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The Human Rights Crisis in Kashmir: Enforced and Involuntary Disappearances

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List of Abbreviations

AFSPA	Armed Forces (Special Powers) Act
APDP	Association of Parents of Disappeared Persons
BJP	Bharatiya Janata Party
BSF	Border Security Force
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CISF	Central Industrial Security Force
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CrPC	Code of Criminal Procedure
CRPF	Central Reserve Police Force
CSW	Commission on the Status of Women
DD	Doordarshan
DEVAW	Declaration on the Elimination of all Violence Against Women
ECHR	European Court of Human Rights
ECOSOC	Economic and Social Council
FIR	First Information Report
HUA	Harkat-ul-Ansar
HUM	Hizb-ul-Mujahideen
IB	Intelligence Bureau
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
IEA	Indian Evidence Act
ILO	International Labor Organization
IOK	Indian Occupied Kashmir
IPA	Indian Police Act
IPC	Indian Penal Code

ISF	Indian Security Forces
J&K	Jammu and Kashmir
JKDAA	Jammu and Kashmir Disturbed Areas Act
JKLF	Jammu and Kashmir Liberation Front
JKNC	Jammu and Kashmir National Conference
JKNPP	Jammu and Kashmir National Panthers Party
JKPSA	Jammu and Kashmir Public Safety Act
LOIPR	List of Issues Prior to Report
LoC	Line of Control
MISA	Maintenance of Internal Security Act
NC	National Conference
NHRC	National Human Rights Commission
NSA	National Security Act
NSG	National Security Guards
OHCHR	Office of the High Commissioner for Human Rights
POTA	Prevention of Terrorism Act
PSA	Public Safety Act
RR	Rashtriya Rifles
RTI	Right to Information
SHRC	State Human Rights Commissions
TADA	Terrorist and Disruptive Activities Act
UAPA	Unlawful Activities Prevention Amendment Act
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCIP	United Nations Commission for India and Pakistan
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council
UPA	United Progressive Alliance
UPR	Universal Periodic Review
WGEID	Working Group on Enforced or Involuntary Disappearances

Introduction

Issues of human rights violations in Jammu and Kashmir ('J&K') have been a persistent international concern for many years.

The region has been the scene of an ongoing conflict between India and Pakistan since the end of British rule in 1947. In recent decades, the conflict in Kashmir has led to widespread human rights violations, including enforced disappearances¹.

The Indian government has a constitutional obligation to respect and protect the human rights of its citizens, including those in Kashmir. India is a signatory to several international human rights treaties, including the International Covenant on Civil and Political Rights ('ICCPR'), and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), both ratified in 1979². Although India has signed these Covenants and followed their principles for creating a more humane society, it is still accused of human rights violations³.

The conflict in Kashmir has created a legal and political environment where human rights violations can take place with substantial impunity. Undoubtedly, the Indian government has enacted several laws and policies that give security forces broad powers, including the Armed Forces (Jammu and Kashmir) Special Powers Act of 1990 ('AFSPA') or the Jammu and Kashmir Public Safety Act, 1978 ('PSA')⁴.

As it will be seen, along with other Indian provisions, these laws create a legal framework that allows impunity for violations, undermining the rule of law and the protection of human rights in the region⁵.

In particular, enforced disappearances violate several provisions of international human rights law, including the right to personal liberty and security, the right to freedom from arbitrary detention, and the right to a fair trial. The use of enforced disappearance as a tool of repression in Kashmir is a gross violation of human rights and has had a devastating impact on the region⁶.

The phenomenon of enforced disappearances constitutes a violation of human rights, in which the dignity of the person is denied. The victim, deprived of all his rights and therefore removed from the protection of the law, is relegated to a situation of total vulnerability in the hands of the perpetrators of this

¹ AMIN (1995: 10).

² The state of signature and ratification of the treaties can be consulted at *United Nations Treaty Collection* (2023b) and *United Nations Treaty Collection* (2023c) and is available online at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND and https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en.

³ SCHRIJVER (2016: 121-125).

⁴ JAISWAL (2021: 2478-2493).

⁵ *Ibid.*

⁶ MALIK (2005: 42-52).

crime. Moreover, this practice inflicts severe suffering on the family members of the missing person because of the total uncertainty about the fate, place of detention and chances of the missing person's return⁷.

This final dissertation aims to examine the current situation of human rights violations in Kashmir, particularly concerning the issue of enforced disappearances. The purpose of this analysis is to observe the root causes and consequences of such violations and investigate the efforts made by various actors to address this pressing matter.

Through a comprehensive review of the relevant literature and a critical analysis of the human rights legal framework in Kashmir, this study aims to shed light on the problem's scope and severity and identify the underlying factors that contribute to the perpetuation of this human rights violation. Subsequently, evaluating the effectiveness of existing measures to protect human rights and prevent disappearances in Kashmir.

Within this context, the main research question of the current dissertation concerns investigating what is the factual state of human rights in Kashmir, paying particular attention to the controversial human rights violation of the enforced or involuntary disappearance. In order to answer this research question, the analysis will proceed as follows.

Chapter I aims to provide an historical framework for the Kashmir issue. It will start with clarifying the origins of the separatist matter and investigating the insurgency's genesis. After that, it will focus on the internal reform initiatives and explain the central State's role in the region's governance. Conclusively, the last part will be dedicated to the repeal of Article 370 of the Indian Constitution and, therefore, the erosion of the special autonomy of the Kashmir region.

Chapter II will still consider Kashmir's dispute but from a legislative point of view. It will investigate laws' influence on both the national and international levels. 'Draconian laws'⁸ are characterized by their harshness and severity, often seen as excessively harsh and oppressive. These typically refer to laws that restrict civil liberties and human rights and may provide penalties that are disproportionate to the crime. These laws are often imposed in response to security threats but are criticized for being applied too broadly and indiscriminately. As we will see in this chapter, the draconian laws concerning Kashmir are laws that have been imposed in this region that restrict various fundamental freedoms. These laws, including the AFSPA, were introduced in Kashmir to deal with militancy and insurgency but have been criticized for their lack of protection for human rights and the way they have been enforced. The purpose of this part will be to understand how domestic and draconian laws apply in the Kashmir area, whether there are restrictions, and especially whether there have been abuses.

⁷ SCOVAZZI, CITRONI (2007).

⁸ The term is derived from the ancient Greek lawgiver Draco, whose legal code was known for its severity.

Chapter III will focus on human rights violations in the region of J&K, starting from an international standpoint and concluding with a domestic one. The first part of this section will be dedicated to an international legal framework for the enforcement of human rights law. Continuing, emphasis will be given to some of the numerous reported human rights violations in India's administered Kashmir region. By way of conclusion, this section will provide an overview of the current human rights scenario in the State of J&K.

Chapter III and the preceding ones will be instrumental in understanding the central topic of this study, discussed in the final chapter.

Therefore, chapter IV will focus on the specific issue of enforced disappearances in the J&K region. In the first part, it will consider the definition of this violation and the human rights infringements implicated. In the second part, the emphasis will be given to the phenomenon of enforced disappearances in the J&K area. Closing, the last part, will investigate the Indian response to this matter from a legal perspective.

The conclusive part of this study will condense the analysis results, attempting to answer the research question and presenting some considerations and recommendations to address this complicated and multifaceted issue.

Chapter I. Political History of Kashmir

1.1 The issue of Kashmir: roots and developments

1.1.1 Introduction

The question of Kashmir has its roots in the colonial era, during which Jammu and Kashmir⁹ ('J&K') was among the 565 semi-independent princely States that were part of the British Raj. When, on August 15, 1947, the Indian Union and Pakistan arose from the ashes of British colonialism, J&K¹⁰, like the other princely States, found itself having to determine for membership in one of the two newly independent States. While the prevailing logic required that the principalities join the State in which their territory fell, in the case of J&K, the issue was complex since it bordered both India and Pakistan. To this was added the fact that the majority of the population of this principality was Muslim, while the ruler, *Maharaja*¹¹ Hari Singh, was Hindu¹².

In J&K, there was also an historical contrast between the majority of the Kashmiri population, consisting primarily of poor Muslim peasants, and a predominantly Hindu class of local landowners. The socio-economic tensions in the region were exacerbated by widespread political discontent with the autocratic regime imposed by the *Maharaja*¹³.

In this scenario, Pakistan claimed the right to annex the State of J&K as composed mainly of a Muslim population, basing its position on the 'theory of the two nations'. Elaborated in the late 1930s by the leader of the largest Muslim party in British India, Muhammed Ali Jinnah, this theory postulated that the Hindus and Muslims of South Asia formed two distinct nations¹⁴.

Based on the rejection of this position, the Indian Union argued the contrary, believing that different religious communities could coexist peacefully within the same State. The annexation to India of J&K, considered by the government of Delhi as an integral part of Indian territory, would have been, in this way,

⁹ Jammu and Kashmir is a union territory administered by India, comprising the southern section of the broader Kashmir region. In the west and north, the Pakistani-administrated areas of Gilgit-Baltistan and Azad Kashmir are divided from Jammu and Kashmir by the Line of Control. The Jammu and Kashmir Reorganisation Act, approved in August 2019, provided provisions for the union territory. The act divided the previous State of Jammu and Kashmir into two union territories: Jammu and Kashmir and Ladakh.

¹⁰ The State of Jammu & Kashmir was a princely State under the control of the British East India Company and the British Raj in India from 1846 until 1952.

¹¹ *Maharaja* is the ancient title used for the Indian rulers.

¹² VARSHNEY (1992: 191-196).

¹³ *Ibid.*

¹⁴ KAIKOBAD (2011: 125-138).

also a test bench from which the Indian Union could prove the groundlessness of that theory¹⁵.

The uncertain situation in the principality of J&K in August 1947, exploded some months later in October of the same year when some tribes from Pakistani territories joined a local peasant revolt that questioned both the power of the landowners in the area, and the authoritarian government of the sovereign Hari Singh. When the revolt reached the gates of Srinagar, that was the capital of the principality, the *Maharaja*, unable to face it militarily, went to India with a desperate request for help: in exchange for sending Indian troops, and provided that to J&K was granted a special autonomous status, Hari Singh agreed to the accession of his State to the Indian Union. At that point, Pakistan reacted by sending its army and tensions in the region turned into open war¹⁶.

The Indo-Pakistani conflict ended on January 1, 1949, when the ceasefire was reached through the mediation of the United Nations ('UN'). The position in which the Indian and Pakistani armies were at that time was thus crystallized: India had regained a large portion of the disputed territory (Jammu and Kashmir), while Pakistan controlled the remaining part of it (Northern Areas)¹⁷.

The UN-mediated ceasefire provided that the armies of India and Pakistan would withdraw from the disputed territories, allowing the people of Kashmir to determine their future through the popular referendum democratically. India, however, refused to withdraw its army by appealing to the Act of Accession agreed with King Hari Singh¹⁸.

The Jammu and Kashmir Instrument of Accession is a legally binding document signed on October 26, 1947, by Maharaja Hari Singh, ruler of the princely State of J&K. The Government of India's offer to hold a referendum to determine the status of Kashmir sparked a dispute between India and Pakistan over the legality of the annexation¹⁹.

India claimed that the accession was unconditional, while Pakistan claimed that the *Maharaja* acted under extreme pressure. He was not in the direct authority of his State and thus lacked the legitimacy to make this decision. In addition, he had no right to accede to India while a standstill agreement with Pakistan was still in effect²⁰.

The popular referendum, initially promised by Indian Prime Minister Jawaharlal Nehru to the *Maharaja*, never took place.

¹⁵ LONE (2018).

¹⁶ CHANDHOKE (2012).

¹⁷ BHAT (2019: 86-87).

¹⁸ GANGULY (2004).

¹⁹ *Ibid.*

²⁰ VARSHNEY (1992: 198-210).

1.1.2 The international scenario

Over the next few years, Kashmir continued to be a land of conflict and tension. In 1962, India, following its defeat in the war with China over the Himalayan border dispute, was forced to relinquish a portion of Kashmir's territory, Aksai Chin, which passed into Chinese hands.

In August 1965, what is remembered as the Second Indo-Pakistani War broke out. This occurred following the emergence of inter-communal tensions in the Indian State of J&K and Pakistan's decision to intervene militarily²¹.

The conflict saw the heavy defeat of Pakistani troops and ended with a ceasefire imposed by the UN. The 1966 peace negotiations restored the situation to the *status quo* before the conflict²².

In the following years, the issue of Kashmir was also indirectly part of the peace negotiations that followed the third Indo-Pakistani conflict that erupted in December 1971 around the question of East Pakistan. The peace treaty establishing the independence of the new State of Bangladesh also referred to Kashmir: it affirmed the bilateral nature of the issue, while the boundary line defined by the 1949 ceasefire was renamed as the 'Line of Control'²³ ('LoC'). Ultimately, in 1999 the Kashmir region was the scene of a new crisis between India and Pakistan due to the infringement of some Pakistani soldiers within the Indian district of Kargil. The explosion of a new war was avoided only thanks to American diplomatic pressures that, fearing a nuclear escalation of the conflict, did not support Pakistan, but imposed on the latter the respect of the LoC²⁴.

To date, the Kashmir issue has not been settled definitively, and the international dispute remains, in fact, open.

1.1.3 From the international to the internal dimension: origins of the separatist matter in Jammu and Kashmir

Since the second half of the eighties, the question of Kashmir has become, for the Indian Union also, a source of deep tensions in the internal political front. Since 1987, the Indian State of J&K has witnessed the emergence of a new and violent popular uprising aimed at contesting the political interference and the lack of democracy of the Union Government. An uprising that soon took on secessionist tones²⁵. Therefore, it is essential to look more closely at the political events that have affected the Indian State of J&K in the aftermath of the annexation to India.

As we have recalled, *Maharaja* Hari Singh signed the Jammu and Kashmir Act of Accession to the Indian Union in October 1947. Article 370 of the

²¹ THOMAS (2019).

²² KAIKOBAD (2011: 133-138).

²³ *Ibid.*

²⁴ BHAT (2019: 79-86).

²⁵ GANGULY (2004).

Indian Constitution resumed this agreement and granted the State of J&K a special status, conceding broad autonomy²⁶. This autonomy was quickly eroded in the following years: already in 1953, the Indian central government intervened directly in State affairs, removing the then Chief Minister²⁷ of J&K, Sheikh Abdullah.

Leader of the National Conference²⁸ ('NC') Sheikh Abdullah was arrested on charges of conspiracy against the State and subjected to detention for 11 years. In J&K, the first truly free State elections were not held until 1977. These established the regain of political power by Sheikh Abdullah, who remained at the head of the State executive until his death in 1982²⁹.

In the first half of the 1980s, the federal government resorted again to political measures similar to those already adopted in 1953. More specifically, in 1984, the then Prime Minister of the Indian Union, Indira Gandhi, imposed the resignation of Chief Minister Farooq Abdullah, son of Sheikh Abdullah, whose party, the NC, had democratically won the 1983 State elections³⁰.

Indeed, the separatist movement in J&K would benefit from a population shift toward more radical political parties. This is one of the reasons, which will be explained in more detail later, why India wanted to have tight control over the region. This decision, which involved the formation of a new executive closer to the central government, had a profound impact on the State's political life. Since then, there have been deep feelings of distrust of the federal government among large sections of the population³¹.

It is also vital to recall, among the factors which contributed to the deterioration of the political situation in J&K, the adoption, since the early 1980s, of community policies by the Congress Party. Such policies would have contributed to exacerbating the tensions already existing between the different regions due not only to the presence of ethnic and religious differences but also to economic disparities. The direct consequence of these maneuvers was political and social tension within the State, which in later years threatened its political stability³².

During the 1983 election campaign, the Congress had no hesitation in projecting itself as the representative of the Hindu minority to build on the widespread resentment in the Jammu region towards the most populous valley of Kashmir, predominantly Muslim. Thus, according to a procedure provided by the Constitution called *President's Rule*³³, in 1986 the central government

²⁶ FAROOQ, JAVAID (2020).

²⁷ The Chief Minister is the head of the executive of each State federated to the Indian Union.

²⁸ The National Conference is a secular regional party, supported mainly by the Muslim section of the electorate of Jammu and Kashmir, which has dominated the State political scene for decades.

²⁹ KAIKOBAD (2011: 133-138).

³⁰ KAUL (2017: 523-548).

³¹ *Ibid.*

³² WILDMAN (1997: 1005-1030).

³³ In India, the President's rule refers to the suspension of state government and the imposition of direct Union government rule in a state. Article 356 of the Constitution of India allows the Union government to take direct control of state machinery if a state government is unable to

asked the President of the Republic for the dissolution of the government of J&K, which was placed under federal control³⁴.

Consequently, the year 1987, was marked by the definitive precipitation of J&K in a problematic situation of political instability. In exchange for suspending Delhi's direct administration of the State, the central government imposed an electoral alliance between the local Congress party and the NC to improve the former's poor electoral prospects³⁵.

This political maneuver alienated the consensus of the Hindu electorate, which in 1983 had been won over by the new political agenda of Congress and the Muslim one, which traditionally supported the NC. In this way, many of the population decided to shift their vote toward more extremist political forces. This benefited not only the explicitly Community-based parties but also the secessionist movement of the Jammu and Kashmir Liberation Front ('JKLF'), which until then had played only a minor political role in the State's history³⁶.

Over the last few decades, Indian Kashmir has so transformed itself from what at the time of independence was thought of as a potential pearl for democracy in the country into one of its most painful thorns in the side. The political order quickly crumbled, and starting in January 1990, J&K were again placed under the direct administration of Delhi, which remained in force for over six years³⁷.

The direct administration of Delhi has again been imposed. Even after the resumption of everyday political life, the State of J&K continued to be tormented by strong tensions, both in 2000 (October-November) and from July 2008 to January 2009.

In recent decades, numerous widespread protests have been raised against human rights violations and abuses committed by the Indian armed forces, still widely deployed in the State's territory³⁸.

1.1.4 Armed insurgency

Rubiya Sayeed³⁹, the daughter of the Indian Minister of Home Affairs, was taken hostage by the JKLF on December 8, 1989, as she left an administrative clinic in Srinagar. The kidnappers refused to free her until a few prisoners from their unlawful assembly were freed. The government in New Delhi agreed to the kidnappers' demands after rushing transactions throughout the

function in accordance with the Constitution. Subsequently, the centrally appointed governor exercises executive authority and has the authority to appoint other administrators to assist them.

³⁴ WILDMAN (1997: 1005-1030).

³⁵ LONE (2018).

³⁶ *Ibid.*

³⁷ SCHOFIELD (2004).

³⁸ TORRI (2007).

³⁹ Rubiya Sayeed was the daughter of the then Indian Home Minister Mufti Mohammad Sayeed.

next few days. In the following weeks and months, numerous extremist groups formed and caused disorder throughout the Kashmir Valley, killing officials from the government, security personnel, and inoffensive bystanders. Even though they belonged to different ideological groups, all the radical gatherings declared their opposition to the Indian State's authority in J&K⁴⁰.

The uprising in J&K has varied since December 1989. A few Hindus (known as Pundits) who faced the anger of numerous Islamic activists have left the Kashmir Valley. Since the start of the rebellion, at least 15,000 to 20,000 agitators, police, paramilitary instructors, and regular citizens died⁴¹. Extremist groups include the following: the allegedly pro-liberty JKLF⁴² and the radical Islamic and knowledgeable Pakistani groups Hizb-ul-Mujahideen⁴³ ('HUM'), Hezbollah⁴⁴, Harkat-ul-Ansar⁴⁵ ('HUA'), and Ikhwanul Muslimeen⁴⁶, maybe the most recognizable of the guerilla groups⁴⁷.

Relations between India and Pakistan have broken due to India's allegations that Pakistan supported some of these guerilla congregations.

In April 1993, the escalating tensions resulted in extraordinary police uprising in J&K, following the death of one of their colleagues, held by the army. Security personnel rushed the headquarters and disarmed the police, ending the escalating and chaotic circumstances in J&K. As a result, the army received the order to take overall leadership of all security operations in Kashmir in May 1993. The contentious BSF Inspector General Ashok Patel⁴⁸ was reportedly relocated out of Kashmir in May as part of the administration's pursuit of a political settlement⁴⁹.

⁴⁰ KAIKOBAD (2011: 144-148).

⁴¹ BHAT (2019: 85-86).

⁴² The Jammu Kashmir Liberation Front is a militant separatist group that operates in Kashmir's Pakistani and Indian-governed regions. Amanullah Khan is credited with founding it, and Maqbool Bhat is listed as a co-founder.

⁴³ Hizb-ul-Mujahideen is an Islamist terrorist organization that is active in Jammu and Kashmir. Their objective is to split Kashmir from India and incorporate it into Pakistan. It is one of the key actors in how the Kashmir conflict narrative changed from nationalism to extreme jihad.

⁴⁴ Hezbollah is a militant Shia Islamist political party, led since 1992 by Hassan Nasrallah, the organization's secretary general.

⁴⁵ Abdelkader Mokhtari established the Islamic terrorist group Harkat ul-Ansar in 1993. It emerged from the union of the Harkat-ul-Mujahideen and the Harkat-ul-Jihad-al-Islami. It carried out a large portion of its operations in Jammu and Kashmir.

⁴⁶ Ikhwan force, a pro-government militia in the Indian State of Jammu and Kashmir, was made up of terrorists from Kashmir who had turned themselves in. Mohammad Yusuf Parry founded the Ikhwan-ul-Muslimeen, which by early 1994 had joined with the Indian forces in the struggle against the terrorists who had the support of the Pakistani government.

⁴⁷ ROY, GATES (2014).

⁴⁸ Ashok Patel was the Inspector General of the Border Security Force in Kashmir. In 1989, while Mufti Mohammed Sayeed served as India's Home Minister, he compelled officer Ashok Patel to serve as the Inspector General of the BSF. Patel employed illegal tactics in those years, but the operations were narrowly focused, and he did not provide State power to disobedient mercenaries. By the end of 1992, he had eliminated the majority of militant organizations.

⁴⁹ HAQ (2021: 97-98).

However, Governor Krishna Rao⁵⁰ rejected requests from human rights organizations to transfer Amar Kapoor, the Deputy Director General of Intelligence, who was a subject of controversy⁵¹. The insurrection appeared to have reached a standstill as of mid-1996. Even with the support of a few thousand Afghan *Mujahedeen*⁵² and significant Pakistani funding, the radicals could not prevail on the front lines. Neither does India's security expertise nor the ability to destroy the guerrillas militarily⁵³.

The current Indian political system appears to have a threefold objective: to place generous military pressure on the extremists, to spread discord in their ranks by making arrangement offers, and to reestablish the State's democratic structure. The administration's understanding of combating insurgent advances in the neighboring State of Punjab and the north-eastern States of India has advanced this tactic⁵⁴.

It illustrates the risks States confront when political activity occurs in the context of institutional problems on a hypothetical level. The failure of governments to meet rising political aspirations within an institutional relationship can build up and eventually result in political violence. These risks are most severe in social orders with multiple ethnic groups when politicized⁵⁵.

More literary depictions have attempted to link the uprising's beginnings to the collapse of competing patriot fantasies, pervasive constituent irregularities, the rise of a disoriented working class, or the dissolution of a composite Kashmiri social identity⁵⁶.

1.1.5 Investigating the insurgency's genesis

Indo-Pakistani ties are one of the most critical urgent aspects of the J&K issue. In two of the three wars fought between India and Pakistan, the issue of Kashmir's status was at stake. According to Pakistani academics, the majority-Muslim population of Kashmir and its geographic proximity have repeatedly encouraged Pakistan to want to annex the territory forcefully⁵⁷.

⁵⁰ General Krishna Rao was a former chief of the Indian Army and served as governor of Jammu and Kashmir, Nagaland, Manipur, and Tripura. From 11 July 1989 to 19 January 1990, and again from 13 March 1993 to 2 May 1998, he served as governor of Jammu and Kashmir.

⁵¹ Report of Human Rights Watch, 1 July 1993, *The Human Rights Crisis in Kashmir: a pattern of impunity*.

⁵² *Mujahedeen* is an Arabic term for those who fight for their homeland. Since the second half of the 20th century, this term has been spreading in Western countries to refer to members of radical Islamic-inspired guerrilla warfare.

⁵³ KAIKOBAD (2011: 145-148).

⁵⁴ WILDMAN (1997: 1005-1030).

⁵⁵ *Ibid.*

⁵⁶ LONE (2018).

⁵⁷ O'NEILL (2001).

The primary effort occurred shortly after Pakistan and India were created in 1947 from the ruins of the British Indian realm. In 1968, Pakistan attempted to seize control of Kashmir from India once more⁵⁸.

India, which was working to end the uprising in the State, had clamped down on J&K with a tenacity comparable to that of Pakistan. With its majority-Muslim population, Kashmir had long served as a symbol of India's unity; its powerful presence demonstrated that Muslims could prosper under India's mainstream policy. As India had developed, the country's leaders were trying to maintain their grip on Kashmir because they feared that Kashmir's separation from the Indian Union would have generated significant spreading constraints in other parts of the country. As a result, the stakes for both governments went far beyond local disputes: the debate over Kashmir's control touched on the foundation of South Asia's peace⁵⁹.

The explanations provided up to this point had not adequately answered this vital question. The timing issue is crucial: not only why the revolt occurred but also why it did not occur earlier, particularly in 1965, when India and Pakistan were at war in Kashmir. Had they chosen to challenge the authority of the Indian State, the Muslims in the Kashmir Valley may have prepared allies during that conflict⁶⁰.

The two interrelated forces of political prevision and institutional decay best depict the beginnings of the uprising in Kashmir. On the one hand, the Indian government's developmental efforts accelerated political activation in Kashmir. At the same time, the people of J&K were more aware of their political rights; yet, the administration was also responsible for the deinstitutionalization of State government difficulties, which stimulated the representation of political unrest to expand into new institutional connections. The insurgency was inevitable as the final institutional channels for claiming disparity were blocked, allowing suppressed resentment to explode in brutality⁶¹.

India was forced into an unpleasant war with China and after China had conquered somewhere between 14,000 square miles of territory claimed by India⁶², India was horrified by China's one-sided cease-fire. On November 21, 1962, China suddenly declared a unilateral cease-fire on the Sino-Indian border, withdrawing its soldiers 20 kilometers from the Line of Actual Control between the two nations that had existed since November 7, 1959. The combat in the short Sino-Indian border confrontation ended with this statement

⁵⁸ *Ibid.*

⁵⁹ JAMWAL (2010: 14-16).

⁶⁰ *Ibid.*

⁶¹ BHATIA (2020: 568-569).

⁶² In October and November of 1962, China and India fought a war known as the Sino-Indian War. A contested Himalayan border mainly sparked the conflict. After the 1959 Tibetan rebellion, when India awarded the Dalai Lama sanctuary, there were several bloody border battles between the two nations. In order to obstruct Chinese military patrols and logistics, India launched the defensive Forward Policy in 1960. As part of this strategy, it established outposts along the border, some of which were located north of the McMahon Line, the eastern terminus of the Line of Actual Control declared by Chinese Premier Zhou Enlai in 1959.

because India did not contest China's unilateral cease-fire proclamation, nor did it hamper or prevent the withdrawal of Chinese forces. As a result of this crisis, India resorted to the US and the UK for military assistance, though it was very restricted in scope⁶³.

Nevertheless, Western armaments and supplies flowing into India raised a red flag among Pakistani military circles, letting them believe that the window of opportunity for capturing J&K might have been about to close. Due to these dubious assumptions, Pakistan began sending regular troops disguised as locals into the Kashmir Valley in 1965⁶⁴.

Despite the concern of the people of Pakistan, in the Valley the people of Kashmir did not rise in revolt and make fundamental reasons with the infiltrators. As the evidence from the Hazratbal⁶⁵ robbery demonstrated, such views were widespread within the Valley. These results did not automatically translate into support for Pakistan and a willingness to rely on large-scale assassinations to show their dissatisfaction with Indian policy⁶⁶.

If, as Pakistani defenders claim, and have claimed since 1947, the people of Kashmir were a 'hostage' of ethno-national gathering, what proves their disappointment to revolt when presented with this providential fortune? Conditions were favorable: within India, a new and inexperienced executive was in charge⁶⁷.

The inconvenience of Hindi as the official language had won over masses in southern India, and the Indian armed forces were getting over their humiliating military defeat with China. The infiltrators that had entered the Valley after 1962 were able to provide significant assistance and lethal weapons inside J&K.

Since the State's independence, the Jammu and Kashmir National Conference⁶⁸ ('JKNC') has dominated its government, having played a crucial role in testing Maharaja Hari Singh, the monarch of Kashmir, in the years before independence. The national government in New Delhi gave the conference much flexibility as long as its authority did not suggest a withdrawal possibility. As a result, the NC was permitted to engage in various forms of deliberate irregularity and corruption⁶⁹.

⁶³ ZHANG, LI (2013: 1-9).

⁶⁴ MATHUR (2016).

⁶⁵ The Hazratbal Shrine is a Muslim shrine located in Srinagar's Hazratbal neighborhood in the Indian States of Jammu and Kashmir. It is regarded as Kashmir's most influential Muslim shrine and is located on the northern bank of Dal Lake in Srinagar. It has a relic known as *Moi-e-Muqqadas*, regarded as Muhammad, the prophet of Islamhair.

⁶⁶ KAUL (2017: 523-526).

⁶⁷ *Ibid.*

⁶⁸ In the Indian union regions of Jammu and Kashmir, and Ladakh, there is a local political party called the Jammu & Kashmir National Conference (JKNC). Sheikh Abdullah and Chaudhry Ghulam Abbas founded the All Jammu and Kashmir Muslim Conference in 1932 in the princely State of Jammu and Kashmir. In 1939, the organization changed its name to "National Conference" to represent all territory residents. It backed India's 1947 invasion of the princely kingdom.

⁶⁹ BEHERA (2006: 104-106).

Because they relied on Sheikh Abdullah, the NC's typical leader, and primarily due to their lack of political advancement as a result of their poor levels of ability, education, and presentation to the general public, the residents of the Kashmir Valley endured the political dishonesty of the NC. Most Kashmiris did not object to the current request because, despite their dissatisfaction with some aspects of the general political agreement, they needed attention for their political condition and the binding authoritative force⁷⁰.

However, over the next 20 years, significant political changes in India and in J&K transformed the politically inert people of Kashmir into a profoundly active population. The people of Kashmir were routinely denied the right to vote in seriously flawed elections, and they witnessed the inexorably free practice of establishment in various parts of India⁷¹.

1.2 Governing Kashmir: rebuilding fractures

1.2.1 The origins of the internal conflict

The main fractures within Kashmir date back to the early 1950s when the fundamental features of government institutions and practices were defined. Since then, their character has not changed much, not even when, in the 1990s, there has been a resurgence of tension. It is therefore appropriate to briefly re-examine the historical context in which the question of Kashmir is inserted, together with the political dynamics underlying it.

Historically political conflicts in Kashmir have followed two trajectories⁷². The first concerns relations with the Indian State. In 1947, J&K could choose three options to determine their political future: joining India, joining Pakistan, or declaring independence. The then Hindu ruler, Maharaja Hari Singh, and the Muslim leader of the NC party, Sheikh Abdullah, favored independence, but incursions from across the border precluded this option. The leadership of the NC then supported membership of the Indian Union, believing that Kashmir's political autonomy would be better safeguarded in a democratic, secular, and federal India rather than in a feudal Pakistan, with autocratic and theocratic positions. This is best developed by the opening speech of the Constituent Assembly delivered by Sheikh Abdullah⁷³.

Within the Indian Union, Sheikh Abdullah demanded maximum political autonomy for J&K, and the then Indian Prime Minister, Pandit Jawaharlal Nehru, promised to respect the right of Kashmiris to self-determination. Together the two politicians laid the foundations of the governing structures

⁷⁰ KAIKOBAD (2011: 125-138).

⁷¹ KUMAR (2020).

⁷² BEHERA (2000: 91-92); ID. (2006: 105).

⁷³ *Ibid* (2000).

of J&K, the basis of its relations with the Indian State. J&K was the first and only State in India to have its constituent assembly draft a separate State constitution. The special status of J&K was enshrined in Article 370 of the Indian Constitution, according to which the Indian Parliament could only legislate on defense, foreign policy, and communications, giving the State the remaining powers⁷⁴.

Tensions began soon after the plebiscite option was overthrown, and J&K were proclaimed an integral part of India in 1947. The NC interpreted the central government's pressure for greater national integration of Kashmir as a violation of its political autonomy. Sheikh Abdullah then relaunched the debate on the right to self-determination, including the concept of the right of the State to secession⁷⁵. This led him on a collision progression with the Union, as it violated the fundamental premise of the concessions previously made by New Delhi, namely the recognition of the Kashmiris' belonging to the Indian nation. Nehru was willing to negotiate measures following the political aspirations of the Kashmiris within the Indian constitutional framework.

The second trajectory of political conflicts in Kashmir deals with the structural problem of the relationship between the J&K regions. The NC had requested for J&K, the status of an autonomous republic within the Indian Union to safeguard and secure the interests of the Kashmiris. However, by reversing this logic within the federated State, the Kashmiris, who constituted the majority community, were reluctant to share political power with Jammu and Ladakh. Thus, they alienated the people of both regions.

Over time, the two sides began to diverge radically, and while the Kashmir Valley called for the secession of J&K from the Indian State, the Jammu and Ladakh regions insisted on its full integration into the Union. Since then, the fundamental dynamics have not changed much, and parallelism has been created⁷⁶.

While the successive governments in Srinagar refused to grant political autonomy to the Jammu and Ladakh regions, the central government eroded the political autonomy of Kashmir itself. In the second half of the 1980s, history seemed to repeat itself: if the Valley was again agitated by demands for secession, in Jammu and Ladakh, separatist forces were rising.

In the early 1990s, Kashmiri Muslims in the Valley incited an armed uprising to secede from the Indian State⁷⁷. Nevertheless, after fighting a violent struggle for almost two decades, they again missed their political goals. It is important to emphasize that this failure is due only partly to the deployment of military forces by the Indian State and more to the fact that separatist groups have been faced with a political impasse in their territory⁷⁸. The Kashmiri leadership has not at all managed to understand that the various communities

⁷⁴ PERRIGO (2019).

⁷⁵ PURI (1981: 116).

⁷⁶ BEHERA (2000: 91-92).

⁷⁷ *Ibid.*

⁷⁸ PURI (1981: 118).

present in J&K are animated by different notions of ‘self-government’, ‘self-determination’, and ‘sense of nationality’. The pluralist character of the society in J&K has exposed the internal contradictions of the Kashmiri view. The separatist leadership, including the Hurriyat Conference⁷⁹, is therefore facing the same dilemma as in the 1950s. While speaking on behalf of the ‘people of Jammu and Kashmir’, it represents only the interests of a part of the majority community. The Kashmiri Muslims of the Valley are no longer one homogeneous entity regarding ideological belonging, values, and political objectives. There are unpleasant divisions between those who call for an independent State: those who wish to join Pakistan, and those who seek to reconcile their differences with the Indian State through constitutional mechanisms that guarantee their political rights⁸⁰.

At the same time, minorities in Jammu and Ladakh are calling for autonomy from the Kashmir Valley. The insurrectional movement, therefore, failed because the secessionist agenda underlying the claim of the right to self-determination was not inclusive. The systematic opposition of the linguistic, regional, and religious minorities has effectively put in check the secessionist project of the majority Muslim Kashmiri community. It is therefore clear that to achieve lasting peace in Kashmir, the involvement of all the communities and nationalities present in the State cannot be disregarded⁸¹.

1.2.2 Internal reform initiatives

Given the diversity and degree of divergence of the political bodies referred to above, a vital objective of the numerous political initiatives undertaken by the central and State governments is the redefinition of the rules governing the sharing of power between the different communities of J&K on the one hand, and on the other hand, between the State of J&K and New Delhi⁸².

Over the past 60 years, various instruments have been formulated to compensate for regional imbalances and to discuss issues relating to the autonomy of the State and regions. Mention should be made of the two Commissions of Inquiry and Justice, headed by Pralhad Balacharya Gajendragadkar⁸³ in the 1960s and Sarv Mittra Sikri⁸⁴ in the 1970s. Their task was to suggest a series of measures to ensure a fair distribution of resources between the three regions, but their recommendations remained on paper.⁸⁵

⁷⁹ The Hurriyat Conference is a political front composed of twenty-six organizations that arose in 1993 around the demand for self-determination in Kashmir.

⁸⁰ KAUL (2017: 523-548).

⁸¹ *Ibid.*

⁸² SCHOFIELD (2004).

⁸³ Pralhad Balacharya Gajendragadkar was the 7th Chief Justice of India, serving from February 1964 to March 1966.

⁸⁴ Sarv Mittra Sikri was the 13th Chief Justice of the Supreme Court of India from 22 January 1971 until his retirement on 25 April 1973.

⁸⁵ CHANDHOKE (2012).

In 1996, when Farooq Abdullah came to power after a seven-year interval during which Kashmir had been governed directly by New Delhi, his government established the Commission for State Autonomy and the Commission for Regional Autonomy. As long as the ruling political parties, and in particular, the NC, could gather the political majority in the State assembly thanks to the support of the electorate of the Valley, they could afford to deny any concession to Jammu and Ladakh⁸⁶.

These committees made their recommendations in 1999, but they met the same fate as the previous ones, notwithstanding for different reasons⁸⁷. This was partly because the process adopted at the time was deeply flawed, as it did not recognize any role for the opposition members in redefining the rules on which the sharing of power should be based. Moreover, the Commission's proposal to carve out seven regions within J&K would only deepen the EU's divisions within the State⁸⁸.

It is, therefore, likely that the electoral dynamics of the State will determine the success of each governance initiative. The results of the last two elections to the State assembly have opened the way for coalition governments. In this scenario, the parties with their electoral base in the Valley, the NC, and the Peoples Democratic Party are forced to seek an alliance with the parties whose electoral base is in Jammu and Ladakh. This situation has taught a lesson in power-sharing of great value, which no committee of inquiry had been able to do until then⁸⁹.

1.2.3 The role of the central State in the governance of Kashmir

At the national level, the different governments of New Delhi have persisted in the effort to reformulate the intra-regional political equations in J&K. For example, the United Progressive Alliance ('UPA') governing coalition, led by Manmohan Singh, set up a negotiating table in February 2006. To ensure the representativeness of the talks, the invitation to participate was addressed to all parties involved, including the essential separatist leaders of the Kashmir Valley and leaders of minority communities⁹⁰.

The separatist leaders decided not to take part in the initiative, which led to five working groups forming. Among these, one focuses on relations with the central State; the second deals with the measures to be taken to restore a climate of trust between the different components of J&K society⁹¹. The most recent initiative of this kind involves the appointment by the second government of the UPA of three delegates to recommend a series of measures to facilitate the renegotiation of relations between State and center; between

⁸⁶ BHAT (2019: 85-86).

⁸⁷ BEHERA (2000: 96-99).

⁸⁸ *Ibid.*

⁸⁹ KAIKOBAD (2011: 148-158).

⁹⁰ D'SOUZA (2015: 78-81).

⁹¹ MATHUR (2016).

State and region; and, if necessary, between intermediate levels of governance⁹².

In addition, the central and State governments have taken numerous civic initiatives to safeguard citizens' fundamental rights in their governance activities to avoid human rights violations. During the most acute phase of the conflict, these initiatives took shape in the creation of a unified command intended to improve and institutionalize coordination between the security forces and the civil administration; the establishment of new paramilitary units, such as the Rashtriya Rifles⁹³ ('RR'), to reduce the deployment of the army in J&K; as well as the establishment of a particular police unit of J&K. Over the years, governments have reduced the number of bunkers and checkpoints in metropolitan areas while putting new checkpoints in remote rural areas. At the same time, the presence of Border Security Force ('BSF') troops and border security units on the territory has been reduced⁹⁴.

The State government has also come a long way in rehabilitating the militia through amnesty measures and, in some cases, through their absorption as police personnel with unique functions. However, the debate on repealing the Armed Forces (Special Powers) Act ('AFSPA') remains inconclusive. This is also because the imperatives mentioned above of human rights protection must be carefully balanced with the needs of the police and security forces engaged in combating armed groups, composed mainly of foreign nationals who, in the last 15 years, replaced local Kashmiri corps⁹⁵.

A new set of initiatives concerns measures to reorganize the functioning of civil administration. Among the most important initiatives of the State government are policies aimed at allowing the return and reintegration of Kashmiri migrants in the Kashmir Valley, as well as Sikh and Hindu refugees settled in J&K during the partition, in 1947, which, to this day, are not considered citizens of the State⁹⁶. The creation of an e-governance agency called the Jammu and Kashmir e-governance Agency and, even more, the law on the right to information, together with the appointment of an information commissioner in J&K, were the most important legislative measures to ensure responsiveness and transparency in the sphere of activity of government officials⁹⁷.

Conclusively, many public governance initiatives have been devised to strengthen and make the local economy of J&K more independent, and measures have also been taken to counter the conferred interests of those who benefit from the continuing conflict. For example, in 1993, the central

⁹² *Ibid.*

⁹³ The Rashtriya Rifles is a counter-insurgency force in India, formed in 1990, to specifically serve in the Jammu and Kashmir region.

⁹⁴ GANGULY (2014).

⁹⁵ KAUL (2017: 523-548).

⁹⁶ From 1947 to the present day, the Constitution of Jammu and Kashmir, recognized by Article 370 of the Indian Constitution, has not guaranteed citizenship to these refugees. As a result, they cannot participate in elections to the State assembly.

⁹⁷ ROY, GATES (2014).

government announced an economic package focusing on the improvement of infrastructure for higher education; on public works projects (repair and construction of roads and bridges); on the opening of rehabilitation centers to offer training to detained fighters; on the restoration of the Governor's Advisory Council; on the reopening of the Srinagar Passport Office and the All India Radio and Doordarshan ('DD') broadcasters⁹⁸.

In the same direction is the Package for the reconstruction of J&K from one billion rupees wanted by the Prime Minister; the institution, in 2010, of the extraordinary crisis units responsible for making a series of recommendations responding to the development needs of the Jammu and Ladakh regions; and the special assistance offered by the central government in Leh and Kargil, to help those affected by the sudden floods of 2010⁹⁹.

There is no lack of governance initiatives on the part of the central and State governments to address the multidimensional aspects of the conflict in Kashmir. The key to their success in achieving the desired objectives, however, lies in strengthening the initiatives of administrative reform and economic development through a proper understanding of the political dynamics underlying them, even grasping their nuances. Only in this way it will be possible to heal all the fractures¹⁰⁰.

1.3 From the erosion to the elimination of the special autonomy in Kashmir

1.3.1 Transformation of the political structure

In contrast to many other post-pioneer States, political preparedness in India started early and defied conventional wisdom. Numerous nationalists from India participated in politics throughout the liberation struggle. The Indian National Congress was transformed from an upper-white collar, Anglicized group into a broad-based mass political organization thanks to Mohandas Gandhi's¹⁰¹ unusual political attempt. Gandhi successfully brought together India's impoverished and illiterate lower class through his large-scale campaigns of common noncompliance that promoted the concepts of political duty and universal establishment¹⁰².

⁹⁸ Doordarshan is an Indian public service broadcaster founded by the Government of India, owned by the Ministry of Information and Broadcasting. It is one of India's largest broadcasting organisations in studio and transmitter infrastructure. It was established on 15 September 1959.

⁹⁹ KAUL (2017: 523-548).

¹⁰⁰ KAIKOBAD (2011: 125-138).

¹⁰¹ Mohandas Karamchand Gandhi (1869-1948) was an Indian lawyer, anti-colonial patriot, and political ethicist who led the victorious struggle for India's independence from British control and afterwards served as an inspiration for movements for civil rights and freedom around the globe.

¹⁰² KAUL (2017: 523-548).

After independence, a few elements strengthened and expanded Gandhi's legacy. For instance, India had at least hypothetical all-inclusive adult facilities at the beginning of its existence. Increasing numbers of Indians became aware of the connection between voting and an open approach through awareness of races at the local, State, and national levels. India's political preparation momentum was boosted by the development of instructional open doors and attendant expansions in education and media introduction¹⁰³.

Class-based and ethnic tumults for independence and even secession were regularly aided by such motivation. The institutional framework of the Indian State proved capable of handling these demands by a thoughtful combination of negotiation, trade-off, and coercion. For instance, India effectively controlled the risks of popular unrest with the States Reorganization Act of 1956 and the development and implementation of the tri-dialect recipe. However, even while the country honorably accommodated the majority of aspirations for self-governance, its dissatisfaction in Kashmir remained glaring¹⁰⁴.

Due to Kashmir's usual and significant noteworthiness, the Indian elite, including Prime Minister Nehru, were prepared to deal with various expressions of political wrongdoing.

Indira Gandhi¹⁰⁵ and Rajiv Gandhi¹⁰⁶, Nehru's successors, gradually deinstitutionalized Indian politics after being given the extraordinary task of enacting laws in a polyethnic State divided along every conceivable social line. Particularly Indira Gandhi had a predilection for personalized tenets and broadened her focus. Furthermore, plebiscitary governmental concerns were ruthlessly pursued by Indira Gandhi¹⁰⁷, her ancestors, and her successor in the name of political survival.

The Gandhis grew in power in New Delhi and increasingly relied on coercive methods to deal with any challenges to the central government's authority. These autonomist demands were repeatedly characterized as threats to India's unity. The coercive systems used to deal with the risks only worsened them. As a result, the Indian State reacted with even more astounding vigor, making the initial problem worse through spiraling of coercion¹⁰⁸.

The post-Nehru political period had a miserable track record regarding positioning foundations. However, there had been some impressive legislative successes in India even during the post-Nehru era, particularly concerning the massive political participation of the Indian electorate. The extraordinary rate

¹⁰³ CHANDHOKE (2012).

¹⁰⁴ BHATIA (2020: 568-580).

¹⁰⁵ Indira Priyadarshini Gandhi was a key member of the Indian National Congress and a politician from India. She was the country's first and only female prime minister when she was chosen to serve as India's third prime minister in 1966.

¹⁰⁶ Rajiv Gandhi was a politician representing India who presided over the country as its sixth prime minister from 1984 to 1989. At age 40, he became the youngest prime minister of India after his mother, the country's first lady at the time, was assassinated in 1984.

¹⁰⁷ SOMERVILLE (2007).

¹⁰⁸ *Ibid.*

of political activation and the early decomposition of Kashmir's political foundations, which the assembly in New Delhi did little to stop, and in some cases energized, turned out to be poor decisions¹⁰⁹.

1.3.2 Legal background

In August 2019, the State of J&K jumped to international attention following the Indian government's decision to revoke its special status¹¹⁰. In 1947, with the independence of the Indian subcontinent from the British Colonial Empire, the princely State of J&K resulted, among other things, in the exclusive right of ownership over land for residents. However, the most northern point area, the so-called Azad Kashmir, remained under the control of Pakistan and still, today, is the subject of dispute between Pakistan and India¹¹¹.

This region at the foot of the Himalayas is formed by very different territorial areas in demographic terms¹¹², and with vital elements of religious differentiation especially compared to the rest of the Indian continent¹¹³, it has been affected by ongoing conflict and violence¹¹⁴.

This is not the only possibility of granting special autonomy in India since the Constitution gave other States a particular regime, expressed above all in the right to purchase property granted exclusively to residents in their territories. The federal model outlined in the Indian Constitution has rather marked asymmetry characteristics. In the framework of asymmetrical federalism, an attempt is made to identify union territories as a separate unit of the Indian federation, and their standing in India is assessed using the principle of weighted and differentiated equality¹¹⁵.

In India, an attempt has been made to integrate diversity through asymmetrical power sharing arrangements between states. As shown in the various powers of the union territories of Delhi, Chandigarh, Puducherry, and J&K, the construction of union territories has also followed this concept of asymmetry, which is justified by their unique context and origin¹¹⁶.

¹⁰⁹ The Jammu and Kashmir Constitution allows for the imposition of the governor's rule for six months. The president's rule provision of the Indian Constitution, which allows New Delhi to suspend State government and rule directly, may be implemented for six months. Only after six months of the governor's administration in Kashmir is allowed under Article 370 of the Constitution for the president to reign for an entire year. In July 1990, the president's rule became effective. The legislative assembly of Jammu & Kashmir was formally dissolved in February 1990.

¹¹⁰ FAROOQ, JAVAID (2020).

¹¹¹ *Ibid.*

¹¹² Kashmir with 5.48 million inhabitants, Jammu with 4.43 million and Ladakh with 0.24 million.

¹¹³ In religious terms, it is one of the five Indian States with a non-Hindu majority (the others are Nagaland, Meghalaya and Mizoram in the Northeast who were Christian majority, and the Punjab with a Sikh majority) and the only Muslim majority.

¹¹⁴ PERRIGO (2019).

¹¹⁵ FAROOQ, JAVAID (2020).

¹¹⁶ BEHERA (2000: 80-92).

Although it is not an isolated phenomenon, for many years, the granting of special status to J&K has been politically challenged by successive governments of the Indian Union. In particular, the leaders of the Bharatiya Janata Party ('BJP'), the government of India since 2014 and proponent of a nationalist policy and defense of Hindu identity, have repeatedly said that the autonomy of J&K has, on the one hand, allowed terrorism to gain a foothold in that territory and, on the other, it has not allowed its good economic development¹¹⁷.

The culmination of this position was reached with the publication of the political manifesto of the BJP for the 2019 general election, which contained the explicit promise to repeal Article 370 of the Indian Constitution on which the special autonomy of J&K is based with the consequent reintegration of this State within India. This is consistent with the Hindu nationalist ideology that sees India as a unitary and centralized State in contrast to the federal traits outlined in its Constitution¹¹⁸.

From the legal point of view, this political objective has been translated into reality through the adoption by the Indian President of two Presidential orders with which, first, the applicability of all the provisions of the Indian Constitution has been extended to J&K and, therefore, the inapplicability of all the clauses of art. 370 of the same Constitution, except for clause 1 only¹¹⁹. The choice of the sovereign of the princely State of J&K, Maharaja Hari Singh, to become part of India in exchange for broad autonomy found its legal basis in the 1949 Indian Constitution. In particular, Article 370 (Temporary Provisions concerning the State of Jammu and Kashmir) stated that only Article 1 of the Indian Constitution (on the official name and territory of India) should apply to the newly created State, and precisely the same Art. 370¹²⁰. Article 370 has been inserted in the Indian Constitution to regulate the relations between J&K and the Indian State. This article first guaranteed the right of the J&K State to have its Constitution, which appeared to be complementary to the Indian Constitution and had to be read in conjunction with it¹²¹. Furthermore, it limited the exercise of legislative power by the Indian National Parliament to specific areas such as defense, foreign affairs, and communication (Art. 370 (1)). The same article (point 1 letter d)) states:

“(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (b) shall be issued except in consultation with the Government of the State: Provided further that no such order which relates to matters other than

¹¹⁷ MATHUR (2016).

¹¹⁸ *Ibid.*

¹¹⁹ FAROOQ, JAVAID (2020).

¹²⁰ PERRIGO (2019).

¹²¹ *Ibid.*

those referred to in the last preceding proviso shall be issued except with the concurrence of that Government¹²².

This part made clear, however, that other provisions of the Indian Constitution, as well as other matters of legislative power, could be extended to this State as well, provided that this was done after the Indian President had issued a ‘constitutional order’ and with the ‘concurrence’ (expression of the consent) of the J&K Government.

The latter constitutional provision is, therefore, the necessary provision for the recognition of the special status of J&K but has also proved to be the legal instrument that has been used to proceed over the years to a progressive erosion of the special autonomy formally recognized, until reaching its recent revocation¹²³.

1.3.3 Article 370 of the Indian Constitution

In an effort to merge Kashmir’s Muslim-majority population with the rest of the nation, India’s BJP¹²⁴ government, led by Prime Minister Narendra Modi, abrogated Article 370 of the Constitution on August 5, 2019. Kashmir has experienced more than seven decades of conflict and unrest since 1947, when it was partitioned between India, which controls the Kashmir valley and the predominantly Hindu area around Jammu city, Pakistan which holds the western part of the region frequently referred to as Azad or Free Kashmir, and China. Kashmir’s partition had its roots in the colonialization of India when Kashmir’s ruler chose to join India rather than Pakistan on the condition of autonomy¹²⁵.

Article 370 and Article 35A, which grant freedom to regulate all State affairs with the exception of foreign affairs, defense, and communications, are the two most important provisions of Kashmir’s special status in the Indian Constitution. The former also prioritizes only Kashmir’s permanent residents with special rights, including property and land ownership, scholarships, and employment in the civil service. Before Article 370 was repealed, thousands of paramilitary troops were stationed throughout the region, important political figures were placed under house arrest, and internet and mobile services were shut down. The Central Government justified these actions by claiming that J&K’s special status was always intended to be temporary and

¹²² Constitution Assembly, 26 January 1950, *Constitution of India*, Article 370(1)(d).

¹²³ FAROOQ, JAVAID (2020).

¹²⁴ The Bharatiya Janata Party is an Indian political party that, along with the Indian National Congress, is one of the two major Indian political parties. The BJP is associated with right-wing politics, and historically, its positions have been consistent with the traditional Hindu nationalist viewpoint. Currently, it is the largest political party in the nation in terms of seats in both the Indian Parliament and State legislatures.

¹²⁵ FAROOQ, JAVAID (2020).

that resolving the situation might lead to a transient increase in militant attacks¹²⁶.

The State's Constituent Assembly recommended Article 370 to be repealed, and this action was legally acceptable. However, the Assembly was disbanded in 1957 after the State's Constitution was adopted. Furthermore, as a consequence of the governing coalition party's separation, the State now lacks a government, and Kashmir has been under the supervision of the Centre through the appointment of a State Governor. The State Governor, also known as 'President's rule', delegated to the Centre the ability to suspend Article 370 within the framework of the Constitution¹²⁷.

Hindu nationalists have used anti-Muslim prejudice among Hindu voters over the past few decades by creating political platforms that threaten to revoke Kashmir's unique status as a way to protect the Indian Constitution¹²⁸. The narrative centered on the BJP's political ideology has taken on an aggressive tone during their rule over the past few years¹²⁹, reimagining Indian nationalism as a male, Hindu supremacist person, with Muslims and other minorities positioned as the Other in this political body¹³⁰.

By pitting the current administration's policies and choices against an unwelcome or foreign influence, this narrative posture aims to legitimize it as the moral compass of the new India. This transforms the country into what it claims is an imagined community that is both intrinsically constrained and sovereign¹³¹. In this aspect, distinct right-wing nationalist ideology has supported Indian socio-political discourse throughout the past few years, whether it has done so through editorials, commentary on 24-hour news channels, or diverse pop cultural discourses¹³². In light of this, it is simple to link the BJP's resurgence after 2014, its spread of Hindutva (the merging of religious and national identity), and the perception that Kashmir's autonomy is crumbling.

However, proponents of the abrogation have argued vehemently against anti-nationals who are thought to have launched a disinformation campaign against the government's actions, which are meant to address the gap between the law and the State that has, over time, led to instability, violence, and the erosion of governmental institutions. J&K resulted from the disconnect that allowed the State to enter an unwinnable battle and widened the chasm between the populace and the government¹³³.

¹²⁶ PERRIGO (2019).

¹²⁷ *Ibid.*

¹²⁸ FAROOQ, JAVAID (2020).

¹²⁹ GANGULY (2014).

¹³⁰ KAUL (2017: 525); LACLAU (2005).

¹³¹ ANDERSON (2010).

¹³² BHATIA (2020: 568-580).

¹³³ KUMAR (2020).

1.4 Conclusions

In this first chapter, we have analyzed the issue of Kashmir retracing its history from a political and social point of view.

The political history of the region of Kashmir is complex and multifaceted. The region has a long history of being a disputed territory, with various powers struggling for control over it throughout the centuries.

As we showed, the conflict has led to several wars between India and Pakistan, and the situation in the region remains volatile.

Efforts to find a peaceful solution to the dispute have been ongoing for decades, but a lasting resolution has yet to be reached.

Having begun this framework by delving deeper into the genesis and developments of the insurrection, we have reached the end of this chapter by referring to the present day. In particular, we focused on the elimination of the special autonomy in Kashmir with the repeal of Article 370 of the Indian Constitution. The article was a provision that granted special autonomous status to the State of J&K. It allowed the State to have its own constitution, and it also gave the State the right to decide which Indian laws would apply to it and which would not.

There are several lessons that can be learned from the ongoing dispute over the region of Kashmir.

One lesson is the importance of finding a peaceful and negotiated resolution to conflicts, rather than resorting to violence and warfare. The dispute over Kashmir has led to several wars and has caused much suffering and loss of life, and finding a peaceful solution to the conflict would likely be more beneficial for all parties involved.

Another lesson is the importance of respecting the rights and autonomy of different groups and regions within a country. The dispute over Kashmir has, in part, been fueled by the desire of various groups within the region for greater autonomy or independence. It is important for any government to consider and respect the desires and rights of such groups, rather than imposing its will on them.

Finally, the Kashmir dispute serves as a reminder of the importance of international diplomacy and the role of international organizations in helping to resolve conflicts and promote peace. The UN has played a role in trying to broker a peaceful solution to the dispute, and the involvement of other international actors could also be helpful in finding a resolution to the conflict. With this first chapter, we wanted to create the basis for the second one, in which we will still consider Kashmir's dispute but from a legislative point of view.

Chapter II. Legal perspective of the Kashmir Dispute

2.1 Evaluation of legal matters

Since the insurgency began in Kashmir in 1989, there have been ongoing violations of human rights in that area, which seem to be encouraged by domestic legislation that dates back to the British Raj¹³⁴. The Indian government, which controlled and occupied Kashmir, had passed a number of laws that gave the agencies in charge of enforcing the law a significant amount of power. These harsh legislations included the Public Safety Act ('PSA') and the Armed Forces (Special Powers) Act ('AFSPA'), among others. The authorities used these regulations to curtail the Kashmiri people's widely held demand for self-determination¹³⁵.

Both domestic and international rules resulted to be inoperative in the situation in Kashmir¹³⁶. Despite offenders' infringement of international law, State laws like the AFSPA and PSA appeared to protect such people rather than bring them to justice¹³⁷.

Due to ineffective enforcement in the Kashmir crisis, international law may be considered weak. This could be a result of its ambiguity and lack of relevance to specific offenses or because it is unable to become involved in situations that fall outside the ambit of the Indian State's internal laws¹³⁸.

The effectiveness of international law in addressing the human rights situation in Kashmir is limited for several reasons. Fundamental, there is a lack of jurisdiction. International law, including the UN Charter and the International Covenant on Civil and Political Rights ('ICCPR'), applies to the actions of States. The legal status of Kashmir is disputed between India and Pakistan, and the two countries have not agreed on the territory's borders. This makes it difficult for the law to apply to the situation. Even if international law did apply to the situation in Kashmir, the enforcement mechanisms available to hold actors accountable for human rights abuses are limited. However, it appears that domestic law and international law are interdependent¹³⁹.

The Protection of Human Rights Act was passed by the Indian Parliament in 1993, providing that each person's human rights will be protected by both the Constitution and international treaties. This Act identifies 'Human Rights' as the rights of the individual to life, liberty, equality, and dignity granted by the Constitution or embodied in International Covenants and enforceable by Indian courts. It went into effect on September 28, 1993, with retroactive

¹³⁴ DESMOND (1995: 5-16).

¹³⁵ ROBERTSON (2005: 330-335).

¹³⁶ KAZI (2018: 153-183).

¹³⁷ CHADHA (2013: 66-67).

¹³⁸ KAIKOBAD (2011: 114-118).

¹³⁹ *Ibid.*

effect, and it applies to the entire Indian nation, including Jammu and Kashmir ('J&K')¹⁴⁰.

The Protection of Human Rights Act of 1993 established the National Human Rights Commission ('NHRC'), State Human Rights Commissions ('SHRC'), and Human Rights Courts for the protection of human rights.

The NHRC and SHRC represent India's commitment to promoting and protecting these rights.

In the field of human rights, India signed the Universal Declaration of Human Rights ('UDHR') in 1948, which included goals for ensuring universal recognition and observance of human rights¹⁴¹.

India also incorporated the fundamental rights into its Constitution between 1968 and 1993.

According to the Indian government, the goal was to include human rights into the Constitution and establish a NHRC to defend these rights across India. In order to accomplish these levels of protection, there should be a human rights court in each district of India. Additionally, each court should have a public prosecutor who would handle cases and expedite the prosecution of offenders. Kashmir is covered under the Protection of Human Rights Act and the Constitution's article on fundamental rights. However, in Kashmir, the AFSPA and PSA are prioritized over all of these measures. Moreover, these disgraceful regulations violate the fundamental tenets of both international humanitarian law and human rights laws¹⁴².

In order to comprehend Kashmir's future, it is essential to look at current laws' influence on both the national and international levels. The aim of the following analysis is to understand how both domestic and international law apply in those areas, whether there are restrictions, and especially whether there have been violations.

2.2 International Law and Draconian Laws

2.2.1 The Public Safety Act of Jammu and Kashmir, 1978

The PSA is one of the most oppressive laws used on the Kashmiri population¹⁴³. This statute has its roots in the Defense of India Act, which the British Government adopted in India during their control. In 1978, this Act was implemented in the region of Kashmir. Many Indian leaders, including Mahatma Gandhi, fell victim to this unfair rule. The PSA is considerably harsher and more punishing than the Defense of India Act. The PSA replaced the Defense Intelligence Act in 1967 and was enacted as the Jammu and

¹⁴⁰ MAHAJAN (2021).

¹⁴¹ *Ibid.*

¹⁴² KAIKOBAD (2011: 121-125).

¹⁴³ HASHMI (2007).

Kashmir PSA in 1978. Legal scholars and human rights advocates have heavily condemned this Act both nationally and worldwide¹⁴⁴.

This statute has several legal gaps that violate international law and the criminal justice system. The Act fails miserably to defend standards of justice such as the idea of equality, the right to a fair trial, brief appearance before a magistrate, access to counsel, the right to appeal, and the protection against the principle of double jeopardy¹⁴⁵.

The Act was enacted in 1978 in the State of J&K, endowing the State apparatus with extensive authority.

According to Section 18 of the Act, administrative detention is permitted for up to two years “(b) [...] in the case of persons acting in any manner prejudicial to the security of the State”¹⁴⁶, and for up to a year “(a) [...] in the case of persons acting in any manner prejudicial to the maintenance of public order”¹⁴⁷.

Under the excuse of preserving the State’s peace and order, this Act authorizes law enforcement authorities to hold a person for up to two years without a trial. Contrary to natural justice¹⁴⁸, the police and other authorities have repeatedly utilized this clause. This statute was updated in 1990, and its application was expanded from the State of Kashmir to the entire country of India, allowing law enforcement officials to hold prisoners in any jail in India¹⁴⁹.

Consistent with Section 22 of the statute, no legal action may be brought against the official if they have acted in good faith. This law is a horrific instrument used to oppress the innocent residents and politicians of the valley¹⁵⁰. Under this statute, detainees are not told of the basis for their detention, and they may be held without cause for an indefinite time. During detention, detainees are deprived of all legal rights, such as meeting with family members and attorneys, even if requesting legal advice is a universal right that cannot be taken away under any circumstances.

Under the PSA, if someone is ordered to be released on bail, his incarceration is secured by law enforcement. Under the PSA, an unlawful presumption is generated: if a person gives the idea that he may commit a crime in the future, he can be imprisoned merely based on this assumption¹⁵¹. Such activities cannot be permitted under any circumstances, and no legislation permits the State apparatus to hold someone based on a presumption founded on the

¹⁴⁴ CHATTAH (2006).

¹⁴⁵ KAIKOBAD (2011: 129-131).

¹⁴⁶ Governor of Jammu and Kashmir, 8 April 1978, Act No. 6 of 1978, *Jammu and Kashmir Public Safety Act*, Section 18(b).

¹⁴⁷ *Ibid*, Section 18(a).

¹⁴⁸ Natural justice asserts that an individual should get a fair and unbiased proceeding before making a decision that will potentially harm them. The three main natural justice requirements must be met in every case: adequate notice, a fair hearing, and no bias.

¹⁴⁹ HASHMI (2007).

¹⁵⁰ Governor of Jammu and Kashmir, 8 April 1978, Act No. 6 of 1978, *Jammu and Kashmir Public Safety Act*, Section 22.

¹⁵¹ NOORANI (2013: 550).

possibility of a future behavior. This assumption is also contrary to international law and human rights agreements. Kashmiri attorneys have often challenged the PSA, but the Government has consistently resisted court rulings and the courts' authority. Under the PSA, Amnesty International urged the Government to include the political leader and anyone speaking out against the violation of human rights in Kashmir¹⁵².

Human Rights Watch notes in its reports that many individuals have spent their whole lives in jail due to the PSA. In addition, they assert that Shabir Ahmed Shah, a human rights activist, served 22 years in prison under the PSA for campaigning against human rights violations in the Kashmir Valley¹⁵³.

Numerous PSA provisions violate international and human rights agreements. Although the Declaration itself is not a legally binding act, its principles are. Article 3 of the 1948 UDHR states "Everyone has the right to life, liberty and security of person"¹⁵⁴, yet the PSA is a tool of arbitrary detention that restricts the liberty of persons at any moment and for no cause. Article 5 of the declaration asserts "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"¹⁵⁵. A climate of impunity prevails, and the relevant regulatory act is twisted in order to allow violations. These agencies regularly breach this article's restrictions, and prisoners under this Act are frequently mistreated¹⁵⁶.

Article 9(1) of the ICCPR states that: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"¹⁵⁷.

This article provides further protection against arbitrary arrest and detention. Sadly, however, the PSA permits law enforcement authorities to arrest a person at any moment and under any conditions, and one can be imprisoned without explanation. In addition, sub-article 5 of Article 9 addresses compensation for unlawful arrest and detention affirming "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation"¹⁵⁸. If someone is detained without a charge or accusation, the State must compensate him because he was deprived of his fundamental rights to liberty and freedom of movement¹⁵⁹.

It is alarming that the PSA contains no compensation for such illegal detentions and that if Indian law enforcement agencies commit any act, no action can be brought against them. No compensation or other remedy is

¹⁵² CHATTAH (2006).

¹⁵³ Report of Human Rights Watch, 1 May 1996, *India's Secret Army in Kashmir; New patterns of Abuse Emerge in the Conflict*.

¹⁵⁴ United Nations General Assembly, 10 December 1948, 217 A (III), *Universal declaration of human rights*, Article 3.

¹⁵⁵ *Ibid*, Article 5.

¹⁵⁶ BOSE (2003: 164-174).

¹⁵⁷ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 9(1).

¹⁵⁸ *Ibid*, Article 9(5).

¹⁵⁹ SHELTON (2005: 20-21).

available to the victims of illegal detention. The Indian Constitution safeguards and protects fundamental human rights. In addition, it provides that no legislation may be enacted violating residents' fundamental rights.

This PSA is also a breach of the Indian Constitution. The Constitution is protected by the Supreme Court of India, and it is the responsibility of this Court to ensure the proper implementation of the provisions of the Constitution and the protection of human rights. However, the role of the Indian Supreme Court in this regard is unsatisfactory, as no action has been taken against the implementation of these laws in J&K.

The PSA also violates the Convention Against Torture ('CAT'), which forbids all forms of torture. The CAT requires that all States prohibit and punish torture¹⁶⁰. Despite this convention, the Indian Government has not modified its position to enforce legislation that violates the fundamental rights of J&K's population.

Amnesty International has consistently said that the PSA is a breach of fundamental human rights and that it should be abolished immediately, but the Indian Government has not given such comments from human rights campaigners any consideration¹⁶¹.

2.2.2 The Terrorist and Disruptive Activities Act, 1985

The Terrorist and Disruptive Activities Act ('TADA'), was enacted in 1985 and revised in 1987 to give law enforcement authorities more power to use force. The 1987 amendment granted unrestrained authority to the police. It has been criticized for allowing Indian law enforcement agents the authority to violate human rights in the region of J&K in several ways.

Arbitrary detention, torture and ill-treatment, denial of fair trial, discrimination, restriction on freedom of expression and presumption of guilt are some violations that stand in opposition to international law¹⁶².

Any action conducted, whether by deed, by voice, via another kind of media, or in another way that is disturbing is referred to as 'disruptive activity'¹⁶³. The participation of any individual in disruptive activities is punishable severely under this Act. According to the TADA, whoever knowingly aids in the conduct of any disruptive action or any act leading up to disruptive activity will be subject to penalties and imprisonment for a term that shall not be less than three years or could carry a penalty of up to life in jail as well as a monetary fine¹⁶⁴. Whoever engages in, conspires to engage in, or knowingly promotes, advises, or otherwise aids any disruptive behavior is described as engaging in disruptive activity under the Act.

¹⁶⁰ SCHOFIELD (2000: 189-191).

¹⁶¹ NOORANI (2011: 93-95).

¹⁶² GEHLOT (1994: 381-390).

¹⁶³ ZUTSHI (2003: 344-345).

¹⁶⁴ SHELTON (2005: 23-29).

This definition is fairly strict and the Indian Constitution's concept of basic fundamental rights is in conflict with this notion. The Indian Constitution guarantees its inhabitants complete freedom of expression and regular access to the media. All people have the right to freedom of speech and expression, according to Article 19 of the Indian Constitution. It is the primary and fundamental responsibility of the Indian State to protect and provide an accessible environment for exercising these fundamental rights, which the Constitution guarantees. As was previously said, it is the responsibility of the Indian government to provide the adequate and accessible exercise of one's right to free speech¹⁶⁵.

As mentioned earlier, thousands of Kashmiris are held for an average of more than a year after being arrested under the statute¹⁶⁶. People subjected to torture interrogations are typically picked up from the market, bazaars, workplaces, and streets¹⁶⁷.

Article 13(1) of the current Constitution of India states that "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void"¹⁶⁸. It forbids the Indian legislature from passing any legislation that violates the fundamental rights of Indian citizens¹⁶⁹.

Because the TADA violates fundamental rights, including the freedom of speech and expression, it also violates Article 13 of the Indian Constitution. Additionally, the TADA violates Article 14 of the Indian Constitution that states that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"¹⁷⁰. Again, the Indian government has to guarantee the equal protection of all State inhabitants and individuals cannot be subjected to discriminatory practices when the nation's laws are drafted¹⁷¹.

The TADA is a flagrant example of a law that discriminates against Kashmiri citizens. Given that India rules over the Kashmir Valley, the Indian government entirely should guarantee equal protection for all of its inhabitants. The TADA further strengthens the severe penalties to the point where it restricts the accused's access to their fundamental rights. This statute forbids bail, and so the accused is not permitted to exercise this option. Furthermore, this law places the obligation of proof on the accused¹⁷². TADA permits police officials to record an accused person's confession, which is

¹⁶⁵ Report of Human Rights Watch, 1 May 1996, *India's Secret Army in Kashmir; New patterns of Abuse Emerge in the Conflict*.

¹⁶⁶ Report of Human Rights Watch, 1 July 1999, *Behind the Kashmir Conflict: Abuses by Indian Security Forces and Militant Groups Continue*.

¹⁶⁷ *Ibid.*

¹⁶⁸ Constitution Assembly, 26 January 1950, *Constitution of India*, Article 13(1).

¹⁶⁹ CHATTAH (2006).

¹⁷⁰ Constitution Assembly, 26 January 1950, *Constitution of India*, Article 14.

¹⁷¹ ASHRAF (2010).

¹⁷² Report of Human Rights Watch, 1 May 1996, *India's Secret Army in Kashmir; New patterns of Abuse Emerge in the Conflict*.

against natural justice and India's current criminal justice system. Because the police are not allowed to record confessions under Indian criminal procedure, only the court judge is permitted to do so. Any confession written down by the magistrate even though the police are present would be defective, and no condemnation may be predicated on such a confession. The TADA permits the police authorities to record the confession. This statute also demonstrates the extent of the police's authority under the Act. Any person suspected by the police may be taken into custody and brought to court. Due to this rigorous rule, the police abuse and unfairly use their incarceration authority¹⁷³.

The TADA does not respect the requirements of international law and the global standard for the defense of fundamental rights. When enacting the TADA, the international community's standards for preserving fundamental rights are transparently disregarded.

Under this Act, the prisoners are denied a fair trial, which is against international human rights treaties. The UDHR article 9 states that everyone should be protected from arbitrary detention and arrest, and the TADA's provisions go against this principle since they provide police broad authority to imprison anyone for up to a year without charging them and without bringing the suspect before a judge. Additionally, it allows the detention of Kashmiri civilians without requiring police officers to declare publicly that the individual has been taken into custody¹⁷⁴.

Moreover, according to Article 10 of the UDHR, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"¹⁷⁵.

According to the provision every person should be presumed innocent unless a crime has been proven against him, and he must be given every chance to be heard. And no one shall be deemed guilty of a criminal offense for any conduct or omission that, at the time it was performed, did not constitute a criminal offense under national or international law¹⁷⁶.

Both provisions mentioned above, require a fair and impartial trial for the accused, but the TADA goes directly against both of them. The suspect is held without cause and is never brought before a judge. This law undoubtedly goes against the principles of justice. Furthermore, "Everyone has the right to freedom of peaceful assembly and association"¹⁷⁷ as stated in article 20(1) of the UDHR. The TADA is restricting the exercise of this right, depriving the Kashmiri people of the ability to assemble and associate peacefully. The law enforcement authorities persecute anyone participating in a peaceful

¹⁷³ HARRIS (2012).

¹⁷⁴ JAMWAL (2013: 172-198).

¹⁷⁵ United Nations General Assembly, 10 December 1948, 217 A (III), *Universal declaration of human rights*, Article 10.

¹⁷⁶ NOORANI (2013: 550).

¹⁷⁷ United Nations General Assembly, 10 December 1948, 217 A (III), *Universal declaration of human rights*, Article 20(1).

gathering. While passing this Act, the Indian government arbitrarily ignored many UDHR provisions¹⁷⁸.

Regarding Indian domestic law, Section 167 of the Code of Criminal Procedure ('CrPC') governs the procedures for holding a person in custody in order to further an investigation. On the direction of a Magistrate, Section 167 of the Code permits a person to be kept in police custody for a term of 15 days, before sending them to judicial detention. In contrast, this can be prolonged for up to 60 days under TADA Section 20 without being formally charged. The prisoner cannot be brought before an executive magistrate, who is not a member of the judiciary and is not submitted to the judicial authorities¹⁷⁹. This has increased the police's ability to use cruel methods.

Furthermore, contrary to the standard practice of the Indian Code, the individual who is held under the Act is not obligated to appear before the magistrate. However, that individual may be brought before the executive magistrate, who is an administration officer and not a judiciary member.

This statute also grants the police the authority to keep witness records confidential, which is another way fictitious trials are carried out outside of the legal system. The duty of evidence is placed on the accused under this Act because he must demonstrate his innocence. This violates the international principles of the criminal justice system, which place the responsibility of proof directly on the shoulders of the prosecution. Under the provisions of this Act, criminal court trials will not occur in open court but in secret locations. Once again, this goes against the international standard of a correct process of law.

India is a member of the ICCPR, established in 1978 to guarantee the preservation of people's rights. All member nations shall safeguard and defend all of the rights guaranteed by the ICCPR while there is peace. Even during war and emergencies, member nations should support certain of the ICCPR's provisions for human rights. TADA also violates several of the ICCPR¹⁸⁰.

Nevertheless, a person may be imprisoned for a year without being charged under the Act. The ICCPR's article 9 is violated by this authority to detain anyone. As stated in Article 9(1): "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"¹⁸¹.

Nobody's freedom may be taken away unless certain conditions are met and legal procedures are followed. It is unacceptable that TADA is being used as a tool to victimize the Kashmiri people. The Indian government is part of the ICCPR, but does not uphold its obligation to stand by the ICCPR and other international agreements protecting human rights. India, in this way, finds an

¹⁷⁸ GIDVANI (2008: 740-741).

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 9(1).

excuse not to follow these international rules by claiming that the Kashmir valley is affected by this policy¹⁸².

The Indian government often argues that some ICCPR requirements can be ignored during an emergency¹⁸³. However, in practice, only some provisions may be exempted under a state of emergency. The ICCPR allows for the possibility of derogation in certain circumstances. Derogation refers to the temporary suspension of certain rights during a state of emergency. States may derogate from certain rights under the ICCPR to protect the life of the homeland. However, the ICCPR sets strict conditions on when and how States can derogate rights. Specifically, Article 4(1) states that:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”¹⁸⁴.

Additionally, with article 4(3), the ICCPR requires that States immediately inform the others, part of the Covenant, of the provisions from which it has derogated and the reasons it was actuated, stating:

“Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation”¹⁸⁵.

Furthermore, as stated in Article 4(2) “No derogation from articles 6, 7, 8 (paragraphs I and II), 11, 15, 16 and 18 may be made under this provision”¹⁸⁶. It is crucial to note that even during a state of emergency, certain rights are considered non-derogable, meaning they cannot be suspended under any circumstances. These include the prohibition of torture, cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, and the prohibition of retroactive criminal laws.

States must also follow the principle of proportionality, which means that restrictions on rights must be limited to the extent strictly required by the exigencies of the situation and must be lifted as soon as the threat to the nation’s life has passed¹⁸⁷.

¹⁸² NOORANI (2011: 98-99).

¹⁸³ MUJAHID (1997).

¹⁸⁴ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 4(1).

¹⁸⁵ *Ibid*, Article 4(3).

¹⁸⁶ *Ibid*, Article 4(2).

¹⁸⁷ GOLDSTON, JAMES, GOSSMAN (1990: 147-151).

The TADA's trial process breaches international human rights standards and the accused's right to a fair trial in any court of law. Even though the ICCPR guarantees the right to a fair trial, the Act does not uphold that right.

Article 14 of the ICCPR states that everyone must be treated equally before the law. Every person will be entitled to a fair and public trial whenever an accusation is brought against him, and a fair and impartial tribunal will be constituted for this purpose¹⁸⁸. This Article guarantees the rights of the accused, stating that they should all be presumed innocent until and unless proven guilty. However, TADA gives the police the authority to detain someone for up to a year without a charge, a grave violation of international human rights treaties. The general public and the media may be kept out of the decision-making process in cases involving public order, national security, or moral considerations. This can only be done if judges consider that the publication of any matter will impair the country's national interest.

The Indian government has not been able to provide a defense for the TADA's suspension of the right to a public trial up to this point.

In order to prevent the prisoners from having regular access to their families, the courts for the cases under TADA have been established too far from the residences. The identities of the witnesses are kept secret and their identity is not made public, which is another violation of the ICCPR¹⁸⁹.

The fundamental assumption of the law of evidence is that only the judicial magistrate may record confessions. A police officer other than the judicial magistrate may also record the confession within the terms of the section 15 of TADA¹⁹⁰. The police officer might write the confession down on plain paper or any technological equipment that can be utilized as substantive evidence against the accused. The list of witnesses must be submitted to the accused within seven days of the start of the criminal trial. This is another fundamental requirement of the Indian criminal justice system. The accused's rights cannot be compromised since it is his natural entitlement to be notified of all proceedings and to appear in court. Unfortunately, TADA deprives the accused of this fundamental right, which is against international human rights principles¹⁹¹.

The accused is required to demonstrate that he is not a criminal. In reality, it is a fundamental norm of domestic and international law that people should be assumed innocent unless proven guilty. At the international level, the presumption of innocence is a fundamental right granted to every person without restriction and regardless of the nature of the proceedings underway. This principle, is solemnly enunciated in Article 11(1) of the UDHR, which states that "Everyone charged with a penal offence has the right to be

¹⁸⁸ DEIBERT (2007).

¹⁸⁹ MALIK (2002: 250-264).

¹⁹⁰ GOUDAPPANAVAR (2014: 111-128).

¹⁹¹ *Ibid.*

presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense”¹⁹².

However, the TADA places the responsibility of proof on the accused, which is against the rules of natural justice. According to TADA, the onus of proof shifts from the prosecution to the defendant. The CrPC and the Evidence Act are both modified by TADA in the instance of confessions since, according to that, the police can record confessions, which are then regarded as legal confessions. However, under the CrPC, a confession may only be recorded by a judicial magistrate, and if it is recorded by the police or even in their presence, such confession can be considered for determining guilty or innocence¹⁹³.

In the case of *Prakash Kumar v. State of Gujarat*¹⁹⁴, the Constitutional Supreme Court ruled that under TADA, whatever confessions are recorded can be used against the accused for other crimes under ordinary laws, regardless of whether the person has been convicted. It is crucial that the Prakash Kumar case be reexamined because it clearly violates Article 14 that affirms “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth”¹⁹⁵ and Article 21 “No person shall be deprived of his life or personal liberty except according to procedure established by law”¹⁹⁶ of the Indian Constitution.

In this connection, it may be argued that the TADA is being used as a weapon against the right to self-determination, in violation of Article 1 of the UN, which emphasizes supporting and developing human rights fundamentals. Everyone has the right to freely exercise their right to self-determination, according to article 1 of the ICCPR. Under this right, they may choose their political status¹⁹⁷.

Everyone has the right to independently use their economic and natural resources, free from outside interference. States that are signatories to the ICCPR are obligated to support the free exercise of the right to self-determination. Additionally, the nations will be required to uphold the United Nations Charter’s rules¹⁹⁸.

In conclusion, as showed in this paragraph, many TADA clauses are flagrant violations of international human rights law.

¹⁹² United Nations General Assembly, 10 December 1948, 217 A (III), *Universal declaration of human rights*, Article 11(1).

¹⁹³ MALIK (2002: 250-264).

¹⁹⁴ Judgement of the Supreme Court of India, 24 April 2007, 2007 (4) SCC 266, *Prakash Kumar v. State of Gujarat*.

¹⁹⁵ Constitution Assembly, 26 January 1950, *Constitution of India*, Article 14.

¹⁹⁶ *Ibid*, Article 21.

¹⁹⁷ BOSE (2007: 290-293).

¹⁹⁸ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*.

2.2.3 *The Armed Forces Special Powers Act, 1990*

The AFSPA, first proposed in July 1990 and later passed by the Indian Parliament, went into effect on September 10th of the same year. Under Section 4(c) of this Act, the army and paramilitary forces are given broad authority when specific regions are considered ‘disturbed’. According to this Act, the Armed Forces may be called upon to assist civil authorities in maintaining peace and order in the valley. The armed forces were granted extensive authority to assist the civil authorities, and non-commissioned officers were permitted to shoot anybody, examine any location or object, inspect any vehicle, enter any home or other place of residence, and detain anyone based only on suspicion¹⁹⁹. The soldiers had the unrestricted authority to detain and arrest people and to destroy civilian property without cause. Considering that the norm allows it, formally it is not illegal. Nonetheless, this does not mean that it is not unjust. Since it does not comply with international principles, it is therefore unlawful according to Article 9(1) of ICCPR that states “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”²⁰⁰.

The Indian Armed Forces frequently carry out extrajudicial murders due to this statute²⁰¹. Even though it is the law, the armed forces do not turn over people they have caught right away to the police²⁰².

According to the Indian Constitution, whenever a person is taken into custody by law enforcement, they must be presented before a court within 24 hours, as specified by the criminal process code. He must appear before the court within the allotted time. It also states that individuals cannot be compelled to testify against themselves, that they have the right to appeal, that they are entitled to compensation if mistreated, and that they cannot be tried twice for the same offense. This is in addition to the usual guarantees of a fair and independent court, public hearings, the presumption of innocence, and the rights of the defense²⁰³.

The most controversial section of the AFSPA is Section 4, which provides the military the authority to fire on anyone who, in his opinion, does appear to be carrying a weapon. The trooper may detain any individual who appears to have committed a cognizable offense without a warrant. According to the AFSPA, any member of the armed forces may enter a home at any time to conduct a property search without obtaining a court order²⁰⁴.

¹⁹⁹ CHADHA (2013: 70).

²⁰⁰ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 9(1).

²⁰¹ *Ibid.*

²⁰² JAISWAL (2021: 2478-2493).

²⁰³ ROBERTSON (2005: 325-329).

²⁰⁴ *Ibid.*

It is deplorable that this large democratic nation broke its own procedural rules since the Indian Criminal Procedure Code requires that authorizations be obtained before law enforcement can investigate a home or other property. Unfortunately, the Indian Criminal Procedure Code is violated by Section 4 of the AFSPA. Section 4 of this law prohibits democratic activity in any form²⁰⁵.

In addition to these unrestricted powers, Section 6 of the AFSPA offers protection to troopers claiming that nothing done in the exercise of the powers granted by this Act shall give rise to any legal procedure against any person without the prior approval of the central government. This also breaks the ICCPR because Article 14 states that everyone must be treated equally before courts and tribunals. Everyone must have the right to a fair and public hearing by a competent, independent, and impartial tribunal set up by law to decide if a criminal charge against them is accurate or to find out what their rights and responsibilities are in a legal proceeding²⁰⁶.

The Indian Constitution's Article 14 guarantees that everyone will be treated equally before the law. It declares, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth"²⁰⁷. In a democratic society, the press and the public may be excluded from all or part of a trial for moral, public order, or national security reasons; or when the interests of the parties' private lives so require; or to the extent strictly necessary in the opinion of the court in unique circumstances where publicity would prejudice a case. With the case law *S.P. Gupta v. President of India And Ors*, it is enshrined that all people must be treated equally before all courts and tribunals, according to this article. No one is given legal immunity or protection from anybody else's wrongdoing. Even with the lack of regulations suitable for the purpose, the discrimination charge may be upheld²⁰⁸.

No one may be deemed guilty until given a fair chance to be heard, according to Subsection 2 of Article 14; however, the AFSPA's requirements go completely against this idea. When they suspect someone, the armed forces are entirely permitted to shoot them. India claims to be the world's greatest democracy, yet the law it passed for the State of Kashmir completely refutes this assertion. The armed forces can battle without needing special abilities when the nation is being attacked and they do not need these particular abilities when there is no external threat. It was unnecessary to give the armed forces additional authority under the AFSPA. Some locations are designated as disturbed regions under this statute²⁰⁹.

²⁰⁵ NOORANI (2009: 8-11).

²⁰⁶ WIRSING (2003: 86).

²⁰⁷ Constitution Assembly, 26 January 1950, *Constitution of India*, Article 14.

²⁰⁸ Judgement of the Supreme Court of India, 30 December 1981, AIR 1982 SC 149, *S.P. Gupta v. President of India And Ors*.

²⁰⁹ DEIBERT (2007).

The Indian security forces ('ISF') have imposed a reign of terror in the seized region, and the State administration has failed to restrain them. The security forces are torturing Kashmiris without informing the civil government. Due to Section 7's exemption from punishment for any acts done by the security services, the Act legitimizes cruelty in the State²¹⁰.

2.2.4 The Jammu and Kashmir Disturbed Areas Act, 1992

Another example of harsh legislation in effect in Kashmir is the Jammu and Kashmir Disturbed Areas Act ('JKDAA') of 1992. This Act provides arbitrary law enforcement authorities with considerable power. Section 2(1) of the Act defines that "In this Act, "disturbed area" means an area which is for the time being declared by notification under Section 3 to be a disturbed area"²¹¹. The whole region of Kashmir may be designated as a disturbed area under this statute.

Under the protection of the law, as mentioned earlier, this Act grants police wide authority that they may exercise at their discretion. Section 4 of the Act gives any police officer the power to fire upon persons contravening certain orders. The permission to use excessive force, such as shooting, even when the situation is not an emergency and the circumstances do not necessitate. One of the most severe crimes carried out by Indian security services following various laws has been extrajudicial killings.

The police are also given enormous authority under this statute to damage anyone's property without cause. The people exercising the powers and performing any action following the provisions of the said Act are granted immunity under Section 6 of the same Act. No official can be the target of legal action without the Government's prior approval. All actions following this law are legal and cannot be challenged in a court of law²¹².

Several of these regulations conflict with international human rights legislation. Each and every person has the right to life, liberty, and personal security, according to Article 3 of the UDHR. However, the JKDAA goes against this clause. The Indian Constitution also protects the right to life. If the death penalty is imposed after a criminal trial, no one's life may be taken without adhering to the law at all costs.

According to Article 6 of ICCPR, everyone has an intrinsic right to life. The law must defend this right. No one's life shall be taken without justification. Everyone has the right to liberty and personal security, according to Article 9 of the ICCPR. No person shall be arbitrarily detained or arrested. No one may be deprived of their liberty other than for legal reasons and in line with legal procedures²¹³. The JKDAA of 1990 contains several clauses that conflict with

²¹⁰ ASHRAF (2010).

²¹¹ Governor of Jammu and Kashmir, 17 July 1992, Act No. 4 of 1992, *Jammu and Kashmir Disturbed Areas Act*, Section 2(1).

²¹² PURI (1993: 28).

²¹³ GANGULY (1999: 172).

one another and violate numerous ICCPR provisions. The Indian Government has an obligation to uphold international conventions and legal norms. The right to life is guaranteed by Article 6 as mentioned earlier; yet, the JKDAA gives the law enforcement authorities the authority to take someone's life at any moment without cause and the right to shoot if they see it as appropriate. This unjust law in Kashmir severely compromises the security of life.

Everyone charged with a criminal offense has the right to be deemed innocent until and unless proven guilty in a court of law, according to Article 14 Subsection 2 of the ICCPR. This provision further protects the accused against a criminal charge. It means that a person should not be considered guilty unless his guilt has been established and should have a fair chance to be heard. Principles of the rule of law require that all accused parties should be treated as innocent until proven guilty and that no one should be condemned without a hearing. The JKDAA does not permit the Kashmiri people to express their thoughts or cause unrest. Article 19 guarantees that everyone has the freedom to express their thoughts without limitation. However, the JKDAA of 1990's provisions forbade residents from expressing their thoughts, and as a result, the police routinely shoot people who disagree with the Government's policies. They were wholly denied the ability to express themselves freely²¹⁴. Additionally, the JKDAA violates Article 13 of the Indian Constitution, which deals with equality before the law. According to this principle, every citizen must be handled equally before the law. All citizens should get equal treatment without prejudice²¹⁵. Equal protection under the law does not imply that everyone should be treated similarly under all circumstances but that governmental actions should not be prejudiced. According to the idea of equal protection under the law, no one shall be excluded from receiving the same level of legal defense as other State residents. Every class in the community should be treated equally concerning their lives, liberty, and property and discriminatory methods can never be used.

The Indian Supreme Court has changed its stance on the Indian Constitution's Article 14 by stating that the idea of equality is dynamic from many angles. The Indian Supreme Court ensured equity and equality of treatment in *Maneka Gandhi v. Union of India*²¹⁶. Every person has a right to equality, and the State is responsible for ensuring that this concept is upheld, according to the Indian Supreme Court. The Indian Government must refrain from passing any legislation violating its people's basic rights. The fundamental responsibility of the State is to treat all citizens fairly²¹⁷.

²¹⁴ BEHERA (2006: 104-106).

²¹⁵ JOHNSON (2005: 268).

²¹⁶ *Maneka Gandhi v. Union of India* is an historic decision in which the Supreme Court of India made a considerable expansion in its interpretation of Article 21 of the Indian Constitution. This decision, which was made on January 25, 1978, changed the Indian Constitution in a big way and opened a new chapter in the history of the idea of personal freedom.

²¹⁷ LAMB (1997: 219).

2.2.5 *The Prevention of Terrorism Act, 2002*

In 2002, the Indian Parliament's joint session approved the Prevention of Terrorism Act ('POTA'). It is regarded as a more recent iteration of the TADA and although the law was for the whole country, its main focus was especially the Indian-occupied region of Kashmir. POTA was enacted with the stated purpose of combating terrorism in India, however, it has been criticized for being disproportionately focused on the region of J&K²¹⁸.

The law was used extensively to repress the political and civil rights of the people in J&K, demanding self-determination and independence. POTA was frequently used to arrest and detain political activists, human rights defenders, and suspected militants without formal charges or trial, violating the right to liberty and security of a person under international human rights law²¹⁹.

The police are given additional authority under this statute. If a crime is committed with a deadly weapon, it can be considered terrorism. The definitions provided under POTA are ambiguous and do not make it obvious what they mean. For instance, the definition of a terrorist group or terrorist organization, in Section 3(5) of the current Act is ambiguous²²⁰. It states that:

“Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist acts, shall be punishable with imprisonment for a term which may extend to imprisonment for life, or with fine which may extend to rupees ten lakh, or with both. Explanation - For the purposes of this subsection, “terrorist organisation” means an organisation which is concerned with or involved in terrorism”²²¹.

As a basic rule of law, the proof is necessary to convict someone of a crime; however, this Act does not need to prove that the individual in question is a member of any terrorist organization. This clause breaches Article 22 of the ICCPR. In detail, Article 22 states that everyone has the right to create their own company and trade and is free to join any trade union to further their interests. Unless current legal restrictions expressly ban it, there will be no limitations on how this can be used. Additionally, this item shall be enforced with legal constraints on those in the armed services²²².

As mentioned, the freedom of association is protected by the previous provision, but regrettably, the POTA denies this right. According to the POTA, everyone who possesses knowledge about the terrorist unit is required to divulge it²²³. Failure to provide such information may result in a three-year sentence for the offender. No one can be penalized under any law for

²¹⁸ MUKHERJI (2003: 4521-4523).

²¹⁹ *Ibid.*

²²⁰ WOLPERT (2011).

²²¹ Joint session of Parliament, 26 March 2002, Act No. 15 of 2002, *Prevention of Terrorism Act*, Section 3(5).

²²² SHELTON (2005: 32).

²²³ NOORANI (2013: 550).

possessing knowledge as this violates a norm of international human rights law²²⁴.

POTA is the subject of intense discussion on its compliance with international human rights standards. It is important to underline that India is part of both the ICCPR and the UDHR²²⁵.

The law enforcement authorities have many detention-related authorities under POTA. Section 48 of the Act, states that if someone is arrested, they may be held for up to 90 days, with the possibility of an additional 180 days with the special approval of a special court. This clause contravenes section 167 of the Indian Criminal Procedure Code, which gives the police the right to hold anyone only for 15 days. The Indian Constitution mandates that any individual who has been arrested appear before the court authorities within 24 hours²²⁶. The POTA conflicts with many Indian domestic law regulations.

As well, the ICCPR's provisions conflict with the current Act's detention authority in several ways. Following ICCPR article 14, everyone shall be treated without delay in resolving any criminal charge²²⁷. This emphasizes the urgency of a speedy trial, but sadly, the POTA allows the police to hold an accused person for up to 90 days, blatantly against international standards for human rights and the rules of international law. Additionally, according to article 9 of the ICCPR, everyone arrested must be presented before a judge or other official with authority to exercise judicial functions. That trial cannot have any delays and if one takes a lengthy time, the person should be freed on bail²²⁸. Because International law provides several provisions that prohibit the denial of access to justice, this article mandates the prompt production of an arrested individual before judicial authorities. It is illegal to deny someone their liberty and personal security, which are constitutional rights for Indian citizens if the accused is kept in police custody beyond the permissible time frame specified by the CrPC or with any judicial authority²²⁹.

Additionally, the POTA prohibits trial hearings in public. Following POTA Section 30, despite anything in the Code, if the Special Court so wants, the proceedings may be held in camera for reasons to be recorded in writing²³⁰. The inherent right of the accused to have his procedures and trial handled in public is why this goes against the rules of justice. Trials should always be held in the open and in front of the public unless there are exceptional circumstances, such as national security or the general public's interest. Excluding these exceptional cases, trials should always be held publicly, following democratic principles and everyone should access the court's proceedings freely²³¹.

²²⁴ HAQ (2021: 92-98).

²²⁵ SOLIS (2010: 147-148).

²²⁶ PARKER (2003).

²²⁷ LIEBENBERG (2000: 16).

²²⁸ HILLMAN (2004: 156).

²²⁹ HUSSAIN (2002).

²³⁰ ASHRAF (2010).

²³¹ *Ibid.*

The ability to record confessions by the police rather than a judge is another unprecedented power granted to the police. Section 32 of the Act permits any police officer, besides the judicial magistrate, to record the confession. The officer might write the confession down on plain paper or any technological equipment that can be utilized as substantive evidence against the accused. The fundamental assumption of the law of evidence is that the Judicial Magistrate is the only authorized to record confessions²³². As a result, we finish with POTA requirements that conflict with the rules of justice, as the police could record a false declaration. According to section 164 of the Indian Criminal Procedure Code, the confession must be documented in court, and even the police's presence when the confession is being recorded is inadmissible²³³. In this aspect, the POTA goes against domestic law and fundamental principles of fairness.

Following Section 48 of the POTA, the burden of proof is with the accused; however, in usual legal practice, the burden of proof rests with the prosecution to prove its case. This violates the accused's rights, which are all protected, as seen, by the ICCPR. In particular, Section 14 of the ICCPR states that everyone who is accused of a crime must be entitled to the presumption of innocence until proven guilty in a court of law²³⁴. Since the burden of proof in the criminal justice system is always on the prosecution, it is a general principle that the accused should be treated as innocent until proven guilty.

Furthermore, section 48 of the POTA conflicts with article 11 of the UDHR. In accordance with UDHR article 11, every person accused of a crime has the legal right to remain innocent until confirmed responsible²³⁵.

POTA creates special courts in J&K and these are the ones that have the discretion to hold the trial in a private location against the accused's right to a fair trial. If the offense is connected to the POTA, the special courts are also permitted to file a criminal procedure charge against the defendant. These courts may also form a negative conclusion if the accused refuses to provide fingerprints, samples of their handwriting, or pictures. The judiciary's independence is weakened and diminished by establishing these special courts.

According to the POTA, the special court may proceed with the case's trial even if the accused or his attorney are not present²³⁶. The trial is entirely under the control of the special court. The special courts possess all the authority to deny the accused their right to a fair trial. The trial can be held behind closed doors, and witness testimony can remain confidential. The special courts take all of the measures disadvantageous to the accused person's rights²³⁷.

All individuals operating in good faith on behalf of the government enjoy special immunity and may escape prosecution. If they acted following the

²³² CHATTAH (2006).

²³³ HARRIS (2012).

²³⁴ FLECK (2008: 229-239).

²³⁵ SHELTON (2005: 20).

²³⁶ MUKHERJI (2003: 4521-4523).

²³⁷ GIDVANI (2008: 725-726).

POTA, their actions would not constitute an offense. Unlike First Information reports ('FIR')²³⁸, criminal case registration is not required. Furthermore, for an accused, detained individual according to the POTA, the police do not need to request remand from the court. For up to 90 days, or until he is brought before the court, the accused may be kept in the dark regarding the circumstances surrounding his arrest²³⁹.

The risk of torture under POTA is also very high and is enhanced due to the unsafe nature of the prolonged detentions. The police officials are granted immunity from their actions, as per Section 56. Because of this clause, the police are not afraid of being prosecuted by the courts for their illegal actions and are free to torture captives. The police may assert their good faith actions as their defense²⁴⁰.

In conclusion, the POTA is an instrument used against the Kashmiri people's liberation movement. POTA cannot guarantee that human rights will be protected following international treaties. Additionally, it has failed to maintain international and natural justice standards. The abolition of these laws in Occupied Kashmir is a current requirement, and the international community must step up and play its part.

2.2.6 The Unlawful Activities Prevention Amendment Act, 2004

The Unlawful Activities Prevention Amendment Act, 2004 ('UAPA') is an Indian law that is used to combat terrorism and other unlawful activities in the country. The law amends the Unlawful Activities (Prevention) Act of 1967, which was originally enacted to deal with activities that threaten the territorial integrity of India.

It gives law enforcement authorities considerable capabilities as well. The powers granted by this ordinance are nearly identical to those granted by the POTA of 2002. In 2008, the Act was changed once again. The Unlawful Activities (Prevention) Bill was tabled for consideration in Parliament in December 2008. Without any debate in the Parliament, it was approved. Even though several members of the Parliament urged that the measure be referred to the standing committee for consideration, the government disregarded their request, and the law was suddenly passed. Any bill passed through Parliament without being discussed or scrutinized can be evaluated for validity.

Unluckily, the inspiration for this Act came from earlier anti-terrorist measures, and the same notion, that law enforcement organizations should

²³⁸ The First Information Report is a critical document because it initiates the criminal justice process. The police begin investigating the case only after the FIR is filed at the police station. When the police receive information about the commission of a cognizable offense, they draft this written report. In most cases, it is a complaint filed with the police by the victim of a cognizable offense or someone acting on their behalf. Anyone can report a cognizable violation, either verbally or in writing.

²³⁹ TRIBUNAL (2004).

²⁴⁰ NOORANI (2013: 550).

have public authority, is preserved. Similar to previous acts, the definition of terrorism in this Act is highly debatable and violates numerous sections of human rights documents. 'Unlawful activity' is defined in Section 2 Clause (o) as any action taken by an individual or group whether by doing an act, saying or writing words, making signs or other visual representations or in any other way²⁴¹.

This concept is very debatable and goes against a number of international human rights laws. It limits the opinions of individuals who are advocating for their fundamental human rights, such as the right to self-determination. This inalienable right is a fundamental value of democratic societies that is widely acknowledged, that gives specific people the freedom to choose how they want to live their lives in the future²⁴².

In substance, the notion of self-determination allows for the people's freedom to select their political position and social, economic, and cultural standing. This idea is clearly stated in international law: Article 1(2) of the UN Charter covers the right to self-determination of peoples, and the need "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"²⁴³.

The principle of self-determination is a fundamental one. It is reflected in the United Nations Charter²⁴⁴ and other international legal instruments, such as the ICCPR, the ICESCR, and the UDHR. To preserve amicable and peaceful relations between the member nations, this principle's presence in the UN Charter ensures that it is acknowledged by everyone²⁴⁵.

In the ICCPR, the right to self-determination is given particular weight. According to Article 1(1): "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"²⁴⁶. As mentioned earlier, this principle's incorporation in the two accords reinforced the right to self-legitimacy determinations in the eyes of the international community. The Covenant's broad definition of the right to self-determination for all peoples, not only those who have been colonized or oppressed, is its most significant aspect²⁴⁷. This is because the principle of self-determination is considered a fundamental human right that is essential for the protection and promotion of

²⁴¹ GANAI (2009).

²⁴² *Ibid.*

²⁴³ United Nations, 24 October 1945, 1 UNTS XVI, *Charter of the United Nations*, Article 1(2).

²⁴⁴ The United Nations Charter is the UN's founding charter and according to that, member States must preserve International law, ensure global peace and security, and encourage universal observance of fundamental freedoms and human rights. It was considered and prepared during the San Francisco Conference, which got underway on April 25, 1945, and was attended by the majority of the sovereign States in the globe.

²⁴⁵ NAYAR (1975).

²⁴⁶ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 1(1).

²⁴⁷ SHAPIRO (2009).

human dignity and it is seen as a necessary precondition for the effective exercise of other human rights.

Additionally, Article 1(1) of ICESCR states: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”²⁴⁸.

This article recognizes all peoples’ right to determine their political status and to freely pursue their own economic, social, and cultural development.

Article 1 of ICCPR and Article 1 of ICESCR are both related to the right of self-determination, but the main difference is that while the first focuses on the protection of individual rights, on the other hand, Article 1 of the ICESCR, focuses on the protection of collective rights, such as the right of peoples to determine their own political status and to freely pursue their own economic, social, and cultural development.

Concluding, Article 1 of both Covenants grants all people the freedom to choose their political position and the unrestricted use and exploitation of their natural economic resources and riches.

Considering what we mentioned above, the definition forbids people and organizations from speaking out in favor of the right to self-determination, which is against the said international agreements. The UAPA was passed to stop the people of Kashmir from joining the movement for freedom.

2.3 The compliance with International Law

International law does have the ability to influence how governments operate. It has a normative force, it sets standards and principles that States are expected to abide by, but it does not have the power to enforce them. It can be a powerful tool for promoting and protecting human rights, but it can only be effective when States are willing to comply with it and when there are effective mechanisms in place to ensure compliance.

The situation in Kashmir may improve if the world community pressures India to preserve its adherence to international law and respect its obligations.

There is optimism that notwithstanding the legitimization of authority through domestic law, international law can provide resistance tools by giving rise to new forms of legal consciousness²⁴⁹.

However, the State must demonstrate a willingness to uphold the law and refrain from breaching international law in the name of domestic law. India must stop to let members of its military service act indelibly and escape punishment for crimes against humanity.

²⁴⁸ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 993, *International Covenant on Economic, Social and Cultural Rights*, Article 1(1).

²⁴⁹ DUSCHINSKI (2018).

In the absence of India's internal legislation being consistent with International law, the human rights situation in Kashmir would continue to compromise national, regional, and State security. Legislation and laws are intended to serve people, not authority²⁵⁰. At the moment, harsh regulations like the AFSPA and PSA still serve the demands of the offenders and do not address the worries of the victims.

In addition to being a territorial dispute between Pakistan and India, the war in Kashmir also affects the millions of people living in J&K, who are denied their natural, unalienable right to self-determination. There are serious worries over violating the Kashmiri people's rights to life, property, freedom of expression, and religion, as well as other fundamental human rights protected by international law. It is a flagrant breach of international law and human rights norms for the ISF to apply such discriminatory and restrictive legislation. These statutes give the ISF broad, expansive authority to torture, imprison, mutilate, and even kill the accused without prior authorization or concern for consequences or inquiries. Because of this lawlessness, there is a culture of impunity, which violates fundamental human rights. For example, as we have seen, the Jammu and Kashmir PSA is quite harsh. The AFSPA of 1958 must expressly be repealed, and other laws that protect the military and police from legal action must also be forced into oblivion.

The United Nations ('UN') and its rules, as well as the international community, desire to take significant actions to proclaim the right to self-determination and defend the fundamental human rights of the Kashmiri people. The findings make it clear that the conduct of the Indian military forces constitutes terrible crimes against humanity, necessitating the adoption of international humanitarian law to uphold international law truly. People in Kashmir have suffered for far too long due to a lack of accountability and prosecution. For this to change, more focus must be paid to how domestic and international law interact.

2.4 Conclusions

In this second chapter, we analyzed the Kashmir dispute from a legal standpoint, examined the legal issues and investigated the interaction between International Law and the Draconian Laws implemented in the region.

From a legal perspective, a few potential lessons can be drawn from the Kashmir dispute. Crucial is the importance of the role of international pressure in encouraging compliance with international law. This pressure can promote compliance with international law and encourage States to respect the human rights of their citizens. The use of draconian laws in Kashmir has been

²⁵⁰ KAZI (2018: 153-183).

condemned by international human rights organizations and has attracted international attention and criticism.

International law and institutions can play a decisive role in the human rights condition in Kashmir. Consequently, there is a need for effective international mechanisms to address violations of international law. In situations where States are not upholding their obligations under international law, it is crucial to have adequate instruments in place to address and remedy these violations. Subsequently, there is the matter of having well-defined legal frameworks. As we saw in this chapter, the Kashmir dispute has been complicated because the region has a complex legal history with competing claims and overlapping agreements. Clearly defined legal frameworks can reduce confusion and facilitate the resolution of disputes.

To conclude, we noticed the importance of defending human rights. International law, including Human Rights Treaties and agreements, requires States to respect and protect the human rights of all individuals within their jurisdiction. The use of draconian laws in Kashmir, which have been criticized for violating human rights, highlights the importance of upholding these obligations.

Indeed, it is fundamental to respect the rights of all parties involved. The human cost of conflicts can be high: the Kashmir dispute has resulted in significant suffering for the people living in the region, including human rights abuses, loss of life, and displacement.

Throughout the chapter, we emphasized that the right to self-determination is essential. The Kashmir issue has at its heart the question of whether the people of the region have the right to determine their future and which country they want to be a part of.

Furthermore, there is a need to effectively implement due process. This conflict has involved allegations of human rights abuses and violations of international law, highlighting the importance of due process and the rule of law in resolving conflicts.

This last point, namely the importance of defending human rights, will be explored further in the next chapter. The latter will be entirely devoted to the crucial topic of the state of human rights violations in the Kashmir region.

Chapter III. Human Rights violations in Kashmir

3.1 The enforcement of Human Rights Law

3.1.1 *United Nations Charter*

In 1945, human rights became more significant when the United Nations ('UN') was established in response to the Second World War's tremendous devastation of both men and infrastructure that humanity has experienced. The UN Charter was adopted by 51 Member Nations in October 24, 1945. The defense of human rights is the foundation of the Charter's preamble and the latter reiterates the belief in fundamental human rights, the value and dignity of each individual, equality of men and women, and the rights of all countries, both large and small²⁵¹.

The primary responsibility of the UN is maintaining international peace and security. An inspiring value of the Charter is the promotion of universal respect for human rights in all member States²⁵².

Article 1(1) of the UN Charter states:

"The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"²⁵³.

According to this article, the organization's goal is to foster amicable relations between States based on respect for the principles of equal rights and national self-determination. Article 1 mandates that the UN use all reasonable methods to advance global cooperation in resolving social and humanitarian issues and improving world peace²⁵⁴.

The UN provides consulting services for human rights as well. The General Assembly established a program of advisory services in human rights in 1955. This program was created to allow governments to exchange information and experiences about the promotion and defense of human rights²⁵⁵.

The Economic and Social Council's commission on human rights ('ECOSOC') and the office of the High Commissioner for Human Rights ('OHCHR'), which assumed responsibility for the division of human rights

²⁵¹ MUNTAQIM (2009).

²⁵² *Ibid.*

²⁵³ United Nations, 24 October 1945, 1 UNTS XVI, *Charter of the United Nations*, Article 1(1).

²⁵⁴ SIMMA (2002).

²⁵⁵ LAWSON (2005).

under the UN secretariat, were the agencies that were most closely involved with the issue of human rights. The Commission on the Status of Women ('CSW') exists in addition to that. The latter is one of the so-called functional Commissions of ECOSOC. It was established in 1946 as a parallel body to the Commission on Human Rights and over the years it has made an important contribution to the elaboration of equality issues, women's rights, and a gender perspective on human rights²⁵⁶. Furthermore, the Sub-commission on Freedom of Information and the Press and the Sub-commission on the Promotion and Protection of Human Rights were established by the Commission on Human Rights²⁵⁷.

Periodically, specialist organizations publish human rights reports. The UN Secretariat sends these reports regularly to organizations that battle to foster human rights²⁵⁸. The International Labor Organization ('ILO') is the most significant body for protecting human rights among the specialized ones connected to the UN that are also interested in protecting these rights.

The UN's top representative for advancing human rights across the globe is the High Commissioner, that is accountable to the Secretary-General and is responsible for all the activities of OHCHR. The first human rights commissioner was chosen in 1994.

The primary charter-based human rights body is the United Nations Human Rights Council ('UNHRC') which was created in 2006 to replace the Human Rights Commission. It aims to promote and protect human rights globally.

Among the activities of the UNHRC is the Universal Periodic Review ('UPR'), a mechanism that evaluates respect for human rights in all UN member countries. UPR aims to identify challenges and progress in protecting human rights in each country²⁵⁹.

During the review, a group of independent experts evaluates the country according to its policies and actions to protect human rights. After the review, the country receives recommendations on actions to improve its protection. In this way, the UPR is a crucial tool to promote respect for human rights at the global level and provide a mechanism of accountability for UN member States²⁶⁰.

3.1.2 Universal Declaration of Human Rights

The UN General Assembly adopted the Universal Declaration of Human Rights ('UDHR') on December 10, 1948. Since its implementation, it has

²⁵⁶ Both the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol are results of the work of the Commission on the Status of Women.

²⁵⁷ BROWNIE (2007).

²⁵⁸ ALSTON (1992).

²⁵⁹ Report of Human Rights Watch, 31 March 2022, *Submission to the Universal Periodic Review of India*.

²⁶⁰ *Ibid.*

influenced governments and other institutions around the world trying to combat any form of human rights violation. The Declaration emphasizes the advancement of individual rights and the rights of people of various cultures, languages, religions, and social backgrounds.²⁶¹

The UDHR is crucial because it sets out the fundamental rights and freedoms that should be guaranteed from States, to all human beings irrespective of race, sex, language or religion. The Declaration lists 30 rights and freedoms, including the freedom from torture, the right of free speech, the right to education, and the right to seek asylum in another country. It covers civic and political rights, including the right to life and the right to privacy. Economic, social, and cultural rights include the right to appropriate housing, health care, and social security²⁶².

In the General Assembly of 1948, Eleanor Roosevelt²⁶³ stated that the Declaration was, first and foremost, a declaration of the fundamental values that would serve as a benchmark for all nations. It could end up being the human race's Magna Carta²⁶⁴.

The UDHR established a legal framework for the defense and upholding of human rights worldwide in 1948²⁶⁵. It has been elevated to a fundamental component of human rights, whose principles many nations have included in their constitutions, along with regional human rights agreements and charters. Although it is not always respected and human rights are still regularly violated in many parts of the world, the Declaration represents a global commitment to protect and promote human dignity. Therefore, the UDHR is an essential point of reference for the fight against human rights violations and a symbol of hope for a more just and equal future for all²⁶⁶.

3.1.3 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights ('ICCPR') was adopted on December 16, 1966, by the UN General Assembly and it entered in force on March 23, 1976²⁶⁷.

²⁶¹ LAWSON (2005).

²⁶² DONNELLY (2003).

²⁶³ Eleanor Roosevelt (1884-1962) was an American activist and first lady, wife of President Franklin Delano Roosevelt. She was actively involved throughout her life in the protection of rights and played a crucial role in the process of creating the United Nations, chairing the committee that outlined and approved the Universal Declaration of Human Rights.

²⁶⁴ ROBERTSON (2005: 330-335).

²⁶⁵ SOHN (1968).

²⁶⁶ LOUIS (2015).

²⁶⁷ The date of adoption and entry into force of the International Covenant on Civil and Political Rights can be consulted at *United Nations Treaty Collection* (2023b), available online at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

The Covenant includes rights and freedoms of a wide range, such as the prohibition of torture²⁶⁸ and slavery²⁶⁹, freedom of thought, conscience and religion²⁷⁰, the right to freedom of expression²⁷¹, the right to participate in the conduct of public affairs, to vote and to be elected²⁷². The Covenant defends the rights of minorities and prohibits discrimination in general²⁷³.

The Covenant is supplemented by two optional protocols. The first optional protocol, which entered into force on May 23, 1976, regulates the right to individual complaint. The second optional protocol on the abolition of the death penalty entered into force on July 11, 1991²⁷⁴.

The ICCPR has been ratified by a majority of UN member States, including India, which ratified it in 1979²⁷⁵.

In addition, the United Nations Human Rights Committee monitors that States implement the rights guaranteed by the Covenant. To this end, the Committee regularly reviews reports from States²⁷⁶. In addition to reviewing individual complaints under the First Optional Protocol to the ICCPR, the Human Rights Committee also monitors compliance with the Second Optional Protocol on the Abolition of the Death Penalty²⁷⁷.

The Committee is composed of 18 experts and States that ratified the Covenant are required to submit an initial report one year after the Covenant enters into force, to be followed by additional reports at the Committee's request.

Since 2011, the Committee has been using a simplified reporting process. The State report is based on a list of issues compiled in advance by the Committee, referred to as the List of Issues Prior to Report ('LOIPR'). Governments have one year to provide answers to these issues in their reports²⁷⁸.

Under the First Optional Protocol to the Covenant, the Human Rights Committee can receive individual complaints against a State. However, only if the State in question has ratified the Optional Protocol and thus recognized the complaints procedure. In the complaint, an individual may state why he or she believes that one or more rights guaranteed by the Covenant have been violated by the State party. The complaint is admissible only if, prior to it, domestic legal procedures have been exhausted and the matter has not yet

²⁶⁸ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 7.

²⁶⁹ *Ibid.*, Article 8.

²⁷⁰ *Ibid.*, Article 18.

²⁷¹ *Ibid.*, Article 19.

²⁷² *Ibid.*, Article 25.

²⁷³ *Ibid.*, Article 27.

²⁷⁴ SCHRIJVER (2016: 457-464).

²⁷⁵ The state of signature and ratification of the International Covenant on Civil and Political Rights can be consulted at *United Nations Treaty Collection* (2023b), available online at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

²⁷⁶ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 40.

²⁷⁷ SCHRIJVER (2016: 455-464).

²⁷⁸ *Ibid.*

been heard by another international judicial body. If the complaint is admissible, the Committee invites the State to submit its observations. After a thorough examination, the Committee communicates its opinion on the existence or non-existence of a violation, associating it with recommendations on actions to be taken by the State. Although the Committee's recommendations are not legally binding, the State Party is still required to consider them²⁷⁹.

As mentioned above, India ratified the ICCPR on April 10, 1979. Nevertheless, to date, India has not signed or ratified the Optional Protocol to the ICCPR, nor the Optional Second Protocol to the ICCPR, aiming to the abolition of the death penalty²⁸⁰.

3.1.4 International Covenant on Economic, Social, and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights ('ICESCR') is considered, together with the UDHR and ICCPR, as the International Human Rights Code²⁸¹.

The ICESCR is one of the most important human rights treaties of the UN. It was adopted on December 16, 1966, as mentioned in the previous paragraph, along with ICCPR, by the UN General Assembly and entered into force in 1976²⁸².

The ICESCR contains economic rights, such as the right to engage in income-generating activities, namely the right to work²⁸³, the right to safe and healthy working conditions²⁸⁴, trade union freedom and the right to strike²⁸⁵. Furthermore, social rights, such as the right to social security²⁸⁶, the protection of family life²⁸⁷, and the right to an adequate standard of living, including housing, food, health, water and hygienic conditions²⁸⁸. Moreover, cultural rights include the right to education²⁸⁹ and participation in cultural life²⁹⁰.

²⁷⁹ *Ibid.*

²⁸⁰ The state of signature and ratification of the International Covenant on Civil and Political Rights can be consulted at *United Nations Treaty Collection* (2023b), available online at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

²⁸¹ HAQ (2017: 117-125).

²⁸² The date of adoption and entry into force of the International Covenant on Economic, Social and Cultural Rights can be consulted at *United Nations Treaty Collection* (2023c), available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en.

²⁸³ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 993, *International Covenant on Economic, Social and Cultural Rights*, Article 6.

²⁸⁴ *Ibid.*, Article 7.

²⁸⁵ *Ibid.*, Article 8.

²⁸⁶ *Ibid.*, Article 9.

²⁸⁷ *Ibid.*, Article 10.

²⁸⁸ *Ibid.*, Article 11.

²⁸⁹ *Ibid.*, Article 13.

²⁹⁰ *Ibid.*, Article 15.

As the monitoring body, the Committee on Economic, Social and Cultural Rights ('CESCR') of the UN monitors compliance with the Covenant. All States that have ratified the Social Covenant must regularly report to the Committee on how they are implementing it²⁹¹.

In 2008, the UN General Assembly adopted an Additional Protocol to the Social Covenant, which has been in force since 2013. The Protocol allows for individual complaints: Individuals who feel that their economic, social or cultural rights have been violated and have exhausted domestic remedies can file a complaint with the UN Social Covenant Committee²⁹².

To date, it results that India only ratified ICESCR on April 10, 1979. Namely, the second Optional Protocol to the ICESCR appears not signed or ratified²⁹³.

3.1.5 Fundamental rights in the Indian Constitution

Part III (Articles 12-35) of the Indian Constitution²⁹⁴ guarantees fundamental rights in India. The Indian Constitution recognizes six fundamental rights: the right to equality (Articles 14-18), the right to freedom (Articles 19-22), the right against exploitation (Articles 23-24), the right to freedom of religion (Articles 25-28), cultural and educational rights (Articles 29-30) and the right to constitutional remedies (Articles 32 and 226)²⁹⁵.

As stated above, in the event of a violation of fundamental rights, the Supreme Court of India may be directly petitioned under Article 32 of the Constitution. The goal of Indian fundamental rights is to eliminate the disparities of pre-independence societal norms. They have specifically been applied to end caste discrimination and condemn discrimination based on religion, race, caste, sex, or place of birth. They also prohibit human trafficking and forced labor and protect the cultural and educational rights of religious institutions²⁹⁶.

Fundamental rights have been revised for many reasons. The political groups and others have called for the right to work, the right to economic assistance in the event of old age, unemployment, and similar rights to be protected as constitutional guarantees. The purpose was to address the issues of poverty

²⁹¹ RIEDEL (2011: 574-589).

²⁹² SCHRUIVER (2016: 121-125).

²⁹³ The date of signature and ratification of the International Covenant on Economic, Social and Cultural Rights can be consulted at *United Nations Treaty Collection* (2023c), available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en.

²⁹⁴ The Constitution of India is the supreme law of India. The document sets out the framework for the fundamental political code, the structure, procedures, powers, and duties of government institutions and establishes the fundamental rights, guiding principles, and duties of citizens. It is the longest written constitution of any country on earth. It was adopted by the Constituent Assembly of India on 26 November 1949 and entered into force on 26 January 1950. The constitution declares India a sovereign, socialist, secular, and democratic republic, assures its citizens justice, equality, and freedom, and strives to promote fraternity.

²⁹⁵ BASU (2015).

²⁹⁶ TAYAL, JACOB (2005).

and economic insecurity, although these provisions have been enshrined in the guiding principles of State policy²⁹⁷.

The right to freedom and personal freedom has several limiting clauses and has therefore been criticized for failing to control the sanction of powers often deemed excessive. In times of emergency, there are measures for preventative detention and suspension of fundamental rights²⁹⁸.

The provisions of acts such as the Maintenance of Internal Security Act ('MISA'), the Armed Forces (Special Powers) Act ('AFSPA'), and the National Security Act ('NSA') are a means to counter these fundamental rights because they sanction excessive powers intending to combat domestic and cross-border terrorism and political violence, without safeguarding civil rights. For instance, the freedom to assemble peacefully and without arms is exercised, but in some cases, these meetings are interrupted by the police through non-fatal methods²⁹⁹.

Freedom of the press has not been included in the right to freedom, which is necessary to formulate a public opinion and to make freedom of expression more legitimate³⁰⁰. The employment of child labor in hazardous work environments has been reduced, but their employment even in non-hazardous work, including their predominant employment as domestic help, violates the ideals of the Constitution³⁰¹.

Article 19(1) of Part III of the Constitution states:

- “(1) All citizens shall have the right
- (a) to freedom of speech and expression;
 - (b) to assemble peaceably and without arms;
 - (c) to form associations or unions;
 - (d) to move freely throughout the territory of India;
 - (e) to reside and settle in any part of the territory of India; and
 - (f) omitted
 - (g) to practise any profession, or to carry on any occupation, trade or business”³⁰².

Following this provision, the fundamental human rights enumerated must be protected and will not affect the interests of sovereignty and the unity and integrity of India.

Article 1 of Part 1 of the Indian Constitution defines *Bharat*³⁰³ as a union of States³⁰⁴.

As rapid process is not a constitutional right of citizens, cases involving violations of fundamental rights require an excessive amount of time for

²⁹⁷ KAUL, TENG (2019: 175-188)

²⁹⁸ BAXI (1986: 1-17).

²⁹⁹ TAYAL, JACOB (2005).

³⁰⁰ BASU, MEHTA (1993).

³⁰¹ BAXI (1986: 1-17).

³⁰² Constitution Assembly, 26 January 1950, *Constitution of India*, Article 19(1).

³⁰³ Bharat is the name for India in various Indian languages.

³⁰⁴ Constitution Assembly, 26 January 1950, *Constitution of India*, Article 1.

resolution by the Supreme Court, which is contrary to the legal principle that states that delayed justice is justice denied³⁰⁵.

3.2 The status of Human Rights in Kashmir

3.2.1 *Human Rights abuses*

Along with its diplomatic, economic, legal, political, and regional dimensions, the Kashmir dispute affects millions of people's fundamental and inalienable right to life. It is not only a geographical problem for India and Pakistan. In the State of Jammu and Kashmir ('J&K'), human rights abuses are a persistent issue. Mass murders, enforced disappearances, torture, rape, and sexual assault are all examples of violations, as are political repression and the stifling of free expression³⁰⁶. Serious human rights violations against Kashmiri civilians were apparently committed by the Indian Army, the Central Reserve Police Force ('CRPF'), the Border Security Force ('BSF'), and other separatist terrorist groups³⁰⁷.

By arbitrarily murdering detainees and killing civilians in retaliation assaults, the Indian army and security forces operating in Kashmir have consistently violated international human rights law. Using deadly force against nonviolent protesters by government troops also constitutes a violation of international human rights law. Furthermore, such abuses have been promoted by security law that permits the security personnel to fire to kill while safeguarding them from punishment³⁰⁸.

The majority of people taken prisoner by Kashmir's security forces are tortured. Torture is used to punish detainees who are thought to support or sympathize with the militants as well as to instill a culture of political repression. It is not just used to force detainees to divulge information. Long-term beatings, electric shocks, burning with hot items, and squeezing the muscles with a wooden roller are all examples of forms of torture. Detainees are often housed in temporary detention facilities that are run by different security agencies without having access to the legal system, their families, or medical treatment³⁰⁹.

Rape frequently occurs within assaults on people in retaliation. Security personnel assault civilians as part of such attacks to punish the civilian population collectively. Rape is also used to target women who the security forces suspect of having sympathies with militants. The security personnel

³⁰⁵ BAXI (1986: 1-17).

³⁰⁶ Report of Human Rights Watch, 31 March 2022, *Submission to the Universal Periodic Review of India*.

³⁰⁷ *Ibid.*

³⁰⁸ DUSCHINSKI (2010: 26).

³⁰⁹ MATHUR (2012: 33-49).

have frequently destroyed civilian property intentionally, most notably by setting fire to residential areas³¹⁰.

People in Kashmir are asking for the right to hold a fair and impartial plebiscite to pick their destiny in accordance with the widely accepted concept of self-determination³¹¹. The massive movement in India has not been put down by the country's repressive policies. India is using more and more personnel and resources to suppress the independence fighters and maintain J&K commitment to the Union at all costs³¹².

3.2.2 Violation of the Right to self-determination

The principle of self-determination of peoples is enshrined in Article 1, paragraph 2 of the UN Charter. This principle has become a human right, formally recognized under article 1 of the two International Covenants on Human Rights of 1966, the ICCPR and the International Covenant on Economic, Social, and Cultural Rights ('ICESCR'). With the respect of this fundamental right, Kashmir people may significantly influence their political destiny and pursue their cultural, social, and economic growth³¹³.

The UN has defended the people's right of J&K to self-determination, which has also been agreed upon by the other parties, namely India, Pakistan, and Kashmir. In this dispute, it is essential to consider the United Nations Security Council ('UNSC') Resolutions 47 of April 21, 1948, Resolution 51 of June 03, 1948, Resolution 80 of March 14, 1950, Resolution 91 of March 30, 1951, and Resolution 122 of January 24, 1957.

The Security Council adopted the Resolution 39 in January 1948, creating the United Nations Commission for India and Pakistan ('UNCIP') to inspect and intermediate the dispute³¹⁴.

The settlement of the Kashmir issue is addressed in UNSC Resolution 47, enacted on April 21, 1948. The Council instructed the UN Commission to travel to the subcontinent and assist the governments of India and Pakistan in restoring peace to the area and in preparing for a plebiscite to decide the future of Kashmir. The Resolution also suggested a three-step procedure for resolving the conflict. Pakistan was initially ordered to expel all its citizens who had invaded Kashmir, intending to engage in combat. In the second stage, India was instructed to gradually decrease its soldiers to the bare minimum needed to maintain law and order³¹⁵. The third phase required India to select a plebiscite administrator who would oversee a fair and impartial plebiscite and who had been proposed by the UN.

³¹⁰ HAQ (2018: 118).

³¹¹ *Ibid.*

³¹² AMIN (1995: 10).

³¹³ SAINI (2001).

³¹⁴ SHAKOOR (1998: 53-69).

³¹⁵ Resolution of the United Nations Security Council, 21 April 1948, S/RES/47, *Security Council resolution 47 (1948) [The India-Pakistan Question]*.

Pakistan and India both voiced opposition to the Resolution. They appreciated the UN Commission's mediation, nevertheless. The Commission strengthened and altered the Security Council Resolution through conciliation, and it also adopted two resolutions of its own that were endorsed by both Pakistan and India. The Commission subsequently succeeded in achieving a cease-fire at the start of 1949. However, differences over the demilitarization process prevented a peace from being reached. The Commission proclaimed defeat in December 1949 after an extensive effort³¹⁶.

The dispute between India and Pakistan was the subject of UNSC Resolution 51, which was approved on June 3, 1948³¹⁷. It instructed the Commission created by UN Security Council Resolution 39 to go to the regions of contention as soon as possible and carry out the tasks given to it by UN Security Council Resolution 47.

The UNSC complimented India and Pakistan for adhering to the cease-fire in Resolution 80, which was approved on March 14, 1950³¹⁸. The resolution also called for simultaneous and progressive demilitarization by India and Pakistan on each side of the cease-fire line. Resolution 80 reversed the demand made in resolution 47 for Pakistan to leave first. Resolution 80 demanded that Pakistan and India simultaneously remove their forces to conduct a referendum.

On March 30, 1951, the UNSC enacted Resolution 91, taking note of a report from the UN Representative for India and Pakistan. It is stated that the following were the primary points of difference in the State of J&K's preparation for conducting a plebiscite: the process for and amount of demilitarization, and the degree of control over the performance of government responsibilities required to guarantee a fair plebiscite³¹⁹.

On January 24, 1957, the UNSC issued Resolution 122, which dealt with the dispute between the governments of India and Pakistan about the territories of J&K³²⁰. The resolution states that the assembly suggested by the Jammu and Kashmir National Conference ('JKNC') could not be a solution to the issue as stated in UN Security Council Resolution 91, which had been issued over six years earlier. It was the first of three security resolutions to address the conflict between the two nations, passed in 1957.

Additionally, the UNCIP resolutions of August 13, 1948, and January 5, 1949 affirm that the State of J&K will take its final position following the wishes of the general populace as expressed through the democratic process for a free and fair plebiscite conducted under the protection of the UN.

³¹⁶ SUBBIAH (2004).

³¹⁷ Resolution of the United Nations Security Council, 3 June 1948, S/RES/51, *Security Council resolution 51 (1948) [The India-Pakistan Question]*.

³¹⁸ Resolution of the United Nations Security Council, 14 March 1950, S/RES/80, *Security Council resolution 80 (1950) [The India-Pakistan Question]*.

³¹⁹ Resolution of the United Nations Security Council, 30 March 1951, S/RES/91, *Security Council resolution 91 (1951) [The India-Pakistan Question]*.

³²⁰ Resolution of the United Nations Security Council, 24 January 1957, S/RES/122, *Security Council resolution 122 (1957) [The India-Pakistan Question]*.

The rejection of this fundamental right to self-determination is a deliberate and grave violation of international law. According to Article 25 of the UN Charter, India is still obligated to provide this fundamental right to the Kashmiris, who have been denied it for more than 70 years. Additionally, it calls on the international community to constrain an investigation into the severe abuses of human rights in Indian Occupied Kashmir ('IOK'). Nevertheless, in accordance with international norms, the ultimate decision about the future of J&K rests with the democratic expression of the people's will through an impartial, fair, and free plebiscite that the UN supervise³²¹.

3.2.3 Brutality Against Women

According to multiple studies conducted in the past, women in Kashmir are among the worst victims of sexual assault in the world³²². The Indian forces have been involved in molestation and assaults of Kashmiris most of which go unreported due to the dread of social disgrace, and of retaliation by State offices. The Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') and International Convention on the Elimination of All Forms of Racial Discrimination ('CERD') favorably talk about all the rights which are being denied to the women of the IOK.

Violence against women is recognized by international law as a violation of human rights. The fight against this form of violence has been regulated by various international instruments that have led not only to a definition of the phenomenon. However, it could include the various forms of violence that a woman can be a victim of, such as physical, psychological, and verbal, but also the adoption of regulatory standards common to the contracting States.

Among the many, we can mention the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence or Istanbul Convention of 2011, the CEDAW, the Declaration on the elimination of all violence against women of 1993 ('DEVAW').

It is undeniable that, for the victims of this form of violence, the most effective protection, both at a national and international level, is judicial³²³.

The Indian security forces ('ISF') frequently mistreat women in Kashmir through rape, molestation, and other sexual acts. Women from Kashmir are also a target for militaries from India and this contributed to the escalation of militancy in Kashmir. The majority of people do not tolerate violence against women and took up weapons against Indian soldiers³²⁴. Since the government's campaign of repression against Kashmiri militants got intense in January 1990, there have been increased allegations of rape by security

³²¹ KAZI (2009: 33).

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ THE NEW YORK TIMES (1991).

forces. Rape most frequently happens during cordon-and-search³²⁵ operations, such as crackdowns, when males are detained for identification in public places like parks or schoolyards while security personnel search their residences³²⁶.

Security forces regularly use collective punishment against the civilian population in these circumstances, most frequently by beating or otherwise attacking citizens and setting their homes on fire. Rape is a tactic employed by security forces to target women they suspect of having sympathies with militant groups in an effort to punish and degrade the whole community³²⁷.

Although no emergency exists, Kashmir is essentially cut off from the rest of the globe. Print and electronic media are under official censorship, and any news of crimes perpetrated by the security forces is suppressed. The event that took place at Kunan Poshpora on 1991, is the worst mass rape tragedy in the history of J&K³²⁸.

The Kunan Poshpora was an alleged mass rape that occurred on February 23, 1991, when an Indian security force unit conducted a search operation in the Kashmiri twin villages of Kunan and Poshpora after coming under fire from militants. Some village residents said that night, troops sexually assaulted numerous ladies. Twenty-three women claimed to have been raped, according to the initial information report submitted to the police department following a visit by the local magistrate. Human Rights Watch claims that this figure may range from 23 to 100³²⁹. The army disputed these accusations. The charges were denounced as terrorist propaganda by the authorities after determining that the proof was insufficient.

International human rights groups have voiced significant concerns about the honesty of these investigations and how they were carried out, even though the Government's inquiries into the incident dismissed the charges as unfounded.

3.2.4 Deprivation of the Right to Freedom of Expression and Opinion

We cannot think of democracy without taking into account freedom of expression. However, talking about it today is complicated. Although it is expressly enshrined and protected by the most important international conventions, freedom of expression, which is part of the fundamental rights

³²⁵ Cordon and search is a military technique that involves cordoning off an area and searching the premises for weapons or insurgents. It is one of the fundamental counterinsurgency operations tactics.

³²⁶ KAZI (2009: 39).

³²⁷ SHAKOOR (1998: 53-69).

³²⁸ Report of Amnesty International, 22 March 2013, ASA 01/146/2013, *India: New Sexual Violence Law Has Both Positive and Regressive Provisions*.

³²⁹ Report of Human Rights Watch, 1 October 1991, *Abdication of Responsibility: The Commonwealth and Human Rights*, p. 13).

of the human being and is the emblem of the rights of freedom, is daily violated and trampled more or less seriously.

It has over time become one of the foundations of democratic systems, as an expression of the connatural need of the individual to freely express their thoughts, individually or collectively, by word, writing and any means of diffusion. This right is intrinsically linked to the political, religious, and cultural identity of the individual and each nation, although the diversity of these factors is often the cause of conflicts that result in limitations of the freedom in question³³⁰.

Although international law recognizes this fundamental right, legal protection does not translate into the same results from the point of view of effectiveness, as evidence that the international community still has a long way to go in making the observance of conventional principles effective³³¹.

The ability to express oneself freely is a fundamental right for the protection of every person and the operation of a democracy³³². Article 19 of the UDHR emphasize that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”³³³. This right covers the ability to hold opinions without interference and the freedom to seek, receive, and share information and ideas across all media and geographic boundaries³³⁴.

The ICCPR is a treaty of great significance as it codifies a wide range of civil and political rights, and one of the most important rights enshrined is the right to freedom of expression³³⁵.

Article 19(2) of the ICCPR explicitly protects the right to freedom of expression affirming “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”³³⁶.

This right is recognized as a cornerstone of democratic societies and is essential for protecting other human rights, including the right to freedom of thought, conscience, and religion.

The right to freedom of expression is not absolute and may be subject to certain restrictions. However, these restrictions must be necessary and proportionate and must not be used to limit the right to freedom of expression to a greater extent than is required. Article 19(3) states:

³³⁰ HOWIE (2018: 12-15).

³³¹ *Ibid.*

³³² United Nations General Assembly, 18 December 1979, Treaty Series, vol. 1249, *Convention on the Elimination of All Forms of Discrimination Against Women*.

³³³ United Nations General Assembly, 10 December 1948, 217 A (III), *Universal declaration of human rights*, Article 19.

³³⁴ *Ibid.*

³³⁵ HOWIE (2018: 12-15).

³³⁶ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 19(2).

“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals”³³⁷.

Freedom of speech is restricted in IOK due to preventative measures that restrict political leaders' ability to interact with the public and their ability to operate. Political figures are subject to arcane detention restrictions. Since 2016, the restriction on the use of the web and internet authorities has been obliged to restrict access to online networking and social media to enforce a digital restriction in IOK.

The traders in Kashmir Valley also suffered financial catastrophes due to the communication bar. Amnesty International noted that the blanket prohibition and extended telecommunications service suspensions do not adhere to international human rights norms. The capacity of Kashmiri phone and internet users to seek, receive, and transmit information, a crucial component of the right to freedom of expression, is hampered by these shutdowns³³⁸.

International law guarantees the freedom to practice one's faith and convictions.

According to media sources, the Indian government compulsorily restricted *Muharram*³³⁹ parades on the eighth and tenth of *Muharram*, which amounted to denying religious opportunities. Instead, the authorities dispersed the *Muharram* procession using animal-horrific methods. The legislative Friday prayers were repeatedly hampered by the recurring limitations and mobility restrictions in Srinagar's grand mosque in Kashmir, better known as *Jamia Masjid*. Limiting their freedom of movement prevents Muslims from upholding their religious obligations.

3.2.5 Denial of the Freedom to Peaceful Assembly and Association

The individual right or capacity of individuals to gather together and jointly express, advance, pursue, and defend their common or shared beliefs is known as the freedom of peaceful assembly. The freedom to associate is acknowledged as a civic liberty, political freedom, and human right.

Governments frequently violate the freedom of assembly in order to silence dissenting and critical voices. The right to peacefully gather does, in fact,

³³⁷ *Ibid*, Article 19(3).

³³⁸ Report of Amnesty International, 2 September 2022, ASA 20/5959/2022, *India: “We are being Punished by the Law” – Three Years of Abrogation of Article 370 in Jammu & Kashmir*.

³³⁹ Muharram is the first month of the Islamic calendar and thus marks the beginning of the Islamic New Year. Muharram also has a greater meaning: we know from the sacred Koran that Muharram is one of the four sacred months. During this blessed month, the rewards for our good deeds multiply and any transgression is more serious.

include the right to peaceful protest. However, nonviolent protesters frequently face harassment, violence, threats, and arrest, especially in non-democratic countries³⁴⁰.

In rare situations, legal interpretations may be altered to justify the detention of lawful demonstrators. Therefore, violations of the right to freedom of assembly have grave ramifications for society since they prevent an inclusive and pluralistic discussion and suppress one of the most important tools used by civil society to protest against the government³⁴¹.

The recognition and preservation of rights that include freedoms of expression and opinion, association, and peaceful assembly are key to ensuring that national legal orders include effective, understandable, and fair rules on the right to protest.

Restrictions have been imposed repeatedly without consideration for the requirements of vulnerable populations, such as the elderly, the disabled, or young children³⁴².

The State has been observed to use prohibitions and other limitations to restrict civil rights and subject the general populace to collective punishment. The ICESCR, to which India is a signatory, has been also violated by these events³⁴³.

IOK faced the most extended time limit since the agitation started on July 8, 2016, which continued for more than 50 days without pauses and resulted in the worst humanitarian tragedies. Due to the requirement of ongoing restrictions, most of the fundamental rights guaranteed by international law and humanitarian law have been restricted³⁴⁴.

For most occasions in the IOK, the Criminal Procedure Code's ('CrPC') Section 144, which prohibits gatherings of many individuals, is still in effect. Congregations, walks, labelling, giveaways and even peaceful vigils are prohibited³⁴⁵.

The colonial-era legislation Section 144 of the CrPC, 1973, permits any administrative magistrate authorized by the State government to issue instructions to prevent and treat urgent situations of perceived risk. Section 144 is used when an immediate annoyance or an event that might cause issues or damage to property or human life occurs. Section 144 of the CrPC generally forbids public meetings, and it has previously been used to impose restrictions to suppress demonstrations that may incite riots or other types of violence. Section 144 has frequently imposed telecom service limitations and internet shutdowns³⁴⁶.

³⁴⁰ HAQ (2018: 120).

³⁴¹ MCBRIDE (2005: 18).

³⁴² Report of Human Rights Watch, 31 March 2022, *Submission to the Universal Periodic Review of India*.

³⁴³ HAQ (2018: 124).

³⁴⁴ Report of Amnesty International, 2 September 2022, ASA 20/5959/2022, *India: "We are being Punished by the Law" – Three Years of Abrogation of Article 370 in Jammu & Kashmir*.

³⁴⁵ Central Government Act, 25 January 1974, Act No. 2 of 1974, *Code of Criminal Procedure*, Section 144.

³⁴⁶ MCBRIDE (2005: 21).

It could be argued, however, that a balance needs to be struck between the legislature's grant of plenary powers to deal with emergencies and the need to protect the personal liberty and other freedoms guaranteed to citizens under the Constitution unless there are unusual or urgent circumstances.

3.3 Current Situation

More than any other aspect, the rise in human rights abuses over the last several years is evidence of the failure of the Indian government's strategy to use coercive measures to end the political crisis. One long-time observer claimed that India's struggle for Kashmir had turned into a war against the populace.

One of the leading causes of the human rights issue in Kashmir has been the government's reluctance to take concrete action to stop atrocities committed by its security forces. Government representatives have acknowledged that excesses have been committed, and those guilty have been punished. However, when such action has been taken, it has seldom resulted in criminal charges. Additionally, these actions have not been made public to convey to Kashmir's civilian population that these violations are unacceptable and that doing so would serve to dissuade other security personnel from engaging in similar violations.

Members of the security services have frequently engaged in violations, including torture, rape, and murder, without being held criminally responsible. When presented with evidence of abuse, the authorities have repeatedly tried to cast doubt on the credibility of the witnesses, undermine the testimony of doctors, attorneys, and other advocates, or deny the allegations. All without launching an exhaustive, independent investigation or bringing charges against those responsible. When penalties have been applied, they have only included administrative disciplinary actions³⁴⁷.

On the contrary, the militant organizations have persisted in abusing the civilian populace while still controlling both military and political authority. Organizations are unaware of any attempts by militant organizations to stop their personnel from abusing people, and these groups have routinely violated international human rights and humanitarian law by carrying out arbitrary killings, rapes, kidnappings, threats, and attacks on civilians.

Furthermore, as previously stated, specific human rights organizations have persisted in encouraging violent assaults against women and other people who do not follow the rules of society, which has led to an atmosphere of terror among many Kashmiris and others who have been compelled to leave³⁴⁸.

³⁴⁷ HAQ (2018: 121-122).

³⁴⁸ SAINI (2001).

The complicated political and historical factors that contributed to the current conflict in Kashmir, which is split between India and Pakistan, impact the situation. It causes serious human rights problems in Kashmir under the Pakistani administration. People have suffered adverse effects and been denied or had their human rights denied to them on both sides of the Line of Control ('LoC').

It is still urgently necessary to redress past and present human rights breaches and provide justice to all Kashmiris who have endured seven decades of fighting. Any attempt to resolve the political situation in Kashmir should include a commitment to putting a stop to the cycles of violence, holding everyone accountable for past and present breaches of human rights, and providing compensation for victims³⁴⁹.

Alarming, there have been rising allegations of ceasefire violations over the past several years, including shelling and gunfire, that have killed civilians and driven families to leave their homes along the LoC.

Journalists, independent human rights groups, and members of civil society are obstructed by the Governments of Pakistan and India's restrictions on entry to Kashmir. Lifting those limitations would be a significant step in the direction of more openness in Kashmir.

3.4 Conclusions

In his third chapter, we dealt with the critical issue of impediments to justice for victims of human rights breaches that exist in both law and practice in J&K, and how the government's reaction to accusations of human rights abuses failed to provide justice for a multitude of victims and their families. To lay the foundation, we opened this section with a legal framework about the enforcement of human rights law. Continuing, delving into some of the numerous reported human rights violations in India's administered Kashmir region.

The status of human rights in Kashmir is a complex and sensitive issue. Human rights organizations have reported widespread human rights abuses in the region, including extrajudicial killings, torture, rape, and arbitrary detention by ISF³⁵⁰. Additionally, there have been reports of human rights abuses by militant groups operating in the region. The situation has been further complicated by the ongoing political and territorial dispute between India and Pakistan over the region. It is important to note that the situation in Kashmir has been highly contested, and there are competing narratives and perspectives on the issue³⁵¹.

³⁴⁹ HAQ (2018: 125).

³⁵⁰ Report of Association of Parents of Disappeared Persons, 2020, *120 Days: 5th August to 5th December - A Report by APDP*.

³⁵¹ Report of Amnesty International, 2 September 2022, ASA 20/5959/2022, *India: "We are*

The human rights violations reported in the Indian-administered region of Kashmir have several vital lessons at the international level. Some of these lessons include the importance of accountability: the ongoing human rights abuses in Kashmir highlight the importance of holding individuals and institutions accountable for their actions. This includes holding security forces accountable for any human rights violations they may have committed and holding political leaders and government officials responsible for their failure to address these abuses³⁵².

Subsequently, there is the need for a political solution. The ongoing conflict in Kashmir has led to widespread human rights abuses, and it is clear that a political solution is needed to address the underlying issues fueling the violence.

Furthermore, independent and impartial investigations into human rights abuses in Kashmir are necessary to establish the truth of what has occurred and to hold those responsible accountable and greater transparency is needed for the international community to fully understand the situation in Kashmir and hold those responsible accountable for their actions.

The human rights violations that have been reported in Kashmir highlight the importance of respecting human rights in any conflict situation and the need for the protection of human rights for all individuals, regardless of their political beliefs or affiliations. From here, also the need to protect civilians: the human rights abuses in Kashmir have had a devastating impact on civilians, who have been caught in the crossfire of the conflict. The international community must take steps to protect civilians and ensure they are not caught up in violence.

This chapter and the preceding ones have been a means for the next and final chapter, that will focus on the specific issue of enforced disappearances in the J&K region.

being Punished by the Law” – Three Years of Abrogation of Article 370 in Jammu & Kashmir.

³⁵² Report of Human Rights Watch, 31 March 2022, *Submission to the Universal Periodic Review of India.*

Chapter IV. Enforced disappearances in Kashmir

4.1 Human rights and enforced disappearances

4.1.1 The notion of 'enforced disappearance'

Human rights are the fundamental rights that everyone has by virtue of being human. They are rights that cannot be taken away by the public authority. They are necessary for the development of human personality as well as the promotion of social progress and higher living standards³⁵³.

It is the sovereign function of the State as the ultimate authority to keep law and order in its territory and to promote and protect the fundamental human rights of everyone who lives there. The State acts in a dual capacity under international human rights law. On the one hand, it has to ensure that human rights are not violated, and on the other, it has to ensure that recognized human rights are respected³⁵⁴.

Refraining from violating human rights refers to a State's obligation under international human rights law to respect and protect individual rights, as enshrined in treaties and conventions such as the International Covenant on Civil and Political Rights ('ICCPR'). This obligation imposes a duty on States not to engage in acts that would infringe upon the human rights of individuals³⁵⁵.

Acting for the promotion of human rights, on the other hand, refers to a State's positive obligation to take steps to advance human rights within its jurisdiction. This involves implementing policies and laws, providing resources, and creating an enabling environment for individuals to enjoy their rights³⁵⁶.

Subsequently, while refraining from violating human rights is a minimum obligation, acting for their promotion goes beyond that, requiring States to take active steps to create a more enabling environment for human rights to be realized³⁵⁷.

The ICCPR and the International Covenant on Economic, Social and Cultural Rights ('ICESCR') are legally binding international human rights treaties that set out the obligations of States that have ratified them concerning the protection and promotion of human rights. These treaties include specific provisions outlining the responsibilities of States to respect, protect, and fulfil human rights. The ICCPR, states in Article 2(1) and (2) that:

³⁵³ NIRMAL (2003: 445-478).

³⁵⁴ *Ibid.*

³⁵⁵ WEBB (1990).

³⁵⁶ *Ibid.*

³⁵⁷ SHELTON (2000).

- “1. Each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Each State Party undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”³⁵⁸.

Similarly, Article 2(1) and (2) of the ICESCR state:

- “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”³⁵⁹.

These provisions and others in the ICCPR and ICESCR, set out the specific obligations of States concerning the protection and promotion of human rights and provide a framework for monitoring and holding States accountable for their compliance with these obligations³⁶⁰.

Therefore, the idea that member States should respect human rights consists of three prepositions. First, all States must respect all persons' fundamental rights and freedoms within their territory. Second, they have a duty not to allow discrimination based on sex, race, religion or language. Lastly, States must promote universal respect for human rights and cooperate to achieve the desired goal³⁶¹.

Nevertheless, what is most impressive and, at the same time, paradoxical is that most human rights violations have their genesis in the State's action, as is the case in the State of Jammu and Kashmir ('J&K'). This demonstrates the inability of the State to protect people living in its territorial jurisdiction and sometimes, as in this case, there is a State action that itself violates fundamental rights. This conducts to the denial of the international and constitutional obligations imposed on States by the human rights laws and constitutions of the States concerned³⁶².

States that allow enforced disappearances are responsible for violating the human rights of individuals and are accountable under international human

³⁵⁸ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 2(1) (2).

³⁵⁹ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 993, *International Covenant on Economic, Social and Cultural Rights*, Article 2(1) (2).

³⁶⁰ KANNABIRAN (2007: 38-39)

³⁶¹ NIRMAL (2003: 445-478).

³⁶² DUSCHINSKI (2010: 20).

rights law. Enforced disappearance is an abuse of power and a denial of the right of a human being to exist and to have an identity on the part of the State³⁶³.

Regrettably, enforced disappearance is practised in an era that is often referred to as the era of human rights and places importance on protecting human values, worth, dignity, self-respect and good governance more effectively and responsibly³⁶⁴.

The International Convention for the Protection of All Persons from Enforced Disappearance ('ICPPED') is a United Nations ('UN') treaty that aims to prevent and criminalize the practice of enforced disappearance. It was adopted by the UN General Assembly in 2006 and entered into force in 2010³⁶⁵. India is a signatory to the Convention³⁶⁶, which defines enforced disappearance in Article 2 as follows:

“For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”³⁶⁷.

Subsequently, Article 3 states that “Each State party shall take appropriate measures to investigate acts defined in Article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice”³⁶⁸.

Thus, according to ICCPED, enforced disappearances occur when, with the involvement of State authorities, a person is forcibly removed from public view, and his or her whereabouts are intentionally not revealed. As a result, victims find themselves outside the protection of the law. In most cases, the only verifiable information concerns the circumstances under which the victim was last seen alive and free³⁶⁹.

³⁶³ DEGUZMAN (2009).

³⁶⁴ CHOUDHURY, MOSER-PUANGSUWAN (2007).

³⁶⁵ The date of adoption and entry into force of the International Convention for the Protection of All Persons from Enforced Disappearance can be consulted at *United Nations Treaty Collection* (2023a), available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en.

³⁶⁶ The state of signature and ratification of the International Convention for the Protection of All Persons from Enforced Disappearance can be consulted at *United Nations Treaty Collection* (2023a), available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en

³⁶⁷ United Nations General Assembly, 20 December 2006, *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 2.

³⁶⁸ *Ibid*, Article 3.

³⁶⁹ CHOUDHURY, MOSER-PUANGSUWAN (2007).

Disappearance is often used as a euphemism, as many are believed to have been killed. Amnesty International describes enforced disappearance as a brutal human rights violation: a violation of the missing person and those who love them. The person in question is often tortured and in constant fear for their life, removed from the protection of the law, deprived of all their rights and at the mercy of their captors. This ongoing violation often persists for many years after the initial abduction³⁷⁰.

An act of enforced disappearance violates the right to security and deprives the person of freedom against his will. In this practice, the State or its officials must be involved in some way, directly or indirectly. Moreover, the refusal to recognize the deprivation of liberty or freedom and to reveal the fate and position of the person concerned is considerable. This deprivation and refusal of recognition place the persons concerned outside the protection of the law and in a situation of total lack of defence³⁷¹.

In regions where separatist groups are active and where counter-insurgency by the government is underway, enforced disappearance has emerged as a powerful weapon of repression and repression³⁷². The Republic of India is not exempt from the crime of enforced disappearance. It has gradually become one of the countries with the highest cases of this practice, which is commonly spread in the State of J&K³⁷³.

4.1.2 Human rights infringements implicated in enforced disappearances

Enforced disappearance is not a violation of a single human right; it is the violation of a constellation of recognized fundamental human rights norms. It involves the arbitrary deprivation of a person's freedom, integrity and security, and even threatens the victim's existence. In some cases, enforced disappearance can also include violations of the prohibition of torture and other forms of inhuman or degrading treatment. These violations may be committed to obtain information or confessions, or to punish or intimidate the missing person or his family. This method is often used to control people in terrorism, insurgency, armed conflict, armed rebellion, internal unrest, political upheaval, and military rule³⁷⁴.

The practice of enforced disappearance includes complete denial and non-recognition of basic rights. Sometimes, it is used to conceal the realities of human rights violations because the exposure of such violations can undermine the government's image, credibility and legitimacy. Governments often use it to silence their opponents, crush insurgent leaders, and sometimes

³⁷⁰ Report of Amnesty International, 1 July 2015, ASA/20/1874/2015, *Denied: Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir*.

³⁷¹ DUHAIME, THIBAUT (2018: 569–587).

³⁷² SAUMYA (2009).

³⁷³ DUHAIME, THIBAUT (2018: 569–587).

³⁷⁴ SCOVAZZI, CITRONI (2007).

suppress the morale of the population by giving support to their political rivals or insurgent groups³⁷⁵.

Enforced disappearance violates all fundamental human rights of the victim, most of which have been recognized by various international instruments as non-derogable rights. These just mentioned, are human rights that cannot be restricted or limited under any circumstances, even in times of emergency or national security. These rights are considered essential and fundamental to human dignity³⁷⁶.

One among them is the right to life, protected under several international human rights treaties. Article 6 of the ICCPR states that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”³⁷⁷.

A person's right to liberty and security is a fundamental human right that guarantees that individuals are free from arbitrary arrest, detention, or imprisonment and that they have the right to be secure in their persons. This right is protected by several international laws and human rights treaties, including Article 9 of the ICCPR, which affirms that “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. Everyone has the right to liberty and security of person”³⁷⁸. This right is based on the principle that all human beings are entitled to respect for their inherent dignity and worth as individuals. In addition, the right not to be subjected to torture and other cruel, inhuman, or degrading treatment or punishment prohibits the use of any form of physical or mental abuse, including torture. This prohibition is considered a *jus cogens*³⁷⁹ norm, a fundamental principle of international law from which no derogation is permitted. For instance, Article 5 of the Universal Declaration of Human Rights (‘UDHR’) states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”³⁸⁰.

Article 16 of the ICCPR, says that “Everyone shall have the right to recognition everywhere as a person before the law”³⁸¹. The right of recognition as a person before the law guarantee that every person is entitled to have their legal status recognized by the State and to have their rights and responsibilities determined by the law. This right is based on the principle that all individuals

³⁷⁵ CREW (2008: 1-28).

³⁷⁶ ROBERTSON (2005: 325-335).

³⁷⁷ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 6.

³⁷⁸ *Ibid*, Article 9.

³⁷⁹ Under international law, the Latin locution *ius cogens* denotes, customary norms that protect values considered fundamental and cannot be derogated from in any way.

³⁸⁰ United Nations General Assembly, 10 December 1948, 217 A (III), *Universal declaration of human rights*, Article 5.

³⁸¹ United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 16.

are entitled to the same legal protections and rights, regardless of their background, status, or circumstances³⁸².

Nevertheless, enforced disappearance does not only affect the rights of the missing person. It also violates the rights of the victims' family members and people living in society. At the same time, an individual fulfils various obligations in society and family, such as husband or wife, son or daughter, father or mother, and brother or sister. The number and areas of obligations vary depending on the individual situation of the person concerned³⁸³.

This phenomenon violates the right to family life and various economic, social, and cultural rights, such as the right to an adequate standard of living for the victim's family and the right to education for their children. Because in places like J&K, in the absence of an income earner in the family, women and children become more vulnerable to various human rights violations, such as begging, sexual abuse, and trafficking. In addition, family members do not know when, if ever, their loved one will return, which makes it difficult for them to adjust to the new situation³⁸⁴.

Amnesty International reported how in the State of J&K, India's national legislation has made it impossible to receive pensions, life insurance policies or other means of support in the absence of a death certificate. The inheritance problem also arises in cases of disappearance when death is not proven. These situations crush the entire family, resulting in economic and social marginalization³⁸⁵.

4.1.3 International response to enforced disappearances

The problem of enforced disappearances has been on the agenda of the UN since the second half of the Seventies. The first significant step in the fight against this phenomenon was the establishment of the Working Group on Enforced or Involuntary Disappearances ('WGEID') in 1980 by the UN Commission on Human Rights. Its mandate is to assist families in determining the fate and situation of their beloved ones who have been subjected to enforced or involuntary disappearance. The WGEID also works to prevent such disappearances from occurring and to ensure that governments take appropriate measures to investigate and prosecute those responsible³⁸⁶. Subsequently, in 1992, the UN adopted the Declaration on the Protection of All Persons from Enforced Disappearance, intending to increase the effectiveness of the fight against enforced disappearances worldwide³⁸⁷.

³⁸² HAQ (2021: 92-98).

³⁸³ *Ibid.*

³⁸⁴ MALIK (2005: 42-52).

³⁸⁵ Report of Amnesty International, 1 July 2015, ASA/20/1874/2015, *Denied: Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir*.

³⁸⁶ CREW (2008: 1-28).

³⁸⁷ SCOVAZZI, CITRONI (2007).

In order to review the existing international rules on enforced disappearance and to propose a binding international normative instrument, in 2001 an independent committee chaired by Manfred Nowak³⁸⁸ was established. The Committee consisted of a group of international experts who have been monitoring and assessing the human rights situation in a particular nation or region. It was established to make and provide recommendations to improve the country's or region's human rights situation³⁸⁹.

Finally, in December 2006, the UN General Assembly adopted the Convention on the Protection of All Persons from Enforced Disappearance, to provide a concrete solution to the problem of enforced disappearance. The Convention, which entered into force in 2010, expresses a firm intent to prevent enforced disappearances and to combat impunity for this crime. In its preamble, it states:

“[...] Considering the right of any person not to be subjected to enforced disappearance, the right of victims to justice and to reparation, Affirming the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end, [...]”³⁹⁰.

Article 1(2) of the Convention explicitly and categorically describes enforced disappearance as a non-derogable prohibition “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance”³⁹¹.

4.2 Enforced disappearance in Jammu and Kashmir

India cannot ignore the problem of enforced disappearances. The phenomenon is widespread in many Indian regions, including J&K. According to communications sent to the UN WGEID, most cases of disappearances occurred between 1983 and 1995 in the context of ethnic and religious unrest³⁹². Nevertheless, even after 2000, cases of enforced disappearance did not decrease³⁹³.

³⁸⁸ Manfred Nowak is an Austrian lawyer and professor of international law. He is known for serving as a United Nations High Commissioner for Human Rights and working in international human rights advocacy.

³⁸⁹ HAQ (2017: 117-125).

³⁹⁰ United Nations General Assembly, 20 December 2006, *International Convention for the Protection of All Persons from Enforced Disappearance*, Preamble.

³⁹¹ *Ibid*, Article 1 (2).

³⁹² United Nations General Assembly, 1998, E/CN.4/1999/62, *Report of the Working Group on Enforced or Involuntary Disappearances*, p. 27.

³⁹³ Report of Association of Parents of Disappeared Persons, 2020, *120 Days: 5th August to 5th December - A Report by APDP*.

In Indian-administered Kashmir, a tacit policy of enforced disappearance has been in effect since 1989, when Kashmiri militancy against Indian rule began³⁹⁴.

The army and administration have denied that they play any role in the disappearances³⁹⁵. Witnesses came forward but recanted after being threatened by the army and police, known as Rashtriya Rifles³⁹⁶ ('RR').

From April 17 to 24, 2003, in the Indian-administered area of J&K, members of the association of families of the disappeared went on a hunger strike. It was organized by the Association of Parents of Disappeared Persons ('APDP'), and its main demands were to know the situation of their disappeared loved ones, to bring the perpetrators to justice, and to end the practice of enforced disappearances in the region. The hunger strike was supported by various human rights organizations, political parties and civil society groups, and it received significant media coverage. At that time, the Indian government affirmed that between 2000 and 2003, 3,744 people disappeared instead of the 60 cases that had been confirmed before³⁹⁷. Kashmir's courts have received numerous complaints since 1990, but not a single case has been resolved³⁹⁸. In 1994, Parveena Ahangar³⁹⁹ and a human rights lawyer-activist, Parvez Imroz, formalized the group as the Association of Parents of the Disappeared (APDP).

On August 4, 2020, a year after India revoked the special status of J&K, the Working Group, issued a press release calling for urgent action to remedy the alarming human rights situation⁴⁰⁰.

The State of J&K are constantly struggling with the problems of insurgency and ethnic violence. The human rights situation in this region of the country is not optimistic, and the law and order situation is bleak⁴⁰¹.

In response to the insurgent groups' activities, the Indian government launched a counterinsurgency campaign. During this movement, flagrant human rights violations could be observed. The army and security forces deployed in the region employed practices such as extrajudicial killings, and deaths in custody, disappearances, torture, and rape to suppress the secessionist insurgents and diminish the popular support they enjoyed in the name of a

³⁹⁴ DUSCHINSKI (2010: 24).

³⁹⁵ HAQ (2017: 117-125).

³⁹⁶ The Rashtriya Rifles are an Indian counterinsurgency force that was established in 1990 to serve in the Jammu and Kashmir region. They also uphold public order by implementing the Armed Forces Jammu and Kashmir Special Powers Act of 1990.

³⁹⁷ SCOVAZZI, CITRONI (2007: 66-68).

³⁹⁸ *Ibid.*

³⁹⁹ Parveena Ahangar is a human rights activist from Indian-administered Kashmir, known for her work on the issue of enforced disappearances in the region. She is the founder and chairperson of the APDP. Parveena began activism in the 1990s after her son Javed Ahmed was taken into custody by Indian security forces and disappeared. Since then, she has been a leading voice on the issue of disappearances in Kashmir and has advocated for accountability and justice for the families of the disappeared.

⁴⁰⁰ United Nations General Assembly, 2021, A/HRC/48/57, *Report of the Working Group on Enforced or Involuntary Disappearances*, p. 53.

⁴⁰¹ SCHOFIELD (2000: 191).

separate State could be witnessed. These gruesome activities were also used to intimidate and terrorize ordinary people, not to give refuge to these insurgent groups or provide any help⁴⁰².

To strengthen the counterinsurgency movement, in 1990, the Indian government extended the application of the Armed Forces (Special Powers) Act ('AFSPA') of 1950 in J&K. This law provides immunity to security forces, which has contributed to a dramatic increase in the intensity of human rights violations in the region. Many innocent people have died and disappeared during counterinsurgency movements⁴⁰³.

In 1998 some incidents drew the attention of the WGEID, which informed the Indian government that disappearances in India had become a standard feature⁴⁰⁴. The WGEID expressed severe concern about an alarming trend accompanying the disappearances of those years following arrests in conflict areas in Kashmir. As reported, the disappearances resulted typical of the practice of ISF, according to which journalists and human rights activists were made to disappear to instil fear in the population⁴⁰⁵.

According to the APDP, some 8,000 to 10,000 Kashmiri men, including combatants and noncombatants, have disappeared at the hand of Indian State forces to date⁴⁰⁶.

Since the beginning of the armed insurgency, the Indian State apparatus has imposed anti-insurgency laws, which grant immunity to the armed forces from being held accountable for any act of impunity in Kashmir. Therefore, the disappearances in the Kashmir region were mainly attributed to the police authorities, the army and paramilitary groups acting in cooperation with or with the submissiveness of the armed forces. In Kashmir, many people have disappeared after armed clashes with security forces. The disappearances would result from several factors linked to the vast powers granted to the security forces by emergency legislation, particularly by the Terrorist and Disruptive Activities Act ('TADA') and the Public Safety Act ('PSA')⁴⁰⁷. Mass disappearances are often the result of a political approach to national security⁴⁰⁸.

In many places, such as Sri Lanka and Northern India, enforced disappearances have been approved as a counterinsurgency practice. Even in Kashmir, enforced disappearances have been used as a counterinsurgency tool by the army, police and informal militias⁴⁰⁹.

⁴⁰² DUSCHINSKI (2010: 26).

⁴⁰³ JAISWAL (2021: 2478-2493).

⁴⁰⁴ United Nations General Assembly, 1998, E/CN.4/1999/62, *Report of the Working Group on Enforced or Involuntary Disappearances*, pp. 26-28.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Report of Association of Parents of Disappeared Persons, 2020, *120 Days: 5th August to 5th December - A Report by APDP*.

⁴⁰⁷ United Nations General Assembly, 1998, E/CN.4/1999/62, *Report of the Working Group on Enforced or Involuntary Disappearances*, pp. 27-28.

⁴⁰⁸ D'SOUZA (2015: 78-81).

⁴⁰⁹ MATHUR (2012: 33-49).

In the Indian criminal justice system, the First Information Report ('FIR') is an initial requirement that must be filed with the police in order to initiate an investigation into any case. In the case of disappearances and other human rights violations by Indian forces, filing the FIR with the police authorities in Kashmir has been difficult or nearly impossible, and there has been no investigation⁴¹⁰.

The refusal to accept complaints was a confirmed political decision that every police station tacitly followed, especially during the early years of the armed struggle. Missing persons, therefore, are annihilated not only physically but also materially. There are no records of their disappearance⁴¹¹.

Therefore, there seem to be significant barriers to access to law and justice in times of such violent erasure and unspeakable violence. The State has implemented mechanisms that make disappearances appear as a forgotten aberration of dubious origin. In this context, not only does access to legal means become impossible, but the struggle for remembrance by relatives and memorialization is also hindered⁴¹².

Kashmiri women have begun the struggle to find the disappeared by supporting resistance and justice movements. These movements are unique because women heavily dominate them and because there are no other initiatives of this nature or such a high profile in Kashmir. What makes women's participation in the movement unique is that women in Kashmir do not have a strong vanguard tradition in social movements. However, their participation in all spheres of life has been modest and increasing since 1947⁴¹³.

Kashmir was a patriarchal society in which women led very private lives. Mourning and grief were closely guarded affairs, and the emotions associated with mourning were discreet. Families freely shared their grief among themselves and with friends, but mourning was limited to the four walls of the house. After 1989, as human rights violations by the Indian military increased, women put aside the more traditional and decorous barriers. They have been at the forefront of protests and demonstrations against human rights violations. They have not hesitated to enter interrogation centres, jails, police stations, military camps, courts and morgues, places that were previously adverse to them⁴¹⁴. As Parveena Ahangar recounts, women went out into the streets to search for their loved ones, and for the first time, they entered spaces that were not considered suitable for them⁴¹⁵.

In the APDP movement, women individually and collectively conduct demonstrations and seminars to raise awareness about enforced

⁴¹⁰ *Ibid.*

⁴¹¹ Report of Amnesty International, 21 March 2011, ASA 20/001/2011, A 'Lawless Law': *Detentions Under the Jammu & Kashmir Public Safety Act.*

⁴¹² GORDON (1997: 140).

⁴¹³ SHIRAZI (2010).

⁴¹⁴ D'SOUZA (2015: 78-81).

⁴¹⁵ Report of Association of Parents of Disappeared Persons, 2020, *120 Days: 5th August to 5th December - A Report by APDP.*

disappearances. This work is dangerous, and many women have been threatened and harassed by police and State authorities⁴¹⁶.

The increasing participation of women in public protests and the increased visibility of their mourning in public represent a significant rupture that has occurred in Kashmiri society. In the case of enforced disappearance, women are initially connected to an informal network of parents, relatives, and other concerned people. The APDP has become a pioneering group of human rights defenders composed mainly of women. Currently, the APDP has split into two groups, one led by Parveena Ahangar and the other by Parvez Imroz, both dominated by women⁴¹⁷.

4.3 Indian response to enforced disappearances

4.3.1 Constitutional mandate against enforced disappearances

India is a champion nation of the international rule of law, multilateralism and the UN and has made valuable contributions to the codification and progressive development of international law. Article 51(c) of the Indian Constitution imposes a duty on the State to foster respect for international law and treaty obligations. It purposes to “foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and encourage settlement of international disputes by arbitration”⁴¹⁸.

India is one of the States signatories of the 2006 ICPPED on February 6, 2007. It has expressed deep concern about the problem and commitment to protecting human rights before the entire community. However, India to date has not yet ratified the Convention⁴¹⁹.

At the national level, the Indian Constitution is one of the most promising documents for protecting the fundamental rights of individuals. It has one of the most elaborate human rights charters ever drafted by a State, consistent with the goal of the nation's unity and the interests of the general public. In addition to other constitutional provisions, Part III of the Constitution provides special protection for citizens and even for foreigners in some cases.

⁴¹⁶ Report of Amnesty International, 21 March 2011, ASA 20/001/2011, *A ‘Lawless Law’: Detentions Under the Jammu & Kashmir Public Safety Act*.

⁴¹⁷ Report of Association of Parents of Disappeared Persons, 2020, *120 Days: 5th August to 5th December - A Report by APDP*.

⁴¹⁸ Constitution Assembly, 26 January 1950, *Constitution of India*, Article 51(c).

⁴¹⁹ The state of signature and ratification of the International Convention for the Protection of All Persons from Enforced Disappearance can be consulted at *United Nations Treaty Collection* (2023a), available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en.

This part contains almost all the critical human rights enshrined and enumerated also in the UDHR and the ICCPR⁴²⁰.

It is worth mentioning one specific article of the Indian Constitution that have non-derogable human rights and is relevant to protection against enforced disappearances. Although it does not explicitly prohibit enforced disappearances or grant protection against them, they prohibit acts involved in this crime or the violation of rights caused by an act of enforced disappearance. These rights are contained in Article 21 of the Indian Constitution that provides: “Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law”⁴²¹.

The above constitutional provision provides the necessary basis for developing protection against enforced disappearance. Indeed, protection against enforced disappearance is already implicit in the right to life and personal liberty.

4.3.2 Legislative framework for the prevention and suppression of disappearances

In India, there is no statute recognizing disappearance as a crime, nor is there a regulatory framework for the prevention and suppression of enforced disappearance. However, there are many laws that, indirectly or by dealing with its constituent elements, provide the basis for its prevention and suppression⁴²².

Below, Indian regulatory texts will be analyzed, focusing on relevant laws in the context of enforced disappearances.

The Indian Penal Code (‘IPC’) of 1860 establishes criminal penalties for crimes committed in India. It was adopted in 1860 but has been amended several times to adapt to the changing needs of Indian society.

The Code under section 363 states that “Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine”⁴²³. In addition, the following section 364 of the IPC affirms that “Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine”⁴²⁴.

⁴²⁰ DUSCHINSKI (2010: 30).

⁴²¹ Constitution Assembly, 26 January 1950, *Constitution of India*, Article 21.

⁴²² KANNABIRAN (2007: 40-43).

⁴²³ Imperial Legislative Council, 6 October 1860, Act No. 45 of 1860, *Indian Penal Code*, Section 363.

⁴²⁴ *Ibid*, Section 364.

Section 368 of the IPC deals with kidnapping offences with intent to kidnap. Specifically, it states that:

“Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement”⁴²⁵ .

Both Sections 339 and 340 provide protection against unlawful imprisonment and refer to persons charged with unlawful restraint and unlawful confinement, respectively. In addition, earlier sections 343 to 348 deal with aggravated forms of unlawful restraint and confinement. These sections of the IPC provide protection against unlawful confinement and kidnapping for ransom, serious crimes that violate human rights and personal freedom. Specifically, Article 346 provides for the crime of wrongful confinement in secret. Specifically, it states that:

“Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement”⁴²⁶ .

Considering all the above provisions, it can be said that although enforced disappearance has not been explicitly recognized as a crime by the IPC, the sections listed above cumulatively provide a practical framework for prosecuting and punishing the perpetrator of the crime of enforced disappearance⁴²⁷ .

Subsequently, the Indian Police Act (‘IPA’) of 1861 is a law that sets out the rules for the organization, management, and control of police forces in India. The Act was adopted in 1861, then amended several times over the years, and applied to all police forces in India.

The IPA establishes rules for the creation, management and control of police forces, as well as their discipline and accountability.

In general, this Act aims to ensure that police forces are effective, efficient, and accountable and that they are able to protect Indian citizens and ensure public safety⁴²⁸ .

Specifically, Section 23 of the Act enumerates the duties of police officers. Then Section 29 prescribes punishments for failure to comply with or violation of the duties enumerated in the Act, as follows:

⁴²⁵ *Ibid*, Section 368.

⁴²⁶ *Ibid*, Section 346.

⁴²⁷ SNEDDEN (2012).

⁴²⁸ RAI (2004).

“Every police-officer who shall be guilty of any violation of duty or wilful breach or neglect of any rule or regulation or lawful order made by competent authority, or who shall withdraw from the duties of his office without permission, or without having given previous notice for the period of two months, or who, being absent on leave, shall fail, without reasonable cause, to report himself for duty on the expiration of such leave,] or who shall engage without authority in any employment other than his police-duty, or who shall be guilty of cowardice, or who shall offer any unwarrantable personal violence to any person in his custody, shall be liable, on conviction before a Magistrate, to a penalty not exceeding three months’ pay, or to imprisonment with or without hard labor, for a period not exceeding three months, or to both”⁴²⁹.

As seen above, some examples of dereliction of duty are illegal violence and using power for unassigned work.

These provisions show that police officers can also be punished for violating the duties enumerated in the law, including violations of the right not to be illegally arrested or detained, custodial violence, and confrontations, in the name of private defence⁴³⁰.

The third legislation highlighted is the Indian Evidence Act (‘IEA’), an 1872 law that establishes rules for the collection, admissibility, and evaluation of evidence in a judicial process. The law has been reformed several times to adapt it to the needs of the times, including the introduction of scientific evidence such as DNA and the use of technology such as video conferencing for witness testimony⁴³¹.

For example, the law stipulates what types of evidence can be presented in court and how the judge should evaluate it. It also distinguishes between direct evidence, such as witness testimony or material evidence, and indirect evidence, such as presumptions or circumstantial evidence. The Act also establishes rules for the admissibility of evidence, such as the need for evidence to be relevant to the case and to be gathered lawfully.

The IEA also establishes rules for witness testimony, including the need to swear or promise to tell the truth and the possibility of being cross-examined by litigants⁴³².

Sections 101 and 102 of the IEA entitle the accused to the presumption of innocence until proven otherwise. The first section attests that “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”⁴³³. Section 102 subsequently states, “The

⁴²⁹ Central Government Act, 22 March 1861, Act No. 5 of 1861, *Indian Police Act*, Section 29.

⁴³⁰ NIRMAL, SHUKLA (2007: 50-60).

⁴³¹ SAUMYA (2009).

⁴³² SNEDDEN (2012).

⁴³³ The Governor-General in Council, 15 March 1872, Act No. 1 of 1872, *Indian Evidence Act*, Section 101.

burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”⁴³⁴.

Under the IEA, a party to a lawsuit has the right to cross-examine any witness who has testified in the case. Cross-examination is the process of questioning a witness who has already testified in court, intending to test the credibility and reliability of their testimony and to bring out any inconsistencies or contradictions in their testimony. The purpose of cross-examination is to challenge the testimony given by the witness in direct examination, to show that the witness is not credible or that the witness’s testimony is not valid. It can also be used to introduce new evidence or to explain or clarify the evidence that has already been presented⁴³⁵.

Section 138 of the IEA stipulates that anyone called to testify must answer any questions subject to the provisions of the law. This includes answering questions asked during cross-examination. The section affirms:

“Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter”⁴³⁶.

The above legislation is vital to a fair trial and consequently crucial to avoid enforced disappearances. Indeed, this practice is closely related to the crime of false imprisonment, which occurs when an individual is illegally detained. Therefore, without due process, the victim's freedom is limited, and they could be detained without cause or justification⁴³⁷.

Underneath, the provisions of the Code of Criminal Procedure (‘CrPC’), 1973, which also provide protection for persons arbitrarily or illegally arrested or detained, will be analyzed.

The CrPC is the primary legislation that lays down the procedural law for administering criminal justice in India. The Code was enacted in 1973 and has undergone several amendments since then. It is divided into two parts; the first deals with the procedure to be followed by the courts, and the second deals with the powers and duties of the police⁴³⁸.

In addition to various other rights, such as protection against arbitrary arrest and detention, protection against unnecessary restraint, and protection against unlawful search and seizure, this Code recognizes other rights that help combat or address the disappearance problem.

⁴³⁴ *Ibid*, Section 102.

⁴³⁵ SAUMYA (2009).

⁴³⁶ The Governor-General in Council, 15 March 1872, Act No. 1 of 1872, *Indian Evidence Act*, Section 138.

⁴³⁷ Report of Association of Parents of Disappeared Persons, 2020, *120 Days: 5th August to 5th December - A Report by APDP*.

⁴³⁸ SAUMYA (2009).

The CrPC protects the right to be informed of the grounds for arrest and the right to bail. According to Section 50(1) and (2):

“(1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offense for which he is arrested or other grounds for such arrest.

(2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offense, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf⁴³⁹.

Section 57 safeguards the right to be presented before a competent magistrate within 24 hours of arrest or detention. Indeed, it is stated that the arrested person shall not be detained for more than twenty-four hours:

“No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty- four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court⁴⁴⁰.

In addition, the CrPC provides for the right of the victim's family to be judicially inquisitioned in cases of death or disappearance in the custody of State officials. Section 176(1) states:

“When any person dies while in the custody of the police or when the case is of the nature referred to in clause (i) or clause (ii) of sub- section (3) of section 174] the nearest Magistrate- empowered to hold inquests shall, and in any other case mentioned in sub- section (1) of section 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offense⁴⁴¹.

In conclusion, it is crucial to analyze the Right to Information (‘RTI’) Act 2005. The RTI Act of 2005 is an Indian law that gives citizens the right to access information held by the government. The Act applies to all levels of government, including central and State governments, as well as authorities and public bodies funded substantially by the government. The law aims to promote government transparency and accountability by giving citizens the right to access information on the functioning of government, including information on government policies, decisions, and activities⁴⁴².

The RTI Act provides that any Indian citizen may submit a request for information to a public authority. The public authority is required, as

⁴³⁹ Central Government Act, 25 January 1974, Act No. 2 of 1974, *Code of Criminal Procedure*, Section 50(1) (2).

⁴⁴⁰ *Ibid*, Section 57.

⁴⁴¹ *Ibid*, Section 176(1).

⁴⁴² DUSCHINSKI (2010: 26-28).

appropriate, to provide the information within 45 days from the date of receipt of the request unless an extension is granted for exceptional reasons. The law also provides for an appeal procedure if the request for information is denied or the information provided is deemed inadequate. The RTI Act is considered one of the most powerful tools for citizens to access government information. The RTI Act in Section 3 recognizes that all citizens have the right to information and obliges every public authority to provide information. Section 8 of the Act provides a list of exemptions from disclosure. For example, Section 8(1)(a) states that:

“Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,
(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offense”⁴⁴³.

Continuing, section 24(1) specifies:

“Act not to apply to certain organizations.
(1) Nothing contained in this Act shall apply to the intelligence and security organizations specified in the Second Schedule, being organizations established by the Central Government or any information furnished by such organizations to that Government: Provided that information pertaining to allegations of corruption and human rights violations shall not be excluded under this -subsection: Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the Central Information Commission, and notwithstanding anything contained in Section 7, such information shall be provided within fortyfive -days from the date of the receipt of request”⁴⁴⁴.

Consequently, this law does not apply to specific intelligence and security organizations, the list of which can be found in Annex II of the law, which mentions the Intelligence Bureau⁴⁴⁵ (‘IB’), the Border Security Force⁴⁴⁶ (‘BSF’), the Central Reserve Police Force⁴⁴⁷ (‘CRPF’), the Central Industrial Security Force⁴⁴⁸ (‘CISF’), and the National Security Guards⁴⁴⁹ (‘NSG’). This shows that, like other impunity laws, this law reserves special treatment for security forces. Section 24, however, states, as cited above, that information

⁴⁴³ Parliament of India, 15 June 2005, Act No. 22 of 2005, *Right to Information Act*, Section 8(1)(a).

⁴⁴⁴ *Ibid*, Section 24(1).

⁴⁴⁵ The Intelligence Bureau is India’s domestic internal security and counter-intelligence agency under Ministry of Home Affairs.

⁴⁴⁶ The Border Security Force is India’s border guarding organisation on its borders with Pakistan and Bangladesh.

⁴⁴⁷ The Central Reserve Police Force is a federal police organisation in India under the authority of the Ministry of Home Affairs. It is one among the Central Armed Police Forces.

⁴⁴⁸ The Central Industrial Security Force is a federal police organisation in India under the Ministry of Home Affairs. It is one among the Central Armed Police Forces.

⁴⁴⁹ The National Security Guard is a counter-terrorism unit in India under the Ministry of Home Affairs.

related to allegations of corruption and human rights violations is not excluded. The requested information must be provided after approval by the Central Information Commission or the State Information Commission⁴⁵⁰. This right to information can be used to know the whereabouts and fate of the missing person. Therefore, this law can revolutionize the fight against human rights violations, primarily enforced disappearances.

4.3.3 Legal and constitutional resolutions

Remedies against enforced disappearances can be discussed from both legal and constitutional perspectives. As mentioned above, no statutory or constitutional provisions in India explicitly prohibit the act of enforced disappearance. Nevertheless, some provisions cumulatively prohibit some of the constituent elements of enforced disappearance⁴⁵¹.

Regarding the legal aspect, as we saw in the previous section, the IPC criminalizes certain acts that can be considered similar to enforced disappearance, such as Sections 339, 340, 343, 344, 345, and 364. Upon receipt of an FIR or complaint, criminal proceedings may be instituted against the perpetrator of enforced disappearance if his alleged act constitutes an offence under these provisions⁴⁵².

If one of the constituent elements of enforced disappearance is false imprisonment, assault or battery, it is possible to file a civil suit to recover damages. However, as we have noted, because the government or its officials usually conduct enforced disappearances, questions may arise regarding the State's civil liability⁴⁵³.

Despite this, the current law is not satisfactory. Judicial decisions are still not uniform, and the State's responsibility under the Constitution is difficult to enforce. It would be essential to bring the law in line with international human rights standards.

Turning now to the constitutional aspect, Articles 32 and 226 of the Indian Constitution give the Supreme Court and the High Courts jurisdiction to enforce fundamental rights.

Article 32(1) claims, "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed"⁴⁵⁴.

Continuing, Article 226(1) and (2) of the Indian Constitution says:

“(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any

⁴⁵⁰ RAI (2004).

⁴⁵¹ MAHMOOD (2000).

⁴⁵² NIRMAL (2003: 445-450).

⁴⁵³ GORDON (1997: 143).

⁴⁵⁴ Constitution Assembly, 26 January 1950, *Constitution of India*, Article 32 (1).

Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories⁴⁵⁵.

Accordingly, the high courts can provide remedies not only for the violation of fundamental rights but also for any other purpose. In addition to the remedies mentioned above, responding to the needs of the moment, the Apex Court has given a new dimension to Article 32 and inferred from it the power to award damages when a person's or citizen's fundamental right has been violated. There are no other adequate remedies to provide relief and redress to the victim. The high courts have also applied a similar approach in interpreting Article 226 of the Constitution.

Honour courts have awarded reparations in cases of secret killings, missing or unidentified persons, and other human rights violations.

The case of *Bhim Singh v. The State of Jammu & Kashmir*⁴⁵⁶ has been heard by the Supreme Court of India. The case concerns Bhim Singh, leader of the Jammu and Kashmir National Panthers Party ('JKNPP') and human rights activist. He filed a petition in the Supreme Court against the State of J&K and government authorities, accusing them of violating his fundamental rights, including freedom of expression and freedom of movement. The crime of false detention is one of the most severe forms of human rights violations. Just because a person has been accused of a crime does not mean that the person loses all his fundamental rights. This case carries on the various illegal detentions by law enforcement. Therefore, the Supreme Court ruled that the State of J&K had violated his fundamental rights and ordered the government to compensate the applicant 50,000 rupees within two months of the date of the judgment⁴⁵⁷.

Although it is clear from the preceding discussion that the Indian judiciary has taken serious note of the human rights violations caused by government officials, awarding compensation, they have not recognized the right not to be subjected to enforced disappearance or ordered mandatory prosecution of perpetrators⁴⁵⁸.

⁴⁵⁵ *Ibid*, Article 226(1)(2).

⁴⁵⁶ Judgement of the Supreme Court of India, 22 November 1985, AIR 1986 SC 494, *Bhim Singh v. State of Jammu & Kashmir*.

⁴⁵⁷ *Ibid*.

⁴⁵⁸ DUSCHINSKI (2010: 34).

4.4 Conclusions

The purpose of this last chapter was to discuss the definition of enforced disappearance and the human rights violations accompanying it. Subsequently, we examined the problem of enforced disappearance in Kashmir and the relevance and availability of legal and constitutional protections available to victims of enforced disappearance in the region.

Enforced disappearance is one of the most severe violations of human rights. It is an offence against human dignity and undermines the deepest values of any society committed to the rule of law, human rights and fundamental freedoms. India is not exempt from the problem of enforced disappearances, and State apparatuses often use the practice as a weapon to counter insurgency and terrorism⁴⁵⁹.

Enforced disappearances are widespread in the State of J&K. In response to this problem, India has demonstrated its commitment to protecting human rights by signing the 2006 ICPPED, in addition to other important international conventions, covenants and agreements to which India is a party. Therefore, the signing is a first step, but the commitment has never really been carried out because of the lack of ratification, possibly because of the situation in Kashmir.

The Indian Constitution not only guarantees the fundamental rights of individuals but also provides constitutional remedies for their violation. Although Indian laws have not explicitly criminalized enforced disappearance, the country's criminal justice system safeguards arrested or detained persons and victims of enforced disappearance. Since enforced disappearance constitutes a violation of the rights to life, liberty, security, freedom from torture, and arbitrary detention, victims, their relatives, and even organizations associated with the missing person's case could approach the courts for redress and appropriate remedies. The Supreme Court has awarded compensation to victims of enforced disappearances or their relatives for constitutional torts committed by police, military and para-military personnel and their agents⁴⁶⁰.

Despite activism in safeguarding people's fundamental human rights, serious human rights abuses, including arbitrary arrests, extrajudicial executions, illegal detentions, prison violence and enforced disappearances, continue unabated. Most worryingly, these violations are generally committed by those who, under the law, are responsible for protecting and safeguarding the human rights of individuals. Against this bleak backdrop, the recent amendments to the CrPC are a positive step, but they are not enough to ensure justice for victims of enforced disappearances and their relatives⁴⁶¹.

⁴⁵⁹ ZIA (2016: 164-175).

⁴⁶⁰ *Ibid.*

⁴⁶¹ D'SOUZA (2015: 78-81).

The following suggestions can be made to make the legal system more sensitive to the growing threat of enforced disappearances. Crucially, the Indian government should promptly ratify the 2006 ICPPED and the 1984 Torture Convention. In addition, enforced disappearance should be declared a crime under the IPC. It should be explicitly recognized as a violation of the right to life and personal liberty enshrined in Article 21 of the Constitution.

It is necessary to support the families of victims of enforced disappearances by ensuring that they are involved in decisions related to ascertaining the truth, ensuring justice and reparation. In addition, children of missing parents should receive special protection.

The Indian government should establish a centralized detainee registry accessible to all, ensuring transparency and accountability regarding the actions of security forces and the government. Conclusively, it should take prompt action against government officials involved in enforced disappearances to ensure that anyone accused of violations is tried relatively and impartially.

Conclusion

The conflict in Kashmir has led to widespread and ongoing human rights violations, including the use of enforced disappearances as a tool of repression by State actors. Enforced disappearances are a gross violation of international law. This practice has a devastating impact not only on the victim but also on the families of missing persons, who are often left without any information about the fate of their loved ones. Despite repeated calls for action by human rights organizations, the Indian government has consistently denied the problem of enforced disappearances in Kashmir⁴⁶². It has not investigated or prosecuted those responsible for this human rights violation⁴⁶³.

The aim of this thesis was to approach in an analytical way the debated issue of human rights violations in the region of Jammu and Kashmir (J&K). In this regard, the purpose was to investigate and demonstrate what is the actual state of human rights in Kashmir, giving particular relevance to the cruel practice of enforced disappearances. In order to do so, we analyzed the international legal framework applicable to the right to remedy enforced disappearances, and we showed how the latter offers important positions and support to tackle this phenomenon.

India has assumed obligations under international law that require the State to ensure the right to a remedy for these gross human rights violations. The remedies provided by the State must be effective and comply with international law. Concerning these standards, it has been shown how India's domestic laws and practices are inconsistent with international law and human rights standards. We have identified the applicable standards and shortcomings of the Indian State's right to redress. India must ensure that victims exercise their right to a complete and effective remedy for enforced disappearances⁴⁶⁴.

After exploring human rights violations in Indian-administered J&K, it becomes clear that justice must be pursued through the conviction of criminals and other judicial and social processes. In the course of this study, it has emerged how the existence of these violations can be understood as indicative of the effects and issue of militarization in Kashmir, and the issues related to militarization itself need to be addressed seriously and quickly.

In light of the research conducted, it could be concluded that the problem of enforced disappearances in Kashmir is rooted in a legal and political environment that provides security forces with broad powers and immunity from prosecution for human rights violations committed in the performance of their duties. This, combined with a lack of accountability for human rights

⁴⁶² Report of Association of Parents of Disappeared Persons, 2020, *120 Days: 5th August to 5th December - A Report by APDP*.

⁴⁶³ *Ibid.*

⁴⁶⁴ DUSCHINSKI (2010: 30).

violations, has created a climate of impunity in which human rights violations can occur with little or no consequence for those responsible.

It is necessary to support the families of the disappeared in their search for truth and justice and calling on the Indian government to take immediate and effective measures to end the use of enforced disappearances in Kashmir. Interestingly enough, in response to this, is that to address this gross violation of human rights, it is necessary to question the legal and political environment that allows human rights violations to occur with impunity and hold the Indian government accountable for its obligations under international human rights law. This will require sustained international attention and pressure, including the use of diplomatic and economic levers to bring about change.

The core of a State's dignity lies in respecting and protecting the fundamental human rights of its citizens, and ensuring that they are not subjected to violations such as arbitrary arrests or disappearances. This upholds not only the dignity of the individuals, but also serves as a critical aspect of national security, as a society that upholds human rights is stable and secure. Protecting human rights and preventing disappearances are critical components of a State's security and stability⁴⁶⁵.

In this context, the International Convention for the Protection of All Persons from Enforced Disappearance ('ICPPED') which entered into force on December 23, 2010⁴⁶⁶, can provide crucial support in the fight. For more than twenty-five years, relatives of thousands of victims around the world have called for the adoption of this international instrument and actively participated in the negotiations, testifying to their human tragedy, their commendable courage, and their firm intention not to forget and prevent any new act of disappearance from taking place anywhere⁴⁶⁷.

The 2007 Convention was a crucial step because it gave a specific legal framework to this phenomenon and, more importantly, a clear definition.

ICPPED addresses the need of effective remedies for people whose human rights have been violated and creates a control procedure to combat this phenomenon⁴⁶⁸.

Consequently, ICPPED is a valuable tool in the fight against this scourge, both in terms of its content and the procedural mechanism provided. However, certain conditions must be met to celebrate the instrument's success. It should receive universal participation, and ratification by India would be significant. The competence of the Committee on Enforced Disappearances, established

⁴⁶⁵ BIMAL (2004).

⁴⁶⁶ The date of adoption and entry into force of the International Convention for the Protection of All Persons from Enforced Disappearance can be consulted at *United Nations Treaty Collection* (2023a), available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en.

⁴⁶⁷ Report of Association of Parents of Disappeared Persons, 2020, *120 Days: 5th August to 5th December - A Report by APDP*.

⁴⁶⁸ DEGUZMAN (2009).

by the Convention, to receive individual complaints should also be recognized⁴⁶⁹.

ICPPED recognizes the human right of every person not to be subjected to enforced disappearance. Relatives of victims of disappearance and society as a whole demand that the fate and whereabouts of disappeared persons be made known. It is a truth that must be known, disseminated and not forgotten. Only full knowledge and remembrance of the truth, together with justice, can prevent impunity and the recurrence of the scourge.

The expectancy is that ICPPED and other international instruments can contribute to the struggle and victory against this gross violation of human rights. A further step would be first the identification and then the trial and punishment of the individuals accused of this crime. Justice, truth and reparation are necessary to eradicate this practice of enforced disappearance. To conclude, the human rights situation in Kashmir, particularly regarding enforced disappearances, is a significant concern. The persistent and widespread nature of these violations highlights the ongoing challenges facing India in ensuring the protection of the rights of its citizens. The situation in Kashmir serves as a reminder of the importance of ensuring respect for human rights in any society.

Enforced disappearances in Kashmir have had a devastating impact on the families and communities affected by these abuses. These violations have created a climate of fear and insecurity. The Indian government is responsible for ensuring that those responsible for these abuses are held accountable and providing support and assistance to the families of those who have disappeared.

Additionally, it is crucial that the international community monitor and advocate for the protection of human rights in Kashmir and to provide support and assistance to those affected by these abuses. The United Nations ('UN') and other international bodies must continue to raise awareness about the situation in Kashmir and call for an end to human rights violations, including enforced disappearances.

The situation in Kashmir also highlights the broader issue of human rights abuses in India. The government must take concrete and meaningful steps to address these violations and uphold its commitment to protecting the rights of its citizens. This includes ensuring that investigations into human rights abuses are independent and transparent and those responsible are held accountable.

Ultimately, the protection of human rights and the prevention of enforced disappearances in Kashmir is crucial for the stability and security of the region, as well as for the dignity and credibility of the Indian State. The situation in Kashmir serves as a reminder of the importance of upholding human rights and the need for continued international attention and support in addressing these abuses.

⁴⁶⁹ KANNABIRAN (2007: 40-43).

On a final note, the human rights situation in Kashmir remains very troubling, and enforced disappearances are a ferocious and controversial form of human rights violation. Addressing this problem requires sustained attention and action both domestically, by India, and internationally. It must be a priority for the international community in its efforts to promote and protect human rights in Kashmir.

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Summary

Jammu and Kashmir's human rights violations have been a persistent international concern for many years.

Since the end of British rule in 1947, there has been an ongoing conflict between India and Pakistan in this region. In recent decades, the Kashmir conflict has resulted in widespread violations of human rights, including enforced disappearances⁴⁷⁰.

The Indian government is required by its constitution to respect and defend the human rights of its citizens, including those in Kashmir. India signed and ratified several international human rights treaties in 1979, including the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social, and Cultural Rights. Although India has signed these Covenants and adhered to their principles for creating a more humane society, it continues to be accused of violating human rights⁴⁷¹. The conflict in Kashmir has created a legal and political climate in which gross violations of human rights can be committed with substantial impunity. Undoubtedly, the Indian government has enacted a number of laws and policies that grant broad powers to security forces, such as the Armed Forces (Special Powers) Act ('AFSPA') of 1990 and the Jammu and Kashmir Public Safety Act ('PSA') of 1978⁴⁷².

As will be demonstrated, these laws, in conjunction with other Indian provisions, create a legal framework that permits impunity for violations, thereby undermining the rule of law and the protection of human rights in the region⁴⁷³.

Specifically, enforced disappearances violate several provisions of international human rights law, such as the rights to personal liberty and security, freedom from arbitrary detention, and a fair trial. The use of enforced disappearance as a means of repression in Kashmir is a flagrant violation of human rights and has had a devastating effect on the region⁴⁷⁴.

Enforced disappearances is a violation of human rights because it denies the dignity of the individual. The victim, deprived of all his rights and removed from the protection of the law, is placed in a position of complete vulnerability at the hands of the criminals. Moreover, this practice inflicts severe suffering on the family members of the missing person due to the complete lack of information regarding their fate, place of detention, and likelihood of return⁴⁷⁵.

⁴⁷⁰ AMIN (1995: 10).

⁴⁷¹ SCHRIJVER (2016: 121-125).

⁴⁷² JAISWAL (2021: 2478-2493).

⁴⁷³ *Ibid.*

⁴⁷⁴ MALIK (2005: 42-52).

⁴⁷⁵ SCOVAZZI, CITRONI (2007).

This dissertation seeks to investigate the current state of human rights violations in Kashmir, focusing on the issue of enforced disappearances. This analysis aims to examine the underlying causes and effects of such violations, as well as the efforts made by various actors to address this pressing issue.

Through a comprehensive review of the relevant literature and a critical analysis of the human rights legal framework in Kashmir, this study seeks to shed light on the scope and severity of the problem and to identify the underlying factors that contribute to the perpetuation of this human rights violation. Therefore, evaluating the efficacy of existing measures to safeguard human rights and prevent disappearances in Kashmir.

In this context, the primary research question of this dissertation is to investigate the actual state of human rights in Kashmir, with a focus on the controversial human rights violation of enforced or involuntary disappearance. To answer this research question, the following analysis will be conducted.

The purpose of the first Chapter is to provide a historical context for the Kashmir issue. It will begin by clarifying the origins of the separatist issue and investigating the origins of the insurgency. The report will then focus on internal reform initiatives and explain the role of the central State in the governance of the region. In conclusion, the final section will focus on the repeal of Article 370 of the Indian Constitution and, consequently, the erosion of Kashmir's special autonomy.

Chapter II will continue to examine the Kashmir dispute, but from a legislative perspective. It will examine the impact of laws at both the national and international levels. "Draconian laws" are characterized by their harshness and severity, and are frequently viewed as oppressive and excessively severe. Typically, these refer to laws that limit civil liberties and human rights and impose punishments that are disproportionate to the crime. These laws are frequently enacted in response to security threats, but they have been criticized for being overly broad and indiscriminately applied. As we will see in this chapter, the "Draconian laws" regarding Kashmir are laws that have been imposed in this region that restrict a variety of basic liberties. These laws, including the Armed Forces (Special Powers) Act ('AFSPA'), were enacted in Kashmir to combat militancy and insurgency, but they have been criticized for their lack of protection for human rights and the manner in which they have been implemented.

This section aims to determine how domestic and Draconian laws are applied in the Kashmir region, whether there are restrictions, and most importantly whether there have been violations.

The third chapter will examine human rights violations in Jammu and Kashmir ('J&K'), beginning with an international perspective and concluding with a domestic one. This section will begin with a discussion of an international legal framework for enforcing human rights law. Continuing, emphasis will

be placed on some of the numerous reported violations of human rights in the region of Kashmir administered by India. This section will conclude by providing an overview of the current human rights situation in J&K. The understanding of this study's central topic, which is discussed in the concluding chapter, will be aided by Chapter III and its predecessors.

Chapter IV will therefore focus on the specific issue of enforced disappearances in J&K. In the first section, it will examine the definition of this violation and the associated human rights violations. The second section will focus on the phenomenon of enforced disappearances in the J&K region. In conclusion, the final section will examine the Indian response to this issue from a legal standpoint.

This study's conclusion will summarize the analysis results, attempt to answer the research question, and present some recommendations for addressing this complex and multifaceted issue.

The conflict over Kashmir has its origins in the colonial era, when J&K was one of the 565 semi-independent princely States in the British Raj. When India and Pakistan gained independence in 1947, J&K had to choose which of the two States to join. The majority of the population was Muslim and the ruler was Hindu, and socio-economic tensions between the Muslim population and Hindu landowners were high.

Pakistan claimed the right to annex J&K due to its predominantly Muslim population, while India argued that different religious communities could coexist within the same State and that the annexation of J&K was necessary to prove the groundlessness of the 'theory of the two nations'⁴⁷⁶.

Tensions in the region escalated into open war when tribes from Pakistan joined a local revolt and the Maharaja requested help from India, which resulted in a UN-mediated ceasefire in 1949. The ceasefire provided for a popular referendum to determine the future of Kashmir, but it was never held. The legality of India's annexation of J&K remains in dispute⁴⁷⁷.

The Indian government led by Prime Minister Narendra Modi abrogated Article 370 of the Constitution on August 5, 2019 as a means to merge Kashmir's Muslim-majority population with the rest of India. Article 370 and Article 35A granted special rights and freedom for regulation of State affairs to Kashmir's permanent residents⁴⁷⁸.

The abrogation was justified as a temporary measure to resolve the ongoing conflict in Kashmir, but it has faced criticism as a Hindu nationalist move against Muslim minorities.

⁴⁷⁶ Elaborated in the late 1930s by the leader of the largest Muslim party in British India, Muhammed Ali Jinnah, this theory postulated that the Hindus and Muslims of South Asia formed two distinct nations.

⁴⁷⁷ GANGULY (2004).

⁴⁷⁸ PERRIGO (2019).

Proponents argue that the move was necessary to address the gap between the law and the State, while detractors link it to the BJP's spread of Hindutva and the erosion of Kashmir's autonomy⁴⁷⁹.

In the first chapter, we have analyzed the Kashmir issue from a political and social perspective by tracing its history.

The political history of the Kashmir region is intricated and multifaceted. The region has a long history as a contested territory, with numerous powers vying for control over it over the centuries⁴⁸⁰.

As demonstrated, the conflict has resulted in multiple wars between India and Pakistan, and the regional situation remains unstable.

Decades-long efforts to find a peaceful resolution to the conflict have not yet produced a lasting resolution.

Having begun this framework by delving deeper into the origins and evolution of the uprising, this chapter concludes by referring to the present day. With the repeal of Article 370 of the Indian Constitution, we focused specifically on the elimination of Kashmir's special autonomy. The article was a provision that granted J&K a special autonomous status. It permitted the State to have its own constitution and granted the State the authority to determine which Indian laws apply to it and which do not.

There are numerous lessons to be learned from the ongoing conflict over the Kashmir region.

One lesson is the significance of finding peaceful and negotiated solutions to conflicts, as opposed to resorting to violence and war. Finding a peaceful solution to the conflict would likely be more advantageous for all parties involved, given that the Kashmir dispute has led to multiple wars and caused much suffering and loss of life.

Respecting the rights and autonomy of different groups and regions within a country is a further lesson. The desire for greater autonomy or independence by various groups within the region has contributed to the conflict over Kashmir. It is important for any government not to impose its will on such groups, but rather to consider and respect their desires and rights.

Lastly, the Kashmir dispute serves as a reminder of the significance of international diplomacy and the role of international organizations in resolving conflicts and promoting peace. The United Nations ('UN') has attempted to mediate a peaceful resolution to the dispute, and the participation of other international actors could be helpful in resolving the conflict.

With this first chapter, we aimed to lay the groundwork for the second, in which we will continue to examine the Kashmir dispute, but from a legislative perspective.

⁴⁷⁹ BHATIA (2020: 568-580).

⁴⁸⁰ CHANDHOKE (2012).

In Kashmir, ongoing human rights violations have occurred since the start of the insurgency in 1989⁴⁸¹. The Indian government, which controls and occupies Kashmir, passed laws that give significant power to law enforcement agencies, including the PSA and the Armed Forces (Special Powers) Act⁴⁸² ('AFSPA').

These laws have been used to suppress the Kashmiri people's demand for self-determination, and both domestic and international laws have been ineffective in addressing the human rights situation. The effectiveness of international law is limited by the lack of jurisdiction and the limited enforcement mechanisms available to hold actors accountable for human rights abuses. India passed the Protection of Human Rights Act in 1993 and established the National Human Rights Commission ('NHRC'), State Human Rights Commissions ('SHRC'), and Human Rights Courts to protect human rights. However, the AFSPA and PSA are prioritized over these measures and violate international humanitarian and human rights laws⁴⁸³.

To understand the future of Kashmir, it is important to analyze the influence of both domestic and international law.

International law is capable of influencing government operations. It has normative force in that it establishes standards and principles that States are expected to follow, but it lacks the ability to enforce them. It can be a potent tool for promoting and protecting human rights, but only if States are willing to comply and there are effective mechanisms in place to ensure compliance. The situation in Kashmir could improve if the international community exerts pressure on India to adhere to international law and fulfill its obligations. Despite the legitimization of authority by domestic law, there is optimism that international law can provide resistance tools by giving rise to new forms of legal consciousness.

Nonetheless, the State must demonstrate a commitment to upholding the law and refrain from violating international law in the name of domestic law. India must stop allowing its military personnel to commit crimes against humanity without being punished.

The human rights situation in Kashmir would continue to jeopardize national, regional, and state security if India's domestic legislation was not consistent with international law. Legislation and laws exist to serve the people, not the government. Currently, harsh regulations such as the AFSPA and PSA continue to serve the needs of offenders and do not address the concerns of victims.

In addition to being a territorial dispute between Pakistan and India, the conflict in Kashmir affects millions of J&K residents who are denied their

⁴⁸¹ DESMOND (1995: 5-16).

⁴⁸² ROBERTSON (2005: 330-335).

⁴⁸³ KAIKOBAD (2011: 114-118).

inherent, inalienable right to self-determination. Violations of the Kashmiri people's rights to life, property, freedom of expression, and religion, as well as other fundamental human rights safeguarded by international law, raise grave concerns. The ISF's use of such discriminatory and restrictive legislation is a flagrant violation of international law and human rights norms. These statutes grant the ISF broad, expansive authority to torture, imprison, mutilate, and even execute the accused without prior authorization or regard for repercussions or investigations. Due to this lawlessness, a culture of impunity has developed, which violates fundamental human rights. As we have seen, the Jammu and Kashmir PSA is particularly harsh. The AFSPA of 1958 must be explicitly repealed, and other laws that shield the military and police from legal action must be obliterated.

The UN and its rules, as well as the international community, intend to take significant measures to proclaim the Kashmiri people's right to self-determination and defend their fundamental human rights. According to the findings, the conduct of the Indian military forces constitutes heinous crimes against humanity, necessitating the adoption of international humanitarian law in order to uphold international law in its entirety. Due to a lack of accountability and prosecution, the people of Kashmir have suffered for far too long. For this to change, more attention must be paid to the interaction between domestic and international law.

In the second chapter, we analyzed the Kashmir dispute from a legal perspective, analyzed the legal issues, and examined the interaction between International Law and the Draconian Laws implemented in the region. From a legal standpoint, there are a few possible lessons to be learned from the Kashmir dispute. The significance of international pressure in encouraging compliance with international law is crucial. This pressure can encourage States to comply with international law and respect the human rights of their citizens. International human rights organizations have condemned the use of draconian laws in Kashmir, which has attracted international attention and criticism.

International law and institutions may play a decisive role in Kashmir's human rights situation. Therefore, effective international mechanisms to address violations of international law are required. In instances where States fail to uphold their international law obligations, it is crucial to have adequate instruments in place to address and remedy these violations.

Following this, there is the issue of having clearly defined legal frameworks. As we have seen in this chapter, the Kashmir dispute is complicated by the region's complicated legal history, which includes competing claims and overlapping agreements. Legal frameworks that are clearly defined can reduce confusion and facilitate the resolution of disputes.

In conclusion, we observed the significance of protecting human rights. International law, including Human Rights Treaties and agreements, mandates

that States respect and protect the human rights of every person within their jurisdiction. The use of draconian laws in Kashmir, which have been criticized for violating human rights, underscores the significance of upholding these responsibilities.

Respecting the rights of all involved parties is, indeed, fundamental. The Kashmir dispute has resulted in significant human suffering, including violations of human rights, loss of life, and displacement, for the region's inhabitants.

Throughout the chapter, we emphasized the importance of the right to self-determination. At the heart of the Kashmir issue is the question of whether or not the people of the region have the right to determine their own future and which country they wish to belong to.

In addition, it is necessary to effectively implement due process. This conflict has allegedly involved violations of human rights and international law, highlighting the significance of due process and the rule of law in conflict resolution.

This final point, namely the significance of defending human rights, will be examined in greater detail in the following III chapter. The latter will focus exclusively on the crucial issue of human rights violations in the Kashmir region.

In addition to its diplomatic, economic, legal, political, and regional dimensions, the Kashmir dispute impacts the fundamental and inalienable right to life of millions of people. It is not just a geographical issue between India and Pakistan. In Jammu and Kashmir, human rights violations are a persistent problem. Mass murders, enforced disappearances, torture, rape, and sexual assault are all examples of human rights violations, as are political repression and the suppression of free speech. Severe human rights violations were apparently committed against Kashmiri civilians by the Indian Army, the Central Reserve Police Force, the Border Security Force, and other separatist terrorist organizations.

The Indian army and security forces operating in Kashmir have consistently violated international human rights law by arbitrarily killing detainees and killing civilians in retaliation attacks. The use of lethal force by government troops against nonviolent protesters also constitutes a violation of international human rights law. In addition, such abuses have been encouraged by security laws that permit security personnel to shoot to kill while protecting them from punishment.

The majority of individuals captured by the security forces of Kashmir are tortured. Torture is used to punish detainees who are believed to support or sympathize with militants and to promote a culture of political repression. It is not only used to coerce prisoners into divulging information. Torture includes prolonged beatings, electric shocks, burning with hot objects, and muscle compression with a wooden roller. Frequently, detainees are housed

in temporary detention facilities run by various security agencies, without access to the legal system, their families, or medical care.

As a common component of retaliatory attacks against individuals, rape is frequently committed. As part of these attacks, security personnel assault civilians in order to punish the civilian population as a whole. Women who the security forces suspect of having militant sympathies are also victims of rape. The security personnel have frequently intentionally destroyed civilian property, most notably by setting residential areas on fire.

In accordance with the widely accepted concept of self-determination, the people of Kashmir are requesting the right to hold a fair and impartial plebiscite to choose their own fate. The repressive policies of India have not quelled the massive movement there. India is employing a growing number of personnel and resources to suppress the independence fighters and maintain J&K's allegiance to the Union at any cost.

The UN was established in 1945 as a response to the devastation caused by World War II, with the defense of human rights as the foundation of its Charter⁴⁸⁴.

The UN's primary responsibility is to maintain international peace and security while promoting universal respect for human rights among its member States. The UN provides advisory services on human rights through its agencies, the Economic and Social Council's commission on human rights ('ECOSOC') and the Office of the High Commissioner for Human Rights ('OHCHR')⁴⁸⁵.

The UNHRC was established in 2006 to promote and protect human rights globally, with its Universal Periodic Review ('UPR') mechanism evaluating the respect for human rights in all UN member countries. The High Commissioner for Human Rights is the UN's top representative for advancing human rights globally, accountable to the Secretary-General⁴⁸⁶.

The human rights abuses in Kashmir have risen in recent years due to the Indian government's failed strategy of using coercive measures to end the political crisis. Security forces have engaged in violations including torture, rape, and murder without facing criminal charges, and militant organizations have continued to abuse the civilian population.

The conflict in Kashmir has led to human rights violations on both sides of the Line of Control. The situation requires justice for all Kashmiris, accountability for past and present breaches of human rights, and compensation for victims⁴⁸⁷.

⁴⁸⁴ MUNTAQIM (2009).

⁴⁸⁵ BROWNLIE (2007).

⁴⁸⁶ Report of Human Rights Watch, 31 March 2022, *Submission to the Universal Periodic Review of India*.

⁴⁸⁷ SAINI (2001).

There have been rising allegations of ceasefire violations and journalists and human rights groups face restrictions on entry to Kashmir by both India and Pakistan.

In the third chapter, we addressed the critical issue of impediments to justice for victims of human rights violations that exist in both law and practice in J&K, as well as how the government's response to allegations of human rights violations failed to provide justice for a large number of victims and their families.

We began this section with a legal framework for the enforcement of human rights law in order to lay the groundwork. Continuing by investigating some of the numerous reported human rights violations in the region of Kashmir administered by India.

Kashmir's human rights situation is a complex and delicate matter. Human rights organizations have documented widespread violations of human rights in the region, including extrajudicial executions, torture, rape, and arbitrary detention by Indian security forces ('ISF'). In addition, there have been reports of militant groups operating in the region violating human rights. The ongoing political and territorial dispute between India and Pakistan over the region has exacerbated the situation. It is essential to recognize that the situation in Kashmir has been highly contested, with competing narratives and perspectives on the issue.

At the international level, the human rights violations reported in the Indian-administered region of Kashmir provide several important lessons. Among these lessons is the significance of accountability: the ongoing violations of human rights in Kashmir highlight the need to hold individuals and institutions accountable for their actions. This includes holding security forces accountable for any violations of human rights they may have committed and holding political leaders and government officials accountable for their failure to address these violations.

Consequently, there must be a political solution. The ongoing conflict in Kashmir has resulted in widespread violations of human rights, and it is evident that a political solution is required to address the root causes of the violence.

In addition, independent and impartial investigations of human rights violations in Kashmir are required to establish the truth and hold those responsible accountable, and greater transparency is required for the international community to fully comprehend the situation in Kashmir and hold those accountable for their actions.

The reported human rights violations in Kashmir demonstrate the significance of respecting human rights in all conflict situations and the necessity of protecting human rights for all individuals, regardless of their political beliefs or affiliations. Human rights violations in Kashmir have had a devastating effect on civilians, who are caught in the crossfire of the conflict. The

international community must take measures to protect civilians and prevent them from becoming involved in violence.

This chapter and its predecessors have served as a foundation for the following and concluding chapter, which will focus on the specific issue of enforced disappearances in the J&K region.

Enforced disappearance is the violation of multiple fundamental human rights, including the right to life, liberty and security, and protection from torture and cruel treatment. It is often used by governments to control individuals during times of conflict, silence opponents, and suppress the population⁴⁸⁸.

The practice of enforced disappearance involves the arbitrary deprivation of a person's freedom, security, and even their existence. The disappearance of an individual not only affects their rights but also those of their family members and the larger community.

This phenomenon can lead to economic and social marginalization, particularly for women and children. The lack of recognition of the missing person and the inability to receive support in their absence exacerbates the situation for the family⁴⁸⁹.

Enforced disappearances are a widespread problem in India, particularly in J&K. The phenomenon has been prevalent in the region since the start of Kashmiri militancy against Indian rule in 1989, but even after 2000, cases of enforced disappearances have not decreased. The army and administration have denied any involvement in the disappearances, but witnesses have recanted after being threatened by the army and police⁴⁹⁰.

Despite numerous complaints to Kashmir's courts since 1990, not a single case has been resolved. In 2020, the UN Working Group on Enforced or Involuntary Disappearances ('WGEID') called for urgent action to address the alarming human rights situation in J&K⁴⁹¹.

Enforced disappearances have been used as a counterinsurgency tool by the army, police, and informal militias in Kashmir to suppress secessionist insurgents and intimidate the population.

The Indian government has imposed anti-insurgency laws that grant immunity to the armed forces, contributing to an increase in human rights violations in the region. Access to law and justice for disappearances and human rights violations by Indian forces is difficult or nearly impossible in Kashmir, and the State has implemented mechanisms to make disappearances appear as

⁴⁸⁸ SCOVAZZI, CITRONI (2007).

⁴⁸⁹ Report of Amnesty International, 1 July 2015, ASA/20/1874/2015, *Denied: Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir*.

⁴⁹⁰ Report of Association of Parents of Disappeared Persons, 2020, *120 Days: 5th August to 5th December - A Report by APDP*.

⁴⁹¹ United Nations General Assembly, 2021, A/HRC/48/57, *Report of the Working Group on Enforced or Involuntary Disappearances*, p. 53.

forgotten aberrations. The struggle for remembrance by relatives and memorialization is hindered⁴⁹².

The final chapter's objective was to discuss the definition of enforced disappearance and the associated human rights violations. Subsequently, we investigated the issue of enforced disappearance in Kashmir, as well as the applicability and availability of legal and constitutional protections for victims of enforced disappearance in the region.

Forced disappearance is one of the gravest human rights violations. It is a violation of human dignity and undermines the fundamental values of any society devoted to the rule of law, human rights, and basic liberties. India is not immune to the issue of enforced disappearances, and State apparatuses frequently employ the practice as a weapon against insurgency and terrorism. In the State of J&K, enforced disappearances are prevalent. In response to this issue, India has demonstrated its commitment to human rights protection by signing the ICPPED in 2006, in addition to other significant international conventions, covenants, and agreements to which India is a signatory. Therefore, the signing is a preliminary step, but the commitment has never been truly fulfilled due to the lack of ratification, possibly because of the situation in Kashmir.

In addition to guaranteeing individuals' fundamental rights, the Indian Constitution also provides constitutional remedies for their violation. Although Indian law does not explicitly criminalize enforced disappearance, the country's criminal justice system protects detained or arrested individuals and victims of enforced disappearance. Since enforced disappearance constitutes a violation of the rights to life, liberty, security, freedom from torture, and freedom from arbitrary detention, victims, their relatives, and even organizations associated with the missing person's case may seek redress and appropriate remedies in court. The Supreme Court has awarded victims or relatives of enforced disappearances compensation for constitutional violations committed by police, military, and paramilitary personnel and agents.

Human rights violations, such as arbitrary arrests, extrajudicial executions, illegal detentions, prison violence, and enforced disappearances, continue unabated despite efforts to protect fundamental human rights. These violations are typically committed by those who, by law, are responsible for protecting and preserving the human rights of individuals. Recent amendments to the Criminal Procedure Code ('CrPC') are a step in the right direction, but they are insufficient to ensure justice for victims and relatives of enforced disappearances.

To make the legal system more sensitive to the growing threat of enforced disappearances, the following recommendations can be made. The Indian

⁴⁹² SHIRAZI (2010).

government must ratify the 2006 ICCPED and the 1984 Torture Convention without delay. Moreover, enforced disappearance should be classified as a crime under the IPC. It should be explicitly recognized as a violation of Article 21's guarantees of the right to life and personal liberty.

It is necessary to support the families of victims of enforced disappearances by involving them in decisions regarding the discovery of the truth, the pursuit of justice, and the provision of reparation. Moreover, children of missing parents should be afforded special protection.

The Indian government should establish a centralized detainee registry that is accessible to all, ensuring accountability and transparency regarding the actions of security forces and the government. In conclusion, prompt action should be taken against government officials involved in enforced disappearances to ensure that anyone accused of human rights violations is tried fairly and impartially.

The conflict in Kashmir has resulted in widespread and ongoing human rights violations, including the use of enforced disappearances by State actors as a means of repression. Forcible disappearances constitute a flagrant violation of international law. This practice has a devastating effect not only on the victim but also on the families of missing persons, who are frequently left in the dark about their loved ones' fate. The Indian government has consistently denied the problem of enforced disappearances in Kashmir, despite repeated calls for action from human rights organizations⁴⁹³. It has not investigated or prosecuted the perpetrators of this violation of human rights.

The purpose of this thesis was to analyze the contentious issue of human rights violations in the J&K region. In this regard, the objective was to investigate and demonstrate the actual state of human rights in Kashmir, with a focus on the heinous practice of enforced disappearances. To accomplish this, we analyzed the international legal framework applicable to the right to remedy enforced disappearances and demonstrated how this framework provides crucial positions and support for combating this phenomenon.

According to international law, India is obligated to guarantee the right to redress for these egregious violations of human rights. State-provided remedies must be effective and consistent with international law. It has been demonstrated that India's domestic laws and practices are incompatible with international law and human rights standards. We have identified the applicable standards and deficiencies of the Indian State's redress right. India must ensure that victims of enforced disappearances exercise their right to a complete and effective remedy⁴⁹⁴.

⁴⁹³ Report of Association of Parents of Disappeared Persons, 2020, *120 Days: 5th August to 5th December - A Report by APDP*.

⁴⁹⁴ DUSCHINSKI (2010: 30).

After examining human rights violations in J&K under Indian administration, it is evident that justice must be pursued through the conviction of criminals and other judicial and social processes. In the course of this research, it has become clear that the existence of these violations is indicative of the effects and problem of militarization in Kashmir, and that the problems associated with militarization must be addressed with urgency.

On the basis of the conducted research, it is possible to conclude that the problem of enforced disappearances in Kashmir stems from a legal and political environment that provides security forces with broad powers and immunity from prosecution for human rights violations committed in the course of their duties. This, coupled with the absence of accountability for human rights violations, has created a climate of impunity in which human rights violations can occur with minimal or no repercussions for those responsible.

Supporting the families of the disappeared in their search for truth and justice and urging the Indian government to take immediate and effective action to end enforced disappearances in Kashmir are essential. Interestingly, in order to address this gross violation of human rights, it is necessary to call into question the legal and political climate that allows human rights violations to occur with impunity and to hold the Indian government accountable for its obligations under international human rights law. This will require sustained international attention and pressure, as well as the application of diplomatic and economic levers to effect change.

Respecting and protecting the fundamental human rights of its citizens and ensuring that they are not subjected to violations such as arbitrary arrests or disappearances is fundamental to the dignity of a State. This is essential to national security because a society that respects human rights is stable and safe. Protection of human rights and prevention of disappearances are essential components of the security and stability of a State.

In this context, the International Convention for the Protection of All Persons from Enforced Disappearance ('ICPPED'), which entered into force on December 23, 2010, can provide essential assistance in the fight⁴⁹⁵. Since more than twenty-five years ago, relatives of thousands of victims from around the world have advocated for the adoption of this international instrument and actively participated in the negotiations, attesting to their human tragedy, their commendable courage, and their determination to never forget and prevent any new disappearances from occurring anywhere⁴⁹⁶.

⁴⁹⁵ The date of adoption and entry into force of the International Convention for the Protection of All Persons from Enforced Disappearance can be consulted at *United Nations Treaty Collection* (2023a), available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en.

⁴⁹⁶ Report of Association of Parents of Disappeared Persons, 2020, *120 Days: 5th August to 5th December - A Report by APDP*.

The 2007 Convention was crucial because it provided a specific legal framework and, more importantly, a clear definition for this phenomenon. ICPPED addresses the need for effective remedies for individuals whose human rights have been violated and establishes a procedure to combat this phenomenon.

Consequently, ICPPED is a useful tool for combating this scourge, both in terms of its content and the procedural mechanism it provides. However, certain conditions must be met before the success of the instrument can be celebrated. It should have global participation, and India's ratification would be significant. The Committee on Enforced Disappearances, established by the Convention, should also be authorized to receive individual complaints⁴⁹⁷. The ICPPED recognizes every individual's right not to be subjected to enforced disappearance. Relatives of those who have disappeared, as well as society as a whole, demand that their fate and location be revealed. It is a fact that must be known, disseminated, and kept in mind. Only complete knowledge and recollection of the truth, along with justice, can prevent impunity and the recurrence of the plague.

The expectation is that ICPPED and other international instruments will aid in the struggle against and eventual victory over this egregious violation of human rights. The next step would be the identification, trial, and punishment of those accused of committing this crime. To eradicate this practice of enforced disappearance, justice, truth, and restitution are required.

In conclusion, the human rights situation in Kashmir, especially with regard to enforced disappearances, is extremely troubling. The pervasive and persistent nature of these violations highlights the ongoing difficulties India faces in ensuring the protection of its citizens' rights. The situation in Kashmir serves as a reminder of the significance of upholding human rights in all societies.

The impact of enforced disappearances in Kashmir on affected families and communities has been devastating. These violations have established an atmosphere of fear and insecurity. It is the responsibility of the Indian government to ensure that those responsible for these atrocities are held accountable and to provide support and assistance to the families of those who have vanished.

In addition, the international community must monitor and advocate for the protection of human rights in Kashmir, as well as provide support and assistance to those affected by these violations. The UN and other international organizations must continue to bring attention to the situation in Kashmir and demand an end to human rights violations, including enforced disappearances.

The situation in Kashmir exemplifies the larger problem of human rights violations in India. The government must take concrete and significant measures to address these violations and maintain its commitment to

⁴⁹⁷ KANNABIRAN (2007: 40-43).

protecting the rights of its citizens. This includes ensuring that investigations into violations of human rights are impartial and transparent, and that those responsible are held accountable.

Protection of human rights and prevention of enforced disappearances in Kashmir are crucial for the stability and security of the region, as well as the dignity and credibility of the Indian State. The situation in Kashmir serves as a reminder of the significance of upholding human rights and the need for continued international attention and assistance to combat these violations.

In conclusion, the human rights situation in Kashmir continues to be extremely troubling, and enforced disappearances are a cruel and controversial form of human rights violation. This issue calls for India's and the international community's sustained attention and action. The international community must prioritize the promotion and protection of human rights in Kashmir.