

The Bare Lives of Kashmiris

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Given the scale of human rights violations and miscarriage of justice in Kashmir, there is an urgent need to set up something akin to international criminal tribunal for the state. For the present legal institutions in Kashmir, it seems, are programmed more to serve the interests of the Indian state in the name of “national security” than to dispense justice.

The Meeting

I met Zahid Farooq’s father at the Association of Parents of Disappeared Persons (APDP) office at Srinagar, Kashmir. Zahid, a teenager, was murdered in cold blood by the Border Security Force (BSF) on 5 February 2010 while he was strolling with his friend. After an outrage and protest against the incident a First Information Report (FIR) was lodged and commandant of the BSF vide letter dated 10.02.2010 handed over the investigation to the local police. After the completion of the investigation, a charge sheet was filed in the court of chief judicial magistrate (CJM), Srinagar.

However, in the court of CJM, the BSF filed an application that the case be transferred to the military court. The BSF took the plea that the case falls within Section 80 and exception I of Section 47 of the BSF Act, 1968 which gives the applicant (BSF) an option to get the case tried in the military court or in a civil court. The BSF further pleaded that the government of India in exercise of powers under Section 2(1) (a) of the BSF Act has issued a notification SO.1473(E) dated 08.08.2007, whereby territories of the state of Jammu and Kashmir for the period 1 July 2007 to 30 June 2010 have been notified as areas of “active service” for the BSF. By virtue of this notification any act done during this period is considered to be an official act protected under the law.

Against this plea taken by the BSF, the government of Jammu and Kashmir and Zahid’s uncle went to the Supreme Court of India and filed special leave petitions. Before the Supreme Court, the petitioners pleaded that the case be tried by the civil court and protection and impunity accorded to the armed forces under the provision of “active service” be dispensed with.

Hope was Not the Right Thing

As the court case papers lay scattered on the table, one of the persons in the office tried to explain to Zahid's father that he must wait and not press his lawyer for early arguments. He explained that Pathribal fake encounter case will be decided soon by the Supreme Court of India, which is most likely going to be in favor of the victims given the damning evidence collected by the Central Bureau of Investigation (CBI). He told the father that on the basis of the Pathribal judgment this case may also be allowed to be tried by a civil court. Zahid's father turned to me seeking corroboration. Looking at the Supreme Court's track record vis-à-vis cases from Kashmir, I kept quiet. However, after sometime, I told Zahid's father that we should hope that the Supreme Court of India does not overlook a DNA report.

In Pathribal, a village in south Kashmir, on 20 March 2000, when the then United States President Bill Clinton was visiting India, some armed men barged into the village of Chattisinghpora in south Kashmir killing 36 persons from the minority Sikh community. On 25 March 2000, the Indian armed forces claimed that five militants responsible for the massacre have been killed in an encounter at Pathribal. The mutilated and burnt bodies were handed over to the police. Local residents claimed that those killed were not militants but local villagers killed in a fake encounter. Protests erupted in which eight civilians were killed in military firing. Among the dead was son of one of the victims of Pathribal fake encounter.

Under immense pressure from the people, a judicial inquiry was ordered into the Pathribal case. The bodies were exhumed. From the half burnt clothes on the bodies of the deceased and then later by DNA testing, the bodies were identified to be those of the missing villagers. The Central Bureau of Investigation (CBI) took over the investigation in February 2003. In March 2006, the CBI filed murder charges against the five army officers.

Hope was not the right thing. Pathribal judgment came in May 2012. The Supreme Court of India held that a DNA sample report is not a cogent and clinching piece of evidence to allow the Indian army to be prosecuted in a civil court.^[i] Further, to try the accused, the Court gave army a time frame to choose between the civil court and court martial. The army chose to go with court martial. On 24 January 2014, the court martial closed the case for lack of evidence.^[ii]

After the Supreme Court's judgment on Pathribal in May 2012, Zahid's case also came to be decided in April 2013.^[iii] The Supreme Court held that Zahid was killed when the BSF personnel were on active duty and thus no permission for filing a case in the civil court against the armed forces was granted. Once again, the Supreme Court affirmed that under the law it is the discretion of the army to choose whichever court they want to go; civil court or court martial.

Justice an Impossible Feat

It has been agreed unequivocally that military justice system is inadequate and cannot address human rights issues. Court martials aside, even in civil courts where fair trial is a

pre-requisite for a trial to be legal, many lacunae are yet to be filled to achieve an institution of justice in the true sense of the term. The military courts are primarily used to “discipline” the military and not to deliver justice.

Human Rights Watch in its 2006 report on Kashmir, [Everyone Lives in Fear](#) asserts the same.^[iv] The report says in clear terms that the “available information shows scant evidence that the military is fully and effectively prosecuting soldiers and officers for abuses committed in Jammu and Kashmir”. The report further says, “to date the army has not publicly released details of the cases they have tried in courts martial: no incidents described, no names of those sentenced, and no information on the crimes committed”. Also, the report talks about the biased nature of these proceedings.

The proceedings become highly contentious as the manipulation by the commanding officers cannot be ruled out. The report makes an essential observation which lies at the heart of the matter. It says, “Military jurisdiction is often used as a means of escaping the control of the civilian authorities and consolidating the military as a power within society, as well as a tool through which the military authorities can exert supremacy over civilians”.

In another report [Myth of Normalcy: Impunity and the Judiciary in Kashmir](#), a complete picture of legal institutions and procedures adopted by the military in Kashmir has been drawn.^[v] The report very neatly captures how these institutions and procedures are rife with injustices, illegalities, exceptions etc. The report further says that

These courts martial are not transparent, as victims rarely learn of the results or findings. Judges sometimes permit defendants to transfer their cases from civil to military courts in the middle of their criminal trials. Allowing members of security forces to evade punishment by electing to be tried before military courts in this manner may violate international human rights law that requires access to an effective remedy for victims of human rights abuses. The lack of transparency in military trials leads to lack of accountability.

So What do These Cases Imply?

They imply that Jammu and Kashmir is ruled by the Indian Army. There is lawlessness and anarchy everywhere. These cases as a representative sample give us a graphic depiction of the manner of working of the *legal* institutions in Jammu and Kashmir. These institutions are set up with the sole purpose of occupation and the same is justified in the name of India’s “national security”. The cost of it is borne by those who do not subscribe to the “national” of this “national security”. Neither do they subscribe to their dying in the name of their occupier’s “security”.

Cases like Pathribal also remind us that there is an urgent need to demand something like

an international criminal tribunal for Kashmir. International People's Tribunal on Human Rights and Justice in Indian-Administered Kashmir and the Association of Parents of Disappeared Person (IPTK/APDP) recently released a report called [Alleged Perpetrators—Stories of Impunity in Jammu and Kashmir](#). The report called upon the International Criminal Court (ICC) to take suo moto notice of the crimes against humanity being committed in Jammu and Kashmir.^[vi]

Since 1989, as many as 80,000 to 100,000 Kashmiris including women and children have been killed; thousands of children orphaned and women widowed, more than a hundred thousand civilians arrested and tortured, almost 8,000 enforced disappearances, thousands of women raped and 6,000 unmarked graves. Justice for these victims continues to remain as elusive as ever. The demand is urgent looking at the scale of violations, the blanket impunity provided to the armed forces, the context in which the violence is being perpetrated and also the response it gets from the *largest democracy* of the world.

Notes

[i] General Officer Commanding Vs. CBI & Anr, Criminal Appeal No. 55 of 2006.

[ii] Ahmed Ali Fayyaz (2014): "Army gives itself a clean chit", *The Hindu*, 25 January, available at <http://www.thehindu.com/news/national/other-states/army-gives-itself-clean-chit-in-patnribal-case/article5613278.ece>, accessed on on 26 January, 2013.

[iii] State of Jammu and Kashmir Vs. Lakhwinder Kumar & Ors, Criminal Appeal No. 624 of 2013, Special Leave Petition (CRL.) No. 5910 of 2012.

Ghulam Mohammad Sheikh Vs. State of J & K & Ors, Criminal Appeal No. 625 of 2013, Special Leave Petition (CRL.) No. 5911 of 2012.

[iv] Human Rights Watch (2006): "Everyone Lives in Fear: Patterns of Impunity in Jammu & Kashmir", 12 September, Vol 18, No 11(C), available at <http://www.hrw.org/reports/2006/09/11/everyone-lives-fear>

[v] Lowenstein, Allard K. (2009): "Myth of Normalcy: Impunity and the Judiciary in Kashmir", International Human Rights Clinic, Yale Law School, April, available at http://www.law.yale.edu/documents/pdf/Intellectual_Life/Kashmir_MythofNormalcy.pdf.

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[vi] International Peoples' Tribunal on Human Rights and Justice in Indian-Administered Kashmir and Association of Parents of Disappeared Persons (IPTK/ADPD), (2012) "Alleged Perpetrators — Stories of Impunity in Jammu and Kashmir" December, available at http://kashmirprocess.org/reports/alleged_Perpetrators.pdf.