INTERNATIONAL JOURNAL OF INNOVATIVE RESEARCH & DEVELOPMENT

ISSN: 2278 – 0211 (Online)

The Jammu & Kashmir Protection of Human Rights Act, 1997: A Critical Evaluation

Faheem Iqbal Shayiq
Research Scholar, Department of Law, University of Kashmir,
Hazratbal Srinagar , J&K, India

Abstract:

As a matter of fact, the special status accorded to the state of Jammu & Kashmir in the Indian federal system, has its bearing & effect on the passage of laws. To make the development regarding the establishment of Human Rights Commission & courts at national level as well as similar provisions in the states, as provided by The Protection of Human Rights Act,1993, workable in the state, it was inevitable to pass a State Act in this regard. As such, the Bill passed by the State legislature after receiving the governor's assent on 30th May, 1997, became a law & was reduced into the Act namely, The Jammu & Kashmir Protection of Human Rights Act, 1997, hereinafter referred to as the Act. The present paper attempts to find out as to why the Act has turned out to be an ineffective instrument to check Human Rights violations in the state of Jammu & Kashmir & failed to deliver on the expected lines.

Key words: *J&K State, The Act (J&K Protection of Human Rights Act,1997), The Commission, Human Rights, Human Rights violations, Case Disposal.*

Introduction:

The preamble literally means 'before walking upon' (pre-before, amble-walk upon). It carries its due weight & importance, as it reflects the contents of a particular Act. Since the preamble is the key to open the minds of the drafters, it becomes important to assess the sufficiency & efficacy of the law in view of the idea underlying the preamble itself. The preamble to the above-stated Act reads as,

- "An Act to provide for the constitution of State Human Rights Commission & Human Rights courts for better protection of Human Rights & for matters connected therewith or incidental thereto."

The use of the words 'for better protection of human rights' suggests that the mechanism was evolved to deliver justice in a relatively better manner than the other mechanism viz., the Judiciary, possibly because it was to exclusively concern itself with the protection of Human Rights. The formation of such alternate mechanism at the United Nations, Regional as well as National level was propelled by the need of fast & efficacious disposal of cases. This was intended not to take away the powers of the law courts but in fact to reduce the burden thereof besides acting as a machinery to supplement & compliment the already existing Judicial set-up. In this backdrop, it becomes important to assess the working of the Act presently under consideration.

2.An Analysis Of The Act

The Act, opening with the preamble, contains seven chapters & as many as 29 sections, putting forth various provisions for the constitution of commission & courts besides other important functions, powers & responsibilities of the members of these organs created under the Act.

The Act provides for the establishment of a quasi-judicial body named as State Human Rights Commission (SHRC). It also provides for its constitution[1], the appointment of its members[2], removal of members, powers & functions[3] and the procedure.[4] The Commission as such, was constituted under SRO 275 of 1997 by the government. It started functioning from December 1997. However its role, powers, functions & jurisdiction are riddled with ambiguities. For an effective functioning of the commission,

---

1 Section 3
2 Section 4
3 Part III, Section 13
4 Part IV, Section 18

it is imperative to give adequate powers to the Commission .The effective working could only be realized if it has its own impartial agencies to investigate, operate & enforce.

Under the Act, the definition of Human Rights is commensurate with the National Act. The Act defines Human Rights as;

- Human Rights means the rights relating to life, liberty, equality and dignity of the individuals guaranteed by the constitution or embodied in the International Covenants and enforceable by courts in India[5]

The definition is not a conceptual but rather technical one, as a result of which it virtually brings its efficacy to naught. It has been aptly remarked by A.G Noorani that the definition is a 'cosmetic fraud'. For the qualifications that follows 'and are enforceable by the courts in India, takes away the covenants altogether. So, unless the rights are enforceable by courts in India, they would be of no relevance to the Human Rights Commission. The net effect of the qualifying expression is to take away with one hand what is offered by other.

The Act provides for the number of members & their qualification[6]. It is to be composed of a Chairman, who shall be a Judge of High court, a member who is or has been a district judge, alongwith three members having knowledge of or practical experience of Human Rights. The Central Act provides for the Chairman to be a retired Chief justice of India. This makes central Act a potent force as the influence of retired chief justice can't be negated. It adds some punch to its constitution. Contrastingly the State Act provides for a Judge rather than a retired Chief Justice of the High Court. This affects its functioning primarily because a retired Chief Justice of High Court would have had greater influence than a judge. Secondarily the retired chief justice would have been able to utilize his services in a better manner because he would have been exclusively concerned with the working of the Commission, without any exertion of influence from within or without the system. The fact that the Commission has mostly remained without a Chairman & presently the post continues to be vacant, may be attributed to the reason that there is already a dearth of Judges in higher Judiciary.

Other glaring weakness in the Act seems to be the 'Committee' concerned with the appointment[7] of the Commission members which is composed of Chief Minister, Speaker of Assembly, Minister of Home Affairs besides others. The committee can

---

5 Section 2 (c)
6 Chapter II, Section 3 of the Act
7 Section 4 of the Act

never be neutral since the Commission has to deal cases brought against the government, the flawed committee allows the government to appoint its favoured members, irrespective of their capabilities & integrity. This literally makes the institution another handiwork of the State which acts as a *safety valve* in times of accountability.

Under the Act, the Commission is to have its independent investigating agency manned by the officers & other members of the police staff. The agency is supposed to be headed by a police officer of the rank of Inspector General of Police[8]. Since the establishment of State Human Rights Commission upto May 2002, two Inspector generals of Police were posted in the Commission, who could not discharge their functions for want of investigating staff. From May 2002, the Commission has mostly been without such officer or the investigating staff, which has left a questionable imprint on its independent working, as it is left with no option but rely on the investigations of the police agency of state. Since usually the police agencies are not keen to indict their officials & book them for the violations, its report in this direction mostly doesn't bring forth the real picture. This substantially leads to the denial of remedies under the mechanism besides leading to violation of principles of natural justice. The well-established principle of Natural Justice "Nemo judex causa sua", meaning that nobody can be a judge in his own cause is violated.

The Commission also lacks jurisdiction to investigate in certain matters. For instance the majority of complaints received by the Commission are against military & Para-military troopers. The Commission cannot exercise its power of even making recommendations in this behalf, investigating in these matters is more of a dream. On the perusal of such complaints it has been found that the Commission is unable to proceed & has shown its reservation to that effect. The Commission has mostly advised complainants to approach the National Human Rights commission in this regard, which has turned it a redundant body.

The Commission is also powerless in the sense that it cannot issue warrants or commit persons to its orders neither punish contemnors for breach of its directions. Since the Commission is just a recommendatory body, it lacks teeth & venom. Although the commission has given directions & recommendations to the State from time to time in

[8] It was introduced by omitting the word 'Deputy' before Inspector General, by the Act Number XXIII of 1997.

different cases but it is evident from the reports that the response has been discouraging. Its reports also suggest the same.[9]

The commission's directions regarding ex-gratia relief shows minimal compliance as well. This is evidenced by the fact that from 1997 to 2000, the Commission recommended ex-gratia awards in about 60 cases, but out of these only 16 cases were cleared & paid by the government as a measure of relief to the victims. However in most cases 'no action taken' report has been sent to the Commission by the government as provided for by the Act[10]. Similar fate has been met to the recommendations in successive years.

The procedure in most of the cases, an unconventional one is adopted by the agencies. Thus the very purpose of the recommendation of the State Human Rights Commission gets defeated.[11] In the years 2002-03, the commission made recommendations in more than 80 cases to the state government, however, nothing is known to the commission with regard to the action taken pursuant to its recommendations. The year 2003-04 saw the Commission recording its anguish for the attempt of brushing aside its recommendations by the officers & starting a fresh enquiry at their end after they receive such recommendations.[12] In some cases officers have blatantly contradicted the findings of the commission, usually by a Deputy Commissioner. By doing so, the functioning of commission has become redundant. This has the effect of diluting the efficacy of the Commission as per the Commission's report.[13]

From April 1, 2005 to November 30, 2005, around 240 complaints were lodged before the State Human Rights Commission out of which 105 complaints were disposed till August of that year. The disposal rate was on the lower side earlier on but had picked up with the passage of time though intermittently showing fluctuating trends. However it is pertinent to note that the number of cases coming to the Commission has drastically fallen in the recent past. The 2010-11 saw a huge decline most possibly because the masses seem to be getting fed-up by the least compliance on the part of government.

---

9 J&K State Human Rights Commission Reports for the years 1998-99, p.36, 1999-2000, p.42, 2001-01,p 121,2003-04, p.10

10 J&K S.H.R.C Annual Report 2000

11 J&K S.H.R.C Annual Report 2000-01

12 J&K S.H.R.C Annual Report 2003-04

13 Ibid, p1

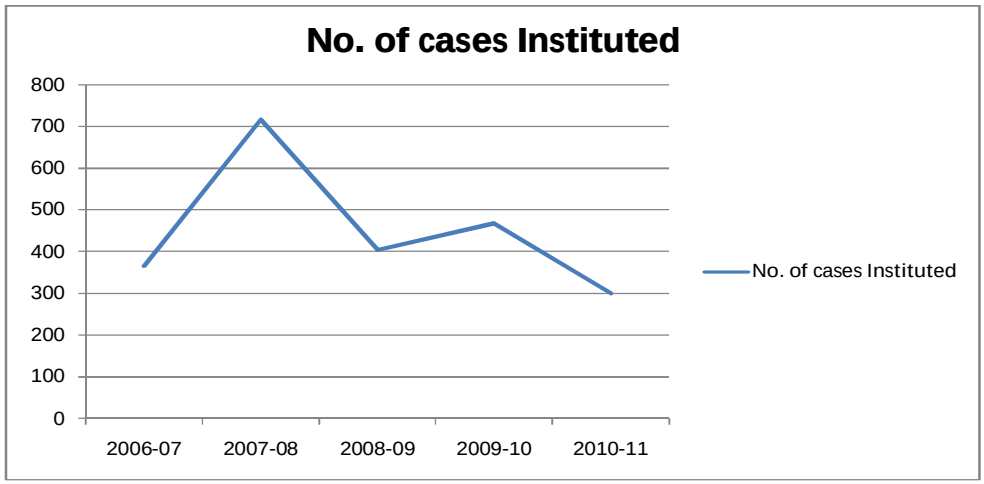

Figure 1

The above graph shows the decline in the filing of cases from the year 2006 onwards, finally coming to a dismal low during the last year.

On perusing the reports of the State Human Rights commission from 2006-11, it was found that the most of the cases filed before the Commission are more pronounced in the matters related to the release of victim, rapes, murders, disappearances, harassment, & custodial deaths. The below give table reflects the true picture about the same.

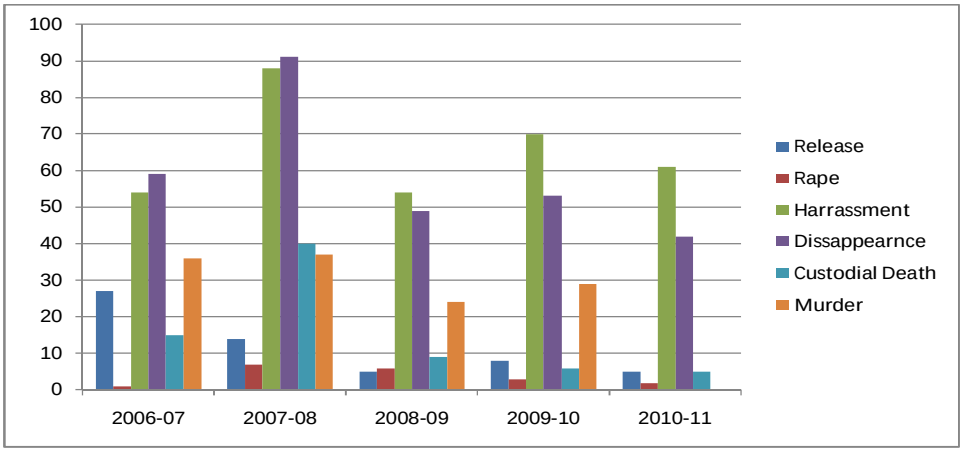

Figure 2

The Harassment of the victims as observed is more vivid than any other of the variables. Since harassment is a wide term & includes a wide range of Human Rights violations ranging from life to equality in treatment etc.

Another interesting observation that has been made on perusal of the Commission's reports in the years mentioned above was the variance in the number of cases from the respective geographical divisions of the State of J&K. It has been found that the Kashmir Division accounts for most of the cases that are filed before the Commission. On certain counts the statistics show alarming tilt so far as the comparisons are concerned. This can be represented by the data represented by the bar chart.

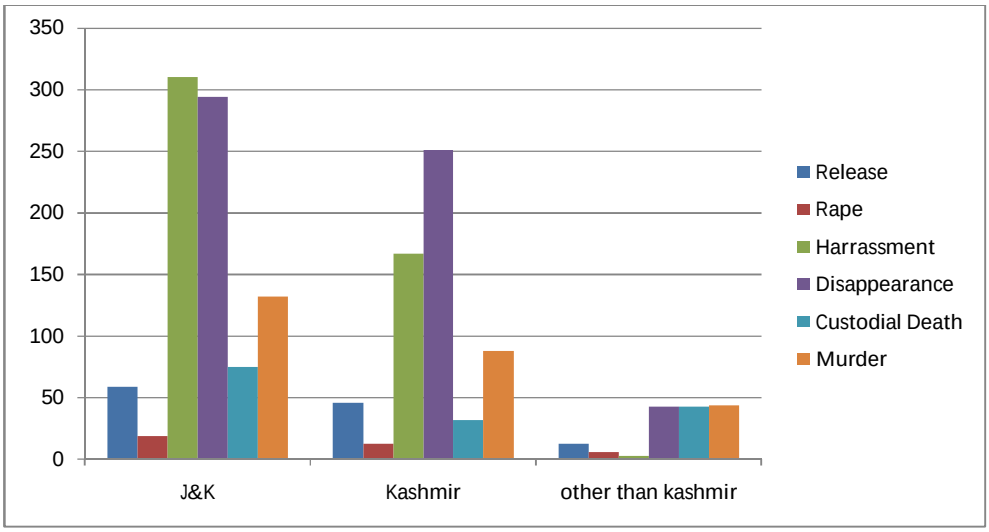

Figure 3

The reason for Kashmir contributing to most of the cases to the Commission can easily be attributed to the circumstances prevailing in the Kashmir valley. It is understandable because the region is the most volatile & the cases of violations are every now & then taking place. The statistics proves the fact that if the peace is restored in this part of the world, the graph of violations will automatically show a steady decline. This will ensure that the variables shown above which account to such a huge percentage of case-filing, will slowly become a thing of the past.

The filing of cases does not make much of a sense if the disposal rate as has been discussed is fairly low than would have been expected. Even in the recent past the rate has not been encouraging enough. For instance the year 2009-10 saw *467* cases filed before the Commission. But only *249* cases were disposed which include the backlog of cases piled over a period over a period of time. So if that backlog of cases is subtracted from the cases disposed of in the year, the statistics will become even more pathetic. The same status applies to the other years. This irony is coupled by the fact that even in these

lesser number of cases that happen to be disposed & in which recommendations happen to be advanced, the rate of compliance is unfortunately very discouraging. The Annual Reports of the commission from 2006 onwards repeat the same story as in previous years on this count. Under these circumstances a question mark is raised on the efficacy of such alternate mechanism which was supposed to act as better enforcer of Human Rights but Alas! the case seems to be otherwise.

Under the Act, Chapter V provides for the establishment of Human Rights Courts. Section 20 of the Act reads;

"For the purposes of providing speedy trial of offences arising out of the violations of Human Rights, the government may, with the concurrence of Chief Justice of the High Court by notification, specify for each district a court of session to be a human rights court…."

It is pertinent to bring out the deficiency arising out of the interpretation of the words used in the section. The section provides that government 'may' specify for such courts in each district which means the provision does not make it mandatory for the government to specify such courts. This discretion has virtually been used by the governments to suit their conveniences & thereby the section becomes nugatory in spirit. The sectional language has been borrowed verbatim from the section of the Central Act which provides for the establishment of such courts. The section in the Central government also uses the words 'the state governments may', thereby making it merely discretionary. This is responsible for not specifying such courts not only in the state of J&K but elsewhere as well.

3.Conclusions & Suggestions

The critical discussion has lead to some important conclusions on the basis of which the present author has made an effort to advances certain suggestions.

It follows from the above discussion that the Act is plagued with deficiencies which is responsible for making it an ineffective instrument for the protection of Human Rights**.**

As the preamble to the Act had provided that the Act is to ensure better protection & promotion of Human Rights, it has not been even close to the protecting not to speak of protecting in a comparatively better manner & as such not lived to the expectations.

In the wake of the dynamics taking place at the International & National plank, as has been seen in the respective chapters dedicated to the study at these levels, there is a dire need of amending the Act to bring it as close as possible to the International Instruments

in this regard. Although the Central Act is also plagued on this count, yet the anomalies in the state Act are more pronounced. The lacunae in the Central Act compelled the Commission to seek amendments to the Act. There are several amendments which have been incorporated through various amending Acts but all the recommendations of the Commission in this regard are not reflected in the amended version of the Act. The State Act remains as it was at its inception as no substantial amendments have been made to it.

The legislators need to sit down with absolute calm with a sacred intention of making this a truly enabling & not a disabling Act. There is a need to amend the definition clause that has taken away the beauty of word 'Human Rights'. The words 'and are enforceable in the Indian courts' has to be omitted. Since these words make the definition of a technical & not conceptual nature. Thereby it reduces its scope as the rights which are not enforceable in the Indian courts will not be considered. Consequently the denial or abridgement of rights would go unredressed. The protection of such rights as a result will not be guaranteed. It is suggested that the scope of the definition be broadened to cover all such rights which come within the conceptual purview of the Human Rights.

The Commission in order to be an effective body must always have a strong quorum. The composition of the Commission is also to be relooked. The Chairmanship in particular is to be entrusted to a person with an undoubted integrity. In place of the words 'shall be a High court Judge' the words preferably 'has been Chief Justice of the High Court', be inserted. This will add the much needed influence of the Commission over the State government. This will furthermore ensure independence of the chairman and avail him sufficient time for effective working.

The Act needs amendment in section 6 clause 1, regarding the term of office of the Chairperson of the commission. As per the section the Chairperson shall hold office for a term of '3 years', which in the case of central Act is '5 years'. The provision contributes to the vacancy of the post arising out of the completion of the term of the incumbent. The amendment should be made to remove the disparity between the Central & the State Act & bring the Act at par with the Central legislation.

The Commission members must be appointed by a neutral body. The 'committee' under the present Act is to compose of Political members, mostly from the ruling party like The Chief minister, Speaker of the Assembly & the like. This leaves the appointees at the mercy of these political bosses carrying on the government for the time being. Quite naturally the government picks its preferred blue-eyed people to man such offices not those who have proven track record & credentials. The appointment committee must

consist of amongst others the members of civil society, Judicial members of high integrity & members representing the organizations working for the promotion of Human Rights. In the matter of appointment of members other than the Chairman, the Chairman be included in the collegium. This would add to the genuineness of the members.

So far the Section 12 of the Act is concerned which makes mandates that the government ought to take action on the Annual/Special Reports of the Commission. The government is supposed to intimate the Commission of the action taken within a specified period of four weeks. But as per the annual report of 2009-10, in most of the cases accounting to almost 95%, the Action Taken Report (ATR), is not at all communicated. It is thus suggested that a penal clause be introduced that would visit the non-complier with consequences, so that the Commission does not remain a 'toothless tiger'.

The Act provides for the establishment of Human Rights Courts. However the section dealing with the establishment of such courts is deficient to the effect that it does not make the establishment of such courts mandatory but merely directory. This is due to the use of words 'the government may', instead of 'shall'. It is suggested that the word 'may' be omitted & in its place word 'shall' be inserted. This will make the provision mandatory & the government won't escape accountability on this front. The Human Rights Courts would come handy to supplement the working of the Commission by speeding up disposal of cases & reduce burden of the Commission.

The central forces which are not under the jurisdiction of the Commission be brought under its jurisdiction. As has been observed throughout the course of discussions in the present work that security forces are the worst perpetrators of crimes & violators of Human Rights. Their operations & working needs to be brought under the direct investigative power of the Commission.

The provision which relates to the Police & Investigation Wing of the Commission be made real in letter & spirit. This can be done by maintaining adequate staff (including the Inspector General) at all times. It has been found that mostly the Commission is deficient in staff on this score for one reason or the other. This ultimately leads the Commission to rely on the investigations conducted by the State police. As the State police is mostly reluctant to indict its officials as well as the government officials, the investigations are biased and unreliable. To do away with this anomaly, it is suggested that the Commission must have an independent investigating agency of its own with adequate staff at its disposal.

Though the Commission is a recommendatory body and can simply recommend a remedy to the State in context of an abuse committed against an individual. The Commission nevertheless has power to initiate or become party to a litigation. Thus rescue those victims who are unable to avail the remedies on their own. National Commission has utilized this avenue to supplement to its otherwise powerlessness by invoking the powers of courts. The Commission proceeded to the courts in context of Chakma Refugees & also in relation to victims of Gujarat Communal Riots. We don't find any such initiative taken by State Human Rights Commission.

The recommendations that the Commission has made has on most of the occasions not been considered. This problem afflicts not only the State Act but the Central Act as well. The Commission has been made a mere watch-dog, something akin to a post-office for receipt & transmission of the communications (complaints). To make it a real protector of Human Rights, it is pertinent to clad the body with authority. Its decisions must be made binding. In fact there should be a provision allowing the Commission to punish the breachers for the contempt of its directions. The government should also learn to accord respect to its decisions. These measures will add teeth to the so-called '*toothless tiger'*.

There is a need of making people aware about the existence of such Acts & Commissions. It has been found that the masses especially the victims are not aware of such redressel mechanisms. A consistent effort should be made by the government for spreading awareness by utilizing the media under its control. It must also endeavor to organize workshops & seminars. The Commission & its members should be accorded sufficient mandate for campaigning in this direction. To this effect there is a need to allot sufficient grants to the Commission for the purpose of Human Rights literacy.

It is also suggested that 'Human Rights cells' be created which can be done by amending the Act to the extent of providing for such cells. These cells should be created in respective District Headquarters & similar efforts be made even at Tehsil level. This will bring justice at the doorsteps of masses & reduce expenditure as well as save time.

The Human Rights courses should be included in the curriculum not only at the University & college level but at the intermediate & primary level to bring the knowledge of these rights to the grass-root level. The more dissemination of information on this aspect will not only civilize people but also prove handy in the promotion & protection of such rights. In this backdrop it is interesting to point out that a Post Graduate Diploma Course on Human Rights was recently closed at the Kashmir University for reasons better known to the authorities. If this is the fate at the highest seat

of learning, one can easily understand the state of affairs at the lower rungs of hierarchy. It is suggested to include subjects on Human Rights at these levels, taught by teachers trained, experienced & committed in the field of Human Rights.

There must be a time-bound disposal of the complaints with lesser or if possible no technicalities. The mechanism should be free, speedy & efficacious. Only then the institution can claim to promote & protect Human Rights in a better manner. It must be ensured that there is absence of red-tapism in the working of the Commission. Those people who have been directly or indirectly involved in bribery or corruption whether monetary, moral or other, be barred from being its members.

There must be stringent punishments for officials who make a breach of their duties. Any complaint against officials of the Commission must be dealt with a heavy hand and an exemplary punishment meted out to those who abuse their power & position for whatever reasons.

The present author believes that if the suggestions are seriously considered, the Act will surely become an effective measure for checking Human Rights abuses & ensure better deliveryof Justice on this count.

4.Reference

1. Annual Reports, The Jammu & Kasmir State Human Rights Commission, 2000-2009
2. Bare Act, The Jammu & Kashmir Protection of Human Rights Act,1997