

***Beit Sourik* and Kunan Poshpora: Reimagining Agency in Legal Resistance Movements**

by

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Thesis submitted in partial fulfillment of the requirements
for the degree of Bachelors of Arts in the
Middle East Studies program

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Brown University
March 30, 2021

ABSTRACT

The law is a weapon of the state used to inflict violence upon those who oppose the state. Yet, there is an unexplained proclivity among those most marginalized by the law's violence to employ the law for emancipation. This apparent paradox of using law to resist the institution of law has been attributed to a range of factors including the resistor's dependence on the oppressive state for basic sustenance. At the same time, such an ethically incongruent relationship between resistance and law often renders the law more powerful by ascribing to it a false sense of legitimacy as an effective and therefore employable means of justice for the marginalized. This thesis argues that such a myopic vision of legal resistance is an unwarranted denial of agency to a specific, and intentional act of resistance. This stems from an internal iteration of the colonial irreverence of legal resistance, and its subsequent perception as an unthreatening and therefore irrelevant means of resistance. This in turn accentuates theories of subaltern law that argue resistance is a layered series of power dichotomies rather than an insular and collective opposition to a monolithic power.

This relatively new premise in the field of subaltern studies has revolved primarily around questions of economic assertion through the law in South Asia. In this thesis, two legal cases from Kashmir and Palestine, concerning issues of political identity, are cast in the same mold. *Beit Sourik*, a legal case situated in the West Bank that argues against Israeli confiscation of Palestinian land is juxtaposed against a legal case surrounding Kunan Poshpora, a public interest petition against the state cover up of a mass military rape perpetrated by the Indian army in Indian 'administered' Kashmir. Both cases, despite their disparate geographic, political, and historical contexts, offer a striking parallel on the emancipatory employment of the law. In both cases, the law is found to work in tandem with rather than in opposition to political protest. In both cases, the subaltern legal resistor is found to exercise a distinct political agency that seeks to prioritize a particular goal, whether it is wrangling compensation from the occupation system, or exposing the violence of the occupier's criminal justice machine to the rest of the world. Ultimately, through legal resistance in these two cases, the hypothesis of subaltern legal theory is established in the context of political movements. Thus, the paradox is dismissed as a superficial critique of resistance, questions regarding power structures within resistance movements are stirred, and agency in resistance is reimagined as inconsistent, complex, and contradictory.

Keywords: lawfare, law, subaltern studies, resistance, state violence, militarism, military rape, military occupation, gender-based violence, Kashmir, Palestine, West Bank, Kunan Poshpora

To Dadu,
who gave me my roots and wings,
who has shaped my life in ways I am only beginning to grasp,
whose tender intelligence I strive to carry forward.

ACKNOWLEDGEMENTS

The three years of conception and one year of research that resides in these pages is a reflection of the collective effort invested into this project by all those around me. I am grateful to everyone at Brown University, who, over the course of the last four years have touched my heart and shaped my mind, inside and outside the walls of the classroom. I thank you for teaching me to question everything with empathy. To my advisor and mentor, Professor Mitter, I am grateful for the world of critical history you opened to me on my first day at college, and the path of which I have been trodding ever since. To Professor Winder, I am grateful for the structure and composure with which you have taught me to navigate bulky academic writing projects. To my mentor and inspiration Professor Doumani, thank you for being the storehouse of knowledge that you are, and for the undeserving faith you place in my abilities. To my friend and guide Suvaid, I am grateful for the experienced eye you were able to cast at my past draft. To all my professors at Brown and at CIEE Amman, I thank you for sharing with me your knowledge, for equipping me with the tools to challenge conformity, and showing me how to accept and rise to challenges with grace and humility. I also want to thank those in Kashmir and Palestine whose tireless activism has fueled this work, particularly those at the Jammu and Kashmir Coalition for Civil Society (JKCCS) with whom I had the privilege and delight of working last summer. Glorifying resilience amidst strife is a crass practice I do not wish to partake, yet, I am compelled to express my awe at the unrelenting fervour with which resistance is practiced by the people whose stories I have attempted to chronicle in this project. I am inspired by the voice that you raise. Finally, I am grateful to my friends, family, and loved ones, who have held me together through sleepless nights and highly caffeinated days, and have roughed the ups and downs of the storm that lies behind the seemingly beguiling accomplishment of writing an undergraduate thesis with me. This includes Vivian, for regularly raising concerns about my nourishment, Kannita, Peri, Roshni and Madhulika for keeping me in touch with human society during my month of hibernation, and Neev, for switching disciplines for a protracted twenty four hour period before the submission deadline and acting as a much needed editor. I also thank Zara and Aya, translators, friends, and more, without whom this would not have seen the light of day. Lastly, I thank my parents, who have taught me to never give up, and have, as a consequence, patiently indulged the overwhelming share of my thesis-writing tirades in the last six months. I want each of you to know the inestimable role you have played in bringing these pages to life.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	ii
INTRODUCTION: The Paradox and Hierarchies of Legal Resistance	1
CHAPTER 1: <i>Beit Sourik</i> and the Quest for Legal Justice	11
Introduction.....	11
Beit Sourik Village Council versus the Government of Israel.....	15
The Paradox of Legal Resistance.....	17
Palestinian Agency through the Lens of <i>Beit Sourik</i>	21
Conclusion.....	40
CHAPTER 2: The Rape of Kunan Poshpora: The Diffusion of Categories of Resistance	42
Introduction.....	42
What Happened in Kunan and Poshpora.....	45
State Violence in Kashmir.....	53
The Exertion of Agency through the Law.....	61
Conclusion.....	78
CONCLUSION: Towards a Subaltern Recasting of the Law	81
WORKS CITED.....	84

INTRODUCTION

The Paradox and Hierarchies of Legal Resistance

Resistance movements agitating against institutions of violence, and advocating for social and political justice have found common ground in their collective faith that the law can be weaponized in an emancipatory fashion. Yet, the law's intricate and often undivorcible relationship with violence and power renders this reliance curious.¹ The law as a site of violence has been the subject of much anthropological and legal debate. Some scholars have argued that the law precedes violence, and the violence is the legal endpoint. Therefore, what is legitimate and legal is what criminalises, punishes, and violates, what it sees as the illegitimate, illegal or the "other".² George Bisharat, a Palestinian legal scholar, argues, on the other hand that violence is not only at the legal endpoint but also at its beginning.³ In other words, what is law is produced and legitimized through violence.⁴ On the other hand, Rober Cover points out, if and how violence that is done by or in the name of the law differs from illegal or extralegal violence

¹ See Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Paris: Gallimard, 1966); Michel Foucault and Alan Sheridan, *Discipline and Punish: The Birth of the Prison* (London: Gallimard, 1975); Michael Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (Paris: Librairie Plon, 1961); and Michael Foucault and Michel Senellart, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978* (New York: Palgrave Macmillan, 2009). A thesis of Foucault's philosophy on the situation of the prison as a tool of violence that imposes institutional understandings of order on society has shaped most legal theory discourse around the law and its relationship with violence and power. A synopsis of Foucault's contributions to the field of law can be found in Gerald Turkel, "Michel Foucault: Law, Power, and Knowledge," *Journal of Law and Society* 17, no. 2 (1990): pp. 170-193, <https://doi.org/10.2307/1410084>. Turkel summarizes Foucault's argument on law: "In modern society, law combines with power in various locations in ways that expand patterns of social control, knowledge, and the documentation of individuals for useful ends."

² E. Adamson Hoebel, *The Law of Primitive Man* (New York, NY: Atheneum, 1979).

³ George E. Bisharat, "Violence's Law: Israel's Campaign to Transform International Legal Norms," *Journal of Palestine Studies* 42, no. 3 (2013): pp. 68-84, <https://doi.org/10.1525/jps.2013.42.3.68>, 68-69. In this article, Bisharat exemplifies his argument by pointing to Israel's employment of international humanitarian law which employs legal entrepreneurialism, an institutionalized, persistent and internally coherent campaign to alter the laws norms, and thereby justify its right to exercise violence against Palestinian civilians.

⁴ Ibid, 70.

is a contested subject.⁵ Therefore, the relationship between violence and law, irrespective of its nuances, is irrefutable. In light of this, the acts of resistance contesting institutions that monopolize the law through the law, appear paradoxical.

To confront the assumed paradox about such legal resistance, I situate my research in the discourse of subaltern law.⁶ In my thesis, I examine two legal case studies—one in Palestine and the other in Kashmir—where subaltern resisters agitating against the state’s violence as well as the violence embodied by the state engage institutions of law to resist state-imposed marginalization.⁷ In both cases, I find an essentialist, hegemonic attribution of legal resistance as inferior to more absolutist forms of resistance. Steering clear of the binary narrative through which legal resistance was being perceived which accounted for the perception of a paradox, I discovered an abundance of primary evidence that demonstrates the complex and contradictory ways in which resistance manifests itself. This included recorded testimonies, newspaper reports, and the texts of the legal petitions that recorded the nuanced political circumstances that enveloped exercise of such lawfare.⁸

⁵ Robert M. Cover, “Violence and the Word,” *On Violence*, June 2007, pp. 292-313, <https://doi.org/10.2307/j.ctv120qr2d.25>.

⁶ I elaborate on this later in the introduction.

⁷ Note that I do not venture to compare the resistance movements in these two places, or the unique and disparate postcolonial historical trajectories of Palestine and Kashmir, but rather the means through which legal resistance occurs at two different sites of anti-state resistance, and the consequences of such resistance.

⁸ First, This thesis was written between the months of September 2020 and March 2021, the year of the global coronavirus pandemic, which prevented all prospects of fieldwork and interviews. Primary sources for this project therefore include sources that have been published as part of, or an appendix to an alternative secondary source. For instance, most interviews cited in this thesis have been drawn from secondary sources such as newspaper reports or journalistic interviews. In some cases, I have looked at social media posts and press releases by activists. However, most of my research has drawn from primary evidence collected by other scholars. Therefore, the answers I have ascribed to individuals cited in this paper is a subjective superimposition of their views in response to different questions asked by different interviewers onto the questions I am seeking to answer in this thesis. This, though permissible in the academic world, can be perceived as a deliberate denial of agency to those voices I am seeking to center. I see this is a major shortfall of my thesis. Future work on this subject will benefit greatly from collecting data from subaltern resistance actors through direct and intentional interviews on the subject of legal resistance. Second, there is no difference between legal resistance and lawfare in this thesis. I use these terms interchangeably, although scholars of subaltern law have held conflicting views on the different kinds of legal resistance. See also: Uday Chandra, “Rethinking Subaltern Resistance,” *Journal of Contemporary Asia* 45, no. 4 (2015): pp. 563-573, <https://doi.org/10.1080/00472336.2015.1048415>.

In the first chapter, I study a petition submitted in 2004 by eight Palestinian village councils in the West Bank to the Israeli High Court of Justice (HCJ) challenging an order issued by the Israeli Defense Forces (IDF) that sought to confiscate their lands. The villages, one of them Beit Sourik around which the legal case was named, located mostly to the north and the northwest of Jerusalem, were the chosen sites for the ‘security fence’ that Israel wanted to build through the West Bank to barricade what they defined as Palestinian terrorism.⁹

Land confiscation, home demolitions, and dispossession of Palestinians in the West Bank by the IDF began in 1967, after Israel occupied the West Bank (including East Jerusalem) and Gaza in the Six Day War, defeating Syria, Jordan, Egypt and a host of neighboring Arab majority countries in the Middle East.¹⁰ Since then, Israel’s ruthless attempts to grab Palestinian land for Israeli military and civil purposes has inflicted immense suffering upon Palestinians, and deprived them of their fundamental human rights.¹¹ Israel’s military rule haunts every aspect of Palestinian life, including travel, work, education, and agriculture.¹² When Palestinians stage

⁹ Andrew C. Eskensten, “Dershowitz Advises Israel on Wall Dispute: News: The Harvard Crimson,” News | The Harvard Crimson (The Harvard Crimson, February 24, 2004), <https://www.thecrimson.com/article/2004/2/24/dershowitz-advises-israel-on-wall-dispute/?page=2>. Alan Dershowitz, a United States constitutional lawyer and professor of law at Harvard University, famously said in an interview for this article that the ‘security fence’ represented Israel’s “last alternative to combating terrorism.” Norman Finkelstein, a notable anti-Zionist scholar, discredited this claim (and its larger political and security premise) in great detail. See, Norman G. Finkelstein, *Beyond Chutzpah: On the Misuse of Anti-Semitism and the Abuse of History* (Berkeley, CA: University of California Press, 2008).

¹⁰ For a comprehensive legal and political history of the Six Day War, also known as Al-Naksa by Palestinians, see Quigley, John B. *The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War*. New York, NY: Cambridge University Press, 2013; William Roger Louis and Avi Shlaim, eds., *The 1967 Arab-Israeli War: Origins and Consequences* (New York, NY: Cambridge University Press, 2012); Guy Laron, *The Six-Day War: The Breaking of the Middle East* (New Haven, CT: Yale University Press, 2018); Rashid Khalidi, “The Third Declaration of War, 1967,” in *The Hundred Years’ War on Palestine: a History of Settler Colonialism and Resistance, 1917-2017* (New York, NY: Picador, 2021), pp. 159-228; Zena Tahhan, “51 Years on: How Israel Devoured the Rest of Palestine,” Israel News | Al Jazeera (Al Jazeera, June 4, 2018), <https://www.aljazeera.com/features/2018/6/4/the-naksa-how-israel-occupied-the-whole-of-palestine-in-1967>; and Noura Erakat, “Taking the Land without the People: The 1967 Story as Told by the Law,” *Journal of Palestine Studies* 47, no. 1 (2017): pp. 18-38, <https://doi.org/10.1525/jps.2017.47.1.18>.

¹¹ “Israel’s Occupation: 50 Years of Dispossession.” Amnesty International. Accessed March 30, 2021. <https://www.amnesty.org/en/latest/campaigns/2017/06/israel-occupation-50-years-of-dispossession/>.

¹² Ibid.

peaceful political protests to resist the occupation, Israel uses military laws to crush dissent.¹³ Further, Israel is notorious for its excessive use of violence to stifle Palestinian quest for political self-determination. For instance, human rights advocates note that the West Bank observes one of the recorded rates of child detentions compared to the rest of the world.¹⁴

In 2002, Israel began constructing one of the largest separation barriers in the world through the West Bank.¹⁵ The wall, a series of fences and 8 meter high walls with barbed wire, trenches and electronic motion detectors, according to Israel, was meant to limit the onslaught of Palestinian suicide bombings witnessed by Israel during the Palestinian intifada of the 1980s and 1990s.¹⁶ However, the wall was built within the West Bank, rather than on the internationally recognized eastern boundary of Israel, which exposed Israel's intent to occupy more land in the West Bank.¹⁷ The land dispossession that set off in the early 2000s rendered the West Bank a site rife for discursive acts of resistance.¹⁸ The petition that is the preoccupation of the first chapter of the thesis was one such act of reimagined lawfare.

It is here that the subaltern legal discourse challenges dominant legal scholarship and practices in Palestine. By reimagining lawfare—in this case the Palestinian petition—as a valid means of resistance, the false binary of legitimacy versus illegitimacy of legal resistance is repudiated. To do so, I argue, that contrary to popular scholarship on the occupation in Palestine, legal resistance is neither a last resort nor a feeble attempt by Palestinians who have succumbed to the

¹³ Ibid.

¹⁴ "Statistics on Palestinian Minors in the Custody of Israeli Security Forces," B'Tselem, 2021, https://www.btselem.org/statistics/minors_in_custody.

¹⁵ "West Bank Barrier," United Nations Office for the Coordination of Humanitarian Affairs - occupied Palestinian territory, accessed March 30, 2021, <https://www.ochaopt.org/theme/west-bank-barrier>.

¹⁶ Chris McGeal, "World Court Tells Israel to Tear Down Illegal Wall," The Guardian (Guardian News and Media, July 9, 2004), <https://www.theguardian.com/world/2004/jul/10/israel3>.

¹⁷ Finkelstein, *Beyond Chutzpah: On the Misuse of Anti-Semitism and the Abuse of History*, 204-205; Peter Lagerquist, "Fencing the Last Sky: Excavating Palestine after Israel's 'Separation Wall,'" *Journal of Palestine Studies* 33, no. 2 (January 2004): pp. 5-35, <https://doi.org/10.1525/jps.2004.33.2.5>.

¹⁸ William Parry, *Against the Wall: The Art of Resistance in Palestine* (Chicago, IL: Lawrence Hill Books, 2013); Polly Pallister-Wilkins, "The Separation Wall: A Symbol of Power and a Site of Resistance?," *Antipode* 43, no. 5 (October 2011): pp. 1851-1882, <https://doi.org/10.1111/j.1467-8330.2010.00859.x>.

occupation to make the most of the system. Rather, it is an active, volatile and intentional form of resistance, whose actors often participate in political resistance of other kinds. More importantly, a study of the legal strategies used by the petitioners expose that they maneuvered the Israeli legal system to get what they wanted. Further, through lawfare, petitioners are able to interact with relevant actors of international law, who weaponize the subaltern's victimization to make a case on their behalf to the international arena; in this regard Palestinian lawfare capitalizes on the injustices meted to them by the legal system, and turns it around. Therefore, lawfare is far from a redundant form of resistance. It claims and exerts agency both within and outside the straightjacket of the occupied legal system.

In the second chapter, I study legal resistance performed by a group of Kashmiri women seeking to confront an incident of mass rape perpetrated by the Indian military in 1991 in two adjoining villages close to the Line of Control (LOC), the international recognized boundary between India and Pakistan that runs through the disputed territory of Kashmir.¹⁹ In February 1991, the villages of Kunan and Poshpora, was the unfortunate prey of what the Indian army calls a 'cordon and search operation,' a particularly ruthless military raid, that is often accompanied by incidents of sexual violence and torture of civilians.²⁰ In the 1990s, 'cordon and search' operations were a routine aspect of Kashmiri life under the Indian military occupation.²¹ In 1989, after the Indian

¹⁹ 'Kashmir' in this thesis has been used to reference the Indian 'administered' portion of Kashmir. In this thesis, the second site of legal resistance elaborated in Chapter 2 is therefore Indian 'administered' Kashmir, and those performing legal resistance are Kashmiris living within this specific portion of the disputed territory,

²⁰ The Office of the United Nations High Commissioner for Human Rights has written 'cordon and search operations' by the Indian armed forces enable a range of human rights violations, including physical intimidation and assault, invasion of privacy, arbitrary and unlawful detention, collective punishment and destruction of private property. Usually, in a 'cordon and search operation', men are rounded up from the neighborhood and identified by Kashmiri collaborators working for the Indian military. See Office of the United Nations High Commissioner for Human Rights, *Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019*, 8 July 2019,

https://www.ohchr.org/Documents/Countries/IN/KashmirUpdateReport_8July2019.pdf. Patricia Grossman, Physicians for Human Rights, and Asia Watch, "The Human Rights Crisis in Kashmir: A Pattern of Impunity," Human Rights Watch, June 1993, <https://www.hrw.org/sites/default/files/reports/INDIA937.PDF>.

²¹ "India's Secret Army in Kashmir: New Patterns of Abuse Emerge in the Conflict," India, 1996, <https://www.hrw.org/legacy/reports/1996/India2.htm>.

government meddled in one of the most significant legislative elections in Kashmiri, resistors had risen up in a sweeping, anti-India, militant insurgency, demanding freedom from the Indian state.²² The Indian government, seizing the golden opportunity to consolidate its long contested rule, deployed the Indian army to the disputed territory and equipped it with the impunity to shoot to kill anyone who questioned India's claim over Kashmir.²³

India's territorial claim over Kashmir is rooted in a British colonial-era law, the Government of India Act of 1935, that offered Kashmir's local ruler, Maharaja Hari Singh, a choice between accession to the newly independent states of India or Pakistan or independent statehood once British rule ended.²⁴ A few months after the independence of India and Pakistan in August 1947, before Kashmir's status had been determined, a handful of Pakistani tribesmen infiltrated Kashmir through its north west border with Pakistan in an effort to coerce Hari Singh into capitulating to Pakistan.²⁵ Hari Singh was thus compelled to turn to India for military assistance.²⁶ Indian prime minister Jawaharlal Nehru agreed to send troops to Kashmir on the condition that Hari Singh sign an Instrument of Accession that would accede Kashmir to India.²⁷

²² Praveen Donthi, "How Mufti Mohammad Sayeed Shaped the 1987 Elections in Kashmir," The Caravan, August 29, 2018, <https://caravanmagazine.in/vantage/mufti-mohammad-sayeed-shaped-1987-kashmir-elections>.

²³ India: Act No. 21 of 1990, *Armed Forces (Jammu and Kashmir) Special Powers Act, 1991*. 1990. <https://www.refworld.org/docid/3ae6b52a14.html>. Article 4(a) of the act states: Article 4(a) of this act empowers armed personnel to even kill civilians at their discretion: "[...]if he [armed personnel] is of the 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 [...]". A more detailed understanding of AFSPA follows in Chapter 2. See also: Seema Kazi (Centre for the Study of Law and Governance, 2012), 9-22. For a detailed analysis on military impunity in Kashmir, see Parvez Imroz, *Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir* (Srinagar, J&K: International People's Tribunal on Human Rights and Justice in Indian-administered Kashmir and Association of Parents of Disappeared Persons, 2012).

²⁴ Kazi, 2; Bipan Chandra, Aditya Mukherjee, and Mridula Mukherjee, "The Initial Years," in *India after Independence, 1947-2000* (New Delhi, NCR: Penguin Books, 2002), pp. 171-206, 180-181.

²⁵ Sumantra Bose, *The Challenge in Kashmir: Democracy, Self-Determination and a Just Peace* (New Delhi, NRC: Sage, 1997), 26; Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (Cambridge, MA: Harvard University Press, 2005), 33-35.

²⁶ Ibid, 36. Also Kazi, 2-8.

²⁷ Ibid. For a complete and brief history of Indian 'administered' Kashmir, see Hafsa Kanjwal, Interview with Chris Hayes, Why is This Happening, podcast audio, November 10, 2019, <https://www.nbcnews.com/think/opinion/contextualizing-lockdown-kashmir-hafsa-kanjwal-podcast-transcript-ncna1069986>.

In the first Indo-Pak War of 1947–48 that followed, the Kashmir region was divided into Azad Kashmir to the west (governed by Pakistan) and Jammu and Kashmir (J&K) to the east (governed by India).²⁸ The two regions were separated by LOC, the internationally recognized, United Nations endorsed boundary running through Kashmir, between India and Pakistan.²⁹ Although the people of Kashmir were promised that their views on the accession would be registered after the war, till date no popular referendum has taken place.³⁰ A political deadlock between India and Pakistan is behind this—India refuses to allow a vote until Pakistan’s troops return to pre-1947 lines while Pakistan refuses to withdraw troops until the vote is held.³¹

India’s colonial anxiety over holding onto the rest of Kashmir, stemming in part from a fear of losing more land to a historical adversary, is manifest in the colonial style tactics it has employed to control the Kashmiri population.³² Even during the 1950s to the 1980s, the relatively peaceful period in recent Kashmiri history, the Indian government denied Kashmiri people economic opportunities in India, barred political speech that was antagonistic to Indian national interests, and bribed Kashmiri politicians into adopting a conciliatory position towards the central government.³³ After the rigged election of 1987, an attempt by New Delhi to pre-empt the

²⁸ Chandra et al, “The Initial Years,” 187.

²⁹ Kazi, 3. In 1972, after the Simla Agreement the UN ceasefire line became the official de-facto boundary that was accepted by both India and Pakistan. See full text of the Simla Accord at: “Simla Agreement July 2, 1972,” Ministry of External Affairs, Government of India, 1972, <https://mea.gov.in/in-focus-article.htm?19005%2FSimla+Agreement+July+2+1972>.

³⁰ Chandra et al, “The Initial Years,” 188-89; Bose, *Kashmir: Roots of Conflict*, 38. Several United Nations resolutions most important of which were UN Security Council Resolutions 47, 51, and 96 called for the plebiscite, but to no avail. See “UN Documents for Jammu and Kashmir: Security Council Resolutions,” Security Council Report, Accessed August 16, 2020. https://www.securitycouncilreport.org/un_documents_type/security-council-resolutions/page/1?ctype=Jammu+and+Kashmir.

³¹ Chandra et al, “The Initial Years,” 189; Bose, *Kashmir: Roots of Conflict*, 42.

³² Sumantra Bose writes: “Indian official ideology has claimed that India’s identity as an inclusive, secular state would be grievously damaged without IJK (Indian ‘administered’ Jammu and Kashmir), the only Muslim-majority unit of the Indian Union. Why retention of Kashmir, apparently by any means necessary, should be indispensable to the validation of India’s tolerant, civic credentials is not clear, since nearly 150 million Muslims live in India outside IJK, and their status and treatment could equally serve to validate those credentials (or otherwise).” Bose, *Kashmir: Roots of Conflict*, 8.

³³ Bose, *Kashmir: Roots of Conflict*, “The Kashmir-India Debacle,” 44-102.

victory of a political party that could enable Kashmir to secede from India, Kashmiris launched an armed struggle against the Indian state.³⁴ Since then, India has had a free pass to terrorize the Kashmiri population to protect its national security interests. Nearly 50,000 people have died, while another 10,000 have been forcibly disappeared.³⁵ Sexual assault, killing of peaceful protestors, and torture of civilians in custody are routinely employed by Indian security forces to humiliate and punish the Kashmiri population.³⁶ One of the most opprobrious tactics of violence mobilized by the military with impunity is the use of pellet guns to blind innocent Kashmiris, including children, at any time a soldier deems them a threat to India security interests.³⁷

It is against this backdrop of this violence that a regiment of the Indian army conducted a ‘cordon and search operation’ in the villages of Kunan and Poshpora in 1991, and then proceeded to rape between 23 to 100 women residents. The case, needless to say, was dismissed without a thorough investigation in 1991 and erased from public memory.³⁸ In 2013, a group of activists—young women—from different parts of Kashmir decided to reconstruct the events of the incident, engaging in legal resistance by petitioning for justice via the Indian judicial system. Their petition was met with opposition and pessimism—from state institutions as well as Kashmiri resisters. As a consequence, the petitioners often felt compelled to justify why they had chosen to employ the law to resist the Indian state. In Chapter 2, I delve into the provocations of

³⁴ Donthi, “How Mufti Mohammad Sayeed.”

³⁵ “Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan,” Office of the United Nations High Commissioner for Human Rights, June 14, 2018, <https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf>.

³⁶ Association of Parents of Disappeared Persons (APDP) and Jammu Kashmir Coalition of Civil Society (JKCCS), “Six Monthly Review of Human Rights Situation in Indian Administered Jammu and Kashmir (January to June 2020),” JKCCS, July 1, 2020, <https://jkccs.net/wp-content/uploads/2020/07/Bi-Annual-HR-Report-2020-JKCCSAPDP.pdf>; Amnesty International, “Rape and Ill-Treatment of Women in Kashmir,” Amnesty International, March 21, 1991, <https://www.amnesty.org/en/documents/ASA20/010/1991/en/>.

³⁷ “India: Stop Using Pellet-Firing Shotguns in Kashmir,” Human Rights Watch, October 28, 2020, <https://www.hrw.org/news/2020/09/04/india-stop-using-pellet-firing-shotguns-kashmir>.

³⁸ This is further elaborated upon in Chapter 2.

the latter, discovering in the process that legal resistance is deemed less worthy than other means of resistance, both by the oppressive, pseudo colonial state, as well as the movement against the state. This stems from the initial hypothesis: resistance against the upholders and enactors of the law through the law appears paradoxical. Through a collection of primary source evidence, the overwhelming majority of which is constituted by interviews with the survivors and witnesses of Kunan Poshpora, I find that the legal and non-legal categories of resistance are fuzzy. In other words, those who resist the state through the law also participate in political action that rejects the state. Moreover, the legal resistance actors exert agency through the law, often wrangling small victories that sustain their longer and larger revolutionary efforts. In the process, I also unveil that the survivors and petitioners of Kunan Poshpora not only mount a distinct resistance against the post-colonial state and its violent institutions (such as the Indian armed forces) but also against the colonial categorizations of the resistance imaginary, that relegates legal resistance to a position inferior to that of tangible revolution.

Through these events, I establish that the question of legal agency exerted by resistance actors must be examined. In the field of subaltern studies, a term called ‘lawfare’ has emerged in recent years, that has been defined by the anthropologists Comaroff and Comaroff as the “use of legal means for political and economic ends.”³⁹ The current wave of “judicialization” of resistance they argue has an “insurgent potential”, because it permits subaltern and marginal populations of the world to use the law and its instruments strategically.⁴⁰ In other words, through the institution

³⁹ Jean Comaroff and John Comaroff, “Law and Disorder in the Postcolony,” *Social Anthropology* 15, no. 2 (2007): pp. 133-152, <https://doi.org/10.1111/j.0964-0282.2007.00010.x>, 26-27; Lila Abu-Lughod, “The Romance of Resistance: Tracing Transformations of Power through Bedouin Women,” *American Ethnologist* 17, no. 1 (1990): pp. 41-55, <https://doi.org/10.1525/ae.1990.17.1.02a00030>, 42.

⁴⁰ Comaroff and John Comaroff, “Law and Disorder in the Postcolony; John L. Comaroff and Jean Comaroff, *Ethnicity, Inc* (Chicago, IL: Univ. of Chicago Press, 2010), 56. This concept has been explored by Kenneth Bo Nielsen in the context of force land acquisition in West Bengal in Kenneth Bo Nielsen, “Law and Larai: The (De)Judicialization of Subaltern Resistance in West Bengal,” *Journal of Contemporary Asia* 45, no. 4 (2015): pp. 618-639, <https://doi.org/10.1080/00472336.2015.1040821>. It has also been explored by Heather Bedi to show how the subaltern employed the law in the western Indian state of Goa to resist the state’s attempt to privatize land. See

of law, agency against those who exercise the law violently can be asserted. Therefore, lawfare, a within-system form of resistance, does not seek revolution. Rather, “it denotes a set of strategies through which subaltern actors turn the law and its institutions into sites of contestation and negotiation with varying degrees of success”.⁴¹

Historically, the discourse of legal resistance has seen its share of skeptics who have iterated misgivings about the paradox mentioned earlier.⁴² In more contemporary scholarship, however, the dualism between power and resistance has been challenged, opening space for the deconstruction of resistance itself as a structure of hierarchies.⁴³ Most scholars of subaltern law have drawn from the following Foucauldian truism on resistance and power: “where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power.”⁴⁴ Thus, resistance is entangled with power rather than acting exclusively in opposition to it.⁴⁵ Resistance is ambiguous, and the acts of resisters are ambivalent.⁴⁶ In lieu of this, lawfare or legal resistance challenges reductive binaries of legal and non legal resistance, and the subsequent paradox that arises, in turn pushing for the reimagined exertion of resistant agency. In this thesis, through the lens of *Beit Sourik* and Kunan Poshpora, I will attempt to illustrate this premise.

Heather Plumridge Bedi, “Judicial Justice for Special Economic Zone Land Resistance,” *Journal of Contemporary Asia* 45, no. 4 (March 2015): pp. 596-617, <https://doi.org/10.1080/00472336.2015.1048406>. Comaroff and Comaroff’s theory on lawfare and judicialization of politics has been examined largely in the field of economic resistance movement. My thesis is an attempt to extend this concept to political resistance.

⁴¹ Uday Chandra, “Rethinking Subaltern Resistance,” *Journal of Contemporary Asia* 45, no. 4 (2015): 563-573, <https://doi.org/10.1080/00472336.2015.1048415>, 567.

⁴² *Ibid*, 564.

⁴³ Timothy Mitchell, “Everyday Metaphors of Power,” *Theory and Society* 19, no. 5 (1990): pp. 545-577, <https://doi.org/10.1007/bf00147026>, 547.

⁴⁴ Michael Foucault, *The History of Sexuality* (London: Allen Lane, 1978), 95-96. Cited in Chandra, “Rethinking Subaltern Resistance.”

⁴⁵ Douglas Haynes and Gyan Prakash, “Introduction: The Entanglement of Power and Resistance,” in *Contesting Power: Resistance and Everyday Social Relations in South Asia* (Berkeley, CA: Univ. of California Press, 1992), pp. 1-22, 2-3.

⁴⁶ Sherry B. Ortner, “Resistance and the Problem of Ethnographic Refusal,” *Comparative Studies in Society and History* 37, no. 1 (1995): pp. 173-193, <https://doi.org/10.1017/s0010417500019587>, 175.

CHAPTER 1

Beit Sourik and the Quest For Legal Justice

INTRODUCTION

On December 9, 2003, the Israeli Defense Forces (IDF) published a military order titled ‘Command about the Occupation of Land Number 84/03T’ that stated:

“This order announces the seizure of land for military purposes. [...] The Israeli Defense Forces will occupy this land and absolute possession of it will be given to the officer of the Central District Command officer in the Ministry of Defense.”⁴⁷

The order that acquired for free 192.2 dunams (48 acres) of land also stated that landowners had the right to appeal to the District Coordination and Liaison (DCL) office in Ramallah that monitors Palestinians’ movements in and out of the West Bank and issues travel permits to Palestinians for compensation for the land appropriation.⁴⁸ The copies of the order would be distributed to the landowners affected by the order, as well as put up at government and military offices in the West Bank including the DCL office and the office of the district judicial advisor amongst others.⁴⁹ The first set of orders—84/03—concerned land in Al-Qubeiba and Qatanna, a village and a town a few kilometers north of Jerusalem, and identified five locations within the two sites where land would be seized.⁵⁰ To the order was appended a map that marked in red the plots of land that were to be appropriated.⁵¹

47 (جيش الدفاع الإسرائيلي، أمر بشأن وضع اليد على أراضي، رقم ٨٤/٠٣ (يهودا والسامرة : جيش الدفاع الإسرائيلي، ٢٠٠٣، http://orders.arij.org/scanned/MO_2005_10_25_50.jpg

Israeli Defense Forces, *Command about the Occupation of Land*. Number 84/03T, (Judea and Samaria: Israeli Defense Forces, 2003).

48 Ibid.

49 Ibid.

50 Ibid.

51 כוחות ההגנה הישראליים, צו תפיסה ת / 84 / 03 \ 1:25,000, 2003

http://orders.arij.org/scanned/MO_2007_08_11_32889376.jpg

Israeli Defense Forces, *Map of Seizure Order*, For Public Distribution, 84/03, 1:25,000, 2003.

On December 13, 2003 an identical order—103/03, that reprinted the same language and a similar map, as the one described above was issued.⁵² This time the village in question was Beit Liqya, a town located in the Ramallah and Al-Bireh governorates of the West Bank, and a total of 607 dunams (150 acres) was seized.⁵³ On December 31, 2003, three sets of identical orders were issued. The first, 107/03 appropriated 238 dunams (60 acres) of land from landowners in the villages of Beit Sourik and Al-Qubeiba, and the towns of Qattanna and Biddu.⁵⁴ The second, 108/03, directed at the villages of Beit Iksa and Beit Sourik, and the town of Biddu, concerned 334.3 dunams (83 acres) of land.⁵⁵ The third was targeted Biddu and the villages of Beit Iksa, Beit Ijza and Beit Duqqu, claiming a total of 334 dunams (82 acres) of land.⁵⁶

None of the orders mentioned in explicit terms what “military purpose” the land was being claimed for. Nonetheless, like most West Bank residents living in proximity to Jerusalem in the early 2000s, the landowners were aware that their land would be confiscated by the IDF to build the security fence—better known in Palestine as the apartheid wall. Israel began construction of the apartheid wall in June 2002, in the name of security from Palestinian terrorism.⁵⁷ In reality, as

⁵² (جيش الدفاع الإسرائيلي، أمر بشأن وضع اليد على أراضي، رقم ١٠٣/٠٣ (يهودا والسامرة : جيش الدفاع الإسرائيلي، ٢٠٠٣، http://orders.arij.org/scanned/MO_2005_10_26_185.jpg & http://orders.arij.org/scanned/MO_2005_10_26_186.jpg Israeli Defense Forces, Command about the Occupation of Land. Number 84/03T, (Judea and Samaria: Israeli Defense Forces, 2003).

⁵³ Ibid.

⁵⁴ (جيش الدفاع الإسرائيلي، أمر بشأن وضع اليد على أراضي، رقم ١٠٧/٠٣ (يهودا والسامرة : جيش الدفاع الإسرائيلي، ٢٠٠٣، http://orders.arij.org/scanned/MO_2006_01_17_10059.jpg & http://orders.arij.org/scanned/MO_2006_01_17_10060.jpg. Israeli Defense Forces, Command about the Occupation of Land. Number 84/03T, (Judea and Samaria: Israeli Defense Forces, 2003).

⁵⁵ (جيش الدفاع الإسرائيلي، أمر بشأن وضع اليد على أراضي، رقم ١٠٨/٠٣ (يهودا والسامرة : جيش الدفاع الإسرائيلي، ٢٠٠٣، http://orders.arij.org/scanned/MO_2005_10_26_177.jpg & http://orders.arij.org/scanned/MO_2005_10_26_178.jpg. Israeli Defense Forces, Command about the Occupation of Land. Number 84/03T, (Judea and Samaria: Israeli Defense Forces, 2003).

⁵⁶ (جيش الدفاع الإسرائيلي، أمر بشأن وضع اليد على أراضي، رقم ١٠٩/٠٣ (يهودا والسامرة : جيش الدفاع الإسرائيلي، ٢٠٠٣، http://orders.arij.org/scanned/MO_2006_01_17_10063.jpg & http://orders.arij.org/scanned/MO_2006_01_17_10064.jpg. Israeli Defense Forces, Command about the Occupation of Land. Number 84/03T, (Judea and Samaria: Israeli Defense Forces, 2003).

⁵⁷ Rick Steves, “The Security Fence, the Anti-Terrorism Barrier, the Wall,” HuffPost (HuffPost, December 7, 2017), https://www.huffpost.com/entry/the-security-fence-the-an_b_4296601.

has been noted by the International Court of Justice (ICJ), the wall is a disgraceful attempt to garb a land grab in twenty-first century legal rationale.⁵⁸

Nearly 700 kilometers long, the wall is not only more than twice the length of the Green Line, the internationally recognized western boundary of Israel, but also runs to the west of nearly a hundred thousand hectares (approximately seventeen percent) of land that belongs to the West Bank.⁵⁹ The verb used to describe the act of seizure in the Arabic text in which the land confiscation orders were distributed—وضع اليد—literally translates into *grab by hand*, a trenchant sign of the wall's true intentions.

The wall is also single-handedly responsible for the ghettoization of multiple villages, the confiscation of large swathes of fertile agricultural lands and orchards, and the disruption of the social, psychological and economic lives of the hundreds of Palestinians who lived near East Jerusalem.⁶⁰ Among them were the recipients of the five aforementioned land clearance orders.

At present, the wall is the subject of widespread international condemnation.⁶¹ In July 2004, its construction triggered the publication of an ICJ advisory opinion that was relentless in its criticism of the Israeli military occupation of the West Bank, the apartheid construction of illegal Jewish only settlements for its favored citizens on occupied land, and the construction of “a security barrier” in territory over which it had no claim.⁶² However, even before the legal debate over the wall made its way to the international court, Palestinians from the eight villages that were targeted by the December 2003 orders waged a partially triumphant legal crusade

⁵⁸ International Court of Justice, “ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the OPT - Full Text - Question of Palestine,” United Nations (United Nations, 2004), <https://www.un.org/unispal/document/auto-insert-178825/>.

⁵⁹ Ibid.

⁶⁰ Ibid; Beit Sourik Village Council [Seven Other Village Councils and 154 Persons], “Petition for Order Nisi and Temporary Injunction.” Tel Aviv, February 26, 2004. <http://www.hamoked.org/Document.aspx?dID=6386>.

⁶¹ Kirk Semple, “U.N. Resolution Condemns Israeli Barrier,” *The New York Times* (The New York Times, October 22, 2003), <https://www.nytimes.com/2003/10/22/international/middleeast/un-resolution-condemns-israeli-barrier.html>.

⁶² International Court of Justice, “ICJ Advisory Opinion”.

against the Israeli government and the military occupation forces, and were able to have the wall rerouted outside of their lands. While their voices were amplified by international pressure—Israel sought to circumvent the impending ICJ bashing by producing an elaborately argued legal defense of the wall—the substance of their legal resistance was original.⁶³ Although the Israeli Supreme Court had received and dismissed hundreds of petitions expressing grievances over land loss ever since the construction of the separation wall began, *Beit Sourik Village Council v. The Government of Israel et. al.*, as it came to be known, a prototype of sorts, became a landmark case in the recent legal history of occupied Palestine.⁶⁴

⁶³ "مركز مدار", September 18, 2005, الجدار - بين القانون الإسرائيلي وقرار محكمة العدل الدولية الاستشاري, <https://www.madarcenter.org/ال-محكمة-العدل-و-قرار-الجدار-بين-القانون-الاسرائيلي> - المشهود الاسرائيلي - من الارشيف/البحاث - در اسات/1175 - الجدار - بين القانون - الاسرائيلي - وقرار - محكمة العدل - لادوية- الاستشاري Madar Center, *The Wall: Between Israeli Law and the Advisory Decision of the International Court of Justice*, September 18, 2005.

resistance. A nuanced reading of the accomplishments of the petition can underscore the reimagination of resistance and the reorientation of agency that stems from grassroots participation in legal structures.

BEIT SOURIK VILLAGE COUNCIL VERSUS THE GOVERNMENT OF ISRAEL

The Petition

On February 26, 2004, 154 Palestinian residents and the councils of eight Palestinian villages of the Jerusalem and Ramallah governorates, all located within twenty kilometres northwest of Jerusalem, petitioned the Israeli High Court of Justice (HCJ) in Jerusalem for an *order nisi* and a temporary injunction against the Government of Israel and the Commander of the Israeli military forces in the West Bank.⁶⁶ This was an organized legal response to five land confiscation orders issued by the IDF in December 2003 in the villages of Beit Surik, Biddu, Al Qubeiba, Qatanna, Beit 'Anan, Beit Liqya, Beit Ijza, and Beit Duquq, to appropriate nearly 500 dunams of Palestinian land and raze to the ground innumerable Palestinian homes.⁶⁷

The Petitioners' Argument

The petition was submitted to the HCJ in Jerusalem by Attorney Mohammed Dahleh, who acted as the principal legal attorney of the petitioners.⁶⁸ Dahleh's arguments exposed the absurd flaws in the Israeli legal system that impeded Palestinians in the West Bank from accessing justice through the law. He also made an evocative legal case, using the framework of law used by Israel

⁶⁶ Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction."

An order nisi is a court order that will come into force at a future date unless a particular condition is met. In other words, the petitioners required the respondents to meet the requirements of proportionality, failing to do which they urged the court to stay the land seizure orders.

⁶⁷ Ibid.

⁶⁸ "محكمة العليا توقف اعمال بناء جدار الفصل العنصري في 11 قرية فلسطينية لمدة اسبوع" موقع عرب 48

(عرب 48, March 17, 2004),

<https://www.arab48.com/-/11-قرية-فلسطينية-لمدة-اسبوع-للمحكمة-العليا-توقف-اعمال-بناء-جدار-الفصل-العنصري-في-11-قرية-فلسطينية-لمدة-اسبوع>

to exercise jurisdiction over the occupied territory, that the route of the separation wall violated the constitutionally guaranteed human rights of the petitioners. Dahleh's principle logic, around which he built the case, positioned the petitioner against the *route* of the wall rather than the wall itself.⁶⁹ Ultimately, his final three sets of arguments were: the construction of the wall infringed the constitution of Israel (and conflicted with Israel's own interpretation of international law), the wall did not adhere to the legal norms that the court has historically mandated of the military's actions, and the publication of the orders itself did not follow due process.⁷⁰ Consequently, Dahleh dexterously uses the law itself to expose multiple layers of injustice in which legal recourse is shrouded.

A Qualified Victory: The High Court's Ruling

The court's decision on the case, published on June 20, 2004, was a qualified victory for the petitioners. The HCJ dismissed the petitioners' claim that the path to optimization of security while balancing human rights obligations was the construction of the wall along the Green Line, Israel's internationally recognized boundary.⁷¹ This, the court claimed, was because military needs justified the appropriation of private property even in occupied territory, as per Israel's interpretation of the laws of occupation under international humanitarian law.⁷² However, the court conceded that the construction of the wall through the eight villages, "even assuming that the path chosen by the Respondent [the IDF] is the optimal security path for the fence [...] does not reflect a proper balance between security needs and the harm to local residents."⁷³ In other words, the court, deeming that the security necessity of the wall was not proportional to the harm

⁶⁹ Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction."

⁷⁰ Ibid.

⁷¹ Beit Sourik Village Council v. Government of Israel (IHL Database June 20, 2004).

⁷² Summary of HCJ decision. "Beit Sourik Village Council v. Government of Israel," Beit Sourik Village Council v. Government of Israel | Cardozo Israeli Supreme Court Project, February 29, 2004, <https://versa.cardozo.yu.edu/opinions/beit-sourik-village-council-v-government-israel>.

⁷³ Ibid.

caused to civilians, ordered the Israeli military to “reconsider” the path of the barrier fence.⁷⁴ The court also ordered a payment of 20,000 new Israeli shekels (about \$6,000, not adjusted to purchasing parity) to the petitioners.⁷⁵

THE PARADOX OF LEGAL RESISTANCE

Palestinian legal scholars and advocates question the paradox of using the Israeli legal system to register protest against the occupation. Palestine based human rights agency, Al Haq, for instance snubbed the Palestinian petitioners’ victory in *Beit Sourik* as a “pyrrhic victory” that only brought the small gain of compensation while the rest of the wall continued to be built.⁷⁶ They also attributed Palestinian participation in the legal system to the lack of alternative recourses.⁷⁷ Palestinian legal scholarship, that has conventionally seen Palestinian legal resistance as a last resort, tends to agree. Practitioners and scholars of the law, therefore have argued that by participating in the legal system, the occupation and the veneer of law that shields it, is legitimated.

Legal Resistance is a Streamlined Means of Justice

In a 2004 press release on the *Beit Sourik* case, Al Haq argued that because of the HCJ’s reluctance to acknowledge, unqualified the humanitarian requirements of IHL to the occupation, lawyers fighting cases relating to the wall, like Attorney Dahleh for *Beit Sourik* are “forced to argue on the restricted terms allowed by the HCJ, including the starting assumption that the Wall is legal.”⁷⁸ A close reading of the *Beit Sourik* petition affirms this claim. Therefore, instead of arguing against the fundamental premise of occupation as a violation of human rights as per

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ John Reynolds and Grazia Careccia, *Legitimising the Illegitimate: The Israel High Court of Justice and the Occupied Palestinian Territory* (Ramallah, Palestine: Al-Haq, 2010), 45.

⁷⁷ Ibid.

⁷⁸ Al Haq, “Sacrificing Justice,” 2.

international law, petitioners have to craft elaborate objections in terms of Israeli law. This is clearly apparent in the *Beit Sourik* petition itself, where Attorney Dahleh is repeatedly compelled to explain his clients' arguments "without taking a position on the building and establishment of settlements in the Occupied Territories [...]".⁷⁹ Dahleh, in arguing that if a wall should be built at all it must be built along the Green Line, could not invoke the fact that the latter is the internationally recognized eastern boundary of Israel, and that building a wall through occupied territories is an outright breach of the Geneva and Hague Conventions. Instead, he had to argue and prove, using maps, testimonies and other devices, that building the wall along the Green Line will minimize the harm caused to Palestinian families along the wall and reduce potential threats of violence by Palestinians toward Israel.⁸⁰ All in all, the legal structure of the occupation offers Palestinians a route to justice only ostensibly. In reality, it is a cage of structural violence from which there is no escape. Expressing frustration at this jaundiced legal system imposed on the Palestinians in the West Bank, Al Haq, argues:

"[...] the HCJ is currently the only forum in which these complaints may be heard, which leaves human rights lawyers in an ethical bind. They are loath to walk away from the court when even small gains, such as a change in the route of the Wall, will make an enormous difference in the lives of the people they represent. Yet they recognize that their engagement with the court serves the broader purpose of entrenching its "legitimacy," and therefore the occupation itself, which clearly results in less protections for the Palestinian population overall."⁸¹

Palestinian Participation Legitimizes the Occupier's Law

In *The Rule of Law in Areas Administered by Israel* published by the Israeli Section of the International Commission of Jurists in 1981, the writers—Israeli lawyers who served as legal advisors to the commanders of the military administration in the OPT—state that "the ability of residents of the administered areas to petition the Israeli High Court of Justice does more than

⁷⁹ Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction," 23.

⁸⁰ Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction," 4.

⁸¹ Al Haq, "Sacrificing Justice," 2.

anything else to guarantee the maintenance of the rule of law.”⁸² Palestinian participation legitimises the “maintenance of the rule of law” in the eyes of these defenders of the occupation—instead shifting focus from the question of the illegality of the occupation itself to illegality of actions performed within the occupation.⁸³ This is at the root of the discomfort experienced by lawyers—both Israeli and Palestinian—who represent Palestinians at military courts in the West Bank as well as at the HCJ. Lisa Hajjar, who interviewed 55 defense lawyers in Ramallah, Hebron, Nablus, Jenin, Tulkaram, and Gaza for her book *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* wrote describing her interviews:

“Defense lawyers, especially those whose motivations for doing such work derived from a sense of political solidarity with the Palestinian struggle against the occupation, were increasingly concerned that their services were merely legitimizing a legal order that many of them abhorred.”⁸⁴

David Kretzmer in *The Occupation of Justice* also argues that the usage of the Israeli legal systems by the Palestinians in the OPT has strengthened its legitimacy.⁸⁵

For instance, almost every single paragraph of the 30-paged petition in the *Beit Sourik* case is dotted with citations of past decisions of the Israeli HCJ and the Israeli Basic Laws. Even when Dahleh calls upon the military administration to follow the stipulations of the laws governing

⁸² International Commission of Jurists, Israel, *The Rule of Law in the Areas Administered by Israel* (Tel Aviv, Israel: Tzatz, 1981). The writers of this book are members of the Israeli National Section of the International Commission of Jurists—most of them lawyers who used to plead before regular Israeli courts but shared a deep commitment to the maintenance of ‘rule of law’ in the occupied territories that they felt was often diminished by military men who infringed the law in the occupied territories. In many cases, they disagreed. One of the most prominent contributors to this book was Joel Singer, the head of the International Law Department of the Military Advocate-General’s unit. This book was written in response to study titled *The West Bank and the Rule of Law* to by two prominent Palestinian lawyers—Raja Shehadeh and Jonathan Kuttāb—who later went on to found Al-Haq, the International Commission of Jurists’ Palestinian wing. *The West Bank and the Rule of Law* critiqued the disintegration of the Jordanian legal systems in the West Bank under the Israeli occupation. For a more detailed critique of the Israeli position on the legal occupation of the OPT see: Raja Shehadeh and Kuttāb Jūnāthān, *The West Bank and the Rule of Law* (Geneva: International Commission Of Jurists/and Law In The Service Of Man, 1980). See also: David Kretzmer and Ronen Yaël, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (New York, NY: Oxford University Press, 2021), 9.

⁸³ International Commission of Jurists, Israel, *The Rule of Law in the Areas Administered by Israel*.

⁸⁴ Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (Berkeley, CA: University of California Press, 2005), 16.

⁸⁵ Kretzmer and Yaël, *The Occupation of Justice*.

belligerent occupation under public international law, he is compelled to phrase it in terms of Israel's qualified commitment to following some provisions of international humanitarian law in the occupied territories.⁸⁶ In the process of participating in this legal system, arguing using the language of Israeli law, and making a case against the land confiscation orders through a resigned acceptance of the inevitable reality of the occupation, Dahleh and his clients legitimize the Supreme Court's jurisdiction over the OPT and participate in the machinery that enables its perpetuation. This system effectively cripples lawyers in terms of the arguments they can draw from, in presenting a case before the Israeli court, in lieu of the latter's recalcitrance toward international law, argues Al Haq.⁸⁷ On the other hand, Kretzmer, Hajjar and Reynolds argue that by allowing Palestinians to participate in a process that is grounded in the veil of 'rule of law', the HCJ is able to legally defend the side of the military administration or worse, challenge it, to create a facade of justness in the legal process.

In conclusion, the scholars hold that while the HCJ positions itself as an admirable legal structure that affords Palestinians a route to seek justice through legal means, in reality, it traps Palestinians into the occupation using the framework of the law. They emphasize the perverseness of a legal system that legitimizes itself through the participation of those it seeks to marginalize. They claim that the court rather than act as a site where Palestinians can exert and own their legal agency, they succumb to a system that is by design meant to strip them of their right to self-determination.⁸⁸

⁸⁶ He refers to *Jimm'at Aksan Almu'almun v. Commander of IDF Forces and Meir Shamgar, Military Government in the Territories Administered by Israel, 1967-1980: The Legal Aspects* (Jerusalem, OPT: Hebrew University Jerusalem, Faculty of Law, Harry Sacher Institute for Legislature Research and Comparative Law, 1982), two important texts in Israeli jurisprudence in the OPT that lay down Israel's limited commitment to IHL. From Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction."

⁸⁷ Reynolds and Careccia, *Legitimising the Illegitimate*, 38; International Court of Justice, "ICJ Advisory Opinion", para 2.

⁸⁸ Reynolds and Careccia, *Legitimising the Illegitimate*, 21.

This scholarship constitutes an unwarranted denial of agency to the Palestinians who it is seeking to center in their work. In the next section, the narrow purported paradox of resisting the law throughout the law is countered through a study of the complicated ways in which the *Beit Sourik* petitioners asserted agency.

PALESTINIAN AGENCY THROUGH THE LENS OF *BEIT SOURIK*

Activists and scholars who contest the legitimacy of the HCJ's influence in the OPT acknowledge that Palestinians are trapped within a system of occupation and are often compelled to seek justice through the means of their oppressor.⁸⁹ Having laid out their fundamental contentions against the Israeli legal system in the OPT, they concede that the average Palestinian petitioner, for instance the 154 people involved in the *Beit Sourik* case, are compelled to submit to the framework of the occupation, and participate in the legitimization of the occupier's law. While this position is not unfounded—Palestinians do seek remuneration for land seizures—by no means can this be viewed as normalization of the occupation, or the right of the occupation's court to exist.

First, this acts as an opprobrious denial of agency to the Palestinian petitioner. As will be argued in this section, using the case study of *Beit Sourik*, Palestinian petitioners are not coerced into legal participation by their political situations. Rather, they voluntarily seek to weaponize the Israeli law for their own benefits, while also contesting the system which permits Israel's monopolisation of the law. For instance, even as the petitioners went to court, their neighbours and cousins gathered at the wall construction site protesting the land confiscation orders and the

⁸⁹ Reynolds and Careccia, *Legitimising the Illegitimate*. Kretzmer and Yaël, *The Occupation of Justice*. Lisa Hajjar, *Courting Conflict*. Al Haq, "Sacrificing Justice."

Israeli colonization of Palestinian land.⁹⁰ Additionally, a study of the petitioner's attorney Mohammed Dahleh's legal strategy will emphasize the streamlined manner in which the case was presented to the court.⁹¹ While Palestinian scholars and advocates viewed this as a limit placed on the Palestinians by the HCJ, in reality, it is an instance of a Palestinian adroitly presenting their wants in terms of a legal language that is palatable to the HCJ. Third, the Palestinian petitioners exposed and critiqued the flaws of the legal system as they participated in the narrow, Israeli-dictated, legal debate, which helped turn the attention of human rights agencies to the injustice inflicted upon Palestinians under the veil of rule of law. This, too, was an intentional assertion of agency.

Therefore, the advocates and scholars who view legal resistance as complicity, are far too preoccupied by the Israeli imposition of violent law to attend to the Palestinian creation of a site of resistance within that law. Further, the condescending binary lens through which legal resistance is perceived creates a rift between Palestinian human rights advocates and scholars on one side, and petitioners on the other—elevating one form of resistance as more justified than the other. Such a smug, unquestioning diminishment of a particular means of resistance creates superfluous categories of privilege within the movement and denies the Palestinian petitioner their legitimate right to resist.

Ambiguity in Resistance Binaries

Legal resistance is a last resort

David Kretzmer in *The Occupation of Justice* employs statistical data to show that in the first decade of the occupation, petitioning was not a prevalent practice amongst Palestinians.⁹²

⁹⁰ Al Jazeera, "قريع يتوقع صدور قرار ضد الجدار العازل," الجزيرة نت: آخر أخبار اليوم حول العالم, (Al Jazeera, February 21, 2004), <https://www.aljazeera.net/news/arabic/2004/2/21/قريع-يتوقع-صدور-قرار-ضد-الجدار-العازل>.

⁹¹ Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction."

⁹² Kretzmer and Yaël, *The Occupation of Justice*, 8.

Kretzmer attributes this to Palestinians' unfamiliarity with the Israeli system, as well as a lack of involvement of Israeli political forces and lawyers who could both encourage Palestinians to seek redress in Israeli courts and provide the necessary legal assistance.⁹³ Menachem Begin's ascendancy to the prime ministership in Israel, that marked the onset of Israeli settlement building activity in the OPT, that dispossessed Palestinians of agricultural land, increased anti-military petitions submitted to the HCJ against land requisition orders.⁹⁴ There was also a surge in petitions in the period of the 1987 Palestinian intifada to contest the legality of security measures used by the military to control the mass revolt.⁹⁵

Using the trends around the submission of petitions, Kretzmer claimed that Palestinians have used petitioning as a means of registering protest during particularly inflamed moments of the conflict. The onset of settlement building and the intifada acting as his reference points, Kretzmer shows that when the conditions of occupation disrupted their lives more than usual Palestinians resorted to employing the court system.⁹⁶ Kretzmer also states that petitions submitted to the court post the Oslo Accords have mostly related to questions of residence and family unification, interrogations by the security authorities, building access roads to settlements, administrative detention, and house demolitions.⁹⁷ Accordingly, these assertions suggest that Kretzmer believes Palestinians have primarily petitioned through the law and appealed to the judicial review system when no other recourse has been available, and when the politics of the occupation have severely endangered their individual rights.⁹⁸ Kretzmer could argue that *Beit Sourik* illustrates this as well. While the wall had been in the works since 2002, the petitioners

⁹³ Ibid.

⁹⁴ Nizar Ayoub, *The Israeli High Court of Justice and the Palestinian Intifada: a Stamp of Approval for Israeli Violations in the Occupied Palestinian Territories* (Ramallah, OPT: Al-Haq, 2004), 76.

⁹⁵ Ibid, 9-19.

⁹⁶ Ibid, 19.

⁹⁷ Ibid.

⁹⁸ Ibid.

sought legal recourse only when the land requisition orders appropriated land in their villages, and the wall materially deranged their lives.

Legal resistance is embedded in political resistance

On February 26, 2004, as Dahleh went to court in Jerusalem, representing the councils of the eight towns and villages party to the dispute, a Palestinian man, Zacharia Eid, from Biddu, one of the affected towns, was shot dead by the IDF during a protest against the wall.⁹⁹ Eid, a father of three, was only one amongst the hundreds of Palestinians who had been protesting the December 2003 military orders that sought to seize land for the construction of the wall.¹⁰⁰ On the same day, over twenty Palestinian and pro-Palestinian activists were wounded by the IDF, as protests organized by the Popular Committee to Resist the Separation Wall were staged in Beit Sourik.¹⁰¹ Palestinians were resisting the destruction of the agricultural lands that belonged to the Abu Ghuraba family, on which the IDF intended to build a military outpost for the wall.¹⁰² Similarly, On May 1, 2004 mass protests broke out in Beit Sourik and Biddu, a day before the court hearing on the case, “after the occupation bulldozers destroyed the village’s agricultural lands, uprooted its fruit trees and seized its lands for the sake of the Apartheid Wall.”¹⁰³ Therefore, contrary to the scholarly suggestion that legal recourse was the only available outlet for the petitioners, the protests emphasize that the legal case was accentuated and buttressed by political resistance and was, by no means, insular.

⁹⁹ Conal Urquhart, “Israelis Kill Two Villagers in Barrier Protests,” The Guardian (Guardian News and Media, February 27, 2004), <https://www.theguardian.com/world/2004/feb/27/israel1>.

¹⁰⁰ Ibid; Al Jazeera, “الجزيرة نت: آخر أخبار اليوم حول العالم,” James Bennet, “Ideas & Trends: Tactical Shift; On the West Bank, a Hint of Resistance Without Blood,” The New York Times (The New York Times, February 29, 2004), <https://www.nytimes.com/2004/02/29/weekinreview/ideas-trends-tactical-shift-on-the-west-bank-a-hint-of-resistance-without-blood.html>; Palestinian Centre for Human Rights, “ReliefWeb,” December 24, 2003, <https://reliefweb.int/report/occupied-palestinian-territory/weekly-report-israeli-human-rights-violations-occupied-15>

¹⁰¹ “إصابة أكثر من 20 فلسطينياً ونشطاء سلام في بيت سوريك بالضفة الغربية,” Arabic People's Daily, February 26, 2004, http://arabic.peopledaily.com.cn/200402/26/ara20040226_76584.html.

¹⁰² Ibid; Urquhart, “Israelis Kill Two Villagers in Barrier Protests.”

¹⁰³ “مسيرة جماهيرية في بيت سوريك ضد جدار الضم العنصري,” Wafa Agency, May 1, 2004, http://www.wafa.ps/ar_page.aspx?id=GPUUdia6071232387aGPUUdi.

As *Wafa* reported of one such protest, Palestinians expressed absolute rejection of the annexation wall and the racialized expansion of Jewish-only settlements on Palestinian lands¹⁰⁴. The Popular Committee Against the Separation Wall, that organized protests in the West Bank at the time of the case, similarly acknowledged that the wall was racist and designed to occupy Palestinian land.¹⁰⁵ Ziad Mansoor, a twenty three year old protestor in Biddu, claimed that the protests against the wall was like a new intifada, where Palestinians sought to reject the Israeli systems that oppressed them.¹⁰⁶ He said, “Like the first intifada, we are not trying to kill anyone, just trying to show our anger.”¹⁰⁷ An Associated Press video from 2004 highlights clips of protest from villages of Beit Ijza, Beit Sourik, Beit Duqqu and other villages located to the northwest of Jerusalem, where Palestinians surrounded the construction site of the wall resisting foreclosure of their lands, as Caterpillar Inc. bulldozers dug up their orchards and farmland, chanting “No no to the wall!” and “Al-Aqsa will be free!”¹⁰⁸ The second slogan, a call for Palestinian control over Jerusalem, is an unequivocal repudiation of the Israeli occupation.¹⁰⁹

In each of these instances, Palestinians opposed the structures that normalized the occupation, and by extension, the court that exercised rule of law over the occupied people. The protests highlighted that the Palestinians petitioning through the law were not legitimating the occupation. Neither were they resisting as a last resort for narrow, personal gains. For instance, in February 2004, Muhammad Khaled Qandil, head of the Beit Surik Village Council, told *Wafa* that the separation wall in northwestern Jerusalem would isolate more than forty thousand

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Urquhart, “Israelis Kill Two Villagers in Barrier Protests.”

¹⁰⁷ Ibid.

¹⁰⁸ Associated Press, “أحداث الجدار 2004 في قرى شمال غرب القدس,” Facebook video, 10:50, posted by “حلوة يا بلدي حبيت دقو” May 29, 2020, <https://www.facebook.com/watch/?v=268825554236622>.

¹⁰⁹ Al Jazeera, “Aqsa Mosque: Five Things You Need to Know,” (*Al Jazeera*, October 1, 2020), <https://www.aljazeera.com/features/2017/12/6/al-aqsa-mosque-five-things-you-need-to-know>.

citizens from the outside world and make room for settlement expansion.¹¹⁰ The extent of impact this would have on Palestinian families in the neighbourhood is what provoked widespread reaction and protests in the region. Additionally, it is important to note that news reports documenting protests in these villages coincided with the court dates, but the time period over which it was spread transcended the period of the court's hearing.

Ultimately, the *Beit Sourik* petitioners demonstrated that they were ambiguous actors within the domain of legal resistance. This meant that the categories used to distinguish them from other resistance actors were obfuscated by the multi-dimensional manifestations of the petitioners' legal agency.

Exertion of Legal Agency through Streamlined Arguments

Al Haq's above-mentioned concerns about legitimacy and complicity are myopic to say the least. That the arguments made by the petitioners at court were streamlined are beyond dispute. However, whether this was as an unfortunate consequence of the law followed by the HCJ, or rather an attempt to mobilize streamlined law to wrangle desired outcomes cannot not be asserted absolutely. To understand Attorney Dahleh's arguments in *Beit Sourik*, two elements need to be identified. First, Dahleh prioritized what the petitioners wanted to accomplish through the law—an *order nisi* or nullification of the five land seizure orders. Second, he was able to expose and critique before the eyes of the international community the insurmountable hurdles that riddled the Palestinian path to justice, even when he sidestepped debate on the occupation itself and chose to argue in the language of the Israeli court. Both were exertions of legal agency that revealed extraordinary acts of legal dexterity.

¹¹⁰ "أهالي بيت سوريك يوجهون نداء استغاثة من الآثار المدمرة عليهم جراء 'جدار الفصل العنصري'" Wafa Agency, February 7, 2004, https://www.wafa.ps/ar_page.aspx?id=LXkw5ta2569733100aLXkw5t.

Nullification of the confiscation orders

A close reading of the *Beit Sourik* petition will show that Dahleh's fundamental plea in the case was that the wall should be rerouted, rather than not be built at all. To this end, Dahleh argued and successfully proved, using maps, testimonies and other devices, that building the wall along the proposed route would harm Palestinian families along the wall and raise potential threats of violence by Palestinians toward Israel.¹¹¹

One of the additional documents submitted by Dahleh was an affidavit prepared by members of the Council for Peace and Security (CPS), a society of Israelis with a background in security, including high ranking reserve officers in the IDF. Ironically, this society, which viewed itself as nonpartisan, was among the first to suggest and argue for the construction of the wall as a solution to Israel's "security" needs.¹¹² In May 2004, members of CPS, joined the case as *amici curiae* although their political position on the occupation differed from that of the petitioners.¹¹³ The position of the members of the CPS elaborated that the security needs of Israel were not adequately addressed by the proposed route of the wall.¹¹⁴ In turn, this enabled Dahleh to argue that the humanitarian impacts the wall would have on the civilians was disproportionate when measured in terms of the limited security benefits it would provide.¹¹⁵

In an interview after the case, Dahleh pointed out that the CPS had appointed a team of security experts to examine the wall, produced aerial and topographic maps, and finally reached the conclusion that, "this wall violates the rights of Palestinians more than what is required by security needs".¹¹⁶ Therefore, he claimed, the council supported changing the route of the wall

¹¹¹ Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction," 4.

¹¹² Beit Sourik Village Council v. Government of Israel.

¹¹³ Ibid, 11.

¹¹⁴ Ibid.

¹¹⁵ Ibid, 12.

¹¹⁶ لمحكمة العليا توقف اعمال بناء جدار الفصل العنصري في 11 قرية فلسطينية لمدة اسبوع. "موقع عرب 48"

and returning tens of thousands of dunams to the owners of the land.¹¹⁷ Dahleh also said in the interview that many Israelis who resided in the towns and settlements surrounding these villages, joined the petition.¹¹⁸ Some had called for the complete cancellation of the construction of the wall, while others demanded its establishment along the Green Line.¹¹⁹

It is important to note here, that a reading of Dahleh's interview with *Arab 48*, does not make discernible the fact that the CPS actively called for the confiscation of Palestinian land elsewhere in the West Bank, and the construction of the wall through a route that did not coincide with the Green Line.¹²⁰ In fact, Dahleh's own position at court, that the wall should be built on the Green Line, if at all, was contradicted by the CPS's affidavit submitted to support the petitioners. This was because Dahleh had desisted from taking a strong stand on rerouting the wall through the Green Line. He had sought to get the orders revoked rather than make a political argument on the legality of the occupation at court. Dahleh later described the trial as "a war game, with the two sides, playing on the same terrain, each land that it would affect from topographic maps, plans to aerial and satellite imagery, photographs and video documentation."¹²¹

In sum, Dahleh was cognizant of the role that the CPS testimony would play in tilting the court's decision in favor of the petitioners. He mobilized testimony of advocates of the occupation against the IDF to prioritize the interest of his petitioners—protection of their land from seizure—within the narrow framework of the case. He chose to use the space that was offered to him by the legal system to assert agency on behalf of the Palestinian petitioners.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Beit Sourik Village Council v. Government of Israel, 11.

¹²¹ "Wall and Peace," *The Amnesty*, April 8, 2016, <https://ucluanestysoc.wordpress.com/2016/04/08/wall-and-peace/>.

Exposure of violations in domestic law

Through cases like *Beit Sourik*, the petitioners helped to bring to light the legal impediments that strew a Palestinian's access to justice in the West Bank. Attorney Dahleh's argument on behalf of the petitioners included a critique of the lack of due process in the military administration's issuance of the land requisition orders, and identification of violation of domestic laws and legal precedents set by the HCJ. Additionally, it brought to light major legal norms that the military confiscation orders violated. All of these arguments were phrased within the framework of Israeli law.

The construction of the wall infringed Israel's constitution

The petitioners alleged that the construction of the separation wall would steal thousands of dunams of private land in the West Bank, breach Israeli administrative law and international humanitarian law, was unconstitutional, caused a greater degree of harm than necessary to Palestinians living in the occupied territories, and was intended for an improper end.¹²² Specifically, their lawyers identified six constitutionally guaranteed rights that were violated by the military order: right to property, right to freedom of movement, right to gaining a living and freedom of occupation, right to education, right to community, and right to life.¹²³

First, the attorneys claim that the land requisition order severely infringes Palestinians' right to property enshrined in the clauses of Israel's Basic Law: Human Dignity and Liberty.¹²⁴ Far from being temporary seizure of land, the lawyers argue that the requisition order signposts a long-term plan for expropriating Palestinian land and changing the borders of the West Bank.¹²⁵

¹²² Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction," 11.

¹²³ Ibid.

¹²⁴ Ibid, 15-16.

¹²⁵ Ibid, 16.

The petition pointed out that Justice D. Levin of Israel spoke of the paramount status of the right to property, primarily following enactment of the Basic Law: Human Dignity and Liberty, which right is incorporated in it. The Honorable Justice voided the decision to expropriate property, and held that: The right to property is a fundamental

Second, the construction of the wall along the chosen route, claimed the petitioners will trap individuals into enclaves, place people's rights to enter and leave villages at the mercy of Israeli soldiers manning the gates in the wall, sever landowners' access to their family's lands on the other side of the separation wall, among other human rights violations.¹²⁶ Right to movement, they pointed out, is a fundamental human right recognized in *Horev v. Minister of Transportation*.¹²⁷ Third, the wall would require the petitioners to apply for permits through a "long, complicated, and exhausted procedure" to work on land on the other side of the wall, that they inherited from their forefathers.¹²⁸ Furthermore, some parts of the villages would be enclosed in enclaves between the gates built along the wall that would prevent some villagers from leaving their homes and accessing their lands.¹²⁹ Both of these consequences of the wall, impeded their right to earning a living protected by the Basic law: freedom of Occupation.¹³⁰ Fourth, the wall would impede residents' access to schools and universities at which they studied and taught.¹³¹ The petition cited Justice D. Dorner's view in *Yated et al. v. Ministry of Education et al.* that the violation of the right to education is to be perceived as a violation of the Basic

human right in Israel. This has been a firmly established and accepted principle for some time, and this court gave it clear expression in its decisions time and again over the years.

¹²⁶ Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction," 17.

See also: HCJ 5016/96, *Horev v. Minister of Transportation*, Piskei Din 51 (4) 1, 49.

¹²⁷ *Ibid.*

¹²⁸ Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction," para 64.

¹²⁹ *Ibid.*, para 63.

¹³⁰ *Ibid.*

¹³¹ Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction," 18.

Law: Human Dignity and Liberty.¹³² Fifth, the petitioners argued that the wall would severely damage family and community relations in the villages. They wrote:

“It will detach families, and create absurd situations in the daily lives of the residents, so that a bride and groom from neighboring villages will now have to have two weddings, one on each side of the fence.”¹³³

Citing *John Doe v. Attorney General*, they claimed that Israel recognizes the right to family life as a “paramount right”, which had been violated by the requisition orders.¹³⁴ Lastly, the attorneys claimed that representatives from the Israeli government and the military had confirmed that army patrols would be conducted along the fence’s route, and gunfire was likely to be exchanged, as they intended to securitize the fence like a boundary between two states. This would naturally endanger the lives of farmers and their families given the fence’s proximity to residential homes.¹³⁵ Additionally, in case shooting broke out close to the wall in populous areas, the petitioners expressed concern that the army would take ‘clearing actions’ to demolish homes and clear tracts of farmland because of security concerns.¹³⁶ This would not only be a violation of the right to life and bodily integrity that the Basic Law: Human Dignity and Liberty promised.¹³⁷

¹³² Beit Sourik Village Council, “Petition for Order Nisi and Temporary Injunction.” Paragraph 65 of the petition cites Justice Dorner as writing: The right to education has long been recognized as a basic human right. The right is anchored in the Universal Declaration of Human Rights of 1948. Article 26 of this Declaration provides that every person has the right to education and that education must be free, at least in the elementary and fundamental stages. The International Covenant on Economic, Social and Cultural Rights of 1966 was also ratified by Israel in 1991. It declared in article 13 that education should be directed to the full development of the human personality, and that it should strengthen the respect for human rights and fundamental freedoms. It also determined that elementary education should be compulsory and freely available. See XXXI Treaties of Israel 1037, at 205. The right to education is also anchored in articles 28 and 29 of the Convention on the Rights of the Child, 1989. See XXXI Treaties of Israel 1038, at 221... Discrimination in the exercise of the right to education, if occasioned on the basis of group affiliation, may indeed be regarded as degradation that violates the right to human dignity. Compare HCJ 4541/94 Miller v. Minister of Defence. [2] at 131-32. See also: HCJ 2599/00, Yated et al. v. Ministry of Education et al., Piskei Din 56 (5) 834, 842-845.

¹³³ Beit Sourik Village Council, “Petition for Order Nisi and Temporary Injunction,” 19, para 69.

¹³⁴ Ibid.

The petition cited Israeli Justice Beinisch who wrote: In our times, when "human dignity" is a fundamental right, we must respect an individual's desire to actualize himself. For this reason, we should honor his wishes regarding the family unit to which he wishes to belong... a person's parents and children are part of his personality and social identity..”. See also: CA 7155/96, John Doe v. Attorney General, Piskei Din 51 (1) 160.

¹³⁵ Beit Sourik Village Council, “Petition for Order Nisi and Temporary Injunction,” 20, para 70.

¹³⁶ Ibid, 21, para 73.

¹³⁷ Ibid, 20, para 72.

It would make permanent the security fence, rendering the Palestinian homes, lands and orchards that have existed many generations “temporary and moveable, and subject to demolition”, “thus preventing the natural growth of the villages and prevent the development of their residents”.¹³⁸

The confiscation orders violated Israeli legal norms

The petitioners also argued that the respondents’ actions were in violation of three broad normative principles of jurisprudence that were routinely upheld by the Israeli supreme court—the principle of proportionality, the prioritization of human rights over security of a population, and maintaining normal living conditions in occupied lands.

First, the Israeli common law maintains that the infringement of any human right has to pass the test of proportionality; the administrative authority responsible for the violation must ensure that the means that causes the least harm necessary has been chosen.¹³⁹ The fundamental premise of

¹³⁸ Ibid, 21, para 74-75.

¹³⁹ Ibid, 20-21.

The petition cited passages from prominent HCJ rulings where Israeli High Court judges had laid down the principle of proportionality in Israeli jurisprudence:

In *Stemkeh*, Justice Chesin ruled: “The test of proportionality concentrates on the means to achieve an objective. The basic assumption is that the objective – in and of itself – is proper, and the question deals only with whether the means for achieving the objective is proper. In applying the grounds of proportionality, we should further remember that the intensity of our concern that the authority acts proportionately should match the intensity of the right infringed or the intensity of the violation of a right.” See HCJ 3648/97, *Israel Stemkeh v. Minister of the Interior*, Piskei Din 53 (2) 728.

In the *Tenufa Manpower Services* case, Justice Dorner wrote about the disproportionate infringement of human rights: As regards the test of selecting the means that infringes a right to the minimal degree required, which, as stated, is not an absolute test, the choice of means will be affected by the right infringed. When a fundamental right is involved, it is especially important to show greater care in choosing a means that infringes the right to the minimal degree, even if the cost of the means is substantial. See: HCJ 3648/97, *Israel Stemkeh v. Minister of the Interior*, Piskei Din 53 (2) 728

In *Bar Ilan Street*, President Ehud Barak, emphasizing that the test of proportionality also applies to governmental authorities wrote: In Israel as in foreign law, the proportionality test is three- pronged. See HCJ 3477/95 *supra*. [51], at 12; Bank Mizrahi *supra*. [28], at 436. The first prong requires a rational connection between the means and objective. Thus, the means employed must be precisely “cut out” to fulfill the desired goal and rationally lead to its fulfillment—“the rational connection test.” The second prong prescribes that the means in question infringe on the individual as little as possible. This is to say that the means are said to be proper only if it is not possible to achieve the objective in a different fashion, whereby the infringement would be minimized— “the least restrictive means test.” The third prong provides that the means selected are inappropriate if the infringement on individual rights is not related to the benefits said to flow from the desired objective—the “restricted proportionality test.” See also HCJ 5016/96, *Horev et al. v. The Minister of Transportation et al.*, Piskei Din 51 (4) 1, 53-54.

this was upheld in cases such as *Stemkeh*, *Tenufa Manpower Services* and *Bar Ilan Street*. The lawyers of the petitioners argued:

“[...] the requisition of the land delineated in the requisition orders is arbitrary, unreasonable, lacks substantive criteria, and harms more than necessary the rights of the landowners and residents of the area in which the fence will be built.”¹⁴⁰

They further claimed:

“[...] the decision on running the separation fence along hundreds of dunams of land, in a manner that imprisons the residents of the enclave villages, will cause the landowners and local residents severe harm to a greater extent than necessary, and the fence’s route should, therefore, be voided.”¹⁴¹

Second, adding onto the proportionality principle, Israeli common law also requires the governmental and/or the administrative authorities (pursuant to governmental authority) to take into account relevant considerations and discard extraneous reasons in decision-making.¹⁴² In the context of *Beit Sourik*, the respondents would have to defend their actions by arguing that the security benefits brought by the land confiscation orders to the petitioners challenging the wall’s route would outweigh the infringement of their human rights. In the context of this case, the petitioners argued that the Supreme Court was obligated to:

“[...] take especial care in cases involving human rights violations in the Occupied Territories, and must apply a clear and present danger test when examining the Respondents’ claims regarding the security need and the means that causes lesser harm to the civilian population.”

It would be illegal, further argued the petitioners’ attorneys, to incorporate extraneous considerations into the decision around the wall. For instance, if the military had issued this order on the basis of the assumption that it would promote Tel Aviv’s political interests or protect security interests of Israeli citizens *outside* of the West Bank, the benefits of which—according to them—outweighed human rights of Palestinian petitioners, they would have violated Israeli

¹⁴⁰ Beit Sourik Village Council, “Petition for Order Nisi and Temporary Injunction,” 21, para 74.

¹⁴¹ Ibid, para 79.

¹⁴² Ibid, para 15 See also: H CJ 953/87, Poraz v. Mayor of Tel Aviv-Yafo, Piskei Din 42 (2) 309, 324 and H CJ 5016/96, Horev et al. v. The Minister of Transportation et al., Piskei Din 51 (4) 1, 53-54.

law.¹⁴³ The petitioners claimed that this was precisely what the respondents had done. The law required the IDF to strike a balance between the annexation of more occupied Palestinian land and the jeopardization of Palestinian human rights in the OPT that it would induce.¹⁴⁴ Instead, the IDF had evaluated Israeli national interests against the annexation of Palestinian land, which had naturally led to the development of a security-based rationale for annexation.¹⁴⁵

Lack of due process

In addition to engaging with the elements of the land confiscation order that either directly violated human rights of the Palestinian petitioners, or signposted human rights violations that would be normalized as a consequence of the construction of the wall, the petition also raised broader questions about the land requisition orders that exposed the structural inconsistencies of the occupation itself.

The petitioners argued that the requisition order was issued without so much as properly informing the Palestinian public, far removed from any due process, which in the case of a decision as severe as this could take the form of a public debate, opening up clear avenues to file

¹⁴³ Beit Sourik Village Council, “Petition for Order Nisi and Temporary Injunction,” 23-24.

¹⁴⁴ The petitioners claimed that, “The actual considerations underlying the building of the fence along the planned route can be found in the lecture given by Mr. Shmuel Groag, architect and city planner, of Bimkom [a non-profit association], titled “Planning in East Jerusalem and the West Bank as a Political Tool for Spatial Control.” This position paper was attached and submitted to both the HCJ and the ICJ during the hearing on the wall. See Yehezkel Lein and Eyal Weizman, *Land Grab: Israel's Settlement Policy in the West Bank* (Jerusalem: B'Tselem, 2002) for a more complete understanding of how the building of the wall was an attempt by Israel to control more land.

¹⁴⁵ This point was effectively articulated by Justice Barak (later prime minister of Israel) in *Jimm’at Askan Almu’almun*: The considerations of the military commander are ensuring his security interests in the region, on the one hand, and ensuring the interests of the civilian population in the region, on the other hand. Both have to do with the region. The military commander is not allowed to consider the national, economic, social interests of his state, insofar as they are military needs and not national security needs in its broad meaning (HCJ 390/79, at p. 17). An area held under belligerent occupation is not territory to be exploited economically or in another way... The military administration is not permitted to plan and build a system of roads in area held under belligerent occupation, if the purpose of the plan and the purpose of its execution are to be a “service road” for his state... Planning and building of a road system may be done on grounds that it benefits the local population. This planning and execution cannot be done in order to serve the occupying state. Therefore, if the petitioner is right, that the purpose of the planning is not to serve the needs of the region (military or civilian) but for the needs of Israel, then they are right also in the legal position that they hold, that this purpose is extraneous to the considerations of the military commander... See also: HCJ 393/82, *Jimm’at Askan Almu’almun v. Commander or IDF Forces*, Piskei Din 37 (4) 785, 795.

objections and by giving residents an opportunity to either speak for themselves or engage experts to voice their grievances on their behalf.¹⁴⁶ For order T/103/03, that was associated with lands located in the villages of Beit ‘Annan, Beit Liqiya, and Qatanna, the attorneys claimed that “the order had not been properly published, and that most of the landowners located in the relevant area were not informed of the order.”¹⁴⁷

Similar lack of publication was also evident in the case of the other orders.¹⁴⁸ The arguments presented by Dahleh also documented the several other bureaucratic and legal hurdles thrown at the Palestinian petitioners when they sought to object to the law through legal means.¹⁴⁹ The petition highlights that proof of land ownership, which the office of the legal advisor needed annexed to the objection, needed to be processed by the Civil Administration's Office—a bureaucratic process that easily took over seven days.¹⁵⁰ Ironically, that weekend the residents submitted several requests for land abstracts to the office, none of which had been processed even close to a month later.¹⁵¹ The attorneys argued that the legal advisor demanded that the residents provide,“ [...] documents of ownership to support their objections, while at the same time delaying the issuance of land abstracts that prove ownership.”¹⁵² Most important of all, they claimed, that the time period granted to Palestinians to object is “is intended simply to meet a requirement and to thwart every genuine attempt to oppose the orders most effectively”.¹⁵³

Dahleh phrases the domestic set of arguments referencing Israeli constitutional and criminal law. Yet, the structural violence that nestle between its crevices is distinctly discernible. While this exposure of legal violence and the implicit critique is not outward facing, human rights agencies

¹⁴⁶ Beit Sourik Village Council, “Petition for Order Nisi and Temporary Injunction,” 13, para 48.

¹⁴⁷ Ibid, 3, para 6.

¹⁴⁸ Ibid, 4, para 12.

¹⁴⁹ Ibid, 6, para 7.

¹⁵⁰ Ibid, 14.

¹⁵¹ Ibid.

¹⁵² Ibid, para 53.

¹⁵³ Ibid.

and actors that observe the occupation are able to draw from these petitions to make a case on how ‘rule of law’ is a myth under occupation. For instance a June 2007 publication by Amnesty International observed, based on the *Beit Sourik* case:

“For two years after the first phase of the fence/wall was approved by the Israeli government, the Supreme Court rejected all petitions filed by Palestinians objecting to the route of the fence/wall in the West Bank. Only on 30 June 2004, as the Advisory Opinion of the ICJ was about to be announced, did the Supreme Court order that the fence/wall in the Beit Surik area, north of Jerusalem, be re-routed to take in less Palestinian land. However, even this Supreme Court ruling accepted that Palestinian land could be seized, destroyed and cut off from its owners for the benefit of Israeli settlements whose presence in the OPT is unlawful.”¹⁵⁴

Molding international law

Even more important is the petition’s engagement with international law. This, in particular, finds added relevance amongst human rights groups. The *Beit Sourik* petition concludes with an examination of Israel’s obligations under international law. Cognizant of Israel’s intractable position on applying all provisions of occupation law in the OPT, Dahleh is adroit in framing the petition in terms of Israel’s international legal position.¹⁵⁵

According to the Israeli Supreme Court’s interpretation of the Hague Regulations, governmental authority must be consistent with the rules of Israeli administrative law and the rules of international law on belligerent occupation. Dahleh draws this from *Jimm’at Aksan Almu’alman v. Commander of IDF Forces*, recounting further, the view of the Israeli Supreme Court that a balance must be maintained between military necessity and meeting the needs of the civilian population in a belligerent occupation.¹⁵⁶ More specifically, citing the ruling of *Jimm’at Aksan*

¹⁵⁴ Amnesty International, “Enduring Occupation: Palestinians under Siege in the West Bank,” Amnesty International, June 2007, <https://www.amnesty.org/download/Documents/68000/mde150332007en.pdf>.

¹⁵⁵ Meir Shamgar, the pioneer of Israel’s original (and egregious) interpretation of IHL, has argued that because Israel doesn’t occupy the West Bank and Gaza but rather ‘administers’ it, it can choose which humanitarian provisions it can opt to uphold in the territories. For more detail see: Shamgar, *Military Government in the Territories Administered by Israel*. For an abbreviation of Israel’s international legal position see: Yonah Jeremy Bob, “Meir Shamgar, Modern Father of Legal System, Laid to Rest,” The Jerusalem Post | JPost.com, October 22, 2019, <https://www.jpost.com/israel-news/meir-shamgar-modern-father-of-legal-system-funeral-today-605369>.

¹⁵⁶ Beit Sourik Village Council, “Petition for Order Nisi and Temporary Injunction,” 25-26.

Almu'almun he argues that “the governmental authorities must maintain normal living conditions in the territory under its control” including safety and welfare of the civilian population and provision of proper protection against danger.¹⁵⁷ Dahleh has argued comprehensively about how basic rights of Palestinians would be depleted as a consequence of the chosen route of the wall in the previous section on the illegality of Israel’s actions in terms of domestic law:

“[...] the decision on running the separation fence along hundreds of dunams of land, in a manner that imprisons the residents of the enclave villages, will cause the landowners and local residents severe harm to a greater extent than necessary.”¹⁵⁸

Separately, Dahleh points to the Hebrew translation of Article 43 of the Hague Convention—customary international law— which was adopted by the HCJ in *Sa'id Mahmud Tabib and Eleven Others v. Minister of Defence*. This requires the “occupant” to ensure that the “laws in force in the country” are respected unless absolutely necessary to infringe them for the requirements of public order.¹⁵⁹ Raja Shehadeh in *Occupier's Law* shows how Israel has violated this requirement in the OPT.¹⁶⁰

Ultimately, in conclusion, he points to oft-cited passages of the pillars of international humanitarian and human rights law—Article 46 of the Hague Regulations, Article 47 of the Fourth Geneva Convention, and Article 2 of the Universal Declaration of Human Rights- that he believes are central to the case the Palestinians petitioners seek to make to the court. Dahleh concedes that mentioning these clauses are “superfluous”, an undoubtedly sardonic reference to Israel’s intransigent and unabashed violation of clauses that are meant to be binding on all member states of the United Nations.¹⁶¹

¹⁵⁷ Beit Sourik Village Council, “Petition for Order Nisi and Temporary Injunction,” para 93. Therefore, the military authorities were required to supply gas masks to residents of the Occupied Territories during the Gulf War. From HCJ 168/91, *Murkus v. Minister of Defence*, Piskei Din 48 (1) 467).

¹⁵⁸ Beit Sourik Village Council, “Petition for Order Nisi and Temporary Injunction,” 21.

¹⁵⁹ Beit Sourik Village Council, “Petition for Order Nisi and Temporary Injunction,” 26.

¹⁶⁰ Raja Shehadeh, *Occupier's Law: Israel and the West Bank* (Washington, D.C.: Institute for Palestine Studies, 1988).

¹⁶¹ Beit Sourik Village Council, “Petition for Order Nisi and Temporary Injunction,” 27, para 97-100.

Dahleh's reference to international law in these terms is telling. He places the international law section at the end of the petition, an apt representation of the primacy of international law in the Israeli Supreme Court's jurisprudence on the OPT. Even within the international law section, he orients the petitioners' case in terms of the clauses of international legal documents that Israel accepts applies to Palestinians. He emphasizes that the military administration's actions are often inconsistent with the limited humanitarian law Israel does apply to the OPT. The petition is an implicit yet sharp revelation of the absurd limits that are placed on Palestinians trying to make a legal case before the Israeli Supreme Court. In a final and arguably remarkable act of legal dexterity, Dahleh briefly mentions the innumerable international legal instruments that would easily take issue with the military administration's confiscation orders.¹⁶² Nonetheless, these would be inept at making an effective case for his clients before the Israeli Supreme Court because of Israel's qualified acceptance of the provisions of international law.

When the three kinds of arguments against the military confiscation orders are brought together—lack of due process, failure to uphold domestic law, and blatant disregard for

Article 46 of the Hague Regulations state: Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated. "Treaties, States Parties, and Commentaries - Hague Convention (IV) on War on Land and Its Annexed Regulations, 1907 - Regulations: Art. 23 -," Treaties, States parties, and Commentaries - Hague Convention (IV) on War on Land and its Annexed Regulations, 1907 - Regulations: Art. 23 -, accessed March 30, 2021, <https://ihl-databases.icrc.org/ihl/WebART/195-200033?OpenDocument>.

Article 47 of the Fourth Geneva Convention states: "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory." From "The Geneva Conventions of 1949 and Their Additional Protocols," ICRC, October 29, 2010, <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

Article 2 of the United Nations Declaration of Human Rights states: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. From "Universal Declaration of Human Rights," United Nations (United Nations), accessed March 30, 2021, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

¹⁶² Beit Sourik Village Council, "Petition for Order Nisi and Temporary Injunction," 26.

international law—it becomes clear that the petition, through Dahleh’s advocacy, cannot merely be read as a document outlining the grievances of some Palestinian victims of an Israeli abuse of power. As has been highlighted earlier, the *Beit Sourik* petitioners, by participating in the Israeli legal system, legitimate the exercise of Israeli rule of law in the OPT. At the same time, the petition undeniably exposes the flaws that riddle the feigned ‘rule of law’ that the Israeli Supreme Court claims to preserve in the OPT. Therefore, to evaluate *Beit Sourik*, and the hundreds of similar petitions made to the HCJ by Palestinians, in terms of the legal outcome of the case—a ruling in favor of compensation for the victims and no substantive political compromises—is to discount a robust, and unfortunately understudied arena of Palestinian resistance and to reduce it to the status of victimhood. It disserves hundreds of on-the-ground Palestinian actors, such as Dahleh, involved in framing the case, actors whose actions supplement efforts by larger human rights advocates in seeking international legal intervention against Israeli breaches of law.

Human rights advocacy organizations like Al Haq have used the *Beit Sourik* case—engaging almost all of Dahleh’s arguments—to emphasize the legal obstacles that hinder Palestinian justice in the OPT. While there is no direct dialogue between Al Haq and Dahleh, and there is no evidence that one is seeking to shape the work of the other, at least in the case of *Beit Sourik*, the processes employed by each complement and enrich the other. It is the petitioners’ willingness to participate in the legal proceedings, despite knowing the implications of this on the occupation’s legitimacy, and the improbability of an outcome favorable toward them (a pyrrhic victory at most), that extends to Al Haq the premise for advocacy against the legal structure of the occupation. Had there not been a *Beit Sourik*, and hundreds of similar petitioners did not legally agitate against the court’s bigoted rulings, Al Haq would most likely not have been able to

present to the international community a case on why ‘rule of law’ in the OPT was distorted. In this regard, the role of Palestinian petitioners in pressuring and molding the law from the bottom up cannot be overlooked.¹⁶³ In fact, petitioners like the Palestinians behind *Beit Sourik* must be judged as active agents who make international law, rather than victims implicated in a jaundiced, occupied legal system.

CONCLUSION

Scholarship by Al Haq, Kretzmer, and other practitioners and advocates of Palestinian human rights have all unintentionally hyper-victimized the *Beit Sourik* petitioners as the voiceless victims of the Israeli legal occupation. They have argued that the Israeli legal system, that seeks to marginalize them, traps them into the quagmire of the occupation by incentivizing easy access to justice. In the process, Palestinians who oppose the dehumanization of the occupation participate in the process that “humanizes” the occupation.¹⁶⁴

Using *Beit Sourik* as my evidence I have attempted to deconstruct this narrow understanding of resistance posited by several scholars and advocates of the law in occupied Palestine. The cooptation of the Israeli argument that legal participation legitimates the violence of the occupation is not only short-sighted, but also denies agency to the Palestinian petitioner. It discredits the mobility of the Palestinian petitioner between categories of resistance, asserting instead the need of hierarchies to order the predicates of the resistance movement itself.¹⁶⁵

¹⁶³ For a more historical understanding of the concept of “legal work” and how Palestinian activism interacts with international law, see Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford, California: Stanford University Press, 2020).

¹⁶⁴ This is an argument made by Israelis who believe Palestinian participation in the law legitimizes the occupation. For an understanding of this argument see: Meir Shamgar and Eli Nathan, “The Power of Supervision of the High Court of Justice over the Military Government,” in *Military Government in the Territories Administered by Israel, 1967-1980: The Legal Aspects* (Jerusalem, OPT: Hebrew University Jerusalem, Faculty of Law, Harry Sacher Institute for Legislature Research and Comparative Law, 1982), pp. 109-169, 110-111.

¹⁶⁵ Subaltern law scholars have argued that resisters must be allowed ambivalence and movement between resistance categories. This is because scholars discovered that the subaltern was resisting multiple forms of power hierarchies,

In reality, the case of the *Beit Sourik* petitioners show that categories of resistance often overlap, as is evidenced by the participation of the petitioners in political protests at the site of the wall. It also highlights that petitioners exert agency within the limits placed on them by the law. In the process, they critique, and expose the violence of the occupier's legal system. Often, this lures human rights actors into observing the systemic denial of justice meted to Palestinians within the law. This in turn places the petitioners into a position where they can influence and shape international law. In sum, the *Beit Sourik* petitioners highlight that agency in resistance cannot be monolithic and consequently challenge colonial understandings of subaltern political expression, sparking a reimagination of resistance itself.

therefore resistance of power/domination was never clear in the context of subaltern studies. This was not only limited to within the resistance movement that manifested hierarchies (and is the theme of this thesis) but also was reflected in social change. To make room for this, the revisionist position adopted by scholars of subaltern law, argued against categorization of subaltern resistance and embraced its ambiguity. See Ortner, "Resistance and the Problem of Ethnographic Refusal," 175. This was also welcomed by postcolonial scholar Gayatri Spivak and a theme in the seminal subaltern studies monograph "Can the Subaltern Speak?". See Gayatri Chakravorty Spivak, "Can the Subaltern Speak?," *Marxism and the Interpretation of Culture*, 1988, pp. 271-313, https://doi.org/10.1007/978-1-349-19059-1_20.

CHAPTER 2

The Rape of Kunan Poshpora: The Diffusion of Categories of Resistance

“[...]There were 20–21 army men. Some entered the house.’[...]‘They had kept the weapons on the ground while raping me. I refused to be examined by the military doctor and gave my statement to the police only, who came after seven days[...].”¹⁶⁶

—[redacted],
Survivor of Kunan Poshpora mass rape

“Many people in Kashmir keep asking us why we have filed the petition, how we can expect to get justice from the oppressors in their own courts [...] We filed the petition not because we expect justice from the system but to make the Indian army answerable, to make it understand that its personnel cannot go scot-free and repeat the same crime. Our struggle is not about outcomes, but about developing a culture of resistance where impunity will be questioned by the people, where we will not remain silent in the face of oppression.”¹⁶⁷

—Samreen Mushtaq,
Co-founder of Support Group for Justice for Victims of Kunan Poshpora, a sub-committee of the Jammu and Kashmir Coalition of Civil Society

INTRODUCTION

Two Kashmiri women of disparate ages, experiences, and backgrounds, [redacted] and Samreen, align in their negotiation of an uncompromisable anti-state posture with the pragmatic mobilization of the state's justice system as a weapon of resistance. The tension of resisting the law—one that permits and perpetuates the injustices perpetrated under military occupation—through the law that is palpable in these narratives is far from unique to these two women. In July 2010, as the Jammu and Kashmir (J&K) High Court convened for the hearing for Mian

¹⁶⁶Batool, Essar, Ifrah Butt, Samreena Mushtaq, Munaza Rashid, Natasha Rather, and International Development Research Centre Issuing Body. *Do You Remember Kunan Poshpora? : [the Story of a Mass Rape]*. Zubaan Series on Sexual Violence and Impunity in South Asia. New Delhi: Zubaan : IDRC, 2016, 81. This testimony was recorded by members of the Support Group for Justice for Kunan Poshpora conducting on-the-spot investigations in Kunan and Poshpora in 2013.

¹⁶⁷Batool et al., *Do You Remember Kunan Poshpora?*, 22.

Qayoom, the highly respected president of the Kashmir Bar Association (KBA) who was accused of sedition, more than a hundred members of the of the KBA—all Kashmiri legal practitioners—packed the courtroom to witness, protest, and support a writ petition that challenged the Qayoom’s arrest.¹⁶⁸ A “protest against the state in an officially sanctioned space” symbolizes the paradox of resisting injustice in Kashmir through the law, argues legal scholars Haley Duschinski and Bruce Hoffman.¹⁶⁹ This argument, developed in the context of the KBA protest, is not exclusively applicable to the legal community in Kashmir but also to individuals who participate in, institutionalize, and radicalize the legal system itself.

A perfunctory perusal of Kashmiri legal participation, especially in incidents fraught with substantial breaches of justice—such as in the case of Kunan Poshpora—can be viewed as a resignation of Kashmiri victims of injustice to the broader political fate of Indian military occupation and as a shortsighted thirst for legal victory. As a result, participation can also be perceived as legitimization of the Indian legal system by Kashmiris. In this chapter, I will argue against this premise, through a case study of the Kunan Poshpora case. I will show that legal participation, while institutionalist in orientation, does not compromise the fundamental premise of self-determination around which Kashmiri resistance is built. Such a nuanced study of the Kunan Poshpora case, a prototype for other similar cases against human rights abuses by the Indian military, will emphasize that the survivors’ desire to hold the soldiers who raped them accountable do not diminish their anti-India convictions. In fact, it shall be seen, that most survivors who recorded their testimony to participate in the lawsuit against the Indian military,

¹⁶⁸ 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): 8-12.

¹⁶⁹ Duschinski and Hoffman, "On the Frontlines of the Law", 8.

reiterated their cognizance of rape being used as a weapon of war to asphyxiate Kashmir's political will.¹⁷⁰

Addressing the idea that rape in Kashmir is an act of war in addition to being a crime, another woman from Kunan Poshpora said at a press conference organized by JKCCS in 2013:

“When someone is martyred here in Kashmir, his father and mother feels proud of the sacrifice and martyrdom. Not only the parents but everyone feels proud. The family is given respect. The Indian army snatched our honour by molesting us. We were attacked for the same reason they martyr the Kashmiri youth. But see the irony, we, the 40 women from Kunan Poshpora, were gang raped by the Indian army men on 23–24 February, 1991 feel stigmatised. Ours was also a sacrifice. No one feels proud of us.”¹⁷¹

Her words, in addition to providing insight into the internal patriarchal oppression of Kashmiri women who face gendered military violence, also attaches the quality of political resistance to a Kashmiri woman's experience of rape. Implacing rape as political violence in Kashmir is a reminder that common forms of resistance against such violence—retributive justice through the state legal system that seeks compensation for damages and arrest of perpetrators—rests within the broader framework of Kashmiri resistance against India. Therefore legal resistance against rape does not indicate deprioritization of Kashmir's quest for self-determination from India. Instead, these two paradoxical pursuits of justice are parallel.

Ultimately, each of these interpretations fail to credit Kashmiri actors with the intuition necessary to grasp the contradictions that riddle collective interpretation of legal agency. Such a limited understanding of Kashmiri resistance, one that reiterates the non-existent binary of legal-and non legal resistance, is in fact a consequence of Kashmiri internalization of reductive colonial categorizations.¹⁷² I argue that this is a trickle-down effect of state violence that further

¹⁷⁰ Gowhar Geelani, “Survivors of Alleged Rape in Indian Kashmir Renew Old Fight with New Spirit,” *Dawn*, June 27, 2013, <https://www.dawn.com/news/1021154>.

¹⁷¹ Ibid.

¹⁷² Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton, New Jersey: Princeton Univ. Press, 2007).

institutionalizes denial of agency to Kashmiri legal actors by ordering resistance in terms of how revolutionary it is.¹⁷³ In reality, legal resisters exert their agency by obfuscating colonial categories. In this chapter, I demonstrate that Kashmiri legal actors maneuver retribution from the state through the law (legal resistance) while boycotting elections that normalize Indian rule in Kashmir (non-legal resistance) simultaneously. Further, they use the space carved out by the institutional acceptance of legal resistance—one that is not afforded to those Kashmiris who exercise militant resistance against the state—to mobilize public awareness on the injustices of the Indian legal system, and to contest the state cultivated internal amnesia that restrained Kashmiri resistance. Therefore, through the complicated ways in which lawfare asserts agency in Kunan Poshpora, a reimagined resistance emerges that challenges not only the Indian military occupation, but also the constricted and colonial conceptions of resistance.

WHAT HAPPENED IN KUNAN AND POSHPORA

The Night of February 23, 1991

Now remembered as Kunan Poshpora, the villages of Kunan and Poshpora, until 1991, were two neighbouring villages in the Trehgam block of Kupwara, the northernmost district of Indian administered Kashmir, only forty kilometres from the disputed LOC that runs through the Indian and Pakistani ruled segments of Kashmir. It was only after the tragic incident of February 1991 that the two villages were morphed into one in collective memory.¹⁷⁴

Between the late hours of February 23 and the early hours of February 24, 1991, 125 soldiers from the fourth battalion of one of the oldest and senior most rifle regiments of the Indian army, the Fourth Rajputana Rifles, raped between twenty-three and one hundred women in the villages

¹⁷³Chandra, “Rethinking Subaltern Resistance.”

¹⁷⁴ Batool et al., *Do You Remember Kunan Poshpora?*, 45.

of Kunan and Poshpora, while conducting a ‘cordon and search operation,’ (also known as military raids or crackdowns locally), to locate “anti-national elements” in the villages.¹⁷⁵ The army left the military camps at Trehgam at 9PM, informed the local police at Trehgam police station about the prospective operation, and then arrived at the villages at 11PM.¹⁷⁶ The soldiers stormed into houses, breaking and kicking down doors, waking up sleeping villagers with guns pointed to their faces.¹⁷⁷

Rape of Female Survivors

Search parties of about five to ten soldiers broke into each house, assaulted the men, and then dragged them out of the house to the make-shift interrogation centers they had set up in a local barn.¹⁷⁸ After the men were forcibly separated from the women and children, soldiers from the search party who had broken into the houses pounced upon the women and gangraped them.¹⁷⁹ The men recall that through the night, as they awaited interrogation and stood in the snow, they could hear the screams of the women from different houses in the village.¹⁸⁰ Occasionally they would stop, only to start again in a few minutes.¹⁸¹ The youngest survivor was thirteen years old while the oldest eighty.¹⁸² Women who were physically disabled—one of them undergoing

¹⁷⁵ Asia Watch Committee and Physicians for Human Rights, *Rape in Kashmir: A Crime of War* (New York, New York: Asia Watch, 1993), (Boston, Massachusetts: Physicians for Human Rights, 1993), 87; Amnesty International, “Rape and Ill-Treatment of Women in Kashmir.” Anti-national element is the military jargon used to refer to Kashmiri militants—usually Kashmiri men who participate in the armed struggle demanding separation from India. In the 1990s, during the heightened stages of the armed insurgency, Kashmiris would often cross the border to Pakistan, receive training and weapons from the Pakistani intelligence, and return to Indian Kashmir to participate in anti-India militancy in Kashmir. See Basharat Peer, *Curfewed Night* (Noida, UP: Random House India, 2009), <https://www.amnesty.org/en/documents/ASA20/010/1991/en/>.

¹⁷⁶ Ibid.

¹⁷⁷ Batool et al., *Do You Remember Kunan Poshpora?*, “That Night in Kunan Poshpora”, 75-86.

¹⁷⁸ Ibid.

“These centres were established in the house of [redacted], situated near the village shrine; in the kuthar (cattle shed and rice/fodder store, barn) of [redacted] and that of [redacted]. These kuthars were made of wood and mud with thatched roofs.” From Batool et al., *Do You Remember Kunan Poshpora?*, “That Night in Kunan Poshpora”, 76.

¹⁷⁹ “These centres were established in the house of Abli Dar, situated near the village shrine; in the kuthar (cattle shed and rice/fodder store, barn) of Ghani Dar and that of Asad Dar. These kuthars were made of wood and mud with thatched roofs.”

¹⁸⁰ Batool et al., *Do You Remember Kunan Poshpora?*, “That Night in Kunan Poshpora”, 76-77.

¹⁸¹ Ibid.

¹⁸² Amnesty International, “Rape and Ill-Treatment of Women in Kashmir,” 1.

treatment for polio, and another who was hearing and speech impaired—were also not spared.¹⁸³

A twenty one year old pregnant woman was raped by seven soldiers.¹⁸⁴ She gave birth to a baby with a fractured arm four days after she was assaulted. Activists who interviewed the survivors in 2013 described their gut-wrenching scenes of helplessness:

“Pushed to the walls, they shouted and screamed for help, for mercy. Their screams were not answered. Guns were pointed at their chests and mouths. They were told not to shout or else they would be shot. The army men were drunk, and were seen drinking during the operations. They smelled of liquor. They tore the women’s pherans (long traditional gowns worn over the clothes). They pulled down their trousers and raped them. While raping them they continued to consume liquor. They took turns, and sometimes took two rounds of a particular house. [...] Mothers were raped in front of their daughters. Grandmothers and their granddaughters were raped in the same room.”¹⁸⁵

Another survivor, whose pregnant daughter was raped in the neighboring room, while she herself was being raped said:

“When the army men entered, I saw they had zips of their pants already opened and they had clearly come with the intention of raping us. 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. They raped me for several hours. After some time I fell unconscious because of the pain.”¹⁸⁶

One of the survivors, who was raped by six perpetrators, claimed that the soldiers had forced her five-year old son to watch as they raped her.¹⁸⁷ Other young children were also abused. A six month old toddler was thrown out of a window into the snow as the soldiers raped her mother, sister and grandmother.¹⁸⁸ Even after the soldiers had left, the women, who were in a state of delirium were unable to bring the child back inside, and the infant was left in the snow for many

¹⁸³ Batool et al., *Do You Remember Kunan Poshpora?*, “That Night in Kunan Poshpora”, 75-86; Asia Watch Committee and Physicians for Human Rights, *Rape in Kashmir*.

¹⁸⁴ Ibid; Amnesty International, “Rape and Ill-Treatment of Women in Kashmir”.

¹⁸⁵ Ibid. This testimony was recorded by members of the Support Group for Justice for Kunan Poshpora conducting on-the-spot investigations in Kunana and Poshpora in 2013.

¹⁸⁶ Ibid.

¹⁸⁷ Asia Watch Committee and Physicians for Human Rights, *Rape in Kashmir*; Amnesty International, “Rape and Ill-Treatment of Women in Kashmir”.

¹⁸⁸ Batool et al., *Do You Remember Kunan Poshpora?*, “That Night in Kunan Poshpora”, 84.

hours until one of the accompanying police officers noticed her crying and rescued her.¹⁸⁹ Another two year old was trampled on by multiple soldiers and was permanently disabled as a consequence.¹⁹⁰

Psychological, Physical and Social Scars

Today, many years after the incident, most survivors experience symptoms of post-traumatic stress disorder such as recurring migraines, blackouts, dizzy spells, forgetfulness and short-term memory loss, and hypertension.¹⁹¹ One of the survivors stated:

“We are still living that nightmare. We have lost our sense of self-esteem. Our lives feel like lifelong trenches of despair. It has caused stress in our families too. We feel worthless. We often cry and break down. We don’t remember things; we don’t have good memories. Our minds are blocked.”

Human rights activists who have worked with survivors document that most of the female survivors suffer from lasting gynaecological problems. Some of the women died from excessive bleeding after ailing for many years.¹⁹² Many have had to undergo multiple surgeries:

“Most of them suffer from poor reproductive health. At least two of the women had multiple miscarriages after the rapes, and others had difficulty in conceiving after marriage. Out of 40 reported survivors (who had approached the JKSHRC in 2004), around 15 women have undergone hysterectomies or other gynaecological surgeries, the exact nature of which was not clear. Most of the rape survivors in the village suffer from one health problem or the other. Out of 40 women, five rape survivors have already died; two of them had continuous vaginal bleeding after their rapes, which did not stop despite treatment, and which eventually led to their deaths. Many of them have undergone multiple surgeries and a few of them are bedridden now. One woman has had rectal surgery – she had to have this almost seventeen years later – because she was raped anally.”¹⁹³

¹⁸⁹ Ibid

¹⁹⁰ Ibid, 100

¹⁹¹ Ibid, 113-114

¹⁹² Billal A. Jan, and Ranjiv Mehrotra, “‘Ocean of Tears’: A Film on Kunan Poshpora Mass Rape in Kashmir,” YouTube video, 7:29, posted by Kashmir Global کشمیر گلوبل, February 23, 2016. https://www.youtube.com/watch?v=JwGXYw5vf3w&t=2s&ab_channel=KashmirGlobal%DA%A9%D8%B4%D9%85%DB%8C%D8%B1%DA%AF%D9%84%D9%88%D8%A8%D9%84

¹⁹³ Batool et al., *Do You Remember Kunan Poshpora?*, “Life in Kunan Poshpora Today”, 116.

In 2004, a survivor approached the Jammu and Kashmir State Human Rights Commission (JKSHRC) demanding justice and compensation for the Kunan Poshpora rapes. In 2007, 39 other women joined her quest, submitting testimony that they had been raped too.

The financial burden of treatment is significant for the survivors.¹⁹⁴ In a lot of cases, as mentioned above, long-term health was affected, which meant paying for treatment was a recurring monthly expense for survivor families. In an interview with journalist Ranjiv Mehrotra, *Global Kashmir* in 2016, one of the survivors claimed that several of them had to spend thousands of Indian rupees on medicines monthly.¹⁹⁵ One of the women stated that she has to pay an average of 8,000 to 10,000 Indian rupees per month continually for medical treatment.¹⁹⁶ According to the Indian Ministry of Statistics and Programme Implementation, India's per capita monthly income alone was less than 9,000 Indian rupees in the 2016-17 financial year.¹⁹⁷ Further, in many instances, the appropriate medical treatment is not available locally because of the dearth of medical infrastructure; families have to travel to Srinagar, or even New Delhi, to receive healthcare.¹⁹⁸

The social stigma around the rape haunts Kunan Poshpora till date and haunts almost every aspect of social life—most importantly education and marriage.¹⁹⁹ Children who attended school in Trehgam and Kupwara dropped out of school after the incident because of the bullying and humiliation they faced.²⁰⁰ Especially older girl children, who were likely survivors of sexual assault had to shoulder the brunt of the stigma. One of the women (not a survivor) interviewed stated:

“I am a graduate and I want to continue my studies but I have become someone to ridicule and laugh at. They say I belong to a raped village, where people have received money from the army.

¹⁹⁴ Ibid. 106-118.

¹⁹⁵ Billal A. Jan, and Ranjiv Mehrotra, ““Ocean of Tears,”” *Kashmir Global* کٚشمیر گلوبل.

¹⁹⁶ Ibid.

¹⁹⁷ Press Trust of India (PTI), “Per Capita Income Rises 9.7% to Rs1.03 Lakh in FY17,” *livemint*, May 31, 2017, <https://www.livemint.com/Politics/EqruCBRa2NLXByxgIJZeNL/Per-capita-income-rises-97-to-Rs103-lakh-in-FY17.html> Provisional Estimates of Annual National Income 2016-17; “National Informatics Center,” *National Informatics Center*, May 31, 2107, http://mospi.nic.in/sites/default/files/press_release/PRESS_NOTE_PE_2016-17.pdf.

¹⁹⁸ Batool et al., *Do You Remember Kunan Poshpora?*, “Life in Kunan Poshpora Today”, 117.

¹⁹⁹ Ibid, 106.

²⁰⁰ Ibid, 107.

I was also taunted in high school but my determination to get an education was so strong that I forced myself to adjust, to accept all the taunts and barbs. Even after decades have passed there is no respite for us. The situation is going from bad to worse; people now say that the photographs of raped women of our village can be easily seen on the Internet.”²⁰¹

Another young woman shared her experience with schooling. She used to attend a private school, until she decided to drop out after her best friend taunted her about her village’s past during a fight:

“Seema and I were good friends. We used to share everything. We used to eat lunch together and share each other’s notes. One day, we argued on a minor issue about some notes. In her anger she called me the daughter of a raped village and shouted loudly that my mother had been raped by the army. That she had slept with Indians. It was then that I fully made up my mind not to go to that school.”²⁰²

Marriages in Kunan Poshpora are also fraught with social stigma.²⁰³ Several of the younger women, who wish to be married now, are the young children who were disabled by soldiers on the night of the incident as their mothers and grandmothers had been raped. The most common invective they face today is “daughter of the raped villages.”²⁰⁴ The baby who had been flung out of the window and was rescued by the police constable, who is now in her early thirties and walks on crutches, has resigned to the idea that she is unmarriageable.²⁰⁵ Others have had marriages arranged with older men within the villages itself—a “compromise” they have had to make because their loss of chastity rendered them unmarriageable to eligible young men outside of the villages.²⁰⁶ Many such young women have been tortured and abused by their in-laws because of their histories.²⁰⁷

²⁰¹ Ibid, 108.

²⁰² Ibid, 109.

²⁰³ Ibid, 111-113.

²⁰⁴ Ibid.

²⁰⁵ Ibid, 112.

²⁰⁶ Ibid, 113.

²⁰⁷ Ibid, 113.

The Case in Court: A Public Interest Litigation

In March 2013, five Kashmiri women—Essar Batool, Ifrah Butt, Samreena Mushtaq, Munaza Rashid, and Natasha Rather—affiliated with the Kashmiri human rights and civil society organization, the Jammu and Kashmir Coalition of Civil Society (JKCCS), began to collect evidentiary material on the Kunan Poshpora case, in preparation of filing a public interest litigation (better known as a PIL) before the J&K High Court in Srinagar, the capital of the state.²⁰⁸ The petitioners, joined by fifty other Kashmiri women, including some survivors of Kunan Poshpora, sought compensation for the families of the survivors and a reinvestigation of the criminal case prematurely dismissed in 1991. The petition was denied by the court after three hearings in 2013.²⁰⁹ In 2014, a redrafted version of a similar PIL was submitted again, where the same group of petitioners sought the high court's intervention against the state police's deliberate delay in conducting investigations.²¹⁰ The court issued notices to the accused army personnel, and in July 2014 confirmed occurrence of rape and ordered the state to pay compensation to the families.²¹¹ However, in 2015, the J&K state government, as well the Indian Ministry of Defense acting on behalf of the Indian army, appealed to the Supreme Court and obtained a stay order on this ruling. Six years later, at the time of writing of this thesis, the case remains buried in the Supreme Court registry, awaiting a hearing.²¹²

²⁰⁸ PIL is a form of litigation that can be filed by anyone at a state high court or the Supreme Court of India to expedite the legal process by bypassing local courts, in cases that have a demonstrably large impact on a socially or economically marginalized group. Batool et al., *Do You Remember Kunan Poshpora?*, "Inquiries and Impunities".

²⁰⁹ The case was presumed to be closed in 1991 after a short police investigation. However, the J&K police had not filed a closure report to the Kupwara magistrate as is needed to close the case. Upon receiving intelligence about the preparation of the PIL, the police filed the closure report in 2013 to the magistrate. As the closure report was pending before the magistrate, the J&K High Court could not rule on the case and dismissed it as "premature". Batool et al., *Do You Remember Kunan Poshpora?*, "Inquiries and Impunities".

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² "Kunan-Poshpora Case: SC Stays High Court Proceedings," *The Hindu* (The Hindu, June 4, 2016), <https://www.thehindu.com/news/national/kunanposhpora-case-sc-stays-high-court-proceedings/article6975871.ece>.

However, the legal impasse faced by the PIL is far from the defining contribution it made to Kashmiri resistance. The five activists wrote an expository book on the case called *Do You Remember Kunan Poshpora?*, a journalistic account centering testimonies of hundreds of survivors and witnesses of the incident, that followed the trajectory of the Indian state and military's successful silencing of the case between 1991 and 2013. They also founded the Support Group for Survivors of Kunan and Poshpora (SGKP) which launched a political campaign in Kashmir in 2013 to smear and boycott all individuals associated with the perpetration and whitewashing of the case.²¹³ The work of these five activists—the legal case, the book, and the political activism—intersectional both in form and substance set in motion renewed legal activity around the case, bringing to the fore the energy, effort, and resources packed into the Indian state's ploy to silence the Kashmiri voice— not only the survivors and witnesses of the crime itself, but also Kashmiri officials who worked for the Indian state. As Essar Batool, one of the activists wrote:

“The PIL was the start of another parallel struggle of sorts: a legal struggle, a struggle to expose the continuing impunity and lies of the Indian state, a struggle against forgetting and criminal cover-ups, a struggle to bring back public memories, and a struggle of support for Kunan Poshpora.”²¹⁴

Therefore, the question of legal resistance in this chapter is studied through the lens of the Kunan Poshpora PIL.

²¹³ “We Demand Justice for Kunan Poshpora Survivors,” Facebook, accessed March 30, 2021, <https://www.facebook.com/KunanposhporaCampaign/>.

²¹⁴ Batool et al., *Do You Remember Kunan Poshpora?*, “Inquiries and Impunities”.

STATE VIOLENCE IN KASHMIR

The Indian State's Mobilization of Justice

The Indian state's response to what transpired in Kunan Poshpora on February 23 and 24, 1991 is by no means extraordinary when situated in the mind-boggling statistics of untried cases of sexual violence perpetrated by the military in India, chronicled by human rights watchdogs.²¹⁵ Neither is this an attempt to exceptionalize the incident of Kunan Poshpora or the tales of its survivors. Rather, the clash between the survivors' tenacious quest for justice and the state's unmasked attempts to impede the former was widely broadcasted. As a result, a breadth of primary material on the incident was made available, which, in particular, helped categorize the varied ways in which the state interacted with the law around the Kunan Poshpora case. It also helped highlight patterns in the practices adopted by the state's legal and criminal justice systems when Kashmiris were at the receiving end of military violence.

The law is unjust

Since the 1990s insurgency in Kashmir, India has subjected Kashmiris to an onslaught of emergency legislation indefensible under international human rights law.²¹⁶ These include the Armed Forces Special Powers Act (AFSPA), the Disturbed Areas Act (DSA), the Public Security Act (PSA), and the Terrorism and Disruptive Activities Act (TADA).²¹⁷ Of these, the AFSPA is particularly pernicious and has faced international criticism from several international human rights agencies.²¹⁸ In the context of the Kunan Poshpora case, two elements of AFSPA need to be highlighted. First, through the AFSPA the Indian government authorizes the security forces in

²¹⁵ See James Goldston and Patricia Gossman, *Kashmir Under Siege: Human Rights in India* (New York, NY: Human Rights Watch, 1991). See also, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir*. New Haven, CT: Allard K. Lowenstein International Human Rights Clinic, Yale Law School, 2009.

²¹⁶ Seema Kazi (Centre for the Study of Law and Governance, 2012), pp. 1-36.

²¹⁷ Kazi, 9

²¹⁸ *The Myth of Normalcy*

Kashmir to have unrestrained and unaccounted power in “disturbed areas” to undertake operations to “maintain public order”.²¹⁹ In the case of Kunan and Poshpora this was manifested in the ruthlessness of the ‘cordon and search operation’ that was justified in terms of the military’s need to search for “anti-national elements”.²²⁰ Second, the AFSPA extends *de facto* immunity to the members of all armed personnel for committing criminal acts. The Ministry of Defense has to sanction prosecutions of armed personnel by the state and Supreme Court. Further, the police and state courts are incentivized to not prosecute crimes by armed personnel.²²¹ In this regard, the mass rape of Kunan and Poshpora, was largely sanctioned, and perhaps even incentivized by the Indian legal apparatus in place in Kashmir.

The law is employed violently

Once the case moved into the courtroom, violence was manifested in the way in which the rule of law was employed. For instance, multiple petitions and counter petitions were heard by different courts parallelly, the judicial magistrates who were assigned to the cases would often go on indefinite leave as the cases hung in balance, and the legal system allowed the opposition to employ loopholes in the law to harass and exhaust the survivors.²²² The book by the SGKP activists shows that the case first hit a snag even before it had been filed. Initially, over a hundred women in Kashmir had participated in the petition.²²³ However, when the registry of the Srinagar

²¹⁹ The DSA decides disturbed areas In this Act, ‘disturbed area’ means an area which is for the time being declared by notification under section 3-to be a disturbed area’. Jammu and Kashmir Disturbed Areas Act, 1992; According to Section 4 of AFSPA ‘The army can arrest anyone without a warrant under section 4(c) who has committed, is suspected of having committed, or of being about to commit, a cognisable offense and use any amount of force ‘necessary to effect the arrest.’ *India: Act No. 21 of 1990, Armed Forces (Jammu and Kashmir) Special Powers Act, 1990* [], 1 1990, available at: <https://www.refworld.org/docid/3ae6b52a14.html> [accessed 30 March 2021]

²²⁰ Sharma, H K. Rep. “*Confidential Investigation Report on Incident Dated 23/24 Feb 91 In Village Kunan And Pushpora (Trehgam)*.” New Delhi, NCR: Zubaan Books, 2016. In *Do You Remember Kunan Poshpora?*

²²¹ Imroz, Parvez. *Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir*. Srinagar, J&K: International People's Tribunal on Human Rights and Justice in Indian-administered Kashmir and Association of Parents of Disappeared Persons, 2012.

²²² “Facebook,” *Facebook*, February 14, 2014, <https://www.facebook.com/KunanposhporaCampaign/posts/665627230160538>.

²²³ Batool et al., *Do You Remember Kunan Poshpora?*, “Inquiries and Impunities”.

High Court required petitioners to submit their identity cards to court officials, fifty women backed out of the petition.²²⁴ This, far from insinuating a lack of seriousness on the part of the petitioners, reified the bureaucratic state's unapproachability to Kashmiris. It is common knowledge that identity cards are precious possessions for people living under military occupation, who are subjected to arbitrary searches by the military and can be asked to produce identifying documentation at any juncture, at any street corner. The court's refusal to soften its documentation requirements for filing a case despite the precarious living situation of Kashmiris exposed its unwillingness to dispense justice equitably. Second, the SGKP activists, referring to the court's dismissal of the case, underscored that it had refused to monitor the police investigations or intervene—two options well within its mandate—"despite the absurdity of the closure report being filed 23 years too late".²²⁵

The failure of the criminal justice system

In the arena of criminal justice, the state was outright in its refusal to follow the rule of law. The police, as is seen later, concealed medical evidence, refused to file the first information report, and in many cases did not follow practices that the law mandates for investigation collection on sexual assault cases.²²⁶ For instance, even after two rounds of medical investigation were also conducted on a total of thirty-two women, mandated by the police, the police filed a closure report in 1991 stating that the case was inconclusive.²²⁷ In a letter dated September 23, 1991 addressed to the Kupwara police, the Jammu and Kashmir Director of Prosecutions in the state capital, Srinagar, wrote that the "inability of the witnesses to [identify] the alleged accused has introduced a fatal and incurable lacuna in the prosecution story."²²⁸ This was despite

²²⁴ Ibid

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ J&K Director General (DG) Police (Kupwara, Jammu and Kashmir, n.d.). From Batool et al., *Do You Remember Kunan Poshpora?*, "Annexure 2, 207".

documentation of medical evidence in a series of letters exchanged between station house officers (SHO) at the Trehgam police station and the block medical officer (BMO), Dr Mohammad Yaqoob Makhdoomi.²²⁹ The SHO asks about the women:

“Were the victims examined raped or not? If yes, then how many days before and were there any marks of resistance? Was hymen torn or intact and other genital area injuries or marks around the vagina?”²³⁰

The BMO Makhdoomi replies in the affirmative to all the questions, claiming all the women had been raped “repeatedly, many a times, by multiple persons [...] against their will.”²³¹ The author writes that Makhdoomi further stated:

“They had injury marks all over their bodies including on their chest and limbs. One woman had bite marks on her face. Others had multiple abrasions and contusions on their lower bodies, their thighs, abdomens, buttocks and chests.”²³²

Rape as a Weapon of War

Throughout history, gendered and sexualized violence, has been inherent in conflicts seeking to bring about tectonic political shifts.²³³ Historically, sexual violence has characterized the colonial-federal encounter in Europe, the colonial encounter with the indigenous peoples of the Americas, enslavement of African in the United States, the Holocaust and the Armenian Genocide during the second world war and other major political events of the modern world.²³⁴ In the twentieth century, sexual violence has retained its role in state formations and transitions in Africa, Latin America, South America, Eastern Europe, South East Asia, the Middle East and South Asia.²³⁵ Gendered and sexualized violence in conflict is a technique used to escalate social

²²⁹From Batool et al., *Do You Remember Kunan Poshpora?*, “That Night in Kunan Poshpora,” 99-100.

²³⁰ Ibid, 99.

²³¹ Ibid, 99-100.

²³² Ibid, 100.

²³³ Angana P. Chatterji et al., *Conflicted Democracies and Gendered Violence: The Right to Heal: Internal Conflict and Social Upheaval in India* (New Delhi, NCR: Zubaan Books, 2016), 44.

²³⁴ Ibid.

²³⁵ Ibid.

control, instill fear into the oppressed population, and exact obedience.²³⁶ As women are considered to be the embodiment of “honor” in a community, their rape brings dishonor to the entire community.²³⁷ “Humiliating a woman means the humiliation of an entire family and community, and an attack on its collective honour”, writes Kashmiri activist Natasha Rather.²³⁸ This is recognized by international law which understand rape as a “tactic of war to humiliate, dominate, instill fear in, disperse, and/or forcibly relocate civilian members of a community or ethnic group”.²³⁹

This sense of dishonor is palapable both in the Indian army’s intention behind perpetration and in the impact it has had on rape survivors in Kashmir. On the part of the army, rape has been seen as a retribution for Kashmiri people’s ‘collective crime’ of resisting the Indian state.²⁴⁰ It has been weaponized “strategically and systematically to threaten, humiliate and degrade the populace and kill their spirit in the struggle against military occupation.”²⁴¹ For instance, one of the most common arguments levelled by Indian politicians and journalists who questioned the truth of the Kunan Poshpora allegations, was that Muslim women in a Kashmiri village would never be able publicly confront the humiliation of rape, let alone do so voluntarily.²⁴² The fact that they did suggested they were either being blackmailed or bribed by militants.²⁴³ On the other hand the

²³⁶ Ibid, 45.

²³⁷ Ibid, 49.

²³⁸ Batool et al., *Do You Remember Kunan Poshpora?*, “Making Sense of the Kunan Poshpora Mass Rape: Sexual Violence and Impunity in Kashmir,” 54-56.

²³⁹ “UN Security Council Resolution 1820 on Women, Peace and Security (2008),” UN Women, February 2, 2008, <https://www.unwomen.org/en/docs/2008/6/un-security-council-resolution-1820>.

²⁴⁰ See “Rapes as Reprisals” in Batool et al., *Do You Remember Kunan Poshpora?*, “Making Sense of the Kunan Poshpora Mass Rape: Sexual Violence and Impunity in Kashmir,” 50-56.

²⁴¹ Ibid, 52.

²⁴² This was the principal argument of B.G. Verghese, the writer of the Press Council of India report that discredited the authenticity of the survivors’ allegations. See Press Council of India. 1991. *Crisis and credibility: report of the Press Council of India, January and July 1991*. New Delhi: Lancer International. Wajahat Habibullah, the Divisional Commissioner also wrote the same in his report, arguing “simple folks” like Kashmiri women would never speak up about rape barring outside provocation. See Wajahat Habibullah, “*CONFIDENTIAL* Report of Divisional Commissioner, Kashmir on Incident at Kunan Poshpora, Kupwara.” (New Delhi, NCR: Zubaan Books, 2016), pp. 214-220. From Batool et al., *Do You Remember Kunan Poshpora?*, “Annexure 5.

²⁴³ Ibid. In an interview in 2014, the Divisional Commissioner Wajahat Habibullah claimed that militants had terrorized the women into lodging complains about the rape. Arun Mohan Sukumar, “Govt Used My Name and

impact of the stigma of the rape, as has been seen, dooms the village even today, three decades after 1991. The element of collective humiliation is internalized by Kashmiris themselves which in turn impedes the resistance itself:

“In a society where notions of purity and chastity of women are glorified, rape became a carefully deployed weapon to target men who were attracted to the armed struggle. The fear of sexual abuse of women as reprisal – and the collective notions of shame and honour – strongly discouraged men from joining the struggle. The choice to take part in the armed struggle meant that ‘their’ women would not be able to live peacefully and their safety would be jeopardized.”²⁴⁴

In this regard, it is also important to note that gendered violence links aggression to apparatuses of social and political control.²⁴⁵ While scholars caution against identifying unifying principles that are determinative of gendered and sexualized violence, simply because manifestations of such violence vary across local and global contexts, legal and cultural norms, and social and political histories, it is also undeniable that such violence is almost always administered through normative constructions of sex, gender, and gender binaries.²⁴⁶ A colonized subject will never measure up to the standards set by the colonizer. Thus, gendered violence is always structural, and almost always intersects with social hierarchies of race, ethnicity, caste, indigeneity, and class. Accordingly, rape transcends the domain to which sexual violence against women is often relegated, the private, and enters the domain of the public where the masculinist concept of armed conflict is situated.²⁴⁷

A Human Rights Watch report on rape in Kashmir documents:

Standing as a Defence against the Outcry over Kunan-Poshpora’,” *The Indian Express*, February 26, 2014, <https://indianexpress.com/article/india/india-others/govt-used-my-name-and-standing-as-a-defence-against-the-outcry-over-kunan-poshpora/>.

²⁴⁴ Seema Kazi, *Between Democracy and Nation, Gender and Militarization in Kashmir* (Brooklyn, NY: South End Press, 2010), 155. Batool et al., *Do You Remember Kunan Poshpora?*, 55-56.

²⁴⁵ Foucault, *History of Sexuality*. Cited in Chatterji et al., *Conflicted Democracies and Gendered Violence*, 48.

²⁴⁶ Riki Anne Wilchins, Clare Howell, and Joan Nestle, *GenderQueer: Voices from beyond the Sexual Binary* (Riverdale, NY: Riverdale Avenue Books, 2020). Riki Anne Wilchins, Clare Howell, and Joan Nestle, *GenderQueer: Voices from beyond the Sexual Binary* (Riverdale, NY: Riverdale Avenue Books, 2020). Cited in Chatterji et al., *Conflicted Democracies and Gendered Violence*, 49.

²⁴⁷ Kazi, *Between Democracy and Nation*, 24.

“Until recently, rape has often escaped international scrutiny and condemnation, including rape committed in the context of armed conflict. In the past, rape has often been...mischaracterised as incidental to the conflict or as a privately-motivated form of sexual abuse rather than an abuse of power that implicates public accountability.”²⁴⁸

Amongst the Indian army, for instance, there is a pervasive culture of dismissing rape as an instance where a soldier is led astray by personal sexual desire. For instance, in 2004, after a woman and her ten year old daughter were raped in Handwara, in a rare investigation and acquittal the accused major was court-martialed and dismissed from the army.²⁴⁹ However, the premise for his dismissal was ‘misconduct’, which wrongly suggested that the act was personal, divorced from the legitimate and defensible structures of military violence that sexually assault male militant suspects (and civilians).²⁵⁰ This, argue scholars of gendered and sexualized violence, is an incorrect and reductive characterization of *gender-based violence* in armed conflict as *violence against women*.²⁵¹ In reality, military rape in Kashmir is not incidental but structural, a weapon that is used to deliberately humiliate the community from within, acknowledged in the best of circumstances as a crime, but never as a weapon of war.

Construction of the Civilian-Militant Dichotomy

The Indian state, in Kashmir, has created a binary of the stone-pelting, arms-hoarding, anti-state ‘militant’ and the terrorized, voiceless, victimized ‘civilian’ into which all Kashmiris are neatly fitted, at least on paper.²⁵² The state has rendered these categories near interchangeable with

²⁴⁸ Grossman et al., *The Human Rights Crisis in Kashmir*, 92.

²⁴⁹ Anuradha Bhasin Jamwal, “Women in Kashmir Conflict: Victimhood and Beyond.,” in *Women Building Peace Between India and Pakistan*, ed. S. Mulay and J. Kirk (New Delhi, NCR: Anthem Press, 2007), 96.

²⁵⁰ Ibid, 100. Kazi, 25.

²⁵¹ Daur, Sheila. “Anthropological Approaches to Gender-Based Violence and Human Rights.” Essay. In *Anthropological Approaches to Gender-Based Violence and Human Rights*, 1–15. East Lansing, MI: Gender, Development, and Globalization Program, Center for Gender in Global Context, Michigan State University, 2014, 3. See also report of European Institute for Gender Equality, 2014. This is not to say that violence against women is by itself not associated with structures of oppression but rather, that it is an expression of gender based violence that stems from structures of masculinist violence.

²⁵² In reality, the military is empowered to shoot at will anyone who is Kashmiri. They will often later claim on paper that a civilian killed was a terrorist. See: “Rare video of Kashmir 1992 Indian army brutalising Kashmiris”, YouTube video, 8:05, posted by “The kashmiri guy,” May 22, 2018, https://www.youtube.com/watch?v=voo2AKQIAeg&t=224s&ab_channel=Thekashmiriguy.

‘anti-national elements’ (or terrorists) and a trapped people, constituting an *atoot ang* (integral part) of India, who must be rescued from militancy and integrated into the national mainstream. Subaltern scholars, studying the Indian colonial and postcolonial experience have argued that there exists a colonial obsession with the creation and enumeration of categories within the “colonized”.²⁵³ This enables the colonizer to argue that because the subject community is broken into smaller groups with insular and impermeable boundaries, they cannot be merged into the larger political community that is needed for national self-determination.²⁵⁴ To support their claims, scholars cite communal divisions in post-colonial South Asia such as class, caste, gender, and race, which overrode their Indian identity.²⁵⁵ In Kashmir, whose identification as the colonized is itself questionable from a historical standpoint, do not experience such communal divisions. Yet, the analysis from the subaltern school offers a relevant insight into India’s quite demonstrable exaggeration of the binary categories in the Kashmiri resistance.

Furthermore, through the polarizing rhetoric of national versus anti-national, and subservience to the law versus militancy, the Indian state has imagined a conflation between Kashmiri respect for the rule of law with unquestioning acceptance of who monopolizes its exercise. The state would argue that participation in the employment of the law against those who make and administer the law in turn legitimates law itself.²⁵⁶ In other words, if Kashmiris who decry the unjustness of a legal and criminal system that is designed to marginalize them, then employ the law to hold their perpetrators accountable, the state’s exercise of rule of law in Kashmir is legitimated, or so one would argue.

²⁵³ Chatterjee, *The Nation and Its Fragments*, “Communities: Fuzzy and Enumerated,” 223-224.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ This is exemplified by the irreverent interactions of the Indian army lawyers with the activists during hearings of the petition. They alleged that the army lawyer had nicknamed them “girls from human rights”. See Batool et al., *Do You Remember Kunan Poshpora?*, “The Recent Struggle: An Insider’s View”, 181.

THE EXERTION OF AGENCY THROUGH THE LAW

The testimonies from Kunan Poshpora as well as the literature centering them recurrently wrestle with the dilemma of employing the Indian state's legal system to resist state crime. Essar Batool, one of the petitioners, asks, "Why reopen the case after 23 long years? What did we hope to achieve?"²⁵⁷ Samreena Mushtaq, Batool's co-writer, also feels obligated to explain why they sought to re-open this case:

"We filed the petition not because we expect justice from the system but we wanted to make the Indian Army answerable, to make them understand that they cannot go scot-free and repeat the same crime."²⁵⁸

This critical, unforgiving, and often public introspection that is implicitly demanded of, and subsequently internalized by Kashmiris seeking legal justice attests to the dichotomous and reductive lens through which law and resistance is perceived under occupation. In reality, the pursuit of justice through legal and non-legal means often emanate from an identical anti-India premise. Therefore, these two means of self-determination succor and nurture each other despite the ostensible and superficial wariness with which one treats the other. The fuzziness of such categories are underscored by their overlap at the level of the individual—the petitioner who attends court during the day attends anti-India protests at night; the survivor who refused to allow the military doctor to examine her after rape allows the police to record her testimony for the case; the village elder who speaks out against Indian rule in Kashmir also demands that the rapists in the military be thrown into Indian prison.²⁵⁹ Finally, through the pursuit of legal justice, a diffused arena is carved out. Here, resisters both claim and exercise agency in the movement

²⁵⁷ Batool et al., *Do You Remember Kunan Poshpora?*, "The Recent Struggle: An Insider's View," 174.

²⁵⁸ Ibid.

²⁵⁹ One of the survivors told the team of SGKP activists recording statements in 2013 that, "I refused to be examined by the military doctor and gave my statement to the police only, who came after seven days." Batool et al., *Do You Remember Kunan Poshpora?*, 81. In Jan and Mehrotra, "Ocean of Tears," a male torture survivor demands that the occupation end and the rapists be thrown into jail in the same sentence.

by breaking out of the state-manufactured, reductive categories associated with Kashmiris resisting through and against the law.

Kashmiri Resistance's Internalization of Resistance Categories

It is not India's depiction of the Kashmiris—a calculated ploy to break up resistance into discrete categories—that is at the core of the essentializing categorization of Kashmiri resistance.²⁶⁰ Rather, it is the unfortunate internalization of these Indian-constructed categories by the Kashmiri resistance that impedes the free manifestation of the multifaceted ways in which the oppressed exercise agency in their resistance. Resistance actors, frustrated by the Indian legal and criminal justice systems, either hold intransigent positions against the employment of the law or feel compelled to acknowledge that the law will not bring the broader liberation desired. In *Do You Remember Kunan Poshpora*, activist-writer Ifrah Butt interviews Syedah Asiyeh Andrabi, the founder of Dukhtaran-e-Millat (Daughters of the Ummah)—an all-women, separatist political group that embodies what Butt calls “radical Islamic [feminism]”.²⁶¹ Syedah's partner was arrested and sentenced to life imprisonment under the Terrorist and Disruptive Activities Prevention Act of 2003 by India, a sacrifice they were both willing to make for the Kashmiri freedom struggle.²⁶² In March 1991, Syedah had been one of the first local community leaders in Kashmir to head down to Kunan and Poshpora after accounts of the mass rape were leaked to investigate and collect testimony from the survivors. When Butt interviewed her in 2013, she registered skepticism on the law's effectiveness as means for justice:

²⁶⁰ Chatterjee, *The Nation and Its Fragments*, “Communities: Fuzzy and Enumerated,” 224.

²⁶¹ Batool et al., *Do You Remember Kunan Poshpora?*, “People Who Remember,” 161-162.

²⁶² Ibid.

“[...] she also feels that justice will never be delivered in the present system of administration. She feels that the only justice which we can deliver to thousands of survivors is freedom from Indian occupation.”²⁶³

Mohammed Yasin Malik, the chairman of the Jammu and Kashmir Liberation Front—a formerly militant separatist political outfit that renounced violence in 1994, and a household name in Kashmir—has also expressed similar views on Kunan Poshpora. In a statement released in 2016, Malik expressed resentment towards the Indian criminal justice system, which he held responsible for denying justice to the survivors.²⁶⁴ The *Greater Kashmir* reported that Malik titled Kashmiri politicians as “stooges” of India, who despite believing in democracy and the rule of law, still shielded the criminals.²⁶⁵ He concluded the statement by reaffirming his commitment to Kashmiri independence:

“[...]today we pledge that we will do everything possible to take the mission of our great martyrs to its desired end”.²⁶⁶

Actors like Syedah and Malik, resistance leaders who are criminalized by the Indian state and constitute the category of ‘militant’, exhibit an explicit aversion to the employment of the law in resistance. They stand in principled opposition to the legal resistance performed by actors such as the Kashmiri activists who filed the 2013 petition, reinforcing the success of the state’s incitement of internal divisions within the ‘colonized’ or ‘subject’ state, demonstrating that they are far too numerous to ever pose a serious threat to the premise of the Indian nation-state.²⁶⁷

Through the imposition and internalization of the civilian-militant binary, the state has erased the space where radical resistance actors such as Malik and Syedah, and the SGKP activists can find commonality in their ultimate cause—Kashmiri freedom—despite holding divergent views on

²⁶³ Ibid.

²⁶⁴“Kunan-Poshpora 'Black Stain on Indian Democracy': Yasin Malik,” *Greater Kashmir*, February 23, 2016, <https://www.greaterkashmir.com/news/kashmir/kunan-poshpora-black-stain-on-indian-democracy-yasin-malik/>.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Chatterjee, *The Nation and Its Fragments*.

the means to that end. Rather, it helps pit the petitioner, the Kashmiri who respects the rule of law, against the Kashmiri militant, who challenges the law. This produces an internal reckoning within the resistance movement itself, each category competing with the other to define what constitutes effective resistance, relegating the other to a position of moral subordination. In a 1992 video on Indian-administered-Kashmir, Kashmiri women are recorded questioning why the army insists on attacking ‘civilian’ houses in retaliation for violence by militants²⁶⁸. A woman says of the army, on tape:

“Maybe the militants treat them [the army] badly, but these people [the army] force themselves into the houses of innocent people and beat them up. When there was militant firing, they barged into our houses. The militants got away but two of our people were killed.”²⁶⁹

Village Chowkidar Juma Sheikh’s letter which was then taken to District Magistrate S.M.Yasin and used to file the FIR in March 1991 also sought to similarly distance civilians from militants in the context of Kunan Poshpora. Sheikh wrote that the rapists on the army:

“[...] made no difference between houses with male family members who were Pakistani trained militants or houses which were not sympathetic to militants.”²⁷⁰

The SGKP activists wrote that Yasin’s words showed that Kashmiris suffered from “a desperate sense of terror” fearing being labeled a “militant” by the Indian state.²⁷¹ Kashmiris had internalized the oppressive and state-sharpened wedge between the so-called ‘civilian’ on the one hand and the so-called ‘militant’ so deeply that they invoked their civilian status as a defense against the state and military crackdown on their human rights.

The Indian state’s infiltration of Kashmir’s anti-India imagination, a deliberate consequence of its exaggeration of categories within the resistance, heightens the aforementioned essentialism of

²⁶⁸ “Rare video of Kashmir 1992 Indian army brutalising Kashmiris”, YouTube video

²⁶⁹ Ibid.

²⁷⁰ Juma Sheikh (Kunan Poshpora, Jammu and Kashmir, n.d.). From Batool et al., *Do You Remember Kunan Poshpora?*, Annexure 1, 205-206.

²⁷¹ Batool et al., *Do You Remember Kunan Poshpora?*, 90.

the binary between legal and other resistance. Furthermore, it casts doubts on the agency claimed by the legal resisters in launching opposition to the state. If Kashmiri activists are compelled to justify the employment of law against the Indian state because of an insecurity triggered by the Indian state, the extent of the agency asserted by the legal resistance must be questioned.

The Case for Agency in Legal Resistance

As much as legal resistance in Kashmir loses agency in justifying its existence to both the state and Kashmiri non-legal resisters, the substantive rationale is a sincere account of what legal activists seek to do through the law and what is accomplished at the end. For the legal petitioners of the Kunan and Poshpora rape, the intent was to simulatenously expose and critique the Indian justice systems that attempted to silence the rape. In the process, the petitioners, who rekindled the case, chose to mobilize the law in certain complex, even contradictory, ways that highlighted the nuances of a politically heterogenous community resisting state oppression.

Most of the legal battles that comprised the Kunan and Poshpora case illustrate the legal routine used by SGKP. The narrative of the first few J&K High Court hearings of the PIL in 2013 is an example. First, the self-proclaimed rationale for the high court's initial denial of the PIL is laid out. Why the court considered the case to be premature is explained, employing the language of the court, and referring to the delayed filing of the closure report by the Kupwara police and the state's purported deliberation over compensations. Second, alternative facts are addressed. Invoking voices of the villagers, the writers assert that, contrary to what is claimed by the J&K advocate general at court, the survivors named in the FIR were given a reduced sum as compensation by a local political representative (later Minister of Law), Mir Saifullah in 2011.²⁷² Then, the dissonance between the actions of the state and what the Kashmiri people demand is critically evaluated, in which larger themes of injustice that materialize as a consequence of the

²⁷² Batool et al., *Do You Remember Kunan Poshpora?*, "Inquiries and Impunity," 135.

military occupation are examined. Regarding the compensation, the authors exposed the incongruence between the state and survivor accounts, and reference their own struggles tracing documents on the compensation.²⁷³ They questioned whether the state's denial that compensation had been paid was both a refusal to accept responsibility, but also an attempt to silence the survivors' pursuit of justice.

“Was it given to buy the survivors and ensure their silence? Was it a signal to the rape survivors that they have received blood money and should not pursue further investigations?”²⁷⁴

This was a reflection on the state of impunity enjoyed by army personnel in Kashmir, and the willingness of the state to shield the army. It was also a time-tested tale of colonial recalcitrance: the unwillingness of the oppressor to register a public acknowledgment of the violence perpetrated by its enactors. Furthermore, argue the authors, it is absurd that the court chose to not intervene and monitor the case, especially considering the odd circumstance surrounding the police closure report, which was being filed twenty two years after the case was believed to have been closed.

It is the final element of the narrative of legal resistance—the question of agency—that provides the most interesting site of analysis. A straightforward understanding of exertion of agency by the petitioners is the act of mounting resistance against the military personnel who raped and tortured the villagers in Kunan and Poshpora. Refusing to permit their own social and political circumstances to impede their legal crusade, they attended court day after day, defying the misogyny and paternalistic dismissiveness inflicted upon them—“the women from human rights”—by the army, the state, and the state's legal machine.²⁷⁵ This interpretation of agency, though important, is far too narrow to encapture why the legal case on Kunan and Poshpora was

²⁷³ Ibid, 136-137.

²⁷⁴ Batool et al., *Do You Remember Kunan Poshpora?*, 136.

²⁷⁵ Ibid, 173.

a pervasive act of resistance; one that helped survivors break out of the mold of the docile ‘civilian’—the collateral damage trapped in the army’s rampage against the true resistor: the ‘militant’. In reality, the reclamation of agency took place outside of the courtroom, and often did not involve the SGKP activists who initiated the petition themselves. Rather, the PIL helped legitimize a space that was exclusively dominated by the Kashmiri voice, that at once sought recognition and inclusion in the discourse against state violence on the marginalized outside of Kashmir. It exposed, critiqued, and evaluated the structures of violence at play behind the scenes that sanctioned the collective defenestration of the Kunan and Poshpora rape. As an act of resistance, this was not limited by the law even though it had been provoked by the petitioners’ situation of the case in the law. It overrode and transcended the limited justification for resistance through the law that the petitioners had proffered, confronting not only state violence in Kunan and Poshpora, but also challenging the binary of legal (and, for India, dismissible) and illegal resistance that India had injected into the imagination of Kashmiri resistance.

At first, write the SGKP activists, the initial denial of the PIL felt like a setback, until they realized the various ways in which it gave the story of Kunan Poshpora and its characters a voice:

“For a moment, when we heard what the court had to say, disappointment spread among many of us, legally naive people who had thought that victory was close. However, we were to realize later that even with the case being disposed of, we had won in many ways. There were small struggles won and people, especially young women, were now drawn in to speak as women of Kashmir.”²⁷⁶

By extending a voice to the survivors, and carving out a space for them into academic, journalistic and political discourse, the activists discovered that justice for Kashmir did not necessarily mean victory inside the courtroom. It meant the deliberate and intentional creation of

²⁷⁶ Batool et al., *Do You Remember Kunan Poshpora?*, 174.

“public accountability” around the case.²⁷⁷ A political site whose reality is sheathed from the national eye, where lies and doublethink are both ubiquitous and unchallenged, justice inside the courtroom is easier found than contesting the power structures that impedes access to this justice. To this end the petitioners were successful. Under the watchful gaze of the media, state denial could no longer be directed at Kashmiris alone.

“There was renewed interest in a case that was presumed to be dead and forgotten. Kunan Poshpora now appeared in the local dailies in bold letters adorning the front page, it flashed on Indian and international news channels, bringing back the ghosts of a forgotten past. People now reacquainted themselves with the villages and the crimes committed in them.”²⁷⁸

Additionally, as Kashmiri advocate Parvez Imroz stated, it united people around the fundamental premise of human rights.

“The PIL did not only work to refresh the memories of the people, it also brought together women’s and civil society groups to work on the case.”²⁷⁹

More importantly, the room for agency that the petitioners had negotiated for the survivors enabled them to assert their truth fearlessly. They helped fill, before the public eye, all the convenient gaps in the reports, files, and police records that the state had visibly sought to erase. For instance, an interesting consequence of the case was that previously-classified documents, held by the police, had to be surrendered to the courts, and thus became publicly available.²⁸⁰ The police case diary for instance, it came to be known, had documented nineteen statements made by survivors as early as in March 1991, and comprised of medico-legal reports signed by government doctors confirming rape, and physical evidence such as empty alcohol bottles and

²⁷⁷ Ibid, 173-174.

²⁷⁸ Ibid, 174; Irfan Mehraj, “Kunan Poshpora Victims Unlikely to Get Justice’: Support Group,” Wande Magazine, February 24, 2019, <https://www.wandemag.com/kunan-poshpورا-victims-unlikely-to-get-justice-support-group/>.

²⁷⁹ Batool et al., *Do You Remember Kunan Poshpora?*, 174.

²⁸⁰ Manecksha, Freny. “Kunan-Poshpورا: Reconstructing Truth.” Himal Southasian, October 14, 2020. <https://www.himalmag.com/kunan-poshpورا-reconstructing-truth/>.

blood stained and torn clothes turned in by the women to the police.²⁸¹ This information now became public knowledge.²⁸²

Through the petition and the legal and political activity surrounding the petition (such as the writing of the book and speaking at lectures and interviews), the activists were able to make public specific instances in which the state gaslighted the survivors. A common argument made by the Indian government and the military around the time of the incident, to cast doubt on the authenticity of the survivors' account, was that the incident had been reported far too late after its alleged date of transpiration.²⁸³ Here again, the survivors help fill the gaps. The pages of Tehsildar Sikander Malik's diary confirm that it had snowed heavily on February 23 and March 3 and 4 in 1991 which had delayed the visit of the Divisional Commissioner to Kunan and Poshpora, in turn delaying investigations.²⁸⁴ Ifrah Butt's interview with the government medical officer, Dr Makhdoomi, who had examined the survivors in 1991 also prove that the decisive medical reports confirming rape had mysteriously disappeared from the police files.²⁸⁵ Butt writes of her interview:

“Despite being a forgetful person, Dr Makhdoomi clearly remembers examining the survivors along with his team on 8 or 9 March, in the village, and making the medical reports. But the documents present in the police file are dated 15 and 20 March 1991, and relate to the examination he conducted in the Kralpora primary health centre. The villagers too remember the BMO [block medical officer] visiting in an ambulance along with a female nurse, and providing them with injections and medicines, soon after the crackdown was lifted, but after 23 years they cannot recall the exact date. This was also confirmed by another medical official. What happened to these earlier reports which could have clarified many allegations, such as the medical evidence being inconclusive because the examinations were delayed?”²⁸⁶

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ See Press Council of India, *Crisis and Credibility*; Habibullah, “*CONFIDENTIAL* Report of Divisional Commissioner.

²⁸⁴ Sikander Malik, *Diary of Sikander Malik*, 2016. From *Do You Remember Kunan Poshpora?*, “Annexure 6”.

²⁸⁵ Batool et al., *Do You Remember Kunan Poshpora?*, “People Who Remember,” 145-152.

²⁸⁶ Ibid, 147-148.

Makdoomi also told Butt in the interview of the fear experienced by villagers and officials around taking too controversial of a stand on the case:

“There was a lot of resentment. Police was afraid of reporting the incident due to fear from both army and militants.”²⁸⁷

Makdoomi was not alone in making this claim. A number of voices that the activists have elevated have spoken of repercussions as a consequence of speaking up about the incident. Even an official as high up as the District Commissioner of Kupwara, S.M. Yasin, who registered the 1991 FIR against the perpetrators, spoke of the life threats and transfer orders he received as a consequence of publishing an unflattering investigation report on the incident.²⁸⁸ In an interview with *India Today*, Yasin painted a gloomy picture of the corrupt internal workings of the government in Kashmir.²⁸⁹ He claimed that after he had the FIR registered, the station house officer in charge of the case at the Trehgam police station was transferred by the higher-ups:

“[...] I took the copy of the report, enclosed it and also sent it to the SHO. An FIR was registered. Two days later I found out that they had removed the SHO.”²⁹⁰

Then he dropped the bombshell on national television that the Indian army had blackmailed him:

“After this [filing the FIR] I received another phone call. ‘I am a General [in the Indian Army]. I come from Udhampur. I have been sent for the special enquiry. Can you come to the Army camp here?’

I said, ‘Why will I come to the army camp? You come if you want to ask me anything.’

So he came and sat down and asked me, ‘Do you know what office you hold?’

I said, ‘If you are here, you must also know.’ He said you are the army’s representative. I said I’m not the ‘opposition’ representative. He said, ‘You have to defend the Indian army.’ I said I am not defending wrong actions. ‘I will not fight for wrong actions.’ He said, ‘How many kids do you have?’ I asked him what he meant by that. I told him, ‘We are not afraid of death. Life is in the hands of God. It is written in the Quran. I am a Muslim. When and how a man will die is in God’s hands.’²⁹¹

²⁸⁷Ibid, 148.

²⁸⁸*Headlines Today*, “Ex-Kupwara Dy commissioner breaks his silence on Kunan-Poshpora” *India Today* video, 4:52, February 24, 2014, <https://www.indiatoday.in/india/video/sm-yasin-former-deputy-commissioner-of-kupwara-breaks-his-silence-on-kunan-poshpora-450949-2014-02-24>

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

Yasin claimed that the army general then tried to backtrack on the threat and bribe him after his firm refusal to submit to the blackmail.²⁹²

Similar fears were also expressed by other residents of Kunan and Poshpora when the petitioners approached them with requests for interviews. A villager said to the interviewers:

“There are chances that people from some agencies might be following you and as soon as you leave some gunmen may barge in and kill me in an encounter, like they did with Constable Abdul Ghani. You all will go away back to Srinagar, but I have to live here.”²⁹³

Only a few days after this interview the authors heard about an incident of an explosion and a recovery of weapons operation by the army in Kunan village, which demonstrated that the fear was far from unfounded.²⁹⁴ The villager was referring to the well known incident of the army murdering the police constable who had accompanied the armed personnel during the raid on Kunan and Poshpora. When the the State Human Rights Commission published its ruling in 2011, it noted the military’s murder of Head Constable Abdul Ghani for being privy to too many army secrets:

“There was a policeman from the village namely Abdul Ghani who tried to raise SOS alarm for help from loud speaker of the local mosque but later [in 1993] he was too killed by army personnels so that evidence against them is whipped off.”²⁹⁵

Army reprisals were not limited to government officials. In the *Telegraph*, Kolkata reporter Yuseef Jameel, who broke the story about Kunan and Poshpora in 1991, lost his friend, Mushtaq Ali, a photojournalist at Asia News International and was severely injured after receiving a parcel bomb in 1995.²⁹⁶ In 1992, grenades were thrown at Jameel’s house.²⁹⁷ In 1990, the army abducted and interrogated him.²⁹⁸ While it was unclear whether Jameel’s threats were directly

²⁹² Ibid.

²⁹³ Batool et al., *Do You Remember Kunan Poshpora?*, “People Who Remember,” 167-168.

²⁹⁴ Ibid, 168.

²⁹⁵ Batool et al., *Do You Remember Kunan Poshpora?*, “That Night in Kunan Poshpora,” 87.

²⁹⁶ Batool et al., *Do You Remember Kunan Poshpora?*, “People Who Remember,” 154-155.

²⁹⁷ Ibid, 155.

²⁹⁸ Ibid.

associated with his courageous coverage of Kunan and Poshpora, voices of individuals like Jameel helped to bring to the fore the larger structures of oppression at play in Kashmir.²⁹⁹ It indicated how far the state was willing to go to repress the reality of military violence.

In addition to responding to the constructed gaps in the state records, the Kashmiris in Kunan Poshpora also contested the lies that had been peddled by the state. A powerful contribution of the petition was the opportunity it extended to Kashmiris to point out what was simply not true. One such instance, where the Kashmiri voice challenged the state, concerned the PCI report written by journalist Verghese in 1991 decrying the allegations of rape “a massive hoax,” which colored the national perception around the case.³⁰⁰ While the activists questioned Verghese’s findings and derided him for his misogyny and nationalism, the villagers in Kunan and Poshpora persistently claimed that Verghese and the PCI investigation team had never set foot in the villages.³⁰¹ Dr. Altaf, a Kashmiri civil society activist and a member of an investigation team that had in fact written a report on the case, claimed:

‘Verghese never went beyond Brigade Headquarters of the army base at Baramulla and wrote this report to cover up the army’s nefarious act, while having a drink with the army. The report was written according to their convenience and conditions. He wrote this only to mislead international public opinion and to protect what he thought was national interest.’³⁰²

Altaf is corroborated by several villagers interviewed by many of the activists through the years, who insist that Verghese never conducted an investigation. In fact, in 2013, activists from SGKP showed the villagers pictures of Verghese to help them identify him.³⁰³ The villagers recalled talking to several people including police officers, doctors, army personnel, lawyers, journalists, politicians and ministers, and even Bollywood and Hollywood actors, but they all confirmed that

²⁹⁹ Ibid.

³⁰⁰ Press Council of India, *Crisis and Credibility*.

³⁰¹ Batool et al., *Do You Remember Kunan Poshpora?*, “People Who Remember,” 158.

³⁰² Ibid.

³⁰³ Ibid.

Verghese had never visited the villages.³⁰⁴ Ifrah Butt's interview with Tehsildar Sikander Malik also confirmed this—the gentleman could not recollect that Verghese was a part of the team from the PCI that he took around the villages in 1991.³⁰⁵

Convergence of Categories of Resistance

A study of the narratives of the survivors of the Kunan Poshpora mass rape and their supporters that the SGKP activists meticulously documented will show that the assertion of agency by Kashmiris took place largely outside of the helm of the law. In other words, while the testimonies themselves may have been collected with the end goal of the petition in mind, and the interviewees may have spoken because they wanted legal retribution, the act of resistance lay in the collection of testimonials, the creation of a public space to acknowledge and heal, and a critical evaluation of the structures that collaborated to perpetrate and then forget. The rampage for justice in the court was exclusive in its legal pursuit—the punishment of the criminals and avenging the crime. But the battles that took place outside the courtroom were the ones that challenged the structures of violence enabling the crime—military occupation, military impunity, and denial of self-determination.

Political resistance triggered by the objective of legal justice has a long and winding history in Kashmir, especially in the Kunan Poshpora case. For instance, the FIR was registered in 1991 only after villagers from Kunan Poshpora protested outside the police and army headquarters for days.³⁰⁶ As has been noted earlier, the two-week period between February 24, the night of the raid, and March 8, the day the FIR was filed was enlivened by widespread protests and

³⁰⁴ Ibid.

³⁰⁵ Batool et al., *Do You Remember Kunan Poshpora?*, 144-145.

³⁰⁶ S M Yasin (Kupwara, Jammu and Kashmir, n.d.). From Batool et al., *Do You Remember Kunan Poshpora?*, Annexure 3, 207-209.

retaliatory curfews in Kupwara.³⁰⁷ S.M. Yasin noted later about his rationale behind carrying out an on-the-spot investigation in the villages and writing a report:

“The news has started to spread in the whole district and I apprehended it might have an adverse effect on the administration.”³⁰⁸

Therefore, the 2014 protests (triggered by the PIL to reopen the case) that similarly sought to hold the court accountable to its commitment to the rule of law was far from unprecedented. In many instances, the resistance that took place outside of the courtroom was not explicitly connected to the legal dimension of the PIL. Rather, they were spontaneous outbursts of solidarity and resistance that found common ground with the petitioners’ work against the state, largely divorced from the ins and outs of the case itself. In 2013-14, when the army’s revision petition was being heard in the Kupwara sessions court, symbolic protests were routinely held outside the court.³⁰⁹ Protestors would include members of civil society groups, village committee, petitioners, and survivors.³¹⁰ The SGKP activists would also join these protests after the court hearings.³¹¹ Protests were not specifically about Kunan Poshpora or the mala fides taking place inside the courtroom. Rather, they were united in their resistance to the Indian state. Kunan Poshpora was an incident, and the court case surrounding it was the vehicle that had led to the orchestration of the protest itself, but nothing more.

Interestingly, there were often militants at these protests, who stood in solidarity with the survivors, employing the case as an opportunity to publicly repudiate the state’s violence. Samreena Mushtaq writes of one such protestor:

“I remember an old man on crutches. I remember looking at him, both feet missing, the stumps in their place dragging along the road, fingers stiff with disfigurement. He was protesting along with us. He was a man who had been tortured by the Indian Army for allegedly helping the militants;

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Batool et al., *Do You Remember Kunan Poshpora?*, “The Recent Struggle,” 181-182.

³¹⁰ Ibid

³¹¹ Ibid.

he was forced to eat his own flesh and his feet were amputated. Qalander Khatana, that was his name, a man of the mountains. ‘I’m with you’, was all he said and stood with us looking at the army men through his thick glasses. It meant a lot for him to be standing with us, with the people of Kunan Poshpora, against a common oppressor.”³¹²

On the other hand, there were also protestors who used the space to voice their grievances against other forms of administrative violence they faced under the military occupation. In 2014, during the run-up to the J&K state legislative elections, Mir Saifullah, the incumbent candidate from Kupwara, set up electricity distribution systems in several villages in the district, in the hopes of securing more votes³¹³. However, as soon as the transformers were set up, the power department snapped electricity supply. This led to widespread outrage amongst local residents. The hearing of the army revision petition coincided with this occurrence; as the SGKP activists would drive up to the sessions court, in 2014, they would often see local protestors clamoring for local infrastructural improvements.³¹⁴ Often such local protestors demanding electricity in Kupwara would show up at the protests outside the courthouse staged by the Kunan Poshpora petitioners.³¹⁵ Batool writes:

“Some people would come up and ask us if the protest was about electricity. It was ironic; in a place where people should have been demanding justice for their men and women, electricity had become the most important issue. But that is what happens in a militarized zone, a crime committed in the past is forgotten, over time other issues of daily life take over. In a conflict, when a crime becomes rampant, human rights, dignity and individual and collective worth take a backseat. The crime loses its impact. And the army and the state struggle hard to keep it that way.”³¹⁶

While the irony of the situation should not be discounted, it would appear shortsighted to discard the location of such voices as irrelevant to the Kunan Poshpora incident. The frustration directed

³¹² Ibid, 182-183.

³¹³ Rouf Pampori, “Kupwara Villagers Suffer from Respiratory Diseases in Absence of Electricity,” 5 Dariya News, March 17, 2017, <https://www.5dariyanews.com/news/187170-Kupwara-villagers-suffer-from-respiratory-diseases-in-absence-of-electricity>.

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Batool et al., *Do You Remember Kunan Poshpora?* “Inquiries and Impunity,” 183.

at local Kashmiri political parties, who work with J&K police, and help the Indian state drive wedges into the Kashmiri voice demanding freedom from India, is part and parcel of the Indian occupation machine. Therefore, the ex-militant and the protestor demanding electricity supply in Kupwara were both integral parts of the larger resistance launched by the Kunan Poshpora PIL. It provided Kashmiris from disparate experiences an opportunity to collectively demand justice for their respective situations. Even if they disagreed on the means that needed to be employed, they found solidarity in resisting their common oppressor—the Indian state.

In another instance reported by *Greater Kashmir* on December 2, 2014, Kunan Poshpora survivors and their supporters surrounded the polling booth at the Government High School in the village, demanding that justice be administered.³¹⁷ Holding black flags and sticks, they picketed the polling booth and registered their protest by boycotting the elections. Some of the protestors told reporters that they had also boycotted the 2014 parliamentary elections that put Indian prime minister Narendra Modi into office.³¹⁸

The story of the survivor whose two year old daughter was permanently disabled because the soldiers had trampled on her during the rape was particularly moving:

“The soldiers looted my chastity and even trampled a leg of my two-year old daughter, rendering her physically challenged. My son crossed Line of Control for arms training to avenge my rape and he too fell to bullets of army in an encounter, after his return. They shattered my happy family and are yet to be punished.”³¹⁹

Protestors like her claimed, “By boycotting the elections, we want to protest [the] indifferent attitude of the government towards us”, while another observed, “It has been over three decades since our lives were shattered by army soldiers and still we are awaiting justice.”³²⁰ The faith in

³¹⁷Greater Kashmir, “Kunan-Poshpura Rape Victims Lock Polling Booth, Stage Protest,” *Greater Kashmir*, December 16, 2014, <https://www.greaterkashmir.com/news/kashmir/kunan-poshpura-rape-victims-lock-polling-booth-stage-protest-2/>.

³¹⁸ Ibid.

³¹⁹ Ibid.

³²⁰ Ibid.

institutional forms of justice, however, were neither absolute nor consistent, for another survivor harangued those who chose to vote in the elections they were campaigning to boycott:

“Those who voted do not have any respect for women and have bartered our chastity and sufferings for jobs and other petty benefits. This indelible ink on their finger will continue to haunt them.”³²¹

Another survivor was even more forthcoming in her position on the Indian state and the pro-India political parties that ran for elections in Kashmir:

“No money can compensate our sufferings. [...] The pro-India leaders and successive regimes have added insult to our injuries by denying us justice. By voting, we cannot trade our plight in lieu of so-called development.”³²²

In sum, the contradictions that riddled the political positions held by the survivors of Kunan Poshpora, and the diversity of individuals that the protests attracted, emphasize that the categories of legal and non-legal resistance in the context of state violence in Kashmir are fuzzy. Distinguishing ‘civilian’ from ‘militant’ is therefore a redundant task, an attempt by the colonial state to impose its manufactured categories onto a movement that is largely united in its end goal—liberation from state violence. A survivor of Kunan Poshpora captures this perfectly:

“We have chosen to resist in ways that range from a simple curse or a kangri thrown at an armed officer trying to molest us, to participation in stone throwing, street protests, and mass funerals, to supporting the armed struggle and organizing and working in civil society to express our political opinions and affiliations.”³²³

Therefore, a study of political resistance in the context of Kunan Poshpora etches the agency of the ‘civilian’ as a resistor of the state, and normalizes the fullest realization of all the contradictory and complementary avenues of resistance triggered by a legal case including non-institutional forms of resistance.

³²¹ Ibid.

³²² Ibid.

³²³ Batool et al., *Do You Remember Kunan Poshpora?*, “Kunan Poshpora and Women in Kashmir,” 4.

CONCLUSION

Earlier, this chapter argued that the petitioners' justification of the pursuit of legal resistance stems from the resistance movement's internalization of externally constructed binaries. That there is a need to justify Kashmiri legal resistance, and acknowledge that the pursuit of justice through legal means will be impeded by the law's structural inefficacy, regurgitates the state's characterization of legal resistance as tame, and therefore, irrelevant. It also reinforces the state-imposed binary of 'militant' and 'civilian', implicating the resistance movement itself in the self-sabotaging task of prioritizing one front of resistance over another, in turn furthering the colonial tactic of 'divide and rule'. In the process, emphasis is shifted from what unites the movement to what divides their means to the end. This posturing, as adopted by the SGKP activists in the book and interviews outside, quite evidently strips the Kashmiris participating in the process of legal resistance of their agency. Ultimately, regardless of what their intention may have been in participating in the petition, they find themselves entrapped in a form of diseased resistance because their representatives—in this case the SGKP activists—believe that this is their only recourse to justice.

The collaboration between the activists and the Kashmiri voices they help uplift through the case reclaims some of the agency lost by carving out space for the survivors outside of the domain of the law. Their voices are used at court to fill gaps in the state archives and challenge lies that the state has manufactured. The activists are then able to package this information and elevate it before the court, which in turn helps turn the world's attention to the incident, through the media and human rights watchdogs. Both in the courtroom and outside, petitioners and their allies are able to have their stories documented, which is an active and relentless struggle against the

pressures of state-instituted amnesia.³²⁴ The attention attracted in such cases helps highlight to the public eye the violence of the legal systems within which legal resistance is staged. For instance, reports by Human Rights Watch, Amnesty International, and human rights agencies of the United Nations draw heavily from the detailed exposure of legal violence within which the Kunana Poshpora survivors found themselves.³²⁵ Using this as evidence, they articulate to an international audience the need for self-determination in Kashmir, extending to petitioners', a direct hand in molding international law.³²⁶

However, agency is fully exerted only when Kashmiris are able to express their contrary and incongruous pursuits of justice within the uncompromised framework of anti-India resistance. This challenges the blindspot in the Indian-manufactured conception of binary Kashmiri resistance that fails to grasp that a Kashmiri's pursuit of criminal justice through the rule of law can occur in conjunction with their political resistance (both violent and otherwise) to India's monopoly over the legal system itself. Therefore, the political resistance around the legal case centering Kunan Poshpora, much like most other legal battles by Kashmiris against Indian state violence, amplifies the distinct complementarity of multiple means of resistance and purges its imagination of artificially fostered divisions. Ultimately, by playing the space that legal

³²⁴ "It was, however, clear that among the state's many tools of oppression, an important one was erasing the memories of human rights violations, or worse still, overwriting such memories with an equally gruesome offence. Our group of women came together to undo the enforced official obliteration of public memory: the biggest injustice that could ever have been perpetrated against the survivors of the mass rape of 1991."

Batool et al., *Do You Remember Kunan Poshpora?*, "Kunan Poshpora and Women in Kashmir," 4.

³²⁵ Asia Watch Committee and Physicians for Human Rights, *Rape in Kashmir*; Amnesty International, "Rape and Ill-Treatment of Women in Kashmir"; Office of the United Nations High Commissioner for Human Rights. *Update of the Situation of Human Rights*. Each of these documents reference testimony from Kunan Poshpora to make a case to the international community about human rights violations under Indian military rule.

³²⁶ The International Peoples' Tribunal on Human Rights and Justice in Indian-Administered Kashmir [IPTK] and The Association of Parents of Disappeared Persons [APDP], *Structures of Violence: the Indian State in Jammu and Kashmir* (Srinagar, Jammu and Kashmir: The International Peoples' Tribunal on Human Rights and Justice in Indian-Administered Kashmir (IPTK) and the Association of Parents of Disappeared Persons (APDP), 2015), 3-6. In this report, civil society organizations affiliated with the human rights agency JKCCS make a persuasive case arguing for criminal accountability on the part of military personnel engaged in military violence in Kashmir through the International Criminal Court.

resistance has created for the Kashmiri resistance in complex ways, they break through the violent restrictions of consistency that restrain the resistance movement. In the end, the simplest way to accost the innate tension between using the state's law to resist the state, is to characterize the tension for what it is—an external imposition.

CONCLUSION:

Towards a Subaltern Recasting of the Law

The cases of *Beit Sourik* and Kunan Poshpora help identify two sources that mount opposition to the exercise of legal resistance. The first is quite predictably the post-colonial, liberal, democratic state, which, by design, is incapable of accepting any form of political expression that threatens its majoritarian hegemony. The second, strikingly, is opposition mounted from within the resistance movement, that questions, often condescendingly, the ability of legal actors to exert agency unimpeded by the state.

The colonial state's opposition to legal resistance is sublime. In its attempt to legitimize its political hegemony, it is compelled to facilitate the expression of heterogeneity in its constituent political discourse. Therefore, as both *Beit Sourik* and Kunan Poshpora highlight, the ability to seek justice through the law is available to those who oppose the state. However, the state exclusively decides what the law is, how it is administered and when it is enforced. Therefore, even though the petitioners can participate in the law, there is a limit on what they can ask for through its means. In the case of *Beit Sourik* for instance, the Palestinian legal counsel Dahleh is compelled to argue in terms of legal precedents set by the Israeli high court that he politically opposes. In fact, his argument is so streamlined that he cannot register his opposition to the Israeli occupation of the West Bank in the court, as that might lose him the favor of the judges. On the other hand, in the legal battle surrounding Kunan Poshpora the state monopolizes the legal and the criminal justice systems. Therefore, even though a survivor of rape is permitted to

register a report before the police under the law, officials, operating under state pressures of corruption and bribery may not be able to document the report.

It is the state's monopoly over justice that accounts for the internal cynicism within the resistance movement about the employment of legal resistance. Those who oppose legal resistance question the emancipatory ability of the law when it is in the clutches of the oppressive state. For instance, supporters of militancy in Kashmir told the Kunan Poshpora petitioners that they could not foresee a future in which the Indian state would arrest the perpetrators of the rape.³²⁷ On the other hand, Palestinian human rights organizations express skepticism about employing of the oppressor's law against the oppressor. As a consequence of the doubt that is cast at legal resistance, activists who employ the law as a form of resistance are compelled to justify why such an exercise is, in fact, legitimate. This is particularly evident in the case of Kunan Poshpora, where the advocates of the PIL repeatedly confront their purpose in registering the PIL.

To this end, *Beit Sourik* and Kunan Poshpora petitioners have emphasized in their arguments that streamlined victories within the institutional structure of legal resistance are a positive and intentional assertion of agency. Contrary to the notion espoused by the defenders of the state that participation in the law legitimate its jurisdiction over the petitioner, the legal resisters in Kunan Poshpora and *Beit Sourik* have shown that the marginalized often exercises their agency within the existing structure to wrangle benefits, while still sharing political space with those resisters who mount militant and political protest against the state. The participation of the *Beit Sourik* petitioners in protests where anti-occupation slogans are raised, while also framing their legal case in a manner that conditionally accepts the occupation emphasizes the fluidity of categories of legal resistance. Similarly, the Kunan Poshpora survivors who picketed local legislature elections in 2014 show that a legal resistor moves between categories. A survivor who seeks

³²⁷Batool et al., *Do You Remember Kunan Poshpora?*, "People Who Remember," 161-162.

compensation from the state can also protest her neighbour's participation in elections that extend power to the state.

This, in turn, has amplified the categories of hierarchy that exist within intellectual conceptions of resistance. As subaltern scholarship has shown, resistance, at least in intellectual spaces does not oppose power, but rather shows the levels of power that exist between different layers of social interaction. Therefore, the posturing of non-legal resistance as superior to legal resistance is the reiteration of the power dynamic between the state and the coagulation of the various kinds of resistance that oppose the state. Consequently, by refusing to acknowledge the ability of the subaltern to carve out a distinctive space within the system of oppression in which it operates, critics of legal resistance strip such movements of their agency, reiterating colonial binaries that they are seeking to repudiate in their work.

The way to steer clear of this pitfall is to acknowledge the power dynamics that shape understandings of resistance categories, and repudiate, with intent, the subconscious repetition of the colonial logics within spaces resisting them. To do so, it is important to recognize the fuzziness of categories between different means of resistance, to centralize the subaltern's mobility between resistance categories, and to understand that the subaltern's engagement with the law does not oppose, but fortifies, resistance of the law. Future work, in the fields of legal theory and jurisprudence, can therefore transition from developing a critical understanding of how subaltern resistance engages with the law to a positive understanding of how the subaltern legal resistor molds, influences, penetrates, and ultimately subverts the violence of the law.

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