

Law, Governance and Gender in Indian-Administered Kashmir

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LAW, GOVERNANCE AND GENDER IN INDIAN-ADMINISTERED KASHMIR

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BACKGROUND

Kashmir¹ is among the modern world's longest running and most tragic conflicts; its genesis lies in the fateful events in the wake of the 1947 partition of the Indian subcontinent and a subsequent replication of the European version of the nation-state in South Asia.² On the eve of India independence in 1947 there were 565 Princely States,³ Kashmir being the largest. Though all such states theoretically reverted to sovereignty upon the withdrawal of colonial power, their real choices were confined to merger with either India or Pakistan. For most states, for reasons of geographic location and religion, accession to India was a foregone conclusion. There were, however, three exceptions to this general pattern of accession

¹ The Valley of Kashmir or Kashmir is among the three regions of the Indian-administered state of Jammu and Kashmir, the other two being Jammu and Ladakh. Unless indicated otherwise, Kashmir connotes the Kashmir Valley.

² For a greater explication of this argument see my *Between Democracy and Nation: Gender and Militarisation in Kashmir* (New Delhi: Women Unlimited, 2009), pp. 49–56.

³ The Princely States were not formally part of British India since their territory was not annexed by the British Government. In return for their recognition of and allegiance to the British Crown, the latter acknowledged the authority of these rulers over their respective fiefdoms.

and absorption. They were Kashmir, Junagadh and Hyderabad.⁴ Whereas Junagadh and Hyderabad had a Hindu majority population under a Muslim sovereign, Kashmir's Muslim majority was ruled by a Hindu Maharaja. Adding to Kashmir's significance were its contiguous territorial borders with the newly independent states of India and Pakistan, and common frontiers with China and Tibet.

Kashmir was not immune to the cataclysmic events of 1947 during which members of the Rashtriya Swayam Sevak Sangh (RSS), a Hindu right wing organisation, used the condition of Hindu refugees fleeing violence from north-west Pakistan as an opportunity to connive with the Maharaja's police in the massacre and expulsion of Muslims in Jammu's eastern districts. The crisis climaxed with the entry of several thousand tribesmen from the North West Frontier Province (NWFP) into the town of Baramulla on the road towards the capital Srinagar.⁵ Pleading inability to defend his kingdom, Hari Singh acceded to India on condition that Delhi send troops to defend his territory, with the understanding that this accession was provisional and conditional on the will of the people being ascertained as soon as law and order were restored.⁶ Hari Singh's decision to accede to India was immediately contested by Pakistan and led to the first India-Pakistan war over Kashmir during 1948. In the aftermath of the 1948 hostilities, a United Nations (UN) supervised cease-fire line (Line of Control or LOC) ended in the partition of Kashmir: the territories of Gilgit and Baltistan—approximately one third of the area of Kashmir—were occupied by Pakistan while Jammu, Ladakh

⁴ 'The Nawab of Junagadh opted for Pakistan but subsequent objections raised by India led to a referendum that established near unanimity in the state's accession to India. The Nizam of Hyderabad on the other hand, evaded a negotiated settlement which provided India an excuse to assimilate his territory into Indian Union by force.' Percival Spear (ed), *An Oxford History of India 3rd Edition* (Oxford: Clarendon Press, 1958), p. 241.

⁵ Sumantra Bose, *The Challenge in Kashmir: Democracy, Self-Determination and a Just Peace* (New Delhi: Sage, 1997), p. 26.

⁶ A.G. Noorani, *The Kashmir Question* (Bombay: Manaktalas, 1964), p. 31.

and the Kashmir Valley came under Indian control. This division of Kashmir achieved militarily by India and Pakistan in 1949 was neither reversed nor affirmed and presently constitutes the de-facto 'border' between India and Pakistan. Three UN resolutions (1948–49) called upon the governments of India and Pakistan to withdraw their respective forces from Kashmir's territory and hold a plebiscite in order to ascertain the wishes of the Kashmiri people. The plebiscite was eventually never held, thus denying the Kashmiri people the right to freely determine their political future. The rhetorical statement that Kashmir is 'an integral part of India' became the trademark of successive regimes in New Delhi. For Pakistan, Indian appropriation of Kashmir symbolised its unjust and illegal occupation of territory that, in Pakistan's view, was rightfully hers.

India has sought to legalise control over Indian-administered Kashmir since 1947. Constitutionally, Indian jurisdiction in Kashmir was limited to the areas of defence, foreign affairs and communication.⁷ Over the years, however, it was extended to areas beyond those spelled out in the constitution. The progressive erosion of Kashmiri autonomy by successive regimes paralleled extraordinary curbs on civil liberties: freedom of speech and assembly in Kashmir could be suspended at any time; no judicial reviews of such suspensions were permissible.⁸ Kashmiri leader Sheikh Abdullah's articulation of the independence option that remained unresolved and therefore open to consideration was interpreted as high treason by the Indian establishment, ending in his dismissal and imprisonment. After twenty-three years of enforced political oblivion by New Delhi, during which Kashmir's autonomy was systematically and substantively eroded, Sheikh Abdullah concluded an agreement with New Delhi whereby Kashmir's 'special status'

⁷ The jurisdiction of the Supreme Court of India did, however, extend to Kashmir.

⁸ See K.G. Kannabiran, 'The Slow Burn' in *The Illustrated Weekly Of India* (1990).

became a mere formality. In a 1975 agreement between both leaders, Kashmir was ‘made a constituent unit of India ... legitimising the usurpation of the right of self-determination and thereby making India and Pakistan the arbiters of Kashmir’s destiny.’⁹ With the legal incorporation of Kashmir as a constituent of India, the option or possibility of self-determination virtually ended. The 1975 accord did, however, ensure Kashmir’s first reasonably free and fair elections during 1977, voting in an administration headed by Sheikh Abdullah until his death in 1982. In the 1984 elections, Sheikh Abdullah’s son Farooq Abdullah won a decisive mandate in the state assembly elections subsequently subverted by Mrs. Gandhi’s dismissal of his legitimately elected government. New Delhi’s subversion of democracy in Kashmir was followed by Abdullah mending fences with the Congress regime in New Delhi—an alignment that prompted the formation of a broad coalition of political groups under the banner of the Muslim United Front (MUF) opposed to both the Congress in New Delhi and Abdullah’s party, the National Conference, in Kashmir. Popular resentment against the Abdullah regime deepened during the 1987 elections that were marred by allegations of rigging (electoral fraud). The allegations were never investigated even as the arrest of several MUF leaders fuelled widespread public outrage across Kashmir. The exact impact of electoral malpractice on the eventual outcome remained uncertain, yet 1987 proved to be a turning point for politics *in* Kashmir. In the eyes of Kashmir’s citizens and opposition parties, the election was perceived as fraudulent and illegitimate. Many opposition candidates drew the conclusion that ‘democratic’ politics offered no channels for the redressal of Kashmiri grievance. The words of Abdul Ghani Lone—a Kashmiri opposition leader—encapsulated the roots of popular anger against ‘democracy’ in Kashmir:

⁹ Bose et al. *India’s Kashmir War* (New Delhi: Committee for Initiative on Kashmir, 1990), p. 35.

It was this [subversion of democracy] that motivated the young generation to say ‘to hell with the democratic process and all that this is about’ and they said, ‘lets go for the armed struggle.’¹⁰

By 1989–90, democratic channels to articulate popular grievance in Kashmir were not available. The slogan of *azadi* (freedom) symbolised not just popular resentment and protest against the denial of democracy in Kashmir, but also ‘freedom’ from Indian rule over Kashmiri land. As simmering resentment transformed into mass rebellion, the response of the Indian state centred on militarily-backed repression.

Pakistan exploited Kashmiri grievances against India towards its own ends by providing arms and training to a number of militant groups. Kashmir’s movement for independence—spearheaded by the Jammu and Kashmir Liberation Front (JKLF) during the early 1990s—could not survive the joint onslaughts of India and Pakistan. India’s policy of militarised repression, imprisonment of the JKLF’s political leadership, and a ban on the organisation was matched by Pakistan’s ruthless pursuit of JKLF cadres through the *Hizbul Mujahideen* (HM) and other militant factions favouring either a theocratic state or Kashmir’s merger with Pakistan. Pakistan’s use of militant groups against Indian security forces successfully appropriated a struggle against state tyranny to reinvent the Kashmiri struggle in denominational terms—a policy that thoroughly undermined the moral and political cause of the very people it championed. It also provided the Indian state an opportunity to reduce Kashmir’s struggle as one between secular India and ‘fundamentalist’ Pakistan¹¹—a distortion that cast Kashmir’s citizens as ‘not just disloyal to India,

¹⁰ Sten Widmalm, *Kashmir in Comparative Perspective: Democracy and Violent Separatism in India* (London: Routledge Curzon, 2002), p. 80.

¹¹ ‘Such an effort is a ... recreation of the enemy in the shape of India’s choice. A force that fights for Kashmiri nationalism would be difficult for India to de-legitimise morally. It would be difficult to argue before the world in defence of India’s war against such a people. But a force that fights for unification with Pakistan is an easier target in this sense, especially because the West fears[s] pan-Islamism these

but much worse, in league with the enemy state across the LOC.¹² The political neutralisation of the JKLF did not render the scenario any less daunting for either state. India had to contend with a *local* sentiment whose desire for independence remains undimmed. Pakistan's success at marginalising the JKLF was short-lived as it struggles to rein in the forces it unleashed in Kashmir—forces that threaten Pakistan's own polity.

For the past few years, Pakistan's diminishing role in Kashmir and the tapering off of militancy-related violence in the Valley has paralleled the emergence of duly elected local regimes¹³ acquiescent with New Delhi's policy of retaining Kashmir within the Indian Union. Elections for Kashmir's legislative assembly in 2008 were hailed as popular endorsement for the status quo and a legitimisation of state claims to 'normality' in the Valley. Yet, the relatively narrow support base of mainstream political parties,¹⁴ the political marginalisation of shades of opinion opposed to the status quo, continuing curbs on freedom of expression and assembly, punitive repressive measures to stifle public expressions of dissent, and resort to arbitrary detention of the separatist leadership imparts a tenuous and deceptive veneer of 'normality' in Kashmir.

Two important shifts in the movement have taken place since 2008. First, there is widespread disenchantment with Pakistan and

days. India therefore prefers a Kashmiri fundamentalist over a Kashmiri nationalist, and a pan-Islamist fundamentalist over a Kashmiri fundamentalist as its enemy. That Pakistan is also interested in the same transformation brings about the strange unity of aims between these two supposed enemies.' *Blood in the Valley, Kashmir: Behind the Propaganda Curtain: A Report to the People of India* (Bombay: Lokk Shahi Hakk Sangathana, 1995), p. 63.

¹² Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (New Delhi: Vistaar, 2003), pp. 112–113.

¹³ Elections for Kashmir's state assembly were held in 2002 and 2008.

¹⁴ The National Conference is presently in power in Kashmir with support from the Congress Party. The People's Democratic Party (PDP) is the main mainstream opposition party.

Pakistan-backed militant groups in Kashmir who, contrary to earlier perceptions, are increasingly perceived to be a liability for the struggle. For instance, in 2010, the JKLF accused the *Jamaat-ud-Dawa* (JD)—a Pakistan-based charity believed to be the parent organisation for *Lashkar-e-Tayyaba* (LeT)—of ‘subverting the indigenous movement.’¹⁵ More recently, in 2011, Ali Shah Geelani—a pro-Pakistan separatist leader—advised Pakistani Foreign Minister Hina Rabbani Khar to set her own government’s house in order before approaching the Kashmir issue.¹⁶ A second significant shift relates to the notable transition in the *form* of resistance movement. Large, peaceful demonstrations have replaced an earlier phase of armed conflict characterised by attacks against Indian military targets by various Kashmiri militant groups. Despite a continued military presence and skirmishes between Indian soldiers and alleged infiltrators from Pakistan on the Line-of-Control, the protests have become more democratic and mature; Kashmiris have taken to the streets in rallies to protest Indian rule. Protests are generally spearheaded by Kashmiri youth who have consciously chosen mass protest as a means to express dissent against the status-quo. On 18 August 2008, huge numbers of Kashmiris came out on the streets of Pampore and Srinagar; they waved banners, chanted slogans, demanded *azadi* and urged India

¹⁵ Zulfiqar Ali, Pakistani militants ‘highjacking’ Kashmir cause. BBC News. Available at <http://www.bbc.co.uk/news/world-south-asia-11425831>. Accessed 22 August 2011.

¹⁶ ‘Geelani’s mind-your-own-business-first counsel [ame] in the midst of mounting Kashmiri disenchantment with untamed internal disorder in Pakistan... [He] is telling them they are no longer in a position to do so because they have lost both stability and credibility as a nation... During his dialogue with Hina Khar’s delegation, Geelani expressed disappointment with Islamabad’s handling of Balochistan at some length and told them that neither a military campaign nor handing out economic packages could suppress Balochi political aspirations. Geelani has been arguing quite on the same lines with New Delhi in relation to Kashmir’. See ‘Set Your House in Order: Geelani Talks Tough With Hina’, *Kashmir Monitor* (August 5, 2011).

to get out of Kashmir. Popular dissent is also expressed frequently through artistic means.¹⁷ Both shifts symbolise re-invigoration of a movement that has experienced periods of profound despondency, disillusionment and fragmentation. An editorial in the Kashmiri daily *Greater Kashmir* dated August 20, 2008 summed up the significance of the transformation of an armed rebellion into a peaceful mass protest movement:

The conducting of such a mammoth public meeting suggests that the people of Kashmir, after having passed through various phases of struggle, have matured enough to take their struggle to its logical conclusions through peaceful means.¹⁸

In contrast to the change regarding the nature of the movement, military presence in Kashmir has remained fairly constant. It is both useful and necessary to situate the issue of law and governance in Kashmir within the context of an extraordinary military presence. The Kashmir Valley is the smallest albeit the most densely populated region of the state of Jammu and Kashmir with a population of approximately 4 million people. The total area of the Valley is 8,639 square miles.¹⁹ By 1990—the first year of Kashmir’s rebellion, there were approximately 150,000 soldiers in the Valley—seventeen for each square mile and one for every twenty-seven civilians.²⁰ By 1993,

¹⁷ For instance, Malik Sajad, a cartoonist, is part of the growing artistic expression of dissent. Rapper MC Kash brings the protest movement to music. His 2010 song, ‘I Protest (Remembrance)’, was adopted as a protest anthem and gained attention within and outside of Kashmir. There is an increasing literature of dissent authored by Kashmiris exemplified by the anthology *Until My Freedom Has Come* (New Delhi: Penguin, 2011).

¹⁸ *Greater Kashmir* dated 20 August 2008 quoted in Prem Shankar Jha ‘No Peace At Gunpoint’ in *Outlook Magazine* (1 September 2008).

¹⁹ Ministry of Home Affairs, Government of India. <http://mha.nic.in/ove.htm>. Accessed 07/11/2005

²⁰ *Undeclared War on Kashmir* (Bombay: Andhra Pradesh Civil Liberties Committee 1991), p. 10.

‘six Indian Army divisions were operating in Kashmir with a total strength of 130,000. In addition, there were almost an equal number of paramilitary forces comprising the Border Security Force (BSF), the Central Reserve Police Force (CRPF) and the Indo-Tibetan Border Police (ITBP)’; according to two independent estimates there were approximately 400,000 soldiers in Kashmir representing ‘just under half or 44 percent of total Indian army strength,’ with ‘almost one soldier for every ten Kashmiris’.²¹ In 2004, the estimate ranged between 500,000—700,000 soldiers—with roughly one soldier for every ten civilians making ‘the Kashmir Valley the most heavily militarised place in the world.’²² There are no official figures regarding troop deployment in Kashmir, though there is general agreement among independent analysts that the total number of troops in Kashmir is at least 500,000.

LAW AND GOVERNANCE IN KASHMIR

Since 1990, Kashmir has been subject to a range of legislative provisions. Among them, three are germane to this discussion, namely, the Jammu and Kashmir Armed Forces Special Power’s Act (AFSPA), the Disturbed Areas Act (DSA), and the Public Safety Act (PSA).²³ All three pieces of legislation are the outcome of the privileging executive and military authority over legal and judicial process in Kashmir; their selective application in Kashmir

²¹ Nils Bhinda, ‘The Kashmir Conflict (1990—)’ in Michael Cranna (ed.) *The True Cost of Conflict* (London: Earthscan, 1994), p. 66.

²² Etienne Jaudel, *Violations of Human Rights Committed by the Indian Security Forces in Jammu and Kashmir* (Paris: FIDH, 1993), p. 4; See also Pankaj Mishra, ‘Death in Kashmir’, *New York Review of Books* 47(14) and *Wounded Valley Shattered Souls: Women’s Fact finding Commission Probing Army Atrocities on Women and Children* (Bombay: The Indian People’s Tribunal on Environment and Human Rights, 1997), p. 18.

²³ Although TADA lapsed in 1995, detainees continue to be charged under TADA on the claims that the crime was committed before TADA was repealed.

underscores the great chasm in law and legal process between Kashmir and India.²⁴

The Jammu and Kashmir Armed Forces Special Powers Act (AFSPA) is linked to the Disturbed Areas Act; both have been in force in Kashmir since September 1990. The AFSPA grants the power to declare an area ‘disturbed’ to the central government and the state Governor. The declaration that an area is disturbed is based entirely on the government’s subjective understanding of what constitutes disturbance²⁵—the sole requirement of which is that such authority be ‘of the opinion that whole or parts of the area are in a dangerous or disturbed condition such that the use of the Armed Forces in aid of civil powers is necessary.’²⁶ In contrast to the Emergency provisions of the Constitution (wherein fundamental rights may be suspended) that mandate a Presidential proclamation and subsequent endorsement by Parliament, no such constitutional pre-requisites are necessary for promulgating the AFSPA.

In an area declared ‘disturbed’ under the AFSPA, security forces and the police²⁷ have unrestricted and unaccounted power to

²⁴ ‘Although the basic structure and laws are the same, a crucial exception is the application to Kashmir of counter-insurgency laws such as the Armed Forces Special Powers Act, Disturbed Areas Act, and the Public Safety Act’. For an extended analysis regarding these points see *The Myth of Normalcy: Impunity and the Judiciary in Kashmir*, Alfred K. Lowenstein International Human Rights Clinic (Yale Law School 2009), pp. 1–4.

²⁵ ‘In this Act, ‘disturbed area’ means an area which is for the time being declared by notification under section 3—to be a disturbed area’. Jammu and Kashmir Disturbed Areas Act, 1992.

²⁶ Ibid.

²⁷ ‘In a ‘disturbed area’, any Magistrate or Police Officer not below the rank of Sub-Inspector or Head Constable in case of the Armed Branch of the Police may, if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning, as he may consider necessary, fire upon, or otherwise use force, even to the causing of death, against any person who is indulging in any act which may result in serious breach of public order or is acting in contravention of any law or order for the time being in force, prohibiting the assembly of five

undertake operations in order to ‘maintain public order.’ The military is empowered to search homes and arrest citizens without warrant, destroy homes and villages, and shoot unarmed civilians with the intent to kill.²⁸ Both the DSA and the AFSPA use identical language to provide immunity²⁹ to members of the security forces guilty of the above-mentioned violations. Although India’s Supreme Court has clarified that the immunity conferred by this Act does not cover criminal acts, the record of the central government in this regard is poor: it has repeatedly refused legal proceedings even in those cases where there is substantive and clear evidence to prove the charges.³⁰ In cases where the state government has indicated willingness to initiate prosecution proceedings against state personnel, it was overruled by the central government. In 2005, the state government in Kashmir made almost 300 requests for permission to prosecute public servants, including members of the security forces: none were granted.³¹ Since the AFSPA is exempt from judicial review, citizens have no legal

or more persons or the carrying of weapons or of things capable of being used as weapons or of fire arms, ammunition or explosive substances’. The Jammu and Kashmir Disturbed Areas Act 1992.

²⁸ According to Section 4 of AFSPA ‘The army can arrest anyone without a warrant under section 4(c) who has committed, is suspected of having committed, or of being about to commit, a cognisable offense and use any amount of force ‘necessary to effect the arrest.’ *Armed Forces Special Powers Act: A Study in National Security Tyranny* (New Delhi: South Asia Human Rights Documentation Centre). Date unspecified.

²⁹ ‘No prosecution, suit or other legal proceedings shall be instituted, except with previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.’ Jammu and Kashmir Disturbed Areas Act and Armed Forces Special Powers Act quoted in *Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir* (New York: Human Rights Watch) 18(11C), p. 30.

³⁰ The evasion of justice by Major Avtar Singh—responsible for the killing of Dr. Jilil Andrabi is a case in point.

³¹ Human Rights Watch, *Everyone Lives in Fear* (2006) quoted in Seema Kazi, *Between Democracy and Nation: Gender and Militarisation in Kashmir* (New Delhi: Women Unlimited, 2009), p. 105.

remedy to challenge the law or their detention within it. Civilian victims of abuse by security forces find it extremely difficult, if not totally impossible, to file a First Information Report³² (FIR) with the local police against security forces. The police, on their part, plead inability to file an FIR saying they are under instructions from 'higher authorities' not to do so.³³ A report by the Yale Law School noted:

Victims intending to seek legal remedies for human rights abuses are often prevented from filing an FIR by police officers who decline to issue one. A 1992 circular, instructed Kashmiri police stations, contrary to the requirements of the Code of Criminal Procedure, to stop filing FIR's against security forces without the approval of higher authorities... [A] lawyer in Srinagar recalled a client who approached the police to request an FIR; the police denied the request and informed him that they would cooperate if he changed the FIR to name 'unidentified gunmen,' and not security forces, as the perpetrators.³⁴

In cases where an FIR has been duly filed by the police, lack of cooperation on the part of the military prevents the police

³² An FIR is an official record filed by a complainant in a police station regarding an alleged criminal offence. Procedurally, it is the first step before investigation and trial.

³³ In one of the earliest reports on Kashmir, Patanjali Vardarajan documented the inability and/or unwillingness of the police to register FIRs on behalf of victims. See Vardarjan, *A People Terrorised: Extrajudicial Executions, Rape, Arbitrary Arrests, Disappearances and other Violations of Basic Human Rights by the Indian Security forces in Indian-administered Kashmir* (Paris: FIDH, 1993), p. 24. That this trend continues is evident from a 2009 Yale Law School report: 'A 1992 circular [Letter No: SP (5exg/267881 dated 14.4.1992)] instructed Kashmiri police stations, contrary to the requirements of the Code of Criminal Procedure, to stop filing FIRs against security forces without the approval of higher authorities'. This trend was also confirmed by a number of lawyers interviewed for the report. See *The Myth of Normality: Impunity and the Judiciary in Kashmir* (Allard K Lowenstein International Human Rights Clinic: Yale Law School, 2009), pp. 11–12.

³⁴ Ibid.

from conducting an investigation. Security forces operate their own network of detention and interrogation centres that are beyond judicial scrutiny. The ambiguity regarding the definition of ‘least possible delay’ between the arrest and handing over of a person to a police station effectively translate into arbitrary detention at the hands of security forces known to hold detainees for indefinite periods of time.³⁵ Since the military usually holds detainees in detention centres rather than in jails, such detentions are not documented. This, in turn, prevents citizens from seeking and receiving information regarding detainees, and from taking recourse to the writ of habeas corpus meant to protect citizens from institutional abuse. Kashmir’s courts have an exceedingly high backlog of habeas corpus³⁶ petitions: in 2006, according to the Jammu and Kashmir High Court Bar Association, there were 60,000 habeas corpus petitions filed by individuals since 1990 and 8000 cases of enforced disappearance.³⁷

Military authorities neutralise the writ of habeas corpus by denying custody of the disappeared.³⁸ According to an Association of the Parents of the Disappeared (APDP) member:

³⁵ ‘There is no definition in the act of what constitutes the least possible delay. Some case-law has established that 4 to 5 days is too long. But since this provision has been interpreted as depending on the specifics circumstances of each case, there is no precise amount of time after which the section is violated. The holding of the arrested person, without review by a magistrate, constitutes arbitrary detention.’ *Armed Forces Special Powers Act: A Study in National Security Tyranny*. Op cit.

³⁶ Habeas corpus petitions can only be filed by those who have access to a lawyer and the courts.

³⁷ Human Rights Watch, *Everyone Lives in Fear* quoted in Kazi, *Between Democracy and Nation*, p. 106.

³⁸ Hundreds of *habeas corpus* rulings ordering the security forces to produce detainees in court have been ignored. This crisis is symptomatic of the magnitude of Kashmir’s human rights crisis where such a fundamental protection under the law is treated by government officials with contempt. See *Behind The Kashmir Conflict: Abuses by Indian Security Forces and Militants Continue* (New York: Human Rights Watch, 1999), p. 2.

When the relatives approach the security officials, they usually receive assurances that their relatives will be released shortly. This never happens. After a few visits the relatives are told that the people they are looking for were not even arrested. The local police almost never file an FIR.³⁹

In instances where charges have been filed against the military, soldiers have the freedom to transfer their case from civil to military courts where they expect greater leniency. Military trials are not held in public and lack accountability in the eyes of civilian victims of human rights abuse by the military.⁴⁰

The AFSPA violates Indian law on several counts. Section 4(c) of the AFSPA allows for arrest without warrant in violation of the right to be informed of the reason for arrest and be produced before a magistrate within 24 hours of being arrested (Article 22(5) of the Constitution of India).⁴¹ Similarly, Section 4(a) of the AFSPA—allowing the use of lethal force—violates the constitutional right to life (Article 21)⁴²; its selective application in Kashmir is a violation of the constitutional right to equality before the law (Article 14). The exemption of the AFSPA from judicial review violates the

³⁹ ParvezImroz, Patron, APDP quoted in Kazi, *Between Democracy and Nation*, p. 107.

⁴⁰ See *The Myth of Normalcy*, p. 16.

⁴¹ Article 22 of the Indian Constitution states that '(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.'

⁴² Article 21 of the Indian Constitution reads 'No person shall be deprived of his life or personal liberty except according to procedure established by law'. Judicial interpretation that 'procedure established by law means a 'fair, just and reasonable law' has been part of Indian jurisprudence since the 1978'. See *Act Armed Forces Special Powers Act: A Study in National Security Tyranny*. Op cit.

right to move the Supreme Court of India to enforce constitutional rights (Article 32 [1]).⁴³ Further, in contrast to the Indian Code of Criminal Procedure (CrPC) which allows for the dispersal of an assembly by commissioned and gazetted⁴⁴ officers through use of civil force (without explicit mention of lethal force), the AFSPA allows non-commissioned⁴⁵ officers to use maximum force to disperse an assembly to the extent of causing death. Similarly, in contrast to the CrPC (Section 129–131) that defines the term ‘assembly’ as one that ‘manifestly endangers’ public security, the AFSPA classifies *all* assemblies as unlawful, thereby justifying the dispersal of legitimate, peaceful assemblies by coercive force.⁴⁶ The AFSPA also violates international human rights law including the right to life, the right to be free from arbitrary deprivation of liberty,⁴⁷ and from torture and cruel, inhuman or degrading punishment⁴⁸ affirmed in the International Covenant on Civil and Political Rights (ICCPR) to which India has acceded.

The Jammu and Kashmir Public Safety Act (PSA) of 1978 is a parallel piece of legislation used by state administrative authorities for detention without trial for a period of two years. The detaining authority in this case is the civil administration, or more specifically, the Divisional Commissioner or District Magistrate.⁴⁹ The PSA grants state authorities, including the state police, the power to

⁴³ Ibid.

⁴⁴ A gazetted officer is a higher level civil servant. His or her appointment is notified in the Indian or state government gazette.

⁴⁵ A subordinate officer of the military not considered to be in command.

⁴⁶ ‘The AFSPA grants wider powers than the CrPC for dispersal of an assembly.’ *Armed Forces Special Powers Act: A Study in National Security Tyranny*.

⁴⁷ ICCPR art 9(1).

⁴⁸ India has signed but not ratified the Convention against Torture. By signing India indicates her intent to refrain from ‘violating the object and purpose of the treaty, one of which is to ensure that competent authorities promptly and impartially examine all alleged cases of torture’. *The Myth of Normalcy*, p. 7.

⁴⁹ Both are executive, not judicial officers.

detain individuals; it provides immunity⁵⁰ from prosecution to state employees even when their actions violate provisions of the PSA.⁵¹ Sections 8(1)(a) and 8(3)(b) of the PSA—under which a majority of civilians are detained—allow detention for persons ‘acting in any manner prejudicial to the security of the State’ and/or for ‘acting in any manner prejudicial to the maintenance of public order’ respectively. Much like the ambiguity regarding the definition of a ‘disturbed area’ in the AFSPA, there is no clear legal definition of the ‘security of the state’ or acts deemed as ‘prejudicial to the maintenance of public order.’ Such ambiguities invest the authorities with sweeping powers to detain individuals without trial for two years while severely diminishing the possibility of detainees contesting the legality of their detention. Like the AFSPA, the PSA offers no scope for judicial review of the grounds for detention or any appeal process for detainees.⁵²

Detentions under the PSA have registered an increase over the past few years.⁵³ The rise in PSA detentions over the past few years⁵⁴ has been coterminous with forceful albeit peaceful expressions of public dissent against the status quo during the period 2009–2010. The administration’s resort to, and reliance on, the PSA must accordingly be viewed in relation to this particular dimension. The

⁵⁰ Section 22 of the PSA prohibits any ‘criminal, civil or any other legal proceedings... against any person for anything done or intended to be done in good faith in pursuance of the provisions of the Act.’ *A Lawless Law: Detentions Under the J&K Public Safety Act* (London: Amnesty International, 2011), p. 22.

⁵¹ Such as the review of police evidence against the detainee by an executive officer and the provision of the grounds of detention to the detainee. Both are routinely flouted. See *A Lawless Law*, Op cit, p. 24.

⁵² *Ibid.*, p. 18.

⁵³ ‘The Chief Minister informed the J&K Legislative Assembly in October 2010 that 724 people had been detained in 2009 and 2010, of which 322 has been detained between January and September 2010 ... The J&K Home Department was reported to have provided details of 334 persons booked under the PSA during the period 5 January 2010—14 February 2010.’ *Ibid.*, p. 13.

⁵⁴ The figures quoted by Amnesty International in *A Lawless Law* corroborate this trend.

movement's transition from armed revolt to peaceful mass protest, together with a marked reduction in Pakistan-backed incursions from across the LOC, greatly contradicts the official establishment position on Kashmir in three vital respects. First, mass peaceful protests are clear evidence and emphatic affirmation of Kashmiri grievance that India has long denied. Second, such protests contest the Indian state's consistent conflation of Kashmiri resistance with Pakistan-backed and orchestrated Islamist terror. Third, the protests are as much an opposition to a repressive status quo as they are a rejection of Indian claims to sovereignty over the Kashmir Valley. For precisely these reasons, the PSA is used against those who publicly support the demand for freedom from Indian rule in Kashmir, including members of Kashmir's separatist leadership. In this regard, the wording of the PSA order against Masarat Alam Bhat (2008), Chairman of the Jammu and Kashmir Muslim League, is particularly instructive:

In order to overcome the menace of terrorism and secessionism, a holistic approach is needed to be adopted wherein besides legal action preventive detention will be a very effective tool against the persons having the potential, will, commitment and urge to challenge the integrity and sovereignty of the state.⁵⁵

In effect, the PSA is not merely an expedient 'legal' tool for the purposes of preventive detention; it is as much a *political* tool to stifle public expressions of Kashmiri resistance and aspiration and, by extension, obscure the core underlying issue of the dispute in Kashmir. The PSA functions as a 'legal' fig-leaf to camouflage institutional subversion and the denial of the right to free speech and assembly in Kashmir. Amnesty International (2011) note the link between both:

⁵⁵ Grounds of detention of Masarat Alam Bhat issued by the District Magistrate (DMS/PSA/20/2008), 9 September 2008 quoted in *A Lawless Law*, p. 9.

Instead of using the institutions, procedures and human rights safeguards of ordinary criminal justice, the authorities are using the PSA to secure the long-term detention of political activists...or other individuals against whom there is insufficient evidence for a trial or conviction—to keep them ‘out of circulation.’⁵⁶

Between 2002 and 2006, the government detained 2,700 under the PSA; during the period January–April 2008, 117 cases of detention under PSA were instituted in the Srinagar High Court under the PSA.⁵⁷ From January to September 2010, 322 people were reportedly detained under the PSA.⁵⁸ Detainees are mainly political activists and members of civil society including children. They are typically picked up for ‘unofficial’ interrogation, during which time they have no access to a lawyer or to their families. Once in formal custody, they are trapped in a cycle of detention; upon expiry of one detention order the detainee is rearrested on ‘new charges;’ as a result, detainees may be held indefinitely without trial.⁵⁹ Nazir Ahmed Ronga, the Kashmir High Court Bar Association president summed up the illegality and illegitimacy of legal process in Kashmir:

The judiciary [is] facing a big challenge in Kashmir in contemporary times. The challenge is not from people or militants but from the lawmakers themselves. Government and its agencies are challenging the acquittal orders ... by the courts. Even if a court orders the release of a detainee, he is arrested and implicated in false charges. Kashmir has been turned into a jail by the government where there is no accountability for human rights abuses by different agencies.⁶⁰

⁵⁶ Ibid., p. 4.

⁵⁷ All figures from *Greater Kashmir*, 23 April 2008.

⁵⁸ Amnesty International, *A Lawless Law*, p. 5.

⁵⁹ Unless stated otherwise, all information in this para from *Behind the Kashmir Conflict: Abuses by Indian Security Forces and Militants Continue* (Human Rights Watch, New York, 1999), p. 2.

⁶⁰ Nazir Ahmed Ronga, President, Kashmir High Court Bar Association, quoted in ‘Pak Can’t Sideline Kashmir,’ *Greater Kashmir* (4 April 2008).

The PSA obstructs and impedes due process in several ways. Habeas corpus petitioners do not receive a ruling on their petitions until the detention period has lapsed leading to inordinate and protracted delays, and a grave undermining of the very purpose of the very writ of habeas corpus.⁶¹ In order to avoid conflict with a Supreme Court ruling declaring re-arrest of a person on similar grounds as illegal, the authorities re-invoke the PSA against a detainee upon release with a slight modification in the original charges to justify re-arrest.⁶² Indian law (Article 22 [1] and [2] of the Indian Constitution) affirms the right to be produced before a magistrate within 24 hours of arrest and the right to be represented by a lawyer, yet this right is waived for detentions under the PSA.⁶³ Further, Section 13(1) of the PSA allows five days for the communication of the detention with a proviso to extend the same to ten days in ‘exceptional circumstances’ without clarification as to what these might be—an ambiguity that legitimises detention without charge.⁶⁴ Both provisions, namely, detention without charge, and non-disclosure of facts related to detention, violate Article 9 of the International Covenant for the Protection of Civil and Political Rights (ICCPR)⁶⁵ signed and ratified by India in 1979. The PSA further contravenes the United Nations Convention on the Rights

⁶¹ *The Myth of Normality*, p. 31 and p. 35.

⁶² ‘PSA Has Been Abused: Law Minister’, *Rising Kashmir* (30 January 2009).

⁶³ Amnesty International, *A Lawless Law*, p. 16.

⁶⁴ *Ibid.*, p. 17.

⁶⁵ Article 9(1) of the ICCPR reads: ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’ International Covenant on Civil and Political Rights PDF version <http://www2.ohchr.org/english/law/pdf/ccpr.pdf>. ‘In 2008, the UN WGAD ruled that 10 individuals detained under the PSA in Jammu and Kashmir had been arbitrarily detained in violation of articles 7,9,10 and 11(!) of the Universal Declaration of Human rights and Articles 9 and 14 of the ICCPR. It called on the Government of India to bring its laws in conformity with its international human rights obligations.’ *A Lawless Law*, p. 15.

of the Child that India ratified in 1992 by treating boys above the age of sixteen as adults; there are a number of cases of children detained during demonstrations for alleged stone-pelting.⁶⁶

Both the AFSPA and the PSA raise grave concerns regarding the legal basis of legislation and governance in Kashmir. If the principle of legality derives from clearly defined laws and legal procedures, then the PSA and AFSPA fall well short of this principle. Both pieces of legislation violate the inalienable right to life; their ambiguity and vagueness regarding the definition of, for instance, ‘disturbed areas’ (AFSPA); or ‘security of the state’ and ‘maintenance of public order’ (PSA) do not provide a clear legal basis for punitive action by military and executive authorities against civilians. Amnesty International’s concern regarding the legality of the PSA is equally valid for the AFSPA:

The PSA violates the principle of legality, that is, that laws should be clear and their grounds and procedures be established by law. The PSA’s operative provisions are so broad and vague that they fall foul of this basic principle.⁶⁷

In general, by placing the AFSPA and the PSA beyond judicial review, the state has ‘legalised’ a gross imbalance of power between citizens and the state in Kashmir, and put in place a security-centric system of governance that re-empts the possibility of public accountability for institutional abuse against civilians by state forces and/or government employees. Both laws violate a range of constitutional and international legal provisions (see above) and symbolise official disregard, if not contempt, for law and legal process governance in Kashmir.

Since 1990, the discourse and practice of governance in Kashmir has been explicitly state (read security) centric. Issues such as the

⁶⁶ *Ibid.*, p. 23.

⁶⁷ *Ibid.*, p. 16.

continuing political impasse in the state, violence by state forces against civilians, the denial of the right to free speech, assembly and protest are framed within a state security perspective with little or no regard for citizens' concerns or priorities. The security of the state, in other words, is privileged over the security, dignity and liberty of citizens in Kashmir. The arbitrary and prolonged suspension of civil liberties in Kashmir⁶⁸ is an extraordinary measure without parallel elsewhere in India. As K.G. Kannabiran noted:

Freedom of speech, assembly and association in the state [can] be suspended at any time on 'grounds of security'. No judicial reviews of such suspensions [are] allowed ... What ... India experienced for a brief period...during Mrs. Gandhi's emergency ... Kashmir has suffered for ... years. We cannot deny a people rights that flow out of citizenship, and then expect their allegiance.⁶⁹

Notwithstanding the changes in the resistance movement and the 2008 state assembly elections, Kashmir's civilians are not free from violence and abuse by security forces and the police, repressive legislation such as the AFSPA and PSA remains firmly in place,

⁶⁸ India's constitution guarantees judicially enforceable fundamental rights, including the right to freedom of speech, political affiliation and against arbitrary arrest or detention. Fundamental rights, however, are not inalienable, and may be suspended (Article 357). In the wake of Kashmir's 1990 uprising, civil society organisations were raided, political parties and public gatherings banned, with wide-spread use of preventive detention and blatant disregard for the right to habeas corpus. The ban on political parties has since been revoked, but the ban on public gatherings, free speech, the right to be free from unlawful detention, and the right to a fair trial remain suspended. The Jammu and Kashmir Public Safety Act (1978), the Jammu and Kashmir Criminal Law Amendment Act (1983), the Terrorism and Disruptive Activities Act (1987), (in force in Kashmir till 1995), together with the Armed Forces Special Powers Act (Jammu and Kashmir), contravene, respectively, the right to be free from arbitrary detention, the right to political affiliation and opinion, the right to freedom of speech and the right to life. For more details see *Blood in the Valley*, pp. 94–99 and p. 101, and Schofield, *Kashmir in Conflict*, pp. 170–172.

⁶⁹ K.G. Kannabiran, 'The Slow Burn', *The Illustrated Weekly of India* (1 July 1990).

unlawful killings and detentions continue, the judiciary remains subservient to executive and military authority, and the right to freedom of speech and assembly remain suspended. A repressive institutional context is reinforced by a coercive and intrusive military presence encroaching deeper into civilian domains of governance. The civil-military interface is typified by the army's 1998 Operation Sadbhavna, aimed at winning hearts and minds of the people where the army is deployed.⁷⁰ The shift is informed by a security-centric practice of governance underpinned by the army and security forces with no role or scope for citizens in shaping or altering the same:

With the army at the bottom of the Indian policy pyramid and regular elections at the top, the middle is filled with a series of social engineering projects run and managed by almost all arms of the state civil administration, most notably the police force.⁷¹

For over two decades, a security-oriented policy and practice of governance privileging military authority has severely undermined civil and judicial process in Kashmir. Gender-specific violence by security forces against women in Kashmir is telling demonstration of a governance machinery more concerned with perpetuating the power imbalance between citizens and the state than on dispensing security and justice to citizens.

GENDERED VIOLENCE, POLITICS AND LEGAL PROCESS IN KASHMIR

Soon after the beginning of the armed revolt in 1989–90, the impasse between the Indian state and the people of Kashmir transformed into

⁷⁰ See Counterinsurgency and Operation Sadbhavna in Jammu and Kashmir (New Delhi: Institute of Defence Studies and Analysis), Occasional Paper 19. PdfVersion Available at http://www.idsa.iP_CounterinsurgencyKashmir.pdfn/system/files. Accessed 2 October 2011.

⁷¹ Parvez Bukhari, Jackboot State, *Conveyor* (Srinagar, April 2011).

an illegitimate counter-offensive by security forces against Kashmiri civilians that included rape⁷² and sexual abuse of women. There exists little reliable documentation regarding rapes by security forces in Kashmir, especially those in rural areas. There is, however, little doubt that the use of rape is common and routinely goes unpunished.⁷³ In their report on rape in Kashmir, Human Rights Watch note that there were many more number of rapes than was possible to document.⁷⁴ In a subsequent report on psychosocial health in Kashmir, Mediciens Sans Frontieres (MSF) noted the unusually high incidence of sexual violence in Kashmir.⁷⁵ Sukhmani Singh—one of the few Indian journalists to visit rural Kashmir in 1990—described the experience of women from the village of Pazipora:

⁷² Members of militant groups are guilty of rape. There is little documentation on rape by militants because most people are reluctant to discuss abuses by militants for fear of reprisal. *Rape in Kashmir: A Crime of War* A Report by Asia Watch (A Division of Human Rights Watch) and Physicians for Human Rights Vol. 5, Issue 9 (New York: Human Rights Watch, 1993), p. 4. Rape by militants is not the focus of this paper. This is not to understate the significance of this particular dimension but rather, to emphasise the political context of militant violence summed up succinctly by jurist Patanjali Vardarajan: The argument ... that human rights groups are in dereliction of their duty in not condemning militants ... must be condemned as the cynical diversionary tactic that it is ... The focus of human rights is the state...citizens have rights ... in relation to the state. The *state* is legally, politically and morally duty bound to protect those rights ... The state violates *human rights*, militants violate *law*.' (emphasis original). See Vardarajan, *A People Terrorised*. Op cit.

⁷³ *Rape in Kashmir: A Crime of War*, p. 3.

⁷⁴ Ibid.

⁷⁵ Sexual violence is an issue that is not openly discussed in Kashmir. '11.6% of interviewees said they had been victims of sexual violence since 1989. Almost two-thirds of people interviewed (63.9) had heard over a similar period about cases of rape, while one in seven had witnessed rape.' The survey found much higher numbers of people whom themselves had experienced sexual violence in comparison to other contexts such as Sierra Leone, Sri Lanka and Chechnya. p 3.P.24. *Kashmir: Violence and Health*, Mediciens Sans Frontieres (November 2006) PDF Version, Available at <http://artsenzondergrenzen.nl/pdf/KASHMIRFINALVERSION221106.pdf> Accessed 23 September 2011.

Recounted 50-year-old Saja: ‘They beat me on my head and under my eyes with rifle-butts, but I didn’t allow my two daughters to be raped.’ But not all women had a Saja to defend them ... Twenty-six year old Saba, another victim, s[at] huddled under in a dingy hut in Pazipora with tears running down her cheeks. ‘I want to kill myself,’ she cried in a voice choked with emotion. Both her husband and brother-in-law were shot dead by the army shortly before she was raped.⁷⁶

Rape and sexual abuse is often not accorded the significance it deserves due to the understanding of armed conflict as a quintessentially ‘male’/public domain where sexual violence against women is associated primarily with the ‘private’ domain. This paper does not subscribe to this viewpoint; the argument here is that rape and sexual abuse of women by security forces in Kashmir involves and implicates state authority, and is therefore as subject to public accountability and legal process as other rights violations. In this regard, it is worthwhile to quote Human Rights Watch on rape in Kashmir:

Until recently, rape has often escaped international scrutiny and condemnation, including rape committed in the context of armed conflict. In the past, rape has often been...mischaracterised as incidental to the conflict or as a privately-motivated form of sexual abuse rather than an abuse of power that implicates public accountability.⁷⁷

Notwithstanding the gravity of the crime, the violation of women’s bodily and sexual integrity by security forces in Kashmir has, at best, evoked muted responses from the authorities ranging from outright

⁷⁶ Sukhmani Singh, ‘Protectors or Predators?’ in *The Illustrated Weekly of India* (30 September 1990), p. 34.

⁷⁷ *Rape in Kashmir: A Crime of War*, p. 5.

denial⁷⁸ to a discrediting of the victim's integrity. In Kunan Poshpora⁷⁹ (a hamlet in Kupwara district adjacent to the LOC) allegations of mass rape by soldiers of the Rashtriya Rifles in 1991 were dismissed by a single-member investigation by the Press Council of India⁸⁰ that acquitted the army of sexual abuse and foreclosed the possibility of any further investigation. Military authorities, on the other hand, attempt to evade accountability for sexual abuse by impugning the integrity of women with kinship ties with alleged militants.⁸¹ Since military courts offer greater leniency and non-transparency than civil courts, soldiers accused of rape can opt for the former (see above) in order to escape prosecution by the latter. In the wake of mass public anger against allegations of rape of a woman and her ten-year-old daughter in Handwara (north Kashmir), in 2004, the army ordered an investigation after making a statement to the effect that the charges were 'baseless'; the accused army major was acquitted of the rape charge in an army court martial but was dismissed from service for 'misconduct' on the basis of a DNA report.⁸²

⁷⁸ Among others, allegations of mass rape at Chhanpora and Pazipora (1990), KunanPoshpora (1991), Chak Saidpora (1992), Theno Budapathary Kangan (1994) and Wavoosa in Srinagar (1997) were never officially acknowledged or investigated. Rita Manchanda, 'Guns and Burqa: Women in the Kashmir Conflict' in Manchanda (ed.), *Women, War and Peace in South Asia: Beyond Victimhood to Agency* (New Delhi: Sage), p. 73.

⁷⁹ 'The reported rape on 23 February 1991 of women from the village of Kunan Poshpora by army soldiers of the Fourth Rajputana Rifles became the focus of a government campaign to acquit the army of charges of human rights violations.' See *Rape in Kashmir: A Crime of War*, p. 7.

⁸⁰ For details regarding Kunan Poshpora see Kazi 2009, pp. 155–157.

⁸¹ Anuradha Bhasin Jamwal, 'Women in Kashmir Conflict: Victimhood and Beyond' in Shree Mulay and Jackie Kirk (eds.) *Women Building Peace between India and Pakistan* (New Delhi: Anthem Press, 2007), p. 101. Jamwal narrates the story of 25 year-old Parveen whose father Ghulam Mohiddin was forced to witness his daughter's sexual abuse by the Border Security Force (BSF) because his son was suspected to be a militant. Parveen and her neighbor Rehana were stripped, molested, given electric shocks and their legs crushed with rollers in order to 'teach them a lesson.' See 'Women in Kashmir Conflict,' Op cit. p. 100.

⁸² Anuradha Bhasin Jamwal, 'Women in Kashmir Conflict,' p. 96.

If these examples demonstrate the evasion of public accountability for rape and sexual abuse of women by the military in Kashmir, the tragedy of Asiya and Neelofar in Shopian demonstrates the systematic denial of justice for sexual crimes against women by state administrative authorities. On 30 May 2009, the bodies of two sisters-in-law, Neelofar Jan and Asiya Jan aged 22 and 17 years respectively, were found in a highly militarised and policed zone (flanked by encampments of the Jammu and Kashmir police, the CRPF and the Special Operations Group (SOG) comprising uniformed renegade militants) in Shopian. The women had gone missing the previous evening and all attempts on the part of Neelofar's husband and Asiya's brother Shakeel Ahangar and his family to trace them had been in vain. In the wake of mounting public outrage and protest, a post-mortem examination conducted by two doctors from Pulwama confirmed rape. As soon as the post-mortem result was announced, the police used tear gas to disperse the assembled crowd followed by a counter-offensive against Shakeel's family and the entire town. The local graveyard was occupied by the Central Reserve Police Force (CRPF) and the family was prevented from performing the funeral rites for the deceased. Kashmir's chief minister Omar Abdullah attributed the deaths due to drowning prompting ever greater public outrage and condemnation. In the wake of sustained public protests, Mr. Abdullah announced a judicial rather than criminal enquiry headed by a retired judge (Jan Commission).

An FIR was registered more than a week after the crime (during which time the case was being pursued as one involving disappearance and accidental death instead of rape and murder) and the investigation entrusted to a Special Investigation Team (SIT) from New Delhi. The Shopian Bar Association and the High Court Bar Association embarked on parallel, independent fact-finding committees. In its interim report on 21 June 2011 based on forensic and medical evidence, the Jan Commission confirmed that the women had been raped and murdered; it indicted the police for procedural neglect and wilful destruction of evidence and criminal failure but remained

silent on the identity of the perpetrators, as well as on the manner in which the crime was covered up by the authorities.

In response to a Public Interest Litigation (PIL) by the High Court Bar Association four police officers were arrested, to be later released on bail.⁸³ The state government, in the meantime, filed an application before the High Court for the case to be handed over to the Delhi-based Central Bureau of Investigation (CBI). It was opposed by the High Court Bar Association whose appeal against the state government was still being heard when the CBI took over the case in September 2009. In its report, the CBI enquiry discredited available medical and forensic evidence, criminalised individuals who had advocated on behalf of the victims' family, and announced that the two women had not been raped or murdered, but had rather, drowned. Dr. Nighat Shaheen, who had performed the post-mortem examination in Shopian confirming rape was discredited, suspended from her job, and repeatedly questioned by the SIT and CBI.⁸⁴ The CBI also sought to discredit three eye-witness accounts

⁸³ The four policemen arrested after the High Court's intervention were held in a non-prison setting till they were released on bail; there is no evidence that they were interrogated. Four suspended police officers, namely, Superintendent of Police Javed Mattoo, Deputy Superintendent Rohit Baskotra, Station House Officer Shafeeq Ahmed and Sub Inspector Ghazi Abdul Kareem admitted before the Commission that they had committed grave dereliction of duty and allowed important evidence to be lost and destroyed in the initial stages of the investigation. None of the four were interrogated by the CBI. On the other hand, the CBI examined almost every family member of the deceased a dozen times and scrutinized their bank accounts and tax papers. See *Shopian: Manufacturing a Suitable Story* (New Delhi: Independent Women's Initiative for Justice), p. 5.

⁸⁴ In her testimony before the Jan Commission, Dr. Nighat stated she took swab/vaginal samples in the presence of Dr. Ghulan Qadir Sofi, Deputy Chief medical officer Pulwama and Dr. Nohd. Maqbool Mir, District Health Officer Pulwama. Members of an independent women's team met with Dr. Nighat three months after the incident during which she confirmed having taken vaginal swabs at the hospital in Shopian, sealed and sent them to the forensic laboratory. In August, media reports stated the samples did not belong to the deceased women. See *Shopian: Manufacturing a Suitable Story*, p. 4.

testifying to both women being in a police truck the night of their disappearance.⁸⁵ Finally, the CBI sought to discredit family members of the deceased and members of civil society who had supported the struggle for justice; it issued charge sheets against six lawyers, five doctors and two local residents from Shopian including a brother of one of the victims. In October 2009, upon exhumation of Asiya's body after permission from her father and brother, a CBI supervised team of doctors from New Delhi declared Asiya's hymen to be intact, thus ruling out rape. In effect, the state-led and sponsored SIT and CBI enquiries ended the possibility of any legal remedy for seeking justice for the victims.⁸⁶

Asiya and Neelofar's gruesome tragedy underscores the blatant and determined attempts by state authorities to deny sexual abuse against women by state forces in Kashmir; it also demonstrates their subversion of the legal and criminal justice system in order to protect the guilty. Kashmir's citizens do not view this particular tragedy *only* within the frame of sexual violence against women by state forces in Kashmir. On the contrary, they situate it within the larger context of the struggle for freedom and justice Kashmir—well summed up by a Kashmiri advocate in his address to the people of Shopian:

⁸⁵ During the course of their own independent fact-finding, the Shopian Bar Association found two witnesses, namely, Abdul Rashid and Ghulam Mohi-ud-din, both of whom testified to witnessing a blue coloured 407 police truck on the road in which two girls were shouting. The eight uniformed men guarding the front and rear of the truck abused, threatened and forced these two witnesses to flee. Both witnesses narrated their experience in their testimony before the Jan Commission. Both witnesses were thereafter kept in police custody for over a month and their statements recorded after a period of time. The CBI reported that both witnesses denied their earlier statements and claimed they were made under duress, and at the behest of, the Shopian District Bar Association. *Shopian: Manufacturing a Suitable Story*, pp. 4–5.

⁸⁶ Unless stated otherwise, all information in this section from Haley Duschinski and Bruce Hoffman, *Everyday Violence, institutional denial and struggles for justice in Kashmir*. *Race and Class* 52(4):44–70, pp. 47–61.

The administration has started using war crimes to suppress the freedom movement. The men in uniform claim they are working to protect our lives, but they are attacking our honour and dignity instead.⁸⁷

The forced closure of the Asiya and Neelofar case by state authorities symbolises official disregard for judicial process and the legal impediments towards securing accountability and justice for sexual abuse of women by security forces. It also demonstrates a governance machinery fearful of democratic accountability for sexual violence against women and, by extension, a state unwilling to adhere to, or enforce, the rule of law.

CONCLUSION

For over two decades, India has attempted to repress, discredit and wear down a Kashmiri resistance calling for an end to Indian rule in Kashmir. In order to achieve this objective and maintain the status quo, the Indian state uses legislative means to stifle and repress democratic articulation of Kashmiri aspiration. From the political, humanitarian and ethical point of view, a governance regime upheld by ‘legalising’ repression, subversion of law and legal process, and the denial of citizens’ civil and political rights is unacceptable and illegitimate. Laws are linked to human aspiration; they can have extremely negative implications if and when they become ‘a law unto themselves.’ States have a right to legislate, yet this right cannot, and must never be, subservient to the security, dignity and development of citizens. In other words, laws exist to serve people, not power. ‘When laws serve only themselves there is a lack of legitimacy. Legitimacy watches over laws, ensuring that they serve their fundamental purpose—to improve the lives of those

⁸⁷ Advocate Zaffar Shah quoted in Haley Duschinski and Bruce Hoffman, *Ibid.* p. 55.

they govern.⁸⁸ If the legitimacy of law derives from its adherence to democratic, moral and ethical principles, India's legal regime in Kashmir is illegitimate because it serves the interests of state executive and military power, not people.

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