



THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

TWAAILR: Reflections #19/2020

Crisis Constitutionalism, Permanent Emergency and the Amnesias of International Law in Jammu and Kashmir

Sbrimoyee Nandini Ghosh

Jammu and Kashmir, among the first international disputes to be referred to the United Nations under its peacekeeping powers, now barely makes the list of global wars. Ongoing political violence and resistance in the hinterlands of Indian-administered Kashmir are largely viewed by the international community as constitutional questions internal to India, unrelated to issues the region's disputed sovereignty and legal status determination, and separate from the unending border war. In this essay, I trace some of the historical trajectories and consequences of this domestication of Kashmir through languages of Indian constitutionalism and exceptionalism. Using examples drawn from case law and statute, I map how the Indian legal order serves to simultaneously effectuate and erase the conditions of militarized occupation, armed conflict and complex permanent emergency in Kashmir.

The contours of a 'constitutional' crisis

On 5 August 2019, in a televised spectacle of disenfranchisement, the Indian Parliament amended Article 370 of the Indian Constitution dismantling Jammu and Kashmir's constitutionally mandated autonomy. It simultaneously passed a law 'reorganizing' the Indian held part of the disputed region into two directly ruled Union Territories. Article 370 was a controversial 'temporary' provision negotiated in the aftermath of the First Kashmir war, between India and the Emergency Administration of Jammu and Kashmir (1947-1948), which administered the part of the divided territory under Indian military control. It provided for a procedure to allow for Indian laws to be extended to this 'Indian state of Jammu and Kashmir' through executive Presidential orders until such time when a 'Jammu and Kashmir Constituent Assembly' could promulgate the Kashmiri constitution. Undergirded by languages of

extraordinariness, transience and necessity, the arrangement recognized Jammu and Kashmir's right to enter into a sovereign pact with India, while 'provisionally' enfolding it into India's constitutional order, papering over the region's divided territoriality and sovereignty, amidst conditions of war, rebellion, partition, ethnic cleansing and statelessness.

The United Nations Security Council passed (non-binding) resolutions in 1951 and in 1957 asserting that any action that the Jammu and Kashmir Constituent Assembly may take to 'determine the future shape and affiliation of the entire State or any part thereof' would not constitute a 'settlement of the dispute through free and impartial plebiscite'. India continued to maintain that the State Government of Jammu and Kashmir, authorized through the Jammu and Kashmir Constituent Assembly, the Constitution of Jammu and Kashmir and Article 370, was the only legitimate political authority for the entire former kingdom of Jammu and Kashmir, including territory under actual Pakistani control. The domestication of Jammu and Kashmir into Indian jurisdiction, through constitutional processes, accompanied by political maneuvers and brutal and intensive militarization consolidating Indian control, has continued over the last seven decades aided by Cold-War induced international inertia, despite an ongoing armed rebellion, a human rights crisis, and a long-standing local struggle for self determination and plebiscite. This history of violent 'integration' effectively obliterated Kashmir's de jure semi-autonomous status except in one crucial domain – that of land ownership and state employment rights, which were exclusively available to 'permanent residents' of the region, until 5 August. The erasure of the last trace of nominal autonomy and territorial integrity within the India-Kashmir constitutional framework poses an existential threat to Jammu and Kashmir.

The legal events of 5 August were preceded by the imposition of siege-like 'preventive security measures' in Kashmir, including declared and undeclared curfew, intensified military deployment, evacuation of Indian tourists and other non-Kashmiri civilians, mass and arbitrary detentions and a total telecommunications and internet blackout. Over the next few months, India countered its international critics – stating that the constitutional status of Kashmir is, as it has always been, an 'internal matter', that the decision was motivated by concerns of 'good governance' and 'national security', that restrictions were being constantly reviewed and progressively eased, and that India's robust, independent judicial system was more than adequate to ensure that any legal issues would be addressed in a manner reflecting its commitment to its constitutional values and the rule of law. The filing of over a dozen petitions in the Indian Supreme Court challenging the amendment on constitutional grounds, as well as several further petitions concerning arbitrary detentions, child rights, and unreasonable restrictions on mobility, internet access and free speech after August 5,

added some heft to this last argument, even as the continuing lockdown contradicted the government's assertions of returning 'normalcy'. Indian critics compared the state repression and mass detentions in Kashmir to the Indian emergency (1975-77) when Prime Minister Indira Gandhi used state of exception provisions to declare a nationwide emergency, and the Indian Supreme Court upheld the suspension of habeas corpus.

Bringing up the bodies

What might the Indian jurisprudence of emergency look like if told from a different jurisdictional locus, centred in Kashmir? In 1954, the President of India passed a Constitutional Order under Article 370 of the Indian Constitution. This Order applied substantial portions of the Indian Constitution, including the Fundamental Rights chapter and the jurisdiction of the Indian Supreme Court, to Jammu and Kashmir for the first time, with some significant modifications. One such modification to the Indian constitutional text as it applied to Kashmir was the addition of Article 35 C, which said that no preventive detention law made by the State of Jammu and Kashmir would be void on the grounds that it violated the Fundamental Rights charter.

This effective embargo on judicial review of the executive's powers to detain without charges or trial was initially limited by a sunset clause of five years, but subsequently extended to last for twenty-five years. The provision and its extensions were upheld by the Indian Supreme Court. This meant that the minimal safeguards of procedural fairness, time limits and the right to legal representation imposed by Articles 22(3) to (7) of the Indian Constitution relating to preventive detention did not apply to thousands of Kashmiri political prisoners (including their first Prime Minister), who effectively could be (and were) detained indefinitely without trial before 1979. The fundamental freedoms and rights to life and liberty of Jammu and Kashmiris, including the right to habeas corpus, were thus constitutionally suspended by executive orders for twenty-five years, between 1954-1979, both preceding and outlasting the Indian Emergency. In addition, further constitutional amendments and executive orders replaced the constitutional head of Jammu and Kashmir with a representative chosen by the Indian Union, and loosened the original requirements for the imposition of a state of emergency, enabling direct rule from New Delhi more easily and with greater frequency than in any other state in the Union.

Through the 1990s, the most violent phase of India's counter insurgency war in Kashmir, thousands of habeas corpus petitions were filed before the Jammu and Kashmir High Court by families seeking the whereabouts of disappeared loved ones. Until the early 2000s, two days a week were dedicated to special hearings of habeas corpus cases alone, given the caseload. A majority of these cases have never been fully

adjudicated, because of pervasive patterns of delays, non-compliance with judicial directions by executive and military authorities, and judicial normalization of impunity. Petitioners and lawyers in these cases organized to form the Association of Parents of Disappeared Persons which continues to agitate for justice, truth and accountability for victims of the estimated 8,000 enforced disappearances in Kashmir. Since the 1990s, tens of thousands of arbitrary and illegal administrative detentions under the Public Safety Act, 1978 have also been continuously challenged through habeas corpus litigation, undertaken on a pro bono basis by the Jammu and Kashmir Bar, at Srinagar. While courts have tended to quash individual illegal detention orders, cases routinely take up to a year to be heard while detainees, many of whom are children, remain imprisoned. Detainees are routinely re-detained on back-to-back detention orders, resulting in imprisonments without charges or trial for years, and even decades, despite repeated successful habeas corpus challenges. The indefinite suspension of habeas corpus is a constitutional, constitutive and continuing feature of Indian law in Kashmir.

The perpetual war

Another feature of the invisibilized exceptionalism of Jammu and Kashmir, is the remarkable persistence and normalization of wartime ordinances and measures. The Enemy Agents Ordinance was a law decreed by the Jammu and Kashmir Emergency Administration (1947-1948) during the First Kashmir war, to deal with 'an emergency [that] has arisen as a result of wanton attack by outside raiders and enemies of the State [of Jammu and Kashmir]'. It provides for special tribunals for the trial and punishment of offences, including capital crimes, relating to 'participating or assisting in the campaign recently undertaken by raiders from outside in subverting the Government established by law in the State'. It enacts a special summary evidentiary procedure that bars access to lawyers, permits in camera proceedings, and allows judges to order a complete media gag. The normal appellate mechanisms are bypassed and the tribunal's orders, including death sentences, are only subjected to a highly limited form of review. In 1965, fifteen years after the official end of the war, the Supreme Court held the law was constitutionally valid, stating that '[t]he Ordinance was a permanent piece of legislation. It came into existence because of an emergency but that was only the occasion for passing it.' In 2015, its continued existence on the Kashmiri statute book was justified by the Jammu and Kashmir State Government, citing 'disturbances' and 'cease fire violations' at the Line of Control [the disputed border with Pakistan] and the anticipation of regional instability resulting from the US withdrawal of troops from Afghanistan.

The Egress and Internal Movement (Control) Ordinance was similarly passed by the Emergency Administration during the First Kashmir War, in 1948. It empowers

the Jammu and Kashmir Government to prohibit the movement of 'any person for the time being in the State' or 'any class of such persons' to a destination outside the State or within the State, except under the authority of a written permit. Both these wartime measures continue to be used to prosecute "infiltrators" — mainly Pakistani nationals, including [Azad Kashmiri stateless persons](#) and divided families, who transgress the disputed Line of Control.

Expansions of martial law and executive jurisdiction

Actions of Indian army and border security forces deployed in Kashmir and elsewhere, including outside Indian territory, are governed by military laws such as the Army Act, 1950 and the Border Security Forces Act, 1968. These laws define active duty to mean deployment on military operations, including armed combat with an enemy, as an occupying force, or as border guards. They exempt most crimes by armed forces' personnel from the jurisdiction of civilian courts. However, armed forces personnel accused of homicide or rape against civilians can not be court-martialled, and must be tried in an ordinary criminal court, *unless* such crimes are committed in the line of active duty, outside Indian territory, or during such time as notified by the government to be 'as a period of active duty with reference to any area'. India has issued and constantly renewed notifications declaring that 'every personnel' deployed anywhere in Jammu and Kashmir is on 'active duty'. Using this clause, [case law](#) by the Indian Supreme Court has empowered members of the armed forces to claim application of martial law remedies, though the statute specifically barred such jurisdiction in relation to serious crimes.

Actions by soldiers in Kashmir are simultaneously governed by the Armed Forces Special Powers Act (AFSPA) that permits the military to be deployed in Indian territory on 'internal security' duties in 'aid of civilian authority'. In January 1990, the AFSPA was extended by federal legislation to Jammu and Kashmir during a period of direct rule after the constitutional declaration of a state-wide emergency in Jammu and Kashmir. According to estimates by local [human rights groups](#), over 300,000 regular soldiers are currently deployed in Kashmir – the vast majority of whom as a counter-insurgency force to dominate and occupy civilian areas, rather than in ongoing hostilities against Pakistan. The AFSPA confers such soldiers with special powers of search, seizure, arrest and the use of lethal force against 'unlawful assemblies'. It enables the use of classic counter-insurgency war tactics of collective punishment, including shoot on sight orders, village sieges and cordons, door to door and vehicle searches, raids and 'search and destroy operations', all targeting civilians and their properties. The AFSPA stipulates that prior executive sanction is required for prosecution of soldiers in a civilian court for acts (including killings and rapes) carried

out in exercise of special powers. Such sanction for prosecution has never been granted in any crime against a civilian.

In *General Officer Commanding v Central Bureau of Investigations*, which involved the extrajudicial killings of Kashmiri civilians by army personnel, the Supreme Court ruled that prior sanction for prosecution under the AFSPA must be obtained after police investigations are complete, at the stage when the Magistrate takes cognizance of the occurrence of a triable offence. It thus barred the jurisdiction of civilian courts to determine whether an incident amounted to a bona fide act done in exercise of special powers under the AFSPA, and to send cases that did not meet this standard directly for trial. In effect, the option of court martial lies solely with military authorities, and the Magistrate's office is rendered a postbox to convey police investigative documents to military authorities, who may then determine whether to take any further action. In an ongoing case involving an army convoy indiscriminately opening fire in a village, the Supreme Court passed an interim order barring police from investigating the a complaint regarding the incident. This is in keeping with long standing police practice in Kashmir, in the past backed by official police circulars, which state that no police complaints should be registered at police stations against army personnel, without permission of higher authorities.

The Permanent Emergency

On 10 January, 2020 the Indian Supreme Court passed its judgment in the case of *Anuradha Bhasin v Union of India*, which had challenged the imposition of the internet shutdown in Kashmir on grounds that it violated the (newspaper editor) petitioner's freedom of speech and right to freely carry on her profession. The Court recognized that there was a constitutionally protected right to free speech and profession via the medium of the internet. It held that a complete or indefinite internet blackout was impermissible. While specific and temporary restrictions were permissible on national security grounds, these must be narrowly crafted to meet the tests of proportionality and necessity, and minimally impact the exercise of freedoms. The judgment was almost universally lauded as a landmark in Indian jurisprudence on the right to universal internet access. However, it did not declare the internet clampdown in Kashmir unconstitutional, or order it to be revoked. Instead, the Court rebuked the Government of Jammu and Kashmir for repeatedly failing to furnish materials to demonstrate the legal basis and grounds for the restrictions, and laid down that all future restriction orders must be in writing and meet the constitutional standards laid down by the court. It left it to executive authorities to pass reasoned government orders that would be reviewed and notified every two weeks, and would be subject to challenge before the Jammu and Kashmir High Court.

Since the Supreme Court was laying down the constitutional test for internet restrictions, why did it not apply the constitutional standards to the case before it – the internet blackout in Kashmir? On a follow-up petition filed in the context of the COVID 19 pandemic to restore high speed internet to Kashmir, the Court doubled down on its position, setting up a new review panel headed by Home Ministry officials, responsible for the shutdown orders. The Court's logic replicates that of earlier judgments which constitute Kashmir as a legalised permanent emergency, where bureaucratic discretion and military jurisdiction is expanded and judicially authorized, whilst seemingly upholding rule of law. John Reynolds' work tracing the relationship between empire, race and the normalizations of emergency in postcolonial and international legal order elaborates on the ground-breaking scholarship of Nasser Hussain, in viewing the norm and the exception as a continuum rather than a binary, both in historical and conceptual terms. Emergencies are complex, hybrid and fluid - characterized not by the absence or absolute suspension of law, but by a grey-zone of hyperlegality, through which the law establishes and redraws elaborate administrative and judicial classifications, special forums and bureaucratic regimes for determining the terms of its own suspension, authorization and application. In keeping with the bureaucratic banality of such 'living emergency' regimes, the *Anuradha Bhasin* judgment performatively enacts the rule of law — setting up an expansive discretionary system based on executive apprehensions of dangers and security threats — even as the constitutional norm shrinks from actual application to the specifics of the rights violations in Kashmir.

After the judgment, the state government has passed orders every fifteen days, detailing the minutiae of whitelists and blacklists of accessible websites including bans on social media and Virtual Private Networks (VPNS), internet speed and bandwidth restrictions, and restrictive and intrusive technical conditions under which the internet can be accessed. Police have filed complaints (FIRs) under draconian anti-terror and public order laws against unnamed suspects for using VPNs to anonymize access to banned websites and social networking sites. This closely parallels the filing of similar 'open FIRs' against hundreds of unnamed suspects in cases of rioting and destruction of state property, casting a legal dragnet for profiling, mass surveillance and administrative detentions of street protesters and political mobilisers under the Public Safety Act, 1978. Internet speeds continue to be throttled, making most websites including medical and news sources unusable, despite the public health emergency and the highly militarized lockdown engendered by the COVID-19 pandemic.

India's denial of a state of undeclared war in Kashmir is premised on a permanent emergency regime, which strategically deploys shifting jurisdictions and contradictory jurisdictional assertions, drawing on elements from constitutionalism,

the criminal justice system, the bureaucratic and police 'law and order' apparatus, and special laws. The law in Kashmir is, as has been the case in counter-insurgency contexts and extraordinary jurisdictions elsewhere, not so much suspended as splintered. India rejects international oversight and the application of laws of armed conflict, while continuing to use an arsenal of wartime and warlike laws to provide impunity for military operations on the ground. Mechanisms for the exercise of almost absolute executive, police and military discretion, whether it is in matters of the use of weapons of mass suffering in crowd control, or the right to access to the internet, are judicially sanctioned. The reach and substance of emergency powers are continuously expanded, and due process rights eroded.

The languages and jurisprudence of Indian constitutionalism and emergency powers serve to render invisible the existence of a protracted and brutal armed conflict and occupation in Jammu and Kashmir. Our collective misrecognition of the nature and stakes of the Kashmir conflict serve as an alibi for ever-escalating acts of Indian aggression. The people of Kashmir have long looked to the world community and United Nations resolutions as a source of their legal claims to freedom and justice, and they continue to do so, despite a lack of meaningful support from the UN. Their struggle is a provocation to unsettle the amnesias and alibis of empire, and truly address questions of international law from below.