21 *International Security* 76.

⁴ Deflem M, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press 2008).

Governor of Kashmir or the Central Government, if they are of the opinion that a part of the state, or even the whole State, is in a disturbed and dangerous condition, may declare the whole state or part of the state to be a disturbed area. This section also states that the State can be declared a disturbed area to prevent activities that would intimidate the Government or affecting the harmony among different sections of people and activities “*directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India*”.⁵ This Section is extremely vague, as it does not explicitly define what constitutes as an act that would disrupt the sovereignty of the country. Such ambiguous provisions of law tend to be misused by the people in power, which is exactly what happened in Kashmir. Then began the decades-long struggle against the AFSPA, which revolutionized the State. Section 4 of the AFSPA is possibly the most controversial clause in the oppressive Act. It gives the power to any commissioned officer, any warrant officer, any non-commissioned officer or any person of equivalent rank in the armed forces, in a disturbed area, if he is of the opinion that “*it is necessary to do so 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*”.⁶ This Section invalidates people’s rights, and goes against the fundamental features of a democracy. The Supreme Court, in a landmark judgement, held that “*freedom of speech, right to assemble and demonstrate*” along with “*peaceful agitation*” are the basic features of a democratic country.⁷ The people of a democratic country like India “*have the right to raise their voice against the decisions and actions of the Government or even to express their resentment over the actions of the government on any subject of social or*

⁵ Armed Forces (Jammu and Kashmir) Special Powers Act 1990.

⁶ Armed Forces (Jammu and Kashmir) Special Powers Act 1990.

⁷ Jaitley A, ‘Can the State Restrict a Citizen’s Right to Protest?’ *Outlook India* (3 February 2022) <<https://www.outlookindia.com/website/story/can-the-state-restrict-a-citizens-right-to-protest/280083>> accessed 12 October 2023.

national importance".⁸ However, this liberty does not extend to the people of Kashmir. They are deprived of their right to express themselves freely and voice their grievances. For them, they have to choose between expressing their opinions and death. The AFSPA also has provisions for arresting people against whom there is reasonable suspicion that he has committed or is about to commit a cognizable offence.⁹ A person can be persecuted without reason, with the pretext of being suspected of an intention to commit a cognizable offence. Additionally, the Act gives the Armed Forces the power to "*detain any person who is suspected of any unlawful activity. The person detained could be taken into custody without any warrant and could be interrogated till the officers deem fit to release the person*".¹⁰ The detainees are taken to detention facilities across the State, where they are subjected to various forms of physical and mental torture. Torture has been used in Jammu and Kashmir since 1947, as a "weapon to curb dissenting voices".¹¹ It is said that about seventy percent of torture victims are civilians and eleven percent die during, or as a result of these barbaric methods of interrogation.¹² It is said that punishment in modern society "*becomes typically a deprivation of liberty*".¹³ Kashmir has been transformed into a military state, where people are unable to exercise their Right to Freedom of speech and expression for the fear of execution.

The plight of the Kashmiris is of National importance, however, discussions regarding the oppression in the region are typically censored. Various journalists who report on the mistreatment of Kashmiris by the

⁸ Jaitley A, 'Can the State Restrict a Citizen's Right to Protest?' *Outlook India* (3 February 2022) <<https://www.outlookindia.com/website/story/can-the-state-restrict-a-citizens-right-to-protest/280083>> accessed 12 October 2023.

⁹ Armed Forces (Jammu and Kashmir) Special Powers Act 1990.

¹⁰ Haji M, 'Armed Forces Special Powers Act: A Call for Repeal' (2012) 4 *Counter Terrorist Trends and Analyses* 12.

¹¹ Jameel Y, 'Torture Rampant in J&K Detention Centres: Report.' *The Asian Age* (21 May 2019) <<https://www.asianage.com/india/all-india/210519/torture-rampant-in-jk-detention-centres-report.html>> accessed 12 October 2023.

¹² Jameel Y, 'Torture Rampant in J&K Detention Centres: Report.' *The Asian Age* (21 May 2019) <<https://www.asianage.com/india/all-india/210519/torture-rampant-in-jk-detention-centres-report.html>> accessed 12 October 2023.

¹³ Armed Forces (Jammu and Kashmir) Special Powers Act 1990.

Indian army are bad-mouthed by Nationalists and people who follow the ideology of the Right-wing parties. Local newspapers, magazines and electronic media are full of reports of misery. Even certain Indian filmmaker's have taken interest in the matter of Kashmir. The film "*Haider*", directed by Vishal Bhardwaj, portrays the insurgency in Kashmir in 1995. It depicts detention camps, civilian disappearances and the brutality of the Indian Army. Although the movie is fictitious and is based on the play "*Hamlet*", it was "*the political turmoil and the 25 years of tragedy of Kashmir*",¹⁴ that compelled the director to base the film in region. He set the film in the time when militancy was at its peak, He "wanted to observe the human tragedy that a regular middle-class family went through".¹⁵ The film also features a monologue on the political plights of Kashmir; particularly the Armed Forces (Special Powers) Act, 1990. The Armed Forces (Special Powers) Act, or "AFSPA", is the best example for a repressive law. The AFSPA has been a matter of concern regarding human rights violations and has been criticized for "*carrying various ambiguous provisions and thus giving arbitrary powers to the armed forces*".¹⁶ However, the idea of the Indian occupation of Kashmir is highly romanticized. In 2016, while the armed forces were committing atrocities against Anti-India protestors with pellet guns, the snapping of telecommunications, the banning of newspapers and the arresting of countless activists, Prime Minister Narendra Modi said in his speech, "*Every Indian loves Kashmir. The freedom that every Indian has also belongs to every Kashmiri*".¹⁷ It is unfortunate that the leader of the nation

¹⁴ Singh H, "Kashmir Is the Hamlet of My Film," Says Vishal Bhardwaj on Haider.' *The Indian Express* (5 October 2014)
<<https://indianexpress.com/article/entertainment/bollywood/kashmir-is-the-hamlet-of-my-film/>> accessed 12 October 2023.

¹⁵ Singh H, "Kashmir Is the Hamlet of My Film," Says Vishal Bhardwaj on Haider.' *The Indian Express* (5 October 2014)
<<https://indianexpress.com/article/entertainment/bollywood/kashmir-is-the-hamlet-of-my-film/>> accessed 12 October 2023.

¹⁶ Haji M, 'Armed Forces Special Powers Act: A Call for Repeal' (2012) 4 Counter Terrorist Trends and Analyses 12.

¹⁷ Kaul N, 'India's Obsession with Kashmir: Democracy, Gender, (Anti-)Nationalism' (2018) 119 *Feminist Review* 126.

fails to recognise the constant turmoil in the province he claims is free. Indians don't love Kashmir; they are in love with the idea of occupying Kashmir. This stems from the undying conflict between India and Pakistan. The Indians are so repulsed by the thought of Pakistan "snatching" Kashmir away from them, that it leads them to oppress the very people they claim to love. The state-wide oppression has caused a shift in the social behaviours in Jammu and Kashmir. From 2008 onwards, the youth of Kashmir have been waging a new sort of rebellion against the Indian government, called "the second revolution".¹⁸ In this revolution, people express their demands through public protests, following the notion of a predominantly non-violent civil disobedience movement in the streets.¹⁹ This movement involves widespread youth mobilisation, with predominantly educated people engaging in the non-violent sphere. These protests stem from the dissatisfaction with the justice delivery system and violations of human rights. While the Kashmiri youth are losing their lives, the international community has "*ignored the ongoing human rights and humanitarian crisis in South Asia's most volatile region*".²⁰ Introducing the AFSPA as a method to counter militancy in the disputed areas would be logical, but the Government's refusal to revoke it in the now peaceful areas stems from a long-lasting prejudice. The Hindu leaders of the country believe that Muslims can never be nationalists, especially not the ones who share a culture and belief system with certain regions in Pakistan. The Indian Government does not understand that the desire for a separate, independent, sovereign Kashmir stems from the years and years of oppression imposed on them by the Indian Government.

Not all Kashmiris are involved in radical activism or militancy. Some civilians are just trying to lead their lives as normally as they can. However,

¹⁸ Anjum A and Varma S, 'Curfewed in Kashmir: Voices from the Valley.' (2010) 45 Economic and Political Weekly 10.

¹⁹ Anjum A and Varma S, 'Curfewed in Kashmir: Voices from the Valley.' (2010) 45 Economic and Political Weekly 10.

²⁰ Anjum A and Varma S, 'Curfewed in Kashmir: Voices from the Valley.' (2010) 45 Economic and Political Weekly 10.

even the innocent are harassed. Cities and towns in Kashmir often experience communication blackouts, where people are unable to access the internet and cannot even place calls. It ensures that no Kashmiri can communicate with the rest of the world; these communication blackouts are often strategically timed. India imposed an unprecedented communication blackout on Jammu and Kashmir, hours before scrapping Article 370 of the Constitution of India, which gave special rights to the only Muslim-majority state in India.²¹ Mobile and internet services had been cut off in Kashmir at times of turmoil in the past, but during this particular period, the Government also blacked out landlines and cable television networks.²² They are left in the dark, with imposed curfew and communication blackouts, they have no way of receiving information in times of need. *“An extraordinary percentage of the population has personally-experienced the casual violence of agents of an intrusive secularity state”*.²³ In the film ‘Haider’, one man is seen, unable to enter his own home, despite his wife pleading him to do so. It is then revealed that he is so used to being frisked and checked, that he could not even enter his house for days, until one of the characters in the film frisked him. Another issue among the civilians is the “half-widows”. Some men are detained by the armed forces and taken to interrogation camps for months at a stretch, and hardly of them ever come back alive. The wives of those men are then deemed as “half-widows”. These women often face attacks on their life and safety, but are also “specifically targeted for rape and abuse”.²⁴ The Law fails to provide justice for the half-widows, who search endlessly for their spouses and engage with a “complicated and apathetic

²¹ Bhardwaj M, ‘India Isolates Kashmir by Shutting down Communications as Big Change Announced’ (*Reuters*, 5 August 2019) <<https://www.reuters.com/article/us-india-kashmir-blackout-idUSKCN1UV1R7>> accessed 12 October 2023.

²² Bhardwaj M, ‘India Isolates Kashmir by Shutting down Communications as Big Change Announced’ (*Reuters*, 5 August 2019) <<https://www.reuters.com/article/us-india-kashmir-blackout-idUSKCN1UV1R7>> accessed 12 October 2023.

²³ Kaul S, “An’ You Will Fight, till the Death of It...”: Past and Present in the Challenge of Kashmir’ (2011) 78 *Social Research: An International Quarterly* 173.

²⁴ Qutab S, ‘Women Victims of Armed Conflict: Half-Widows in Jammu and Kashmir’ (2012) 61 *Sociological Bulletin* 255.

legal system”.²⁵ In the case of disappearances, *Habeas Corpus* writ petitions are filed, but they are found to be too time consuming and expensive, especially in a slow justice system. Along with that, not all women are aware of the legal procedures required, which is why their searches are in vain. Half-widows are forced to live with the uncertainty about the existence of their spouses and the poverty that follows after the loss of the primary breadwinner of the family. For women who are uneducated, they are not able to sustain themselves, and since there is no official, legal recognition of “half-widows”, they do not receive any concessions from the Government. Countless children are orphaned at a very young age, which exposes them to personal trauma too early. This severely alters the course for their mental state as adults, and would, in all probability, contribute to them developing a radical mindset, in order to avenge the death of their loved ones.

It has been decades since the militancy began in Kashmir, and although Jammu and Kashmir have become Union Territories, the situation seems to be getting worse. With the separatist movement and the constant conflict between India and Pakistan, no one can predict what the future holds for the people of Kashmir, and whether they will ever receive justice.

²⁵ Qutab S, 'Women Victims of Armed Conflict: Half-Widows in Jammu and Kashmir' (2012) 61 Sociological Bulletin 255.