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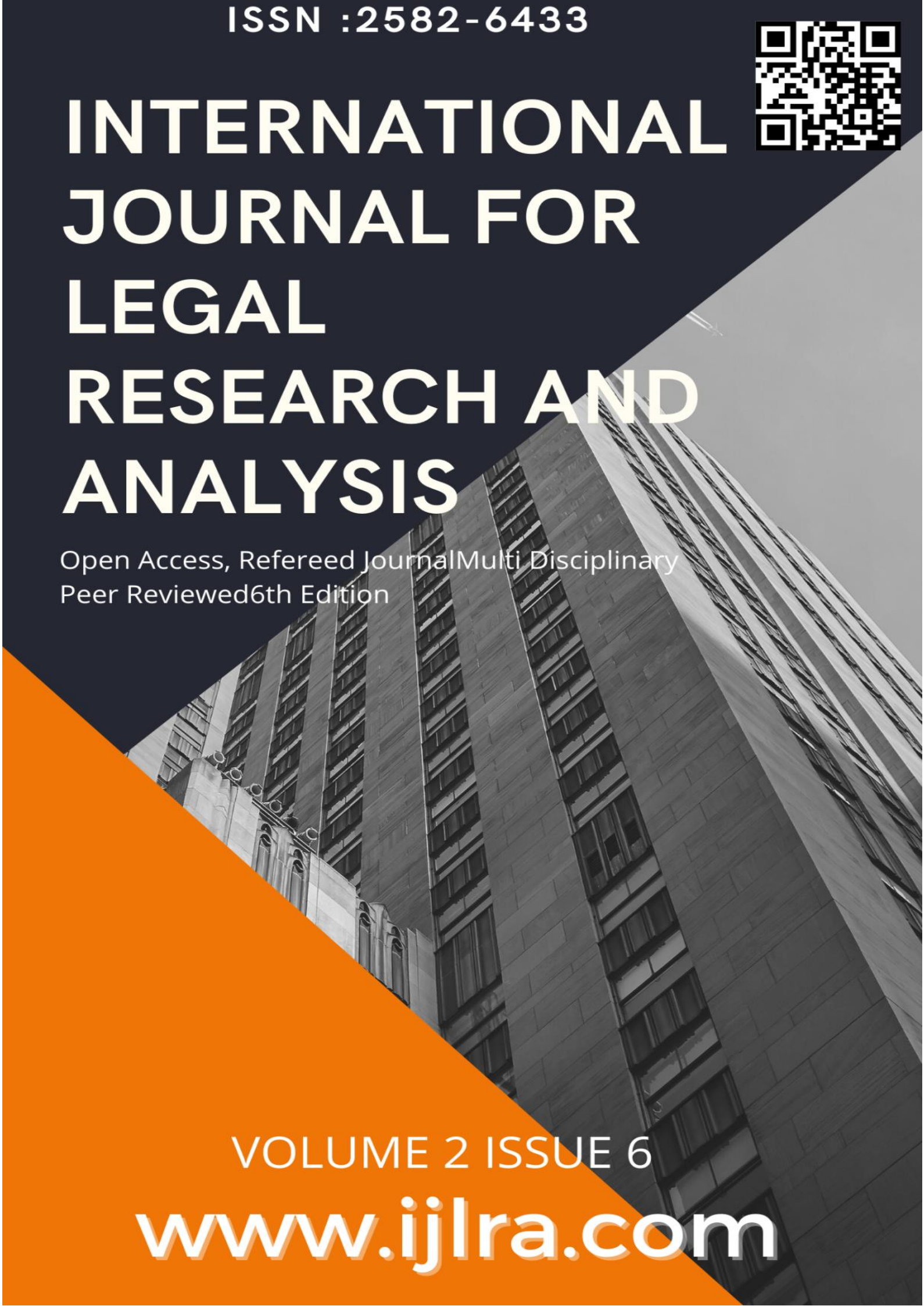

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SOCIOLOGICAL ANALYSIS OF AFSPA

Authored By- Sama Zehra ,
National Law University Delhi, 2022

AFSPA: "where the law is splintered – neither suspended, nor firmly in place"

John de Carteau in his "*Practice of Everyday Life*" examines how people of a particular area alter their everyday lives/ activities in response to socio- political developments. The author investigates how people individualize mass culture by changing things like utilitarian products, street designs, laws and language to maintain their daily routinized practices. The epitome of Carteau's concept can be found in the present-day Indian state, wherein emergency condition laws or martial laws have been normalized and internalized in the colonial and post-colonial legal regime. The heart of this research paper is to examine how India has failed to ensure a "*bare life*" for individuals and to understand the construction of people's everyday life in response to socio-economic struggles and suppression imposed by martial laws like AFSPA. In the later part of the paper, the author has analyzed the functioning of various structures of impunity, independently and in relation to each other and how it has been used to veil the offences committed by the armed forces.

Baxi argues that the Indian legal system comprises of two parallel criminal justice regimes, one is the "*criminal justice system"* which strictly adheres to the due process rules and emphasizes on rights of the accused, whereas the other model is the "*Preventive detention system"*, which allows detention without any judicial oversight[1]. These two systems coexist, with the latter taking precedence lately. Often announced as the powerful weapon against insurgency, this legal system has produced a "*door revolving detention system"* which is weaponized by the state to ensure, what they call "*normalcy*", in conflict-prone areas.

Sugarcoated by terms of "*public order"* and "*national security"*, numerous legislations have been implemented by the state to erode and erase the historical legal sovereignty of places like North-east and J&K. "*Necessity*" or "*state of exception"* is the widespread political tool used for advocating such implementations, which often is reasoned on conditions of "*actual"* or "*presumed*" crisis. This condition eternalizes over time.

The condition of necessity, as Agamben defines is a state of serious crisis or emergency where juridical order is suspended and the sovereign has the authority to suspend basic rights and norms. Schmitt argues that the state possesses the authority of suspending the legal system and declaring a "*state of exception*" if

[1] Upendra Baxi, "Crisis of the Indian legal system" (1982)

the country faces an existential crisis or threat. However, scholars such as Agamben claim that "*exception*" has become *"the dominant paradigm of government in contemporary politics"*[2]. Further, he regards the suspension of law as pivotal as it not only affects the life of people as citizens but also as human beings. The key to Agamben's conception lies around the fact that the "*state of exception"* blurs the line between the "*private*" and *"public"* life of an individual, thereby reducing their life into what he calls *"bare life".* At this stage, the sovereign exercises complete control over humans, not only as "citizens" of state but to the extent of acting on their natural life, therefore denying them their "right to live".

During the colonial period, numerous legislations were passed by the British, which technically were bad in law and led to a huge public furore. Extraordinary laws such as public safety act, preventive detention Act, Armed forces special powers Act were the "*ultimate weapons"* in the state's arsenal of lawfare. Ironically, the same laws which were used to stifle dissent and resentment of Indians, are now being employed by the Indian state with negligible modifications, to accomplish exactly what the Britishers did, i.e., silence uproar.

Armed forces special protection Act has been in place since 1950's in North-east and 1990's in J&K. Since its enactment, "*AFSPA has been legally married to democracy"* and has worked alongside the "sovereign power" by creating contentious "*spaces of exception".*
This draconian and colonial legislation continues to affect the everyday lives of people living in these "*highly contested"* disturbed areas. It has been used as a weapon of repression to curb insurgency and situations of "*real"* or *"presumed"* emergency. Surprisingly, the areas where "*public order*" is maintained by AFSPA, " the armed forces are accused of committing world's least known human rights abuses however, the same remains veiled behind legal impunity provided by provisions of the said legislation.

Sections 4 and 6 of AFSPA, in the name of "*counter-terror operations"* authorizes forces with extensive powers and impunity for all crimes including rapes and gang rapes. Section 4 allows the armed forces to "*use force, even to extent of causing death*" if a person acts "*in contravention of any law or order".* It includes vague conditions such as *"carrying of things capable of being used as a weapon"*, which has a high potential of being misused by the forces. Incidents of rapes, assaults, kidnapping and torture have been reported and continue to occur during army crackdowns in these "disturbed areas". *"Mission to India*" report by UNHRC in 2013 revealed that between 1993 to 2008, a total of 2560 deaths were reported during police encounters, out of which 1224 were regarded as fake encounters committed by CRPF, BSF and other forces acting under the AFSPA[3].

[2] Davide Giordanengo, "*the state of exception"* (2016) < https://www.e-ir.info/2016/06/21/the-state-of-exception/> accessed 2May 2022.
[3] UNHRC, "*Mission to India"* , jan 2011

Precisely, AFSPA functions on an "assumption", and on a mere assumption, army personnel can kill and arrest a person, destroy any shelter, and search without a warrant.

With blanket impunity granted under "*maintaining public order"* and "*aiding civil power*", forces have the authority to detain, arrest and question civilians as well as use lethal force against public gatherings, with little or no accountability. For e.g. According to the International Law of Protest, pellet guns can only be used in "*exceptionally rare"* circumstances and should be used in open spaces with the primary motive of dispersing violent crowds. However, usage of pellet guns in conflict-prone areas like Kashmir is at apex, and in contravention to the law, armed forces shoot directly at vital organs of the person thereby, causing serious injuries to them. A 2010 report by IndiaSpend revealed that since 2010, 27 people were killed and 139 were blinded in Kashmir, the reason being the injuries caused by the supposedly "*non-lethal"* pellet guns. Such impunities are a paradox to democratic principles and fasten the oscillations between ordinary and special laws.

Since the 90's, emergency laws such as *"AFSPA"* and "J*&K disturbed areas Act" have* been part of the legal armoury of the state and have successfully bolstered a climate of political, moral & judicial impunity for large scale infringement of human rights including, gang rapes, enforced disappearances, extra-judicial killings and civilian massacre. The functioning of the army in counterinsurgency duties is governed by Acts such as BSF 1968, CRPF Act 1949 and Army Act 1950, these legislations along with judicial precedents give military courts the power to try any acts of military indiscipline, whether committed on or off duty, in closed- door court martial proceedings begun at the discretion of military officials. Section 9 of the Act states that the police cannot initiate proceedings or arrest armed personnel suspected or accused of committing abuses without the sanction of the federal government. The section receives backing from sections 19 and 45 of CRPC. Such provisions make it impossible for victims to prosecute their wrongdoers and thus create a perpetual cycle of terror and uncertainty.

As McDuie Ra rightly observed, *"AFSPA enforces a state of exception that allows democracy to be completely suspended & people of the region to be under complete surveillance"*[4]. The legislation has effectively turned Kashmir into a carceral grid and has been successful in alienating people labelled as "*political dissidents"* and forcing them "*out of circulation".* John Reynolds in his "*socio-historical examination of permanent emergencies"* analyzes how special powers have been normalized in various legal systems and thereby concludes that "*emergency doctrine and the language of crisis have been purposefully deployed by the security state to whittle away civil rights protections, to shrink the space for political dissent and to erode anti- discriminatory norms"*[5].

[4] McDuie Ra, "*Fifth year disturbance: armed forces special powers Act & exceptionalism in South Asian periphery" (*2009) 17 CSA, 255.

[5] Reynolds*, Empire emergency & international laws, (*Cambridge University Press 2018)

From the international level AFSPA is viewed as a violation of basic human rights, however, at the local level it is "*part of everyday life".* The condition of "*permanent emergency"* has been imposed by strategically weaponizing legislations and targeting all those who question the legitimacy of the Indian state. This state was attained by what Ranbir Samaddar calls *"occupational constitutionalism",* which was established by a dual process of establishing authoritarian rule of India and undermining the "*sovereign status"* of J&K. Duschinski and Ghosh argue that the historical legal sovereignty of J&K has been obliterated by the Indian occupation and a new form of state power- "*occupation through perpetual emergency"* has been legitimized by the Indian constitution.

J&K has been in a state of emergency since 1947 and the Indian state has since then failed to maintain a "*bare life*" for the people of Kashmir. According to UN OCHCR, "*state of exception"* has created a climate of pervasive and sanctioned impunity in Kashmir which has, in turn led to large scale extrajudicial killings, torture, arbitrary arrests, detentions, and sexual violence by state forces. In a report to UNHRC, Rashida Manjoo, UN special rapporteur on violence against women stated that AFSPA, "*allows for the overriding of due process rights and nurtures a climate of impunity and a culture of both fear and resistance by citizens".* There are innumerable examples where the army has misused and overused provisions of this legislation for e.g.

- In the year 2000, 5 Kashmiri village men were abducted and brutally massacred by the paramilitary forces and they afterwards blamed the militants for killing these people. The army men faced no repercussion as their actions were shrouded by provisions of AFSPA.
- In 2017, a minor girl from Pattan, J&K was brought in for questioning about whereabouts of her neighbor and during interrogation, was stripped naked then raped and nearly killed. No FIR was filled, no case initiated.

Innumerable brutalities by army either go unchecked or are ignored and not reported. The irony is, in past 58 years only six army men who were involved in "*Machil encounter"*, were punished with life sentence, no other army personnel has ever been formally prosecuted for the sheer human right abuses committed by them.

After analyzing the situation in J&K in light of Agamben and Schmitt's theory, we reach on the irrefutable conclusion that AFSPA has eternalized the state of emergency in J&K and has time and again, failed to ensure "bare life" of individuals. AFSPA is a paradoxical instrument of security and downright aberration of democracy.

AFSPA: AN ULTIMATE SHIELD AGAINST PUNISHMENT

"Three army men caught hold of me and 8-10 army men raped me in turns. They had huge battery torches with them and they used them to see my naked body, while making lewd remarks".

One of the survivors of the infamous "*Kunan-poshpora gang rape*" narrates her story in the book *"Do you*

remember Kunan Poshpora?"[6]. The night of Feb 23-24, 1991 turned out to be the most excruciating and blackest night in the history of Kashmir. 4 units of Rajputana Rifles, 68 mountain brigades of Indian army visited the twin villages of kunan and poshpora to conduct a search and cordon operation, they first ordered men to come out of their houses and gather in a separate location. Thereafter, the beastly sides of these barbarians were unleashed when they, *"gagged the mouths of the victims and committed forced gang rape against their will and consent"*, women as old as 60 and as young as 13 were raped in the same room, including a pregnant woman. Moreover, men were also tortured by passing electric current through their genitals. A month later, an FIR was registered and the criminal process was set into motion. However, the investigation was highly biased, improper and callously handled. Officials working on the case were frequently transferred and changed. Medical examination of the victims showed evidence of healing abrasions and sexual assault however, declaring all this evidence as "*baseless",* the case was labelled as *"untraced"* and thereafter closed. During the hearing of the case before the J&K High Court, the army shamelessly asserted that the incident was "*a hoax orchestrated by militant groups and part of a cleverly contrived strategy of psychological warfare to discredit the security forces and to jeopardize counter-insurgency operations"*.

The night of Feb 23 has refused to end for 30 long years, a night that holds stories of oppression, violence and injustice. The victims, despite long history of false investigations, biased commissions, subversion of the judicial process and brutal humiliation stand firm waiting for Justice. The Kunan Poshpora case not only demonstrates the justification of human rights infringement in the name of "*national interest*" and "*counte-insurgency"* but also the vicious structure of impunity which pervades all the tiers of the criminal justice system of Kashmir.

The "*Thangjam Manorama rape and death case*" had a similar fate. Troops of 17th Assam Rifles brutally tortured the victim in front of her family and to cover up the crime, she was shot multiple times in her private parts. Later, rifles were planted in her house to prove that Manorama belonged to a militant group. Interestingly, the security forces in numerous cases, audaciously have justified the rape of the victims by accusing the victims of being part of a "*militant group"* or "*militant sympathizers",* in raping them the armed forces are attempting to humiliate and punish the whole community. Chenoy argues that "*Rape, as a practice in war zones, is embedded in the patriarchal construction of a woman's body as a symbol of the territory or 'property' of the enemy which has to be violated"*[7] . Sadly, many people living in mainland India see rape as part of "*collateral damage"* to safeguard and secure the integrity and sovereignty of the nation.

The Kunan poshpora incident became an excruciating example of what the armed forces are capable of. In all such instances, the state machinery has sided with the perpetrators. Professor William says '*Rape in*

[6] Esar and ors., *Do you remember kunan poshpora? , (* Zubaan, 2016)
[7] Amit Ranjan, *A gender critique of AFSPA: security for whom?* (2015) SAGE

Kashmir is not the result of a few undisciplined soldiers but rather an active strategy of Indian forces to humiliate, intimidate and demoralize the Kashmiri people'. Be it the case of Kunan poshpora, or Asiya-Nilofar or any case of mass rape in Kashmir, the case is always discharged as "*baseless*". A strong feeling of Deja-vu hit Kashmiris when a PIL was filed in the J&K High court, demanding re-investigation and re-opening of Kunan poshpora Case. The case was handled pitilessly and with exactly the same degree of bias and prejudice as in 1991. Keeping up with the "*culture of Impunity"* the case was quashed at the High Court and the investigative process ordered by the subordinate judiciary was never completed. Till date the army denies all accusations of rape and has vehemently argued that kunan poshpora rape case is a "*pre-planned politically motivated game against army"* and "*statements of victims are stereotyped and like rotten stereo songs that play rape all the time"*[8].

The institutional buildup around AFSPA, the range of laws and bi-laws shield armed forces against punishment for the excesses committed by them. Although the text of AFSPA does not grant immunity to armed forces against rape or sexual assault, however, certain conditions have made ensuring justice in such cases a vexed question. Section 7 of the legislation grants protection against prosecution from *"anything done…in exercise of the powers conferred".* These "powers" include arrest without warrants, causing death and searches, however the same cannot be misused and taken as a token of liberty to assault residents. But armed personnel cannot be prosecuted without "**prior sanction"** from the government. The Jammu and Kashmir Home Department responded to an RTI request by an NGO by stating that *"no sanction for prosecution has been intimated by the Ministry of Home Affairs and Ministry of Defense to the State Government from 1990-2011 under the J&K Armed Forces Special Powers Act". (Emphasis added).* J. Verma committee in its recommendations asserted that in cases of sexual violence, prior sanction of government should not be required however, the suggestion is yet to be adopted.

According to the Army Act, 1950 all crimes committed by the army shall be tried in a court martial. The decisive role of "*Army Act"* gains greater significance in cases of conviction in these "disturbed areas", as the process of trial has not been detailed in AFSPA. This grey area was misused when in 2013 a review petition was filed against a reinvestigation order on the mass rape case of Kunan Poshpora. Rather than using provisions of AFSPA, Sec. 125 of the Army Act was invoked which stated that "*the competence of filing the final charge sheet to decide whether the accused should be tried through court martial or criminal court solely lies with the army"*[9].

In a well-documented case of mass rape in the area of Kangan, the police officials straightforward denied filing the FIR because they didn't want to "*be an annoyance to the army"* despite the presence of affidavits which indicated that the armed forces were charged with rape. In numerous cases, the judiciary too has

[8] Ayesha pervez, *Sexual violence & culture of impunity in Kashmir, (*2014) 49 (Economic & political weekly) 10
[9] S(125), *Armed forces special protection Act*, 1958

fallen into the circle of collusion with army. In 2003, a court martial order was set aside by J&K High court against army captain, Ravaindar Singh who was accused of committing rape of a mother-daughter duo in Banihal village and was sentenced to rigorous imprisonment by the military court. Setting aside the order, the army officer was released and declared "*not-guilty*". This appalling verdict was neither challenged by the court martial nor by the state.

The sovereign in Kashmir has evaded its "*democratic accountability"*, and other arms of the state i.e., the police and judiciary have efficiently colluded in abetting oppression and derailing the justice delivery process. The army has been successful in trivializing heinous crimes such as rapes, with aid of the executive and judiciary. This pattern of trivializing cruel acts and systematic sexual assaults by the army became evident when in 1993, A report by United Nations revealed that 882 women were gang raped by security forces in Kashmir in 1993 alone and government turned a blind eye toward this report. A similar case of collusion was reflected in rape and murder case of "*Asiya and Nelofar".* All evidence indicated the involvement of armed forces in the murder and rape of the victims however, the state and police put up a phenomenal show to thwart the course of justice. CBI and a judicial commission were set up, which sacked all arguments of rape and dismissed the case as "*death by drowning"*. What is even more disgraceful is the fact that all those who sided with women and resented the CBI findings were charged with falsifying evidence, intimidating witnesses and acting under the influence of "*separatists*". It is due to such circumstances that time and again, international organizations have pressured the Indian government to bring offences committed by armed forces under the purview of civilian courts. However, as of now, nothing has been done in this regard.

Military and para-military forces evade the clutches of Law when all other state actors collectively work in disrupting the process of justice. Introducing amendments to AFSPA or even repealing the act would mean anything to the victims when the whole structure of impunity is dismantled. In the past, numerous committees have raised concerns regarding the misuse of AFSPA provisions however, the issue of abetment by state actors (judiciary & executive) and the significant role played by Army Act in obstructing justice has never been raised. A paradigm shift is the need of the hour.

Conclusion

Mimicked as a “necessity legislation” under the state of exception, AFSPA is leading to a silent apocalypse. It has given rise to a culture of terror and militarised societies where lives have been converted to a bare minimum and “citizens have been stripped of their political determinations & reduced to pure natural existence, totally at disposal of the sovereign”. AFSPA is as Agamben says, a “legal form of what cannot have a legal form". It is a form of cultural violence used by the sovereign to maintain and impose its legitimacy by suppressing protest, and resentment and by violating the rights of individuals which in turn raises the question: Whether AFSPA provides security and protection to citizens or the state itself?

As discussed throughout the paper, this legislation has been weaponized to put a shroud over human rights violations, killings, rapes and other countless offences committed by the security forces. According to AFSPA, every individual living in these “*razor-wired cities”* is a potential suspect, anyone can be frisked, stopped or even shot without any explanation or accountability. Everyday Kashmiris are exposed to unmediated authority & power, with everyone reduced to the position of “*killable*”.

AFSPA still remains a vexed issue. The government not only turned a blind eye towards 16 yearlong fast of Irom Sharmila but also to innumerable testimonies of human rights infringement. Evidently, all cases related to crimes committed by security forces have received negligible importance by the judiciary. What actually encourages this “culture of impunity” is the complex structure of collusion created by the state actors. AFSPA, which is legitimised by the state of "*permanent emergency"*, is not just an extraordinary suspension of rights, but it is also incorporated into the logic of postcolonial India's occupational constitutionalism.

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