

## **PROBLEM OF SECURITY-CENTRIC APPROACH TO TERRORISM AND THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 1990 : A STUDY OF THE MACHIL ENCOUNTER IN JAMMU AND KASHMIR**

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### **Abstract**

*The decades of insurgency and counter-insurgency in the state of Jammu and Kashmir have taken a terrible human toll on all sides. Hardly a day passes when the killings either at the hands of the militants or the security forces do not take place in the state. If the militants have targeted the state forces, their informers, the human rights record of the state forces has been equally appalling. The innocent civilians have been the worst sufferers since the onset of militancy. The paper, however, focuses on encounter killing of three Kashmiri youths at Machil in the border belt of Kupwara district in north Kashmir. The state must ensure that security forces deployed for combating terrorism act within the bounds of law and not become law unto themselves.*

### **I. Introduction**

### **II. The Machil Encounter Case**

### **III. Conclusion**

#### **I. Introduction**

Terrorism has become a serious threat to human existence. According to the UN General Assembly's 2000 Resolution "acts of terrorism in all its forms and manifestations are aimed at the destruction of human rights and at a creation of an environment that destroys the right of people to live in freedom from fear".<sup>1</sup> Further it reaffirmed that "all measures to counter terrorism can never be justified in any instance, as a means to promote and protect human rights."<sup>2</sup> To counter the menace, the United Nations Security Council adopted a resolution 1373 on September 28, 2001 which made it obligatory for states to take appropriate measures and to co-operate in the fight against terrorism. In addition, a global war on terrorism was also declared. However, keeping in view the implications of the resolution, the UN Human Rights Committee stressed that "fear of terrorism does not become a source of abuse of human rights".

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<sup>1</sup> See Upendera Baxi, *Human Rights in a Posthuman World: Critical Essays* 168 (Oxford University Press, 2007).

<sup>2</sup> A/Res/54/161, 24 February 2000, quoted in *ibid.* Also "The UN Security Council and Terrorism", in Andrea Bianchi (ed.), *Enforcing International Law Against Terrorism* 83-102 (Cambridge: Cambridge University Press, 2004).

In case of Jammu and Kashmir, the trajectory of terrorist violence since 1989 onwards has manifested in the form of various types of violations like killings, maiming, custodial deaths, fake encounters, torture, abductions, rape, extortions, destruction of property, imposition of religious codes and atrocities on non-believers and minority communities resulting in massive exodus of people from the Kashmir valley. It has left deep scars on the body and soul of Kashmir and Kashmiriyat exemplifying tolerance, amity and brotherhood. The militancy in the state undoubtedly has affected the ‘fabric of amity and oneness which remained impervious to communal tensions and rioting, so common in many other parts of the country, even at the worst of times’.<sup>3</sup> Violations by the militants have jettisoned the Indian constitution, particularly article 21 which guarantees the right to life and personal liberty. Likewise, it has betrayed the objectives and spirit of various international human rights and humanitarian Law. These laws apply to both the state forces as well as to the militants.

With a view to tackling the menace of terrorist violence and protecting freedom and human rights of people in Jammu and Kashmir the authorities have enacted and implemented various extraordinary laws from time to time to enable legal powers to security forces and law enforcing machinery. In *People’s Union for Civil liberties v. Union of India*<sup>4</sup>, the Supreme Court observed that certain “additional” and “unusual powers” have to be given to deal with terrorism.<sup>5</sup> Paradoxically, the anti-terrorist laws meant to combat insurgency and terrorism have, more often than not, contributed to repression and violation of civil liberties as it has given unbridled power to the armed forces, undermining the freedom and rights of the people in the state.<sup>6</sup> The actions of the security forces on the pretext of maintaining law and order and safeguarding the unity and integrity of the country have had often resulted in excesses like torture, custodial deaths, forced disappearances and fake encounter. According to the National Human Rights Commission statistics, of the 2,560 encounter cases reported to the Commission since October 1993, 1,224 were fake.<sup>7</sup> The incidents of fake encounter in the state of Jammu and Kashmir has posed a challenge to democracy, civil society and the rule of

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<sup>3</sup> See, P.S. Verma, *Jammu and Kashmir at The Political Crossroads*, v (Vikas Publishing House, 1994).

<sup>4</sup> (1997) 3 SCC 433.

<sup>5</sup> *Id.* at para 6.

<sup>6</sup> Among the various stringent laws implemented in the state include: the Subversion and Sabotage Act, 1965; the Public Safety Act, 1978; the Terrorist and Disruptive Activities (Prevention) Act, 1987; Armed Forces Special Powers Act (J&K), 1990; the Jammu and Kashmir Disturbed Areas Act, 1992; Prevention of Terrorist Act, 2001 and the Unlawful Activities (Prevention) Amendment Act, 2008.

<sup>7</sup> Editorial, “Extrajudicial Executions” 50 (15) *EPW* 7 (2015).

law. Some have observed that “in Kashmir the immediate task of human rights groups should be to focus attention on preventing custodial deaths.”<sup>8</sup> In many cases of extra-judicial execution of the boys picked up by the police and security forces for one pretext or another, the impression in Kashmir is that they have rarely returned alive. The police and the security forces in such cases have maintained that the victims were killed in shoot-outs or “encounters”. Whereas the witnesses have claimed that the victims had been in detention before the alleged shoot-outs or that the security forces resorted to shooting even though they could have arrested the suspects. A human rights group called the Jammu and Kashmir Coalition of Civil Society (JKCCS), in its report ‘Buried Evidence’, recorded cases of over 50 people who were allegedly killed by the Indian army and state police and branded as “terrorists”, but who were later found to be innocent civilians.<sup>9</sup> The State Home Department in reply to a query under the Right to Information Act on February 23, 2012, put the number of cases of custodial killings and fake encounters that are pending with the government in which army men are said to be involved in preliminary investigations at 70. Further, the figures offered by the state government put the number of fake encounters reported in the state at 26 in the four years between July 2011 and July 2015.<sup>10</sup> Most of all, the Association of Parents of Disappeared Persons (APDS),<sup>11</sup> set up by the relatives of disappeared persons in 1995-96 and a constituent of the JKCCS, alleged that more than 8000 people had disappeared in the state during militancy. While blaming the security forces for enforced disappearances, the APDS has staged frequent sit-in protests in Srinagar and demanded an impartial probe into such cases.<sup>12</sup> In a written reply to the query of Peoples Democratic Party (PDP), the then government informed the house that only 1,378 persons have disappeared during the last 20 years, while as four fake encounters have taken place in the state since 2002. The reply states that 121,13,23,195,275,76,235,225,19,17,19,03,05,03,47 and 52 persons have gone missing

<sup>8</sup> Prabhu Ghate, “Kashmir: The Dirty War” 37(4) *EPW* 313 (2002).

<sup>9</sup> Faisul Yaseen, “Matter of Routine”, *Frontline*, Nov. 25, 2016.

<sup>10</sup> *Ibid.*

<sup>11</sup> The relatives of the disappeared people set up the “Association of Parents of Disappeared Persons” (APDP) in 1994. The Association is chaired by a lady, the mother of one of the disappeared persons named Javed Ahmad Ahanger. Its activities are coordinated by human rights advocate Parvez Imroz, who for several years has sought judicial remedy for the disappeared and redress for other human rights violation in the state. In public meetings, members of the Association have repeatedly demanded that authorities reveal the whereabouts of their missing relatives or “if they are dead, tell us so that we do not have to live in this terrible uncertainty.” See Amnesty International, *India: If they are dead, tell us: Disappearances in Jammu and Kashmir* (AI Index: ASA 20/02/99).

<sup>12</sup> *The Tribune*, Jul. 30, 2007.

since the armed rebellion broke out in the valley.<sup>13</sup> The United Nations Office of the High Commissioner for Human Rights (OHCHR) in its first ever report on Kashmir emphasised the “the urgent need to address past and ongoing human rights violations and to deliver justice for all people in Kashmir who have been suffering from seven decades of conflict”.<sup>14</sup> The report titled “*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 Balistan*” came out on July 14, 2018. The government, however, has dismissed the report as “fallacious, tendentious and motivated”, violating “India’s sovereignty and territorial integrity”.<sup>15</sup>

The Supreme Court has been confronted with many encounter cases from time to time.<sup>16</sup> It has held in several cases that matters of encounter deaths are to be inquired into thoroughly. In 2014, the Apex Court in *People’s Union for Civil Liberties v. State of Maharashtra*,<sup>17</sup> had laid down as many as sixteen guidelines to be followed in the matters of investigating police encounters. One of the guidelines requires that in case of encounter death, an FIR shall be registered and the same shall be forwarded to the court under section 157 of the Code of Criminal Procedure (CrPC) without any delay. More importantly, no out-of-turn promotion or instant gallantry rewards shall be bestowed on the officer concerned after the occurrence. In *Extra Judicial Execution Victim Families Association (EEVFAM) v. Union of India*<sup>18</sup>, the bench while reiterating the importance of accountability for human rights violations by the police and security forces held that allegations of excessive force resulting in the death of a person had to be inquired into thoroughly. The bench comprising Justices Madan B. Lokur and U.U. Lalit directed that judicial inquiries are to be held after encounter deaths.

The general feeling in Kashmir is that the laws like Armed Forces Special Powers Act (Jammu and Kashmir) 1990, have been used as a shield to cover up the abuses, atrocities and offences perpetrated by the police and army personnel. Section 4 of the Act empowers

<sup>13</sup>“Govt Contradicts its Earlier Claim: Say 1378 Persons Disappeared in 20 Years”, *J&K HUMAN RIGHTS Perspective*, 8 (September-October, 2011).

<sup>14</sup>Available at: [https://www.ohchr.org/Documents/Countries/IN/Developments in KashmirJune2016ToApril 2018.pdf](https://www.ohchr.org/Documents/Countries/IN/Developments%20in%20KashmirJune2016ToApril2018.pdf).

<sup>15</sup>Available at: [https://www.mea.gov.in/media\\_briefings.htm?\\_dt/29978/official\\_spokespersons\\_response\\_to\\_a\\_questions\\_on\\_the\\_Report\\_by\\_the\\_office\\_of\\_the\\_High\\_Commissioner\\_for\\_Human\\_Rights\\_on\\_The\\_human\\_Rights\\_on\\_The\\_human\\_rights\\_situations\\_in\\_K](https://www.mea.gov.in/media_briefings.htm?_dt/29978/official_spokespersons_response_to_a_questions_on_the_Report_by_the_office_of_the_High_Commissioner_for_Human_Rights_on_The_human_Rights_on_The_human_rights_situations_in_K).

<sup>16</sup>*Chaitanya Kalbagh v. State of U.P.* (1989) 2 SCC 314; *R.S. Sodhi, Advocate v. State of U.P.*, 1994 Supp (1) SCC 143; *Satyavir Singh Rathi, Asistant Commissioner of Police v. State through Central Bureau of Investigatio* (2011) 6 SCC 1; *Prakash Kadam v. Ramprasad Vishwanath Gupta* (2011) 6 SCC 189; *B.G. Verghese v. Union of India* (2013) 11 SCC 525; *Rohtas Kumar v. State of Haryana through the Home Secretary, Government of Haryana Civil Secretariat, Chd.* (2013) 14 SCC 290.

<sup>17</sup> Criminal Appeal No.1255 of 1999 (decided on September 23, 2014).

<sup>18</sup> (2013) 2 SCC 493.

officers (both commissioned and non-commissioned) in a “disturbed area” to “fire upon or otherwise use force, even to the causing of death” against any person contravening laws or orders ‘prohibiting the assembly of five or more persons’.<sup>19</sup> The Act has provided legal immunity for the actions of erring armed personnel. Section 7 of the Act requires sanction from the central government before the security forces can be prosecuted in civilian courts.<sup>20</sup> The main objective behind this provision is to protect security personnel from frivolous or vexatious law suits. However, it has more often resulted into legal tussle between the Centre and the state government. In *Vineet Dhanda v. Union of India*,<sup>21</sup> the petitioner questioned the filing of an FIR by the Jammu and Kashmir police against Major Aditya Kumar in connection with the killing of two civilians in Shopian on January 27, 2018 during a stone-pelting incident. He also sought a direction for an inquiry by a sitting high court judge into the case. The issue was whether Army personnel can be prosecuted without prior sanction for their action taken in “good faith.” The petitioner said, such an FIR would affect the morale of the armed forces operating in tough conditions.<sup>22</sup> Acting on the petition the Supreme Court held that the state of Jammu and Kashmir was not justified in initiating criminal proceedings against any army personnel for bona fide action in discharge of their duties or in self-defence. Attorney General K.K. Venugopal, representing the Centre, said there was “a total bar” on such legal proceedings against Army personnel under the AFSPA and such FIRs can be lodged in exceptional circumstances with the prior sanction only from the Centre. The police therefore, cannot proceed with the investigation as section 7 of the Act clearly postulates that prior sanction is needed.<sup>23</sup>

Regarding sanction, as per the data provided by the Government of India, between 2001 and 2016, out of 50 cases received by the Central government for prosecution, the permission was denied in 47 cases, and is pending in three cases, two for kidnapping and one for murder<sup>24</sup>. Consequently, the resentment in Kashmir has often revolved around matters like repeal of

<sup>19</sup> Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, s. 4.

<sup>20</sup> “No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act”. *Ibid*, s. 7.

Apart from section 7 of AFSPA, various other laws require prior sanction for prosecution of members of the armed forces. According to section 45(1) of the Code of Criminal Procedure: “Notwithstanding anything contained in sections 41 to 44, no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central government”. Likewise, section 197(2) of the Code of Criminal Procedure says:

No court shall take cognisance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central government.

<sup>21</sup> Writ petition (Criminal) No. 36/2018.

<sup>22</sup> Available at: <http://news.statetimes.in/sc-to-hear-plea-for-expert-panel-probe-before-fir-against-army-personnel/>.

<sup>23</sup> Available at: <http://www.dailyexcelsior.com/sc-to-examine-jk-plea-on-fir-against-armymen/>.

<sup>24</sup> A.G. Noorani, “The Army above the Law”, *Frontline*, Apr. 13, 2018.

AFSPA and withdrawal of armed forces. Besides the separatists, the major political parties in the Kashmir valley have also demanded revocation of AFSPA laws and reduction of armed forces. More recently, the PDP hailed the recommendations of Amnesty International to remove AFSPA from Jammu and Kashmir. The BJP, on the contrary has opposed any move to remove the Act.<sup>25</sup>

All this makes it imperative to discuss and delineate the nature and extent of violations of civil liberties and freedom of the people by the security forces while fighting terrorism during which they cannot shun their responsibility to observe national and international laws on human rights. The present paper attempts to analyse and examine incidents of extrajudicial killings resulting in violations of human rights at the hands of the security forces with special reference to the Machil encounter (2010) in which three innocent civilians were done to death. This encounter had fuelled peoples' anger against authorities resulting in alienation of common people in the Kashmir valley.

## **II. The Machil Encounter Case**

This case of alleged fake encounter has brought the spectre of extra-judicial executions to the fore. The case relates to an encounter killing of three Kashmiri youths namely, Shahzad Ahmed Khan (27), Mohammad Shafi Lone (23) and Riyaz Ahmed Lone (23) at Machil in the border belt of Kupwara district in north Kashmir. The three victims belonged to Nadihal village in Baramulla district who had been missing since April 27, 2010. In terms of background, Shahzad Ahmad Khan used to earn his livelihood by selling fruits from a road side cart in Baramulla. He has left behind a wife and a two-year old son. Similarly, Riyaz Ahmad lone was working as a repairer of automobiles at a workshop at Sangama town. Whereas Abdul Rashid Lone was simply a daily wage labourer. They were allegedly killed on April 30, 2010 by the army men of the 4 Rajputana Rifles in a "staged encounter".<sup>26</sup> As many as 11 persons, including eight Army personnel, were booked by the police on murder charges. The eight army personnel included a Colonel, Commanding officer of 4 Rajputana Rifles, two Majors, a Subedar and three Sepoys. The other three accused included one civilian, one Special Police Officer (SPO) and one Territorial Army rifleman. The army claimed that it had killed three militants in an encounter at Machil when they were trying to infiltrate into the Indian side from Pakistan. The army also claimed that it had recovered a huge cache of arms and ammunition from their possession. According to an Army spokesperson, "at around 3 a.m. on April 30, 2010, troops deployed on the line of control saw

<sup>25</sup> Dinesh Manhotra, 'BJP Makes Veiled Attack on PDP for Endorsing Amnesty Report on AFSPA', *The Tribune*, Jul. 5, 2015.

<sup>26</sup> Tahira Begum, Letter to the Editor, "Denial of Justice", 49 (2) *EPW* (2014).

three terrorists trying to cross over. On being challenged, they opened fire on our troops. In the ensuing gun fight, all three were killed.” Further the spokesman said “three AK rifles were recovered, besides other war-like stores. On checking, two more AK rifles and a pistol were recovered.”<sup>27</sup>

However, the event triggered controversies when the photographs of the slain youths had appeared in the local media. In fact, the family members recognized them<sup>28</sup> who had filed missing person’s report at the police station. It was followed by violent protests, leaving 113 dead.<sup>29</sup> An orgy of protests and stone-pelting continued unabated for almost three months costing lives, mostly teenagers and young men and closure of business and educational institutions. The spate in violent protests forced the police to investigate the matter. The bodies were exhumed and an autopsy concluded that the three slain youths had been shot at point blank range. “The identification of the three bodies by their families on May 30, 2010 blew the lid off the crime and an Army Major and a Lt. Colonel were implicated along with jawans belonging to the Territorial Army and a SPO.”<sup>30</sup> Subsequently, the major was suspended and the Lt. Colonel was removed for alleged involvement in encounter killing and an inquiry was ordered.<sup>31</sup> The state police called it “a clear case of murder for medal and reward. The three youths were innocent civilians, who were labelled as militants and killed by the Army”.<sup>32</sup> All the eleven accused were charge sheeted in a criminal court at Sopore.<sup>33</sup> Three “counter-insurgents”, including a territorial Army Jawan, SPO and a civilian,<sup>34</sup> who lured the three youths by promising them job of a porter in the Machil sector of the line of control, reported to have pocketed cash from an Army unit for handing over the three men. It was done on the behest of an officer of the army unit. Thereafter, the men in uniform had killed the three youth and reportedly earned cash rewards for eliminating “militants”.<sup>35</sup> It was alleged that there was a mechanism of reward of cash and promotions for those killing terrorists in the counter-terrorist operations. According to some, “The whole operation in this case was conducted for the sake of three reasons: money, promotions and appeasing superiors. The villagers who took Riyaz, Shahzad and Shafi got Rs 1.50 lakh- Rs 50,000 for

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<sup>27</sup> *The Hindustan Times* May 1, 2010. Also see, *The Tribune*, May 1, 2010.

<sup>28</sup> “Machil encounter: Army orders high – level probe”, *The Tribune*, May 31, 2010.

<sup>29</sup> Toufiq Rashid, “Life term confirmed for six Army men in 2010 Machil fake encounter”, *Hindustan Times*, Sept. 8, 2015.

<sup>30</sup> Ashish Gupta, Moushumi Basu, (secretaries PUDR), “The Disappeared of Kashmir”, 45(25) *EPW* (2010).

<sup>31</sup> “J&K Fake encounter: Colonel removed, Major suspended”, *The Hindu*, Jun. 7, 2010.

<sup>32</sup> *The Tribune*, May 30, 2010.

<sup>33</sup> *The Hindu*, Dec. 27, 2013.

<sup>34</sup> *Supra* note 31.

<sup>35</sup> *Ibid.*

each of the three victims – and the rest of Rs 4.5 lakh was shared by Army men. The reward for killing a terrorist is Rs 2 Lakh”.<sup>36</sup>

The then Chief Minister, Mr. Omar Abdullah, also said that the Machil encounter had raised questions about several other encounters.<sup>37</sup> The police had arrested three persons who had lured the three victims by promising porter’s job. But it did not arrest the army officers who figured in the charge sheet. However, the police had sent three reminders to the Army for handing over the custody of the officers for their custodial interrogation.<sup>38</sup> A charge sheet was also filed against a Colonel, a Major and seven others in the court of Chief Judicial Magistrate, Sopore.<sup>39</sup> But to stall the proceedings before the trial court, army decided for a court of inquiry.<sup>40</sup> According to the army, since the civil offence has been committed by a soldier on active service, he is first taken into military custody for examination of the facts of the case by a Court of Inquiry. Mention may be made here that the Army Act, 1950, contain provisions that prohibit security forces from investigating or trying ‘civil offences’. However, section 69 of the Act dealing with “civil offences” and section 70 relating to “Civil offences not trial by court-martial” read together, a soldier who commits murder or rape of a civilian will not be tried by a court-martial unless he is on active service, or at any place outside India, or at a frontier post specified by the Central Government by notification in this behalf. The classification of an area as “disturbed” has allowed the security forces to claim the soldiers are considered to be on “active service” as when operating under the AFSPA.<sup>41</sup>

However, the Chief Judicial Magistrate in its order stated that the case falls beyond the option of trial by Court Martial. The trial of the accused persons, therefore, is necessarily to be conducted by a civil court. The order of Chief Judicial Magistrate dated 15<sup>th</sup> July, 2010, was

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<sup>36</sup>Arun Joshi, “Machil Verdict: Army Proves All Doubters Wrong”, *The Tribune*, Dec. 27, 2013.

<sup>37</sup>*Supra* Note 31.

<sup>38</sup>“Colonel, Major Chargesheeted”, *The Tribune*, Jul. 16, 2010.

<sup>39</sup>*Ibid.*

<sup>40</sup>See, *The Hindu*, Dec. 27, 2013.

<sup>41</sup>Section 69 of the Army Act, 1950 in relation to civil offences states that “Subject to the provisions of section 70, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court- martial and, on conviction, be punishable as follows, that is to say, (a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and (b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned”.

Whereas, section 70 of the Army Act, 1950 deals with civil offence not triable by court- martial. It says “A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences (a) while on active service, or (b) at any place outside India, or (c) at a frontier post specified by the Central Government by notification in this behalf”.



assailed in revision petition before Sessions Judge, Baramulla. The Stand taken by the Army was that as the accused were on active service at the time of alleged occurrence and the Commanding Officer concerned should be given an opportunity to exercise the option as regards the Civil Court or Court Martial by which the accused were to be tried.<sup>42</sup> The Revisional Court on 13.12.2010 dismissed the revision petition, observing that the alleged murder of three innocent civilians cannot be considered as part of active service.

Since the civil court in Baramulla and Sopore had rejected the plea of seeking transfer of the case to the army, the army had filed a revision petition in the High Court against the court order challenging the jurisdiction of the civil court to try the accused Army men in the case. In *High Court Of Jammu And Kashmir v. Special Judicial Magistrate*,<sup>43</sup> the High Court on July 4, 2012 quashed both orders of the Chief Judicial Magistrate, Sopore, and the Session Judge, Baramullah.<sup>44</sup> The High Court in its judgment said that the two civilians and a Territorial Army rifleman should be tried by the CJM Sopore while the eight Army personnel should be tried by a general court martial. Subsequently while acting on a review petition by the Army, seeking custody of a Territorial Army rifleman who was in judicial custody, the High Court permitted the army authorities to try the Territorial Army rifleman also under the court martial proceedings.<sup>45</sup>

Thereafter, the army court after a thorough investigation of the case ordered court martial proceedings against six of its men, including two officers, for their alleged involvement in the Machil fake encounter. The court martial proceedings came after a court of inquiry report was submitted.<sup>46</sup> In its report, the inquiry officer has ascertained the role of the accused soldiers and ordered Court Martial against them. All of them were charged under sections 302 (murder), 364 (abduction), 120-B (criminal conspiracy) and 34 (common intent) of the Ranbir Penal Code (RPC) for conspiring and kidnapping three youths on the pretext of giving them jobs and later killing them in Machil, claiming they were militants. Thus, the army's court of inquiry came to the same conclusion as that of the investigation of the police. When this news was disclosed, the families of the three youths killed in fake encounter, expressed

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<sup>42</sup> Section 125 of the Army Act, 1950. Deals with choice between criminal court and court- martial. It says "When a criminal court and a court- martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court- martial, to direct that the accused person shall be detained in military custody".

<sup>43</sup> CMP No. 243 of 2012.

<sup>44</sup> "Government Asked to File Reply on Review Petition by Army", *The Tribune*, Nov. 19, 2012.

<sup>45</sup> Available at: <http://www.tribuneindia.com/2013/20131226/j&k.htm> (last visited on 14 July, 2014). See also "Government Asked to File Reply on Review Petition by Army", *supra* note 44.

<sup>46</sup> Ravi Krishnan Khajuria, "Army Orders Court Martial of 6 Men in Machil Encounter Case", *The Tribune*, Dec. 26, 2013.

satisfaction over the court martial of six soldiers.<sup>47</sup> The verdict of the army court undoubtedly gave them a great respite but the accused soldiers, according to victim's relatives, "deserve to be sentenced to death".<sup>48</sup> Similarly, the civilians who had misled the victims and led them into the Army trap, according to relatives, deserved death sentence.<sup>49</sup>

However, the Kashmir based rights groups like the APDP had raised questions about transparency of the court martial proceedings as neither the civilian victims could avail opportunity of being represented by a lawyer in a court martial nor did they have the right to challenge the judgment in higher courts".<sup>50</sup> Whereas, the accused enjoyed all the protection, access and the right to challenge the wrongs of the judgment in the higher courts.<sup>51</sup> In fact, the court martial proceedings were termed as a 'futile' exercise in case of Jammu and Kashmir. According to APDP "How can the same army be trusted to prosecute its personnel for human rights abuse that has institutional mechanisms of impunity and has incentivized policy of encouraging the extra-judicial killings?"<sup>52</sup> This shows that issues such as transparency, representation of families of victims and availability of court martial proceedings need to be addressed. It becomes more important because army court operates in an autonomous and independent manner free from any judicial intervention. Regarding this, the Supreme Court in *Union of India v. Major A Hussain*<sup>53</sup> had also laid down that:<sup>53A</sup>

..... (t)hough court-martial proceedings are subject to judicial review by the High Court under article 226 of the Constitution, the Court-Martial is not subject to the superintendence of the High Court under article 227 of the Constitution. If a Court-Martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. ....

Though doubts were raised about fairness of court martial proceedings, the military court sentenced the six soldiers, including two officers, to life imprisonment in November 2014.<sup>54</sup> The court found that the men were lured to Kupwara district with promises of jobs

<sup>47</sup> Amin Masoodi, "Machil Encounter: Victim's Families Welcome Army Verdict", *The Tribune Online Edition*, Dec. 26, 2013. Available at: <http://www.tribuneindia.com/2013/20131226/j&k.htm> (last visited on 14 July 2014).

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> "Machil Court Martial Lacks Transparency, Claims Right Body", *The Tribune*, Dec. 29, 2013.

<sup>51</sup> Tahira Begum, *supra* note 26.

<sup>52</sup> "Army's Court Martial Decision Futile, Obfuscation" *APDP News*, Dec 28, 2013. Available at: <http://www-risingkashmir.com/armys-court-martial-decision-futile-obfuscation-apdp/> (last visited on 5 October, 2018).

<sup>53</sup> (1998) 1 SCC 537. ;Gautam Navlakha, "Impunity, War and Justice", *Sanhati*, May 1, 2014, available at: <http://sanhati.com/excerpted/9771/#sthash.uo16ZWiu.dpuf> (last visited on October 2, 2018).

<sup>53A</sup> *Id.* at para 23

<sup>54</sup> *Supra* note 29.

and money but shot dead by the troops in the staged encounter near the border with Pakistan. The Territorial Army man was, however, exonerated by the Army Court. The remaining two accused (a civilian and SPO) were facing trial in the Baramulla Sessions Court. However, the verdict requires confirmation by the commander and the same was confirmed by the General Officer Commanding-in-chief on 7<sup>th</sup> September 2015. The case, however, took a fresh twist when the military court sentenced the Territorial Army man also to life imprisonment. It all happened when the court martial recommendations were sent to the reviewing authority for confirmation. The General Officer Commanding-in-chief confirmed the life sentence awarded to five soldiers on 7<sup>th</sup> September 2015 and also asked the court martial to relook at Shah's case citing legal opinion. When the fresh court martial was convened on the orders of Northern Army commander to re-examine Shah's culpability, the army court found his culpability to be proportionate to life sentence as he was accused of luring the civilians on the pretext of offering them jobs.<sup>55</sup> The punishment awarded to Shah, according to some, by the second court martial is a clear message that the army will not hesitate to punish "unprincipled soldiers".<sup>56</sup> The erring soldiers have been identified as Colonel Dinesh Pathania, Captain Upendra, Havildar Devendra Kumar, Lance Naik Lakhmi, Lance Naik Arun Kumar and Rifleman Abbas Hussain.<sup>57</sup> Five of the convicts are lodged in jail in their respective hometowns. Territorial Army man Abbas is lodged in a jail in Jammu.

The verdict of the military court to order court martial against army men and sentencing them to life imprisonment was widely welcomed as it had imparted justice to the victims and their families. It was also the first time in Kashmir that army personnel, including colonel, were given life term in court martial proceedings for extra-judicial killings. It was in sharp contrast to the Pathribal encounter<sup>58</sup> in which five persons were killed by branding them as foreign militants. The army also lauded the verdict and claimed that the Army court had given exemplary punishment to its soldiers. The local people and the relatives of the deceased while welcoming the verdict wanted an exemplary punishment for the two civilians (i.e. a civilian and the SPO) who lured the three youths. The mother of one of the victims said "justice will be complete only when all accused, including the civilians, get death penalty".<sup>59</sup> Moreover, the people while welcoming the conviction of the army men involved in the fake encounter demanded similar actions in other cases like

<sup>55</sup> Rahul Singh, "Another Soldier Gets Life Term for Machil Killings", *Hindustan Times*, Mar. 15, 2015.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Supra* note 29.

<sup>58</sup> *General Commanding Officer v. CBI* (2012) 5 SCR 599.

<sup>59</sup> Majid Jahangir, "The Machhil Fake Encounter Case: Reactions to the Army Judgment", *The Tribune*, Nov. 14, 2014.

Pathribal in which perpetrators had escaped punishment. Mirwaizumar Farooq, spokesman of moderate Hurriyat also termed it positive.<sup>60</sup> Some interpreted the verdict as “a major image makeover by the army”.<sup>61</sup>

However, after the verdict, the six convicts approached the Armed Forces Tribunal (AFT), New Delhi, challenging the verdict of the Summary General Court Martial (SGCM). They have challenged the order on grounds of being arbitrary and against facts and figures. Consequently, the Armed Forces Tribunal (AFT) issued notices to the army authorities<sup>62</sup> and surprisingly on 26 July 2017, it suspended the sentences given to five of them and also given them bail. The sixth convict, rifleman Abbas Hussain Shah of the Territorial Army, was already on bail. The lawyer of the army said “We had pleaded that on the grounds of parity the other convicts should also get the benefit of being released on bail. And this has been appreciated by the Tribunal.”<sup>63</sup> The Tribunal gave four reasons as to why bail was given to army personnel. Firstly, those killed were wearing Pathan suits, which are worn by terrorists. Secondly, they were found to be roaming close to the LoC. “that too during the night when infiltration from across the border was high”. Thirdly, arms and ammunition were recovered from them. Lastly, parents of those dead delayed filing FIRs to gain sympathy and monetary compensation.<sup>64</sup>

The Armed Forces Tribunal verdict to suspend and free the accused has turned out to be a major setback for the families of victims and created a fear for safety and a demand for justice. The father of one victim said, “We don’t accept this verdict”. Shahzad’s mother, Asha Begum said it would be murder of justice if the soldiers are released. Mohammad Yousuf Lone, whose son was one of the victims said, “We have no hope of any justice now”. “Which law is this that you sentence them to life sentence and then within a few years decide to release them? I think they should kill us all –me and my family- so that we can get rid of this agony” he said. Reacting to the suspension of sentence, father of the third victim, “If they were guilty before, how are they innocent now?” Worried about the safety of his family, he said, “When they did not even refrain from killing our children, why would they spare us now after coming out of the jail”. He warned “If they release them, all the three families will commit suicide collectively and responsibility will lie with state.” The families alleged that the former counter insurgent

<sup>60</sup> Peerada Ashiq “Machil Verdict a New Beginning, Says Separatists”, *Hindustan Times*, Nov. 14, 2014.

<sup>61</sup> *Ibid.*

<sup>62</sup> Majid Jahangir, “Army Gets Notice as Six Convicts Move Tribunal”, *The Tribune*, Nov. 23, 2015.

<sup>63</sup> HT Correspondent, “Tribunal Stays Life Term to Five Army Jawans”, *Hindustan Times*, Jul. 27, 2017.

<sup>64</sup> Ashok Bagriya, “Terrorists Wear Pathansuits: How Tribunal Justified Soldiers’ Bail”, *Hindustan Times*, Jul. 29, 2017.

Bashir Ahmad Lone, who had allegedly taken the three youth to army and is in jail, was already sending them threats from behind the prison walls.<sup>65</sup> The families of the three victims, thus, approached the district commissioner of Baramulla, asking them for the safety of their lives. The mother of one of the victim said, “those locals who lured our sons and got them killed have the power and the money. We aren’t safe now”.

### III. Conclusion

In brief, the above discussion and analysis regarding the counter insurgency operations in the Kashmir valley reveal that the actions of soldiers equipped with stringent laws as a mechanism of legal safeguards in disturbed conditions, sometimes, have resulted in violations of human rights of innocent people. It is alleged that pecuniary gains of money, promotion or awards have also tempted them to commit such crimes. It may not be true in all cases. However, on the basis of the Machil encounter any one can guess about the fate of rights of people in the trouble-torn areas of Kashmir and other parts of the state. Interestingly enough, in the event of such violations at the hands of security forces, the local people and civil liberty groups have preferred judiciary to impart justice and opposed the system of army court of inquiry. Whereas the accused army personnel have opted for the court martial. Though the judgment awarded by the army court in the case gave a respite to victim’s relatives but suspension by the Tribunal was a shock for the victim’s family. The victim’s family were expecting the death sentence for the accused army men as well as those who had allured the three civilian victims into the army trap. The affected families and local groups, while expressing resentment against the reversal of decision by AFT, have alleged that neither the victim avail opportunity of getting represented in a court martial nor can challenge its judgment in courts. The Army Act, 1950 is silent about the victim’s right to defence in Army courts.<sup>66</sup> Amnesty International in its report said that no member of security forces over the past 25 years of militancy in the state has been tried for human rights violations in civilian courts.<sup>67</sup> Lack of transparency tends to be another hassle. Moreover, the immunity

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<sup>65</sup> *Supra* note 63.

<sup>66</sup> S. 164 of the Army Act, 1950 specifies remedy against order, finding or sentence of court- martial. (1) Any person subject to this Act who considers himself aggrieved by any order passed by any court martial may present a petition to the officer or authority empowered to confirm any finding or sentence of such court-martial, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates. (2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any court- martial which has been confirmed, may present a petition to the Central Government, 1[ the Chief of the Army Staff] or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, 1[ the Chief of the Army Staff] or other officer, as the case may be, may pass such order thereon as it or he thinks fit.

<sup>67</sup> Available at: <https://www.amnesty.org/download/Documents/ASA2018742015ENGLISH.PDF> (Visited on July 10, 2015).

provided under section 7 of the AFSPA has exacerbated the problem resulting in alienation of the people. According to a report, section 7 of the Act, “encourages a culture of impunity and further recurrence of violations”.<sup>68</sup>

Violence perpetrated by militant groups must be dealt with, but it should be done without violating the basic rights of civilians. It has rightly pointed out by the Supreme Court “terrorism often thrives where human rights are violated”, and the lack of hope for justice provides breeding grounds for terrorism”.<sup>69</sup> Though the army and the security personnel have been accused of violating human rights, it does not mean that they themselves have not faced any violation of their rights at the hands of terrorists. As a matter of fact there is escalation in the attack on police forces and their families by the militants resulted in the killing of at least 27 policemen in the current year in addition to the 27 killed in 2017.<sup>70</sup> The Security forces have also paid a high price. As many as 71 have reportedly lost their lives up to September 2018.<sup>71</sup> Keeping in view of the spate of fidayeen attacks and indiscriminate killing of the security personnel, there is no doubt that the security forces are operating in a difficult situation and to some extent need the support of extraordinary laws to carry out operations against the militants. However, it does not justify killing of people in fake encounter. While in the existing situation, it may not be possible to repeal the AFSPA, it would certainly be open to amend it. It is imperative that section 7 should be amended by providing that while denying permission for prosecution the Central Government must give reasons in writing which should be subject to judicial review. This apart, cases of human rights violations by soldiers should be tried under the criminal law. The state must ensure respect for human rights and the rule of law by fixing responsibility for human rights violations committed by army officers for promotions and rewards and initiation of legal actions against them.

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<sup>68</sup> Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions. *available at*: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47Add.1\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47Add.1_EN.pdf) (Visited on July 9, 2015)

<sup>69</sup> *People's Union for Civil Liberties v. Union of India*, AIR 2004 SC 456 at 466.

<sup>70</sup> Ajai Sahni, “Nothing New About SPO Killings”, *The Tribune*, Sep. 28, 2018.

<sup>71</sup> *Ibid.*