

AN UNPUBLICISED WAR: A CRITICAL ANALYSIS OF THE PUBLIC SAFETY ACT AND ITS AFTERMATH ON THE DETAINEES OF JAMMU AND KASHMIR

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The eminence of the state of Jammu and Kashmir has been politically controversial for decades. Since 1989, there has been a turbulent political movement in the Kashmir Valley for self-determination and independence, alongside a conflict between state forces and armed separatist groups, in which both sides have committed acts of violence against civilians. The state police and security forces are permitted to use broad powers under laws such as the PSA and Armed Forces Special Powers Act to maintain “public order” or the “security of the state”. The author, acknowledges the right, indeed the duty of the state to defend and protect its population from violence. However, this must be done while respecting the human rights of all concerned. There are accounts of prisoners languishing behind bars for several years awaiting their day in court are not uncommon. Many prisons are between 100% and 200% over capacity, where milieus are squalid and the weaker inmates face serious physical harm among other anguishes. In this study, we examine the current state of the Criminal Justice System prevalent in the state of Jammu and Kashmir and its treatment and causes towards its detainees. Furthermore, we examine one of the most draconian laws applicable in Jammu and Kashmir, Public Safety Act that is being liberally used as a repressive measure to scuttle any dissent, often also victimizing innocent youth. The practice of this Act proves to be a contravention of the prevalent human rights. This paper is an attempt to recognize that delay in process is denial of justice.

Introduction

“Where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is in an organized conspiracy to oppress, rob, and degrade them, neither persons nor property will be safe.”

-Frederick Douglass

Sixty- Eight years since the birth of independent India torture, disappearances and killings sanctioned by the state remain prevalent. ‘India is a vibrant electoral democracy with an abysmal human rights record’ was the 2008 assessment of the Human Rights Watch in relation to the state’s failure to provide adequate redress for victims, and the continuing culture of impunity for security forces responsible for grave human rights violation. The use of such extra judicial measure still pervades every facet of criminal justice system in every Indian state, remaining an enduring legacy and everyday reality for millions of citizens.

Brutal methods are deployed by the police and security forces on the pretext of maintaining the ‘unity and integrity’ of the country. The experiences in Punjab, Kashmir, the Northeast and the so called Naxal affected areas, sanctioned arbitrary powers and draconian laws as a

tool of suppression in the pursuit of law and order and the perceived threat to national security. The courts, the criminal justice system and commissions have consistently failed to deliver justice and strengthen the human rights and constitutional safeguards of victims.

Since early 1990, the valley of Kashmir¹ in the north Indian state of Jammu and Kashmir has been the site of a vicious conflict between Indian security forces and Muslim insurgents demanding independence or accession to Pakistan. In their efforts to crush the insurgency, Indian forces in Kashmir have engaged in massive human rights violations, including extrajudicial executions, rape, torture and deliberate assaults on health care workers. In late 1992 and early 1993, human rights conditions further deteriorated as Indian troops embarked on a "catch and kill" campaign against suspected militants. Since then, summary executions of detainees by security forces have sharply increased.

From the outset, that crackdown was marked by brutality against civilians, including the shooting of unarmed demonstrators, civilian massacres and summary executions of detainees. At the same time, militant groups - who received arms and training from Pakistan - stepped up their attacks, murdering and threatening Hindu residents, carrying out kidnappings and assassinations of government officials, civil servants and suspected informers and engaging in sabotage and bombings. In the three and a half years since the conflict began, at least 6,000, and possibly twice that number, have been killed by all sides and well over 100,000, mainly Hindus, have fled the valley. In 1992 alone, at least 2,000 were reported to have been killed - most of them civilians². Despite the escalation of violence, militant groups continue to command popular support throughout the valley, not necessarily for ideological reasons but because they are seen to represent the only alternative to the government's repressive policies and widespread abuses by the security forces.

The Public Safety Act was brought into effect in 1978, primarily to adopt a tough measure against timber smuggling in the state. It was much later that the act was frequently used to control militancy-related incidents. Under this act, the government can declare any area as 'protected' and exercise authority to regulate entry of any citizen in the protected area. Attempts to forcefully enter the designated areas invite prosecution.

¹The valley of Kashmir lies between the PirPanjal and Karakoram mountain ranges. The term refers to the area that includes the towns and villages along the Jhelum River, from Handwara in the northwest to Anantnag in the south east.

² No precise figure of the number killed is available. The U.S. State Department Country Report for 1990 sites press figures of 1214 civilians, 189 security forces and 890 militants killed. For 1991, the figures were 900 civilians, 1305 alleged militants and 55 security forces. For 1992, the figures were 1106 civilians and 982 militants. However, the figures cannot be considered accurate because official sources cited in such press accounts often describe civilians killed by the security forces as militants. As the Country Report for 1992 notes, many of the alleged militants "died in encounters with security forces or under other suspicious circumstances." See U.S. Department of State *Country Report on Human Rights Practices for 1992*, February 1993. P. 1134. In early 1993, press reports citing records maintained by local hospitals and journalists and lawyers reported that more than twelve thousand people may have been killed since 1989. See, for example, Molly Moore and John Ward Anderson, "Kashmir's Brutal and Unpublicized War." *Washington Post*, June 7, 1993.

The PSA gives J&K government the power to detain anyone who acts “in any manner prejudicial to the maintenance of public order”. To be precise, an individual faces the risk of being detained if he or she is found “promoting, propagating, or attempting to create feelings of enmity or hatred or disharmony on grounds of religion, race, caste and community”. This detention without trial happens under the pretext of maintaining public order. Because these issues are fundamental to any efforts to provide basic human rights protections in Kashmir, we have chosen to highlight them here. The report concludes with a set of specific recommendations and suggestions for amendments to be made in the Public Safety Act, 1978 for all parties and the international community.

1. Article 370: Special Status to the State of Jammu & Kashmir

At the time of independence in August 15th 1947, the State of Jammu and Kashmir decided not to join either India or Pakistan. However, soon Pakistan attempted to annex the State military. Meanwhile, Maharaja Hari Singh signed the “Instrument of accession” with India along with certain concessions for the autonomy of the State. Article 370 in Part XXI of the Indian Constitution grants a special status to Jammu & Kashmir. It is perhaps the most controversial provision of the Constitution of India. It deals exclusively with J&K state that came under the administrative control of the Government of India after the country’s 15-month war that Pakistan started in 1947 to grab sovereignty over that State.³

Termed as the ‘umbilical cord’ of the Indian Constitution, it is the only link between J&K and India. Under *Part XXI* of the Constitution of India, which deals with the “*Temporary, Transitional and Special provisions*”, J&K has been accorded special status under Article 370. Even though included in 1st Schedule as 15th state, all the provisions of the Constitution which are applicable to other states are not applicable to J&K. Further the State has a separate Constitution known as ‘The Constitution of Jammu and Kashmir’, its own State Flag⁵ and its own Anthem called ‘*Quami Tarana*’⁶ “Article 370 of the Constitution would disappear by being eroded progressively.” That hope of Nehru hasn’t been fulfilled till date. Instead, Article 370 has become permanently ‘Temporary’.⁷ The

³Legally and constitutionally the State comprises the territory which, immediately before the commencement of the Constitution of India, constituted what was formerly the princely State of Jammu & Kashmir. However, after the 1947 war, Pakistan came to occupy 1, 15,669 sq. kms. Of the State out of which it gave China 37,555 sq. kms. Through the 1963 Sino-Pakistan Border Agreement. As a result, the control of the Government of India extends to 1, 06,567 sq. kms. or 48% out of the State’s total area of 2,22,236 sq. kms

⁴Originally, Article 370 fell under the Constitution of India’s Part XXI called ‘Temporary and Transitional Provisions’ and Article 370 itself was dubbed as ‘Temporary provisions with respect to the State of Jammu and Kashmir.’ From 1st December 1963, under the Constitution (Thirteenth Amendment) Act, 1962, the title of Part XXI of the Constitution was changed to ‘Temporary, Transitional And Special Provisions’, the word ‘Special’ being the significant addition to the previous title.

⁵Jawaharlal Nehru in Delhi Agreement of 1952

⁶*The Daily Excelsior*, June 24, 2002

⁷Arvind Lavakare; *The Truth about Article 370*; 2005; p-24.

Supreme Court five-judge bench without referring to *Prem Nath Kaul v. State of J&K*,⁸ pronounced a strange decision in *Sampat Prakash v. State of J&K*⁹ ruled that (i) the wording of Article 370 makes no mention of the completion of work of the Constituent Assembly or its dissolution and (ii) the Constituent Assembly recommended that Article 370 should continue with one modification. The modification that the Court alluded to was the 'Explanation' of 15th November 1952. The apex court's verdict implied that just because the J&K Constituent Assembly had so recommended, way back in November 1952, Article 370 should continue. The content of Article 370 restricts the applicability of parliamentary legislation on J&K depending either on the consultation or concurrence. This phenomenon of certain laws of the Indian Parliament not being applicable at all or applicable only in part to J&K is extraordinary.¹⁰ Following Parliamentary laws are not at all applicable to J&K:

- *Indian Penal Code 1860*.¹¹
- *The Prevention of Corruption Act, 1988*.
- *The Religious Institutions (Prevention of Misuse) Act, 1988*¹²
- *The Delhi Special Police Establishment Act, 1946*.¹³ — An exclusion which 'may possibly have serious consequences for India and Kashmir'.¹⁴
- *The Protection of Human Rights Act, 1993*.¹⁵

⁸1959 AIR 749; A Constitution Bench consisting of five judges unanimously held that Article 370 (2) "shows that the Constitution-makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provision of Article 370 (1) is made conditional on the final approval by the said Constituent Assembly in the said matters". It referred to Clause 3 and said that "the proviso to Clause (3) also emphasizes the importance which was attached to the final decision of Constituent Assembly of Kashmir in regard to the relevant matters covered by Article 370". The court ruled that "the Constitution-makers were obviously anxious that the said relationship should be finally determined by the Constituent Assembly of the State itself."

⁹*Mohammed Maqbool Damnoo v The State of J&K*, AIR 1970, SC 1118

¹⁰In the USA in contrast, each of the 50 constituent States has its own Constitution, but every Federal law is applicable to all the 50 States by virtue of Article VI of Part IV of the USA Constitution.

¹¹Jammu and Kashmir has Ranbeer Penal Code

¹²This law prohibits religious institutions from allowing their premises for the promotion of political activity and for storing of arms and ammunition.

¹³The legal powers of investigation of Central Bureau of Investigation (CBI) are derived from this Act. The CBI is today the country's foremost criminal investigation agency. CBI is entry number 8 in the Union List but this entry is, by a Constitution order under Article 370, excluded from Parliament's purview in respect of Jammu & Kashmir.

¹⁴Justice A. S. Anand; *The Constitution of Jammu & Kashmir — Its Development & Comments* 1998, 3rd ed. p. 140.

¹⁵ It does not extend to Jammu & Kashmir in respect of subjects under List II of Seventh Schedule.

- *The Representation of the People Act, 1950.*¹⁶
- *The Representation of the People Act, 1951.*¹⁷

In the same manner certain Constitutional Provisions are exempted from being applicable to J&K:

- *Article 31C*¹⁸
- *Articles 36 to 51*¹⁹
- *Article 51A*²⁰
- *Article 134A*²¹
- *Articles 153 to 217*²²
- *Article 360*²³

Further, the word ‘secular’ was added to the Preamble of Indian Constitution by the 42nd Constitutional amendment in 1976; it is meant to be omitted in respect of J&K. The Constitution of J&K therefore does not proclaim itself to be ‘secular’. What has been ruled by SC as part of ‘basic structure’ of the country’s constitutional framework²⁴ is thus not true of J&K.

2. What is Public Safety Act, 1978?

“There is no justice, no law and order. A security person can do what they want to catch any person. I am not a militant. I just want to study.” – Sultan said as he recovered from his injuries, at the Bone and Joint Hospital, which were sustained during an alleged shootout by the Indian Security Forces.

The PSA, 1978 is one of the most stringent laws to be ordained in J&K, which was primarily brought into the effect to adopt a tough measure against timber smuggling in the

¹⁶Jammu & Kashmir State has its own “People’s Representation Act, 1957” and “Representation of People (Conduct of Elections and Election Petitions) Rules, 1957

¹⁷The Representation of the People Act, 1951

¹⁸Prohibits challenge on certain grounds to laws giving effect to Directive Principles of State Policy set out in Part IV of the Constitution of India.

¹⁹These contain directive principles which need to be applied in making laws. One such directive is to secure a uniform civil code throughout the territory of India

²⁰Lays down 10 fundamental duties of every citizen of India

²¹Empowers the High Courts to give certificate for appeal to the Supreme Court

²²These constitute Chapters II, III and IV of Part VI titled ‘The States’. The provisions lay down procedures, rules, authority etc. relating to the Governor, the Council of Ministers, the State Advocate General, High Courts, and all aspects of State Legislature.

²³Empowers the President of India to make a Proclamation of Financial Emergency if, in his opinion, the financial stability or credit of India or any part thereof is threatened.

²⁴*Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, See also *S. R. Bommai v. Union of India*, (1994) 3 SCC 1 as cited in P. M. Bakshi, *The Constitution of India* (2002)

state. It was much later that the Act was frequently used to control militancy-related incident. Endorsed with great love and affection by the Abdullah government, this act gives unquestionable power to the state authorities to arrest and jail persons without a trial for two years on mere suspicion that he/she may disrupt law and order in the state or may act in a manner prejudicial to the security of the state. The Act bypasses all the institutional procedures and human rights safeguards of ordinary criminal justice system in order to secure a long detention term. Many human rights activists maintain that this Act gives blatant leeway to the authorities to do as they please, often resulting in extreme violence and tortures of the worst kind.

3. Main Cause of the Origin

Omar Abdullah's love for the PSA perhaps stems from the family lineage the law has with. The law was promulgated by the chief minister's grandfather Shaikh Abdullah in 1978 essentially to target Jamaat-e-Islami, which was the principal opposition party at that time. Even though the official use of the Act, albeit on paper, was to prevent timber smuggling, the main ulterior motive was to arm the National Conference Party with immense power against any obstruction. Despite the voices of disagreement with this Act, Shaikh Abdullah got the bill passed on the strength of the brute majority his party enjoyed in the Assembly.

The first person arrested under PSA was a private bus driver Gulam Nabi of Batamaloo, Srinagar. He was President of Kashmir Motor Drivers Association (KMDA) which was a private bus drivers' union. KMDA had fervently supported the opposition Janata Party against Shaikh Abdullah's National Conference in the assembly elections a year earlier (1977). There could hardly be a few dozen forest-looters who might have been arrested under this law but those arrested for voicing against the government ran in thousands. In the pre-militancy era, when political dissent was restricted to contesting elections and opposition to government policies, the frequency with which this law was used is daunting. Many leaders of the Jamat-e-Islami were picked up on mere press statements, and jailed for years. Syed Geelani, as stated by his close aides, has been jailed under PSA for 103 months since the Law came into force in late 70s. Ashraf Sahrayee, another Jamaat leader has spent 112 months in jail on different occasions. Shabir Shah is reported to have spent over 130 months in jail under PSA.

It should not surprise anyone to say that the National Conference leadership enjoys using this Act against its rivals. And much to their joy, no other chief minister has used it as arbitrarily as the Abdullahs'.

In 1987, Farooq Abdullah used PSA capriciously against his political rivals who had gathered under Muslim United Front (MUF) to oppose him in the Assembly elections. The elections were not only largely rigged by the state administration to the advantage of the National Conference but the government also made a massive use of its administrative power to detaining opposition MUF candidates, leaders and activists under PSA.

Omar Abdullah's indiscriminate use of PSA against people—young and old, minors and otherwise—has made the world cry. According to The Economic Times in 2012, 1,332

people have been detained under this Act since 2009. However, despite the numerous protests made for repealing this Act, Omar Abdullah not only remains adamant but also tight lipped about the causes of preserving his alleged legacy. Senior Supreme Court lawyer and BJP leader Ram Jethmalani once blasted Omar Abdullah's government as "Nazi outfit" for making excessive use of PSA.

4. Amendments to the Public Safety Act, 1978

In April 2012, the J&K Government amended the PSA through Jammu and Kashmir Public Safety (Amendment) Act, 2012. The most notable amendment was that no person could be detained under the age of 18.

The following five amendments to the PSA came into force on 18 April 2012,

- (i) Section 8 of the PSA was amended to provide that no person under the age of 18 may be detained under the PSA for offences under sections 8(a) and (a-1) of the PSA.
- (ii) Section 13 was amended to add that the grounds of detention have to be communicated to the detainee within 10 days from the time of arrest and in a language that he or she understands.
- (iii) Section 14 was amended to introduce a maximum term of office for the Chair and members of the Advisory Board. Now, they can hold office for a maximum of three years, which will be extendable for a further period of two years. Prior to the amendments, there was no maximum term.
- (iv) Following the amendment to section 16, the Advisory Board must submit its report to the Government within a period of six weeks from the date of detention. They had eight weeks to do so prior to the amendments.
- (v) Section 18 was amended to reduce the maximum period of detention under the PSA. This was reduced from 12 months to three months, extendable to 12 months, in the case of persons "acting in any manner prejudicial to public order". It was reduced from two years to six months, extendable to two years, in the case of persons acting in "any manner prejudicial to the security of the state".

The J&K Law and Parliamentary Affairs Minister, Ali Mohammad Sagar has described these amendments as a "remarkable achievement".²⁵ People of J&K welcome the repeal of the powers to detain children under the PSA, and believes that the amendments, if applied in practice, would improve the current situation. However, Amnesty International reiterates that the amendments are far from adequate in their present form.²⁶ As part IV of this briefing indicates, several provisions in the PSA still do not comply with India's

²⁵ "Govt reacts to Amnesty's allegations, terms amendments a remarkable achievement" Rising Kashmir, 4 May 2012, <http://www.risingkashmir.in/news/govt-reacts-to-amnesty-allegationsterms-amendments-a-remarkable-achievement-26331.aspx>, accessed 8 October 2012.

²⁶ Amnesty International, Amendments not Enough, Repeal the Jammu and Kashmir Public Safety Act AI Index: ASA 20/019/2012, <http://www.amnesty.org/en/library/info/ASA20/019/2012/en>

international law obligations. However, the amendments do not even go as far as the recommendations made by the Interlocutors in their report.

5. Violation of International Rights

In the 2011 report, Amnesty International explained how the PSA violates India's obligations under international human rights law. In particular, the PSA is inconsistent with provisions of the International Convention of Civil and Political Rights (ICCPR).²⁷ The PSA violates several provisions of article 9 of the ICCPR, which protect the right to liberty. At the time of accession, India made a reservation to article 9 of the ICCPR, declaring that it "shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India." Articles 22(1) and 22(2) of the Constitution provide robust protections for persons arrested in India. However, article 22(3) weakens these protections for persons' subject to administrative (or "preventive") detention. The rights to be produced before a magistrate within 24 hours of arrest and to consult and be represented by a lawyer of choice are thus available to persons ordinarily arrested in India, but are unavailable to persons under administrative detention. Under international law, India's reservations to the ICCPR, including its reservation to article 9, must not be "incompatible with the object and purpose of the treaty."²⁸ The UN Human Rights Committee has clarified that to reserve the right "to arbitrarily arrest and detain persons" would be incompatible with the object and purpose of the ICCPR.²⁹ Similarly, in 2008, the UN Working Group on Arbitrary Detention concluded that 10 individuals detained under the PSA in J&K had been arbitrarily detained in violation of articles 7, 9, 10 and 11(1) of the Universal Declaration of Human Rights and Articles 9 and 14 of the ICCPR.³⁰

Provisions of the PSA violate international human rights law because:

- (i) According to article 9(1) of the ICCPR "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." In the context of national security laws, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has made reference to the principle of legality, and stated that legal provisions "must be

²⁷ For a detailed discussion on this topic, see Amnesty International, A 'Lawless Law' – Detentions under the J&K Public Safety Act, AI Index: ASA/20/001/2011, page 15

²⁸ Vienna Convention on the Law of Treaties, A/CONF.39/27 (1969), adopted 22 May 1969, entered into force 23 May 1980, para. 19(c). The provisions of this treaty are considered to reflect rules of customary international law applying irrespective of whether or not states have ratified it.

²⁹ Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para 8.

³⁰ Opinion no. 45/2008 (India) adopted on 26 November 2008, Opinions adopted by the Working Group on Arbitrary Detention, Human Rights Council Thirteenth Session, 2 March 2010, UN Doc. A/HRC/13/30/Add.1, at www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-30-Add1.pdf (UN WGAD 2010), para 51, accessed 8 October 2012.

- framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct.”³¹ The PSA does not define “security of the state”, and provides a vague and over-broad understanding of what “public order” is.³² Thus the PSA violates the principle of legality.
- (ii) According to article 9(2) of the ICCPR “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” The UN Human Rights Committee has stated that this must also apply to preventive and administrative detentions.³³ Section 13 of the PSA allows the detaining authority to not communicate grounds of detention for up to 10 days of detention, and also to withhold any information that it considers “to be against the public interest to disclose”.
 - (iii) Articles 14(3)(b) and (d) of the ICCPR provide for the right to communicate with and be represented by counsel of one’s choice. However, Section 16(5) of the PSA explicitly stipulates that legal counsel cannot represent a detained person before the Advisory Board.
 - (iv) All individuals have the right to a remedy under article 2(3) of the ICCPR. Section 22 of the PSA enables impunity and prevents individuals from accessing their right. In its 2005 Basic Principles covering the right to reparation, the UN General Assembly has emphasized that states have the duty to “investigate and, if there is sufficient evidence,

³¹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report to the Commission on Human Rights, UN Doc E/CN.4/2006/98, 28 December 2005, para 46

³² As per section 8 (3) (b) of the PSA, acting in any manner prejudicial to the maintenance of public order" means (i) promoting, propagating, or attempting to create, feelings of enmity or hatred or disharmony on grounds of religion, race, caste, community, or region; (ii) making preparations for using, or attempting its use, or using, or instigating, inciting, or otherwise abetting the use of force where such preparation, using, attempting, instigating, inciting, provoking or abetting, disturbs or is likely to disturb public order; (iii) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of mischief within the meaning of section 425 of the Ranbir Penal Code where the commission of such mischief disturbs, or is likely to disturb public order; (iv) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of an offence punishable with death or imprisonment for life or imprisonment for a term extending to seven years or more, where the commission of such offence disturbs, or is likely to disturb public order. Amnesty International has argued that this definition is vague and broad – see Amnesty International, A ‘Lawless Law’ – Detentions under the J&K Public Safety Act, AI Index: ASA/20/001/2011, page 18.

³³ Human Rights Committee, General Comment No. 8: Right to liberty and security of persons (Art. 9), 30 June 1982, <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/f4253f9572cd4700c12563ed00483bec?OpenDocument>, accessed 8 October 2012

the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him”.³⁴

- (v) When the PSA is used as an informal justice system, persons suspected of, and sometimes charged with violating human rights, are detained for long periods of time without being prosecuted through a fair trial in a court of law. Where such administrative detention replaces proper investigations and trial, the risk of the real perpetrators remaining free is much greater. This also violates the rights of victims to see the person responsible for violations against them promptly and duly prosecuted and punished, and denies them the right to participate in this process.

6. Violation of National Law

Legal experts say that PSA differs from the act operating in rest of the country. They maintain that Jammu and Kashmir Public Safety-1978 was amended in the year 1990 which made it possible for extending the operation of act beyond the state, enabling the State machinery to keep detainees in the jail of India, outside of state.

Experts opine that state government can recommend review of Public Safety Act but the same has never been done. They add that respective governments since 1978 have used the law to their fullest advantage but have never sought a review of this Act.

Furthermore, once the High Court has quashed a PSA detention order, the detaining authority continues to hold the detainee by issuing a new detention order on the basis of “new grounds,” which are often made up of extremely vague allegations. This practice appears to be unique to J&K: lawyers defending those detained under similar legislation in other parts of India expressed astonishment that the J&K authorities could issue new detention orders for the same individual based on “new grounds” immediately after a detention order had been quashed by the High Court.³⁵ This has been the fate of many detainees in J&K. Shabir Ahmad Shah, Masarat Alam Bhat and others referred to above have been detained under up to eight successive PSA detention orders. A senior lawyer explained the process: The detaining authorities know well that the detention orders will be challenged in the High Court and will be often quashed, but they also know that the entire process will usually take about six months. Earlier, detention used to be one year, but it doesn’t really matter to the police – if they want to hold the person further, they will get another detention order passed. The order may be for two years but even if it gets

³⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147 of 16 December 2005, available at <http://www2.ohchr.org/english/law/remedy.htm>, accessed 5 October 2012

³⁵ Amnesty International conducted interviews with lawyers in Manipur State where administrative detentions under the National Security Act are common.

quashed, their objective will be achieved as the person is in jail for six months. They can keep on doing this as no one holds them accountable.³⁶

7. Present Scenario- Implementation of the Act

'Since independence, Kashmir has seen more red than ever.'

-Anonymous

"Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law." Justice ArijitPasayat, Supreme Court of India, judgment in Union of India v. YumnamAnand M,³⁷

Kashmir has been a contested state split between India and Pakistan and has seen violent clashes over the past 20 years. The Kashmiri people have been subjected to the worst kind of human rights abuses ever since the British sold Kashmir to the Dogra Maharaja Gulab Singh. Mass killings, forced disappearances, torture, rape and sexual abuses to political repression and suppression of freedom of speech have become an integral part of their day to day life. The Indian Central Reserve Police force, Border Security personnel and various militant groups have been accused and held accountable for committing severe exploitations against Kashmiri Civilians. However, the fact worth mentioning is that perhaps, PSA is the most misused law of J&K. More than five thousand were arrested during the uprising of 2008 and again many others were arrested in 2010. Contrary to the amendment introduced in the Act, minors below the age of 16 are currently behind the bars. Many people have fallen into destitution and often remain without the knowledge whether their family members are dead or alive. To put it lightly, the situation is critical.

In 2010, after the discovery of the bodies of three civilians alleged to have been killed by the Army caused many young men to take to the streets, pelting stones at the Indian Forces. When the smoke cleared, over 4000 policemen and soldiers were found to be injured and 118 Kashmiris were dead, many of whom were children. About a 1000 people had been detained and when they emerged they told chilling tales of brutal torture revealing a practice that goes back almost two decades. "They cut my flesh, put salt and chili on it and put it in my mouth," said one of the detainees. Another lamented, "They ripped my nails out with pliers and tortured my private parts." As has been correctly said by an eminent Kashmiri human rights lawyer, "torture is not a historical issue. It is happening right now in Kashmir Valley."

³⁶ When a writ petition challenging a detention order is filed in the High Court, it takes two days for the judge to decide whether to admit the petition or not. Almost all petitions in PSA cases are admitted. They are then listed two weeks later and the state is asked to respond to the petition. Invariably the state seeks more time to reply and petitions get delayed by weeks at a time. A rebuttal is then permitted to the petitioner before a date is fixed for final arguments.

³⁷Union of India v. Yumnam Anand M, (2007) 10 Supreme Court Cases 190.

The main reason that torture is practiced is to coerce detainees to reveal information about suspected militants or to confess to militant activity. It is also used to punish detainees who are believed to support or sympathize with the militants and to create a climate of political repression. The practice of torture is facilitated by the fact that detainees are generally held in temporary detention centers, controlled by the various security forces, without access to the courts, relatives or medical care.

Methods of torture include severe beatings, electric shock, suspension by the feet or hands, stretching the legs apart, burning with heated objects, sexual molestation and psychological deprivation and humiliation. One common form of torture involves crushing the leg muscles with a heavy wooden roller. This practice results in the release of toxins from the damaged muscles that may cause acute renal (kidney) failure. This report documents a number of such cases which required dialysis. Since 1990, doctors in Kashmir have documented 37 cases of torture-related acute renal failure; in three cases the victims died.

This state has brought India and Pakistan to war three times. Because of this reason, Kashmir is now one of the most heavily occupied areas by the Armed Forces. Today there are 700,000 troops and policemen in the State, one for every seventeen Kashmiris. By the beginning of 2011, with the insurgency at its lowest ebb, the Indian Security Forces were playing cat and mouse with the new generation of protesters armed only with rocks. India claims that these stone pelters are funded and organized by terror groups in Pakistan. The government says that the damage and losses to the economy caused by the riots have cost the state more than 20 crores.

Lawyers in J&K have consistently challenged specific PSA cases in the courts, but the government has blatantly disregarded court orders quashing detention orders or granting bail. Such disregard completely undermines the role of the courts to protect human rights. According to a human rights activist, J&K uses PSA “to keep people they can’t or won’t convict through proper legal channels locked up and out of the way.

8. Recommendations

Propositions for the Government of Jammu and Kashmir:

1. Repeal the J&K Public Safety Act and any other legislation facilitating the use of administrative detentions;
2. Abolish the system of administrative detentions in J&K and either release or charge persons accused of committing criminal acts for recognizably criminal offences and try them in a regular court with all safeguards provided;
3. Implement court rulings ordering release of detainees without delay;
4. Immediately and unconditionally release all detainees deprived of liberty solely for the peaceful exercise of their rights of freedom of thought, conscience, religion, opinion or expression;

In the period before repealing the PSA, strengthen protection during detention by:

1. Ending immediately the use of incommunicado detention;
2. Ending detention in unofficial places of detention;
3. Ensuring officers carrying out the initial arrest inform the families of the place where the detainee is held;
4. Ensuring all detainees are brought before a judicial magistrate withing 24 hours of arrest;
5. Ensuring that the families of those detained are informed of subsequent tranfers to other places of detention without delay.
6. Maintaining a centralized register of all detainees available for public access, detailing the date of order or arrest and detention, authority issuing such orders and all transfer, release and revocation orders;
7. Take all necessary measures to improve prison conditions, including by ending overcrowding and providing adequate food and medical care, in accordance with the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
8. Amend the J&K Juvenile Justice Act to make it compatible with the UN Convention on the Rights of the Child and implement its provisions in full.

Conclusion

The Indian Supreme Court's observation in the case of *Jaya Mala v. Home Secretary, Government of Jammu and Kashmir* (1982) about the PSA detention case in 1982 – well before the eruption of the popular uprising and armed movement for independence – was prophetic. As said by Justices D.A. Desai and P. N. Bhagwati “the PSA is a ‘lawless law’ ” that has largely supplanted the normal criminal justice system in J&K.

Hundreds of people are detained under the PSA in J&K, many of them political activists and youth. Instead of charging and trying persons suspected of committing offences in a fair trial in a court of law, the J&K authorities continue to circumvent the rule of law by resorting to the PSA. Repeal of the PSA would send a strong signal to the residents of J&K about the government's commitment to the rule of law and human rights and it would also bring India into conformity with its international human rights legal obligations.

However, India has so far chosen to ignore the calls of UN human rights mechanisms in relation to its administrative detention regime. In response to concerns raised about human rights violations by UN human rights mechanisms, the Government of India recently claimed, “... despite continuing provocations, the security forces continue to exercise their utmost restraint because of the Government's emphasis on human rights protection and

the adverse impact that human rights violations by security forces can have on the work being done by them in countering terrorism in the State.” Yet, these claims do not appear to be backed up by the J&K authorities. In a meeting with Amnesty International delegates in Srinagar in May 2010, where concerns about PSA detentions were raised, the then Additional Director General of Police (Criminal Investigation Department) of J&K asked, “What rights are you talking about? We are fighting a war – a cross border war.”

Such opinions, and the practices that result, run directly counter to commitments made by India in ratifying international human rights treaties, and assertions regularly made by government officials at both the state and central level that democracy and the rule of law should prevail in J&K. The widespread and abusive use of the “lawless” PSA further risks undermining the rule of law and reinforcing deeply held perceptions that police and security forces are above the law. “It is not security that we feel, but insecurity at the hands of the Indian Security Forces,” said a Kashmiri civilian.

Today Kashmir stands all alone as world awareness is being kept at a distance while the reality in Kashmir remains shrouded. Behind the smoke screen of Indian propaganda, children are killed for crimes not committed, girls are raped and young men tortured and slain to death for nothing but a surge for freedom. It is unfortunate to say but factually Indian administered portion of Kashmir suffers with every moment death of human rights.

“You want that India should defend Kashmir, India should develop Kashmir, and Kashmiris should have equal rights as the citizens of India, but you don’t want India and any citizen of India to have any rights in Kashmir. I cannot betray the interest of my country.”

-Dr.B.R.Ambedkar