

## CHRONICLES OF JAMMU AND KASHMIR: CONSTITUTIONAL DEVELOPMENT AND HUMAN RIGHTS VIOLATION

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### *Abstract*

*There is a fine line between killing a suspect who is a threat to the society and killing a person who, the officials reckon, may pose a threat to the society. That line is unbiased judgment. There is also a fine line between a freedom fighter and a cold blooded murderer. That line is not letting one's judgment be clouded by irrational ideologies. The hazard is, more often than not, faced by the irreproachable by-standers. Ever since India's independence, there has been a prevailing threat to the state of Jammu and Kashmir. At first it was because it wanted to be independent and merge with neither India nor Pakistan, which was unacceptable to Pakistan and the newly separated country attacked Kashmir. Then when it finally did merge with India, seeking protection, the threat from Pakistan sustained but another one found its way, the ruthless, dismal actions of the non-civilians in the state (that includes Armed forces and Militants). The consequences of the animosities between the militants and the security forces are faced by the civilians. They are caught in a loop and unless a serious, unbiased action is taken against the pseudo-fascists, innocent civilians will keep suffering. . This paper will deal with the constitutional position of Jammu and Kashmir post-independence along with the massive human rights violation of the people by the armed forces and the militants in the contemporary times and if there is any scope for improvement in the state.*

**Keywords-** Jammu and Kashmir, Militants, Armed Forces, Civilians, Human Rights

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## INTRODUCTION

Kashmir was popularly known among the Mughals as *Paradise on Earth*, it was an independent territory, but since its accession to India, the circumstances surrounding the internal peace of the state have changed drastically. After the partition, Jammu & Kashmir was in a vulnerable state and the subject of the conflict between India and Pakistan over whose territory it belonged in.

At the time of British Raj, Kashmir was one of those princely states that were not under the direct control of the Britishers. They handed over the state to Maharaja Gulab Singh by signing a *Treaty of Amritsar, 1846*. Then in 1947, at the time of independence, Maharaja Hari Singh had three choices; to continue to be independent, unify with India or integrate with Pakistan. Maharaja decided to stay independent. However, on being attacked by Pakistan in 1947, the Maharaja in order to protect his territory approached the Indian government for help. India, before sending its troops, urged Kashmir to accede to the Dominion of India. That is when Maharaja Hari Singh agreed to sign the Instrument of Accession on 26<sup>th</sup> October, 1947. But the instrument was subjective to Kashmir. Clause 5 and 7<sup>1</sup> of the document gave an upper hand to Kashmir over India in terms of control and regulation. Without the consent of the state and the constituent assembly no changes of any kind, be it territorial or legal in nature, could be made to the state of Jammu and Kashmir even by the President of India independently. Moreover, the state continued to be governed by its *Constitution of 1939* by the virtue of this instrument.

## ARTICLE 370 AND DELHI AGREEMENT

After the Instrument of Accession was signed, Article 370 was incorporated in *The Constitution of India* which rendered special status to the state of Jammu & Kashmir. It was not framed at the first instance. At first another provision, Article 306A was framed which elaborated on some temporary provisions to design laws in pursuance of certain subjects falling under the state and the concurrent list, which in this case wouldn't apply to the state of Jammu and Kashmir. It was amended several times<sup>2</sup> until, on 17<sup>th</sup> October, 1949, Shri N. Gopalaswami Ayyangar came before the parliament and laid the bill for Article 370 on the floor. The drafting of Article 370 was influenced by various factors including political

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<sup>1</sup> Instrument of Accession, 1946

<sup>2</sup> A.G. Noorani, Article 370 A Constitutional Histories Of Jammu & Kashmir, 58-63 (2011).

turmoil, the involvement of U.N. resolutions suggesting plebiscite in the state, the constant state of conflict between India and Pakistan about gaining control over the state etc.<sup>3</sup> It was also stated by the minister in the house that;

*“Instrument of Accession will be a thing of past in the new Constitution.”*

This will become a matter of grave debate in the contemporary times as the “temporary provision” is still functional. A consensus was made and Article 370 was incorporated in *The Constitution of India* which came into force on 26<sup>th</sup> January, 1950.

This was the situation back in 1950, the present status of the temporary provision was discussed in the case of *Ashok Kumar & Others v. State of J&K*<sup>4</sup>, the court held that regardless of what the title of the provision states (temporary provision), Article 370 is a permanent provision of the Constitution. It further stated;

*“It (Article 370) cannot be abrogated, repealed or even amended as mechanism provided under Clause (3) of Article 370 is no more available. Furthermore, Article 368 cannot be pressed into service in this regard, inasmuch as it does not control Article 370 - a self-contained provision of the Constitution.”*

Even though the high court established this, the legal nature of Article 370 has diminished over the years. Various number of presidential orders have made plenty provisions (of the constitution of India) applicable to the state. Though few subjects over which the state enjoys independence in true sense is, non-applicability of Emergency Provisions (Article 356), non-alteration of the name and boundary of the state and permanent resident's land rights, which was also challenged. In a case before the Supreme Court of India, *State Bank of India v. Santosh Kumar & Anr.*<sup>5</sup>, questions were raised in reference to a Jammu and Kashmir High Court judgment where the High Court, in many places, has stated the absolute sovereignty of the state, according to section 5<sup>6</sup> of the Constitution of Jammu and Kashmir, to lay rules in matters regarding immovable property of the permanent residents of the state. The Supreme Court (division bench), on the point of “absolute sovereignty of the state” held against the high court that, in saying that the state has “absolute sovereignty” is going *ultra virus*. That;

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<sup>3</sup> *Ibid*, at 66-67

<sup>4</sup> AIR 2016 J&K 1

<sup>5</sup> (2017) 2 SCC 538

<sup>6</sup> The Constitution of Jammu and Kashmir, 1956

*“It is clear that the state of Jammu & Kashmir has no vestige of sovereignty outside the Constitution of India and its own Constitution, which is subordinate to the Constitution of India... they (residents of state) are governed first by the Constitution of India and also by the Constitution of Jammu & Kashmir,”*<sup>7</sup>

The court further explained how the state comes first and foremost under the ambit of Constitution of India;

*“It is necessary to reiterate that Section 3 of the Constitution of Jammu & Kashmir, which was framed by a Constituent Assembly elected on the basis of universal adult franchise, makes a ringing declaration that the State of Jammu & Kashmir is and shall be an integral part of the Union of India. And this provision is beyond the pale of amendment”*

The case was instituted for clarification of whether the SARFAESI Act, 2002 would be applicable in the state of Jammu and Kashmir.

Also, in 1952, to establish the relationship between the union and the state (J&K), an agreement was signed between India (Jawahar Lal Nehru) and Jammu and Kashmir (Sheikh Abdullah). There were a number of questions that were put to rest in *Delhi Agreement of July, 1952* precisely ten points<sup>8</sup>;

- 1.) Residuary Powers: Would rest with the state itself.
- 2.) Citizenship: Article 5 of the Constitution of India would apply and the state had power to make its own law on the subject.
- 3.) Fundamental Rights: No clear stance on the subject was made. India insisted upon applying the Fundamental Rights as provided under Chapter III of the Constitution of India, it was observed that the state was under distress and special circumstance due to which the conditions prevailing were different, but the Kashmir delegation stated that they would like to include Fundamental rights in their own constitution which would be in conformity to the Indian Constitution. India argued that that would create some amount of confusion in the minds of the people but in the end it was agreed upon that the Government of India would be prepared to apply the provision of Part III to Jammu & Kashmir if necessary.

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<sup>7</sup> *Supra* note 2.

<sup>8</sup> Prof. S.K. Sharma, *The Constitution of J&K: A Perspective with Reference to the Constitution of India*, 38-9 (2011)

- 4.) Supreme Court: Supreme Court of India had original jurisdiction in matters falling under Article 131 and disputes regarding fundamental rights.
- 5.) National Flag: The Union flag will have a unique distinctive place in the state and the state flag will continue to have its historic recognition.
- 6.) President of India: Power to grant, reprieve and commute death sentences etc. will lie with the President.
- 7.) Headship of the State: He will be recognized by the President of the Union and on the recommendation of the state, he will hold office during his pleasure and for a term of five years and he may resign by giving in writing to the President.
- 8.) Financial Integration: Objection analysis on the subject of financial integration between the Union and the State was decided upon.
- 9.) Emergency Powers: Article 352 (State Emergency) would be applied in addition to consultation with the state government regarding internal disturbances. Article 356 and 360 were not given consideration by the Indian Government.
- 10.) Conduct of elections to the Houses of Parliament: Article 324 was applicable.

The Delhi Agreement was not perceived by the people positively and received numerous criticisms but that did not change the situation and the agreement continues to stay in existence.

## **HUMAN RIGHTS VIOLATION AGAINST THE CIVILIANS**

Human Rights is expounded as those basic rights that every individual must enjoy by the virtue of being a part of the human race. These are primary rights that a person possesses for a dignified life in the society. It defines the quality of life of an individual<sup>9</sup>. In the current scenario in India, Human rights Violation are seen as derogation of fundamental principles laid down in the Constitution of India as well as India's involvement in International humanitarian treaties<sup>10</sup>. But when it comes to the state of Jammu and Kashmir, the citizens face violations of these Human Rights.

Jawahar Lal Nehru was a profound admirer of Kashmir. In his biography he has been quoted writing about Kashmir as;

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<sup>9</sup> A. K. Das & P. K. Mohanty, Human Rights In India, 3 (2007)

<sup>10</sup> Ibid, at 6

*“Like some supremely beautiful woman, whose beauty is almost impersonal and above human desire, such was Kashmir in all its feminine beauty of river and valley and lake and graceful tress.”<sup>11</sup>*

Such was his fondness for Kashmir. It was also said that his political inclination towards the state was coloured by his emotional glow<sup>12</sup>. He was, in fact, successful in bringing the territory under the geographical umbrella of India after independence as discussed above, but it came with its consequences.

The conflict between India and Pakistan regarding Kashmir has been prevalent since 1947, and even till date the same is under dispute, but the current prevailing scenario of the internal affairs of the state is much worse on moral grounds. The citizens of the state of Jammu & Kashmir have been facing challenges on a daily basis since 1989 since the infamous “Kashmiri Insurgency” (which will be dealt with in detail later). There is a tremendous amount of Human and Legal rights violation in the state ranging from torture to kidnapping to grievous injuries to rape by none other than the military forces that the former Prime Minister had administered in the state to “protect” it from the attack from Pakistan. And not just the Special forces, but also from the local militant groups of the state.

There have been a number of cases where a civilian who is going about his normal day to day chores, disappears. He is either taken hostage by the militants or captured by the paramilitants who claim he is working for the terrorist militant group. Interrogation in the latter case takes place in the form of stripping the civilian down to his innerwear then either electrocuting him or beating him senseless<sup>13</sup>. In the former case the torture is of lesser magnitude but the crime is of the highest, they are directly shot and murdered.

## MILITANTS

Kashmir, in terms of religion, has had a very composed situation. It follows a distinctive culture called *Kashmiriyat* which is a combination of three religions; Hinduism, Buddhism and Islam. But over the years, ever since the state has come under the control of India, the Muslim political leaders have experienced resentment because of contrived elections which,

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<sup>11</sup> Frank Moraes, *Jawahar Lal Nehru: A Biography*, 402 (2007)

<sup>12</sup> Ibid,

<sup>13</sup> Human rights watch, *The Human Rights Crisis in Kashmir: A Pattern Of Impunity*, 42-46 (1993)

has led to the creation and rise of Muslim militant groups who are devoted to get Independence<sup>14</sup>.

In 1964, first militant group was formed, Jammu and Kashmir Liberation Front (JKLF) who were determined to fight for independence. They were irked by the agreement between the then Prime Minister of India, Rajiv Gandhi and Prime Minister of Jammu and Kashmir, Farooq Abdullah, in 1986 who cast a new tender which was widely criticized by the people and gave birth to a new militant group, Muslim United Front (MUF), who then claimed seats in the state assembly<sup>15</sup>. This led to bulk arrest of MUF candidates in the election which resulted in deep distrust in the authorities and growing support for the militant groups. It came into common knowledge that Pakistan was supplying these groups with arms and ammunitions which catered to riots in the state by these militant groups. The JKLF started setting off bombs at government buildings, at the houses of government officials and buses<sup>16</sup>.

More such terror attacks followed, but the one that made history was in 1989 that also came to be known as the *Kashmiri Insurgency*. The intolerance of the militant groups had grown to such an extent that they were now acting more in self-interest than in the interest of the state. On 8<sup>th</sup> December 1989, the JKLF members kidnapped Dr. Rubiya Sayeed, daughter of the then Home Minister of India as she was leaving the hospital premise. The kidnappers demanded the release of the detained members of JKLF in return of releasing the victim. After several discussions and meetings the government agreed to give into the demands of the kidnappers and released several who were incarcerated. This whole incident created a ruckus in the state and various insurgent groups started killing government officials, security personnel and civilians, precisely anyone who crossed their path. Their rationale was freeing Jammu and Kashmir against the Indian rule.<sup>17</sup>

Now something that was a political dismal, turned into a religious havoc. Over 200,000 Kashmiri Pandits had to flee from the state because of the Islamic militant groups. More militant groups emerged with varied ideologies. While JKLF was a pro-independence group that wanted an independent Kashmir, there were other groups like Hizb-ul-Mujahideen

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<sup>14</sup> Unnamed, *India's Secret Army in Kashmir*, Human Rights Watch (May, 1996), Available at [https://www.hrw.org/legacy/reports/1996/India2.htm#P128\\_23852](https://www.hrw.org/legacy/reports/1996/India2.htm#P128_23852)

<sup>15</sup> *Supra* note 13 at 36.

<sup>16</sup> *Ibid*,

<sup>17</sup> Sumit Ganguly, *Explaining the Kashmir Insurgency*, 21 Int. Security 76 (1996)

(HUM), Ikhwanul Muslimeen, who were radical Islamists and pro-Pakistanis, they wanted Kashmir to be wholly a part of Pakistan, not independent and definitely not a part of India<sup>18</sup>.

Members of militant groups have also raped women in Kashmir. They have used it as a weapon to humiliate the Muslim community, to bring dishonor to them<sup>19</sup>. Women were raped for not following a dress code and other restrictions. Mostly it was done because they were accused of being informants<sup>20</sup>.

The Militants have also had their share of tiffs with the security forces. To make a statement in one instance, they attacked a police station and killed a number of police officers in gruesome manner. Soon after, they attacked the Central Reserve Police Force (CRPF) and intelligence officials<sup>21</sup>. There have also been reports of militants capturing security personnel and killing and torturing them since there were cases of custodial deaths by the Indian security forces.

In short, the “freedom fighters” of Kashmir in their struggle for attaining freedom, whether as an independent state or merging with Pakistan, committed offences of such enormous scale that their intent has been overshadowed by their crimes.

## PARAMILITANTS AND SECURITY FORCES

However difficult and confusing it may be to believe, but if ever a comparison is to be made as to who has been more volatile than whom, then the security forces will defeat the militants hands down. Not just volatile in their discourse, the security forces have been gruesome in their plight. There are ‘n’ numbers of cases that have been reported of human and legal rights violation by these forces but, the state government has always turned a blind eye towards them. The incident may have taken place in public with hundreds of witnesses, but it is treated as if it never happened.

The security forces don’t only have arms and ammunitions, but they also have the authority to detain, harass and kill people who are suspected of being militants/terrorists, and they have complete immunity against such acts. This has been center of various controversies and has

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<sup>18</sup> Ibid, at 77

<sup>19</sup> Ayesha Ray, *Kashmiri Women and Politics of Identity SHUR Final Conference on Human Rights and Civil Society*, Luiss University 5 (2009)

<sup>20</sup> *Supra* note 13 at 157

<sup>21</sup> Navnita Chadha Behera, *Demystifying Kashmir* 147 (2007)



been debated upon multiple times but the security forces still have been prevalent in the state since its enactment in 1990<sup>22</sup>.

The state is surrounded by security personnel, which includes not just the Indian Army but the Central Reserve Police Force (CRPF), the Border Security Forces (BSF), the Central Industrial Security forces (CISF), the Indo-Tibetan Border Police (ITBP), local Jammu and Kashmir Police and also (suspected) Research and Analysis Wing (RAW).

The human rights violation by these groups have touched and crossed roofs. Their abuse of arbitrary power has been the main source of it. The Indian Military and the Paramilitary, which includes men from CRPF, ITBP, BSF and Assam Rifles, are the major contributors in this violation, along with this they are also responsible for, what has been termed as a “Secret Army”, creation of “Renegades”.

If, even for once, the army’s act of detaining a person or killing him on suspicion is accepted by the virtue of AFSPA, how does one justify the incidents of rape that have been committed by them? Not just one or two instances but uncountable.

In 1990 in Kunan, Poshpora, an incident of mass rape by the army personnel came in light. In a report<sup>23</sup> by Senior Journalist and Human Rights activist, Zahir-ud-Din, the incident was described. He stated that on the night of 22<sup>nd</sup> February, 1991, Kunan was ambushed by soldiers and over “Thirty-two” women were mass raped. He shared the agony of a woman named Khaira who told him that she along with her two daughters were raped. One of the daughters got pregnant and her husband refused to accept her as the baby was the result of the rape and the second daughter tried to commit suicide by jumping from a window, though she survived the fall, she lost both her legs. The government gave these women Rs. 100 as compensation.<sup>24</sup> Sheer ignorance of the government is clear from this gesture. Instances like these affect the mind of the victim to an extent that they want to take their own life and the social distress caters to it. The ridicule they face from the society is almost as if getting raped was the woman’s fault.

Rape is used as a medium of humiliating the community of the women who are accused of being sympathetic towards militants. They consider it a punishment for the woman for

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<sup>22</sup> The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, No. 21 of 1990, India.

<sup>23</sup> *Supra* note 2

<sup>24</sup> *Ibid*

“allegedly” being pitiful towards the militants. Even in cases when an area was first stormed by militants, they would kill civilians and rape women, accusing them of providing food and shelter to the militants<sup>25</sup>, and their only fault would be that they were in the area which was raided by the militants first.

In another, rather recent, case in 2009, two women, Asiya Jan (17) and Neelofar Jan (22) were gang raped and murdered and their bodies were dumped in a local stream, one kilometer apart (allegedly) by the CRPF officials. There were no witnesses so the incident cannot be verified factually. But, circumstantially, what could be deduced was, on the night they disappeared, the location where the bodies were found stood between a CRPF and Police camp, which was a high security zone and no one could just wander and reach there<sup>26</sup>. In the first post mortem report, the doctors confirmed that the women were raped. But in the following reports the facts were immensely fabricated. The case was handed over to the CBI and later in the reports it was stated that the women had died of drowning in the water and that Asiya was in fact, a virgin and that her hymen was intact. After this “alleged” change in facts the situation changed. The focus of the case now shifted from whether the women were raped and murdered to did they die of drowning. In the official reports and statements no one mentioned the involvement of CRPF. Omar Abdullah, former prime minister of the state, also officially announced that the women died of drowning and were not raped and murdered. But the circumstances of their death spoke otherwise. Asiya, who was supposedly a virgin at the time of her death, was found with a laceration on her forehead and her clothes torn apart. That doesn’t sound like a woman who was not raped. All the reports by the investigative team and their official statements are believed to be an attempt to cover up the armed forces involvement in the deaths. The murders made headlines and few angry protestors also compared it to the Nirbhaya gang rape case as that had taken the nation by storm but the Asiya and Neelofer murder case was not given much heed initially because it took place in a small town in Kashmir and not a big city like Delhi<sup>27</sup>.

Now the *Armed Forces (Jammu and Kashmir) Special Powers Act, 1990*, is the enabling act of all that the security forces thrive upon. It is codified in such a manner that it is basically the catalyst for the Human rights violation taking place in the state. The act has conferred such

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<sup>25</sup> Human Rights Watch, *Rape In Kashmir: A Crime Of War* 1-2 (1993).

<sup>26</sup> Greeshma Aruna Rai, *Tales from Shopian – Kashmir*, RAIOT (June 20, 2016), <http://raiot.in/tales-from-shopian-kashmir/>

<sup>27</sup> Abu Daud, *Story of Asiya & Nilofer, Raped & killed by Indian Army*, Pristine Kashmir (Nov. 20, 2015), <http://pristinekashmir.com/topics/stories/story-of-asiya-nilofar>

powers in the security personnel that it practically authorizes them to go ahead and murder and torture civilians. All they have to say it, it was under the apprehension of suspicion that the civilian was tortured, and by the virtue of Section 4 and Section 7 of the said act, they walk away scot-free.

Section 4 (c) of the said act states;

*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,-*

*(c) 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 ; ”<sup>28</sup>*

The first part of the provision states that armed personnel can arrest any person who has committed a cognizable offence, which is logically reasoned. But the second part states that an arrest can be made of a person “against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence”, which has only loopholes. There is no precise or legal definition of the term “reasonable suspicion”. Because of the ambiguity of this provision and the others, the armed personnel have created havoc in the state. Why these officers don’t get arrested for the unaccounted acts that is commit is because of section 7<sup>29</sup> of the act. This provision rids the armed forces of any responsibility that they may be accountable for, for their act.

Because of these provisions the number of instances of murder and torture and detention that have taken place is uncountable.

But the situation regarding the excessive power of the Armed Forces could change in the near future. In a recent case, *State Bank of India v. Santosh Kumar*<sup>30</sup>, Supreme Court ruled certain guidelines for the Armed Forces to follow. In the judgment the court reviewed the powers of the Armed forces and their application in the respective state. The case was instituted for Manipur but the judgment delivered affects the administration of armed forces everywhere

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<sup>28</sup> *Supra* note 22

<sup>29</sup> *Ibid*,

<sup>30</sup> *Supra* note 5

(which includes Jammu and Kashmir). The court observes upon the excessive use of force in the state by the armed forces and the misuse of the protective shield given by the virtue of AFSPA<sup>31</sup>. AFSPA is not the only legislation that is creating problems in the two states, but also the Disturbed Areas Act<sup>32</sup> (DAA) and the Public Safety Act<sup>33</sup>, both of which cater to the inhabitable situations in Manipur and Jammu and Kashmir. So now, the Supreme Court has ordered to restrain the army from using “excessive and retaliatory force” in the “Disturbed regions”. This is a landmark decision in the history of Jammu and Kashmir and Manipur, never before this, an action, that could make a difference in the prevailing conditions of the states, had been taken and implemented.

But the Union has filed a curative petition in the Supreme Court to review its decision<sup>34</sup>. The petition is filed on the grounds stating that the restriction on the use of its power in the states has caused an obstruction in the army’s capability to handle the insurgencies in the two states where military has been administered.

If the curative petition filed by the center reverses the original Supreme Court judgment, and the army is given a free pass to use its powers again, then that would set a precedent which would be close to impossible to reverse.

In another recent incident, in April, 2017, the security forces took matter in their own hands. A 26 year-old man named Farooq Ahmad Dar, was tied to an army jeep, and taken around the village as a human shield. On the day of election in the state, eight civilians were killed during an encounter when mobs tried to attack polling stations in a Srinagar constituency. Dar was picked by the army randomly and mistreated. It was not just mistreatment; the Jammu and Kashmir Human Rights Commission (SHRC) said that it was an act of “Humiliation, torture and wrongful confinement”. In their defense, army has claimed that Dar was a stone pelter. But the commission chairman, Justice (retd) Bilal Nazki said, *“For the humiliation, physical and psychiatric torture, stress, wrongful restraint and confinement, the*

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<sup>31</sup> *Supra* note 22

<sup>32</sup> The Disturbed Areas (Special Courts) Act, 1976, No. 77 of 1976, India

<sup>33</sup> Jammu & Kashmir Public Safety Act, 1978, No. VI of 1978, India

<sup>34</sup> Bhadra Sinha, *Govt urges Supreme Court to review Afspa decision restraining Army*, Available at <http://www.hindustantimes.com/india-news/govt-urges-sc-to-review-its-decision-restricting-army-s-afspa-power/story-qeNrx3HTaZx7YX2qXpXkO.html>

*commission thinks it appropriate to direct the state government to pay a compensation of Rs. 10 lakh to the victim,”*<sup>35</sup>

What is clearly an act of brutality and ruthlessness has been awarded the Army's chief Commendation card. Major Gogoi, who was responsible for using Dar as a human shield, was rewarded by the Army Chief Rawat<sup>36</sup>.

SHRC has the authority to give recommendations to the government, and it is the government's prerogative whether it will comply with the recommendation or challenge it further because it is not binding. But the SHRC has no jurisdiction over the acts of the army. So where it has declared the act of Major Gogoi as unlawful, it cannot act upon it as the SHRC is restrained by the special powers given to the armed personnel.

## RENEGADES

When it comes to holding somebody liable or holding someone accountable for a murder or torture, there generally are two groups that could be blamed; the militants or the Indian armed forces. But what happens when a person belonging to none of these groups commits a crime? Whom to contest against then?

The Indian Security forces have been, allegedly, operating a secret, illegal army called the “Renegades”. Renegades are militants, who have surrendered their militancy, and now work as informants for the armed forces to capture and bring down other militants<sup>37</sup>.

This has also caused a considerable amount of havoc in the state because now, it created a loop. The armed forces attack civilians accusing them of being militants, the renegades strike civilians accusing them of being militants and then finally the militants' assault civilians thinking they are renegades. In the end, it's the civilians who suffer in all these shenanigans.

Renegades are “un-uniformed” and un-credited solders, who work for the Armed forces but the armed forces, take no legal responsibility for them. All renegades are not officially enrolled in the army but, in 1997 it was admitted by the Director General of Police that the continued service of renegades was, in fact, fruitful and they were successful in rehabilitating

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<sup>35</sup> Zulfikar Majid, *Human Shield Case: Govt, directed to pay 10L*, Available at <http://www.deccanherald.com/content/621948/human-shield-case-govt-directed.html>

<sup>36</sup> Mudasir Ahmad, *Kashmiri Used as Human Shield by Army Awarded Rs 10 Lakh Compensation for Torture*, Available at <https://thewire.in/156276/human-shield-kashmir-army-compensation/>

<sup>37</sup> *Supra* note 14

five thousand soldiers and had given them the post of *Special Police Officers* (SPO) in the State Police, and some others were integrated in the security forces<sup>38</sup>. Hence after an attack from a renegade, the victim or his family has no recourse because there is no one to hold liable and when they do officially come under the purview of the armed forces, they have the immunity granted under the Armed Forces Jammu and Kashmir) Special Powers Act, 1990.

There are a number of cases where human rights activists or medical practitioners or journalists were murdered by “unidentified men” who were not bearing a uniform and posed as civilians.

In an instance in 1992, a human rights activist, Hirdai Nath Wanchoo, was shot and killed by “unidentified men”. Wanchoo was a 67 year-old Human rights activist, who brought to light cases of such violation by armed personnel and militant groups and filed *Habeas Corpus* petitions in the court to seek justice. He was often approached by strangers who wanted help. One day he was approached by two men, whom he had never seen before, who told him that a boy was captured by the security forces and had not been returned and his mother had fallen sick. They requested him to go with them to the mother to reassure her that her son would be alright and would come back home safe. Wanchoo went with the men. After about half an hour after he left, Wanchoo’s body was found on a street. He was shot three times. The case was handed over to the CBI. No information on the investigation was released. The government in its official statement said that the murder of Wanchoo was in fact, executed by the militant group Jamait-ul-Mujahidin, but neither any credible proof or motive was ever provided nor the identity of the perpetrators was ever revealed<sup>39</sup>.

## CONCLUSION

India is democracy. We, the people of India, are sovereign. The citizens, falling under the geographical territory of the country have rights, like Fundamental rights, which include Right to Equality<sup>40</sup>, Right to live with human dignity<sup>41</sup>, Right to freedom of speech and expression<sup>42</sup> and so on. State of Jammu and Kashmir also falls under the geographical territory of India. But then why have the citizens of Jammu and Kashmir not seen this side of

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<sup>38</sup> Kashmir Nuclear Flashpoint, *Renegade Militants in Kashmir*, Kashmir Library, Available at [http://www.kashmirlibrary.org/kashmir\\_timeline/kashmir\\_chapters/renegade-militants\\_detailed.shtml](http://www.kashmirlibrary.org/kashmir_timeline/kashmir_chapters/renegade-militants_detailed.shtml)

<sup>39</sup> *Supra* note 13 at 150

<sup>40</sup> Article 14, Constitution of India

<sup>41</sup> Article 21, Constitution of India

<sup>42</sup> Article 19, Constitution of India

India? Where the people have a right to express, where people belonging to any gender, caste, creed, colour have the right to be treated equally, where Hindus and Muslims are treated alike and most importantly where people have a right to life. Why are these basic rights, which every person needs for a dignified survival in a democratic country, taken away from the citizens of Jammu and Kashmir? If the reason is because the state has its own constitution and Penal Code, then that is not good enough. The fact that they have their own legislations further guarantees that there shouldn't be any human rights violation in the state, especially by the forces of the state.

The sole reason for the integration of Kashmir in India was that it needed protection from the abuse inflicted by Pakistan. But as it can be seen in the past 25-30 years, Kashmir has been falling victim to the abuse by India more than Pakistan. Pakistan has been the Lucifer to India's Michael when it comes to Kashmir, but India has not acted in the most civilized manner either. But the matter is far gone and almost out of hands now, that it is very difficult to gather it back together. Difficult though but not impossible.

After researching on the issue what can be concluded is that there are two kinds of problems prevailing in India when it comes to Kashmir, i.) India and Pakistan's life long struggle over which country Kashmir belongs to and ii.) Kashmir's struggle with India. Had the Human and Legal rights violations that are inflicted by the armed personnel in the state not prevailed, the situation would be different. India doesn't have Kashmir's support because of this violation. As can be concluded from the Farooq Ahmad Dar case, a state where the security forces cannot be trusted, there is not much else the people would trust. It is because of the loopholes in the legislations, the army's actions cannot be controlled. The unlimited power conferred over the army is so arbitrary, that if curtailed, would solve a lot of problems. The Human rights commission has some authority over the government as it can give suggestions, but it doesn't have the authority to even give suggestions for the inhuman acts of Army.

In the case of *State Bank of India v. Santosh Kumar*<sup>43</sup>, the Supreme Court has taken a step towards the injustice the army inflicts upon the citizens, but the government has filed a curative petition to review that as well.

For the time being, the Supreme Court judgment is the only ray of hope for the citizens of Jammu and Kashmir as such a step has never been taken before.

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<sup>43</sup> *Supra* note 5