



**DEBATE ON ARMED FORCES (JAMMU AND KASHMIR)
SPECIAL POWERS ACT, 1990 POST ABROGATION OF SPECIAL
STATUS**

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ABSTRACT

The violence unleashed by militants in the late 1980's and the consequent combating exercises by state forces in the newly formed Union Territory of Jammu and Kashmir have frequently violated the basic rights of life and liberty of the people in the region. The escalation of insurgent violence, which developed into an “invisible war” by 1990, had necessitated the enactment and implementation of anti-terrorist laws such as the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (hereafter used as AFSPA). Paradoxically, these anti-terrorist laws meant to combat insurgency and terrorism have more often than not, contributed to repression, and violation of civil liberties resulting into demand of the repeal of the Act. Such demand has become an issue for debate among politicians, human rights groups and the armed forces. The issue over the years has acquired political overtones casting a cloud over its revocation as the diverse communities, regions and political organizations in the state hold conflicting and contradictory views on the matter. The paper attempts to examine the debate on AFSPA and that has assumed significance following the abrogation of Article 370 and division of the state of Jammu and Kashmir into two Union territories, Jammu and Kashmir and Ladakh.

I. INTRODUCTION

The terrorist violence in the erstwhile state of Jammu and Kashmir now a union territory¹ has affected all the three regions of the state. The indiscriminate killings, incidents of rape, molestation, blaze, destruction of property by militants sometimes assumed menacing proportions. According to the information provided by the Jammu and Kashmir government as many as 41,866 persons lost their lives in 71,038 incidents of terrorist violence in the region.² This apart, 23 civilians and 78 security personnel lost their lives itself till September 4, 2019. Such violations by the terrorists groups necessitated the enactment, implementation and retention of anti-terrorist laws such as Armed Forces

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¹On August 5, 2019, Home Minister introduced two Bills in the Rajya Sabha revoking the special status of Jammu and Kashmir under Article 370 and bifurcating the state into two Union Territories.

²Vijaita Singh, “365 terrorist incidents so far in J&K this year”, *The Hindu*, (November 23, 2019).

(Jammu And Kashmir) Special Powers Act, 1990 (hereafter used as AFSPA), which was enacted by the Parliament on 5th July 1990. Ironically, the Act also contributed to the spate of violations of human rights and “ended up being the vehicle of state oppression”.

The Act, according to some, confers extraordinary powers on the men in uniform who have often abused it but cannot be prosecuted. According to them, as per section 4 of the Act, special powers are conferred upon the members of the armed forces empowering them to arrest, to detain, and even to kill. Under section 4(a) of the Act, even a non-commissioned officer can order his men to shoot to kill “if he is of the opinion that it is necessary to do so for maintenance of public order”.³ Section 4(c) of the Act permits arrest without warrant, and section 4(d) authorizes the entry and search, without warrant of any premises to make arrests as sanctioned under section 4(c), or to recover any person believed to be wrongfully restrained or confined” etc. Moreover, in order to enable them to carry out their duties without fear of being prosecuted for their actions, section 7 exempts army personnel from prosecution. It states that “no prosecution suit or legal proceedings shall be instituted, except with the previous sanction of the central government”. Section 7 of the AFSPA have rather given impunity and non-accountability to security forces resulting in more excesses. This has been substantiated by incidents such as Pathribal and Machil encounter cases. Amnesty International has held section 7 of the Act as “the primary facilitators of impunity”⁴ and thus sought removal of prior sanctions. While demanding repeal of AFSPA it has sought investigation into violations by an “independent and impartial authority”.⁵ The Act has also evoked criticism and scorn among the academicians and human rights activists. This apart, no political outfit based in the Kashmir Valley has favoured the AFSPA in the present form.

The judiciary however, has upheld the provision of sanction by the Central government. In *General Officer Commanding v. CBI & Anr.*⁶, the Supreme court held that “If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio for want of sanction”⁷. Earlier also, the Supreme Court in the *Naga People’s*

³ The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.

⁴ Available at <http://economictimes.indiatimes.com/news/politics-and-nation/afspa-amnesty-seeks-probe-into-human-rights-violations-in-jk/article/show/47898718.cms>. Accessed on 4 January 2021.

⁵ Available at <http://economictimes.indiatimes.com/news/politics-and-nation/afspa-amnesty-seeks-probe-into-human-rights-violations-in-jk/article/show/47898718.cms>. Accessed on 9 December 2020.

⁶ (2012) 5 SCR 599

⁷ Id at 614. Also see, Bhadra Sinha, “Let Army decide how to try personnel in fake encounter cases: SC”, *The Hindustan Times*, (May 02, 2012).

*Movement of Human Rights v. Union of India*⁸ upheld the validity of the law. But in view of the potential abuse of human rights the court has laid down detailed guidelines for its use. Further, to ensure accountability for human rights violations by the police and security forces the Supreme Court in case of *Extra Judicial Execution Victim Families Association (EEVFAM) & Anr. v. Union of India & Anr.*,⁹ ordered the Central Bureau of Investigation to thoroughly investigate cases of alleged extrajudicial killings by the security forces in the state of Manipur. The court held that the Act, ‘does not allow blanket immunity for perpetrators of unjustified deaths or offences.’ Further, the court stated that the armed forces cannot justify excessive use of force under the AFSPA. Any excesses beyond the call of duty, those members of the armed forces would be liable to be proceeded against in a court of law, and not necessarily by the army in court martial proceedings.¹⁰ Ironically, such initiative by the court has not been seen in cases of alleged extrajudicial killings in Jammu and Kashmir.

However, despite such guidelines and directions issued by the Supreme Court, the people in ‘disturbed areas’ have experienced abuses as the Act has an inherent tendency to enable any incumbent of such power to misuse. Demanding the revocation of the Act, they have often alleged that the AFSPA has led to violations of human rights and abuse of power by the security forces. The killing of three labourers Abrar Ahmad (25), Mohammad Ibrar (16) and Imtiyaz Ahmad (20), in the Amshipora (Shopian) in an encounter on July 18, 2020 has once again ignited the debate against the Act and security personnel. All three were labelled as terrorists by the security personnel. The protesting relatives on the contrary stated that the deceased had no connection with militancy and were locals not foreign terrorists as claimed by the forces. As doubts were raised, the police conducted DNA profiling of the three families which established that the killed persons were infact locals not foreign terrorists. Consequently, an SIT was set up to probe the case. A chargesheet was produced in the District and Sessions Judge, Shopian by the police, against three persons, including an Army Captain for their alleged role in encounter. The three accused are Captain Bhoopendra of 62 Rashtriya Rifles, Bilal Ahmad and Tabish Ahmad.¹¹ The Army also conducted an inquiry which found prima facie evidence that the troops had “exceeded” powers vested under the Act. A general court martial proceedings has now been initiated against Captain

⁸ AIR 1998 SC 431

⁹ (2016)14 SCC536

¹⁰ *Ibid.* Para 173.

¹¹ “Shopian fake encounter :Capt among three named in challan”, *The Tribune*, (December 27, 2020).

Bhoopendra Singh. Mohammed Yusuf, father of Abrar Ahmed, who was called for deposing in the court martial proceedings stated that he is “expected justice”.¹² In another incident the families of the three youths killed in an encounter with security forces in the Parimpora area have also claimed that those killed had no connection with militancy. The deceased included a class XI student, a university student and a carpenter. The three were killed in a joint operation of the Army, Central Reserve Police Force (CRPF) and the police. The case is being investigated.¹³ Such incidents of human rights violation result in resentment and demand of the local Kashmiri people for whom the Act has become a “metaphor for the denial of human rights”. Their resentment is further stirred by the ceaseless opposition and propaganda carried out by the separatist groups and related organizations in Kashmir. Further, the ISI handlers from Pakistan has tried to build up false narrative by using fake videos of alleged atrocities committed by the security forces to whip up the emotions.¹⁴

However, conflicting and contradictory views on the matter has resulted in fragmented and contrasting stand, casting a cloud over its revocation. This apart, the incidents of infiltration and terrorist strikes supported from across the border has thwarted any dilution or repeal of the AFSPA. In 2020, there were 5,100 instances of ceasefire violation with an average of 14 cases daily by Pakistan along the Line of Control (LoC) in Jammu and Kashmir. Of these 1,565 violations took place since August 2019 after the Central government abrogated Article 370 and bifurcated the state into UT’s. This is the highest ceasefire violation by the Pakistan that claimed 36 lives including 24 security personnel and left more than 130 persons injured.¹⁵ Thus even after revocation of Article 370 the problem of militancy is not over. In addition, Pakistan has used terrorism as a substitute for war. It has failed to “significantly limit” militant outfits like the Lashkar-e-Taiba(LeT) and the Jaish-e-Mohammed (JEM). Consequently the withdrawal of the Act is extremely difficult in the existing conditions. Nonetheless, the issue over the years has acquired political overtones casting a cloud over its revocation as the diverse communities, regions and political organizations in the state hold conflicting and contradictory views on the matter.

¹²“Amshipuraen counter : GCM proceedings begin against Capt”, *The Tribune*, April 4, 2022. Available at <https://www.tribuneindia.com/news/j-k/amshipura-encounter-gcm-proceedings-begin-against-capt-383407>. Accessed on April 4, 2022.

¹³“Youths killed in Srinagar encounter had terror links, say J&K Police”, *The Tribune*, (January 2, 2021).

¹⁴“Pak terror groups resorting to cyber recruitment : Officials”, *The Tribune*, (January 4, 2021).

¹⁵“Highest truce violations by Pak this year”, *The Tribune*, (December 30, 2020).

The paper attempts to examine and analyse the debate surrounding AFSPA that has assumed significance following the abrogation of article 370 and division of state of Jammu and Kashmir into two union territories, Jammu and Kashmir and Ladakh. More so with the decision of the government to withdraw the Act from parts of Assam, Manipur and Nagaland that has fuelled calls for the Act to be lifted from Kashmir as well. Broadly, there are three types of conflicting viewpoints regarding the AFSPA in Jammu and Kashmir as reflected in the actions and attitudes of various organizations including political parties, civil liberty groups, separatist outfits and the army elite. The paper accordingly is divided into three parts followed by conclusion. While the first and second part deals with views on complete and partial revocation of the Act, the third part focuses mainly on debate surrounding retention of the Act.

II. REVOCATION OF AFSPA

The first view consider AFSPA as troublesome providing cover to the perpetrators of violations. It includes perceptions of groups or organizations demanding scrapping or withdrawn or review of the AFSPA. The separatist groups maintained that the state of Jammu and Kashmir is a disputed territory and laws like AFSPA and Disturbed Areas Act (DAA) need to be revoked.¹⁶ According to them “peace would return to the state only after India withdrew its security forces and agreed to plebiscite”.¹⁷ Similarly, the leaders of the moderate Hurriyat group have asserted that the situation in Kashmir could improve only by taking steps such as: the revocation of the AFSPA and the Public Safety Act (PSA); withdrawal of troops and removal of security bunkers from cities, towns and villages; release of prisoners and holding tripartite talks involving Pakistan for the solution of Kashmir problem.¹⁸ Likewise, Muzaffar Hussain Beig, a senior leader of the Peoples Democratic Party (PDP), said that AFSPA “will have to go from all areas and not merely from Srinagar and Jammu as a cosmetic exercise”.¹⁹ The PDP, maintains that since the Act clashes with human rights and democratic values it should be withdrawn. The former chief Minister Mehbooba Mufti appealed to the Central government to consider the recommendations of repeal made by the Amnesty International.²⁰ While the PDP supported the recommendation of Amnesty

¹⁶*The Tribune*, (August 12, 2010).

¹⁷Arati R. Jerath & M.Saleem Pandit, “India not listening to people of J&K – Withdraw forces to bring peace :Geelani” *Times of India*,(August 5, 2010).

¹⁸*The Tribune*, (August 28, 2010).

¹⁹Ehsan Fazili, “PDP holds anti-govt. protests across Kashmir valley”, *The Tribune*, (November 22, 2011).

²⁰Available at <http://zeenews.india.com/news/jammu-and-kashmir/pdp-hails-amnesty-recommendations-forremoval-of-afspa-from-jk-1624360.html>. Accessed on 4July 2021.

International asking for revocation of the Act, the BJP on the contrary strongly opposed the demand of its coalition partner.²¹

Apart from political parties, the human rights organizations, including the Kashmir based groups, have also opposed the AFSPA. Protesting against AFSPA a Kashmir based civil rights activist asked “The Army is here to protect Kashmir. But what of the Kashmiris”.²² He also alleged that the prevalence of AFSPA in the state makes it difficult for the police to investigate cases of human rights violations. The Association of Parents of Disappeared Persons (APDP), also demanded repeal of the Act.²³ A report released by the APDP and the International People’s Tribunal on Human Rights and Justice in Kashmir alleged that 235 army men had been involved in human rights abuses in the state. The Army, however, rebutted the report and said “allegations of human rights abuses by army personnel are investigated and action is taken against defaulters. Further it claimed that since 1990, only 36 cases, out of 1,519 cases of alleged human rights violations in the state, were found to be true”.²⁴ The activists, however, are not satisfied. According to them the inquiries conducted by the army are never transparent. In addition, the social activist, Medha Patkar, while demanding revocation of the AFSPA, termed the Act as a blot on democracy.²⁵ The Justice Santosh Hegde Commission set up by the Supreme Court to investigate cases of fake encounters in Manipur described the law as “a symbol of oppression”.²⁶ Likewise, Irom Sharmila, who sat on fast for 16 years demanding repeal of AFSPA,²⁷ stated that “I am against a government that uses violence as a means to govern”. Some have demanded a review of the AFSPA. Regarding this, the report of the three interlocutors, appointed by the Central Ministry of Home Affairs to study the situation in Jammu and Kashmir, had suggested a review or re-appraisal of the AFSPA and other central Acts in the state.²⁸ In like manner, a high-level committee comprising former Chief Justice of India, Justice J.S. Verma,

²¹Dinesh Manhotra, “BJP makes veiled attack on PDP for endorsing Amnesty report on AFSPA” *The Sunday Tribune*, (July5, 2015).

²²Poulomi Banerjee, “Kashmir’s Festering Wounds”, *Sunday Hindustan Times*, (August 2, 2015).

²³ Press release from the Association of Parents of Disappeared Persons, “Not Just AFSPA, End the Culture of Impunity from JK : APDP”, *Daily Post, Kshmir Walla*, (October 29, 2011).

²⁴ “Army rebuts NGO’s report”, *The Tribune*, Chandigarh, (December 8, 2012).

²⁵Shikh Saleem, “In Irom Sharmila’s support, march begins from Srinagar”, *The Indian Express*, (October 17, 2011).

²⁶ “Amnesty for repeal of AFSPA in N-E”, *The Tribune*, (July 13, 2015).

²⁷ “Sharmila completes 12 years of fast”, *The Tribune*, (November 6, 2012). She went on fast on November 5, 2000 after 10 persons were shot dead in an encounter with Assam Rifles personnel at Malon, on November 2, 2000.

²⁸Dileep Padgaonkar, Radha Kumar and M.M.Ansari, “A New Compact With The People Of Jammu and Kashmir (Final Report)”, 150(2012)

also called for a review of the AFSPA.²⁹ According to some “The Act is a display of hard power. There is a need to replace it with soft power generated by democracy.”³⁰

The National Human Rights Commission (NHRC) of India also holds that the AFSPA confers impunity which has often led to the violation of human rights.³¹ More than that, Justice BP Jeevan Reddy Committee, which was set up by the Union Home Minister to review the provisions of the AFSPA in the north-east, also recommended repeal of the Act in its report submitted on June 6, 2005. The report said “It is highly desirable and advisable to repeal the Act altogether”. Further, it said that “recommending the continuation of the present Act, with or without amendments, does not arise”.³² However, the report recommended insertion of appropriate provisions of the AFSPA in the Unlawful Activities (Prevention) Act(UAPA) 1967 (as amended in the year 2004, 2008) instead of any new legislation. In fact, the committee proposed the insertion of a new chapter VIA in the UAPA incorporating, among others, the Supreme Court’s directions regarding deployment of armed forces of the Union and their conduct during such deployment.³³ In the case of violations or abuse of power by armed forces, the committee proposed an independent “grievances cell” constituted by the Union government. Similarly, the Second Administrative Reforms Commission (2007) also favoured the repeal of the AFSPA by inserting its appropriate provisions in chapter-VIA of the UAPA.³⁴ Altogether, the aforesaid description shows that a variety of groups including certain Kashmir based organizations, human rights bodies, committees etc. have perceived that the AFSPA is incompatible with human rights and democratic norms.

Apart from this, the United Nations Human Rights Committee had also pointed out that the provision of sanction of central government “contributes to a climate of impunity”. While recognizing the factor of terrorist violence, the Committee emphasized that all measures adopted must be in conformity with the state’s obligation under the covenant. Section 4 of the AFSPA violates Article 6(1) of the International Covenant on Civil and Political Right (ICCPR) which states that “no one shall be arbitrarily deprived of his life”. In 2018, the United Nations Office of the High Commissioner for Human Rights (UNHCR) emphasized on the urgent need to address “human rights violations and to deliver justice for all people in

²⁹Nitya Rao, “Rights, Recognition and Rape”, *Economic and Political Weekly*, 19(February 16, 2013)

³⁰Arun Joshi, “AFSPA in J&K will remain a bone of contention”, *The Tribune*, (July 6, 2015).

³¹Aditi Tandon, “NHRC calls for AFSPA’s repeal”, *The Tribune*, Chandigarh(December 5, 2011).

³² Government of India, Ministry of Home Affairs, *Report of The committee to Review The Armed Forces Special Powers Act, 1958*, 74(2005).

³³*Ibid.*

³⁴ Government of India, *Second Administrative Reforms Commission-Public Order(Fifth Report) 242*(June 2007)

Kashmir”.³⁵ Notwithstanding the criticism of the AFSPA, the Government of India in its national report for the Universal Periodic Review (UPR II) maintained that “as long as deployment of armed forces is required to maintain peace and normalcy, AFSPA powers are required”.³⁶ Likewise in its third Universal Periodic Review report (2016), when some members of United Nations recommended that India should repeal or revise the AFSPA the Government of India stated that whether the “Act should be repealed or not is a matter of on-going vibrant political debate” in the country”. Regarding aberrations, according to the government, same are “dealt with by internal processes that include our fiercely independent judiciary, autonomous Human Rights Commission at both national and State levels, vigilant and vocal media and a vibrant civil society”.³⁷ Moreover, any allegations of human rights violations by security forces are appropriately handled by the military justice system. However, in March 2018, Union Minister of State for Home Affairs, while rejecting any demand to repeal or amend AFSPA added that a proposal is under consideration to make the Armed Forces (Special Powers) Act, 1958 “more operationally effective and humane”.

III. PARTIAL REVOCATION OF AFSPA

The second point of view holds that the Act should be partially withdrawn and made “more humane”. Regarding this, the then Chief Minister, Omar Abdullah, had claimed that his suggestion for the gradual revocation of AFSPA in certain parts had represented the public view as the people wanted to relish the fruits of peace and tranquility along with the development process.³⁸ In terms of areas, he wanted withdrawal of the AFSPA from districts like Ganderbal, Srinagar, Badgam, Jammu, Kathua and Samba where terrorism related incidents had declined considerably. Notwithstanding his views on the AFSPA, he has appreciated Army for help and relief operations in the troubled areas of the state. The Congress party, on the other hand in its manifesto of 2019 Parliamentary election promised to

³⁵ Available at http://www.ohchr.org/Documents/Countries/IN/Developments_in_KashmirJune2016ToApril2018.pdf Accessed on April 3, 2022.

³⁶ National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, A/HRC/WG.6/13/IND/1, UN General Assembly, 8 March, 2012, para 25. The UPR mechanism was created by the UN General Assembly (UNGA) on March 15, 2006 and is undertaken every four years to ensure universal coverage on human rights across the world. The mechanism calls for three reports from every country to judge its performance on human rights – the report by the country’s human rights commission; another by the civil society and a third by the government. Also see, Aditi Tandon, “India rejects recommendation to review AFSPA”, *The Tribune*, (December 10, 2012).

³⁷ https://mea.gov.in/Uploads/PublicationDocs/27953_27953_UPR_-III_for_MEA_website_.pdf. Accessed on December 2, 2021

³⁸ “My demand for AFSPA rollback reflects public view: Omar”, *The Tribune* (November 22, 2011).

amend AFSPA. According to its manifesto, Act will be reviewed so as to make suitable changes to balance the requirements of security and the protection of human rights.³⁹ Whereas, the CPIM had supported the partial withdrawal of the AFSPA from the aforementioned areas on a trial basis.⁴⁰ Unfortunately, the relatively peaceful situation in the stated areas soon turned volatile by the mid-2013 as the terrorist made major attacks on the Army units in Srinagar and Samba area which, obviously, had put the then Chief Minister, Mr. Omar Abdullah in a dilemma whether AFSPA should stay or go from the Jammu and Kashmir. During the terrorist strikes on the Army units eight soldiers were killed on June 24, 2013, near Hyderpora on the outskirts of Srinagar and four army personnel, including one Lt. Colonel, in Samba on September 26, 2013. Before entering into the Army camp at Samba, the three terrorists dressed in combat fatigues also killed four policemen and one shopkeeper in the way in Hiranagar. These attacks took place in areas from where the Chief Minister had demanded the Act should be revoked. The situation had improved but intermittent violence by militants was yet to be brought to an end. In one of the worst attack so far, 31 people, including 21 army personnel and their family members, and 10 civilians were killed by three Pakistani terrorists at Kaluchak on May 14, 2002.⁴¹ Likewise, on August 27, 2008 as many as 11 people, including three soldiers, five civilians and three militants were killed in a suicide attack in Kanachak. On March 20, 2015, seven people were killed by two terrorists dressed in army uniforms after they hijacked a jeep and stormed a police station in Kathua district. Both terrorists were shot dead. And on March 21, 2015, two terrorists, probably a splinter group of the March 20 terror attack try to storm an army camp in Samba district. However, both were killed. Apart from this in 2014, 12 people, including five civilians and four terrorists, were killed in a day-long encounter at Arnia sector in Jammu.⁴² This apart, there has been a spurt in incidents of firing along the border, with Pakistan attacking India on regular basis. Firing along the Line of Control (LOC) in Poonch district of Balakote on 15th August 2015 resulted in five civilian casualties.⁴³ These factors have adversely affected the move for the partial withdrawal of the AFSPA in the state. The situation ever since 1990, has remained

³⁹<http://www.news18.com/india/lt-gen-hooda-bats-for-amendment-of-afspa-says-act-needs-to-be-more-humane-2089935>. Accessed on February 5, 2022.

⁴⁰ Dinesh Malhotra, "CPM supports AFSPA revocation", *The Tribune*, (November 5, 2011).

⁴¹ "NH-15: Highway to terror attacks", *Hindustan Times*, (July 28, 2015).

⁴² *Ibid.*

⁴³ "Amid shelling and firing on LoC, Shariff greets India", *The Hindu*, (August 16, 2015).

impregnated with insurgency, infiltrations, ceasefire violations, terrorist strikes, combat exercises etc., making army's presence indispensable in the state.

IV. RETENTION OF AFSPA

The third group favours the AFSPA and spurns the idea of revocation, review or reappraisal of the Act. It is presumed that revocation of the AFSPA may promote terrorism and demoralize armed forces. Among the political parties falling in this group, the ruling party, BhartiyaJanata Party (BJP), which is based in the Jammu region, has unequivocally opposed the premise of revocation because it would weaken the fight against terrorism sponsored from across the border. The Act, according to BJP, has served as a protective mechanism for the armed forces.⁴⁴ The spokesperson of the state unit of the BJP, while opposing the idea of partial rollback of the Act, said "one can not expect a soldier chasing a militant to be suddenly deprived of the protective AFSPA cover once the militant enters another district where the Act is not applicable".⁴⁵ Further, while reacting to the killing of CRPF jawans in a fidayeen attack in Srinagar the BJP's state chief spokesperson said, "The demand for withdrawal of AFSPA at the time when these forces are already target of recurrent terrorist attacks is senseless and politically motivated".⁴⁶ He dared the then Chief Minister Omar Abdullah to surrender the Z-plus and NSG personnel security cover.⁴⁷ Consequently the then coalition government of the BJP and PDP which took office on 1 March 2015, in its 'Common Minimum Programme' stated that "While both parties have historically held a different view on the Armed Forces Special Powers Act (AFSPA) and the need for it in the state at present, as part of the agenda for governance of this alliance, the coalition government will examine the need for de-notifying 'disturbed areas'. This, as a consequence, would enable the Central Government to take a final view on the continuation of AFSPA."⁴⁸ However, when PDP supported the recommendation of Amnesty International asking for revocation of the Act from J&K, the BJP strongly opposed the demand of its coalition

⁴⁴ Ravi KrishananKhajuria, "Our stand against AFSPA rollback vindicated : BJP" *The Tribune*, (December 13, 2011).

⁴⁵ *Ibid*.

⁴⁶ Arteev Sharma, "Suicide attack reignites debate on AFSPA revocation", *The Tribune*, (March 14, 2013).

⁴⁷ *Ibid*

⁴⁸ "Full text: Common Minimum Programme of PDP-BJP government in J&K", IBN Live, (2 March 2015). Available at <http://ibnlive.in.com/news/full-text-common-minimum-programme-of-pdpbjp-government-in-jk/531591-37-64.html>. Accessed on 16 April 2015.

partner.⁴⁹ The then Union Home Minister Rajnath Singh said that the Act would be revoked only when the situation was conducive in the state.⁵⁰ Similarly, the “Jammu State Morcha”, a Jammu based outfit, has opposed the withdrawal or revocation of the Act in the present circumstances. In addition, the Panthers Party, commanding support in certain pockets of the Jammu region, charged that if the Ministers in the state were not safe, where was the guarantee of safety of life of the common people. According to the party, it is duplicity on the part of the state government which demands revocation of the AFSPA and shows no concern for security personnel gunned down by militants from time to time.⁵¹

Apart from the Jammu based political parties, the Kashmiri migrants (Pandits, Sikhs etc.) have also opposed the idea of revocation of the AFSPA till the ongoing violence has ended. The migrants, among others, have also criticized the civil liberty groups for opposing the AFSPA. They accused the Amnesty International of refusing to entertain their plea of human rights abuses and brutality at the hands of the militants.⁵² It was also alleged that their account had violated all human norms of fair reporting as it had highlighted the alleged excesses by security forces and tended to gloss over atrocities by the militants.⁵³ Mr. K.P.S. Gill, the former DGP, Punjab said, “If they were fair and balanced, one could accept their views. But they are biased and support the terrorists”⁵⁴. According to some “security forces not only take casualties, they get bad press”⁵⁵. At times, the vested interests have instigated people nevertheless, excesses have been committed by the security forces.

The Army, which is of paramount importance in the terror-affected state, has also resisted any scrap or dilution of the Act under the pretext that it would fritter away the gains made in curbing the militancy in the state. The stand of the army, according to an army officer “rests on this vast experience, gained over a long period of time.”⁵⁶ It is argued that “what the Indian Army most needed in its face-off with Pakistan is not more officers or better-trained soldiers or bullet proof jackets. It is AFSPA.”⁵⁷ The army holds that AFSPA is merely a legal cover and does not give sweeping protection to the forces being used in aid of the civil

⁴⁹Dinesh Manhotra, “BJP makes veiled attack on PDP for endorsing Amnesty report on AFSPA” *The Sunday Tribune*, (July 5, 2015).

⁵⁰ “AFSPA to stay in J-K for now”, *The Tribune*, (July 3, 2015).

⁵¹Arteev Sharma, “Suicide attack reignites debate on AFSPA revocation”, *The Tribune*, (March 14, 2013).

⁵² Sabina Sehgal, “How green was our valley”, *The Times of India*, (January 24, 1993).

⁵³ N.C. Menon, “Asia Watch Report on J&K”, *The Hindustan Times* (May 10, 1993).

⁵⁴⁵⁴Kanwar Sandhu, “Confessions of a killer cop”, *Outlook*, 33(December 14, 2015)

⁵⁵ Prakash Singh, “Wash The Khakhi”, *Outlook* 44(December 14, 2015).

⁵⁶ Lt-Gen Harwant Singh (retd), “AFSPA in J and K : Selective withdrawal may be harmful”, *The Tribune* (January 8, 2013).

⁵⁷ Sanjay Kak, “It is what you don’t see”, *Hindustan Times*, New Delhi, September 29, 2010.

administration. Further, it is believed that if protection is denied to soldiers tackling insurgency they will conduct operations “not on the basis of military judgement but on the need to defend their actions in court”. That can only benefit the insurgents.⁵⁸

In other words, the military officers perceive that Act is almost the same as the protection available to the state police under the Criminal Procedure Code (CrPC). Further, to counter the charge of misuse of powers, it is claimed that strict action has been taken against the guilty or errant official under the Army Act -1950, which, according to army, is prompt and as stringent as the Criminal Procedure Code. It is illustrated by facts that the “The Army has punished 104 of its men, some of them held guilty of rape, including a major. They were dismissed from the service and also sentenced to rigorous imprisonment ranging from seven to 10 years. Since 2008, there has not been a single case of rape charge against any of the soldiers posted in Jammu and Kashmir”.⁵⁹ According to the Ministry of Defence, “there have been 1013 allegations of human rights violations by the army officials in Jammu and Kashmir between 1994 and 2014. After enquiry, only 61 of these cases were found to have any truth in them and in these cases, action was taken against the guilty.”⁶⁰ The militants according to them, want the army to withdraw and are inciting people to bring in such allegations against soldiers.⁶¹

Moreover, the AFSPA, according to a retired General, was essential to keep the highways secure and to ensure supply lines for Indian troops in Siachen”.⁶² Another General believed that it would be impossible for the army to operate in J&K without the cover of the Act as the force would get bogged down in legal battles. The General observed:

“The provocation for a move to abrogate the AFSPA is due to alleged serious violations of human rights by the security forces. Counter-insurgency operations are complex in nature and are carried out under difficult and trying circumstances. Often it is a situation where you kill or get killed. In many encounters, collateral damage in the form of casualties to innocent civilians takes place. During such encounters, invariably it is the insurgents who target innocent civilians knowing

⁵⁸ Karan Thapar, “Act now, act right”, *Sunday Hindustan Times*, New Delhi (September 26, 2010)

⁵⁹ “By commenting on AFSPA, panel has overstepped its brief”, *The Tribune* (January 25, 2013).

⁶⁰ *Supra Note 22*

⁶¹ *Ibid.*

⁶² Sanjay Kak, “It is what you don’t see”, *Hindustan Times*, New Delhi, September 29, 2010.

fully well that it is the security forces who will be blamed. In a virulent insurgency, security forces just cannot operate without the cover of the AFSPA”.⁶³

Similarly, a former chief of Army staff observed that any dilution or partial revocation of the Act would affect operational effectiveness in Jammu and Kashmir. According to him, the Act’s revocation in districts like Srinagar and Ganderbal will have the following security implications

- (a) These areas are likely to become a safe haven for terrorists. After carrying out activities in areas outside, the terrorists may escape to find shelter in such areas.
- (b) Many army units are located in Srinagar. There is a frequent movement of troops and convoys within and outside the city. Convoys to Kargil and Leh have to pass through Ganderbal. In the event of any terrorist act troops will not be able to conduct a seamless operation.⁶⁴

Moreover, while reacting to the proposed amendments such as taking prior arrest warrants, taking away the power of armed forces to open fire causing death and setting up of a grievance redressal cell⁶⁵, a senior army officer said “Terrorists do not have a permanent address and keep moving. By the time we get warrants, he would have moved to another district. How can we operate under such circumstances”.⁶⁶ Furthermore, in the case of J&K there exists elements within the state that are perennially in support of the insurgents.⁶⁷ According to a former army officer, separatists create situations in which the security forces are offered few options but to respond”. It is not easy to be facing mobs and attempting to be “good guys”. Cadres are usually on the ready for this and professional rabble-rousers move from town to town, with teams of stone throwers.⁶⁸ Many stone throwers had admitted to being paid, meaning the pot was frequently stirred.⁶⁹

The army, thus, maintains that lifting of AFSPA may prove counter-productive in the present scenario as over 40 terrorist camps are still active in PoK and more terrorists awaiting their chance to enter into Kashmir. Pakistan’s support to the ongoing proxy war continues

⁶³ Lt-Gen Harwant Singh, “AFSPA in J and K : Selective withdrawal may be harmful”, *The Tribune*, January 8, 2013.

⁶⁴ Gen. V.P.Malik, “Revisiting AFSPA”, *The Tribune*(September 20, 2010).

⁶⁵ “home ministry mulls three amendments in AFSPA”, *Hindustan Times* (April 11, 2012).

⁶⁶ *Ibid.*

⁶⁷ *Ibid*

⁶⁸ Syed Ata Hasnain, “Kashmir may witness many Handwaras”, *The Tribune* (April 19, 2016).

⁶⁹ Samar Halarnkar, “Threat to the idea of India”, *Hindustan Times* (April 21, 2016).

unabated, the terror infrastructure, both in Pakistan/POK (Pakistan occupied Kashmir), remains intact.”⁷⁰ Similar concerns were raised by the Union Ministry of Defence, in its Annual Report. Above all, intermittent attacks, causing death and injury to security personnel, political leaders, panchayat members and civilians have contributed more than any other factor to keep the issue of revocation or partial withdrawal of the Act hanging. Around 300 panchayat members in South Kashmir have resigned on account of alleged threats from militants.⁷¹ Several Sarpanches and Panches have also lost their lives. In July 2012, the National Human rights Commission had also directed the state government to provide a security cover to all vulnerable persons with immediate effect.⁷² During the Parliamentary elections held in May 2014, a number of attacks against election officials by armed groups took place resulting in the killings of a local village head and his son in Pulwama district, and another village leader in the same district on 21 April 2014.⁷³ This apart, the incidents of killing of security personnel on different occasions make it evident that terrorist have the capacity to strike anywhere. The incidents include killing in a suicide attack and beheading of police personnel. As many as 71 have reportedly lost their lives upto September 2018.⁷⁴ On February 14, 2019, a SUV driven by suicide bomber packed with RDX rammed into a CRPF bus in Pulwama. Atleast 38 CRPF personnel were killed.⁷⁵ According to official their “bodies had been mutilated beyond recognition”.⁷⁶ The JeM released a video claiming credit for the attack. They identified the attacker as Adil Ahmed Dar, a resident of Kakapora in Pulwama, who joined the outfit last year. In the video, Dar, who was seen sitting with sophisticated weapons in front of a backdrop of a black and white flag, was heard saying that by the time the video was released, he would be in heaven.⁷⁷ The attack is the second fidayeen attack in Pulwama. The first was on November 3, 1999, when a Srinagar boy, along with another militant, drove an improvised explosive device-laden car into the Badamibagh Cantonment in Srinagar, killing six security personnel.⁷⁸ This apart soldiers and policemen

⁷⁰Ajit Kumar Singh, “J&K: Lingerin Irritants”, *South Asia Intelligence Review (SAIR), Weekly Assessments & Briefings*, Vol.10, No.51,(June 25,2012).

⁷¹*Ibid.*

⁷²See Aditi Tandon, “Lashkar threat : NHRC tells state to provide security to sarpanches” *The Tribune* (July 20, 2012).

⁷³“Lok Sabha elections: Militants kill three including sarpanch before voting in Kashmir”, *DNA India*, 22 April 2014. Available at <http://www.dnaindia.com/india/report-lok-sabha-elections-militants-kill-three-including-sarpanch-before-voting-in-kashmir-1980795>. Accessed on 9 April 2020.

⁷⁴AjaiSahni, “Nothing New About SPO Killings”, *The Tribune* (September 28, 2018).

⁷⁵*The Hindu* (February 15, 2019).

⁷⁶Vijaita Singh, “Suicide car bombing returns to the Valley after 18 years”, *The Hindu* (February 15, 2019)

⁷⁷*Ibid*

⁷⁸PeerzadaAshiq, “Resurgent Jaish poses new challenge to security apparatus”, *The Hindu*, February 15, 2019

have been targeted and killed when off duty on leave.⁷⁹ The cases of rifleman Aurangzeb, Lt. Umar Farooq are too well known.⁸⁰ At least 27 policemen, have reportedly fallen to such targeted killings. Militants have also targeted the family members of the police personnel. The abduction of 11 members of the families of police personnel in Pulwama, Anantnag, Kulgam and Tral district of the Valley has created panic and fear among them.⁸¹

The Army personnel viewed that such attacks had vindicated their stand on the AFSPA.⁸² These killings and proxy-terror from across the border have impacted the discourse on AFSPA. Keeping these factors in mind, the Army, Defence Minister and Home Ministries at the Centre perceive that the withdrawal of the Act may endanger safety and security of the people in the state. In his K. Subrahmanyam Memorial Lecture on February 6, 2013 at the Institute of Defence Studies, P.Chidambaram said : “We can’t move forward because there is no consensus. The present and former Army Chiefs have taken a strong opposition that the Act should not be amended (and) do not want the government notification... to be taken back. How does the government ... make the AFSPA a more humanitarian law?”⁸³

V. CONCLUSION

It can be concluded that the debate on AFSPA has brought forth controversial and contradictory stands in the region and elsewhere. Those poised against the AFSPA and demand its revocation in the state mainly belong to the Kashmir valley whereas those who favour it represent the Jammu region. The army maintains that the revocation of the Act would prove counter-productive frittering away the gains made in curbing militancy in the state. This apart, the terrorist violence at regular intervals and the pangs of cross-border terrorism has strongly impacted the discourse on the partial or complete withdrawal or revocation of the AFSPA in Jammu and Kashmir. The Union Territory of Jammu and Kashmir is facing militancy which cannot be fought without soldiers. Exceptional situations justify exceptional measures. The Act has conferred extraordinary powers on the men in

⁷⁹ “J&K police asks its personnel to avoid visiting hometowns”, Press Trust of India (16 August 2017). Available at <http://indianexpress.com/article/india/jk-police-asks-its-personnel-to-avoid-visitinghometowns-4615700/>. See; “Ex-militant and a lawyer shot dead in Kashmir”, Press Trust of India (17 August 2017). Available at <https://www.financialexpress.com/india-news/ex-militant-and-a-lawyershot-dead-in-kashmir/630200/>. Amnesty International, “The State of the World’s Human Rights 2017/18”, p. 189. Amnesty International, “The State of the World’s Human Rights 2016/17”, p. 183. Available at <https://www.amnesty.org/download/Documents/POL1048002017ENGLISH.PDF>.

⁸⁰ Lt-Gen Syed Ata Hasnain, “A Twist to insurgency in Valley”, *The Tribune* (July 9, 2018).

⁸¹ AjaiSahni, “Nothing new about SPO killings”, *The Tribune*, 28 September 2018.

⁸² Ravi Krishnan, “Jammu grenade attack may upset Omar’s AFSPA plan”, *The Tribune* (November 20, 2012).

⁸³ *The Hindu*, February 7, 2013. Quoted in Walter Fernandes, “AFSPA : Who Rules India?”, *Mainstream*, 11(February 23, 2013).

uniform so as to prevent terrorist act. However, it is fair to argue that even after 30 years since the Act came into existence the problem of terrorism remains. Unfortunately the people in the region are witnessing violations on all hands. On the one hand are the militants who do not recognise the Indian constitution and the Indian state and are targeting innocent people in the region. On the other hand the state is also responding in the similar vein resulting into excesses committed by them. At times the vested interests have also spread false information to malign the security forces and have instigated people to protest and bring in such allegations against soldiers. Nevertheless, excesses have been committed by the security forces. The security forces are no doubt operating in difficult situation and are target of recurrent terrorist attack but it does not justify human rights violations by them. Misuse of law by the state forces is self-defeating and alienates the security forces. It does not provide solution to the problem. On August 5, 2019, the Central government revoked Article 370 and bifurcated the state into two Union territories. The government while abrogating Article 370 stated that it was the root cause of corruption and militancy in Jammu and Kashmir. However, even after revocation of Article 370 and retention of AFSPA militancy is not over. Abrogation has rather created more anxiety and led to breaking the trust of the Kashmiri people. The recent move of the government to withdraw the Act from parts of Assam, Manipur and Nagaland will lead to demand for lifting of AFSPA from Kashmir also. It remains to be seen whether in the changed circumstances the Central government will listen to such demands or not. Since the situation has remained impregnated with insurgency, infiltrations, ceasefire violations, terrorist strikes, revocation appears to be risky. In addition, Pakistan has used terrorism as a substitute for war. It is the security forces who bear the brunt of Pakistan's aggressive manoeuvres and are being attacked by the terrorist forces. The real problem is not the legitimate protection the Act offers to the armed forces, but the impunity it simultaneously grants. It is imperative to review the Act and amend section 4 which confers extreme powers on security forces and section 7 which allow impunity and non-accountability to security forces. Winning the trust of the people by urgent review of the Act and holding the security personnel accountable for violations combined with restoration of democratic rights in the region would prove to be a strong fight against terrorism.