

LAW AS VIOLENCE IN THE POST-COLONIAL STATE: THE CASE OF LAWFARE
IN KASHMIR

by

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A THESIS

Presented to the Department of International Studies
and the Division of Graduate Studies of the University of Oregon
in partial fulfillment of the requirements
for the degree of
Master of Arts

June 2022

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Title: Law as Violence in the Post-Colonial State: the Case of Lawfare in Kashmir

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Degree awarded June 2022

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THESIS ABSTRACT

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Master of Arts

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June 2022

Title: Law as Violence in the Post-Colonial State: the Case of Lawfare in Kashmir

This study uses law as a divining rod to draw out historical connections and intersections that implicate power, violence, and oppression in Indian-administered Kashmir. Broadly, this study asks why violence and oppression persist in Kashmir and how law acts as an underwriting force. Specifically, this study seeks to uncover in what ways do law, the post-colonial context, security discourse, and violence and oppression in Kashmir intersect, influence, perpetuate, and legitimize one another.

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ACKNOWLEDGMENTS

I owe an immense debt of gratitude to my thesis committee: Dr. Angela Joya and Professors Michelle McKinley and Ibrahim Gassama. It was with their steadfast support and candid advice that I embarked on an incredible journey. And it is with their generous mentorship that I prepare this work. Additionally, it is with the kind assistance of many Kashmiris that this work comes to fruition. I am incredibly thankful for their stories, guidance, insights, and compassion.

Moreover, it was with the early encouragement of Professor Suzanne Rowe that I found my way to this place. She sharpened my legal research and writing skills and emboldened my intellectual curiosity. Her kindness seems to always appear when I need it most.

Finally, this work would not have been possible without the love and support of my two families. First, I am sincerely grateful for my biological family in the United States. They taught me how to fly and graciously opened the window to set me free. Second, I am sincerely grateful for my adoptive family in Kashmir. They shared their life with me, which was a precious gift of humanity.

For my Choti Ladkiyan.

Your fierce friendship, mischievous wit, quiet grace, and enduring courage showed me another way.

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I. INTRODUCTION

Kashmir is often referred to as “the Valley” because it sits in the low swing of the Himalaya Mountains. In the late summer and early fall of 2015, almost every evening sky was streaked red and orange as the huge sun sank behind Dal Lake. The red setting sun was often obscured in the dusty haze produced by choked traffic crowding unpaved streets. Fridays were the exception. The haze that choked Srinagar on Fridays was not dust or pollution but tear gas. It came as a thick, peppery fog that caused everyone in the city to erupt in coughs making throats raw, gag, and gasp. At home we’d huddle together on the concrete floor with the wooden shutters closed and locked over the open windows. Without window glass, the Friday evening haze floated into our house, dancing along the fading sun streaks as our eyes watered and burned. We swallowed our coughs and sat in silence as the call to prayer played across the city.

Kashmir is a study in juxtaposition. The serene beauty of the region is cut and cordoned by mangled heaps of barbed wire, concrete lookout towers, and behemoth iron gates. The Mughal gardens that languorously wind around Dal Lake, once home to artists and poets, are now pockmarked by Indian military soldiers armed and rigid in fatigues. Outside of Srinagar, picturesque rolling farms of kesar, Kashmiri Saffron, stretch across the Valley. Upon closer look, hard, black metal boxes interrupt the purple and orange hectares. They are Indian military MRAPs, mine-resistant and ambush protected vehicles with armed machine gun turrets.

There is also a legal contradiction at work in the Valley. An intellectual premise called lawfare, where the law acts to protect as well as exploit denizens who fall under its care. Kashmir exists in a realm of physical and intellectual juxtaposition, informed by its

melancholic history of colonialism followed by modern occupation that has continued to stifle growth and potential in the Valley.

This study, titled *Law as Violence in the Post-Colonial State: the Case of Lawfare in Kashmir*, uses law as a divining rod to draw out historical connections and intersections that implicate power, violence, and oppression in Indian-administered Kashmir. Broadly, this study asks why violence and oppression persist in Kashmir and how law acts as an underwriting force. Specifically, this study seeks to uncover in what ways do law, the post-colonial context, security discourse, and violence and oppression in Kashmir intersect, influence, perpetuate, and legitimize one another.

Theory and Framework

The regional focus of the following research is Indian-administered Kashmir, the Muslim majority population residing in the very northwest of India along the India-Pakistan military Line of Control (LOC). Kashmir is a historically contentious, often explosive place with a complex colonial history and tangled operation of law and security. Engaging theories of law and violence, post-colonial legal studies, and security discourse, this study seeks to understand the case of Kashmir in consideration of these theories and practices.

Moreover, this study addresses the underlying nature of quotidian political violence, the “state of exception” that Kashmir exemplifies. In particular, law acts as a fundamental underwriting force in the post-colonial state of exception—at once lethal and legal—authorizing and legitimizing force.¹ It is argued that the post-colony, like

¹ See generally *Law Disorder in the Postcolony*, eds. Jean Comaroff and John L. Comaroff (Chicago: The University of Chicago Press, 2006) 22-42.

Kashmir, trends toward more violence than other states. As the Comaroffs' explain,

the predicament of postcolonies arises from their place in a world order dominated by new modes of governance, new sorts of empires, new species of wealth—an order that tends to criminalize poverty and race, entraps the “south” in relations of corruption, and displaces politics into the realms of the market, criminal economies, and the courts.²

Although marred by disorder, the post-colony is also the site of entrenched fetishizing of law, legal ways, and legal means. Where an almost universal belief in law's benevolence and role as guardian of the wretched in our world is protected and placed on mantels with prayers and lighted candles. However, any blind belief has a way of exploiting its followers, as is the case in Kashmir.

Lawfare—the resort to legal instruments, to the violent inherent in the law, to commit acts of political coercion, even erasure—is equally marked in postcolonies. As a species of political displacement, it becomes most readily visible when those who act in the name of the state conjure with legalities to act against some or all of its citizens.³

This legal machination, the post-colonial evangelization of law as development and growth as well as law as force and security, is referred to as lawfare.

Lawfare is one of the central phenomena this study explores in the case of Kashmir. As the Comaroffs' explain,

Lawfare can be limited or it can reduce people to “bare life”; in some postcolonies, it has mutated into a deadly necropolitics with a rising body count. But it always seeks to launder brute power in a wash of legitimacy, ethics, propriety. . . [U]ltimately, it is neither the weak nor the meek nor the marginal who predominate in such things. It is those equipped to play most potently inside the dialectic of law and disorder.⁴

And, therefore, lawfare's work in Kashmir is central to this study as it seeks to engage issues of power, violence, and oppression in the post-colony.

² *Law and Disorder in the Postcolony*, eds. Jean Comaroff and John L. Comaroff (Chicago: The University of Chicago Press, 2006) back.

³ *Law and Disorder in the Postcolony*, 30.

⁴ *Law and Disorder in the Postcolony*, 31.

Consequently, I argue, drawing from the work of critical theorists such as Giorgio Agamben, Jean and John Comaroff, and Sundhya Pahuja, that the modern legal project is the progeny of colonialism (and capitalism/class hierarchy) and post-colonial states entrapped by Western/colonial legal doctrine are scarred by this legacy. Particularly as this legacy works through the machinations and expressions of law as lethal and law as legal in post-colonial society.

Considering the above theorists, my study draws upon evidence and examples of law as remnants and reinforcements of historic British colonial security and military practice in Kashmir. Following the decolonization of South Asia, India absorbed key aspects of the British colonial code enacted prior to partition, including the Disturbed Areas Act (the state of exception designation), Armed Forces Special Powers Act (AFSPA), and the Public Safety Act (PSA).⁵ Under the banner of the state of exception designation, the AFSPA and PSA are two legal mechanisms that have continued to enshrine and legitimize the militarized violence and impunity that has resulted in decades of human rights violations in Kashmir.

Statement of the Problem

This study considers environments of violence and disorder in the post-colonial state as perpetuated, authorized, and underwritten by Western/colonial law and legal structure. This study is endeavored in the post-colonial context, striving to approach, understand, and analyze evidence and data through post-colonial discourse. Specifically, my study considers the post-colonial example of Indian-administered Jammu and

⁵ Haley Duschinski and Bruce Hoffman, "On the Frontlines of the Law: Legal advocacy and political protest by lawyers in contested Kashmir," *Anthropology Today* 27, no. 5 (2011); *see also* Eugene F. Irschick, *A History of the New India: Past and Present* (New York: Routledge, 2015) 149-150.

Kashmir, herein referred to as simply Kashmir. Kashmir is a semi-autonomous state, associated with the Indian Union, and situated between India, Pakistan, and China in the Himalaya Mountains.⁶

This study examines how Western/colonial law underwrites and legitimizes post-colonial violence—*lawfare*—in the state of Indian-administered Kashmir. Kashmir is the most militarized parcel of land in the entire world.⁷ More soldiers per civilians exist in Kashmir than in any other place.⁸ Accordingly, these soldiers are the physical embodiment of lawfare in Kashmir; put another way, these soldiers legally occupy Kashmir. A remnant of colonial British rule in India, the Armed Forces Special Powers Act (AFSPA) is the most ripe example of law underwriting violence, legitimizing a state of emergency that indefinitely suspends civil rights and protections, and eroding judicial remedy for civilian victims of military or police harassment, violence, or death.⁹ Furthermore, the example of law as the physical embodiment of violence demonstrates an important element that undergirds this study of lawfare in the post-colonial state: law is lethal and law is the apex of power and knowledge. Those with access to law’s power and knowledge also command law’s violence and oppressive possibilities.¹⁰

The AFSPA was originally enacted by the British in colonial India in order to suppress the ‘Quit India’ movement led by Mahatma Gandhi in 1942.¹¹ However, after Indian partition and independence in the late 1940s, India elected to keep the AFSPA and

⁶ See generally Alastair Lamb, *Kashmir: A Disputed Legacy, 1846-1990* (Hertingfordbury: Roxford Books, 1991).

⁷ Shuhb Mathur, *The Human Toll of the Kashmir Conflict* (London: Palgrave Macmillan, 2016) 7; see also Haley Duschinski and Bruce Hoffman, “On the Frontlines of the Law: Legal advocacy and political protest by lawyers in contested Kashmir,” *Anthropology Today* 27, no. 5 (2011): 8.

⁸ Ibid.

⁹ *Structures of Violence: The Indian State in Jammu and Kashmir* (Srinagar: IPTK and APDP, 2015) 3-5.

¹⁰ *Law and Disorder in the Postcolony*, 22-42.

¹¹ Mathur, 21-22; see also Irschick, 149-150.

to enact its draconian measures in states throughout India. These states were deemed to be ‘states of exception’ (or emergency); a legal calculation of social disorder.¹² The AFSPA in synchrony with its legal counterparts—the Disturbed Areas Act (the state of exception designation) and the Public Safety Act (PSA)—form a holy triad of subversive, quotidian post-colonial state lawfare. Moreover, as my study examines, the commonplace nature of this lawfare has invaded and subverted the public and private lives of Kashmiris. Ultimately, leading to the erosion and remaking of civil rights, social and political freedoms, and human protections for Muslim Kashmiris in India.¹³

This triad of law was born of British colonial rule and reified in the post-colonial state. The post-colonial reification manifests as military occupation, political suppression, and extrajudicial killing in the name of law and order.¹⁴ Simply, law is underwriting state-authorized violence to quell disorder as a means to bring back law.¹⁵

Import and Purpose of this Study

The cyclical nature of lawfare is unique to the post-colonial state and is the focus of this study. Of great import and concern is the coercive, destructive, and subversive nature of lawfare in the post-colony.¹⁶ This phenomenon is at once quotidian and ordinary, while authorizing mass extrajudicial killings and complete utility shutdowns across Kashmir as punishment for political rallies or stone-throwing protesters.¹⁷

Globally, India’s image is very important: India is emerging as the largest

¹² Mathur, 21-22; *see also* Irschick, 149-150.

¹³ *See generally* Hannah Arendt, *The Origins of Totalitarianism* (New York: A Harvest Book, Harcourt, Inc., 1967).

¹⁴ *See generally* *Structures of Violence*, 3-5; *see also* Mathur.

¹⁵ *Law and Disorder in the Postcolony*, 22-42.

¹⁶ *Law and Disorder in the Postcolony*, 22-31.

¹⁷ *See generally* Duschinski and Hoffman; *Structures of Violence*, 3-5.

democratic population in the world, yet its record of human rights violations and direct-democracy promises is murky and should be examined and debated. At the forefront of this examination and debate must be India's current and historical treatment of Kashmiris.

There are both private and public purposes for this study. Publicly, the case of Kashmir needs exploration and examination within post-colonial and legal studies. Scholar Kamala Visweswaran remarked, "the silence among post-colonial theorists on India's ongoing military occupation of Kashmir . . . is as deafening as the protests over Israel's occupation of Palestine are loud."¹⁸ Seemingly, an examination of the case of Kashmir in light of post-colonial, legal frameworks is a needed and important undertaking this study hopes to contribute to.

Likewise, the private purpose of this study is to contribute to the gap in research and scholarship on these topics. My decision to begin with the post-colonial nature of Kashmir and continue to bring forward the post-colonial context of lawfare in Kashmir, in tandem with the issues of violence and security, is purposeful. The justification for the literature used to frame my study means to signal that there is missing scholarship in this area: no specific scholarship on the post-colonial context of lawfare in Kashmir exists currently. My hope is to demonstrate with this study the importance of these issues.

Limitations of this Study

This study is limited by time, scope, geography, and community. From August to December of 2015, I lived in the Safa Kadal district of downtown Srinagar, Kashmir with

¹⁸ Kamala Visweswaran, "Occupier/Occupied," *Identities: Global Studies in Culture and Power* 19, no. 4 (2012): 442.

a local family (mother, father, 3 sisters and a younger brother). I did everything with the family, which gave me great access but which also, naturally, limited my scope and reach. Additionally, I did not do any research or fieldwork in Jammu, the southern portion of the state of Jammu and Kashmir. Because of this limitation, I also did not work with any Hindu majority communities while in Kashmir, as most Hindus live in southern Jammu and most Muslims live in northern Kashmir. Moreover, my work with local non-profits and my privilege as a white, American student scholar gave me access to many Kashmiris from myriad socio-economic backgrounds, political opinions, and lived experiences. However, the limited time I spent in Kashmir did not allow for the establishment of true trust or colloquial proficiency. As I interacted with Kashmiris, they were likely unaware of my own stakes in their conflict and unsure of what was safe to tell me. This is an important limitation to my research yet a familiar issue for researchers doing work in conflict zones with vulnerable populations.

Additionally, I know my very physical presence was uneasy, unnatural, and unwanted by some, whether those Kashmiris felt safe enough to share that with me or not. This is another important limitation and exploitation of this study. Undoubtedly, there were instances where the pressure to speak kept stories and lived experiences hidden because those who were uncomfortable or unsure would not speak or did not feel safe. Taken together, my experience and admitted limitations justify why I am relying on previously collected data sets. The insecurity of research in a conflict zone can make using personal interviews and narratives dangerous and exploitative.

Before I went to Kashmir, I was hoping to conduct personal interviews with victims, move freely, and make connections with Kashmiri journalists, lawyers, and

advocates. Though once I arrived, I realized the daily restrictive and oppressive conditions facing Kashmiris. I did not have the ability to do much of what I intended. I abandoned the idealized fieldwork I had romanticized and pivoted. I was able to access data sets, files, records, and public information through my work with local non-profit organizations. I had to rely on and learn from those organizations, adapting how I spoke to Kashmiris, traveled throughout Kashmir, and understood the stakes of the conflict. Working with local non-profits in the field was invaluable and an important part of my experience on the ground.

Moreover, there is no immunity from the harsh realities and struggles the conflict brings to daily life in Kashmir. At home, at university, and at work, there was often no electricity, no indoor plumbing, and limited vehicle access. While in Kashmir, I experienced multiple police curfews and neighborhood cordons. Moreover, my colleagues or family accompanied me everywhere because it was socially inappropriate to allow me to travel to or meet with people by myself. Naturally, without light, heat, internet access, or mobility, some opportunities for further research and examination were limited or lost. Too often, the bare necessities are withheld without explanation or warning in Kashmir.

Data Collection and Methods

This study is designed as a case study, relying heavily on public data and historical records. All data collected for this study is not my own, rather the data was shared with me in my capacity as a student scholar working with non-profits, universities, and civil society groups while in Kashmir. Specifically, data was gathered from research

studies, newspapers, non-profit work, legal doctrine and code, university library reserves, United Nation letters and appeals, pamphlets, books, articles, reports, government records and documents, judicial opinions, and public speeches. Moreover, the data represents two important timelines. First, the historical data that presents the narrative and development of colonial Kashmir and the introduction of India's draconian security laws post-partition in the region (1586-1948). Second, the data, figures, and lived-experience narratives on violence (extrajudicial killings, rape, torture, detainment, etc.) speak to the exercise of the AFSPA, the PSA, and the Disturbed Areas Act in Kashmir (1991-Present). Although there are many examples of violence and oppression from much earlier, the IPTK and the APDP civil society groups, from which the data originates, began collection of this data around that time.

Study Organization

The data is organized and presented in this study to support the thesis's arguments regarding lawfare in Kashmir. The data, facts, and figures are organized into an Introduction, a Theoretical Framework chapter, a History chapter, an Evidence chapter, and a Conclusion. Both the History and Evidence chapters should be read together with the preceding Theoretical Framework chapter on lawfare and post-colonial violence. In the Evidence chapter, the facts and figures are organized into sub-themes that demonstrate the scale, scope, and spatial components that have emerged from the evidence. Moreover, the law is illuminated with lived-experience narratives. These stories exemplify the quotidian character of violence in Kashmiri society and accompany data sets that show scope but lack humanity. Similarly, multiple data sets that share

common narrative and exemplify the cyclical, reoccurring nature of lawfare in Kashmir are also used to show the historical entrenchment of violence and impunity, which dates back through Kashmir's colonial history.

II. THEORETICAL FRAMEWORK

This study considers, broadly, the intersectionality between post-colonial theory and law. Specifically, this study asks in what ways do law, the post-colonial context, security discourse, and violence and oppression in Kashmir intersect, influence, perpetuate, and legitimize one another. Additionally, I consider why violence and oppression persist in Kashmir and how, particularly, law has underwritten this violence and oppression.

Understanding the Law and the Colony

Foundational to this study is scholar Sundhya Pahuja's work, *Decolonising International Law*. For the purposes of this study, I rely on Pahuja's explanation of post-colonial theory and law as relational and productive. First, it is important to establish what post-colonial theory means. She explains,

Postcolonial theory is a style of engagement, or loosely a method, which draws attention, inter alia, to the work of categorisation and its effects in imperial and post-imperial contexts. It does this paradigmatically in the context of the 'West' as a (defining) category. Specifically, it draws attention to the way 'that European or Western identity is constituted in opposition to an alterity that it has itself constructed'. In other words, a key insight of postcolonial theory has been the demonstration of how the formation of the 'West' as an identity depends on the construction of an 'other' by reference to which the West defines itself.¹⁹ (Internal citations omitted.)

Post-colonial theory is an approach that engages the categorization inherent in colonial and post-colonial contexts as a way of understanding the construction of our world.

Similarly, law relies on a system of categorization. In order to know what law is, what

¹⁹ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011) 27-28.

law is not must also be established. The practice of building systemic dichotomies is found in post-colonial theory as well as law. Pahuja writes,

It is through a postcolonial lens that we can most easily understand [] law as both a key *means* by which the categorical distinctions on which the self-constitution of the West (or ‘developed’ world) rests are formed and as *itself* a ‘universal’ object constituted by a gesture of circular self-constitution. Typically, ‘law’ is cut from a plurality of forms of ordering, which are then defined as something else—what law is ‘not’—and denied the status of law. Such orderings provide the screen upon which the other of law (and the law of the other) may be projected, and so enable a constitutive exclusion to be effected. These orderings include other peoples’ forms of social ordering, such as customs, or ‘indigenous’ laws, but also extend to other orders of knowledge, such as economics, or other normative schemes, such as theology, morality, or grammar. This particular cut—of ‘law’ from its rivals—must also be encompassed within a universal claim for itself. The specific universal claim, that law is ‘law’ ‘properly so called’, as well as the projection of law’s others, must then be secured to serve as the point of departure, or foundation for what follows.²⁰

Thus, it is in this spirit that this study seeks to consider law through the post-colonial lens, or within the post-colonial context. Moreover, “international law’s role in the story of decolonisation points to a complex duality... its capacity to be both regulatory and emancipatory, both imperial and anti-imperial.”²¹ This dual capacity is an important productive element in this study because of the way law is both implicated in the violence and oppression persistent in Kashmir as well as lauded and relied upon by the victims of its violence and oppression.

The legal duality Pahuja details above brings her important work within the same constellation of another foundational work relied upon in this study. Jean and John L. Comaroffs’ edited volume, *Law and Disorder in the Postcolony*, provides this study with the theory of *lawfare*. Law acts as a fundamental underwriting force in post-colonial state

²⁰ Pahuja, 27-28.

²¹ Pahuja, 45.

violence—dually working as lethal and legal—authorizing and legitimizing force.²² It's known that the post-colony is more violent than other states—as the Comaroffs' explain,

[T]he predicament of postcolonies arises from their place in a world order dominated by new modes of governance, new sorts of empires, new species of wealth—an order that tends to criminalize poverty and race, entraps the “south” in relations of corruption, and displaces politics into the realms of the market, criminal economies, and the courts.²³

Although marred by disorder, the post-colony is also the site of entrenched fetishizing of law, legal ways, and legal means.

Lawfare—the resort to legal instruments, to the violent inherent in the law, to commit acts of political coercion, even erasure—is equally marked in postcolonies. As a species of political displacement, it becomes most readily visible when those who act in the name of the state conjure with legalities to act against some or all of its citizens.²⁴

This legal machination, the post-colonial evangelization of law as development, law as growth, and law as force, is referred to as *lawfare*. Lawfare is one of the central phenomena this study explores in the case of Kashmir. As the Comaroffs' explain,

Lawfare can be limited or it can reduce people to “bare life”; in some postcolonies, it has mutated into a deadly necropolitics with a rising body count. But it always seeks to launder brute power in a wash of legitimacy, ethics, propriety. . . ultimately, it is neither the weak nor the meek nor the marginal who predominate in such things. It is those equipped to play most potently inside the dialectic of law and disorder.²⁵

Lawfare is intimately entangled with the articulation of what is order and what is disorder. This articulation is often operational through the seemingly legal designation of the ‘state of exception’ (or emergency) in the post-colony.

²² See generally *Law and Disorder in the Postcolony*, eds. Jean Comaroff and John L. Comaroff (Chicago: The University of Chicago Press, 2006) 22-42.

²³ *Law and Disorder in the Postcolony*, back.

²⁴ *Law and Disorder in the Postcolony*, 30.

²⁵ *Law and Disorder in the Postcolony*, 31.

Law as Violence: Emergency Powers and the State of Exception

As philosopher Giorgio Agamben explores in his work, *The State of Exception*, there “is this no-man’s-land between public law and political fact, and between the juridical order and life.”²⁶ He continues,

Only if the veil covering this ambiguous zone is lifted will we be able to approach an understanding of the stakes involved in the difference—or the supposed difference—between the political and the juridical, and between law and the living being.²⁷

Although Agamben explores the differences (or supposed differences) between the law and the living being, he also continues to reiterate that the law and the living being cannot be detached from one another. In consideration of Michel Foucault’s biopolitics, Agamben explores how sovereign power (the power of the state) produces ‘bare life’.²⁸ Bare life is an essential measurement for Agamben’s state of exception. He emphasizes, “‘Bare life’ is a product of the machine and not something that preexists it, just as law has no court in nature.”²⁹ The production of bare life for the living being is a form of political and civil inclusion by way of exclusion (banning or detaining) in the order of the polity and under the organization of the state.³⁰ This inclusive exclusion or reduction to bare life is vital for Agamben because it creates a space where “even being within the polis does not in any sense guarantee our protection, so the notion of a political life within the state order takes on dark and ambiguous connotations.”³¹

²⁶ Giorgio Agamben, *State of Exception*, translated by Kevin Attell (Chicago: The University of Chicago Press, 2005) 1.

²⁷ Agamben, 2.

²⁸ Bare life is “biological and politically denuded life, life as objectified and calculable, above which is suspended the permanent threat of sovereign violence or the state of exception.” John Lechte and Saul Newman, *Agamben and the Politics of Human Rights: Statelessness, Images, Violence* (Edinburgh: Edinburgh University Press, 2013) ix.

²⁹ Agamben, 87-88.

³⁰ Lechte and Newman, ix.

³¹ Ibid.

Simply, it is dangerous to carry on believing the fiction that our mere belonging to a nation with seemingly protective rights afforded to citizens is the difference between political and juridical safety or bare life. Mere citizenship does not protect the living being from sovereign violence for there exists the state of exception, where the suspension of law for the sake of law's preservation leaves living beings 'objectified and reduced to a biological and politically denuded life'.³²

Agamben begins his exploration of the state of exception with the work of Carl Schmitt. Schmitt's famous definition of the 'sovereign as one who decides the state of exception' intrinsically depends upon the state's authority to determine necessity.³³ Necessity has been historically presented as the foundation of the state of exception, although, as Agamben traces, necessity is not a legal finding.³⁴

The theory of necessity is none other than a theory of the exception (*dispensatio*) by virtue of which a particular case is released from the obligation to observe law. Necessity is not a source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm.³⁵

Rather, necessity is a specific political decision masquerading as a legal designation.³⁶ Here, Agamben begins to pull apart the threads of the political and the juridical, between the living being and law, to call attention to the historical trespass of power and authority. Of great import is the fact that,

The concept of necessity is an entirely subjective one, relative to the aim that one wants to achieve. . . [T]he recourse to necessity entails a moral or political (or, in any case, extrajudicial) evaluation, by which the juridical

³² See generally, Lechte and Newman, ix.

³³ Agamben, 24-31; see generally Carl Schmitt, *Political Theology*, translated by George Schwab (Cambridge: MIT Press, 1985).

³⁴ Agamben, 27-30.

³⁵ Agamben, 25.

³⁶ Agamben, 27-30.

order is judged and is held to be worthy of preservation or strengthening even at the price of its possible violation.³⁷

Agamben makes clear that “[n]ot only does necessity ultimately come down to a decision, but that on which it decides is, in truth, something undecidable in fact and law.”³⁸ Yet, “as a figure of necessity, the state of exception therefore appears . . . as an “illegal” but perfectly “juridical and constitutional” measure that is realized in the protection of new norms (or of a new juridical order).”³⁹

Moreover, “the modern state of exception is instead an attempt to include the exception itself within the juridical order by creating a zone of indistinction in which fact and law coincide.”⁴⁰ Agamben explains,

It is as if the juridical order [*il diritto*] contained an essential fracture between the position of the norm and its application, which, in extreme situations, can be filled only by means of the state of exception, that is, by creating a zone in which application is suspended, but the law [*la legge*], as such, remains in force.⁴¹

Agamben’s investigation of the state of exception is complex and nuanced. For the purposes of this study, his conclusions regarding *potestas* (roughly, power) and *auctoritas* (roughly, the right to decree/authority)⁴² are particularly illuminating.

Ultimately, Agamben uncovers that the Western juridical system is best understood

[A]s a double structure, formed by two heterogeneous yet coordinated elements: one that is normative and juridical in the strict sense (which we can for convenience inscribe under the rubric *potestas*) and one that is anomic and metajuridical (which we can call by the name *auctoritas*).⁴³

³⁷ Agamben, 30.

³⁸ Ibid.

³⁹ Agamben, 28.

⁴⁰ Agamben, 26.

⁴¹ Agamben, 31.

⁴² I recognize *potestas* and *auctoritas* are highly contested and widely expounded upon by scholars across disciplines. My crude reduction of the terms to English translation is meant to help novice readers grapple with Agamben’s important findings. I do not mean to disregard or generalize the valuable scholarship that has explored the nuances of defining and understanding these concepts.

⁴³ Agamben, 85-86.

Because the system of law is built upon the tense, antagonistic dialogue between power and authority, norms and unrest (arguably, order and disorder), “the ancient dwelling of law is fragile and, in straining to maintain its own order, is always already in the process of ruin and decay.”⁴⁴ As Agamben concludes,

The state of exception is the device that must ultimately articulate and hold together the two aspects of the juridico-political machine by instituting a threshold of undecidability between anomie and *nomos*, between life and law, between *auctoritas* and *potestas*. It is founded on the essential fiction according to which anomie (in the form of *auctoritas*, living law, or the force of law) is still related to the juridical order and the power to suspend the norm has an immediate hold on life.⁴⁵

Agamben warns that when the concepts of unrest and juridical order, life and law, authority and power come together in the form of the state of exception, a form that ‘binds and blurs’ these concepts together in dialogue, character, time, and essence, the state of exception “becomes the rule, then the juridico-political system transforms itself into a killing machine.”⁴⁶

The post-colonial state of exception is predicated on the production of fictional relationships between law and unrest or, more subversively, security, violence, and mechanisms of oppression. The dichotomy of law in the state of exception reveals instances of legal use of lethal force by the state or operatives of the state in the name of security, safety, and protection. Herein, demonstrating the dichotomy of law as both, and simultaneously, the hand that kills and the hand that protects cannot be divorced from the post-colonial context or the origins of law as an export of empire. This is true because of

⁴⁴ Agamben, 86.

⁴⁵ Ibid.

⁴⁶ Ibid.

the operation of law as categorical and dichotomous.⁴⁷ Moreover, the origins of power and knowledge that are informing and deriving law operate in a similar dichotomy. This dichotomy is at the heart of the identity of the West, which always keeps the other, the opposite of the West, at odds and in diametrical opposition.⁴⁸ This empowers a dichotomy of characteristics to developed and self-affirm the Western categorization of the world (for example, civilized/uncivilized, rational/superstitious etc.). “Elements of either the West or non-West that belie this dichotomy are treated in myriad ways that sustain the dichotomous characterization and the hierarchy of knowledge it creates.”⁴⁹ Thus, as law cuts and erases in order to categorize and organize, the production of opposites (for example, inside/outside, self/other) becomes essential to the process.⁵⁰ As Pahuja points out (and Agamben signals toward), “The two sides are inseparable; that which is excluded is crucial to the formation of the included.”⁵¹ She goes on,

[T]his applies not only to identity *stricto sensu*, but also to the sets of values of which the West claims to be both exemplar and guardian. It extends beyond the West as a geographical entity or ‘racial’ category to institutions and people grounded in Western structures of knowledge. To this other and his values are attributed characteristics the West both rejects and ostensibly lacks—the other is crucially what the West is *not*. The self-constitution of the West thus forms identity in a ‘defining exclusion of certain existent peoples accorded characteristics ostensibly opposed to that identity’.⁵²

Consequently, the duality and dichotomy of law operates through the lethality and legality of the violence and oppression experienced in the post-colonial state of exception.

⁴⁷ This point is argued by many scholars. For the purposes of this study, I draw connections between Agamben, Pahuja, and the Comaroffs. All three scholars point to dichotomy, binary, or juxtaposition as part of the systemic production of law.

⁴⁸ Pahuja, 31.

⁴⁹ Pahuja, 28.

⁵⁰ Pahuja, 32.

⁵¹ *Ibid.*

⁵² *Ibid.*

III. HISTORY⁵³

In South Asia, the small northwestern territory of Kashmir has historically been treated as uniquely strategic and prized. Kashmir is currently considered a semi-autonomous state, administered in part by the Indian Union, and geographically situated between China, India, and Pakistan along the Himalaya Mountain range. Kashmir has a Muslim majority population (estimated 70-96%) that has been historically conquered, ruled, or administered by a minority ethnicity or religion.⁵⁴ In recent history, this minority ruling class has been Mughal, Sikh, and, currently, is Hindu.⁵⁵

From Mughal Dynasties to British Imperialism, 1586-1946

From 1586 until about 1846, Kashmir was ruled by a succession of Mughals, Afghans, and, finally, Sikhs. A frequent site of invasions and conquests, Kashmiris have spent modern history as subjects of foreign, often remote, rulers and dynasties.⁵⁶ Kashmiris rose to import in European markets beginning in 1780 with their production of intricate and beautiful hand-woven Kashmiri-style shawls.⁵⁷ Between 1780 and 1813, looms in Kashmir ballooned from 16,000 looms to 24,000 looms in production.⁵⁸ The shawl industry was booming and the value of Kashmiri goods were quickly recognized

⁵³ I acknowledge that I rely heavily on the historical works of Victoria Schofield. Her works are narrowly focused on Kashmir, as opposed to India or Pakistan. Additionally, Schofield builds upon another important historian of Kashmir, Alastair Lamb. Lamb and Schofield have put forward some of the most complete histories of Kashmir where Kashmiris are the focus.

⁵⁴ The last official population census was recorded in 1941. The 1924 census reported Muslims as 96% of the population of Kashmir; see Victoria Schofield, *Kashmir in Conflict: India, Pakistan, and the Unending War* (London: I.B. Tauris, 2010) 8, 16.

⁵⁵ Schofield, *Kashmir in Conflict: India, Pakistan, and the Unending War*, 8.

⁵⁶ Schofield, 3-7.

⁵⁷ Ibid.

⁵⁸ Schofield, 4.

by European import-export companies like the East India Company.⁵⁹ However, also quickly recognized by many visitors to Kashmir were the miserable conditions of the Kashmiri population, wrecked by sickness and starvation while living under oppressive conditions where brutality, cruelty, and slavery were commonplace.⁶⁰

The Sikh reign by ruler Ranjit Singh came to an end when he died in 1838. Up until his death, the Sikhs and the British-operated East India Company had maintained cordial relations, both entities motivated by the desire to keep the British in India happy.⁶¹ However, when Ranjit Singh died, the relationship fell apart and in December of 1845, the Sikh army engaged the British and started the First Anglo-Sikh War.⁶²

As had happened throughout Kashmir's history, someone on the sidelines saw the region as uniquely strategic and prized. Named Raja of the Jammu area by Ranjit Singh in 1822, a feudatory named Gulab Singh was vying for power in the region.⁶³ During the First Anglo-Sikh War, Gulab Singh played sides: offering support to Sikh overlords but not actually giving any while staying in constant communication and sharing information with the British.⁶⁴ With this, the fate of Kashmir was sealed. "The British, recognising that Gulab Singh's neutrality had tipped the balance of the war in their favour, treated him as a welcome ambassador."⁶⁵ For their new ambassador, the British brokered a Peace Agreement with the defeated Sikhs and secured the subsequent Treaty of Amritsar.⁶⁶ This treaty made Gulab Singh the official Maharaja of Jammu and Kashmir, a new territory

⁵⁹ Schofield, 4.

⁶⁰ Schofield, 5, *in reference to* H.H. Wilson, William Moorcraft, and Victor Jacquemont journals.

⁶¹ Schofield, 6.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

that included Jammu, Kashmir, Ladakh, and Baltisan.⁶⁷

Maharaja Gulab Singh was an ethnic Dogra Rajput from Jammu, thus his reign has become known as the Dogra rule of Kashmir.⁶⁸ During this time, the British came under intense scrutiny for their decision to sell Kashmir to a foreign ruler rather than help the indigenous people of the Valley.⁶⁹ In return, the Dogra Maharaja continued to support the British; Gulab Singh gave his support to the British in the Second Anglo-Sikh War in 1848 and sent a large amount of money and troops to assist the British during the bloody rebellion of 1857.⁷⁰ Kashmir was also a site of refuge for English women and children during this time.⁷¹

Gulab Singh died in August of 1857, during ‘the Indian Mutiny’, and his son and heir, Ranbir Singh officially became Maharaja of Jammu and Kashmir.⁷² Ranbir received many titles and accolades from the British government for the support lent during the bloody rebellion.⁷³ This time marked the strengthening of ties between Kashmir and the colonial British (Imperial India). Though Kashmiris continued living and working in miserable, dire conditions, the indigenous population never attempted to rebel.⁷⁴ Kashmiris feared the strong relationship between the Maharaja and the colonial British in India, understanding the English would interfere and crush any rebellion.⁷⁵ However, by 1884 the British could no longer ignore Ranbir Singh’s reign of indifference; the word

⁶⁷ Schofield, 7.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Schofield, 9.

⁷¹ Ibid.

⁷² Schofield, 7, 9.

⁷³ Schofield, 9.

⁷⁴ Ibid.

⁷⁵ Schofield, 10.

was out on the miserable, dire conditions of Kashmiris.⁷⁶ The British were ready to intervene in Kashmiri administration because “[t]he state of Jammu and Kashmir effectively constituted the northern frontier of Imperial India.”⁷⁷ As the northern frontier, a cooperative Kashmir was essential to keep Imperial India safe from military ambush and invasion by eager neighbors Afghanistan, China, and Russia.⁷⁸ Simply, the British recognized that Kashmir was uniquely strategic and prized.

The new recognition of Kashmir’s strategic importance marked a shift toward British interest and active engagement in Kashmir and the northern frontier. In the late 1800s, the British Viceroys of India (British head of state in Imperial India) ‘directed policy towards Kashmir with Britain’s imperial considerations firmly in mind’ and permitted extending ‘Kashmiri influence if, at the same time, it served British interests.’⁷⁹ This period of British engagement in Kashmir culminated in the station of a British Officer on Special Duty (OSD) along the Kashmir-Afghanistan border; this officer reported directly to the British Government and did not answer to the Maharaja.⁸⁰ British Colonel Bidduph was stationed as the first OSD in Kashmir. This move riled the Maharaja and he refused to cooperate with Colonel Bidduph or his mission.⁸¹ The Maharaja perceived the British station of an OSD as a move to undermine the Maharaja’s control and management of the territory.⁸² In retaliation, the Maharaja began forging independent relationships and trading initiatives with Russia, China, and other small,

⁷⁶ Schofield, 10.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Schofield, 11.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Schofield, 11-12.

regional fiefdoms.⁸³ “The maharaja’s independent initiatives were being watched with concern by the British, who were still making up their minds as to the extent to which they would permit him to conduct an independent foreign policy.”⁸⁴

Maharaja Ranbir Singh died on September 15, 1885.⁸⁵ Although he had nominated his youngest and most ‘wise’ son, Amar, to succeed him, the British allowed his eldest son, Pratap, to take the throne.⁸⁶ Pratap’s ascension was a strategic allowance by the British because ‘in return, they stipulated that a Resident Political Officer be appointed and act as advisor in the reform of the administration’.⁸⁷ Maharaja Pratap Singh’s appointed British Resident Political Officer was Colonel O. St John.⁸⁸ “The view expressed by St John after four months as resident, that the maharaja was unfit to rule, persisted throughout Pratap Singh’s long reign.”⁸⁹ After only one year, Pratap was forced by the British government in India to reorganize his throne to include his two younger brothers, Amar and Ram, as part of his new advisory council.⁹⁰ The first and most important task of Pratap’s new council was addressing the long-standing inequities in Kashmir. Walter Lawrence, a British commissioner sent to aid the council, “described the position of the people as worse than that of the Third Estate in France before the French Revolution.”⁹¹

Between 1885 and 1890, British trust and confidence in Pratap Singh’s reign

⁸³ Schofield, 12.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Schofield, 12-13.

⁹¹ Schofield, 13.

significantly eroded. On April 1, 1889, Pratap was stripped of his powers as Maharaja.⁹² The Council, created 4 years earlier by the British, replaced the Maharaja and the powers of the state were vested therein.⁹³ Brothers Amar and Ram, alongside two ministers and a British member appointed by the Government of Imperial India, made up the initial council.⁹⁴ In the following years, Amar Singh was made Prime Minister, then President of the Council, and, finally, Executive Head of the Administration.⁹⁵ Yet, those positions were largely ceremonial because ‘the real power was with the British resident’.⁹⁶ Outside of Kashmir, other Indian princes took notice and expressed their upset with the unprecedented interference by the British in Kashmir’s domestic affairs.⁹⁷

Amar Singh died in 1909, clearing the way for his disgraced brother, Pratap, to regain authority and leadership in Kashmir.⁹⁸ Although the council was disbanded and nominal power was returned to the position of Maharaja, Imperial India and the British resident appointed to Kashmir continued to control the purse (state finances and taxation), the military, and foreign relations.⁹⁹ Control over these key government functions in Kashmir by remote, colonial administrators began a legacy that continues to thrive today, undermining local social and political policies (for example, Indian Constitution Article 370).

Less than 10 years later, World War I rocked the British Empire. Indian military forces were immediately deployed on behalf of the Crown. Newly reinstated Maharaja Pratap Singh committed all the state forces of Jammu and Kashmir to the British and

⁹² Schofield, 12.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Schofield, 14.

⁹⁸ Ibid.

⁹⁹ Ibid.

their war efforts.¹⁰⁰ In WWI, Kashmiris fought in East Africa, Egypt, France, and Mesopotamia and were instrumental in the Turkish defeat in Palestine.¹⁰¹ While military and monetary support from Imperial India and the surrounding Princely States, like Kashmir, were sent on behalf of the Crown, Indian public servants and politicians were pushing for change at home and began to demand greater indigenous inclusion in Indian government.¹⁰²

Kashmiris had also had enough with the inequities in their state, although Kashmiris were not working in solidarity with Indian politicians, just simultaneously.¹⁰³ It had long been a policy of Imperial India to ‘appoint respectable officials’ to oversee the administration of the government of Kashmir.¹⁰⁴ “The lack of educated or trained Kashmiris to fulfill these positions meant that Bengalis and Punjabis from British India were introduced into the administration, which upset the local Kashmiris.”¹⁰⁵ A pattern emerged from this British practice. Kashmiri Pandits, those historically Bengali and Punjabi Hindus that immigrated to Kashmir as government officials, benefitted from their positions and took advantage of better education and higher socio-economic class than indigenous Kashmiri Muslims.¹⁰⁶ Kashmiri Muslims were larger in population, but excluded from educational opportunities or work in government service and, thus, remained poor and burdened by taxes without economic mobility.¹⁰⁷

Kashmiri Muslims were becoming acutely aware of the class divide and lack of indigenous political representation in the state as newspapers throughout India reported

¹⁰⁰ Schofield, 15.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ *See generally* Schofield, 15.

¹⁰⁴ Schofield, 14.

¹⁰⁵ Ibid.

¹⁰⁶ Schofield, 14-15.

¹⁰⁷ Ibid.

on the rise of Kashmiri Pandits at the expense of Kashmiri Muslims.¹⁰⁸ This awareness led to the creation of the All Muslim Kashmiri Conference, which set up scholarships for Kashmiri Muslims to study in British India.¹⁰⁹ More importantly, this era saw the establishment of the Mirwaiz, a historic Muslim leadership position in the region, and his political and social association, Anjuman-i Nusrat-ul Islam.¹¹⁰

As wealthy Kashmiri Muslims established scholarships and political associations, poor Kashmiri factory workers took political action for the first time. In the spring of 1924, Kashmiri Muslims working in a state-owned silk factory demanded wage increases and an end to corruption and worker extortion from the Hindu management.¹¹¹ Leaders of the silk-factory workers were arrested and the workers went on strike.¹¹² It was reported that “Military was sent for and most inhuman treatment as meted out to the poor, helpless, unarmed peace-loving labourers who were assaulted with spears, lances, and other implements of warfare.”¹¹³ After the worker’s strike was crushed, strike organizers and supporters were reprimanded, either forced to apologize to the Maharaja or face banishment from the state.¹¹⁴

Maharaja Pratap Singh died on September 25, 1925 and his nephew, the son of Amar Singh, Hari Singh ascended to the throne.¹¹⁵ Maharaja Hari Singh reined as the last Maharaja of Kashmir. Muslim and Pandit Kashmiris alike were optimistic that Hari Singh would be a more equitable and just ruler than his Uncle Pratap, but optimism soon faded. “The alienation of the Kashmiris to Hari Singh was heightened by the continuing

¹⁰⁸ Schofield, 16.

¹⁰⁹ Schofield, 15.

¹¹⁰ Ibid.

¹¹¹ Schofield, 16.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Schofield, 17.

¹¹⁵ Ibid.

presence of ‘outsiders’ in government service.”¹¹⁶ However, in 1927 the ‘Hereditary State Subject’ law was passed, prohibiting the employment of non-state subjects in public service and prohibiting the purchase of land by non-state subjects.¹¹⁷ Unfortunately, and to the great disappointment of Kashmiri Muslims, this law ushered in the status improvement of Jammu’s Dogra Rajputs and Kashmiri Pandits, both religiously Hindu, but further disenfranchised the Muslims of the Valley.¹¹⁸ Moreover, new laws prevented Kashmiri Muslims from carrying firearms or enlisting in the army.¹¹⁹ Maharaja Hari Singh did not allow military recruitment of Kashmiri Muslims, although he did allow recruitment of Muslims from linguistically and culturally distinct Poonch and Mirpur¹²⁰ regions.¹²¹ This strategic decision, he believed, would give him the upper hand should he need to “suppress whatever trouble might arise in the valley.”¹²²

Although Hari Singh actively worked to exclude Kashmiri Muslims from political life, organized groups and campaigns sprang up across Jammu and Kashmir in opposition to the Maharaja’s draconian policies. Notably, “In Srinagar the Reading Room Party, comprising a number of graduates from Aligarh Muslim University in British India, rose to prominence” and became a place to discuss grievances and work to improve the lives of Muslims in the Valley.¹²³ Then, in 1931, Mirwaiz Yusuf Shah succeeded his uncle and ambitiously took over as religious leader.¹²⁴ The new, beloved Mirwaiz began organizing

¹¹⁶ Schofield, 17.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Of the 71,667 state subjects from Jammu and Kashmir who served in the British Indian forces during WWII, 60,402 were Muslims from the southern provinces of Poonch and Mirpur, *see* Schofield, 41.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

meetings at Kashmiri mosques and speaking out against the Maharaja's government.¹²⁵

Around the same time, another important young political activist rose to popularity. "After being educated at Aligarh, another rising political activist, Sheikh Mohammad Abdullah, returned to the valley in 1930, just as the political turmoil in Kashmir was beginning. He too became a member of the Reading Room Party and rose to prominence as the 'Lion of Kashmir'."¹²⁶ The Mirwaiz and the Lion are two of the most important political figureheads in Kashmiri history and continue to invoke and engender Kashmiri Muslims' calls for political action. However, in 1931, their lives as political activists were just beginning as Kashmir was roiling, poised to explode.

In July of 1931, Kashmir finally exploded and 21 people died. This event is known today as the 'Abdul Qadir Incident'.¹²⁷ Abdul Qadir was a butler who, fed up with the treatment of Kashmiri Muslims, delivered an intense speech that called upon Kashmiris to rise up and fight against their own oppression.¹²⁸ People took to the streets in large crowds and swarmed the jail where Qadir and others had been held after their arrests.¹²⁹ As the protests swelled and engulfed the city, police fired into the crowds of people and killed 21.¹³⁰ The bodies of the 21 slain were carried in protest and procession through Srinagar, while Hindu-owned shops were broken into and looted.¹³¹ Sheikh Abdullah, the Lion, was one of the hundreds of young Kashmiri Muslim protesters arrested that day.¹³² He recalled, "Our Dogra rulers unleashed a reign of terror."¹³³ The

¹²⁵ Schofield, 17-18.

¹²⁶ Schofield, 18.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

Abdul Qadir Incident marked the first in a long, embattled history of protests, deaths, and arrests by and of Kashmiris in pursuit of their political voice.

Abdullah remained imprisoned in the Srinagar Central Jail until June 1932.¹³⁴ While imprisoned, Abdullah met with other political prisoners and discussed the formation and leadership of a new political party.¹³⁵ Abdullah's political party was named the Muslim Conference and Abdullah served as President.¹³⁶ Fellow political leader and activist, Ghulam Abbas, served as General Secretary.¹³⁷ "A hallmark of Abdullah's political struggle was his insistence that the fight was against the oppression of both the Muslim and Hindu poorer classes. His continuing emphasis on promoting secularism eventually led to an internal disagreement, which also had some foundation in religious differences amongst Muslims."¹³⁸ Due to Abdullah's secularism, prominent Muslim religious leaders, including the Mirwaiz, abandoned efforts to unify the political parties and, instead, established competing political parties.¹³⁹ This historical divergence and ideological chasm continues to haunt efforts to unify Kashmiri Muslims today.

While internal issues were tense and explosive in Kashmir, external issues also plagued the Maharaja. Throughout the 1930s, the British had paranoid fears regarding the Soviet Union and its threat to invade Imperial India by way of Gilgit (presently Pakistan) and the northern frontier of Kashmir.¹⁴⁰ Previously, the British had controlled and dictated Pratap Singh's foreign relations policy and oversaw protection of the northern

¹³⁴ Schofield, 18.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Schofield, 19.

frontier border.¹⁴¹ When his nephew, Maharaja Hari Singh, took the throne, he also took back management of Kashmir's foreign policy and military protection plans, including the northern frontier and Gilgit military station.¹⁴² "After two years of discussion, the maharaja suggested that he would either take over responsibility for the defense of Gilgit, provided he did not have to share administration with the [British] political agent; alternatively, he was prepared to hand over all responsibility to the Government of India [i.e. the British]."¹⁴³ Although it would cost the British immensely, they chose to negotiate and secure the lease of 'the Gilgit Agency north of the Indus [river] for a period of sixty years from 26 March 1935'.¹⁴⁴ This lease initiated the process of parceling off Kashmiri territory by and for Imperial India, run by Colonial British administrators.

Between 1935 and 1938, multiple Round Table Conferences were held between British representatives, the leaders of the princely states, and the newly emerging constituent political party groups (like India's Congress Party and The Muslim League).¹⁴⁵ The Round Table Conferences produced the Government of India Act, which memorialized the march toward a more self-governing India.¹⁴⁶ However, in August of 1938, Kashmir again erupted in street protests, led by Kashmiri political leaders, raising slogans against high unemployment, high taxes, and lack of regional medical facilities.¹⁴⁷ Yet, protesting this time were Muslims, Hindus, and Sikhs joined together by shared inequity.¹⁴⁸ As they protested together, they went to prison together and, reunited under

¹⁴¹ Schofield, 19.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Schofield, 20.

¹⁴⁸ Ibid.

common cause, they reaffirmed the Valley's commitment to secularism.¹⁴⁹ Embracing the turn towards secularism, the Muslim Conference¹⁵⁰ changed its name to the National Conference on June 11, 1939.¹⁵¹

On the horizon, World War II loomed over Britain and, subsequently, British India. On September 3, 1939, the British Viceroy to India issued a war proclamation, warning that Britain was now at war with Germany and, thus, British India was declared in a 'state of war emergency'.¹⁵² WWII marks an important turning point in the colonial history and the making of India and Pakistan. At that point, India had two major indigenous political parties: the Indian Congress Party—led by secular socialist Jawaharlal Nehru—and the Muslim League—led by the pro-partition, Muslim politician Mohammad Ali Jinnah.¹⁵³ How Nehru and Jinnah aligned their parties during WWII greatly impacted the making of post-colonial India and Pakistan.

Following the announcement of WWII and facing the implications of wartime in British India, the Indian Congress Party and the Muslim League responded in discontinuity, exposing the rupture and ever-growing vale between the two parties.¹⁵⁴ The Indian Congress Party repudiated the war and rejected the assumption that as Britain's colony, India would automatically be dragged into the war without political debate and representative vote.¹⁵⁵ Emboldening their calls for independence, the Indian Congress Party tried to use their cooperation with the wartime effort in India as a bargaining chip

¹⁴⁹ Schofield, 20.

¹⁵⁰ The Muslim Conference, which became the National Conference, was started by Sheikh Abdullah and emphasized secularism in Kashmiri politics. As opposed to the Muslim League, famously led by Mohammad Ali Jinnah, which emphasized political inclusion of Muslim Indians and eventually lobbied for partition and the creation of Pakistan.

¹⁵¹ Schofield, 20-21.

¹⁵² Schofield, 21.

¹⁵³ *See generally*, Schofield, 21-25.

¹⁵⁴ Schofield, 21.

¹⁵⁵ *Ibid.*

for the promise of independence.¹⁵⁶ In the spring of 1940, “Nehru condemned [the] war ‘for imperialist ends’ to which the Congress [Party] could not in any way be party.”¹⁵⁷

While Nehru and the Indian Congress Party protested India’s inclusion in Britain’s WWII fight, Mohammad Ali Jinnah and the Muslim League used Muslim support and loyalty to ensure the Muslim League would be represented in any decision making that could affect Muslims in India.¹⁵⁸ Jinnah saw a political opening and he seized his opportunity. On March 23, 1940, the Muslim League met in Lahore and finalized the ‘Pakistan Resolution’.¹⁵⁹ The Pakistan Resolution declared: “areas in which the Muslims are numerically in a majority, as in the north-western and eastern zones of India, should be grouped to constitute “independent states” in which the constituent units shall be autonomous and sovereign.”¹⁶⁰ Jinnah endorsed the Pakistan Resolution by explaining, “to yoke together two such nations (as the Hindus and Muslims) under a single state, one as a numerical minority and the other as a majority, must lead to growing discontent.”¹⁶¹ This resolution marked the formal conception of Pakistan and introduced plans for the mass transfer and migration of Muslim Indians.¹⁶²

On March 7, 1942, the Japanese took Burma and WWII arrived at India’s door.¹⁶³ British Prime Minister Winston Churchill was reluctant to give any attention to the calls for independence in India and largely ignored the growing internal political instability.¹⁶⁴ Nevertheless, the Indian Congress Party continued its civil disobedience campaign. The

¹⁵⁶ Schofield, 21.

¹⁵⁷ Schofield, 21, *citing* H.V. Hodson, *The Great Divide* (Oxford: Oxford University Press, 1969) 78-79.

¹⁵⁸ Schofield, 21.

¹⁵⁹ *Ibid.*

¹⁶⁰ Schofield, 21, *citing* H.V. Hodson, *The Great Divide* (Oxford: Oxford University Press, 1969) 78-79.

¹⁶¹ Schofield, 21.

¹⁶² *Ibid.*

¹⁶³ Schofield, 22.

¹⁶⁴ *Ibid.*

Indian Congress Party leadership was working as part of the Quit India movement, famously led by civil rights activist Mahatma Gandhi, and many party leaders were arrested and jailed during the summer of 1942.¹⁶⁵ Between 1942 and 1944, on account of the jailing of many Quit India movement leaders, the civil disobedience decreased and internal politics in India quieted momentarily.¹⁶⁶

Meanwhile, Maharaja Hari Singh of Kashmir was one of only two Indian representatives to the British Imperial War Cabinet and pledged assistance and troop support during WWII.¹⁶⁷ Interestingly, in 1941 the Maharaja travelled to the Middle East to meet with Kashmiri troops who were on active duty in the region.¹⁶⁸ Although the Maharaja threw his wholehearted support behind Britain and its wartime efforts, the indigenous political party groups in Kashmir were growing ever bolder, reimagining a Kashmir without monarchical rule.¹⁶⁹

At this same time, the rupture between the Indian Congress Party and the Muslim League had reached Kashmir. “Those Muslims who were discontented with Abdullah’s pro-Congress stance [Abdullah’s Kashmir National Conference had aligned with Nehru’s Indian Congress Party], especially the non-Kashmiri speakers, became staunch supporters of the Muslim League.”¹⁷⁰ The rupture between those political parties in favor of a secular, socialist plan and those in favor of partition and the separation of Muslims and Hindus began to divide once united Kashmiri activists. Ghulam Abbas, who had first met Abdullah in prison and served as Secretary General in the National Conference party

¹⁶⁵ Schofield, 22.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

(originally, the Muslim Conference), defected and joined religious leader Mirwaiz Yusuf Shah to revive the Muslim Conference and support the Muslim League's Pakistan Resolution.¹⁷¹ It is important to note that Abbas was born in Jalandhar in Punjab state, south of Kashmir and just east of Lahore.¹⁷² Consequently, Abbas was not a 'State Subject' of Kashmir and he did not speak indigenous Kashmiri, which ultimately undercut his credibility as a leader who could challenge the indigenous, Kashmiri-speaking Abdullah.¹⁷³

Abbas' desertion of Sheikh Abdullah and the National Conference was a hard loss, but it did not derail Abdullah's vision of a 'New Kashmir'. Abdullah's New Kashmir plan "was one of the most advanced socialist programmes of its time."¹⁷⁴ Even Abdullah himself knew that, "initially 'New Kashmir' [would be] opposed by 'reactionary' elements from amongst both the Hindus and Muslims, but eventually the Indian National Congress Party [would] approved the manifesto."¹⁷⁵ At this moment in history, Abdullah is the most influential Muslim Kashmiri politician and his loyalty to and friendship with Indian politician Jawaharlal Nehru would be instrumental in the unfolding of Kashmir's entangled future with the Union of India.¹⁷⁶

Significantly, both the Indian Congress Party and the Muslim League had adopted official stances on the issue of the princely states and how those principalities should be treated in an independent India.¹⁷⁷ Nehru, speaking on behalf of the Indian Congress Party in 1935, presented the party's position on principalities: "The Indian National

¹⁷¹ Schofield, 22.

¹⁷² Schofield, 23.

¹⁷³ Ibid.

¹⁷⁴ Schofield, 22.

¹⁷⁵ Ibid.

¹⁷⁶ Schofield, 22-23.

¹⁷⁷ Ibid.

Congress recognises that the people in the Indian states have an inherent right of Swaraj (independence) no less than the people of British India. [The Indian Congress Party] has accordingly declared itself in favour of establishment of representative responsible Government in the States.”¹⁷⁸ Alternatively, Jinnah, speaking on behalf of the Muslim League, made it emphatically clear that the Muslim League respected the domestic affairs of the principalities and would not interfere. He stated, “[The Muslim League does] not wish to interfere with the internal affairs of any State, for that is a matter primarily to be resolved between the rulers and the peoples of the States.”¹⁷⁹ Jinnah was signaling to British India that the Muslim League would not interfere as long as the alliance, and acquiescence, between the two held strong.¹⁸⁰

After WWII ended, the British turned their attention toward India. In 1946, Britain sent a team to set up a constituent assembly that would begin drafting the constitution for a ‘united, self-governing India’.¹⁸¹ The British team of bureaucrats attempted to gather Indian politicians to fill out an interim government that would oversee the transfer of important departments of state.¹⁸² Initially, both the Indian Congress Party and the Muslim League argued over the implementation of Britain’s plan and both rejected it.¹⁸³ Eventually, the Indian Congress Party came around and, in October of 1946, Nehru and members of his party were sworn into office.¹⁸⁴ Nehru took control of the Foreign Affairs Department and Vallabhbhai “Sardar” Patel¹⁸⁵ headed up

¹⁷⁸ Schofield, 23, citing M.J. Akbar, *Kashmir: Behind the Vale* (New Delhi: Roli Books, 2002), 81.

¹⁷⁹ Schofield, 23.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Revealingly, Jawaharlal Nehru and Sardar Patel would become India’s first Prime Minister and Deputy Prime Minister, respectively.

the Home Department.¹⁸⁶ By the time Jinnah and members of the Muslim League relented and agreed to participate, all the most powerful departments in the interim government were headed up and controlled by the Indian Congress Party.¹⁸⁷ “In retrospect, that the Muslim League did not join the interim government at the outset meant that it lost the opportunity to attain parity with the Congress Party at the ‘most important moment in the demission of British authority’ [in India].”¹⁸⁸

Independence, Partition and Accession, 1947-1948

By 1947, independence and the decision to partition the Indian subcontinent into Pakistan and Hindustan (Anglicized as India) was assured, although how and when remained unclear.¹⁸⁹ The Indian Congress Party had maintained control of the interim government and created a ‘States Ministry’ to encourage the principalities to either join India or join the newly formed nation of Pakistan.¹⁹⁰ If the Maharajas of the principalities wanted to join, they needed to exercise one of two options offered by the States Ministry: (1) declare an act of accession or (2) passively accede under ‘Standstill Agreements’.¹⁹¹ When the British handed over power to the interim government, all 565 Maharajas regained full ruling powers in their princely states.¹⁹² Yet, those rulers faced an important decision regarding whether to continue monarchy rule (which most could neither politically nor economically afford) or join one of the two newly independent states.¹⁹³ “Only twenty [principalities] were of sufficient size for their rulers to be in a position to

¹⁸⁶ Schofield, 23.

¹⁸⁷ Ibid.

¹⁸⁸ Schofield, 24.

¹⁸⁹ *See generally*, Schofield, 27-47.

¹⁹⁰ Schofield, 23.

¹⁹¹ Schofield, 23-24.

¹⁹² Schofield, 24.

¹⁹³ Ibid.

make serious decisions about their future, of which one was the state of Jammu and Kashmir.”¹⁹⁴

Maharaja Hari Singh did not enjoy support from the majority of Kashmiris and, due to his political unpopularity, many Kashmiri politicians challenged the decision to leave the future of Kashmir in the Maharaja’s hands.¹⁹⁵ One such Kashmiri politician was, of course, Sheikh Abdullah. Abdullah had taken notice of the success of Gandhi’s Quit India movement and organized a sister movement called the ‘Quit Kashmir’ movement.¹⁹⁶ The Quit Kashmir movement, as Abdullah described, rose up against “the tyranny of the Dogras [Maharaja Hari Singh’s dynasty] [that] lacerated [Kashmiri] souls.”¹⁹⁷ Abdullah and the Quit Kashmir movement began to agitate and test the patience of the interim government and newly appointed authority in India.¹⁹⁸ Although Abdullah had remained friends with Nehru, his attempt to visit Nehru in Delhi during this time resulted in Abdullah’s immediate arrest and imprisonment.¹⁹⁹ Abdullah’s arrested prompted Maharaja Hari Singh’s Prime Minister, Ram Chandra Kak, to declare Kashmir under martial law.²⁰⁰ The authorities worried the Maharaja had lost control in the state and did not want the Quit Kashmir movement to destabilize the delicate partition process.²⁰¹

Abdullah was facing criticism from inside the Indian Muslim community as his political rivals in the Muslim Conference derided his Quit Kashmir movement.²⁰² The

¹⁹⁴ Schofield, 24.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

Muslim Conference “charged that [Abdullah] had begun the agitation in order to boost his popularity, which [Abdullah] was losing because of his pro-India²⁰³ stance.”²⁰⁴ In a somewhat ironic and curious move, Ghulam Abbas and leaders of the Muslim Conference “led a campaign of action similar to Jinnah’s in British India.”²⁰⁵ This campaign of action and civil disobedience landed Abbas and others from the Muslim Conference in the same jail as Abdullah.²⁰⁶ During this time, “Abbas and Abdullah were held in the same jail, where they discussed in night-long conversations the possibility of a reconciliation and resumption of the common struggle, which, as subsequent events showed, never materialised.”²⁰⁷

In the months leading up to independence, Maharaja “Hari Singh appeared as a helpless figure caught up in a changing world, with which he was unable to keep pace.”²⁰⁸ The Maharaja was ‘too feudalistic to make any real accommodations for the emerging protagonists in the changing political order’ and he was ‘too patriotic to strike quickly and make deals’.²⁰⁹ Politically, the Maharaja was ‘hostile to the Indian Congress Party’, led by Nehru, Gandhi, and Patel, partly because of his contempt for the close friendship between Nehru and Abdullah.²¹⁰ He could not align himself with the National Conference, Abdullah’s party, because it openly contested the Dogra dynasty.²¹¹ Nor could the Maharaja align himself with the Muslim League because he opposed the

²⁰³ There are evolving iterations of players and power hierarchies in this story. Like the Quit India movement grew from colonial British oppression of indigenous Indians, the focus of the Quit Kashmir movement was on ousting the Dogra Rajput ruling dynasty as the apex of oppression in Kashmir. Moreover, to be pro-India at this time was to object to the partition of the subcontinent. India’s entanglement in Kashmir had not yet been fully realized.

²⁰⁴ Schofield, 24.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Schofield, 25.

²⁰⁹ Schofield, 25, *citing* Karan Singh, *Heir Apparent* (Oxford: Oxford University Press, 1982) 41-42.

²¹⁰ Schofield, 25.

²¹¹ Ibid.

communalism undergirding the Muslim League's push towards partition.²¹² He rejected accession to Pakistan because he did not want the Hindus in Jammu or the Buddhists in Ladakh to become a minority.²¹³ And he had been warned to consider accession to India carefully, given the region's Muslim majority population and issues of future geographical and political proximity.²¹⁴

All this rendered him largely powerless and ineffectual and when the 'crucial decision making moment arrived, the Maharaja was alone and friendless'.²¹⁵ As historian Victorian Schofield points out,

In hindsight, it also seems extraordinary how comparatively little influence the British assumed in assisting the Maharaja with his decision. For over forty years, at the end of the 19th and the beginning of the 20th centuries, Britain had maintained virtual control over the state of Jammu and Kashmir. Yet, with the future peace and stability of the sub-continent hanging in the balance, the British government let the Maharaja of Jammu and Kashmir pursue his destiny alone.²¹⁶

What happened next is still marred by turbidity and discord. Much jockeying was happening by Nehru, Gandhi, and the British Viceroy in an effort to persuade the Maharaja to accede to India.²¹⁷ Interestingly, Nehru's family had emigrated from Kashmir in the 18th century (Nehru is a Hindu Pandit) and he continued to have an emotional attachment to the Valley.²¹⁸ He also knew that Kashmir, as the northern frontier border state, was uniquely strategic and prized.²¹⁹ Between Nehru's emotional attachment to Kashmir and his political savvy, he was determined to negotiate the

²¹² Schofield, 25.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Schofield, 25, citing Karan Singh, *Heir Apparent* (Oxford: Oxford University Press, 1982) 53.

²¹⁶ Ibid.

²¹⁷ Schofield, 27-31.

²¹⁸ Schofield, 29.

²¹⁹ Ibid.

Maharaja's accession.²²⁰

Nehru and the Indian Congress Party were not the only politicians jockeying for favor in Kashmir. The Muslim Conference was angry with Nehru's Indian Congress Party and its relentless pro-India lobby activity in the Valley.²²¹ However, most of the Muslim Conference's Kashmiri leadership was still imprisoned after the 1946 campaign of action and could do nothing.²²² Additionally, Mohammad Ali Jinnah had previously endorsed the right of the principalities to remain independent.²²³ Consequently, Jinnah and the Muslim Conference focused their energies on the formation of Pakistan.²²⁴ Jinnah announced, "If [the princely states] wish to remain independent and wish to negotiate or adjust any political or any other relationship such as commercial or economic relations with Pakistan, we shall be glad to discuss with them."²²⁵

Whilst partition and independence were effectuated at the same time, the actual redrawing of India and details of partition were not commenced until the summer of 1947.²²⁶ One British bureaucrat confided, "[the partition] announcement was likely to confuse and worsen an already dangerous situation."²²⁷ As tensions between the newly formed governments of India and Pakistan boiled over, massacres and reprisal killings between Hindus, Sikhs, and Muslims were happening across the fracturing subcontinent.²²⁸ The British Boundary Commission determined that "Kashmir . . . was so placed geographically that it could join either Dominion [India or Pakistan]" and Sardar

²²⁰ *See generally*, Schofield, 28-33.

²²¹ Schofield, 32.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ Schofield, 32-33.

²²⁶ Schofield, 33.

²²⁷ *Ibid.*

²²⁸ Schofield, 37.

Patel of the Congress Party knew that as long as “Kashmir [did] not lie in the bosom of Pakistan, [it could] claim an exit to India.”²²⁹

Throughout the partition process, Pakistani distrust and apprehension grew. Pakistanis harbored deep “apprehension about the intentions of both the Indians and the British [which] arose from [the] long-standing feeling that neither Britain nor India wanted nor expected Pakistan to survive.”²³⁰ From Pakistani apprehension grew great anxiety and fear over Kashmir. Pakistanis worried that Britain wanted India to absorb Kashmir in order to gain a strategic foothold over Pakistan and put pressure on the country’s most northern borders.²³¹ Pakistan also fretted over the possession and control of Kashmir’s important rivers, including the Indus, which fed the energy and agricultural industries.²³² Ultimately, Pakistanis believed that India was set on grabbing Kashmir in order to ‘encircle Pakistan militarily and strangle it economically’.²³³ And Pakistanis may have been justified in their anxiety. On June 5, 1947, a Congress Resolution was passed that stated,

Geography and mountains and the sea fashioned India as she is, and no human agency can change that shape or come in the way of her final destiny. [Once] present passions [have] subsided the false doctrine of two nations will be discredited and discarded by all.²³⁴

To the shock of many, on August 12, 1947, Maharaja Hari Singh exchanged telegrams with Pakistan to arrange a ‘Standstill Agreement’ between the states.²³⁵ The Agreement’s objective was to ensure that commerce and service vital to travel, trade, and

²²⁹ Schofield, 38.

²³⁰ Schofield, 39.

²³¹ Ibid.

²³² Ibid.

²³³ Schofield, 39, *citing* A.H. Suhrawardy, *Kashmir: The Incredible Freedom Fight* (Lahore: Jang Publishing, 1991) 36-37.

²³⁴ Ibid.

²³⁵ Schofield, 40.

communication would continue on in Kashmir in the same way it had under British India administration.²³⁶ Under the Agreement, Pakistan took control of the important commercial railways and river links between the two states.²³⁷ Curiously, India did not interfere and, surprisingly, stood back and watched; explained by a Congress Party member as “[wanting] to examine [the Standstill Agreement’s] implications, [so] we left the State alone.”²³⁸

Due to the Standstill Agreement between Pakistan and Maharaja Hari Singh, most Kashmiris believed they now were part of the state of Pakistan.²³⁹ At midnight on August 14, 1947, the day of Pakistan’s official independence, Pakistani flags were hoisted above government buildings and post offices across the Valley as people cheered and celebrated their new independence and identity.²⁴⁰ In a befuddling about-face, the Maharaja demanded all Pakistani flags be taken down and ordered all pro-Pakistani newspapers closed.²⁴¹ No sooner did growing unrest and revolt lead to rebellion across the southern region of the state (namely, Jammu’s Poonch and Mirpur provinces).²⁴² And “against the declared Standstill Agreement, the Maharaja started moving his troops along the river Jhelum. It was an unusual movement which had never happened before and [clearly] had a purpose of sealing off the border with Pakistan.”²⁴³ This military maneuver was followed by large-scale massacres with looting and raping of villagers in Poonch and Mirpur.²⁴⁴ Some accounts blamed the Maharaja’s army and other accounts blamed

²³⁶ Schofield, 40.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Schofield, 40-41.

²⁴⁰ Ibid.

²⁴¹ Schofield, 41.

²⁴² *See generally*, Schofield, 41-43.

²⁴³ Schofield, 42.

²⁴⁴ Ibid.

‘aggressive hordes from across the borders’.²⁴⁵ Still others blamed the Maharaja himself, accusing him of ‘undertaking a systemic purge of Muslims’ while deliberating over accession to India.²⁴⁶ The Statesmen newspaper in Calcutta reported that

[F]or a period of about 11 weeks, starting in August, systematic savageries . . . practically eliminated the entire Muslim element in the population, amounting to 500,000 people. About 200,000 just disappeared, remaining untraceable, having presumably been butchered or died from epidemic or exposure. [The atrocities were perpetuated] not only by uncontrolled bands of hooligans but also by organised units of the Maharaja’s army and Police.²⁴⁷

Needless to say, the Standstill Agreement between Pakistan and the Maharaja did not bring stability and peace to the region. In the following weeks, political posturing from all sides began again.²⁴⁸ On September 13, 1947, India found the Maharaja’s pressure point when he broke down and requested the Government of India send the Maharaja Indian military assistance.²⁴⁹ India worked diligently to keep communication and roads open between Kashmir and India.²⁵⁰ “The idea [was] to keep up some sort of communication between the State and the Indian Union, so that essential supplies and troops could be rushed to Kashmir without having to transport them through Pakistani territory.”²⁵¹ While Nehru and India pledged more assistance to Kashmir, Pakistan set up supply blockades along the borders.²⁵² The Indian leadership knew they needed access to Kashmir and to the Maharaja in the short term to secure and protect their interests, but in order to achieve accession they needed to find a way to win the hearts and minds of Kashmiris over the long term.

²⁴⁵ Schofield, 42.

²⁴⁶ Schofield, 42-43.

²⁴⁷ Schofield, 43, *citing* Alastair Lamb, *A Disputed Legacy* (Hertingfordbury: Roxford Books, 1991) 123.

²⁴⁸ Schofield, 43.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² Schofield, 45.

On September 29, 1947, Sheikh Abdullah, the founder of the National Conference and the leader of the Quit Kashmir movement, was finally released from prison.²⁵³ “Nehru had hoped that the Maharaja could be persuaded to accede to India before any [Pakistani] invasion took place and he realised that accession would only be more easily accepted if Abdullah, as a popular leader, were brought into the picture.”²⁵⁴ Meanwhile, Pakistan strongly rejected the encroachment of India into Kashmir and Jinnah began trying to coax the Maharaja back toward accession to Pakistan. With ‘both India and Pakistan busy courting the old and new rulers’ of Kashmir, the news that ‘a large number of raiders from the tribal territory of Pakistan’s northwestern frontier province had crossed the borders and were heading for Kashmir’ grinded all diplomatic initiatives to a screeching halt.²⁵⁵ All progress and hard-won inroads Pakistan hoped would guide Kashmir towards accession were lost and the Pakistani tribesmen’s jihad destroyed any possibility of accession.²⁵⁶ “The rest is history.”²⁵⁷

The invasion of Kashmir by northern Pakistani tribesmen forced Maharaja Hari Singh’s hand. If Kashmir was to receive the military aid it needed from India, the Maharaja had to accede to India.²⁵⁸ There are differing and conflicting accounts regarding the true, possibly nefarious, source and motivation behind the invasion.²⁵⁹ Whether it was India, Pakistan, the Maharaja, or tribal forces that invaded Kashmir does not ultimately change the political events that unfolded following the invasion. On October 24, 1947,

²⁵³ Schofield, 44.

²⁵⁴ Ibid.

²⁵⁵ Schofield, 47.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Schofield, 50-52.

²⁵⁹ Ibid.

the Maharaja made a desperate plea to India for help.²⁶⁰ The following day, on October 25, India approved the immediate delivery of arms and ammunition to Kashmir but reiterated that it would not send troops without legal assurances formalized under an instrument of accession.²⁶¹

Between the days of October 25 and October 27, the Maharaja Hari Singh and his family fled Srinagar for Jammu.²⁶² On October 27²⁶³, the Maharaja composed a long letter describing ‘the pitiable plight of the State and reiterating his request for military help’.²⁶⁴ More importantly, his letter requested accession.²⁶⁵ The Maharaja’s letter was full of regret and apology but made clear that the ‘tribal invasion had forced a decision upon him’ and India’s ‘insistence on accession before assistance had pushed him a step further than he may necessarily have wanted to go’.²⁶⁶ Thus, he concluded his letter by attaching ‘the Instrument of Accession for acceptance by [the Indian] government’.²⁶⁷

As the next 70 years unfolded, Kashmiri history memorialized many more, storied examples of violence and oppression in the region. For the instant purposes, the following chapter details the important laws born from the decades of disorder exemplified in Kashmir and the entangled relationship between law and order in Kashmir.

²⁶⁰ Schofield, 52.

²⁶¹ Schofield, 52-53.

²⁶² Schofield, 53-54.

²⁶³ Although exact accounts of how the procurement of the official Instrument of Accession from the Maharaja Hari Singh differ, from the plausible to the conspiratorial, I accept historian Victorian Schofield’s following account.

²⁶⁴ Schofield, 54.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

IV. EVIDENCE: LAW AS VIOLENCE

Fundamentally, this study asks why violence and oppression persist in Kashmir. However, that question can be examined in a myriad of ways, calling on endless disciplines and theories. More than any other explanation, theory, or discipline, the action, inaction, and historical power that law exemplifies in the post-colony speaks to the violence and oppression that is pervasive and underlying in Kashmir. Thus, I ask how law underwrites violence and oppression in post-colonial Kashmir.

Yet, law itself is broad and, in this study, must be examined as operational, not just ideal or aspirational. Moreover, the phenomena here are more acute than merely law as such. Consequently, the following evidence and data speak to this study's specific curiosity: In what ways do law, the post-colonial context, security discourse, and violence and oppression in Kashmir intersect, influence, perpetuate, and legitimize one another?

In the preceding chapter, the history of the region and the making of Kashmir detailed a long, entrenched colonial entanglement. This historical entanglement consistently cast indigenous Kashmiris and Kashmiri Muslims as its protagonists, struggling in opposition against a rotating cast of antagonists: the early Mughal, Afghan, and Sikh dynasties, followed by Dogra Rajput Hindus, Pandit Hindus, and British colonial bureaucrats, and, currently, the India government and Indian military forces stationed in Kashmir. Particularly important to this study is how British colonial law became Indian law and, subsequently, law in Kashmir. As Chapter 3 ends, the triad of laws at the heart of violence and oppression in Kashmir evolve in form and operation. This triad becomes a legal trinity, made up of three laws: the Disturbed Areas Act (the state of emergency designation), the Armed Forces Special Powers Act (AFSPA), and the

Public Safety Act (PSA). This holy legal triad is the Godhead of law as violence in Kashmir, underwriting the deadly, subversive quotidian lawfare that operates there.

This chapter is organized in the following way: First, the text of the above three laws. The legal language and structure of the laws are presented in discussion with the historical colonial legacies still clearly operating through the intersection, influence, perpetuation, and legitimization of law. Second, a discussion connecting the specific legal causes and effects by showing evidence and data of extrajudicial killings, military-civilian rapes, assaults, and property crimes, as well as evidence of state-authorized civil rights restrictions and infringements. Here my goal is to consider how post-colonial subjects, Kashmiris and Indians alike, perpetuate and legitimize colonial power structures of security and development through these legal relationships, operations, and obligations. All in an effort to demonstrate how post-colonial law operates to undermine Kashmiri and Indian interests and stifle regional growth even as those same post-colonial subjects further ingrain legal loyalties and evangelize the law as virtuous.

The Law

As mentioned above, there are three laws that create a holy legal trinity in Kashmir that sits at the heart of the region's on-going violence and oppression. These laws are: the Disturbed Areas Act (designating the state of emergency), the Armed Forces Special Powers Act (AFSPA), and the Public Safety Act (PSA). These three laws do not originate from Indian lawmakers, politicians, academics, or policymakers.²⁶⁸ Rather, these laws are artifacts of British colonial rule prior to Indian independence and regional

²⁶⁸ Haley Duschinski and Bruce Hoffman, "On the Frontlines of the Law: Legal advocacy and political protest by lawyers in contested Kashmir," *Anthropology Today* 27, no. 5 (2011); *see also* Eugene F. Irschick, *A History of the New India: Past and Present* (New York: Routledge, 2015) 149-150.

partition in 1947.²⁶⁹ However, the tumult and uncertainty in the region post partition saw the reemergence and reinforcement of these laws under the Indian government in former principalities, like Kashmir.

The Jammu and Kashmir Disturbed Areas Act of 1992

The Jammu and Kashmir Disturbed Areas Act of 1992²⁷⁰ reads in part, “An Act to provide for better provision for the suppression of disorder and for the restoration and maintenance of public order in disturbed areas of Jammu and Kashmir.”²⁷¹ Section 3 of the Act, entitled, “Powers to declare areas to be disturbed areas,” states in part, “The State Government may, by notification in the Official Gazette, declare that the whole or any part of any district of Jammu and Kashmir as may be specified in the notification, [is] a disturbed area.”²⁷² Section 4, entitled, “Power to fire upon persons contravening certain orders” describes the extent of the legal designation of “disturbed area.”

In a “disturbed area,” a 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, 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 or more persons or the carrying of weapons or things capable of being used as weapons or of fire arms, ammunition, or explosive substances.²⁷³

Section 5, “Powers to destroy arms dump, fortified positions, etc.” goes on,

²⁶⁹ See Duschinski and Hoffman; see also Irschick, 149-150.

²⁷⁰ Repealing and replacing the Jammu and Kashmir Disturbed Areas Act of 1990 (Governor’s Act No. 12 of 1990); see Sec. 1(1)-(4) and 7(1)-(2), Jammu and Kashmir Disturbed Areas Act, No. 4 of 1992 for elaboration and discussion of the reasons to replace a Governor’s Act with a Legislative and/or Presidential Act in Indian law.

²⁷¹ Sec. 1, Jammu and Kashmir Disturbed Areas Act, No. 4 of 1992.

²⁷² Sec. 3, Jammu and Kashmir Disturbed Areas Act, No. 4 of 1992.

²⁷³ Sec. 4, Jammu and Kashmir Disturbed Areas Act, No. 4 of 1992.

In a “disturbed area,” any Magistrate or Police Officer not below the rank of a Sub-Inspector may, if he is of the opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position of shelter from which aimed attacks are made or [are] likely to be made or are attempted to be made or any structure used as a training camp for armed volunteers or [utilized] as a hideout by armed gangs or absconders wanted for any offense.²⁷⁴

Finally, relevant here is Section 6, “Protection of persons acting under Sections 4 and 5,”

No suit, prosecution, or other legal proceedings shall be instituted except with the previous sanction of the State Government against any person in respect of anything done or purporting to be done in exercise of the powers conferred by Section 4 and 5.²⁷⁵

The Armed Forces (Jammu and Kashmir) Special Powers Act of 1990

In 1990, following the Governor’s designation of Kashmir as a place of such disorder that the legal status of “disturbed area” was required for public safety, the Armed Forces Special Powers Act (AFSPA) came into effect. The Armed Forces (Jammu and Kashmir) Special Powers Act of 1990 begins, “An Act to enable certain special powers to be conferred upon members of the armed forces in the disturbed areas in the State of Jammu and Kashmir” and explains that “[i]t extends to the whole of the State of Jammu and Kashmir.”²⁷⁶

The AFSPA defines “armed forces” as “military forces and the air forces operating as land forces and includes any other armed forces of the Union as operating.”²⁷⁷ Interestingly, the AFSPA also includes a section dedicated to the ‘power to declare areas to be disturbed areas.’ It reads in full,

3. Power to declare areas to be disturbed areas. If, in relation to the State of Jammu and Kashmir, the Governor of that State or the Central

²⁷⁴ Sec. 5, Jammu and Kashmir Disturbed Areas Act, No. 4 of 1992.

²⁷⁵ Sec. 6, Jammu and Kashmir Disturbed Areas Act, No. 4 of 1992.

²⁷⁶ Sec. 1, The Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990.

²⁷⁷ Sec. 2(a), The Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990.

Government, is of opinion that the whole or any part of the State is in such a disturbed and dangerous condition that the use of armed forces in aid of the civil power is necessary to prevent—

(a) activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people;

(b) activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India [from] the Union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution of India, the Governor of the State *or* the Central Government, may, by notification in the Official Gazette, declare the whole or any part of the State to be a disturbed area.²⁷⁸

The heart of the AFSPA is Section 4, which reads in full,

4. Special powers of the armed forces. Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area, —

(a) 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 acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of firing arms, ammunition or explosive substances;

(b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders wanted for any offence;

(c) arrest, without warrant, any persons who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;

(d) enter and search, without warrant, any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary, and seize any such property, arms, ammunition or explosive substances;

²⁷⁸ Sec. 3, The Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990.

(e) stop, search and seize any vehicle or vessel reasonably suspected to be carrying any persons who is a proclaimed offender, or any persons who has committed a non-cognizable offence, or against who a reasonable suspicion exists that he has committed or is about to commit a non-cognizable offence, or any person who is carrying any arms, ammunition or explosive substances believed to be unlawfully held by him, and may, for that purpose, use such force as may be necessary to effect such stoppage, search or seizure, as the case may be.²⁷⁹

This section is followed by Section 5²⁸⁰, the “Power of search to include powers to break open locks, etc.”, and Section 6²⁸¹, “Arrested persons and seized property to be made over to the police.” These sections are generally peripheral and self-explanatory. Section 7 is worth including in full, however, as it is the immunity against legal action clause.

Section 7 reads in full,

7. Protection of persons acting in good faith under this Act. No prosecution, suit or other legal proceeding shall be instituted, except with the 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.²⁸²

The Power to Declare an Area Disturbed

It is important to stop here and examine the legally murky and much disputed relationship between the Disturbed Areas Act of 1992 and the Armed Forces Special Powers Act of 1990. Technically, the AFSPA’s Section 3 on the ‘Power to declare areas disturbed’ predates the official legislation and passage of the Disturbed Area Act. Before 1992, the Central Government of India encouraged state Governors to issue unilateral decrees declaring their states as disturbed and in emergency.²⁸³ A Governor’s decree was

²⁷⁹ Sec. 4, The Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990.

²⁸⁰ Sec. 5, The Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990.

²⁸¹ Sec. 6, The Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990.

²⁸² Sec. 7, The Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990.

²⁸³ Muzamil Jaleel, “Explained: AFSPA-Disturbed Areas Debate in J&K,” *The Indian Express*, March 30, 2015, <http://indianexpress.com/article/explained/explained-afspa-disturbed-areas-debate-in-jk/>.

then published in the official government gazette, which triggered the AFSPA powers in that state or region of India.²⁸⁴

The Jammu and Kashmir Government's Civil Secretariat Home Department published such a notification from the Governor on July 6, 1990 that read,

In exercise of the powers conferred under Section 3 of the Armed Forces (Jammu and Kashmir) Special Powers Ordinance, 1990, the Governor of Jammu and Kashmir hereby notifies the areas given in the Schedule to this notification as Disturbed Areas.

Schedule

1. Areas falling within 20 Kms. of the Line of Control in the Districts of Rajouri and Poonch.
2. Districts of Anantnag, Baramulla, Badgam, Kupwara, Pulwama and Srinagar.²⁸⁵

And again on August 10, 2001, the Governor published a disturbed areas decree, reiterating the specific areas subject to the power and force of the AFSPA.

Whereas the Governor is of the opinion that the State is in such a disturbed condition that the use of Armed Forces in the aid of civil power is necessary to prevent the activities involving terrorists acts directed towards striking terror in the people;

Now, therefore, in exercise of the powers conferred by Section 3 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, the Governor hereby declares the districts of Jammu, Kathu, Udhampur, Poonch, Rajouri and Doda to be disturbed areas in addition to districts, Srinagar, Budgam, Anantnag, Pulwama, Baramulla and Kupwara which stand already so declared.

By order of the Governor²⁸⁶

However, the question of who holds the legal authority to trigger the AFSPA powers is still much disputed. Although the Disturbed Areas Act of 1992 clearly grants the power to declare areas as disturbed to the State Government (or Governor)²⁸⁷, the AFSPA of

²⁸⁴ Jaleel.

²⁸⁵ Noti. 4, Disturbed Areas Notification and Schedule, Civil Secretariat Home Department, Government of Jammu and Kashmir, 103 GAZ. INDIA 14-1, Srinagar, 6 July 1990.

²⁸⁶ Noti. 350, Disturbed Areas Notification and Schedule, Civil Secretariat Home Department, Government of Jammu and Kashmir, 219 GAZ. INDIA 97, Srinagar, 10 August 2001.

²⁸⁷ See Sec. 3, Jammu and Kashmir Disturbed Areas Act, No. 4 of 1992.

1990 grants this power “in relation to the State of Jammu and Kashmir, [to] the Governor of that State or the Central Government.”²⁸⁸ Moreover, the Disturbed Areas Act does not have the implicit power to abrogate the AFSPA, which explains why many are still confused as to who actually has the power to declare an area as disturbed and in order to trigger the AFSPA.

Kashmir’s legislative assembly has directly run afoul of this important issue and subversively attempted to challenge Section 3 of the Disturbed Areas Act. Some scholars and jurists argue that the Disturbed Areas Act designation in Kashmir lapsed in 1998, making the continued use of the AFSPA powers in Kashmir blatantly illegal.²⁸⁹

In 1997, when Farooq Abdullah was Chief Minister, the legislative Assembly ratified the law [the Disturbed Areas Act] for one year. But in October of 1998, it was allowed to lapse in response to a huge wave of resentment against the misuse of its draconian provisions, especially in Kashmir, where police and armed forces were repeatedly accused of fake encounters, custodial killings and enforced disappearances.²⁹⁰

Yet, the lapsing of the Disturbed Areas Act did not bring an end to, or even an inquest into, the use of AFSPA powers in Kashmir. Rather, opponents argued that the two laws are permissive and allow the State Government or/and the Central Government to declare an area as disturbed. If the State Government does not issue a notification under Section 3 of the Disturbed Areas Act, the State Government or the Central Government of India still has the opportunity to issue a notification of the same strength and validity under

²⁸⁸ See Sec. 3, The Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990.

²⁸⁹ Muzamil Jaleel, “Explained: AFSPA-Disturbed Areas Debate in J&K,” *The Indian Express*, March 30, 2015, <http://indianexpress.com/article/explained/explained-afspa-disturbed-areas-debate-in-jk/>.

²⁹⁰ Jaleel.

Section 3 of the AFSPA.²⁹¹ Opponents have concluded, “[T]he power to declare an area disturbed is ‘inherent in AFSPA’.”²⁹²

The Indian Supreme Court has also weighed in on this legally murky and much disputed issue.

In November 1997, the Supreme Court, while upholding the constitutional validity of AFSPA, said that “Section 3 . . . does not confer an arbitrary or unguided power to declare an area as a ‘disturbed area’,” and that “a declaration under Section 3 has to be for a limited duration and there should be a periodic review of the declaration before the expiry of six months”.²⁹³

The Supreme Court’s ruling caused the Home Ministry to review and add new districts to the former Disturbed Areas Act notification, reissuing the notice in August of 2001 and again in 2005.²⁹⁴ However, according to constitutional lawyer and Kashmiri political leader Muzaffar Hussain Baig, “if a notification was not issued afresh after six months, AFSPA would be illegal. Even if a fresh notification were to be issued now [in 2015], it won’t have retrospective effect.”²⁹⁵

The implications of legal ramifications entangled in this debate culminate in one, very important point: if the disturbed area designation has legally lapsed in Kashmir, that potentially means the powers of the AFSPA are operating illegally there and the AFSPA immunity afforded to the armed forces acting behind its shield would be unavailable, allowing victims of militarized violence and terror to challenge their alleged offenders in court.²⁹⁶

²⁹¹ Muzamil Jaleel, “Explained: AFSPA-Disturbed Areas Debate in J&K,” *The Indian Express*, March 30, 2015, <http://indianexpress.com/article/explained/explained-afspa-disturbed-areas-debate-in-jk/>.

²⁹² Jaleel.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

Recently, the Indian Supreme Court again waded into the issue of the AFSPA powers in areas designated as disturbed. While the ruling was in response to 1,528 claims made by family members of victims who died in violent fake or staged encounters with the Indian army in northeastern Manipur, the Court’s findings have significance for Kashmiris. Heard by Supreme Court Justices Madan B. Lokur and U.U. Lalit, Writ Petition (Criminal) No. 129 of 2012 “raises important and fundamental questions of human rights violations—not in the context of the accused but in the context of the victims. Do the next of kin of deceased victims have any rights at all, other than receipt of monetary compensation?”²⁹⁷

In the cases of those Manipur victims, Justices Lokur and Lalit make some important legal delineations that may apply to future cases out of Kashmir. First, the Justices make clear that absent war, armed rebellion, or external aggression, an ‘internal disturbance’ rising to the level of emergency deployment of armed forces must do so only ‘in aid of the civil power’.²⁹⁸ “Normalcy not being restored cannot be a fig leaf for prolonged, permanent or indefinite deployment of the armed forces (particularly for public order or law and order purposes) as it would mock at our democratic process and would be a travesty.”²⁹⁹

Additionally, the case is clear that either the Governor or the Central Government have the power to publish notification of disturbed area designation³⁰⁰ and “the postulates for a declaration under Section 3 of the AFSPA are that a public order situation exists and that the assistance of the armed forces of the Union is required in aid of the civil power.

²⁹⁷ *Extra Judicial Execution Victim Families Association (EEVFAM) & Anr. v. Union of India & Anr.*, (July 8, 2016) SCC 1.

²⁹⁸ *EEVFAM v. India*, 36 at 92.

²⁹⁹ *EEVFAM v. India*, 35 at 91.

³⁰⁰ *EEVFAM v. India*, 37 at 93.

In such a situation, the AFSPA enables the armed forces of the Union to exercise vast powers.”³⁰¹

The Court acknowledges that the AFSPA contains a powerful provision granting immunity to armed forces acting while in the line of duty. However, “if an offence is committed even by Army personnel, there is no concept of absolute immunity from trial by the criminal court.”³⁰² The Court goes on, “From the point of view of a citizen, living under the shadow of a gun that can be wielded with impunity, outright acceptance of the [AFSPA immunity clause] is equally unsettling and demoralizing, particularly in a constitutional democracy like ours.”³⁰³ Thus, to prevent the impunity seen arising from the AFSPA immunity clause, the Court emphasizes just, fair, and prompt enquiry tribunals that collect and save evidence on behalf of victims so that they may build a solid case.³⁰⁴ The Court also reiterates the need to publicly issue, for benefit of victims, official findings in cases where excessive force and unjustifiable death have occurred.³⁰⁵

Finally, the Court issues an important warning regarding the Army’s argument that a member of the armed forces must act against any ‘enemy’ of the state. A person is not a terrorist because of mere, passive membership with a banned organization, nor is it appropriate to deem someone ‘enemy’ because he is carrying arms in a disturbed area.³⁰⁶ “If members of our armed forces are deployed and employed to kill citizens of our country on the mere allegation or suspicion that they are ‘enemy’ not only the rule of law but our democracy would be in grave danger.”³⁰⁷

³⁰¹ *EEVFAM v. India*, 37 at 94.

³⁰² *EEVFAM v. India*, 79 at 163.

³⁰³ *Ibid.*

³⁰⁴ *EEVFAM v. India*, 82-85.

³⁰⁵ *EEVFAM v. India*, 72-75.

³⁰⁶ *EEVFAM v. India*, 64-66.

³⁰⁷ *EEVFAM v. India*, 67 at 143.

The Jammu and Kashmir Public Safety Act of 1978

Finally, this legal trinity is not complete without the Jammu and Kashmir Public Safety Act of 1978 (PSA). Although the oldest of the three laws, the PSA tends to play a supporting role to the AFSPA. Generally, the PSA covers the legal procedures surrounding local policing and local police custody of suspects after the military, acting under the AFSPA, is done with them.³⁰⁸ The preamble of the PSA sets forth the wide scope of the law, “Whereas it is necessary in the interest of the security of the State and public order to make law providing for the measures hereinafter appearing.”³⁰⁹ The PSA contains 24 sections. Although all of the sections are tangentially related to this study and are potentially implicated in light of specific facts and cases, I will outline the most relevant sections below.³¹⁰

Chapter II of the PSA is entitled, “Access to Certain Premises and Areas” and contains Section 3, Section 4, and Section 5 (relevant text of sub-sections quoted below).

3. Prohibited places—

(1) If as respects any place the Government considers it necessary or expedient that special precautions should be taken to prevent the entry of unauthorised persons, the Government may, by notified order, declare that place to be a prohibited place.

(2) No person shall, without the permission of the Government or the authority specified by the Government, enter, or be on or in, or pass over, or loiter in the vicinity of, any prohibited place.

. . .

(4) Any Police Officer, or any other person authorised in this behalf by the Government, may search any person entering or seeking to enter or being on or in, or leaving a prohibited place, and any vehicle, aircraft or article brought in by such person, and may, for the purpose of the search, detain such person, vehicle, aircraft and article:

Provided that no female shall be searched in pursuance of this sub-section except by a female.

³⁰⁸ The Jammu and Kashmir Public Safety Act, No. 6 of 1978.

³⁰⁹ Preamble, The Jammu and Kashmir Public Safety Act, No. 6 of 1978.

³¹⁰ See The Jammu and Kashmir Public Safety Act No. 6 of 1978 and The Jammu and Kashmir Public Safety (Amendment) Act No. 7 of 2012.

...
(6) If any person is in a prohibited place in contravention of any of the provisions of this section he shall be punishable with imprisonment for a term which may extend one month, or with fine, or with both.³¹¹

4. Protected areas—

(1) If the Government considers it necessary or expedient in the interests of the defence or security of the State to regulate the entry of persons into any area, it may by a notified order declare the area to be a protected area and thereupon, for so long as the order is in force, such area shall be a protected area for the purpose of this Act.

(2) The Government or the authority specified by the Government may regulate the entry of any person into a protected area.

...
(4) If any person is in a protected area in contravention of any of the provisions of this section, he shall be punishable with imprisonment for a term which may extend to two months, or with fine, or with both.³¹²

5. Forcing or evading a guard—

Any person who effects or attempts to effect entry into a prohibited place or a protected area after taking precautions to conceal his entry or attempted entry from any person posted for the purpose of protecting or preventing or controlling access to such place or area shall be punishable with imprisonment for a term which may extend to three months, or with fine, or with both.³¹³

Chapter III of the PSA is entitled, “Maintenance of Communal and Regional Harmony”

and contains Section 6 and Section 7, both relevant law to the instant study.

6. Power to prohibit circulation within the State or entry into the State of certain documents—

(1) The Government, or any authority authorised by it in this behalf, if satisfied that such action is necessary for the purposes of preventing or combating any activity prejudicial to the maintenance of communal or sectarian, or regional harmony affecting or likely to affect public order, may, by notified order, regulate, or restrict the circulation within the State, or prohibit or restrict the importation into the State, of any document;

Provided that no such order shall remain in force for more than three months from the making thereof unless before the expiry of such period, and in case the High Court does not otherwise direct, the Government, by an order made in the like manner, extend it by any period

³¹¹ Sec. 3(1)-(2), (4), and (6), The Jammu and Kashmir Public Safety Act, No. 6 of 1978.

³¹² Sec. 4(1)-(2) and (4), The Jammu and Kashmir Public Safety Act, No. 6 of 1978.

³¹³ Sec. 5, The Jammu and Kashmir Public Safety Act, No. 6 of 1978.

not exceeding three months at a time as it thinks fit, so however, that the total period of the original order does not extend one year;

...

(2) Any person who contravenes an order made under this Section shall be punishable with imprisonment for a term which may extend to three months or with fine, or with both.

(3) In the event of disobedience of an order made under sub-section(1) the Government of the authority issuing the order, may, without prejudice to the penalty to which the person guilty of the disobedience is liable under sub-section(2), order the seizure of all copies of any such document.³¹⁴

7. Removal of doubts—

For the removal of doubts it is hereby declared that the restriction imposed by Section 6 on the rights [conferred] by Clause (1) of Article 19 of the Constitution of India shall be deemed to be reasonable restrictions.³¹⁵

Chapter IV of the PSA is entitled, “Power to Make Orders Detaining Certain Persons” and contains Sections 8-20. This Chapter covers a wide swath of law pertaining to who may execute an order for arrest or detention and who may be arrested or detained and under what circumstances. The text of those sections and sub-sections that are most relevant to this study follow.

8. Detention of certain persons—

(1) The Government may—

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(i) the security of the State or the maintenance of the public order;

...

(b) if satisfied with respect of such person who is—

(i) a foreigner within the meaning of the Foreigners Act,

(ii) a person residing in the area of the State under the occupation of Pakistan,

that with a view to regulating his continued presence in the State or with a view to making arrangements for his expulsion from the State, it is necessary so to do, make an order directing that such person be detained.

...

(3) For the purpose of sub-section(1),

...

³¹⁴ Sec. 6(1) and (2)-(3), The Jammu and Kashmir Public Safety Act, No. 6 of 1978.

³¹⁵ Sec. 7, The Jammu and Kashmir Public Safety Act, No. 6 of 1987.

(b) “acting in any manner prejudicial to the maintenance of public order” means—

(i) promoting, propagating, or attempting to create, feelings of [enmity] or hatred or disharmony on the ground of religion, race, caste community, or region;

(ii) making preparations for using, or attempting to use, or using or instigating, inciting, provoking or otherwise abetting the use of force where such preparation, using, attempting, instigating, inciting, provoking or abetting, disturbs, or is likely to disturb public order;

(iii) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of, mischief within the meaning of Section 425 of the Ranbir Penal Code where the commission of such mischief disturbs, or is likely to disturb public order;

(iv) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of an offence punishable with death or imprisonment for life or imprisonment of a term extending to seven years or more, where the commission of such offence disturbs, or is likely to disturb public order;³¹⁶

...

(f) [Added in 2012 as part of *The Jammu and Kashmir Public Safety (Amendment) Act, No. 7 of 2012*] “person” shall not include a citizen of India who has not attained the age of eighteen years for being detained under clause (a)

9. Execution of detention order—

A detention order may be executed at any place in the manner provided for the execution of warrants of arrest under the code.

10. Power to regulate place and conditions of detention—

Any person in respect of whom a detention order has been made under Section 8 shall be liable—

(a) to be detained in such place and under such conditions including conditions as to the maintenance of discipline and punishment for [breaches] of discipline as the Government may, by general or special order, specify; and

(b) to be removed from one place of detention to another place of detention by order of the Government;

[Inserted by *The Jammu and Kashmir Public Safety (Amendment) Act, No. 8 of 2002*] Provided that the [detainees] who are permanent residents of the State shall not be lodged in jails outside the State.

11. Detention orders not to be invalid or [inoperative] on certain grounds—

³¹⁶ Sec. 8(1)(a)(i) and (b)(i-ii); (3)(b)(i-iv) and (f), *The Jammu and Kashmir Public Safety Act, No. 6 of 1978*.

No detention order shall be invalid or inoperative merely on the ground—

(a) that the person to be detained thereunder is outside the limits of the territorial jurisdiction of the officer making the order; or

(b) that the place of detention of such person is outside the said limits.

...

13. Grounds of order of detention to be disclosed to persons affected by the order—

(1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention communicate to him, [*the following language requirement was inserted as part of The Jammu and Kashmir Public Safety (Amendment) Act, No. 7 of 2012*] in the language which is understandable to him, grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the Government.

(2) Nothing in sub-section(1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.³¹⁷

Finally, under Chapter V of the PSA, “Miscellaneous,” the protections and immunity clause sets out,

22. Protection of action taken under this Act—

No suit, prosecution or any other legal proceeding shall lie against any person for anything done or intended to be done in good faith in-pursuance of the provisions of this Act.³¹⁸

The Impunity

The following narratives document the human cost of impunity in Kashmir as it flows from the vast powers exercised under the Disturbed Areas Act, the AFSPA, and the PSA. These narratives were collected, documented, and publicly reported by the team of advocates and investigators at the Jammu and Kashmir Coalition of Civil Society (JKCCS). Specifically, this report was published by two important JKCCS constituent groups: The International Peoples’ Tribunal on Human Rights and Justice in Indian-

³¹⁷ Sec. 13(1)-(2), The Jammu and Kashmir Public Safety Act, No. 6 of 1978.

³¹⁸ Sec. 22, The Jammu and Kashmir Public Safety Act, No. 6 of 1978.

Administered Kashmir (IPTK) and the Association of Parents of Disappeared Persons (APDP).

Beginning in 1991 through 2012, the JKCCS “Structures of Violence” report documents 1,080 extrajudicial killings, 172 enforced disappearances, and numerous other cases of torture and sexual violence perpetrated by the armed forces, operational in Kashmir under the AFSPA.³¹⁹ This report “is directly concerned with identifying the structure, forms and tactics of violence of the Indian State in Jammu and Kashmir.”³²⁰ Moreover, the report emphatically finds “the institutions and procedures of rule of law in Jammu and Kashmir have been subverted to function within the larger culture of institutionalized impunity and violence.”³²¹

While the report documents many, many cases, all worth covering here, for the sake of this study I am going to focus on three documented cases from Chapter 2: Theatres of Violence. Chapter 2 is a study of mass violence perpetrated by Indian armed forces against Kashmiri civilians. The report explains,

The military occupation of Jammu and Kashmir by the Indian State is enacted everyday through variegated displays of power aimed at inscribing fear on not only the bodies and minds of the local population but also the spaces they inhabit through the performance of brutality, both small and spectacular.³²²

Five regional cases of mass violence are presented in Chapter 2: (1) The mass rape and torture at Kunan and Poshpora, Kupwara District, 1991; (2) The massacre at Sopore, Baramulla District, 1993; (3) The massacre at Saderkoot-Bala, Bandipora District, 1996; (4) The massacres at Sailan & Mohra Bachai, Poonch District, 1998 and 1999; and (5)

³¹⁹ *Structures of Violence: The Indian State in Jammu and Kashmir* (Srinagar: IPTK and APDP, 2015) 4.

³²⁰ *Structures of Violence*, 3.

³²¹ *Ibid.*

³²² *Structures of Violence*, 67.

The massacres at Chittisinghpora, Pathribal & Brakpora, Islamabad District, 2000. For this study, I will be relying on three of those five cases, (1) the mass rape and torture at Kunan and Poshpora, (2) the massacre at Sopore, and (5) the massacres at Chittisinghpora, Pathribal & Brakpora. I have chosen not to include the massacre at Saderkoot-Bala because it involves issues specific to the Ikhwan, the local Kashmir militia paid by the Indian armed forces, and the Ikhwan is beyond the scope of this narrow study. Additionally, I have chosen not to include the massacres at Sailan & Mohra Bachai because these villages lie in the Poonch District in Jammu, along the Line of Control, and have specific issues related to regional proximity that situate the case outside the narrow scope of this study.

The Mass Rape and Torture at Kunan and Poshpora, Kupwara District, 1991

Late into the night of February 23, 1991 and into the morning of February 24, 1991, 400 armed military forces from the 4 Rajputana Rifles, 68 Mountain Brigade, carried out a planned cordon and search operation in the neighboring villages of Kunan and Poshpora.³²³ The army and interviewed villagers later agreed that the operation began around 11pm that night and ended somewhere around 9am the next morning.³²⁴ The army came down into the villages by foot and vehicle to cordon off the periphery, “with explicit orders that ‘no one [be] allowed to move in or out’.”³²⁵ Then, the army’s local ‘spotter’ “showed the army personnel houses “suspected” of harbouring militants—

³²³ *Structures of Violence*, 72.

³²⁴ *Structures of Violence*, 72-73.

³²⁵ *Structures of Violence*, 72.

separate individual cordons were set up around these houses.”³²⁶ The documented purpose of the army’s cordon and search operation that night was to conduct “interrogations.”³²⁷ To that end, the army used one villager’s home, two villager’s kuthars (mud and wood storage huts), and the first floor of a school building as makeshift interrogation centers where army search parties would bring boys and men from the villages to be interrogated.³²⁸

The army search parties barged into homes and separated men from women.³²⁹ Men were carried away from their homes to the makeshift army interrogation centers, where many were tortured and abused through the night.³³⁰ Women remained in their homes and faced numerous acts of brutality, including physical assault, sexual assault, rape, torture, and infanticide.³³¹ The following are narrative testimonies of survivors of the mass violence at Kunan and Poshpora, as collected and reported by the JKCCS.

Afia, Survivor of rape and Victim of infanticide, Kunan and Poshpora

Background: Afia was at her mother’s home in Kunan after giving birth four days earlier. It is the custom practice for Kashmiri women to return to their family home after giving birth.³³² Afia, her mother, her father, and her brother were asleep in the same room, also customary practice, when 10 or 11 armed and uniformed military personnel broke down

³²⁶ *Structures of Violence*, 73; see also *Structures of Violence*, Section 161 statement of Captain Ranjan Mahajan to Assistant Superintendent of Police Dilbagh Singh and Section 161 statement of rape survivor A.

³²⁷ *Structures of Violence*, 73.

³²⁸ *Structures of Violence*, 73; see also *Structures of Violence*, Section 161 statement of torture survivor Abdul Ahad Dar, Captain Ranjan Mahajan’s statement to police, and Constable Abdul Gani’s statement.

³²⁹ *Structures of Violence*, 71-72.

³³⁰ *Structures of Violence*, 72-73.

³³¹ *Structures of Violence*, 71-80.

³³² *Structures of Violence*, 73.

the door and barged into their home.³³³ The armed men took Afia's father and brother away and then returned to rape Afia and her mother.³³⁴ Afia recalls,

I had delivered a baby four days back and I was lying on the bed with my baby on my side. The baby was trampled by the boots of army men. The baby cried and I screamed for help. . . [T]wo army men caught hold of my arms and two caught hold of my legs. They tore my clothes. . . Some of the army men grabbed my mother's arm and dragged her to another corner of the room, tore her clothes and raped her. They put a cloth on my mouth so that I would not scream. Then five to eight army men raped me one after another. . . The baby had died three days after the incident as she has severe damage in her internal organs.³³⁵

Abli Dar, Survivor of torture, Kunan and Poshpora

Background: Abli Dar was tortured after being taken by the army to an interrogation center that was set up in another villager's home.³³⁶ He was repeatedly asked where the militants in the village were hiding and he continued to answer that there were no militants in his village and he had no information about any militants in general.³³⁷ Dar remembers,

The army men were inside the bedroom. There were about 15 army personnel inside this bedroom sized 10 feet by 12 feet. They had lit a fire in the center of the room and were preparing tea for themselves. It was a small fire, which was set up on the mud floor. . . They removed my shirt and laid me down on the plank facing the floor. Then about 4-5 army personnel got on my back along with their boots, then pressed down my legs, lower back and upper back. Then some men pushed my head down into the bucket of chilly water. On the initial attempt of dipping my head into chilly water when I felt suffocated I turned my body on the left and pushed a bit. The army men sitting on my back fell down on the floor. They got angry and shouted "Salay Pehalwan lagta Hai" (You seem to be a strong-man). Then they brought a rope and tied my arms on my back and also tied my ankles. Then, they again laid me down on the plank facing down. Then they brought three thick planks, which were about 4 feet long

³³³ *Structures of Violence*, 73.

³³⁴ *Ibid.*

³³⁵ *Structures of Violence*, 73-74.

³³⁶ *Structures of Violence*, 74.

³³⁷ *Ibid.*

and 10 inches thick. They kept one plank on my upper back, second on my lower back and third on the back of thighs. Then army men got over all the three planks, clutched my body and again my head was repeatedly dipped into the bucket of chilly water. The thick wood planks damaged my legs, back and chest. The army repeatedly asked me for information about militants but I pleaded with them about not having any such information.³³⁸

Following the night of mass violence perpetrated by the army in Kunan and Poshpora, the villages were cordoned for two more days and prevented from reporting the crimes or seeking medical attention.³³⁹ On February 26, 1991, the village drafted a “detailed communiqué” that described the operation to cordon, search, and interrogate militants as a front for army brutality, the torture of men, and the sexual assault of women.³⁴⁰ The Kupwara Police conducted a “spot visit” of the two villages on March 5, 1991 and reported findings that “the armed forces [had] turned violent and behaved like beasts.”³⁴¹ After interviewing survivors, the reported found “that a prima facie case of molestation and manhandling as well as rape [was] made out.”³⁴²

After the local Kupwara Police investigated the Kunan and Poshpora incident, the army could no longer deny its existence. The army conducted an inquiry and Brigadier HK Sharma, Commander in the 19 Artillery Brigade, produced the “Confidential Investigation Report on Incident dated 23/24 Feb in Village Kunan and Poshpora.”³⁴³ Despite the conclusions of the local police, the Brigadier found “the charges [of rape] are baseless, unfounded, mischievous and motivated and were being leveled to “defame the army” and prevent inconvenience [to the villagers caused by the army operation].”³⁴⁴

³³⁸ *Structures of Violence*, 74.

³³⁹ *Structures of Violence*, 75.

³⁴⁰ *Ibid.*

³⁴¹ *Structures of Violence*, 75-76.

³⁴² *Structures of Violence*, 76.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

After twenty-six years, nothing has been done to remediate the crimes perpetrated by the army against the villagers of Kunan and Poshpora.³⁴⁵ Since the incident, one eyewitness has been murdered and six victims of rape and torture have died; all awaiting resolution.³⁴⁶ Moreover, “despite all [the] incriminating information, the fact that the police chose to conveniently close the case as “untraced” and now continue to delay investigation” illustrates “how the legal process is used to provide cover to the army, while keeping victims engaged” in never-ending legal battles is “a trauma and a violence in itself.”³⁴⁷ The army operation in Kunan and Poshpora, which devastated two villages and destroyed the lives of many, uncovered that night: one grenade, one AK-47, and one person who said that he knew about a grenade his son kept in the house.³⁴⁸ None of the allegedly recovered weapons were handed over to the Kupwara Police by the army, as is legally required, nor were any militants apprehended.³⁴⁹

The Massacre at Sopore, Baramulla District, 1993

On the morning of January 6, 1993, army personnel of the 94 Battalion, Border Security Force (94 Bn. BSF), led by Commanding Officer S. Thangappan, shot and killed 46 people and injured dozens more.³⁵⁰ According to a report filed by the Indian Central Bureau of Investigation (CIB), “the Sopore massacre was the result of “cross-firing” during an “encounter” between “militants” who ambushed an “army convoy” of five guard vehicles en route to Kupwara, blasted an Improvised Explosive Device [IED] and

³⁴⁵ *Structures of Violence*, 80.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ *Structures of Violence*, 73.

³⁴⁹ *Ibid.*

³⁵⁰ *Structures of Violence*, 83.

“opened fire from automatic weapons” on a Road Opening Party [ROP] of the 94 Battalion BSF.”³⁵¹ In response, the army fired 981 “self-defense” rounds because “the militants engaged in “indiscriminate firing” on “innocent civilians” and the troops of the 94 Battalion of the BSF with the motive to “tarnish the image” of the security forces” in the region.³⁵² Most of those killed were reportedly shopkeepers or street traders along the Main Chowk (city center) in Sopore, opening their shops or coming to work that morning.³⁵³ In addition to the massacre, the Main Chowk of the city was set a flame and approximately 2 kilometers of the road was burnt on either side.³⁵⁴ The destroyed property included 250-300 businesses and shops, 30 houses, a cinema (called Samad Talkies), a women’s college, a public grade school, 4-5 bank branches, and 4 vehicles.³⁵⁵

It is important to note that the city and surrounding region of Sopore is a highly militarized zone in Kashmir. The people of Sopore live and move at the pleasure of the many military forces stationed there. The Sopore Massacre of January 6, 1993 was not the first time the military opened fire in a heavily civilian-occupied zone within the city center nor was it the first time the army set fires to burn down shops and homes in reprisal.³⁵⁶ However, the sheer number of casualties, the cost of property damage, and the brazen brutality sets this incident apart from the other instances of mass violence³⁵⁷ perpetrated in Sopore.³⁵⁸ The following are narrative testimonies of survivors of the massacre at Sopore, as collected and reported by the JKCCS.

³⁵¹ *Structures of Violence*, 83.

³⁵² *Ibid.*

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ *Structures of Violence*, 83-84.

³⁵⁷ *Structures of Violence* defines “mass violence” as the killing of more than three in a single incident.

³⁵⁸ *Structures of Violence*, 83-84.

Mohammad Abdullah Shalla, Survivor, Sopore

Background: Mohammad Abdullah Shalla was unloading boxes of apples with his brother and cousins from their family truck when the gunfire began in the Main Chowk of Sopore that morning.³⁵⁹ Shalla ran for cover and hid for a while in a shop.³⁶⁰ However, he was eventually discovered by BSF personnel and forced to line up in the street with other men. The men were told to run away from the BSF as the army fired bullets toward the men's backs.³⁶¹ "Shalla is an eyewitness to the killing of Zahoor Ahmad Khan of Shallapora, a teacher by profession, who, Shalla says was shot in the back while running."³⁶² When the massacre was over, Shalla lost four family members and an employee.³⁶³ They were his three cousins, Mohammad Ashraf Shalla, Ghulam Rasool Shalla, and Bashir Ahmad Shalla; his brother, Sajad Ahmad Shalla; and his employee, Ghulam Rasool Sofi.³⁶⁴ Shalla recalls,

On 5 January 1993, in the evening, we had brought a truck loaded with 400 boxes of apples from Handwara. . . [B]efore the truck could enter the Shallapora lane the truck got stuck in a manhole. We had to unload the truck to get it out of the manhole but it was late night and we could not do it. Then next day morning . . . I along with my family members [and] our laborer . . . went to unload the truck. It was about 9:45 in the morning when we were unloading the truck, that the firing by personnel of the 94th Battalion BSF began. I was outside the truck while my cousins were inside the truck. I ran for safety and took refuge in a nearby fabric shop. After entering [the] shop, I heard shouts of BSF men saying "Jo jahan milayga goli maro, Aag lagao" (Where ever you find them shoot them, set fire). Then after about 30 minutes, the fire started. While hiding in [the] shop, [myself and others] were taken out by BSF personnel [and] made to stand in a queue and told to run. [As I ran, I heard] shots from behind but [I] managed to escape to Shallapora lane.³⁶⁵

³⁵⁹ *Structures of Violence*, 85.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ *Structures of Violence*, 87.

³⁶⁴ *Ibid.*

³⁶⁵ *Structures of Violence*, 85.

Tariq Ahmad Kanjwal, Mehra Begum, and Shafaqat Hussain Dar, Survivors, Sopore

The following three narratives illustrate three distinct vantage points of the massacre in Sopore, all occurring around the same time in the Main Chowk. Tariq Ahmad Kanjwal retold his story to investigators and a concise version is quoted below.

Tariq Ahmad Kanjwal witnessed a BSF officer along with 8-10 other BSF personnel shooting at Abdul Khaliq Malik, a resident of Arampora who received multiple bullet injuries. Kanjwal was himself shot, and dumped in the shop by the officer who told his men “Isko andhar fenko, aur in salon ko gun powder faenk key zinda jalao” (Throw him inside, and then throw gun powder and burn these people alive). Kanjwal was later recovered, in an unconscious state by his relatives from amongst the pile of dead bodies. While in his shop, Kanjwal saw BSF personnel of the 94th Battalion enter into a government bus coming from the bus stand and [saw the BSF personnel] begin shooting passengers indiscriminately.³⁶⁶

Mehra Begum was a passenger on the government bus and retold her story to investigators.³⁶⁷ A concise version is quoted below.

Mehra Begum, a resident of Doabgah, travelling from Sopore to Bandipora in the government bus, says in a statement given to researchers of this report that the bus full of men, women and children was close to Khayam Hotel near Samad Talkies (cinema), at around 10:30am, when the driver stopped the bus because there was firing [going] on ahead. Mehra Begum saw a huge fire and 2-3 dead bodies lying in the middle of the road, before armed and uniformed BSF personnel entered the stationary bus and ordered everyone to put their hands up. Following this, the personnel started shooting people in the bus indiscriminately. This included a couple from Haathlung both of who were shot and one of whom [the wife] died on the spot. Mehra Begum was also shot in the arm, near the shoulder. She escaped when the BSF personnel, distracted by a loud noise at Samad Cinema left the bus. After this, a few locals took her to Baramulla Hospital along with two other passengers, one of who died en route to Baramulla.³⁶⁸

³⁶⁶ *Structures of Violence*, 85-86.

³⁶⁷ *Structures of Violence*, 86.

³⁶⁸ *Ibid.*

Shafaqat Hussain Dar sought refuge in the Samad Talkies (cinema) while the gun battle raged along the Main Chowk.³⁶⁹ Dar retold his story to investigators and a concise version is quoted below.

Shafaqat Hussain Dar of Mahrajpora, Sopore who owned a shop at the Main Chowk heard the firing as he was about to open his store, and ran into Samad Talkies for refuge. He found that around 200-250 adults and children had already gathered in the compound to escape the firing. From 10am onwards, from his locations on the first and second [story] of the Cinema building, he saw fire in the Main Chowk, and heard the BSF men shouting “Sallon ko pakdo . . . jo jahan mile mar do” (Get hold of them, kill them where you find them) as well [as] the cries of the victims. The BSF personnel set fire to the building next to the Cinema, Hotel Khayam, made mostly of wood. According to Dar, the BSF [personnel] expelled a white powder from their guns, then fired a few shots at it upon which sparks emanated, starting a fire. Upon seeing the rising flames, those holed up in the cinema, including [Dar] jumped out of the Cinema into the Shallapora graveyard, adjacent to the building. [Dar] says he lost consciousness as soon as he jumped and woke only to find himself in a Soura Hospital [in Srinagar], five days later.³⁷⁰

The immediate aftermath of the Sopore massacre was chaotic and frenzied. At around 11:35am, the police received a report that “dead bodies were lying in the Main Chowk” with the instruction to remove them.³⁷¹ However, when Assistant Sub Inspector Ghulam Hassan Teli and others arrived at the Main Chowk to remove the dead bodies, they reported being “stopped by BSF personnel near the Central Bank of India [branch storefront] from a distance of about 100 yards by raising the arms signal. [The BSF] then opened fire on [Assistant Sub Inspector Teli and fellow police officers].”³⁷² After hearing this report, the Assistant Superintendent of Police, Narender Singh Bali, headed for Sopore.³⁷³ When he reached the Main Chowk at around 12:15pm, he noted seeing two

³⁶⁹ *Structures of Violence*, 86.

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ *Ibid.*

fire personnel idly standing outside the fire station, a mere 10 yards from the burning Main Chowk.³⁷⁴ When ASP Bali asked the men why they were not battling the blaze, “they stated that they had been prohibited by BSF with the threat that if they go ahead they will be fired upon.”³⁷⁵

The Sopore Fire Station Officer in charge, Ahmad Hussain Andrabi, corroborated ASP Bali’s account of the massacre aftermath. According to his deposition, Fire Station Officer Andrabi and his crew of 28 arrived at 11:50am ready to battle the blaze engulfing the city center of Sopore. He testified to seeing “around 20-25 personnel of the BSF “roaming” on College Road, Tehsil Road, Kupwara Road with their weapons.”³⁷⁶ Andrabi also reported, “The BSF personnel were “firing continuously [. . .] in all directions” but he “did not see anyone shooting at the BSF personnel from anywhere”.”³⁷⁷ Sadly, “the moment the fire personnel rolled out their hose-pipes to extinguish the fire, the BSF personnel stopped them, around 50 [meters] away from the fire, and kept them under “siege” for around one hour.”³⁷⁸ When the fire personnel tried to do their job, the BSF forces issued a threat saying, “[A]ny fire fighter who tried to operate the fire fighting media shall be killed instantly.”³⁷⁹ It took seven area fire crews two days to finally extinguish the blaze.³⁸⁰

Although First Information Reports (FIRs) were filed by survivors and victims, investigations by the Jammu and Kashmir Police and the Indian Central Bureau of Investigations (CBI) were conducted, and a judicial inquiry commission established, no

³⁷⁴ *Structures of Violence*, 86.

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*

³⁸⁰ *Structures of Violence*, 87.

official legal action has been taken to remediate the crimes at Sopore.³⁸¹ Twenty years later, on December 4, 2013, a closure report was filed before the Court in regard to the FIR victim reports. The CBI, who moved to close the files, stated “that during the investigation, the witnesses examined by the local police and CBI, were “unable to identify the BSF personnel involved in the incident and they could not give details of the firing or cross firing” and that “thorough investigation could not yield any result for the reasons” [mentioned therein].”³⁸² The CBI also justified the closing of the Sopore complaint files arguing, “[T]he accused BSF personnel have already been tried and convicted for the alleged offenses” in closed, military tribunal proceedings.³⁸³

On June 28, 2014, in response to the CBI’s motion to close the reports, three survivors of the massacre filed a protest petition before the Court. Tariq Ahmad Kanjwal, Mohammad Abdullah Shalla, and Ghulam Rasool Ganai lost family in the massacre.³⁸⁴ Their protest petition argued, “[T]he investigations by the CBI have been incomplete and clearly affected by an interest to protect perpetrators of the crimes.”³⁸⁵ Although the CBI argued that the protest petition had no standing and should be dismissed by the Court, the Court decided to look into the matter further.³⁸⁶

On July 14, 2014, the Court requested all CBI documents in support of the closure of the FIR reports to be handed over.³⁸⁷ The CBI responded to the Court’s request by refusing to hand over the documents, stating, “no person or party including the applicant

³⁸¹ *Structures of Violence*, 87.

³⁸² *Ibid.*

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*

should be allowed to have access to the documents gathered by the CBI.”³⁸⁸ Then, on July 30, 2015, the parties were notified that the judge working on their case had been transferred and a new judge would be assigned to continue the review.³⁸⁹ Currently, “The case remains pending.”³⁹⁰

The researchers and authors of the JKCCS report point out, in frustration,

The absurdity of the CBI position is brought out by the fact that the CBI seeks to close this case as untraced [i.e. the perpetrators cannot be traced] while at the same time depending on the BSF court-martial in which perpetrators have obviously been identified. Quite obviously, the BSF is not interested in continuing the case in the civilian court . . . and has no qualms with the CBI case closing the case. Both the CBI and the BSF stand implicated in covering up the crimes of 6 January 1993.³⁹¹

The Massacres at Chittisinghpora, Pathribal & Brakpora, Islamabad District, 2000

This final example is an important one. Three separate massacres in the spring of 2000 demonstrate the evolving nature of state violence exercised through the AFSPA powers. Like dominos, the massacring of 36 Sikh men from the community of Chittisinghpora by 50 armed and uniformed gunmen on the night of March 20, 2000³⁹² set into motion a chain reaction of spectacular violence and devastation in the region.³⁹³ What followed on March 25, 2000 was a staged military operation, or ‘fake encounter’, where five alleged ‘Pakistani militants’ responsible for the Sikh slaughter were captured

³⁸⁸ *Structures of Violence*, 87.

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ *Structures of Violence*, 90.

³⁹² Though it has never been fully understood, many political pundits believe the massacre of the Sikh men from Chittisinghpora was timed to coincide with United State’s President Bill Clinton’s visit to India. The massacre, the pundits surmise, was meant to destabilize the region and draw attention to sectarian fighting; Celia W. Dugger, “34 Massacred In Sikh Town in Kashmir,” *The New York Times*, March 21, 2000, <http://www.nytimes.com/2000/03/21/world/34-massacred-in-sikh-town-in-kashmir.html>.

³⁹³ *Structures of Violence*, 105.

and killed.³⁹⁴ When it was revealed that the five alleged Pakistani militants killed by the army were not militants at all but local Kashmiri Muslims from the Islamabad District, the region erupted.³⁹⁵ On the afternoon of April 3, 2000, around 2,000 villagers from the surrounding area, including the families of those five men killed in the Pathribal fake encounter, took to the streets in procession and mourning.³⁹⁶ There were signs held and slogans chanted demanding justice for the five men killed and for their families.³⁹⁷ The procession was headed to the local Office of the Deputy Commissioner in Anantnag and after crossing the Brakpora Chowk (main road), seven military personnel stationed there opened fire on the crowd.³⁹⁸ Eight civilians were killed and 35 were injured at Brakpora that day.³⁹⁹

Fake Encounter at Pathribal

Five days after the massacre at Chittisinghpora, where 36 Sikh men were forced from their homes in the middle of the night to be “shot dead at point-blank range in a cold-blooded massacre,” the Senior Superintendent of Police and the Union Home Minister held a press conference on national television.⁴⁰⁰ The Indian Officials announced “that five Pakistani militants responsible for the massacre at Chittisinghpora had been killed in a joint operation mounted by the 7th Rashtriya Rifles (RR) and the SOG [Special Operations Group] of the Jammu and Kashmir Police in the forests near

³⁹⁴ *Structures of Violence*, 105.

³⁹⁵ *Ibid.*

³⁹⁶ *Structures of Violence*, 105.

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

Pathribal.”⁴⁰¹ They reported that seven military leaders stationed at the 7 Rashtriya Rifles Camp in Khundroo, located in the Islamabad District, planned and led the swift operation.⁴⁰² The operation claimed to be based on interrogation information obtained after the arrest of Mohammad Yaqoob Wagay, who had been suspected of involvement in the massacre at Chittisinghpura by police.⁴⁰³

The five men abducted and killed during the staged, fake encounter with the army in Pathribal were local Kashmiri men.⁴⁰⁴ No evidence has ever been found linking any of them to the massacre at Chittisinghpura or to Pakistani militias.⁴⁰⁵ No matter, the army still recommended the involved military leadership from the 7 Rashtriya Rifles for “commendation for their role in the operation.”⁴⁰⁶ The men killed by the army during the staged encounter at Pathribal were Jumma Khan (father of Abdul Rashid Khan), Jumma Khan (father of Shakoor Khan), Zahoor Ahmad Dalal, Mohammad Yusuf Malik, and Bashir Ahmad Bhat.⁴⁰⁷

What is known is that all five men were abducted in the middle of the night, by either police or military personnel, on or around March 24, 2000.⁴⁰⁸ The men were then held captive, taken to a small mud hut atop a hill called Zoontengri in Pathribal in the early hours of March 25, 2000.⁴⁰⁹ There, the five men were “shot dead and then burnt or dismembered to obfuscate their identity.”⁴¹⁰ After the men were killed and mutilated,

⁴⁰¹ *Structures of Violence*, 105.

⁴⁰² *Ibid.*

⁴⁰³ *Structures of Violence*, 105.

⁴⁰⁴ *Structures of Violence*, 105-106.

⁴⁰⁵ *Structures of Violence*, 105-110.

⁴⁰⁶ *Structures of Violence*, 105.

⁴⁰⁷ *Structures of Violence*, 105-110.

⁴⁰⁸ *Structures of Violence*, 105.

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*

“their dead bodies were dressed in ‘chitra wardi’ (army fatigues) and buried in different locations within two to three kilometers of the spot of their killing.”⁴¹¹

The following are the individual accounts of each man’s abduction, collected and reported by the JKCCS.

Jumma Khan, Father of Abdul Rashid Khan, Killed at Pathribal

Molvi Qasim Ali, a villager from Pathribal, was the first to raise alarm.⁴¹² He saw the dead bodies while he was walking and told his nephew, Abdul Rashid Khan, that he recognized one of the alleged Pakistani militants as his brother and Khan’s father, 50 year-old Jumma Khan.⁴¹³ The family learned that on March 23, 2000 Khan had been abducted from his home in the middle of the night by army personnel belonging to the 7 Rashtriya Rifles.⁴¹⁴ He had not been seen since.

Jumma Khan, Father of Shakoor Khan, Killed at Pathribal

Shakoor Khan testified that, during the night of March 24, 2000, uniformed military broke down the door to their home, entered and seized his father, Jumma Khan.⁴¹⁵ The military personnel told Shakoor Khan that they needed his father to “guide” the military men to their Camp at Utrasoo and that Jumma Khan would return to his family in 30 minutes.⁴¹⁶ Jumma Khan never returned.

⁴¹¹ *Structures of Violence*, 105.

⁴¹² Ibid.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

Early the next morning, Shakoor Khan learned that another man named Jumma Khan was abducted in the night.⁴¹⁷ Shakoor Khan and Abdul Rashid Khan, the other Jumma Khan's son, went to the Achabal Police Station to report the abductions.⁴¹⁸ The Station Officer noted Shakoor Khan's grievance in the police register and "told [Shakoor Khan] to come to the Camp at Utrasoo at noon the next day to know [his] father's whereabouts."⁴¹⁹ Shakoor Khan arrived at the Camp at Utrasoo at noon the next day but was told to wait because the local police and army were in Pathribal.⁴²⁰ At 5pm, the police and army arrived at Utrasoo.⁴²¹ Shakoor Khan was told not to worry, that his father was not one of "those killed in the 'encounter' [because they] were five young Pakistani militants [whose] bodies had been burnt."⁴²²

Abdul Rashid Khan, son of the other man named Jumma Khan killed at Pathribal, reflected,

The Army targeted the two Jumma Khans because they had long beards and wore dastars (turbans)—the beard and dastar is a part of our cultural and religious tradition but for the army it meant the two could be passed off as Pakistani militants. . . The dead bodies of the two Jumma Khans were burnt because the army and the police knew that locals of the area would recognize them but by the grace of Allah (PBUH), a part of the henna-tattooed beard of my father survived.⁴²³

Zahoor Ahmad Dalal, Killed at Pathribal

There are not many details regarding Zahoor Ahmad Dalal. Dalal's Uncle, Nazir Ahmad Dalal, reported seeing his nephew abducted by local Assistant Sub Inspector

⁴¹⁷ *Structures of Violence*, 105.

⁴¹⁸ *Ibid.*

⁴¹⁹ *Structures of Violence*, 105.

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

⁴²² *Structures of Violence*, 106.

⁴²³ *Ibid.*

Bashir Ahmad.⁴²⁴ Moreover, Assistant Sub Inspector Ahmad testified that on the night of March 24, 2000 he received a telephone call from the 7 Rashtriya Rifles Commanding Officer.⁴²⁵ After he received that telephone call, Ahmad and his staff went to the army Camp at Khundroo and slept there.⁴²⁶

Mohammad Yusuf Malik and Bashir Ahmad Bhat, Killed at Pathribal

Similarly, not much is known about Mohammad Yusuf Malik and Bashir Ahmad Bhat. Both men were from Halan-Verinag and both men's families discovered that the men had been killed after seeing their photographs printed in the Hind Samachar newspaper.⁴²⁷ The pictures of dead bodies of Mohammad Yusuf Malik and Bashir Ahmad Bhat had been labeled "foreign militants" by the newspaper.⁴²⁸

Later, when the bodies of the men were exhumed as part of the official investigation to establish their identity, Shakoor Khan, son of Jumma Khan, described the exhumation of Mohammad Yusuf Malik,

At the time of the exhumation, Ghulam Nabi was asked what the 'nishani' (identifying mark) of his brother was, to which he responded that his brother had long hair, wore white clothes and that his hands were tattooed with henna. When the grave was dug, the dead body was dressed in army fatigues but was not burnt. When we saw the body, we were afraid and wondered if he was in fact a militant but underneath the fatigues we saw his white clothes and his henna tattooed hands. Ghulam Rasool took out a photo of [Mohammad Yusuf Malik] from his pocket and the dead body was of course that of his brother.⁴²⁹

⁴²⁴ *Structures of Violence*, 109.

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*

⁴²⁷ *Structures of Violence*, 105.

⁴²⁸ *Ibid.*

⁴²⁹ *Structures of Violence*, 107.

V. CONCLUSIONS

This study used law as a divining rod to draw out historical connections and intersections that implicated power, violence, and oppression in Indian-administered Kashmir. Returning to my original quest: broadly, this study asked why violence and oppression persist in Kashmir and how law acted as an underwriting force; and specifically, this study sought to uncover in what ways law, the post-colonial context, security discourse, and violence and oppression in Kashmir intersected, influenced, perpetuated, and legitimized one another.

The holy legal trinity of the Disturbed Areas Act, the Armed Forces Special Powers Act, and the Public Safety Act ushered in the entrenchment of the quotidian impunity that persists in Kashmir. Yet, those laws are remnants of colonial architects. Many colonial rulers and administrators saw Kashmir for what she was: a region uniquely strategic and prized. However, the geography of Kashmir was, time and again, prized over the Kashmiri people and much violence and oppression happened in order to secure geo-political power in the region.

Although Kashmir has produced important political figures, infighting amongst the homegrown politicians and their parties have further widen the vale that exists between secular Kashmiris and Muslim Kashmiris. All the while, the Kashmiri people suffer. As Kashmir nears a century designated as a 'state of emergency,' generations of Kashmiris have come of age under the AFSPA and the PSA. Stories of massacres, mass rapes, fake/staged military encounters, and enforced disappearances are sewn into the collective national identity. What it means to be Kashmiri is indistinguishable from what it means to be oppressed. The quotidian violence Kashmiris feel blunts the political,

historical, cultural, and ethnic erasure that is happening because of it. Law is violence in post-colonial Kashmir.

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