A Paradigm Of Impunity: Two Months in the Life of the 20 Grenadiers

By Ashok Agrwaal

This article is based upon a three year long research into the failure of the guarantee of the right to life in Kashmir. The study examined eighty seven habeas corpus petitions filed before the Srinagar Bench of the Jammu and Kashmir High Court between 1990 and 2000, selected from a random collection of about 300 petitions gathered through lawyers who had filed them before the High Court.¹ For purposes of comparison, we also examined nine cases of enforced disappearance in which a petition was not filed. Of the ninety eight persons (two of the petitions pertained to two persons each) whose cases were examined, seventy four persons were disappeared, seventeen were released and, the facts about five persons could not be ascertained.²

Since, in cases of disappearance the arrest is invariably disputed, we examined the validity of the allegations of arrest in each case, in the context of the evidence on record. Our investigation of the facts and the judicial findings shows that in a majority of the cases there was sufficient evidence to establish that the arrest and the subsequent disappearance took place, as alleged by the families. Further, the patterns revealed by the cases as a whole lend veracity to the allegations of arrest and disappearance.

The petitions reveal a failure of justice of epic proportions. It is not enough to blame the State, the army, the BSF, the CRPF, etc. The failure goes beyond the obvious malafides of the executive. Our study makes it clear that the judiciary is fully complicit in the theatre of the absurd that is being played out in Kashmir at this very moment. The complete lack of seriousness about the dispensation of justice and, the complete lack of faith in justice are startling, to say the least, when seen as reflected in the conduct of a constitutional authority such as the High Court. It is like having an election Commission which by its conduct makes it clear that it has no faith in the possibility of free and fair elections. What would be the sanctity of an election conducted by such an authority?

Though the study is based on disappearances that are from 6 to 17 years old, its relevance to the current situation cannot be doubted. The recent reports of enforced disappearances and fake encounters in Kashmir show that the province continues to be ruled by the sword arm of the Indian state. Thus,

¹ We also examined one case from 2003, which we came across during the course of our field research. This case shows that the manner and pattern of arrest had not changed in the three years since the year 2000, which was the last year for which we had data at that time.
² We were not able to meet the families of these five persons.
notwithstanding the elaborate normative framework that essays to assure every person life with equality, dignity and self fulfillment, the State has consistently armed itself and its institutions with the power of draconian laws, more befitting a totalitarian regime. The assurances work intermittently at best but the latter set of laws, and the personnel who operate them are always at work. Further, a process of executive malafides and judicial pusillanimity, melds these laws into impenetrable armour protecting the security forces in Kashmir from facing the consequences of their crimes. The outcome is an impunity that enjoys the best of both worlds: *de jure* as well as *de facto*.

The legal core of this process of impunity lies in the power of the State to control (read- prevent) the prosecution of “public servants” and “members of the Armed Forces of the Union” who commit crimes “while acting or purporting to act” in the discharge of their official duties. A series of facts can be stated to show the existence of the decision to allow security forces the freedom to commit crimes, without fear of repercussion.

First, is the impunity of action that they enjoy by virtue of the powers conferred upon them by the Armed Forces Special Powers Act (AFSPA). Section 4 of this Act empowers ‘Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces’—

a) The authority to arrest, to search and, to seize without a warrant;
b) The authority, extending to the right to shoot to kill: ‘if he is of the opinion that it is necessary to do so for the maintenance of public order’.
c) The authority to destroy any structure or place that is suspected (or is likely) to be used as an arms dump or, position or shelter from which armed attacks are made or are likely to be made or, is used (or likely to be used) as a ‘training camp’ or, is utilised as a hid-out by armed gangs or absconders wanted for any offence.

Having conferred the power to act with impunity, section 7 of the Act bars all ‘legal proceedings’ against “any person” for ‘anything done or purported to be done in exercise of the powers conferred by this Act’, except with the prior “sanction” of the Central government. Though the Supreme Court has made it clear in a number of decisions that the protection conferred by this provision does not cover criminality or criminal acts, it is almost universally interpreted to grant immunity from prosecution of any kind, in the absence of the Central government’s permission. Needless to say, the Central government’s record is abysmal: it routinely rejects permission, even in cases where there is cast iron evidence to support the allegations.

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4 In Rouf Shah’s case the Army is on record as arguing that a habeas corpus petition was not maintainable without the prior permission of the Central government.
Next, is the decision to disconnect the normal law enforcement machinery, qua the operations of the armed forces. In almost none of the cases studied did the police make any real attempt to investigate complaints against the security forces. Most survivor families stated that the police refused to register complaints about their family member’s arrest/abduction. The police claimed that they were under instructions not to register cases against the security forces. Even when they did register the case, the police made very little attempt to investigate the complaint or, to book the culprits. The courts were of no help. In several cases it was reported to us that the police explicitly said that irrespective of what the courts might say, their instructions were very clear: they were not to investigate or take any action on complaints against security forces.

The third facet of this design comprises the failure of the High Court to enforce its authority to do justice. The responses of the security forces to the petitions filed before the High Court are an example of this failure. Our study shows that they blandly deny arrest even when there are eyewitness testimonies to prove the same. They, also, stonewall and stymie the Court’s process at every step, using delay as an effective tool of attrition. The High Court succumbed in the face of such intransigence, allowing the power of judicial redress to slip out of its hands. In not one of the petitions studied in this report did the High Court pass an effective order, challenging the impunity of the State’s agencies or, ensuring punishment upon a guilty person.

That they did not file a reply before the High Court or, that they did not participate in the inquiry proceedings did not mean that the security forces were not following the proceedings. In several cases the accused unit of the armed forces did not file a reply before the High Court or cooperate in the judicial inquiry ordered but chose to file objections to the inquiry report; which had held against them. Thus, the overall picture is one of watchful disregard for the court and its processes. Wherever the security forces felt that they needed to intervene, they did so.

This position of watchful disregard becomes clearer when the context is widened to include the response of the Central government in cases where the State government requested it for grant of sanction to prosecute officers/members of the Central security forces (including the army), who had been charged with penal offences. In four petitions, the police are on record as having completed their investigation and finalised a charge sheet against the officers/soldiers responsible for the arrest/disappearance. In two of these cases, in which the High Court involved itself in monitoring and, to some extent, supervising the State government in the process of obtaining “sanction” from the Central government, the Central government rejected the request for grant of sanction to prosecute the officers concerned despite there
being ample evidence to establish the guilt of the accused officers/ units. In fact, it is our information that the Central government has granted sanction to prosecute in only two of the over hundred and fifty cases in which such sanction was sought.  

In other words, it is reasonable to infer that the Central government is not inclined to permit the courts in the State of Jammu and Kashmir to exercise jurisdiction and control over forces under its command. The conduct of the Central security forces, in the habeas corpus petitions studied in this report, mirrors this attitude and, once this attitude is factored in, the conduct of these forces becomes explicable.

Leave alone effective final orders, our study shows that the High Court exercised no control over any aspect of the Court process. Once filed, cases acquire a life of their own. Their progress is controlled by a random mix of factors rather than by the Court’s sense of purpose. Such a state of affairs is very frustrating for the petitioners, who rapidly become imbued with a sense of futility once they realise that nothing they do will help or facilitate the course of justice. If you attend court on every hearing it doesn’t matter, if you leave it to the lawyers and the judges, and their sense of justice, it doesn’t matter. In many cases, where the person arrested was subsequently released and, consequently, his family did not bothered to pursue the case they had filed on his behalf before his release, the High Court continued to process the case as a matter of routine for years thereafter. These empty cases, as we call them, are proof of the mindlessness of the judicial process.

Virtually every family we met said to us that they found the entire process before the High Court bewildering and frustrating. The refrain was that nothing seemed to happen during the hearings, except an adjournment. The fact that the proceedings in the Court were conducted in English added to the bewilderment and frustration since most of the petitioners were not familiar with the language.

The 20 Grenadier cases are a microcosm of the report. They manifest almost all the features of the larger report: from the difficulties faced by the families in identifying the arresting unit, to the attempts made by them in securing the release of their kin, prior to filing the petition before the Court, to the nature of

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5 One of these is the case of Parveena Ahangar, whose son, Javed, was disappeared in 1990. Sanction to prosecute was recently granted by the Central government in this case, after a fourteen year struggle for justice. However, we are informed that the court seized of the matter has been unable to enforce the attendance of the accused officer because the police cannot “trace” him. The other is the case relating to the killing of Jalil Andrabi, a well known human rights lawyer. In this case too, despite the grant of sanction after more than a decade’s struggle, the accused persons continue to elude justice.
the response by the arresting unit to the *habeas corpus* petition, to the ultimate outcome of the petition, in the cases where it was filed.

Between 29 March 97 and 23 May 97, the 20 Grenadiers, part of an elite regiment of the Indian Army, arrested at least fifteen persons.\(^6\) There is evidence to show that the police were aware of these arrests by the 20 Grenadiers and had repeatedly enquired about the whereabouts of the arrested persons from the various Army Commands stationed in the valley. One such letter of enquiry was written by the office of the Inspector General Police, Kashmir to the GOC, 8 Mountain Division on 19 May 1997. The letter listed the names of twelve men who had been arrested by the 20 Grenadiers, with their dates of arrest. The names mentioned in the letter of 19 May 1997 are listed in table 1 below.

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name</th>
<th>Date of Arrest</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Manzoor Ahmad Dar</td>
<td>30.3.97</td>
</tr>
<tr>
<td>2.</td>
<td>Nisar Ahmad Wani</td>
<td>30.3.97</td>
</tr>
<tr>
<td>3.</td>
<td>Bilal Ahmad Sheikh</td>
<td>30.3.97</td>
</tr>
<tr>
<td>4.</td>
<td>Zahoor Ahmad Dar</td>
<td>11-12.4.97</td>
</tr>
<tr>
<td>5.</td>
<td>Mushtaq Ahmad Khan</td>
<td>14.4.97</td>
</tr>
<tr>
<td>6.</td>
<td>Mushtaq Ahmad Dar</td>
<td>14.4.97</td>
</tr>
<tr>
<td>7.</td>
<td>Tariq Ahmad Dar</td>
<td>30.3.97</td>
</tr>
<tr>
<td>8.</td>
<td>Mehraj-ud-din Dar</td>
<td>19.4.97</td>
</tr>
<tr>
<td>9.</td>
<td>Farooq Ahmad Shah</td>
<td>29.4.97</td>
</tr>
<tr>
<td>10.</td>
<td>Ghulam Mohammad Shar Gugri</td>
<td>29.4.97</td>
</tr>
<tr>
<td>11.</td>
<td>Farooq Ahmad Dar</td>
<td>29.3.97</td>
</tr>
<tr>
<td>12.</td>
<td>Mizafar (Muzafar) Ahmad Dar</td>
<td>Not legible</td>
</tr>
</tbody>
</table>

*Table-1*

Similar letters were sent to the 56 Mountain Brigade and other Army commands, on different dates. The number of persons arrested, as listed in the several letters, varied slightly. In other words, from time to time the Police compiled information about the arrests carried out by the 20 Grenadiers and wrote to the Army Commanders in the valley, asking for information about the missing persons.

Our study includes the cases of eight of the fifteen persons who are known (to us) to have been arrested by the 20 Grenadiers during the period mentioned.

\(^6\) Most of those arrested lived in the Tengpora - Batamaloo area of Srinagar. Two of them were arrested from the Ganderbal area, close to Srinagar.
above. In addition, we have a fair amount of information in the case of another arrestee, one Yehya Khan, who was arrested along with his father, Shahban Khan, one of the eight persons whose cases were examined by us. All these nine persons have disappeared.

All the arrestees about whom we have information were between sixteen and twenty eight years, with the exception of forty five year old Shahban Khan. The names of the nine persons whose cases are included in our report are listed in table-2 below. Two of them had a militant past.\(^7\)

<table>
<thead>
<tr>
<th>No.</th>
<th>Name</th>
<th>Date of Arrest</th>
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</thead>
<tbody>
<tr>
<td>1.</td>
<td>Manzoor Dar*</td>
<td>30.3.97</td>
</tr>
<tr>
<td>2.</td>
<td>Bilal Sheikh*</td>
<td>30.3.97</td>
</tr>
<tr>
<td>3.</td>
<td>Nisar Wani*</td>
<td>30.3.97</td>
</tr>
<tr>
<td>4.</td>
<td>Mushtaq Dar*</td>
<td>13.4.97</td>
</tr>
<tr>
<td>5.</td>
<td>Mushtaq Khan*</td>
<td>13.4.97</td>
</tr>
<tr>
<td>6.</td>
<td>Shahban Khan</td>
<td>16.4.97</td>
</tr>
<tr>
<td>7.</td>
<td>Yehya Khan</td>
<td>16.4.97</td>
</tr>
<tr>
<td>8.</td>
<td>Mehraj-ud-din Dar*</td>
<td>20.4.97</td>
</tr>
<tr>
<td>9.</td>
<td>Ashiq Hussain Malik</td>
<td>23.5.97</td>
</tr>
</tbody>
</table>

Table-2
Note: Those who were listed in the letter of the police dated 19 May 1997 (Table-1) are marked with an asterisk.

Arrest

Nisar Wani was arrested from outside his house during a crackdown in his locality. Manzoor Dar and Bilal Sheikh were arrested together, from the road, while the 20 Grenadiers were returning to their base after carrying out the crackdown in Nisar Wani’s locality. All the rest were arrested in the course of raids on their homes.

Torture

\(^7\) Mehrajuddin Dar (99/19) and Yehya Khan. Mehrajuddin was a Pak trained militant who had been arrested and, thereafter, released in December 1994, after a two and a half year long detention. After his release he had severed links with militancy. At the time of his arrest in 1997 he was running a shoe shop and, was married with a nine month old child. Yehya Khan was released after a two year detention under the PSA in 1995. After his release he was working as a truck driver.
In five cases the arrestees were subjected to torture prior to their arrest, in the presence of witnesses. In all these cases the family members, including women and children, were also tortured or, were forced to witness the torture.

• During the crackdown in which Nisar Wani was arrested, the soldiers targeted young boys and men, though no one was spared. Nisar was subjected to particularly severe torture. They broke the nose of one of the labourers working in the area.\footnote{They were digging a drain in the locality.} While leaving, the Army handed over the custody of many of those injured by their torture to the police. Nisar, who was in a very bad shape, was taken away.

• Ghulam Qadir Bhat, who was picked up along with Ashiq Husain Malik but was later released, testified that Ashiq was subjected to severe torture and, was in severe pain and, was vomiting due to the torture.

• Mehrajuddin Dar was tortured in the presence of his wife and nine month old child and, after about an hour of interrogation, whisked away in a private, passenger vehicle.

• After identifying Mushtaq Khan, the soldiers tortured him and his young wife, who was pregnant. An electric heater was used to give them shocks. Other family members were beaten for protesting. Mushtaq was tortured so badly that the soldiers had to carry him away.

• Mushtaq Dar was beaten up in the presence of his family.

\section*{Rescue Attempts Prior to the Petition}

Colonel SK Malik, Lieutenant Colonel A Malik, Major Vishwajeet Singh,\footnote{CO of Alpha Company, 20 Grenadiers, he is named in one case as the leader of the arresting party. He was awarded the Shaurya Chakra in 1998.} Major Rathore, Major Satpal, Major Rehman (or Rehmani), “Camp Officer” Raj Pal, “Commanding Officer” Raj Nath Singh and, Naib Subedar (or Subedar) Nazar Mohammad were named by the families as having been part of the arresting party or, officers whom they met after the arrest. In five of the nine cases, the arrest and custody was informally acknowledged by the officers.

• Mushtaq Dar’s family and neighbours were repeatedly assured by Colonel SK Malik and Major Vishwajeet Singh that he would be released.

• Shaban and Yehya Khan’s arrest was initially acknowledged by the CO of the 20 Grenadiers, who assured their family that both of them would be released shortly.

• Two or three months after Ashiq Husain Malik disappeared, Lieutenant Colonel A Malik asked Nazar Mohammad to “release” him. Nazar Mohammad opening a diary in which Ashiq Husain’s name was
mentioned as an arrestee and, showed it to Ashiq’s brother and his companion, one Mr Dar, a Congress worker.

- “CO” Raj Nath Singh and the Naib Subedar Nazar Mohammad assured Mushtaq Khan’s family that he would be released.

Nazar Mohammad was named by several families as an officer who approached them with offers to help them secure the release of their kin. Mushtaq Khan’s family paid him rupees ten thousand, which was not returned. Meharjuddin Dar’s family, also, paid him rupees ten thousand through the numbardar of their village (Tengpora), which too was never returned. Mushtaq Dar’s family paid Nazar Mohammad rupees twenty thousand, which they demanded and, got back, since he was unable to keep his part of the bargain.

Identification of the Arresting Unit

In none of the cases did the 20 Grenadiers identify themselves. In some cases the families recognised them as being from a nearby camp. In a few cases the forces at the local checkpoint identified them for the families. In one case, they were identified by the police. The slightest error in identifying the arresting unit/ officer was used to bolster the denial of arrest.

- In Meharjuddin Dar’s case, the identity of the arresting unit metamorphosed from ‘20 Grenadiers, stationed at the RR camp, Bemina’ to the ‘20 RR’, in the course of the filing of the petition before the High Court. The 20 RR did not file any reply to the habeas corpus petition but in reply to a query from the State Human Rights Commission (SHRC), the 20 RR, stated they had never been posted in Kashmir.\(^\text{10}\)

- In Ashiq Husain Malik’s petition, respondent no. 4 was named as “Mr A A Malik, Commander camp 20 Grenadiers”\(^\text{11}\). In response, almost four years later, the counter affidavit filed by the 20 Grenadiers claimed that—
  “there is no Officer named Mr AB A Malik (Respondent No 4’) is present in this unit (sic)”.\(^\text{12}\)

- In Nisar Wani’s case, the crackdown in which the arrest was made was stated to have been carried out by the 35 RR and the 20 Grenadiers, jointly. Both units denied the arrest. In addition, 35 RR claimed before the High Court that—
  “Batamaloo locality does not fall within the(ir) area of operation-s”.

\(^{10}\) Apart from filing a petition before the High Court, Meharjuddin Dar’s family, also, filed a complaint before the SHRC.

\(^{11}\) The “A A” came into existence due to a botched up attempt to correct a typing error by hand.

\(^{12}\) While this was probably true, there was no denying that a Lieutenant Colonel (or, a Colonel) A (Anil) Malik, was part of the 20 Grenadiers at that time.
**Inquiry Into the Allegation of Arrest**

The High Court ordered an inquiry in five cases.\textsuperscript{13}

- In the inquiry into Shahban and Yehya Khan’s disappearance, the Judge, initially, informed the High Court that the 20 Grenadiers could not be served notice of the Inquiry because their address was not on file.\textsuperscript{14} Later, the 20 Grenadiers appeared and, denied the arrest and, denied the “operation”.\textsuperscript{15} The Inquiry held that, prima facie, Shabhan and Yehya Khan were arrested on 16-17.4.97 by the 20 Grenadiers, after which their whereabouts were not known.

- In Ashiq Husain Malik’s case too, the Inquiry Judge wrote to the High Court stating that he was having difficulty in ensuring the presence of the 20 Grenadiers, delaying the inquiry. Here also, the 20 Grenadiers had contested the case, before the High Court. However, they did not participate in the Inquiry proceedings, despite repeated service of notice. The Inquiry report indicted the 20 Grenadiers, on the basis of the co-detainee’s testimony.

- In Nisar Wani’s case the 20 Grenadiers did not participate in the Inquiry proceedings.\textsuperscript{16} Further, Abdul Rashid, the SHO of the local police station, PS Batamaloo, was present on the spot along with a team of policemen, during the crackdown in which Nisar was arrested. He witnessed the torture and, took custody of some of those injured by the torture. However, the State government did not volunteer his testimony before the High Court or the Inquiry Judge. Nor did these authorities summon him. Based on eyewitness testimony, the Inquiry report indicted the 35 RR for Nisar’s disappearance.\textsuperscript{17}

- In Mushtaq Dar’s case, the 20 Grenadiers appeared before the Inquiry Judge a couple of times and, thereafter, lost interest in the proceedings.

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\textsuperscript{13} The inquiry in Shahban and Yehya Khan’s case was joint.

\textsuperscript{14} This was notwithstanding that 20 Grenadiers had been served in the petition before the High Court and, had filed a counter affidavit denying arrest.

\textsuperscript{15} They, also, denied a subsequent raid on Shahban Khan’s father-in-law’s house. They claimed that on that day they had been on a “R.O.P” on the Patan-Srinagar road during which they did not arrested anyone. However, they did not produce any record in support of this contention.

\textsuperscript{16} Both the 20 Grenadiers and the 35 RR were respondents to the petition. Both filed replies before the High Court, denying arrest.

\textsuperscript{17} The witnesses mentioned both, the 20 Grenadiers and the 35 RR. Based on identical testimony, the Inquiry Judge appointed by the High Court held against the 35 RR while the SHRC (Nisar’s family had, also, filed a complaint there) held the 20 Grenadiers liable.
Based upon testimony, the Inquiry report held that Mushtaq was arrested by the 20 Grenadiers and was, thereafter, in their custody.

The indifference of the 20 Grenadiers went beyond mere failure to participate in the inquiries ordered by the Court. In Nisar Wani’s case, based on the finding in the Inquiry report, the High Court ordered the police to register a case and investigate Nisar’s disappearance. In December 2002, the State government complained to the Court that ‘despite numerous letters and, summons u/s 160 CrPC, the 20 Grenadiers had failed to respond’. The police expressed its inability to complete its investigation in such circumstance. Again, in August 2003, the police complained of lack of cooperation. In January 2004, the High Court directed that a copy of its order of July 2003, should be sent, for ensuring compliance, to the Central Government and—

“Commanders at upper echelon of the Army organizational structure stationed at Udhampur/ Srinagar”,

Still failing to elicit the cooperation necessary to complete the investigation in the FIR, in March 2004, The Court threatened ‘stern action’ against the officers of the Central Government for their ‘laxity and persistent failure to comply with the directions’ and, asked the police to file particulars of the army officers and officers of the Home and Defence Ministry who should be proceeded against. The case was still pending in April 2004, with the situation unchanged.

It is appropriate to conclude this narrative with a reference to Montesquieu’s famous maxim - Law should be like death, which spares no one. Unfortunately, in Kashmir, the law spares everyone, while allowing death to stalk every Kashmiri.

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18 Section 160 of the J&K CrPC empowers the police to summon persons, to give information about the offence under investigation.