

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

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Volume 6 | Issue 4

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2023

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# Provoking the State: Human Rights in Secession Conflicts

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NITHIN V.<sup>1</sup>

## ABSTRACT

*This research paper delves into secessionist movements in India, focusing on the response to such conflicts in the newly formed Union Territory of Jammu and Kashmir. It examines India's human rights obligations during secessionist conflicts, exploring the principles of derogation, limitations, and reservations. The paper critically analyzes India's administrative measures, like the Armed Forces (J&K) Special Powers Act, 1990, and the J&K Public Safety Act, 1978, in terms of their compatibility with human rights obligations. Highlighting issues of arbitrary arrests, impunity, violations of freedom of expression, and more, the paper concludes that India's actions have not fully aligned with its international human rights commitments, particularly in handling the insurgency situation in Kashmir.*

**Keywords:** *Secessionist movements, Jammu & Kashmir, Human Rights Law, ICCPR, International Humanitarian law, Armed Forces Special Power Act, J&K Public Safety Act.*

## I. INTRODUCTION

Secessionist movements are movements against a particular political structure of a country by demanding an internal change or autonomy from that country. Such movements can either be peaceful or violent. Most of the times these movements end up taking arms revolting against the government for autonomous rights and the government's response to such situations are worth looking into.

Over the years a lot of secessionist movements have occurred in India. In response India took serious administrative measures and deployed huge number of armed forces in such areas in order to maintain law and order situation. The best scenario of such government actions could be seen in the newly formed Union Territory Jammu and Kashmir of India. It is worthy enough looking into the present and past of the newly formed Union Territory of India. Right from the beginning of Jammu and Kashmir accession with special autonomy status to the dilution of its autonomy to the revocation of special status given under Article 370 of the India Constitution, the Indian Administered Kashmir has gone through a series of separatist movements raising objections to Indian Control over Kashmir. In order to repress the situation, the Armed Forces

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(Jammu and Kashmir) Special Powers Act, 1990, was introduced which led to the large deployment of Indian Security Forces in Kashmir. Apart from that, there were communication blackouts, arbitrary detentions and other human rights violations which led the situation even worse. The Jammu and Kashmir Public Safety Act, 1978 which was brought by the then State Government to prevent smuggling and other activities later on were used as a method of repression by the Government to control the insurgency situations.

India is a state party to International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Universal Declaration of Human Rights, the Convention on the Rights of the Child and many other Human Rights Conventions. By becoming a state party to any international convention treaties, it is assumed that the state party has the right to respect, protect and fulfill human rights obligations.<sup>2</sup> If the states are signatories but not yet ratified then they are not bound to such obligations until they ratify it. However if a convention is on the matter of a strong international consensus that makes it be binding on the international customary law then such conventions are binding on all countries, even though they have not ratified it. One such example is Convention against torture.

Hence India has the right to respect, protect and fulfill its human rights obligations. However during the times of insurgency it was found that the method of repression by derogating and extremely limiting the basic human rights from what is required has violated both Constitutional Framework and human rights obligations that India has to respect, follow and fulfill. Having said the research question of this paper is “Did India fulfill its human rights obligations while responding to the insurgency situation in Kashmir?”

For the purpose of this, the research paper is divided in three sections. The first section deals with the Human Rights obligations of a State during the time of secessionist conflicts. The second section deals with the India’s response to the secessionist movements in Indian Administered Kashmir from a Human Rights perspective. The third section is the concluding section which talks whether the India is justified in derogating or limiting the basic human rights as a part of repression against secessionist movements in Indian Administered Kashmir or not.

## **II. HUMAN RIGHTS OBLIGATIONS OF STATE DURING SECESSIONIST MOVEMENTS**

Secessionist Movements which are violent in most cases are a type of armed conflicts that take arms in their hand to rebel against the government of a country for autonomous status or to be independent and separate from that country.<sup>3</sup> According to an International Criminal Tribunal

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<sup>2</sup> Mary Robinson, HUMAN RIGHTS: A BASIC HANDBOOK FOR UN STAFF, 5 (2000).

<sup>3</sup> United Nations, *Armed Conflicts*, (2001), available at <https://www.un.org/esa/socdev/rwss/docs/2001/15%20A>

Case of *Prosecutor v. Dusko Tadic*<sup>4</sup>, armed conflicts occur whenever there is violence that is armed in nature between government and armed groups or within both. In *Prosecutor v. Ramush Haradinaj*<sup>5</sup>, the trial chamber laid down some factors for calling a conflict as armed conflicts.<sup>6</sup> During armed conflicts both International Humanitarian law and International Human Rights law could apply depending upon the circumstances of the armed conflicts. This could be seen from two of the International Court of Justice Cases i.e., *Legality of the Threat or Use of Nuclear Weapons*<sup>7</sup> and *Legal Consequences of the Construction of a Wall*.<sup>8</sup> Human Rights committee on its General Comment No. 31 of Article 2 of ICCPR stated that the rights contained in ICCPR also applies in armed conflicts along with International Humanitarian Law and both spheres of law would apply not in a mutually exclusive manner but in a manner that is complementary in nature.<sup>9</sup> However there will be situations in which both of these laws have conflicting positions. In such situations, the principle of *lex specialis* will come into play to decide the best possible law to be applied in an armed conflict based on the facts and situations of that case.<sup>10</sup>

With regard to the territorial aspects of the state parties' human rights obligations, the Human Rights Committee in General Comment no. 31 of Article 2 of ICCPR stated that "*State party must respect and ensure the rights laid down in the covenant to anyone within the power or effective control of that state party, even if not situated within the territory of the State party*".<sup>11</sup> The ICJ also reiterated the same in *Construction of a Wall Case*.<sup>12</sup>

Having discussed in brief about the armed conflicts, concurrent application of both International Humanitarian Law and International Human Rights Law and territorial aspects of Human Rights Obligations the researcher now moves on to the Human Rights Obligations of State during Secessionist or Armed Conflicts. It is a general principle that conflicts do not affect the applicability of International Human Rights. However these rights can be derogated or limited during armed conflicts. These exceptions are not limited to such conflict situations and can be used in other situations also.

**Derogations-** Article 4.1 of the ICCPR states that, "*in time of public emergency which threatens*

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armed%20Conflict.pdf (Last visited on May 16, 2020).

<sup>4</sup> Prosecutor v. Duško Tadic', case No. IT-94-1-A (International Criminal Tribunal).

<sup>5</sup> Prosecutor v. Ramush Haradinaj et. al., case No. IT-04-84-T (International Criminal Tribunal)

<sup>6</sup> These factors include the involvement of UN Security council, the intensity of individual confrontations, types of weapon used and other military equipment, types of forces etc.

<sup>7</sup> Legality of the Threat or Use of Nuclear Weapons, (1996) ICJ Rep 226 (International Court of Justice).

<sup>8</sup> Legal Consequences of the Construction of Wall (2004) 43 ILM 1009 (International Court of Justice).

<sup>9</sup> UNOHCHR, *General Comment No. 31(80)*, CCPR/C/21/Rev.1/Add. 1326 (2004).

<sup>10</sup> UNOHCHR, *International Legal Protection of Human Rights in Armed Conflict*, HR/PUB11/01 (2011).

<sup>11</sup> *Supra* note 8, at Para. 10.

<sup>12</sup> Construction of Wall Case, (2004) 43 ILM 1009 (International Court of Justice).

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..”. But these derogations have to satisfy some conditions in order to become operative. The following are the conditions:-

- There should be a situation of public emergency.<sup>13</sup> In *Case of Lawless v. Ireland*<sup>14</sup>, the European Court of Human Rights has explained the meaning of public emergencies. According to the court public emergencies are “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed.”<sup>15</sup>
- Derogation should be temporary in nature.<sup>16</sup>
- Derogation should be the last resort. If other intrusive means are there to achieve the aim then human rights obligations should not be derogated.<sup>17</sup> Also the emergency situations should be of the type that the situation needs strict derogation of human rights.<sup>18</sup>
- Consistent with other obligations of International Law.<sup>19</sup>
- Derogations should not be made to procedural safeguards.<sup>20</sup> One example is Article 6 of ICCPR. This right cannot be derogated in its entirety. According to Human Rights Committee, the requirements of Article 14 and 15 of ICCPR should be met in a trial proceedings leading to the death penalty of a person during a situation of public emergency.<sup>21</sup> Apart from these, the other non-derogable rights include the rights mentioned in Articles 6,7,8,11,15,16 and 18 of the Covenant.<sup>22</sup>

**Limitations that are permissible-** Under ICCPR lawful limitations can be placed upon the rights mentioned under Articles 12, 18, 19, 21 and 22. Even ICESCR allows for limitation of some specific rights mentioned under Article 4 of that Covenant. However limitations of rights, like derogations, can only be placed upon fulfilling the necessary conditions. The conditions are as follows:

<sup>13</sup> UNOHCHR, *General Comment No. 29*, CCPR/C/21/Rev.1/Add.11 (2001) at Para. 3.

<sup>14</sup> *Case of Lawless v. Ireland* (No. 3), application No. 332/57 (European Court of Human Rights).

<sup>15</sup> *Lawless case* (No. 3), application No. 332/57 (European Court of Human Rights).

<sup>16</sup> *Supra* note 13, at Para 1.

<sup>17</sup> Article 4.1 of International Covenant on Civil and Political Rights.

<sup>18</sup> *Id.*

<sup>19</sup> *Supra* note 17.

<sup>20</sup> *Supra* note 13, at Para 15.

<sup>21</sup> *Id.*, at Para 15.

<sup>22</sup> Article 4.2 of International Covenant on Civil and Political Rights,

- Limitations should be of an essential nature in order to protect “*public safety, order, health or morals or the fundamental rights and freedom of others*” and should only be placed as prescribed by law.<sup>23</sup>
- Rights should be conditioned to limitations for general welfare and such limitations should be in accordance with other rights of the Covenant.<sup>24</sup>
- Limitation of rights should be based on “*the principle of proportionality and intrusiveness*”.<sup>25</sup> It is widely accepted in international jurisprudence that the limitation should be based on proportionality principle and should only be conditioned to limitations to a particular extent.<sup>26</sup> According to the *Construction of the Wall Case*<sup>27</sup>, the ICJ citing the General Comment on the right to freedom<sup>28</sup> of ICCPR stated that the limitation placed should be based on proportionality principle and should be limited only to a particular extent.<sup>29</sup>

**Reservation-** At the time of ratification of a treaty, the state may restrict the applicability of few articles by entering into reservations.<sup>30</sup> The Human Rights Committee in its General Comment no. 24 (1994) of ICCPR stated that “*the state may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he or she proves his or her innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry or to deny to minorities the right to enjoy their own culture, profess their own religion or use their own language*”.<sup>31</sup> A reservation on the right against discrimination and prohibition of cruelty against women is also not permissible.<sup>32</sup>

### III. INDIA’S HUMAN RIGHTS OBLIGATIONS WITH RESPECT TO SECESSIONIST MOVEMENTS IN KASHMIR: A CRITICAL ANALYSIS

In this section the researcher tries to critically analyze the administrative measures taken by

<sup>23</sup> Article 18.3 of International Covenant on Civil and Political Rights; Article 12.3 of International Covenant on Civil and Political Rights also contain a similar provision for the limitation of rights.

<sup>24</sup> Article 4 of International Covenant on Economic, Social and Cultural Rights.

<sup>25</sup> *Supra* note 10, at 51.

<sup>26</sup> *Id.*, at 51.

<sup>27</sup> *Construction of Wall Case*, (2004) 43 ILM 1009 (International Court of Justice).

<sup>28</sup> UNOHCHR, *General Comment No. 27*, CCPR/C/21/Rev.1/Add.9 (1999), at para 14.

<sup>29</sup> *Construction of Wall Case*, (2004) 43 ILM 1009 (International Court of Justice).

<sup>30</sup> *Supra* note 10, at 52.

<sup>31</sup> UNOHCHR, *General Comment No. 24*, CCPR/C/21/Rev.1/Add.6 (1994) at Para 8.

<sup>32</sup> UNCEDAW, *General recommendation No. 21*, (1994) at Para 44.

both Central and State Government in repressing the secessionist movements in Indian Administered Kashmir.

As said in the previous section, Human Rights Committee is against the state parties making reservations in some particular rights. India while adopting ICCPR showed its disinterest in taking the human rights standards as a whole. So the country has entered into reservations to Articles 9<sup>33</sup>, 19<sup>34</sup>, 21<sup>35</sup> and 22<sup>36</sup> of the Covenant because the mentioned articles were subjected to restriction under Article 19 of the Indian Constitution.<sup>37</sup> Transparency and Accountability are inherent part of the Human Rights Committee.<sup>38</sup> However India while avoiding the distinction of condition that is prevalent in Jammu and Kashmir with state of emergency in international terms takes away the Human Rights Committee's transparency and accountability principles. Having said lets look into the administrative measures taken by the Government in repressing the secessionist movements in Kashmir and the Human Rights violations associated to those measures.

**Armed Forces (J&K) Special Powers Act, 1990-** Section 3 of the Act gives power to Governor of the State or Central Government to tag an area as “*disturbed area*” which has an absence in peace and security. This is equal to a state of emergency proclaimed under Article 359 of the Indian Constitution. The researcher thinks it violates Article 4 of ICCPR.<sup>39</sup> Also Article 359 of the Indian Constitution cannot suspend the rights under Article 20 and 21 of the Indian Constitution during emergency situations. So even without declaring emergency situations such rights have been suspended or restricted when Section 3 of the Act has been invoked.

Section 4 of the Act violates Article 21 of the Indian Constitution. In *Maneka Gandhi v. Union of India*<sup>40</sup>, the meaning for the “*procedure established by law*” has been established saying the law should be fair and reasonable. Having said AFSPA, 1990 does not turn out to be a good law as it unreasonably derogates and limits human rights. Supreme Court in *DK Basu v. State of*

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<sup>33</sup> Right against Arbitrary Arrest and Detention of International Covenant of Civil and Political Rights.

<sup>34</sup> Right to Freedom of Expression of International Covenant of Civil and Political Rights.

<sup>35</sup> Right to Peaceful Assembly of International Covenant of Civil and Political Rights.

<sup>36</sup> Right to Freedom of Association of International Covenant of Civil and Political Rights.

<sup>37</sup> Human Rights Watch (Organization), “EVERYONE LIVES IN FEAR”: PATTERNS OF IMPUNITY IN JAMMU AND KASHMIR 18(11), 105 (2006).

<sup>38</sup> *Id.*, at 105.

<sup>39</sup> According to Article 4 of the ICCPR, derogations can be made only in the time of public emergencies which causes threat to the nation. Further Article 4.3 of the Covenant talks about informing such derogation of rights due to public emergencies to the Secretary-General of the United Nations. India however has not provided any information because it avoids the distinction of the condition prevalent in Jammu and Kashmir hence infringing the accountability and transparency principles discussed in the Human Rights Committee.

<sup>40</sup> *Maneka Gandhi v. Union of India*, 1978 AIR 597 (Supreme Court of India).

West Bengal<sup>41</sup> laid down 11 guidelines<sup>42</sup> for arrest and detention. The AFSPA, 1990 provisions do not adhere to those guidelines. Additionally the General Comment no. 36 of Article 6 of ICCPR says that the state parties are expected to take measures to prevent arbitrary deprivations of life by law enforcement officials and also the way in which they behave should be in accordance with international standards to give full respect to right to life.<sup>43</sup> However this obligation has not been respected due to excessive use of force which leads to arbitrary deprivation of life.

Section 7 of the Act gives impunity to the security forces personnel from prosecution. This means impunity from sexual violence also. However the committee set up after the Delhi gang rape case for the amendment of criminal law gave recommendations to do away with the central government sanction for prosecution which were only admitted till the extent of giving sanction for prosecution in cases relating to sexual violence.<sup>44</sup>

Some incidents were reported in the UN Report of 2018 on Kashmir issue where the armed security officials were given impunity even though they had committed crimes.<sup>45</sup> According to Human Rights Committee the obligations for proper, credible, transparent and effective investigation come under the application of Article 6 of ICCPR.<sup>46</sup> Human Rights Committee on General Comment no. 29 says that the procedural safeguards should not be taken away.<sup>47</sup> By not adhering to such obligations would lead to the violation of Article 4 and 6 of the Covenant.<sup>48</sup>

India has signed the Convention for Enforced Disappearance but has not ratified it till now. The UN Report of 2018 on the Kashmir Issue mentioned a number of cases relating to enforced

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<sup>41</sup> D.K. Basu v. State of West Bengal, 1997 1 SCC 416 (Supreme Court of India).

<sup>42</sup> 11 guidelines provided by the DK Basu Case are proper identification and record of interrogation in a register, preparation of memo, giving chance for the arrestee or detainee to meet his relatives or friends, giving notifications regarding the arrest or detention of the person to his relatives or friends, the person arrested or detained should be provided with reasons for his arrest or detention, entry should be made into the case diary, examination of injury of the arrestee and inspection memo should be made available, medical examination should be made available within 48 hours, copies of all documents including the arrest memo should be sent magistrate, lawyer should be made available and police control room should be informed about the arrest within 12 hours.

<sup>43</sup> UNOHCHR, *General Comment No. 36*, CCPR/C/GC/36 (2018) at Para 13

<sup>44</sup> UNOHCHR, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan*, (2018), available at <https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf> (Last visited of May 17, 2020).

<sup>45</sup> The action of blocking the five army officials for extra judicial killings under Section 7 of the Act by the Indian Army was upheld the Supreme Court of India in the case of *General Officer Commanding v. CBI* (2012) 5 S.C.R. 599. However the Supreme Court asked for a court martial which has been carried out and dismissed saying the case was suffering from lack of evidence. In 2014, the Armed Forces Tribunal suspended the jail sentence and granted bail for army officials who were convicted for extra judicial killings in court martial.

<sup>46</sup> *Supra* note 43, at Para 17, 18 and 64.

<sup>47</sup> *Supra* note 14, at Para 13.

<sup>48</sup> *Supra* note 43, at Para 67.



disappearances happened in Kashmir between 2016 and 2018.<sup>49</sup> Enforced disappearances violated Article 6 of the ICCPR along with Articles 7, 9 and 16 of the Covenant.<sup>50</sup>

The UN Reports on Kashmir also mentioned a number of cases relating to torture reported between 2016-2019 from the armed security personals and other officials.<sup>51</sup> Article 4(2) read along with Article 7 of the ICCPR prohibits torture as it is considered as a derogable right. Even though India is not a signatory to the UN Convention against Torture, the problem of torture has gained international consensus and is a part of customary international law which makes the countries to follow it even though they have not ratified the convention.<sup>52</sup>

**J&K Public Safety Act, 1978-** Arbitrary arrest and detention should take place in accordance with law as the last resort available to maintain public or national security along with proper procedural safeguards and reparations.<sup>53</sup> According to Human Rights Committee, a state cannot reserve right against arbitrary arrest and detention.<sup>54</sup>

India has reserved this right and has no procedural safeguards available to a person who is detained or arrested under PSA and has hardly given any reparations for such acts.

Minors are also detained. India being a state party to Convention of Rights of Child has the obligation to protect the rights of child and by detaining minors violates the human rights obligations provided under that convention.<sup>55</sup>

According to Human Rights Committee, Article 6(1) of ICCPR may overlap with Article 9(1).<sup>56</sup> The Supreme Court of India in *Jaya Mala v. Home Secretary, Government of J&K*<sup>57</sup> commented on PSA, 1978 calling it as a “lawless law”. Constitutionally speaking, the researcher finds PSA, 1978 violates Article 22 of the Indian Constitution. So being a state party to ICCPR, India is obligated to protect, respect and fulfill the rights mentioned under Articles 9, 14 and 15 of the Covenant.

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<sup>49</sup> *Supra* note 44.

<sup>50</sup> *Supra* note 43, at Para 58. The committee further added that the state should take necessary measures to stop enforced disappearances and develop procedures to find the persons liable for such act. The UN Reports of 2018 and 2019 urge India to ratify the Convention against Enforced Disappearances.

<sup>51</sup> UNOHCHR, *Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019*, (2019), available at [https://www.ohchr.org/Documents/Countries/IN/KashmirUpdateReport\\_8July2019.pdf](https://www.ohchr.org/Documents/Countries/IN/KashmirUpdateReport_8July2019.pdf) (Last visited on May 17, 2020).

<sup>52</sup> Human Rights Watch (Organization), *supra* note 36 at 95.

<sup>53</sup> UNOHCHR, *General Comment No. 35*, CCPR/C/GC/35 (2014).

<sup>54</sup> *Supra* note 31.

<sup>55</sup> Article 37 of the Convention says that detention of a minor should be in accordance with the law and should be the last resort. The Committee on the Right of Child stated that if a person is below the age of 18, then he should be treated in accordance with the Juvenile System.

<sup>56</sup> *Supra* note 43, at Para 57.

<sup>57</sup> *Jaya Mala v. Home Secretary, Government of J&K*, (1985) AIR SC 18 (Supreme Court of India).

The administrative measures taken by the Government also led to other human rights violations. UN reports on Kashmir issue reported a lot of violations to the right to freedom of expression and censorship and attack on press freedoms. According to the researcher the restrictions placed are unnecessary and does not conform to the three part test.<sup>58</sup> According to UN Report of 2019, the internet shutdown amounts to “*capital punishment*” and goes against the proportionality and necessity principles.<sup>59</sup> The reports also mentioned about the violation of right to education.<sup>60</sup> Right to education is considered as a fundamental right under the Indian Constitution.<sup>61</sup> Violations to the right to health could also be seen from the UN Report of 2018 on the Kashmir issue.<sup>62</sup> Right to health is considered as a fundamental right under Article 21 of the Indian Constitution and it should not be suspended or restricted during emergency situations.

The conditions have never changed even after the revocation of Article 370 of the Indian Constitution. There are still communication black outs, house arrests, excessive use of force, curfews, arbitrary arrest and detention happening in Kashmir thus creating more human rights violations in the process of repressing the secessionist conflicts.

#### IV. CONCLUSION

India has been an arena for secessionist movements for a long period of time. The way Government responded to such movements led to large scale human rights violations in most of the cases as could be seen in the case of Kashmir. The Government use draconian legislations like AFSPA and PSA to suppress secessionist movements. With the revocation of Article 370, a situation to maintain law and order has arisen in the newly formed Union Territory of Kashmir which again tend the government to use the above mentioned draconian legislations that give license to do arbitrary detention, arrests and even torture.

India being a state party to some of the major international conventions has the right to respect, protect and fulfill human rights obligations in general even during secessionist conflicts. India on various occasions has reserved non-reservable rights hence diluting its human rights obligations.

A state of public emergency is a situation in which basic human rights could be derogated and even restricted. India however not conveying the situation of Kashmir to be a state of public

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<sup>58</sup> 3 part test of freedom of expression consist of legality, legitimacy and proportionality. If the 3 part test is satisfied, then only a restriction can be imposed on the freedom of expression.

<sup>59</sup> *Supra* note 51.

<sup>60</sup> Being a state party to IESCR, India has obligation to respect, protect and fulfill the right to education under Article 10 of the Covenant.

<sup>61</sup> Article 21(A) of the Constitution of India, 1950.

<sup>62</sup> Being a state party to IESCR, India is also obliged to protect that right under Article 12 of the Covenant.

emergency in International terms would lead to hindering the accountability and transparency principles of the Human Rights Principles. Even if there was a state of emergency prevalent for real then also certain rights could not be derogated or limited unreasonably. However by using draconian legislations like AFSPA and PSA in Kashmir gross human rights violations have occurred and certain provisions of International Conventions are violated. Hence it is clear that India has not adhered to Human Rights Obligations in handling the insurgency situations in Kashmir.

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