

**THE IMPACT AND CHALLENGES OF JAMMU AND  
KASHMIR PUBLIC SAFETY ACT, 1978: A STUDY OF  
SOUTH KASHMIR**

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**In**

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**By**

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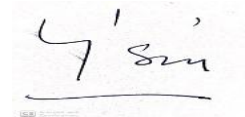
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## **Declaration**

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### *Abstract*

Peacebuilding in restive environments is a humongous challenge, more so, in Jammu and Kashmir which has remained festered for decades now. Myriad models have been tried in order to garner peace but most of them have failed. This study takes historical incidences and political manoeuvring of Centre since 1947 as the background in order to analyse and study the implications of Administrative/Preventive Detention (through J&K PSA, 1978) in J&K. The J&K PSA has been the potent weapon in the hands of State in order to quell the disturbances, secessionism & separatism. Of late doyens of various political parties have been detained under this law including leaders from mainstream, separatist camp and stone pelters and other Over Ground Workers who work for various militant/terrorist & jihadist groups in valley. India being a Liberal-democratic country has had to resort to this illiberal measure through this Act in order to bring peace to the region. Preventive detention carries its sanction from constitution of India that is Art 22 (3), to be more specific. This study proposes to deconstruct the two models/approaches adopted by Indian State in J&K. Firstly that of Liberal genus which includes approaches by regimes including that one followed by Vajpayee. This approach relied upon assimilation and dialogue in order to gain the results and bring peace. Second one is more hawkish and Illiberal one which includes using state apparatus like Security agencies in order to subdue any kind of protest/dissent against the state and later on start a dialogue process with moderate factions. Using Jammu & Kashmir Public Safety Act, 1978 in order to keep people under Preventive Detention belongs to the second category. This study uses both Qualitative and Quantitative methods in order to analyse the impact & challenges created by J&K PSA, 1978. The challenges created and impact generated thereof are both for Democracy as well as for the families and detainees.

## **Objectives of the Research**

- ✓ To sketch the political history of Jammu and Kashmir in its relation with Union Government.
- ✓ To analyse the social and economic implications of J&K PSA, 1978.
- ✓ To highlight the effects of J&K PSA, 1978 on peace building process.
- ✓ To explore the varying nature and changing dimensions of Democracy due to J&K PSA, 1978.

## **Research Questions**

- ✓ What has been the trajectory of political relations between J&K and Union of India historically?
- ✓ What is the background for enacting of J&K PSA, 1978?
- ✓ What makes state to impose J&K PSA on individuals?
- ✓ What is the social and economic impact of J&K PSA, 1978 on detainees and their families?
- ✓ What has been the prospect of peace in Kashmir in the environment of Preventive Detentions?
- ✓ What are the challenges for democracy inflicted by detentions and curtailing liberty of citizens?
- ✓ What is the nature of Democracy in Kashmir?
- ✓ Why does the state resort to illiberal measures in order to obtain liberal outcomes?

## **Research Methodology**

The general objective of this research is to analyse and investigate the detentions under Preventive Detention Law (PSA) in Kashmir particularly in two districts of South Kashmir—Kulgam and Shopian. These remain very restive districts of South Kashmir and are at the forefront of militancy and insurgency in Kashmir. Preventive detention under J&K PSA is a potent tool in the hands of Administration in order to detain a person who acts prejudicial to “Security of State” or “Public Order”. To achieve this goal, this study employs both Qualitative and Quantitative aspects (mixed method). Research method includes various steps taken by the researcher in order to arrive at academically sound conclusions which include defining the Statement of Research Problem, setting out Research questions, its objectives and significance. The method also includes tools used for the research and its design and sample.

### ***Population, Sample Size and Area of Study***

The study involves both Qualitative and Quantitative aspects. Jammu & Kashmir is the universe for the present study. Two districts of South Kashmir—Kulgam and Shopian constitute the area of the study. The sample size of the study is 174 (160+08+06), out of which 160 for Quantitative & 14 for Qualitative data analysis which includes 08 for FGD and 6 members as Key Informants for purely Qualitative analysis. For qualitative data Purposive/Convenient Sampling has been used. Stratified Random Sampling is the Sampling Technique for Quantitative data. The sample of detainees from district Kulgam is 80 (40 detainees & 40 families) and sample to be chosen from District Shopian was 80 (40 detainees & 40 families). Raw data was available at JKCCS website which showed total detainees in Shopian as 59 and Kulgam as 64 along with parentage, address and age. That means 0.67% from Shopian and 0.625 % from district Kulgam.

### ***Data Collection***

For data collection questionnaire was designed. The questionnaire was divided into various parts. The first part was designed to gather information about social characteristics of the detainee. The second part includes the questions to be posed to the detainees released. The third part includes the questions for the families of the detained individuals. In order to arrive at some specified thematic outcomes, qualitative methods like Focused Group discussion (FGD) and In-depth Interview were conducted with key Informants (which are quite influential in the society and work on Preventive Detentions as well or have been directly or indirectly involved with incarcerations). These included lawyers, professors of Universities/colleges, Public Prosecutors, Human Rights activists and Government officials/police officials as well. One of the important tools of data collection employed was Right to Information Act, 2005. The RTI was filed with such intent so as to extract qualitative as well as quantitative information from the Police Department. RTI was filed in Department of Home, Government of J&K with questions which were closed ended as well as open ended. The open ended questions for example were posed in RTI as: -

- ✓ Is there any policy to detain PSA detainees separately from other inmates in UT of J&K?
- ✓ Is the current infrastructure of jails enough to ensure that there is no mixing of Preventive detainees with other hard-core criminals/under trails?
- ✓ Is there any policy by J&K Government to reduce recidivism of PSA detainees?

Purposive sampling was used in FGD. The participants were beforehand made aware about the topic. The outcomes were coded through 'splitting technique' manually and eight themes hence emerged out of the FGD which have been discussed in later chapters. Further for FGD following questions along with follow ups were posed: -

- ✓ How do you see the detentions in Kashmir under J&K PSA?

- ✓ Do you think detentions have served their purpose in bringing Law and Order in check?
- ✓ What are your views about of J&K Police?
- ✓ How far are you satisfied with state functionaries like Police, Judiciary and Bureaucracy when it comes to the detentions?
- ✓ Do security agencies work contrary to the specified mandate? Like are they the arms of State repression or for managing Law and order? Your views?
- ✓ Do Detentions lead to radicalisation of youth or is it otherwise?
- ✓ What are the main reasons of Radicalization of youth?
- ✓ How can a detainee get relief if he is detained under PSA or do you think bail is a rule in PSA or an exception?
- ✓ How far do you think that elections in Kashmir are done on ‘free and fair’ criterion?
- ✓ How do you see the democratic atmosphere in Kashmir?

Questionnaire (attached as Annexure I) was used for quantitative research which includes questionnaire for actual detainees, their families. Being a conflict zone & keeping in view the privacy of all the informants & primary respondents who were part of this study, pseudonyms have been used and also anonymity has been ensured.

Open-ended questions were asked to Key Informants, the uniformity of questions was maintained in order to get thematic outcomes. For Key Informants representing State, few changes were made in order to get their perspective. The questions more or less remained as follows (as annexed with Annexure I): -

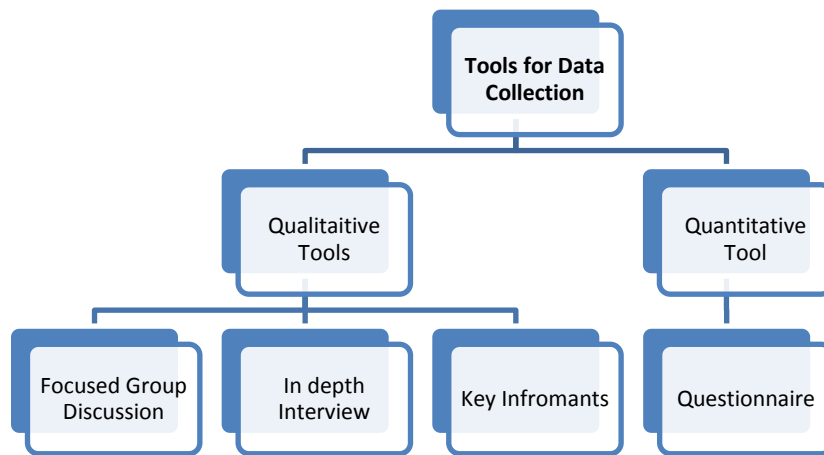
- ✓ How do you reconcile with Preventive Detention in Democratic Societies like India?
- ✓ Has Preventive Detention served its purpose in Kashmir?
- ✓ Is preventive Detention a reasonable measure in the hands of the State in order to garner ‘good behaviour’ from citizens and hence can it lead to peace building in the region?



- ✓ How do you see Kashmir conflict: Is it more a Law and Order/Governance issue or a larger Political issue that fans across geography and history?
- ✓ Do you think J&K PSA and hundreds of detentions under it had helped the State to manage the situation in Kashmir Post abrogation of Article 370?
- ✓ Kindly contrast the ideal mechanism/policies that should have been in place for Kashmir from Centre with the actual policies that have been in vogue since 1947?
- ✓ Don't you think that Preventive detention in J&K leads to proliferation of "conflict entrepreneurship\*"??
- ✓ Give the contrast/reasons as to why some detainees are detained under J&K PSA, 1978 and some others are detained under ULA (P) Act [Unlawful Activities Prevention Act]?

For secondary data various books, journal articles, papers and news items were analysed. In order to understand the implications of the Act and its working it is very important to study the Preventive Detention Act in entirety. Various websites of Government of J&K like Home Department have given the description about the J&K PSA. Further various reports of JKCCS (Jammu and Kashmir Coalition of Civil Society) were analysed which also provided the list of detainees in districts of Kulgam & Shopian. JKCCS has done numerous empirical researches on detentions and tortures. Further, various case studies of Preventive detainees have been analysed by Amnesty International. Those reports have also been studied in order to arrive at academically sound conclusions.

Diagram 1: Showing the Tools of Data Collection



### **Significance of the Study**

This study that is “*The Impact and Challenges of Jammu and Kashmir Public Safety Act, 1978: A Study of South Kashmir*” depicts old dilemma between Liberty and Security of the state within context of Kashmir and more generally in South Asian context, as India, Pakistan, Bangladesh & Srilanka used the preventive detentions. Securitization is one of the most important aspects of statecraft and developmental discourse. Detention’s under PSA form one of the most important aspects of State policies in Kashmir as the Act helps in managing the security scenario but it has ramifications for individual, society and peace building aspects. The study nuances and highlights the impact and challenges which detentions create for liberal democracies like India. Further the study shall be a good policy guide for administrators and Government in terms of providing the path which they shall traverse after abrogation of Article 370, because Preventive Detention without reforms or new policy measures can’t be a permanent feature of democratic societies like India.

### **Scope of the Study**

Detentions carry a huge baggage of being detrimental to Liberty of detainees and a measure which is illiberal in character. These tough measures are quite often used to muzzle the dissent but the larger aim is to bring ‘peace and tranquillity’ in the

society. The impact of detentions range in two directions: One is that it impacts the individual detainees and his/her immediate family (which includes son, daughter, romantic partner etc.) and secondly, it casts an imprint on the larger setup of the society within which it operates. Jammu and Public Safety Act has been there since five decades in the current avatar but has its roots in colonial history. PSA history shows that the Act has been used for quelling the political dissent, used against criminals, militants and to serve the objectives of ‘national interest’. By analysing the socio-economic impact and the impacts on State and peace building, this study offers new insights into the working of the Act. Besides this, the study analyses the trajectory of new realities which have come about due to recent developments largely managed through detentions. This will offer new insights to the policy makers.

### **Research Findings**

The findings mainly include various impacts that PSA creates for detainees and families and challenges that PSA imposes for Security agencies as well. The study argues in favour of PSA continuation in valley but along with various amendments which include not to detain individuals outside of J&K in far off jails like those in UP or Rajasthan or Haryana. The major findings of this research include that J&K Public Safety Act has been a handy tool in the hands of security agencies to quell the dissent and protest whether in 2008, 2010, 2016 and 2019. Security agencies including Political Executive have claimed that after the watering down of Article 370, Public Safety Act, 1978 was used extensively and liberty of individuals was curbed but in the ‘larger good’ of erstwhile state which ensured that there were far less killings and hence peace prevailed. This study has found that torture, intimidation, detention and working with Iron -fist against a volatile population works very well to a certain extent, but beyond that threshold, detentions prove detrimental and can push a dissenter, stone pelter, political opponent into militancy which leads to devastation of society at large. Further given proper care and accommodating nature of security agencies and State, protests and stone pelting in Kashmir can be brought under control. Giving economic opportunities to detainees and helping their families by State through soft approach will have a wider impact on law and order. Security agencies need to analyse the detainees and their economic background much more

deeply/thoroughly and help those families which are in need; through this approach the need to slap PSA's on detainees again and again will be minimised. Thus the "revolving door" and keeping detainees permanently detained for years together will be obliterated altogether. This study found that the jail system in J&K lags in capacity to hold the detainees in detention cells. Detainees under PSA are put in with hardened criminals, militants and drug addicts, which can prove detrimental and may actually worsen the situation.

### *Acknowledgements*

The credit for strenuous effort in this thesis goes solely to My Lord, who has sustained me throughout my journey and surely will continue to do that. When there was no one to believe in me, my parents held me and stayed in front of me to shield every abuse and slander when it mattered the most! I would like to make special mention of my guide Dr Rajvinder Kaur who guided me through the troughs and trenches of research, without her able guidance, my PhD could not have been a reality. This work was long, arduous and tricky; hence lot of characters who helped me in this research, to get the data and talked with me will always remain shrouded in mystery but will reflect in the lines of this thesis. A very sincere deep hearted thanks to all those characters. Going against the normal discourse I would love to stand my neck out and thank Police Department of J&K, which has always been in front of the firing line when it comes to criticism, but I found its personnel very professional and true to their job. Without their timely replies and also their follow up, whether I had received a particular file or not was something very surprising and is definitely commendable (given the bad moniker which government departments across have earned). During this work I also found some interesting characters in Kashmir who *prima facie* claim to help anyone doing research on ‘controversial’ subjects/topics but when it came to practicalities, they always reneged from their commitments. A mention of those very characters in these lines would suffice their contribution. I always reached out to everyone who could add to my knowledge of detentions, but one special person who was enthusiastic to help was Habeel Iqbal, the man deserves accolades and credit for what he is and what he does. Certain international scholars, like Tanya Golash-Boza (University of California) and Shytierra Gaston (Criminologist at George Town University) who helped through their research papers/works and replied to my mails instantly, do deserve a special mention. Without being my guide, Dr Rajeesh CS (friend, philosopher & brother) believed in quality of my work and his ‘special help and care’ makes me what I know of research and skills I got! One person for whom, this arduous journey was started and because of whom these lines are being written is Subreena Sheraz, she has remained a cool campaigner throughout.

## Table of Contents

<i>Abstract</i>	<i>IV-XI</i>
<i>Acknowledgements</i>	<i>XII</i>
<i>List of Tables</i>	<i>XVI-XVIII</i>
<i>List of Diagrams</i>	<i>XIX-XXI</i>
<i>List of Abbreviations</i>	<i>XIX-XX</i>
<i>Annexures</i>	<i>266-274</i>
Chapter 1 .....	1
Introduction.....	1
1.1 Background of the Study: Conceptual Framework .....	1
1.2 Detentions: Dilemma between Liberty and Security of the State .....	4
1.3 Kashmir: Security Studies Perspective (Ole Waever) and questions of Legitimacy (Max Weber & Van Dijk) .....	7
1.4 “Pretexts” and Preventive Detentions .....	9
1.5 Statement of the Research Problem .....	10
1.6 Significance of the Study .....	11
1.7 Objectives of the Study .....	11
1.8 Research Questions .....	12
1.9 Research Methodology.....	13
1.9.1 Tools for Data Collection .....	14
1.9.2 Scope of the Study .....	17
1.10 Limitations of the Study .....	18
1.11 Chapterization .....	19
Chapter 2.....	23

Review of Literature .....	23
2.1 Review of Literature.....	25
2.1 Jammu & Kashmir Public Safety Act, 1978 .....	25
2.1.1 Law and Order in India.....	25
2.1.2 Democracy.....	26
2.1.3 Liberalism.....	26
2.1.4 Illiberalism.....	26
2.2 Relation of Kashmir with Union of India: An Overview.....	27
2.3 Preventive Detention Laws and their impact: Myriad instances from various countries .....	31
2.4 Rise of Illiberal Democracies across world.....	38
2.5 Familial Impact and challenges for detainees in Kashmir and elsewhere.....	44
2.6 Summary of Literature Review .....	51
2.7 Research Gap.....	52
Chapter 3.....	53
Political Relations of Jammu & Kashmir with Union of India: A Historical Account	53
3.1 Introduction .....	53
3.2 Main Events in Kashmir Relationship with Union of India.....	54
3.2.1 Indira-Abdullah Accord.....	54
3.2.2 Rajiv-Farooq Accord .....	55
3.2.3 Article 370 .....	55
3.2.4 Autonomy of National Conference.....	55
3.3 Pakistani Misadventure, Nehruvian pacifism and Sheikh Abdullah’s posturing .....	56
3.4 The Puzzle of Plebiscite and Nehru’s ambivalence .....	60
3.5 Creating friends in Kashmir: The Nehruvian Ploy to ‘win’ over Kashmir .....	62

3.6 Rise of communalism in 1980's: Build up to the Secessionism and Militancy.	64
3.7 1990's: Phase of Militancy & Authoritarian approach under P.V. Narsimha Rao .....	66
3.8 Dovish Policies: The History of Interlocutors to Kashmir.....	70
3.8.1 Two Round Table conferences .....	72
3.9 Vajpayee bonhomie & Manmohan Singh's decade vis-s-vis Kashmir.....	73
3.10 Changing contours of India's Foreign Policy under Narendra Modi and end of 'Special Status' of Kashmir—5 <sup>th</sup> August, 2019.....	77
3.11 Conclusion.....	79
Chapter 4.....	82
The Jammu and Kashmir Public Safety Act, 1978: Traversing Through Constitutionality and Historicity.....	82
4.1 Introduction .....	82
4.2 Preventive Detention in India: Constitutionality and Historicity.....	83
4.3 Safeguards in the Constitution against abuse of Preventive Detention Laws ....	84
4.4 Central and State Legislations for Preventive Detention .....	86
4.4.1 At Various State Level.....	87
4.5 PSA Detainees: Varying Account/Figures from Jammu and Kashmir .....	91
4.6 Counterinsurgency and Detentions in Kashmir .....	93
4.7 Peculiar Case of Mian Qayoom Which Substantiates Above Two Propositions of Section 8 and 13(2).....	95
4.8 Advisory Boards under J&K PSA, 1978.....	96
4.9 Performance of Advisory Board over the Years .....	97
4.10 Signing of Bonds under Section 107 of CrPC .....	100
4.11 Amendments to J&K PSA over the Years .....	101
4.12 J&K PSA after abrogation of Article 370 .....	101



4.13 Revolving door and PSA detainees turned militants: A Case of Radicalisation .....	107
4.14 Detentions and Peace Building .....	110
4.15 Peace Building: Analysis of the Concept and Definitions .....	111
4.16 Hybrid Peace Governance in Kashmir .....	113
4.17 Punishment and Discipline: Process as Punishment .....	114
4.18 Do detentions under PSA lead to peace in Kashmir?.....	114
4.19 Preventive Detentions: Current Jail Infrastructure.....	125
4.20 Conclusion.....	126
Chapter 5.....	128
Preventive Detentions, Human Rights and Legal Intricacies addressed.....	128
by.....	128
Apex Court in India & High Court of J&K .....	128
5.1 Introduction .....	128
5.2 Preventive Detentions and Human Rights .....	132
5.3 Constitutional Debates: Ambedkar, Patel & Bakshi Tek Chand .....	136
5.4 Assertions by Apex Court through various Judgments.....	139
5.5 Nonchalance, ' <i>Application of Mind</i> ' & Indefinite Incarceration .....	141
5.6 Pre-trial detentions in India .....	145
5.7 Conclusion.....	150
Chapter 6.....	152
Data Analysis & Interpretation .....	152
6.1 Introduction .....	152
6.2 Detainee Socio-Economic Profile .....	155
6.3 PSA Detainees and their Experience with Incarceration/Detention.....	161
6.4 Torture and types of torture faced by detenu in Detention .....	166

6.5	Providing Reasons of detention to detenu.....	171
6.6	Revocation of Detention and Role of Advisory Board .....	173
6.7	Frequency of imposition of PSA.....	177
6.8	Duration of detention .....	178
6.9	Criminal Charges against the detainees .....	180
6.10	Detentions and Family Visitations .....	202
6.11	Monitoring and Surveillance.....	222
Chapter 7.....		225
Research Findings, Suggestions and Conclusion.....		225
7.1	Research Findings .....	225
7.2	Suggestions.....	238
7.3	Conclusion.....	241
Bibliography .....		243
List of Publications .....		280
List of Conferences .....		282
Book Chapters.....		282
Newspaper Article and Op-eds .....		283
Sex Workers in Bangladesh: Tales of Destitution amidst the Pandemic with Dr Rajeesh CS <a href="https://niice.org.np/archives/4659">https://niice.org.np/archives/4659</a> .....		283
Chinese Engagements in Afghanistan <a href="https://niice.org.np/archives/6876">https://niice.org.np/archives/6876</a> .....		283
Peace Trajectory in Afghanistan: Analysing the Role of Stakeholder Nations with Dr. Rajeesh CS in NIICE <a href="https://niice.org.np/archives/4488">https://niice.org.np/archives/4488</a> .....		283

## **List of Tables**

Table 4.1	Detentions as revealed in Amnesty International Report
Table 4.2	Details of Politicians detained under PSA along with date of released
Table 4.3	Showing the list of PSA detainees turned militants
Table 4.4	Ceasefire Violations between India and Pakistan since 2001-2020
Table 4.5	Showing year wise terror incidents and terrorists killed in J&K
Table 4.6	Table showing Gross and Net Infiltrations since 2014
Table 4.7	Terrorists killed since 1990-2004
Table 5.1	Data showing under trials numbers and detenues in India
Table 5.2	International Centre of Prison Studies (2010)
Table 5.3	Developing countries and pre-trial detention population
Table 6.1	Sample Size of the Study
Table 6.2	Age of Detainees
Table 6.3	Educational Qualification of Detainees
Table 6.4	Profession of Detainees
Table 6.5	Income of Detainees (Monthly)
Table 6.6	Marital Status of Detainees
Table 6.7	Family Income of Detainee (monthly)
Table 6.8	Circumstances under Which the Person was detained
Table 6.9	Security Agency which ensured Detention
Table 6.10	Gap between Initial detention and imposition of PSA
Table 6.11	Torture Faced during detention
Table 6.12	Security agency involved in Torture
Table 6.13	Type of Torture faced
Table 6.14	Communication of Reasons/Grounds of Detention
Table 6.15	Grounds of Detention communicated in the language understood by detainue
Table 6.16	Awareness about Advisory Board
Table 6.17	Detainee produced before the Advisory Board
Table 6.18	Detention revoked within 3-months
Table 6.19	Frequency of PSA imposed
Table 6.20	Duration of detention

Table 6.21	Criminal Charges or FIR against the detainees
Table 6.22	Crime against which FIR has been lodged
Table 6.23	Place of Detention
Table 6.24	Influence of fellow detainees on detenu
Table 6.25	Inmates influencing the detenu
Table 6.26	Inclination for joining militancy
Table 6.27	Knowledge regarding whether detention can be quashed by High Court
Table 6.28	Appeal to High Court
Table 6.28.1	Relief by High Court
Table 6.29	Police Complying with Court Order
Table 6.30	Repetition of Detention or tactics of ‘keeping out of circulation’
Table 6.30.1	Psychological impact after repeated PSA’s
Table 6.31	Detentions and Political participation
Table 6.32	Rapport of detainee with family
Table 6.33	Society’s response towards detenu pre and post imposition of PSA
Table 6.34	Detention and Impact on Job/Studies
Table 6.34.1	Problems faced in resumption of normal life
Table 6.35	Frequency of Family visits
Table 6.36	Procedure of Meeting
Table 6.37	Behaviour of jail authorities
Table 3.38	Expenditure of family on jail visitations
Table 6.39	Economic Impact of detentions
Table 6.39.1	Nature of Economic Impact
Table 6.40	Bulk of Money Spent
Table 6.41	Money Spent on Legal Proceedings
Table 6.42	Communitarian help felt by family
Table 6.43	Financial help by society
Table 6.44	Revival of economic conditions
Table 6.44.1	Time period for revival of economic conditions
Table 6.45	Moral Support from Society
Table 6.45.1	Type of Moral Support
Table 6.46	Days in a month reserved for court proceedings

Table 6.47 Cases of detaining kith or kin if actual accused not available

Table 6.47.1 Member of family picked

Table 6.48 Monitoring and Surveillance

Table 6.48.1 Type of monitoring/surveillance

### **List of Figures**

Figures 4.1 Showing the number of cases received and quashed by High Court

Figure 4.2 Correlation between Terror incidents and Net infiltration

### **List of Diagrams**

Diagram 1 Showing the Tools of Data Collection

Diagram 6.1 Sample Size of the Study

Diagram 6.2 Ages of Detainees

Diagram 6.3 Educational Qualifications of Detainees

Diagram 6.4 Professions of Detainees

Diagram 6.5 Incomes of Detainees (Monthly)

Diagram 6.6 Family Incomes of Detainees

Diagram 6.7 Circumstances under Which the Person was detained

Diagram 6.8 Security Agency which ensured Detention

Diagram 6.9 Gap between Initial detention and imposition of PSA

Diagram 6.10 Torture Faced during detention

Diagram 6.11 Security agency involved in Torture

Diagram 6.12 Communications of Reasons/Grounds of Detention

Diagram 6.13 Grounds of Detention communicated in the language understood by  
detenue

Diagram 6.14 Awareness about Advisory Board

Diagram 6.15 Detention of Detainee Revoked by Advisory Board

Diagram 6.16 Revocation of Detention within 3 months

Diagram 6.17 Frequency of PSA imposed

Diagram 6.18 Duration of detention

Diagram 6.19 Criminal Charges or FIR against the detainees

Diagram 6.20 Crime against which FIR has been lodged

Diagram 6.21 Place of Detention

Diagram 6.22 Influence of fellow detainees on detenu

Diagram 6.23 Inmates influencing the detenu

Diagram 6.24 Inclination for joining militancy

Diagram 6.25 Knowledge regarding Detention can be quashed by High Court

Diagram 6.26 Appeal to High Court

Diagram 6.26.1 Relief by High Court

Diagram 6.27 Police Complying with Court Order

Diagram 6.28.1 Psychological impact after repeated PSA's

Diagram 6.29 Detentions and Political participation

Diagram 6.30 Rapport of detainee with family

Diagram 6.31 Society's response towards detenu pre and post imposition of PSA

Diagram 6.32 Detention and Impact on Job/Studies

Diagram 6.32.1 Problems faced in resumption of normal life

Diagram 6.33 Frequency of Family visits

Diagram 6.34 Procedure of Meeting

Diagram 6.35 Behaviour of jail authorities

Diagram 6.36 Expenditure of family on jail visitations

Diagram 6.37 Economic Impact of detentions

Diagram 3.37.1 Nature of Economic Impact

Diagram 6.38 Bulk of Money Spent

Diagram 6.39 Money Spent on Legal Proceedings

Diagram 6.40 Communitarian help felt by family

Diagram 6.41 Financial help by society

Diagram 6.42 Revival of economic conditions

Diagram 6.42.1 Time period for revival of economic conditions

Diagram 6.43 Moral Support from Society

Diagram 6.43.1 Type of Moral Support

Diagram 6.44 Days in a month reserved for court proceedings

Diagram 6.45 Cases of detaining kith or kin if actual accused not available

Diagram 6.45.1 Member of family picked

Diagram 6.46 Monitoring and Surveillance

Diagram 6.46.1 Type of monitoring/surveillance

### **List of Abbreviations**

BSF	Border Security Forces
SF	Security Forces
CFV	Cease Fire Violations
PSA	Public Safety Act
AFSPA	Armed Forces Special Powers Act
DAA	Disturbed Areas Act
SOG	Special Operations Group
USA	United States of America
CRPF	Central Reserved Police Forces
SC	Supreme Court
FIR	First Information Report
CrPC	Criminal Procedure Code
IPC	Indian Penal Code
OGW	Over Ground Worker
J&K	Jammu and Kashmir
MUF	Muslim United Front
JeI	Jamaat-e-Islami
NC	National Conference

PDP	People's Democratic Party
JKPC	Jammu Kashmir People's Conference
CPIM	Communist Party of India Marxist
JKPM	Jammu Kashmir People's Movement
JKLF	Jammu Kashmir Liberation Front
CASO	Cordon and Search Operations
WHAM	Winning Hearts and Minds
RAW	Research and Analysis Wing
RTC	Round Table Conference
CBM	Confidence Building Measures
UPA	United Progressive Alliance
LOC	Line of Control
LAC	Line of Actual Control
ISI	Inter-Services Intelligence
MEA	Ministry of External Affairs
BJP	Bhartiya Janta Party
NSCN	National Socialist Council of Nagaland
UT	Union Territory
LeT	Lashkar-e-Toiba
JeM	Jaish-e-Muhammad
HM	Hizbul Mujahideen
USIP	United States Institute of Peace
IED	Improvised Explosive Device
JKCCS	Jammu Kashmir Coalition of Civil Society
RTI	Right to Information
PASA	Prevention of Anti-Social Activities



NDPS	Narcotics Drugs and Psychotropic Substances
UAPA	Unlawful Activities (Prevention) Act
JKCCS	Jammu and Kashmir Coalition of Civil Society

# **Chapter 1**

## **Introduction**

### **1.1 Background of the Study: Conceptual Framework**

Jammu and Kashmir has been a simmering cauldron and one of the toughest nuts to crack for New Delhi. It is definitely as they say the Gordian Knot that has remained as such since 1947. The dynamics to this cauldron range from political, economic, geographical and security while as politics remains one of the potent reasons for uncertainty. This aspect that is political has got two dimensions both internal as well as external and also encompasses security scenario as well. Inter-dynamics to this conflict make the Kashmir issue extremely confusing and multi-layered. There are several stakeholders involved which range from left, Centre as well as Right not to mention the 'secessionists'.

Being a border state and marred with violence inflicted by insurgents backed by Pakistan, Security scenario in valley particularly has always remained hostage to context. Many models have been tested by Indian State in order to 'mainstream' the discourse but every time this has bumped with ill omens. The culprits remain the traditional ones but New Delhi has messed up the matters as well. By staging and planting the so called 'collaborators' and 'managing Democracy' which lacked any organic growth was always going to be short lived.

Political experiments and 'managing Democracy' in Kashmir has been tried since 1953 since the Prime Ministership of Sheikh Abdullah and has continued through 1980's, 2000's and the most recent one in 2019 by abrogation of Article 370. Due to policies/strategies in order to democratise the environment in valley, repercussions/reactions to this were handled with iron-fist policies which included arming the security agencies with laws which were quite illiberal in character and

didn't satisfy the consciousness of democratic credentials of India. These laws include AFSPA (Armed Forces Special Powers Act) and PSA (Public Safety Act). The former gives special protection to Armed forces in J&K while the latter allows for Administrative Detention if a person acts prejudicial to "security of the state" or "Public order". Technically, detentions ensure that a detainee is not allowed to do a certain crime in near or distant future but practically speaking, detentions in Kashmir under PSA serve various purposes for the government. PSA was used initially in order to stop illegal timber smuggling but later on the governments in power used the Act to serve their own vested interests and also intimidate their opponents. Similarly, since rise of militancy, PSA has been used against Over Ground Workers (OGW'S) as well as militant sympathisers. After abrogation of Article 370, Centre used PSA against the mainstream politicians thereby obliterating political grey areas that were there in Kashmir.

There is a direct proportional relationship between the party imposing the PSA and ideology of the detainee. This statement can be sufficed under following heads:

- ✓ **PSA against mainstream:** - the PSA imposed on mainstream politicians after abrogation of Article 370 is mainly because they have on many occasions tried to flirt on both sides of the political divide be it separatist camp or New Delhi.
- ✓ **PSA against Separatists:** - Various dossiers after analysis reveal that the PSA was imposed because of the separatist ideology which those leaders held.
- ✓ **PSA against Citizens:** - The PSA against the citizens and the reasons thereof reveal that citizens have either at some point been stone pelters or they sympathise or have the potential to organise protests in order to disturb the 'public order'.

The security challenge in Jammu and Kashmir emanates from various dimensions. These are geographical, internal as well as external. The proximity of J&K with Pakistan and facing a security threat from its neighbour coupled with alienated populace makes New Delhi resort to measures which are illiberal in nature. This has to do with the attacks of 9/11 as well because there was global consensus against terror groups operating in Af-Pak region. Thus, India along with Israel is one among many countries which forms the so called the "geographies of threat" loop (Oza, 2007). India thereby needs more weapons and surveillance technologies in

order to ‘control’ the populations. Extraordinary securitization and using of exceptional measures is often dated back to 9/11 and global war on terror (Brooks, 2004). Contrary to this view, scholars argue that the roots of exceptional securitization lie in British colonialism (Berda, 2013; Neocleous, 2007; Valverde, 2006). Detentions definitely are contrary to liberty of citizens as well as against the liberal philosophy of constitutional democracies. There is often a thin line maintained by states in differentiating imprisonment and detentions. Jails serve as abode of detainees who are detained under Preventive Detention. Through ‘hyper-legality’ and creating permanent emergencies (Duschinski & Ghosh, 2010; Ghosh & Duschinski, 2020) detainees often serve months, years and decades in prison. By gaming the provisions of the Detention Acts, Security agencies keep detainees in a permanent loop of imprisonment. Thus, detentions in countries which face serious security challenges use these Acts for various purposes which include ‘correcting’ the behaviour of erring citizens. In serious cases, dissent is also muzzled through detention orders when it is contrary to the political order/environment of the day. Detentions in modern states are all pervasive and so is the case with Preventive Detentions in Kashmir. Detentions ensure that state uses various mechanisms and its instruments in order to enhance its control and power over the local populace. This is very close to the concept of *Dispositif* used by Foucault (Deleuze, 1992). Again, the current level of detentions in Kashmir is very pervasive and ensuring strict surveillance over the “subjects”. They are profiled, marked and the data is collected/collated in order to effectively ensure surveillance akin to Panopticon.

Detentions effectively curtail the liberty of citizens. There is a tussle between Liberty and Security of the State. This dilemma has gone through its own history and has again been in debate after 9/11 and even before. The surveillance and use of various mechanisms by States in order to curtail the liberty of citizens in modern age is somehow deliberate and the argument is that citizens are willing to sacrifice more liberty in order to gain a better share of security (Davis & Silver, 2004; Davis, 2007). This might be because of various threats facing the nations and their people in terms of disasters, terrorism, pandemics and other emergencies. But the use of detentions takes the debate in a different territory altogether. Security of the State & Public order

is prime sovereign duty of the States hence in order to bring peace; detentions become *sine qua non* for the States. The problem arises when State and its implementing authorities use their discretion of imposing detentions to serve ulterior motives. Given the conflict environment, illegal detentions proliferate ‘conflict entrepreneurship’— which effectively means that an agency uses the conflict environment to serve its own financial aggrandisements.

## **1.2 Detentions: Dilemma between Liberty and Security of the State**

Recently in a Judgement in the case of Anuradha Bhasin v/s Union of India (2020), Justice N V Ramana and Justice V Ramasubramaniam argued while quoting Charles Dickens as “it was the best of times, it was the worst of times...” in the context of Liberty v/s Security debate. The learned judges read that:

Liberty and security have always been at loggerheads. The question before us, simply put, is what do we need more, liberty or security? Although the choice is seemingly challenging, we need to clear ourselves from the platitude of rhetoric and provide a meaningful answer so that every citizen has adequate security and sufficient liberty. The pendulum of preference should not swing in either extreme direction so that one preference compromises the other. It is not our forte to answer whether it is better to be free than secure or be secure rather than free. However, we are here only to ensure that citizens are provided all the rights and liberty to the highest extent in a given situation while ensuring security at the same time. (SCI, Anuradha Basin v/s Union of India, 2020).

This judgement was pronounced in the context of internet freedom, mobile communications and other restrictions placed in Kashmir after abrogation of Article

370 but remain true for detentions under PSA as well. It is quite natural that detentions play havoc with liberty of a detainee and curtails him/her of very basic human right provided by International Law as well as domestic Indian Constitutional scheme. Preventive detentions ensure that a subject is placed under arrest for an offence which he/she is likely to commit in near future. Supreme Court has also called this as “Jurisdiction of Suspicion”. Liberty / security dilemma is there since eons but recently due to spate of terrorist violence in western liberal – democratic countries have resolved their commitment to liberty and ensuring safety of their citizens at any cost. The Paris Attacks (13 November, 2015) in France led the Government to curtail the freedoms of citizens while famous US Philosopher Judith Butler questioned the stand of Paris Government led by then President Francois Hollande (David Kearns, 2015). Judith Butler argued that declaration of state of emergency in order to curtail the liberty of citizens constitutes itself an attack by the State on Freedom of Liberty. Terrorism can’t be the pretext for stripping off liberty from citizens. She argued that ensuring liberty of citizens is the ‘primary task’ of the State.

But the Social Contract Theory argues the opposite. That providing the Security to a citizen is the ‘primary task’ of the State. The very basis for justification of extraordinary measures demands that there is a genuine threat which needs state arming itself with special powers and curtailing liberty. This happened when Iraq was invaded; shrouded in ‘war on terror’ theme and particularly after 9/11. Media also plays a very important role when it comes to managing the PR stunts, this is what happened against Saddam Hussain according to MacArthur (2003, P.62).

In order to curtail liberty, there has to be enough threat that shall legitimise the detention of a person on security grounds. There is intricate relationship between Securitization (Waeber, 1995) and liberty of citizens. Anaelle Azoulay (2015) believes that when media gives enough hype to rhetoric by government and doesn’t perform functions independently & analytically, the government of the day gets enough ammunition to launch an attack on liberty of citizens thereby playing into the hands of terrorists who eventually wish to bring the edifice of Liberal-Democracy to naught.

Imposition of State of emergency or for that matter pretending/creating state of emergency serves the purpose of curtailing the liberties. According to Scheppele (2004, p.1004), State of emergency is defined as a situation in which a State faces a moral threat, thereby, it responds in a way which shall not be required/justified in normal times. Thus, States turns authoritarian during abnormal times or when it has to deal with a specific or a general threat. Being a conflict zone and also to serve some political scores, J&K PSA in Kashmir has been according to the circumstances and challenges faced by society. Sheikh Abdullah led government thought that ‘timber smuggling’ is a bigger threat hence PSA was imposed in 1978 against those who led or were involved in the illegal trade of timber in the state. Similarly, against the onset of armed rebellion backed by Pakistan, while using genuine warfare tactics, State also imposed PSA quite drastically against anti-social and anti-state actors which also included Over Ground Workers (OGW’s). Before the abrogation of Article 370, State created extraordinary situation and claiming that there is threat to Amarnath Yatra as some incriminating material (which included Improvised Explosive Devices, US-made M24 sniper rifle) was found en-route to the cave (Rashid, 2019). Later in 2019, Amarnath yatra was cancelled mid-way, more security personnel were called in into the valley. What ensued after 5<sup>th</sup> August 2019 was that Article 370 was watered down which conferred semi-autonomous status to J&K. In order to ensure that calm remains intact and security situation remains normal, State imposed severe restrictions, mobile communication was shut down, internet and other modes of communication were snapped. Government largely gained success when it claimed that there were least casualties which actually happened after this drastic move. To further maintain calm and ‘peace’ which was largely controlled/managed peace, the State used J&K PSA rampantly against anyone who it thought to be potential danger to ‘security of State’ or ‘public order’. The Act was used against mainstream, separatists as well as common citizens. This leads us to understand the securitisation dynamics of detentions and State in Jammu and Kashmir.

### **1.3 Kashmir: Security Studies Perspective (Ole Waever) and questions of Legitimacy (Max Weber & Van Dijk)**

Due to various internal and external threats facing the border state of Jammu and Kashmir, security scenario has always remained active dimension to this conundrum of Kashmir besides the political and developmental one as well. Through Traditional Security Perspective, Kashmir has been a good case for traditional dynamics in terms of use of war, weapons and state machinery including Laws/rules/acts in order to garner peace. The framework that is provided by *Ole Waever, Jaap de Wilde and Barry Buzan* which argues that securitization is much more than military solutions to military problems. It believes in non-military tactics as well which include the range of many themes like – military, political, economic, environmental and societal. New Delhi has used non-military solutions as well like starting dialogue processes with separatists, making economic & social development its main focus and involving non-state actors as well during various regimes. This paradigm reached its pinnacle during 2002-2007 under Atal Bihari Vajpayee.

The process of various interlocutors is also one of the glaring examples of steps taken in the non-traditional framework. But the overall trajectory shows that this dimension has remained short-lived and piece-meal. The fact remains that the portion of Traditional security dynamics has remained much more active and larger one. The presence of huge security cover, concertina wire on every road, aggressive stance on LOC (Line of Control) and rampant use of AFSPA and PSA makes it a safe bet to conclude that securitisation is skewed along the axis of Traditional Security School. Over the years New Delhi has seen Kashmir issue more through the Security prism. According to Lt. General Gurbir Mansingh, formerly served in Indian Army, suggests that 60% of Army deployed in recent years has been done to deal with internal problems in India (Ganguly & Bajpai, 1994). The problem with higher deployment of Army and reliance on security forces in order to impose peace has great dangers. As Army continues to be deployed in conflict zones, largely unblemished image of Indian Army gets tarnished as there are high chances of accusations against the institution every now and then. No matter what the truth in these charges is, it surely



poses a deterring and demoralising effect on the Army as an institution (Cohen, 1990). For Kashmir issue Pakistan has gone to war with India for at least four times and asymmetrical warfare continues unabated. Borders always remain hot. After the watering down of Article 370 in 2019, ceasefire violations up to 10 June 2020 across the border has increased more than 69 percent compared to 2019 (The Economic Times, 2020). Every year 200-300 militants are being killed which includes both locals and foreigners. Since 1989, thousands of civilians have lost their lives. But the situation after the bonhomie of Vajpayee era saw a complete reversal after 2008-2010 and more specifically after 2015.

The security agencies have been given free hand. There is excessive use of UAPA against civilians, journalists and others. The analysis of security situation in valley reveals that although security agencies are able to bring the level of militants down and bring in some semblance of normalcy, political engagement always fails to cash in on. This reality was also highlighted by former Lt. General of Northern Command D S Hooda who has always emphasised human rights and a civic/political approach encompassing a security one in order to deal with Kashmir. Further this will lead to demoralising of forces by using them against their own people (Interview of D S Hooda with Seema Mustafa, 2016).

Detentions demand that the imposing authority has the legitimacy to impose detention on the subject and curtail his freedom. According to Max Weber (1978, p.212), domination demands legitimacy and legitimacy can be of three kinds— Rational, Traditional and Charismatic. By analysing the recent detentions and after abrogation of Article 370 or before that, the detentions don't largely fall in any of the three categories. Detention aggravates the security scenario and aggravates the peace prospects further in valley. The detention of mainstream politicians after 5<sup>th</sup> August 2019 puts a huge question mark on the 'Rational' doctrine of Legitimacy. Because detaining mainstream politicians questions their 'nationalistic' credentials. Detaining a youth suspect of aiding militants on the basis of suspicion further aggravates the security scenario. So, Weber's compartmentalisation doesn't answer the question of legitimacy. The answer to this dilemma is provided by Van Dijk (1996) who has

given a cognitive perspective to the question of legitimacy. He argues that if the *controlling authority* is able to construct a discourse which is used to create new meanings and interpretations that can be channelized into dominance. Thus, power is more an equation of creating right kind of discourse for a particular situation. This is why Rawls (1993) argues that if institutions don't meet the criteria of legitimacy, people shall not comply. Of course, detentions serve the purpose for the State by giving it abnormally normal peace or so-called veneer of peace is maintained but it lacks requisite legitimacy in the eyes of citizens and detainees.

#### **1.4 “Pretexts” and Preventive Detentions**

To use the phrase of Edmund Burke “pretexts”, it can be argued that detentions by State serve as pretexts for its various motives and objectives along with the binary of liberty-security dilemma. The establishment has various pretexts in order to impose restrictions on the citizens. Apart from the theoretical or what has been written in law, detentions have various dimensions which covers various swathes of conflict in J&K. Detentions serve various ends for the State. There is a thin line between dissent, expressing the opinion and expressing displeasure. The rules/sections of J&K PSA give enough discretion in the hands of executive to define the domains/contours of various terms used in the Act itself along with “security of State” and “public order”. Of course, the scope is vast and open to interpretations. Judicial overview is quite important to define the contours of the law. This has not happened over the years and hence as argued above, the questions of legitimacy loom large.

The imposition of detention under J&K PSA, 1978 reveals various reasons/intentions behind the State policy. It has over the years been the primary instrument along with others in order to contain the unrest and secessionism in valley. The policy of the State is of ‘zero-tolerance’ towards terrorism but the fringe elements which remain oscillating between separatism and mainstream become prime targets for PSA. Of course, the Act is used against militant sympathisers. The imposition of PSA over the years has had a deep impact on the societal and economic life of individuals. Besides these repercussions it has also led to proliferation of conflict

entrepreneurship. These by-products of detentions in Kashmir are yet to be unravelled/analysed. Questions of securitisation and the feasibility of the Act whether it has served its purpose is a huge question mark yet to be answered. Detentions go into the historical debates of Liberty v/s Security and hence do pose the questions of securitisation as well. The frequent and significant usage of detentions in Liberal Democracies is awkward and deserves scrutinising and nuancing. These measures (detentions) are common among states cutting across by ideological differences. Whether you talk of US PATRIOT Act or what China has done in Hong Kong is a point of convergence when it comes to sovereign questions facing the nations. The same questions stared at India while drafting the constitution. Remember at the time of partition, the country was faced with secessionism, separatism, sub-nationalism and centrifugal tendencies. It was but a natural choice/decision to include Preventive detention in the constitution of India although with riders put in place.

### **1.5 Statement of the Research Problem**

Preventive detentions are manifest in almost all South Asian nations. The communist China and Capitalist USA both use Preventive detentions to serve the interests of the State. Preventive detention in the current literature is addressed through statements like detentions in liberal constitutional framework. But this thesis argues that preventive detentions change the very character of a liberal democracy to an illiberal order. Given the fact that we study preventive detentions within liberal framework distorts the analysis. The familial impact on PSA detentions in Jammu and Kashmir is an area which hasn't been properly analysed when compared to western scholars like Arditti (2003), Bales & Mears (2008), Hood & Gaston (2021) *et al.* This work goes in that direction and builds the framework through security studies framework and other analytical variables like 'pretexts'. The PSA is purely a bureaucratic work hence Weberian model gives a proper direction and focus area which is also employed in Kashmiri settings. The interlinkages between the PSA detentions in J&K particularly South Kashmir within illiberal framework has been analysed keeping in view the impacts and challenges which are in turn generated. The

impacts are manifest on individuals, their families as well and eventually challenges for the security scenario of J&K.

## **1.6 Significance of the Study**

This study that is “*The Impact and Challenges of Jammu and Kashmir Public Safety Act, 1978: A Study of South Kashmir*” depicts old dilemma between Liberty and Security of the state within context of Kashmir and more generally in South Asian context, as India, Pakistan, Bangladesh & Srilanka use the Preventive Detentions against their population. Securitization is one of the most important aspects of statecraft and developmental discourse. Detentions under PSA forms one of the most important aspects of State policy in Kashmir as the Act helps in managing the security scenario but it has ramifications for individual, society and peace building aspects. This study nuances and highlights the impact and challenges which detentions create for liberal democracies like India. Further the study is a good policy guide for administrators and Government as to the path which they shall traverse after abrogation of Article 370, because Preventive Detention without reforms or new policy measures can’t be a permanent feature of democratic societies like India.

## **1.7 Objectives of the Study**

- ✓ To sketch the political history of Jammu and Kashmir in its relation with Union Government.
- ✓ To analyse the social and economic implications of J&K PSA, 1978.
- ✓ To highlight the effects of J&K PSA, 1978 on peace building process.
- ✓ To explore the varying nature and changing dimensions of Democracy due to J&K PSA, 1978

## 1.8 Research Questions

- ✓ What has been the trajectory of political relations between J&K and Union of India historically?
- ✓ What is the background for enacting of J&K PSA, 1978?
- ✓ What makes state to impose J&K PSA on individuals?
- ✓ What is the social and economic impact of J&K PSA, 1978 on detainees and their families?
- ✓ What has been the prospect of peace in Kashmir in the environment of Preventive Detentions?
- ✓ What are the challenges for democracy inflicted by detentions and curtailing liberty of citizens?
- ✓ What is the nature of Democracy in Kashmir?
- ✓ Why does the state resort to illiberal measures in order to obtain liberal outcomes?

## **1.9 Research Methodology**

The general objective of this research is to analyse and investigate the detentions under Preventive Detention Law (PSA) in Kashmir particularly in two districts of South Kashmir—Kulgam and Shopian. These remain very restive districts of South Kashmir and are at the forefront of militancy and insurgency in Kashmir. That is why south Kashmir has been chosen as the area of study. This area also provides easy access to the detainees as detainees under PSA are enormous. Preventive detention under J&K PSA is a potent tool in the hands of Administration in order to detain a person who acts prejudicial to “Security of State” or “Public Order”. To achieve this goal, this study employs both qualitative and quantitative aspects (mixed method). Research method includes various steps taken by the researcher in order to arrive at academically sound conclusions which include defining the Statement of Problem, setting out Research questions, its objectives and significance/scope. The method also includes tools used for the research and its design and sample.

### **Population, Sample Size and Area of Study**

The study includes both qualitative and quantitative aspect. Jammu & Kashmir is the universe for the present study. Two districts of South Kashmir- Kulgam and Shopian will constitute the area of the Study. The sample size taken was 174 (160+08+06), out of which 160 for Quantitative & 14 for Qualitative data analysis which includes 08 for FGD and 6 members as Key Informants for purely Qualitative analysis were incorporated. For qualitative data Purposive/Convenient Sampling has been used. Stratified Random Sampling was the Sampling Technique for Quantitative data. The sample of detainees from district Kulgam was 80 (40 detainees & 40 families) and sample from District Shopian was 80 (40 detainees & 40 families). Raw data was available at JKCCS website which showed total detainees in Shopian as 59 and Kulgam as 64 along with parentage, address and age. That means 0.67% from Shopian and 0.625 % from district Kulgam.

### **1.9.1 Tools for Data Collection**

For data collection questionnaire was designed. The questionnaire was divided into various parts. The first part was designed to gather information about social characteristics of the detainee. The second part includes the questions to be posed to the detainees that have been released. The third part includes the questions for the families of the detained individuals. In order to arrive at some specified thematic outcomes, qualitative methods like Focused Group discussion (FGD) and In-depth Interview were conducted with key Informants (which are quite influential in the society and work on Preventive Detentions as well or have been directly or indirectly involved with incarcerations). These included lawyers, professors of Universities/colleges, Public Prosecutors, Human Rights activists and Government officials/police officials as well. One of the important tools of data collection employed was Right to Information Act, 2005. The RTI was filed with such intent so as to extract qualitative as well as quantitative information from the Police Department. RTI was filed in Department of Home, Government of J&K with questions which were closed ended as well as open ended. The open ended questions for example were posed in RTI as: -

- ✓ Is there any policy to detain PSA detainees separately from other inmates in UT of J&K?
- ✓ Is the current infrastructure of jails enough to ensure that there is no mixing of Preventive detainees with other hard-core criminals/under trails?
- ✓ Is there any policy by J&K Government to reduce recidivism of PSA detainees?

The participants were beforehand made aware about the topic. The outcomes were coded through ‘splitting technique’ manually and eight themes hence emerged out of the FGD which have been discussed in later chapters. Further for FGD following questions along with follow ups were posed: -

- ✓ How do you see the detentions in Kashmir under J&K PSA?
- ✓ Do you think detentions have served their purpose in bringing Law and Order in check?
- ✓ What are your views about of J&K Police?
- ✓ How far are you satisfied with state functionaries like Police, Judiciary and Bureaucracy when it comes to the detentions?
- ✓ Do security agencies work contrary to the specified mandate? Like are they the arms of State repression or for managing Law and order? Your views?
- ✓ Do Detentions lead to radicalisation of youth or is it otherwise?
- ✓ What are the main reasons of Radicalization of youth?
- ✓ How can a detainee get relief if he is detained under PSA or do you think bail is a rule in PSA or an exception?
- ✓ How far do you think that elections in Kashmir are done on 'free and fair' criterion?
- ✓ How do you see the democratic atmosphere in Kashmir?

Questionnaire (attached as Annexure I) was used for quantitative research which includes questionnaire for actual detainees, their families. Being a conflict zone & keeping in view the privacy of all the members who had participated, pseudonyms were used and also anonymity has been ensured.

Open-ended questions were asked to Key Informants, the uniformity of questions was maintained in order to get thematic outcomes. For Key Informants representing State, few changes were made in order to get their perspectives. The questions more or less remained as follows (as annexed with Annexure I): -

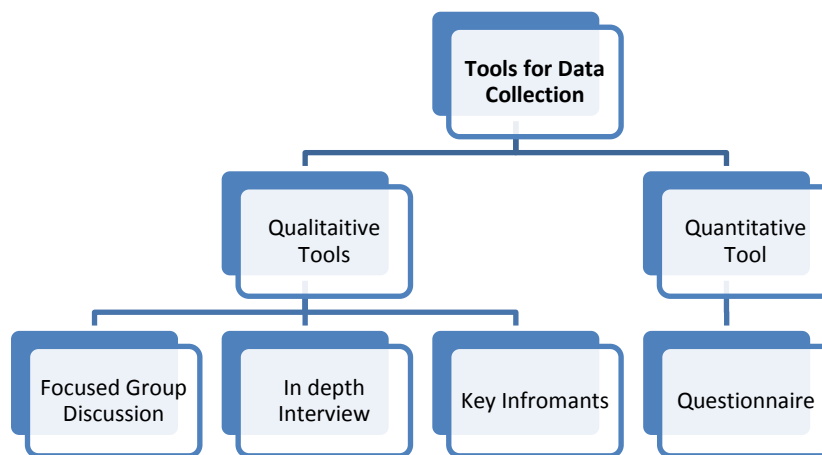
- ✓ How do you reconcile with Preventive Detention in Democratic Societies like India?
- ✓ Has Preventive Detention served its purpose in Kashmir?



- ✓ Is preventive detention a reasonable measure in the hands of the State in order to garner ‘good behaviour’ from citizens and hence can it lead to peace building in the region?
- ✓ How do you see Kashmir conflict: Is it more a Law and Order/Governance issue or a larger Political issue that fans across geography and History?
- ✓ Do you think J&K PSA and hundreds of detentions under it had helped manage the situation in Kashmir Post abrogation of Article 370?
- ✓ Kindly contrast the ideal mechanism/policies that should have been in place for Kashmir from Centre with the actual policies that have been in vogue since 1947?
- ✓ Don’t you think that Preventive detention in J&K leads to proliferation of “conflict entrepreneurship”?
- ✓ Give the contrast/reasons as to why some detainees are detained under J&K PSA, 1978 and some others are detained under ULA (P) Act [Unlawful Activities Prevention Act]?

For secondary data various books, journal articles, papers and news items were analysed. In order to understand the implications of the Act and its working it is very important to study the Preventive Detention Act in entirety. Various websites of Government of J&K like Home Department have given the description about the J&K PSA. Further various reports of JKCCS (Jammu and Kashmir Coalition of Civil Society) were analysed which also provided the list of detainees in districts of Kulgam & Shopian. JKCCS has done numerous empirical researches on detentions and tortures. Various case studies have been analysed by Amnesty International. These reports have also been studied in order to arrive at academically sound conclusions.

Diagram 1: Showing the Tools of Data Collection



### 1.9.2 Scope of the Study

Detentions carry a huge baggage of being detrimental to Liberty of detainees and a measure which is illiberal in character. These tough measures are quite often used to muzzle the dissent but the larger aim is to bring ‘peace and tranquillity’ in the society. The impact of detentions range in two directions: One is that it impacts the individual detainees and his/her immediate family (which includes son, daughter, romantic partner etc.) and secondly, it casts an imprint on the larger setup of the society within which it operates. Jammu and Kashmir Public Safety Act has been there since 5 decades in the current avatar but has its roots in colonial history. PSA history shows that the Act has been used for quelling the political dissent, used against criminals, militants and to serve the objectives of ‘national interest’. By analysing the socio-economic impacts and the impact on State and peace building, this study shall offer new insights into the working of the Act. Besides this, the study shall analyse the trajectory of new realities which have come about due to recent

developments largely managed through detentions which in turn shall offer new insights to the policy makers.

### **1.10 Limitations of the Study**

There are various areas which this research was not able to cater up on. The female participants in this research were negligible, so this research can't be a specific reference point on women detentions in Kashmir (although women detentions under PSA are quite less but nevertheless there are women detainees in Kashmir as well). Secondly, this research takes family as a unit and doesn't consider the impact of detentions on various age groups of a family separately. This might be a new research gap and an area which needs to be explored. Thirdly, this research has raised an important issue of decision making in an illiberal environment which is purely a Simonian decision-making aspect dealing with psychological cognition of a detainee in various political settings. This area needs to be further explored.

## 1.11 Chapterization

**Chapter 1** entitled as **Introduction** deals with the conceptual framework of the study undertaken. This work has been done through security studies framework provided by Ole Waever and Van Dijk. Further chapter 1 analyses the works of various scholars like Max Weber and Edmund Burke in the context of legitimacy principle and ‘pretexts’ respectively. The argument is to build a narrative and new framework of preventive detentions in the context of Kashmir. Various scholars study preventive detentions as part of liberal framework but this Chapter builds a narrative for preventive detentions within illiberal framework so that facts and analysis doesn’t get distorted. What this work intends to do, what are the objectives, questions & significance of the study have been highlighted at length in this chapter. The Research Methodology employed and tools used to achieve the objectives have been meticulously jotted down in first chapter.

**Chapter 2** entitled as **Review of Literature** analyses plethora of Literature under various themes around which this work revolves. Firstly, literature around Liberal/ illiberal framework has been thoroughly studied up to the point and framework when Fareed Zakaria wrote his famous article “The Rise of Illiberal Democracy” in *Foreign Affairs*. Although this wasn’t the maiden effort but this article created a focus towards a new framework of analysis around illiberal democracies of the world and their manifest characteristics. As far as another theme which this work delves into is that of political conflict in Kashmir and India-Pakistan discourse/literature around Kashmir. Various works which range from great scholars like Amitabh Mattoo, A G Noorani, and Husain Haqqani *et al* have been quoted in this chapter. The PSA detentions in Kashmir have been studied through historical perspective and Human Rights perspective hitherto, almost all the literature has been analysed whether published in books, Journals or News Papers has been properly dealt with in this chapter. The impact of Preventive Detentions around globe became manifest after US ‘war on terror’ gained prominence. Various international works have been studied along with immigration detention and their impact on detainees and their families. The Second chapter at the end develops a Research Gap for this research as well.

**Chapter 3** entitled as **Political Relations of Jammu and Kashmir with Union of India: A Historical Account** gives a historical account of J&K with union of India since formation of Muslim conference and its later avatar as National Conference. This Chapter goes into the historical account of relations between Nehru and Sheikh Abdullah and how and why Accession of J&K with Union of India took place and in what circumstances. The personal rapport between democrat Nehru and Nationalist Abdullah reached nadir when former jailed later and installed different regime in Kashmir. Kashmir has seen various political up's and down's since 1947 and after that. The major events, their impacts on politics of erstwhile State and central Governments various 'blunders' in Kashmir particular of 1989 has been thoroughly addressed. The militancy aspect and how New Delhi later on dealt with Kashmir can better be described as "smoke & mirrors", because what was manifest was never true and what was true was never manifest. New Delhi employed both Iron fist policies to win over Kashmir as well as employed 'soft' approach which has been entitled as "dovish" character of Indian State in this chapter.

**Chapter 4** is entitled as **The Jammu and Kashmir Public Safety Act, 1978: Traversing through Constitutionality and Historicity** which gives details of bare Act itself and what are the provisions of the Act. The Chapter deals which historical context of PSA in Kashmir and detention laws in India since British era. The chapter also highlights the various preventive detention laws in various Indian States and NSA, 1980 at National level. The chapter hence highlights the contrast between PSA of J&K and various Acts in other Indian States and how they are different. The Chapter further highlights the working of PSA, 1978 in J&K and how it has fanned since 1978. The working of Advisory Boards under the Act has also been analysed. Through various case studies, this chapter has analysed how through skewed implementation of the Act, J&K PSA which although primarily remains a mere preventive detention law creates huge security risks for security agencies. Peace remains one of the major objectives for State in J&K and has remained a primary objective for New Delhi since 1947. This chapter shows that PSA and its usage has been rampant since 2008 to quell dissent and protests in valley. This Act has been used by the State to implement major constitutional changes to J&K in August 2019.

The chapter highlights that although the State claims that PSA ensured ‘peace’ in valley after 2019 but that peace was largely a false manifestation of real objective. Peace in Kashmir is not directly proportional to various security acts and laws (Like PSA & AFSPA) but depends on various factors which have been discussed in this Chapter.

**Chapter 5** is entitled as **Preventive Detentions, Human Rights and Legal Intricacies addressed by Apex Court in India & High Court of J&K** which deals with the various legal intricacies of Preventive detentions in India and how apex court has interpreted various provisions of Preventive detention laws. Because although Preventive detentions finds mention in Fundamental Rights of Indian Constitution and was vehemently debated during Constitutional debates by the like of Sardar Patel, Ambedkar and Bakshi Tek Chand but the fact of the matter remains that Preventive detentions in India work under larger Liberal Framework. Apex Court through various judgements has addressed the intricate balance between security of State and individual liberty. Similarly, various High Court Judgements of J&K have also been quoted in this chapter to bring home the point.

**Chapter 6** entitled as **Data Analysis and Interpretation** brings fore the primary data collected from field and its interpretation. As the questionnaire was framed in various parts for example for individual detainees, families and around various themes, the analysis has also been grouped under various headings. The torture faced by detainees, the security agencies involved in detention and difficulties faced by detainees in jails has been grouped and discussed in initial sections. The other factors which have been analysed are regarding various rights of detainees which they enjoy according to the provisions of the Act. The data analysis shows whether security agencies provide proper relief to the detainee according to the Act, whether he is given proper legal counsel according to the provisions of the Act or not? Similarly other portions of this chapter highlight social stigma faced by detainee and his family. What is the familial impact of the detention under PSA? The opprobrium faced by families in society. Whether the society helps out the families or not? Finally, the chapter also discusses surveillance of detainees and their families which comes along with preventive detentions in Kashmir, because PSA detainees are also

OGW's, stone pelters or former militants as well. The basic objective of PSA and its continuation after abrogation of Article 370 remains mainly as a counter-insurgency tool.

**Chapter 7** is entitled as **Research Findings, Suggestions and Conclusion** which highlights various findings of the study undertaken. The findings mainly include various impacts that PSA creates for detainees and families and challenges that PSA creates for Security agencies as well. The study argues in favour of PSA continuation in valley but along with various amendments which include not to detain individuals outside of J&K in far off jails like those in UP or Rajasthan or Haryana. The major findings of this research include that J&K Public Safety Act has been a handy tool in the hands of security agencies to quell the dissent and protest whether in 2008, 2010, 2016 and 2019. Security agencies including Political Executive have claimed that after watering down of Article 370, Public Safety Act, 1978 was used extensively and liberty of individuals was curbed but in the 'larger good' of erstwhile state which ensured that there were far less killings and hence peace prevailed. This study has found that torture, intimidation, detention and working with Iron-fist against a volatile population works very well to a certain extent, but beyond that threshold, detentions prove detrimental and can push a dissenter, stone pelter, political opponent into militancy which leads to devastation of society at large. Further given proper care and accommodating nature of security agencies and State, protests and stone pelting in Kashmir can be brought under control. Giving economic opportunities to detainees and helping their families by State through soft approach will have a wider impact on law and order. Security agencies need to analyse the detainees and their economic background much more deeply and help those families which are in need; through this approach the need to slap PSA's on detainees again and again will be minimised. Thus the "revolving door" and keeping detainees permanently detained for years together will be obliterated altogether. This study found that the jail system in J&K lags in capacity to hold the detainees in detention cells. Detainees under PSA are put in with hardened criminals, militants and drug addicts, which can prove detrimental and may actually worsen the situation.

## **Chapter 2**

### **Review of Literature**

The concept of modern state is closely knit with the concept of Welfare depending upon the legitimacy of state power and control. By regulating economic activity and acting as a large-scale economic consumer/producer, as well as by its redistributive welfare state operations, the modern state plays a significant role in constructing the socio-economic scenario. Law and order is the most basic and essential prerequisite of a modern welfare state in order to secure the welfare of the people and continue the growth story. The two functions of the state i.e. developmental and Law and Order must and should dovetail each other. Government is the sine qua non of modern state. Life without government, according to Thomas Hobbes (1651), is "solitary, poor, nasty, brutish, and short," and he further contends that 'law and order' is a crucial element of modern civilization.

In recent years due to large and humongous immigration from African, Asian and other countries towards Europe and America has brought the Administrative Detention back to focus. Administrative detention is not an isolated incident which seeks to halt or stop an individual from committing a crime, but it is nowadays a larger phenomenon which has roots in rise of illiberalism and pushing too much on the principles of 'national security' and 'sovereignty'. Administrative detentions in Israel serve different objectives for the State than a detainee detained by USA in Guantanamo Bay. Similarly, detention of immigrants by USA and other European Countries serves different purpose for respective governments. The Administrative Detention further arguing is the extended arm of US 'war on Terror' and is connected with the securitization studies as well. Because, providing security is the foremost duty of the State, thus, this study delves into the realms of Security Studies most prominently the Traditional one. Administrative Detention takes us back to Traditional Security Studies which is drastically different and diverging from the non-traditional studies.

India at independence was marred with secessionism, separatism and centrifugal tendencies. It is in this direction that the framers of the constitution inserted certain sections in Indian constitution which according to some experts are



illiberal and centralising in character like Article 22(3) and some Articles pertaining to Emergencies. Indian constitution is among very few constitutions of the world that contains Preventive Detention provisions in the Constitution itself during peacetime. Centre as well as States in India has enacted preventive detention laws in order to subdue separatism & secessionism. At Federal level the Act goes by National Security Act amended from time to time with its own history attached. Jammu and Kashmir has also enacted in 1978 under Sheikh Abdullah led government what is popularly known as J&K PSA, 1978. Since its enactment, J&K PSA has been used against anti-social elements, militants, political opponents and dissenters. Since 1978, J&K PSA's usage has been as per whims and fancies of the political party in power and keeping in various security dimensions in view. It is pertinent to mention that J&K PSA until 1990 was mostly used to quell the dissension witnessed by establishment in power and other separatist tendencies. After 1990's, due to militancy, J&K PSA was used against former militants and their sympathisers. And of course, the usage of J&K PSA after abrogation of Article 370 has changed.

Preventive detentions laws curb the liberty of an individual. There is always a tussle between liberty & security of the state. State has to maintain a balance between the two while ensuring requisite amount of liberty as well as securing security of State. Recently in *Anuradha Bhasin V/s Union of India* case regarding Internet Judgement, Supreme Court dealt with this issue with sagacity and eloquently. J&K PSA is a similar legislation which traverses between these two philosophical dimensions of the State—Liberty of Individual and Security/Sovereignty of State. Apart from philosophy, J&K PSA deals with individuals which are also citizens of a State. An individual detained under J&K PSA is profoundly impacted both economically & socially when detained under preventive detention. This is where preventive detention gets into punitive domain, and of course what it is not meant to be. There is economic and social cost involved with each detention. Disturbances in social life and economic costs involved bear their shadow on peace in conflict zones like Jammu and Kashmir. Given the external dimension within which J&K politics works, detentions drastically change the Law & Order scenario as well. It is within these dimensions that this study shall analyse the impact of J&K PSA, 1978 on individual detainees, families and society at large. More importantly, the impact of

illiberal measures resorted to by the state in order to bring shall be systematically analysed in order to derive academic conclusions.

## **2.1 Review of Literature**

The Review of Literature has been discussed under various themes which revolve around the conception of State power and Legitimacy, the political relationship between Centre and Union of India since 1947, the genesis of preventive detentions around the globe, the impacts there of and the genesis of PSA in Kashmir, Preventive laws in the country and the familial and individual impact of PSA in Kashmir. Furthermore, the impact and challenges that these detentions create for a democratic setup has also been discussed and relevant literature has been added. This discussion proceeds with certain definitions.

### **2.1 Jammu & Kashmir Public Safety Act, 1978**

The J&K PSA, 1978, was signed into law by the Governor of Jammu and Kashmir on 8 April, 1978. The stated Act was adopted by Sheikh Abdullah's government as a harsh measure to deter timber smuggling and put traffickers "out of circulation". The statute authorised the government to hold anybody above the age of 16 for up to two years without charge or trial. Later, particularly after the 1990s, this Law was utilised against persons/individuals who stood against the state in any way, whether "verbal, material, physical, or substantial".

#### **2.1.1 Law and Order in India**

Law and Order in India is a State subject and is covered under Seventh Schedule of Indian Constitution. However, Central forces do supplement the efforts of the state Government.

### **2.1.2 Democracy**

Democracy since the times of Herodotus has meant the “Rule of People”. Democracy is the form of Political System where people are sole deciders of their fate. Democracy has various manifestations. There can be Direct and well as Indirect Democracy. More often than not, democracy is substituted with the term “majoritarian rule”. Democracy involves consensus building among participants and no one is the absolute winner in the discourse. It is constant struggle of ideas to arrive at a common meeting point which further leads to a base for consultations.

### **2.1.3 Liberalism**

As a basic concept in statecraft and political ideology which believes in safeguarding and strengthening individual liberty. Liberals generally think that government is important to protect individuals from harm caused by others, but they also realise that government may be a danger to liberty, as well.

### **2.1.4 Illiberalism**

Illiberalism is a Politico-philosophical concept that is characterized by certain attributes. These attributes make it quite paradoxical to the concept of Liberalism. Illiberalism was defined by *Fareed Zakaria* in his widely popular paper in Foreign Affairs entitled as “*The Rise of Illiberal Democracy*” published in **1997**. Illiberalism denotes democracies that practice free and fair elections but are low on constitutional guarantees. Free and Fair elections give government the legitimacy to rule the people according to the theoretical rule book. Elections are held regularly in these democracies but exchange of power rarely happens or power is consolidated through a larger mandate. The constitutional guarantees that should have come by default through free and fair elections are missing in these democracies. These guarantees are: Freedom of expression, Freedom of Assembly, Freedom of Religion, separation of Powers, etc. Because of this blending of “free and fair” elections and absence of Liberal-constitutional guarantees what we obtain is illiberal democratic order.

## 2.2 Relation of Kashmir with Union of India: An Overview

The review of literature is accordance with the political history of J&K. The political atmosphere has largely impacted the situation in the state. It is in the context of above-mentioned theme that the literature review is done. The happenings on the ground and how the Democracy of state has navigated. The J&K PSA has been the part of the Law and order situation and issues related to the same. The implications of the said Act have been profound on the National security scenario and on the political happenings of the valley in particular. The families and the individuals affected by the Act are many and the studies conducted on the theme are in dearth.

In order to understand and assess the impact of Public Safety Act 1978, the following Journal Articles, books and Bare Act of Public Safety Act are reviewed. The analyses of various countries where preventive measures have been employed in order to obtain peace have given skewed results.

*Snedden (2017)* argues that Jammu and Kashmir has remained a contentious issue between two nuclear powered states. The issue has since 1947 gone so bad that the two states have gone to war on four instances including 1947, 1965, 1971, and 1999. These two powers, because of Kashmir issue, have remained bitter rivals for decades since partition in 1947. This book gives the historical account of the dispute and also address the current status of the issue. The book has started from 19<sup>th</sup> history and charts the genesis of Maharaja Hari Singh to power. The author argues that this was possible because of British interference. Snedden argues that even some of Hindu advisors advised him to join Pakistan.

*Aman Hingorani (2016)* has maintained that in order to keep their interests alive in J&K Britishers deliberately kept J&K partitioned between India and Pakistan. The author suggests that there have been many instances of goodwill between the two countries over kashmir issue but 2007 engagement was much closer to settlement but could not go forward because of political compulsions.

*Thomas (1933)* argues in “*The struggle for Kashmir: Alternative interpretations and solutions*” that despite being a Muslim majority state, the leadership in J&K led by Sheikh Abdullah decided to go with Secular India. The author argues that there were many frictions in Muslim population over joining of the state with Union of

India. The major role was played by Muslim conference. Even during Jinnah's visit to Kashmir, Muslim conference garnered large population but National Conference distanced itself from the rallies supporting Jinnah.

*A G Noorani (2011)* in his work, he provides a thorough overview of historical events that led to the signing of the Instrument of Accession and the subsequent history. Temporary arrangements for the Jammu and Kashmir are included in the set of papers relevant to Article 370 of the Indian Constitution. Noorani's book details the protracted debates that followed the law's introduction on October 17, 1949, and lasted for five months. It explains the document's objective, explains how it was weakened, and traces the state's constitutional history and, as a result, its relationship with the Union of India. It covers the era from 1946–2010.

*Hussain Haqqani (2003)* while arguing that The Kashmir issue is frequently referred to by Pakistani politicians as the "central problem" between India and Pakistan. The tactic of the latter is motivated by a general fear of India and Pakistan's national identity. Pakistan's reaction to the Kashmir dispute has been characterised by a series of diplomatic manoeuvres that have ignored either a consistent policy or a predetermined outcome. Various conflicts between India and Pakistan may only be resolved, according to the author, through a long-term peace process. Pakistan may not have a clear endgame in Kashmir, and one way to assure is to address its anxieties thoroughly.

*Amitabh Mattoo (2010)* The purpose of this article is to provide answers to the following questions: Is it possible that India holds the answers to ultimately resolve the Kashmir issue? What are the necessary conditions for that? Although there was no publicly visible Indian strategy, Kashmir holds the possibility for long-term peace. Following the 1999 Kargil conflict, the September 11 terrorist attacks on the United States (9/11), and a shift in international public opinion on Kashmir, India has an opportunity to resolve the Kashmir issue. These considerations, however, are embedded in deeper shifts within the Indian polity, such as growing agreement on economic and political decentralisation and a desire to expand India's international reach, which may increase India's ability to commit to a more long-term and creative Kashmir strategy.

**Anand Mohan (1992)** This article contends that not long ago, it was widely believed that the only solution to Kashmir's issue was for it to become obsolete. Because the contradictory views of India and Pakistan are based on opposing ideas of equality, the subject has been exhaustively discussed in international forums for more than two decades with no viable solution. According to Pakistan Kashmiri's have the right to self-determination under Article 1(2) of the United Nations Charter. India contends that Pakistan's unwavering support for the Kashmir cause, including the employment of irregulars, violates India's territorial sovereignty and violates Article 1(4) of the Charter.

**Carole McGranahan (2003)** the author has given the comparison of worlds two conflicts that is Tibet and Kashmir and argues that even after 5 decades, the disputes have lingered in 21<sup>st</sup> century without obvious indications of settlement. This study focused on universal rights, nationhood and national sovereignty issues in two conflicts and asks what political remedies exist for Tibetans or Jammu and Kashmir citizens in today's ever changing world.

**V P Menon (1956)** in the book "*The story of Integration of Indian States*" vehemently argues that one of the most structurally monumental tasks faced by the Indian administration after Independence was to fuse the 554 princely states with the Indian state. V.P. Menon collaborated closely with Sardar Patel to help the princely states merge with India. He took up each state's case and explained how they were convinced to sign the accession instrument that rendered them part of the Indian union. He also demonstrates how various states were put together to create common divisions of administration.

**Devin Hagerty (2003)** argues that Washington had failed to chart Kashmir's path for stability. And although probability of resolving the dispute is low, the likelihood of failure also shouldn't inhibit the US administration from playing a more proactive role in resolving the conflict.

**Puri (1981)** According to the author of *Jammu and Kashmir: Triumph and Tragedy of Indian Federalization*, there was a consensus among Muslim conference and Hindu Sabha that Kashmir should remain independent, and Hindu Sabha believed

that the State should not join secular India in order to protect its 'Hindu identity.' According to the demands of the people, Chaudhary Hamidullah Khan persuaded and forced Maharaja to organise a separate constituent Assembly for the state.

*Ujwwal (2007)* in *The State, Democracy and anti-terror laws* argues that anti-terror laws are enacted to fight a particular menace in the society but these laws have a long-lasting impact on Rule of Law, Democracy and Liberal credentials of a country. These laws have extreme ramifications on the lives of ordinary people and political institutions.

*Duschinski et al (2018)* this book presents alternative form of perspective regarding Kashmir that transcend traditional borders. The study presents its argument around various scholars in the field and from multiple methodological backgrounds who have done extensive field research in various regions of Kashmir. The writers, many of whom were raised and bred at the peak of war in the 1990's, provide ethnographically rooted viewpoints on contemporary financial, legal, and political existence in ways that illustrate the multiplicity of Kashmiri community experiences.

Jammu and Kashmir became part of Union of India within the modalities as specified in the Instrument of Accession, signed between Maharaja and New Delhi. Sheikh Abdullah was the tallest leader of J&K. Sheikh belonged to Muslim Conference and later formed his separate political party as National Conference. J&K signed Instrument of Accession because of aggression from Pakistan as it sent non-regulars to attack Kashmir. In the war that ensued in 1947, Pakistan retained large swathes of land of erstwhile princely state of J&K which included Muzaffarabad, Gilgit-Baltistan, Shaksgam Valley. Aksai Chin also part of J&K was taken by China in 1962 war. Infatuation about taking away Kashmir from India, Pakistan launched many attacks on India but failed. New Delhi's relation with Kashmir since 1947 has also been undulating. Mostly, Article 370 has been the binding adhesive between New Delhi and Kashmir. The Nehru-Abdullah relationship saw a major setback when in 1953 Sheikh Abdullah was arrested on charges of conspiracy against India. Since then, many up's & down's have ensued upto 1989 when armed rebellion started between insurgents and security agencies which resulted in migration of large population of Kashmiri Pandits.

### **2.3 Preventive Detention Laws and their impact: Myriad instances from various countries**

*Upendra Baxi (1982)* Upendra Baxi explains how Preventive Detention works alongside and often replaces the Criminal Justice System (CJS), which is focused on traditional police plan and techniques, with arrests based on suspicion and circumvention, in his groundbreaking initial research on the Indian legal framework.

*Yael Berda (2020)* in "Managing Dangerous Populations" looks at the historical roots of current security laws as a vector of citizenship. When comparing Israel's new Counter-Terrorism Law to Indian security legislation, the central argument is that these laws and their consequences are based on colonial emergency regulations and the bureaucratic structures for population control that resulted from them, rather than on the "global war on terror". The study depicts the influence of imperial security bureaucracies on transitional nations seeking legitimacy as contemporary democracies by determining how to use an inherited arsenal of imperial and settler-colonial protective legislation tools for community control. These controls are manifest in limitations on movement, surveillance and political conflict.

*Bhawnani (2018)* the implementation of the Public Safety Act to crush democratic dissent in the Kashmir Valley is unlawful and indiscriminate. The work demonstrates a brazen disregard for the Constitution and the right to constitutional liberty established therein. Following the killing of Hizb-ul-Mujahideen Commander Burhan Wani, an examination of 100 instances of Kashmiri youth held under the draconian PSA reveals that both the State and the PSA's execution agencies are engaged in maintaining "lawlessness".

*Chaterjee (2017)* believes that NGOs, campaigners, and survivors in Gujarat have relied on India's criminal justice system to keep culprits accountable. Lower courts in Ahmedabad, however, were successful in immunising and protecting defendants. Three interconnected strategies provide the overall impact of impunity, which permits public, even spectacular violence to go unpunished. Postcolonial regimes can employ such mechanisms of legitimacy to inscribe and repackage excessive brutality towards minorities in order to strengthen and enhance a system of state control based on the obvious subjugation of minority groups. Gujarat's situation



displays a distinct post-colonial national identity, one founded on the ability of a multitude of actors, both state and non-state, to balance majority and minority views.

*Warisha (2013)* examines the detention laws in Kashmir through the perspective of security agencies. How there is complete lack of political will to undo the grave Preventive detention laws? Despite repeated governments trying to do away with the law and assurances, this law hasn't been done away with.

The basic argument in *Manoharan (2009)* paper Trojan Horses: Counter Terrorism Laws and Security in India is that the implementation of strong country wide anti-terrorism laws without adequate safeguards to limit misappropriation and ensure national homogeneity in their application has resulted in human rights abuses and disparate enforcement patterns across the country. Rather than assisting the state's oppressive arm, the primary goal of security regulations should be to reduce political tensions.

*Christopher (2005)* following a terrorist assault on India's Parliament building in December 2001, India approved its own anti-terrorism law, the Prevention of Terrorism Act (POTA), after the September 11 terrorist strikes in the United States. Indian politicians acted fast, declaring the Act to be a crucial tool against terrorism, similar to the USA PATRIOT Act. But, like the USA PATRIOT Act, POTA was attacked by critics as being unnecessary and oppressive. POTA provided for 180 day detentions without charge, presumptions of guilt, hazy review processes, and trials in absentia, among other potentially problematic provisions. POTA was tougher in many aspects than the USA PATRIOT Act, but India's terrorism danger is as well. POTA was repealed by a new federal administration in September 2004.

*Y. Berda (2018)* During her time as a human rights prosecutor and legal analyst in the Israeli licensing system in the occupied West Bank, she used ethnographic data she gathered. The book, published by Stanford University Press, is divided into four chapters and treats Palestinian management as a serious event of population control. Berda's examination of the often-erratic logic, methods, and impacts of bureaucratic highhandedness is based on conversations with Palestinian clientele and military civil administration employees. She emphasises that the permit system, which regulates mobility and focuses on data gathering and monitoring, is not as deliberate or precise as we might think.

*Raphael Cohen-Almagor (2000)* in this detailed essay argues that Administrative Detention should be put at par with other offences where detainee has every right to defend himself/herself. Administrative imprisonment can be treated as an anti-humanitarian intervention and opposed to in the same manner we argue against slavery, arbitrary abuse, injury to infants, displacement and involuntary population transfer.

*M Rishmawi (1989)* argues that Administrative detentions must follow due process of Law. Detainees must be provided with adequate reasons of detention under Law. Detainee must be produced before judicial body immediately after arrest. Mrs. Rishmawi studied about the cases in West bank and Gaza. She argues that the way in which Israel has used the process of Administrative detention should be reviewed immediately.

*Tania Penovic (2008)* studying administrative detention in the context of Australia argues that the wide bureaucratic power of detention imposed by the Migration Act was exercised in a way that refuses to pay due consideration to the right to personal freedom. At least 250 people were detained outside the scope of their detention provisions. Some of these individuals were among Australian society's most disadvantaged and oppressed participants and their imprisonment created questions over Australia's conformity with its foreign human rights obligations. This essay explores the nature of false imprisonment persecution to resolve issues resulting from unjust arrest of immigrants.

*Jeremy Shapiro & Bénédicte Suzan (2003)* argue about the French experience with Counter Terrorism that France has always been on the spurting bloodbath of violent extremism for quite some time. It has suffered repeated waves of international as well as domestic terror in particular over the last 20 years. As a consequence, France has built a relatively successful program for combating terrorism at home, mostly through expensive trial and error. This program is unique to France adapted to the particular challenges, capabilities and democratic structure of France. Nevertheless, there are lessons for other nations, including the United States. Several stand out benefits of a unified and professional judicial process; the value of establishing good, reliable partnerships with judicial and intelligence organizations

and the need to recognize the interplay with counter-terrorism strategies at home and globally.

*Parveen Swami (2003)* the author suggests that Jammu and Kashmir needs a more sophisticated view of terrorism. Instead, Pakistan's security leadership holds the keys to the ferocity of terrorist activity. The allegedly liberal-nationalist movement of the early 1990s was in fact profoundly Islamist in character; there was a larger unity of reasoning undergirding terrorism than admitted by the literature. Finally, the essay argues that terrorism activity requires to be viewed not only in the narrow sense of Jammu and Kashmir but as part of a broader identity problem in South Asia.

*Nick Chessman (2015)* in his book “*The Impunity Effect: Majoritarian rule, everyday legality and State formation in India*” the rule of law, according to the author, is a utopian concept that has been embraced and pushed all over the world today. Chessman's thesis is a significant contribution to Myanmar's growth, which is a country where the rule of law is present in theory but not in practise. Chessman uses legal and political theory to explain how and why law-sponsored groups fight rule of law and order, tracing techniques and ideologies from British colonisation to totalitarian regimes to the current day. This book is based on both Burmese and English sources, including criminal trial transcripts and a wide range of government documents..

*Christine Hoglund and Camila Orjuela (2012)* examine hybrid peace governance and illiberal peacebuilding in postwar Sri Lanka in their book *Hybrid Peace Governance and Illiberal Peacebuilding* in Sri Lanka. It focuses primarily on the international/domestic nexus by studying the relationship between foreign military intervention and domestic politics of peace governance and popular mobilisation while discussing the types of overlap that have evolved. The findings show that there exists social and political differences that promote hybrid peace governance frameworks. There is a strong divide not just between local and international players, but also within the international community. In this sense, illiberal international powers have gained clout and helped to shape domestic policy. Illiberal politics is justified in part by mobilisation against other foreign powers' liberal peacekeeping initiatives.

*Ashley S Deeks (2007)*, argues in this essay that treaties have long recognised that during armed conflicts, a State may hold without charge not just opposing armies, but also its own citizens and individuals who constitute a direct threat to its security interests. Unlike administrative detention in international armed conflicts, which is governed by a set of procedural norms, administrative detention in non-international armed conflicts is governed by a set of extremely specific Treaty regulations.

*Sarah Biddulph (2007)* uses conceptual framework of constitutional transition mechanisms in post-socialist territories like China. A comprehensive study of three disciplinary prison forces explores the effect of China's post-1978 legislative changes on police actions: prisons for schooling of prostitutes, forced rehabilitation for those detained under drug abuse, and re-education through forced labor.

*Rosemary Foot (2006)* argues that war terminology/language has a close association with a fundamental reason as to why civil and political freedoms are violated. Detention without charge, unlawful detention, abduction, and brutality will result only when a regime wants to redefine the character of an uprising. State or government stability is at the forefront of any regime. The Cold War as well as the current global war against terrorism is no exceptions to this general argument.

*M C Waxman (2008)* This is a second of series of papers jointly by Brookings Institution and Georgetown University Law Centre. The paper argues basically about the procedures of detention. The paper goes into the questions of how to detain and why to detain?

*Rodrigo Tavares (2008)* This article suggests a conflict resolution approach to alleviate the bloodshed in Kashmir. To begin with, Kashmir is viewed as a multi-faceted conflict involving several parties. In addition, in order to understand the complexity of Kashmir, the author provides a novel paradigm based on six tiers of control, which allows us to describe the consequences of the India-Pakistan-Kashmir peace phase. The author recommends a three-step paradigm for regional peace that includes confidence-building measures, restoration of Jammu and Kashmir's original reversed status, and finally shared sovereign rights between India and Pakistan.

**Jonah Blank (2003)** Kashmiris don't reveal much hope regarding their future following a recent de-escalation of military conflicts and the fairest election in more than two decades. Whether this cynicism is warranted, then it is at the cost of long-term planning owing to a near-universal focus on short-term strategies. Almost all sides to the Kashmir conflict – either centered in New Delhi, Islamabad, Kashmir or Muzaffarabad, seem to think tactically. Only jihadists remain skeptical.

**Adam Roberts (2002)** the legality of emergency laws are questioned in combat operations, including operations against terrorists, according to the author. The US-led 'war on terror' is fraught with difficulties, particularly when it comes to the deployment of military action in Afghanistan. Since late September 2001, the categorisation and prosecution of detainees taken in the war on terror has been a major worldwide concern.

In her research on preventive detention and emergency legislation in post-colonial Sri Lanka, Vasuki Nesiah (2010) challenges the liberal understanding of exceptional laws by looking at how preventive detention laws function as permanent features of violent political regimes of containment and exclusion, rather than as tensions, contradictions, or unconstitutional or extra-constitutional suspensions of the rule of law in constitutional democracies. This feeling of political urgency is prevalent and socialised in a legal context of heightened danger and risk perception, such as military wars or active political resistance, and “the subjectivity of protest” becomes coded and prefigured as deviant through the discursive and performative violence of emergency regulations” (p. 136). “Power”, she writes, “is authorized through the very delineation of constitutional limits” (p. 122).

**Jelena Pejic (2005)** that stripping of liberty for security purposes is an extraordinary form of power which may be exerted in military conflict. Administrative arrest of individuals, who are considered a danger to Security of State, is now being conducted more often outside the violent conflict zones. The whole paper claims that internment and incarceration are actually institutional are not properly analysed from the point of view of securing the interests of the affected persons.

*Sarah Biddulph (1993)*, in this article illustrates the forms in which police in China are granted specific and loosely specified powers by the legislative regimes for enforcing preventive detention sanctions. The study shows that most laws provide police broad latitude in exercising their authority, and in particular in deciding if such actions merited the person's detention. Although procedures have been constitutionally developed for evaluating the police conduct, they continue to be restricted in scope. The party aggrieved by the disciplinary action for the most part has little capacity to compel the oversight agency to resolve their allegation or act upon it.

*Michela Ceccorulli and Nicola Labanca (2014)* in their book argue that migration is often used as a question of defense, both in public discourse and in policy making. In addition, the trend of detention as a governance procedure has arisen, and a tangle of fresh and complicated problems has been generated by the emerging existence of migrant camps in Europe. This book explores the problem of illegal immigration and offers a detailed description of migrant processing activities and consequences inside and beyond the European Union. This work analyses detention as a governance mechanism and discusses some main concepts under following heads: -

- Europe's Stability issues
- Processes for defence monitoring introduced to comply with illegal immigration
- Detention occurs within various spatial frameworks
- Efficacy of the EU in solving migrant problem.

*Michael Goldstein (1978)* argues in the context of Israeli detention policies that Israel has adopted one big protection initiative, and how it is viewed by different Palestinians and Israelis. The writer claims that such views are particularly significant as the interactions between these two cultures would be critical in settling their disputes. Administrative arrest and the destruction of houses were among the many divisive Israeli defense policies in the occupied territories unpopular not only among the Palestinian Arabs but also by Israeli Jews. The key explanation for this dispute is that administrative detention violates one of the individual's most fundamental protections of freedom and makes it unlawful to detain and jail people on "the suspicion that a person might be dangerous in the future".

## **2.4 Rise of Illiberal Democracies across world.**

In this work titled as *The Rise of Illiberal Democracy*, Foreign Affairs *Fareed Zakaria (1997)* has given the analytical description of illiberal democratic nations that are on rise across the world from Peru to Philippines. This paper was published in 1997. It is a philosophical description of how states slowly turn from democratic orders into illiberal states. The author has analysed the differences between Democracy and constitutional liberalism. How one without other is useless and what we are left without constitutional liberalism is just the "good government"

*Smith (2008)* examines that rise of illiberal democracies from 1978 to 2004, in Latin America. It indicates, secondly, that throughout the region, illiberal democracy—which combines free and fair elections with systematic restrictions on individuals' rights—has become the norm. Second, it demonstrates that regime transitions almost often result in illiberal democracy rather than liberal democracy.

*Singha (2015)* This essay explores how legislative codification, high court oversight, and the extension of imperialist preventive policing restructured local courts. These reflect the degree to which descriptive judicial functions exerted by the district's administrative director have been integrated, not removed, into the law. Educated Indians objected to the combination of administrative and judicial powers in the hands of the district magistrate but the CrPC's preventive sections flourished.

*M Ayoob (2002)* argues in this chapter that latest efforts to stretch the meaning of the protection term beyond its conventional practical context have generated a significant challenge for international relations students. Mostly on one side, it is evident that the standard concept of protection that has dominated Western literature on the topic is inadequate to describe the multifaceted and multidimensional complexity of the security issue encountered by the majority of participants of the international community. From the other side, sometimes indiscriminate extension of the meaning of protection tends to make the term so fluid that it becomes worthless as an explanatory method.

*Daniel A. Bell et al (1995)* says that in Western cultures, liberal democratic values and institutions have virtually universal support, a phenomena that must be understood in light of the West's common history and culture. However, in what appears to be an all-too-obvious theoretical error, it is frequently assumed without question that liberal democracy meets the deeper aspirations of the rest of the world, most notably by Francis Fukuyama with his now-famous claim that we are witnessing an "End of History" in which liberal democracy has finally prevailed over all its competitors. More specifically, this blind faith in liberal democracy's universal potential manifests itself in a US government policy to promote liberal democracy abroad, regardless of local needs, habits, or traditions, and not surprisingly, moral exhortation has proven far less effective than in the days when MacArthur could impose democratic forms of government on recalcitrant countries. In conclusion, democracy campaigners have faced significant opposition in non-Western contexts, and the work of exporting liberal democracy looks to be far more difficult than optimists predicted in the heady days following the collapse of the Soviet Union.

*Hussain (2007)* in this paper has defined the concept of *Hyperlegality*. Through this article, Hussain proposes a reading of new antiterrorism laws in the United Kingdom that moves away from a more conventional interpretation of emergency as a reaction to a particular situation, such as an assault or invasion, by briefly withdrawing freedoms in order to maintain public order. He argues that with



these laws there is a structural shift in the working in bureaucratic and governance structures. He also delves into the colonial past of Britain to reach these conclusions.

*T Kelly (2006)* in this essay explores the function of identification documentation in creating the unique structure of relationships in the Israeli-Palestinian dispute between individuals and States. For those in the country, the modes of legal identity which they possess are fundamental to their chances of survival. Therefore, substantial attempts are made to seek, collect, exploit political and economic development records. The implications of holding identity documents are nevertheless always partial and unstable. Since the creation of identification papers produces a distinction between the legal individual and the actual citizen, these two facets of the citizen-hood are combined as individuals continue to represent the indeterminacies of the records that they carry by their anxieties. Records thus produce legibility and illegibility, continuity and chaos, coherence and incoherence.

*Enyedi (2016)* This research analyses how elitism might be incorporated into an overall populist appeal by analysing the ideology of two Hungarian parties that are traditionally considered populist. Fidesz and Jobbik are both authoritarian populist parties with paternalist populism and illiberal elitism, but provide distinct approaches to the issues that authoritarian populist movements face. The article reveals the existence of three separate ideologies within Jobbik: right-wing populist, ultra-nationalist, traditionalist, and 'meta-nationalist'. The research examines the layered character of partisan ideological discourses and evaluates the model's applicability to Eastern and Central Europe.

*Laleh Khaili (2010)* compares two suppressions in human history in 1939 which is the British suppression of Arab Revolt and Israel's counterinsurgency techniques against Palestine in 2002 during which almost same techniques were used. The similarity in control measures is quite striking and amazing. Furthermore, these practices — house destruction, arrest of all people of a certain generation, and harassment of residential areas and populations are common to other counterinsurgency techniques, whether in British and French imperial wars in the 20th century or United States wars in Iraq and Afghanistan in the 21st century.

*De olivira (2011)* This study examines and investigates Angola's oil-fueled rehabilitation following the end of the civil war in 2002, which is a far cry from the

mainstream liberal peacebuilding method pushed and implemented by Western donors since the end of the Cold War. The Angolan case is a key example of ‘illiberal peace building’, a process of post-war rebuilding led by local elites in defiance of liberal peace precepts on civil liberties, the rule of law, economic freedoms, and poverty alleviation, with the goal of establishing an authoritarian order and a massive influence on the political economy. Making sense of the Angolan example serves as a springboard for a more in-depth examination of other illiberal peacebuilding scenarios, such as Rwanda, Lebanon, and Sri Lanka.

*Gautam Navlakha (2007)* in the paper titled “*Doctrine for Sub-Conventional Operations: A Critique*”. According to the author, the Indian Army revealed its sub-conventional operations doctrine in 2006. Insurgency, extremism, proxy wars, and border skirmishes are all variables that the Indian security establishment sees as part of a sub-conventional, dynamic, or asymmetric warfare in Kashmir.

*Daniel Wilsher (2011)* in his book argues about the liberal moral principle of the citizen being shielded from compulsory custody without jury is reflected in the practice of habeas corpus. The usage of incarceration to regulate immigrants has, moreover, moved from an emergency anomaly to standard procedure, thereby bringing into doubt the commitment of western states to the rule of law. Daniel Wilsher explores how western states have gained advantage of long-term immigration incarceration without legal oversight. In an era of mass migration, he explores the broader evolving foreign human rights problem faced by detention focused on preserving ‘state sovereignty’. He examines immigrants’ fragile political position and explains how efforts to close open democracies will produce ‘unwanted individuals’ denied constitutional rights. In addition, he recommends a series of guidelines to ensure that attempts to regulate migration, including the use of incarceration, remain compliant with the rule of law and protect human freedoms independent of immigration status.

*Giuseppe Campesi (2015)* argues how birth and emergence of immigration detention in Italy, explaining how this mechanism reacted to various migration securitization logics. Indeed, the securitization cycle will take place after two somewhat different dynamics: on the one side, it will react to a phase of symbolic hazard dramatisation, leading to a rapid collapse of the normative order with the

adoption of Exceptionalism. It may encourage the incremental institutionalisation of control measures that operate below the level of Exceptionalism in the daily activities of security officials, without sudden breaks in the normative order but through a steady deterioration of established legal norms. The author concludes that the Italian situation is an important illustration of the double dynamics of securitization.

*Aron Buzogány (2017)* in his essay analysis the Hungarian political manoeuvring, was accompanied by the government which adopted a pro-Russian stance in 2010. Such procedures have come to be recognised as an unusual example of totalitarian dissemination within an EU member state. The paper provides a theoretical and hierarchical structure to examine the problem of authoritarian diffusion, focusing on the topic of value versus ideational appeal as drivers of authoritarian diffusion. The system emphasises the significance not only of the characteristics of sender territory but also those of the recipient nations. The study found no scientific proof of totalitarian diffusion; Vladimir Putin did not encourage or help Hungary's descent towards illiberalism. Instead, it is important for common interests to recognize Russo-Hungarian cooperation.

*David Bourchier (2014)* argues that Illiberal Democracy in Indonesia maps the history and growth of indigenous philosophies from the early 20th century to the present in Indonesia. By doing so, it offers a backdrop to the philosophies and philosophy that influenced organicist thinking, tracks main trends by Indonesian history, explores the Soeharto regime and its 'New Order' in depth, and looks at contemporary Indonesia to challenge the likelihood of past ideologies making a comeback in the region. Starting with an analysis of the roots of organic state theory in Europe, this book discusses how many young Indonesian intellectuals and secular nationalists inspired this. This also looks at Japan in depth and describes the connections in the mechanism by which Japanese and Indonesian nationalist intellectuals used European romantic organic concepts to create 'anti-Western' discourse.

**Vedi R Hadiz (2004)** this essay also reveals how these theoretical discussions over the past few decades have clashed with current domestic political disputes in Indonesia in several prominent cases, in ways that might be surprising. It also indicates that the post-cold war global order premised on US supremacy is weakening, rather than strengthening, the forces of democratic liberalism in Indonesian society and reinforcing the reorganisation of an illiberal form of democracy. Actually, the essay claims that in Indonesia and elsewhere, the prediction of US influence in the post-11 September world strengthens the tendency toward an evolving “neo-Third Worldism”. It retains the more restrictive aspects of the initial Third Worldism of the 1950s and 1960s, but is stripped of its earlier radical, internationalist view.

**András L. Pap (2019)** in this book reveals the emergence and evolution of a self-identified 'Illiberal Democracy,' the European Union's first illiberal democratic system of the 21st century. After 2010, Hungarian governments of Viktor Orbán have convincingly provided policy, language and political ideology to oppose neo-liberalism in an anti-modernist and bashing-cosmopolitan / anti-European Unionist manner.

**Anthony J Gaughan (2017)** The 2016 general election has rocked American democracy. In a situation without precedent, the CIA and the FBI concluded that the Russian Government has been hacking and revealing e-mails of Democratic Part to help Donald Trump win election. There were allegations that Russia has meddled in the elections to favour Trump. The astonishing turn of events and the extraordinary debate preceding it had a significant effect on the popular perception. A lot of Americans are still challenging the legitimacy of the government General election which gave win to Republicans. Appropriately, this article argues that we have decided to enter a hazardous new chapter in the history of the nation which not only endangers public confidence in electoral fairness but could conceivably even diminish the long-term health of the democratic system of the country.

**Jan Enberg and Svante Ersson (1999)** the authors have underlined the trajectory of growing illiberalism in Third world. They are primarily interested in figuring out if illiberal regimes are distinctive scientific categories in contrast with

other forms of rule, and to what degree illiberal democracy might become a role model for third world countries. Their findings indicate that illiberal societies are an increasing trend and are fairly stable over time.

*Jorgen Moller (2008)* has given a critique of Fareed Zakaria published in 1997 in *Foreign Affairs Magazine*. The author reviews and reassesses Zakaria's argument in this research. He comes to an extremely clear scientific assumption on the grounds of a specific philosophical analysis – that it is theoretically appropriate to consider the two elements of liberal democracy as separate characteristics, conceptually autonomous of one another. Author finds that illiberal democracies were not on the rise during 1990's and have actually decreased over the next decade of 2000's.

## **2.5 Familial Impact and challenges for detainees in Kashmir and elsewhere**

*Report by Amnesty International (2019)* this report came in 2019 and has given a detailed account of how PSA has impacted by individuals. This report is based on lot of interviews of the PSA detainees, the loopholes in the law and its lawlessness.

*Hood & Gaston (2022)* argue in their research about the fact that how families respond to the consequences of incarceration. The authors have identified 10 stress responses among families which are quite interesting, intriguing and novel. Some responses are quite normal like some families have shown to rely on religion, others have decided to move forward with their life, quite a few families chose to be indifferent to detention of kith and kin, some have tried to avoid the social stigma and others have demonstrated that they are relieved because the incarcerated person was a nuisance.

*Basharat (2010)* gives a horrendous narrative of Kashmir conflict. This book narrates the stories of torture, betrayal and violence. It narrates stories of young people going into a Pakistani training camps, a poet who finds refuge in religion when his entire family is wiped out, of politicians living in absolute dissolution and former militants visualizing their lives in discotheques; of idyllic villages that are filled with landmines, temples which have turned into army bunkers/security camps and ancient Sufi shrines attacked during encounters.

*Suvir (2012)* this paper looks at the conflict in Kashmir from the point of view of poets and lyricists. In this paper Suvir Kaul has quoted artists like Muzaffar Kashmiri and M C Kash. They have written various poems about the life in detentions and how they look at the things around them. The impact on literature has been quite amazing searing as far as detentions in Kashmir are concerned.

*Rabbani (2011)* This research investigates the impact of the Armed Forces (Jammu & Kashmir) Special Powers Act (AFSPA). Because of some of its severe features, this Act has permitted more human rights breaches than anything else. AFSPA, which was initially intended to be temporary, has now become a lasting component. Torture, intimidation, rapes, forced disappearances, and fake encounters are all reported by the authorities on a regular basis. The AFSPA has empowered forces to use disproportionate force to repress public ambition in order to maintain calm, resulting in the deaths of thousands of unarmed civilians. This article argues that this situation is untenable in view of the oft-claimed democratic credentials of India and hence argues for AFSPA's annulment. This contrast between AFSPA and PSA has been highlighted by results of *Ayjaz Wani (2018)* in ORF paper that AFSPA has better accountability mechanism, hence there is less resentment among local populace against AFSPA. The more furiousness is about PSA, because there is less accountability among the security agencies. More often than not PSA has been used for political vendetta as well. According to *Majid (2016)*, Kashmir is Pakistan's and India's oldest and most significant issue. Various bilateral and multinational initiatives were ineffective in resolving this issue. Both nations have had hot and cold conflicts, which have harmed their bilateral ties. Pakistan, which supports Kashmiris' right to self-determination under the UN Resolution of 1948-49, has consistently questioned

India's efforts to expand its control over Kashmir by the use of force. This study examines the origins of the Kashmir conflict, as well as its impact on Indo-Pakistan relations and possibilities for resolution.

*Ganie (2019)* looks into the role of metaphors in Kashmir's political discourses. Across a one-year micro-study—2016, which saw the outbreak of a mass uprising—of what can be identified as rebellion literature, the author shows that Kashmiri political debate is permeated by the 'paradise lost' and wound metaphors. Although the term 'paradise lost' narrowly implies a rational understanding, the wound term reflects Kashmiri's political subjectivity in a strongly emotional way, since this metaphor is rooted in affective cultural traditions. The paper attempts to deepen the comprehension of Kashmiri political myths by exploring how metaphorical language works within them, and how it helps Kashmiri youth to build an imaginative room for protest in terms of voicing political grievances in an evocative way, combating statistical myths and affirming a sense of culture.

*Sarbani Sharma (2020)* argues that although everything has been said about the historicity of the Kashmir dispute or how persons and societies defied colonization and claimed the right of self-determination, under these circumstances far less has been said about the essence of daily existence. This article depicts life in Maisuma's working-class area, which is located in the heart of Srinagar City, and its connection to the azadi (independence) movement. The author contends that life in Maisuma is characterised by a 'double interminability' dilemma: the state's unremitting cruelty on the one hand, and the movement's continual demand for azadi on the other, as the peace circumstances are unbearable.

*Dunschinski (2009)* in *Destiny Effects: Militarization, state power, and Punitive Containment in Kashmir valley* examines the Juridical-politico logic of Exceptionalism (under PSA) in Kashmir valley to demonstrate how Kashmiri civilians have been framed/blamed as a threat to larger national security interests and hence are incarcerated and fettered. Further he demonstrates how intense militarization, that has been authorized through legal enactments works with impunity in the guise of constitutional law. It is just the punitive containment with the parameters of neo-liberalism, Nationalism and militarization.

*Shrimoyee & Duschinski (2020)* argue in their anthological paper that PSA in Kashmir is fraught with lot of loopholes and ill-consequences. They have through various cases analysed how PSA is imposed without “application of mind”. The PSA detenue through humungous overload of paper work is made to impede under the different sections of CRPC and PSA. Security agencies twist and use same PSA provisions to book a detenue again and again hence creating a ‘revolving door’ scenario.

*Lubna Mohiuddin (1997)* has given a detailed account of violations in Kashmir under various Acts as passed from time to time. The arson, deaths and other human rights violations are detailed under AFSPA and PSA. The author claims that as a party to multiple international conventions and treaties, India has an international duty to investigate human rights breaches in Kashmir and launch a thorough inquiry. Both India and Pakistan have a duty to resolve the conflict diplomatically, via engagement and diplomacy.

*Abdul Majid and Mahboob Hussain (2016)* argue that Kashmir is India's longest and gravest rivalry with Pakistan. Numerous initiatives at the bilateral and global levels failed to address this issue. Both nations had conflicts that harmed their bilateral relations. Pakistan, which shares Kashmiris' claim to right self-determination under the 1948-49 UN resolution, has resisted India's attempts to strengthen its authority over Kashmir via the use of force. This article examines the history of the Kashmir dispute, its influence on Indo-Pakistan ties, and the prospects for resolving it.

*Seema kazi (2009)* after the gory incident in Shopian in 2008, State resorted to grave and strict usage of illiberal measures and laws like PSA and torture. Even then Finance Minister Ab. Rahim Rather also admitted to the same. The author argues that there is a track record of the State and central government in previous incidents also where it resorts to harsh measures in order to quell the dissent and protests by the citizens rather than ensuring peace and justice in first place.

*Asma Jan (2013)* argues that in Kashmir children are not only the victims of conflict indirectly but they are also illegally detained under J&K PSA, 1978. These children are imposed and incarcerated under laws which are meant for adults and put



in jails with hardened criminals. Further juveniles are tried in various courts meant for adults.

**Alexander Evans (2000)** In January 2000, claims that Kashmir fundamentalism is gaining traction, and Indian forces are on the defensive. This comes after a period of reduced militancy from 1996 to mid-1999. Despite the fact that India has been able to get more diplomatic assistance from the West, Delhi has not been able to regain the trust of locals in order to establish an elected state government in Kashmir. Increased professionalism, as well as substantial assistance from Pakistan, are driving the extremist comeback. Given that a 30-year cycle of abuse has previously been investigated, new study provides useful insights.

**Edward Desmond (1995)** has shown that Pakistan is backing the Kashmiri insurgents logistically, morally and diplomatically. He argues that the resolve of insurgents in gaining ground day by day despite many reverses over the years. The movement is gaining an Islamic character. Similarly, Indian government is also not showing any signs of compromise hence the situation gets dire and serious.

**Caitlin Patler and Nicholas Branich (2017)** have argued in their paper *Patterns in Family Visitation during Immigration Detention* that detentions impact the families of detainees profoundly. The parents are usually left by their children on their own and never visit them. Detentions have negative impact on the psychological, mental and physical health of families of detainees. Findings indicate that demographic backdrop, type of detention centre, and judicial status of children significantly impact the experiences of contact and visitation. Results show that immigration detention replicates illegal activity and perpetuates discrimination in refugee populations.

**Golash-Boza and Hondagneu-Sotelo (2013)** have demonstrated in their paper that US prosecutions skyrocketed between 1997 and 2012, underlining how Latino working-class people were unfairly hit by such deportations.

**Cochran (2012)** argues that recent theories and studies indicate that visiting prisoners will minimise prison abuse. Past research does not, although take into consideration the quantitative and heterogeneous complexity of such interactions. This paper explores this empirical void by exploring differences in visitor interactions and the association between visitor habits and abuse.

**Bales and Mears (2008)** The authors argue that with increasing empirical and political exposure to re-entry of inmates, much remains unclear about the factors leading to an effective return from incarceration to community. The writers have concentrated on an overlooked yet possibly important aspect, prisoner interaction, which may minimise recidivism. The likelihood of such an impact derives from influential crime theories and other works which stress the importance of social relations for re-entry into the society. The investigators evaluated theories regarding the impact of visits on recidivism using evidence from the Florida Department of Corrections. The visiting metrics covered that there were any visitors, the duration and regency of the trip, and the sort of visitor that was received. The investigators also looked at how the consequences of visitation differed by age, class, sex, form of instant offender and previous incarceration. The results suggest that attendance decreases recurrence and slows it.

**Julie Poehlmann (2005)** has shown in his paper titled *Representations of Attachment Relationships in Children of Incarcerated Mothers* that separation of children from mothers can have negative impact on them. Popular responses to initial separation involved depression, anxiety, uncertainty, frustration, isolation, issues of sleep and regressions.

**Olga Grinstead et al (2001)** has studied the amount of agony women members of family go through when they see their earning men in incarceration. Females who have interaction with incarcerated people experience mental, societal, and financial difficulties. In addition to lack of assistance and employment, the financial burdens of jail stays, telephone calls and products for shipping are substantial. The author argues that women spent \$292 on visits to jails/prisons on an average.

**Christian (2005)** demonstrates and highlights in his paper titled *Riding the Bus: Barriers to Prison Visitation and Family Management Strategies* that one direct result of imprisonment is geographic separation from family. Based on the jurisdiction, jails are frequently situated in isolated rural areas, far from the metropolitan centres, from where many inmates come. Having to undertake a visit to a jail is a stressful, resource-intensive experience for a family member. It's crucial to consider how communities determine how much of their time they commit to

preserving their connection with the inmate. Utilizing evidence collected by ethnographic research and observations, Christian (2005) discusses the jail visiting relatives management of travel from to & fro to the jail as one of the unintended effects of imprisonment.

## 2.6 Summary of Literature Review

- ✓ That there are basically two functions of a State that is maintenance of Law & Order and providing Good Governance
- ✓ That there is always a tussle between Liberty of and individual and security and sovereignty of the State.
- ✓ That Liberal Democracies across the world have had a stint with illiberal measures taken in order to protect the integrity of State viz. USA, Australia, India & UK.
- ✓ India has enacted National Security Act as a preventive detention law according to the provisions of Constitution Article 22(4)(5)(6).
- ✓ Jammu & Kashmir Government has also enacted preventive detention law way back in 1978 under Sheikh Abdullah led Government.
- ✓ Various governments in J&K have tried to repeal the Act but all efforts went in vain.
- ✓ Preventive Detention Law's deeply and profoundly impacted the individuals, society and state in J&K.
- ✓ Preventive detention laws have a deep impact on societies within which they operate.
- ✓ That there is an economic and social cost involved in detentions.
- ✓ Preventive detentions have distorted the citizen-state relation in Kashmir.
- ✓ Throughout the world where there is illiberal order, it has led to illiberal peace-building which is not sustainable.
- ✓ The preventive detentions have led to a kind of skewed nature of the concept of Democracy.

## 2.7 Research Gap

This study shall take historical incidences and political manoeuvring of Centre since 1947 as the background in order to analyse and study the implications of administrative/preventive detention (through J&K PSA, 1978) in J&K. The J&K PSA has been the potent weapon in the hands of State in order to quell the disturbance, secessionism & separatism. Of late doyens of various political parties have been detained under this law including leaders from mainstream, separatist camp and stone pelters and other Over Ground workers who work for various militant/terrorist & jihadist groups in valley. India being a Liberal-democratic country has had to resort to this illiberal measure through this Act in order to bring peace to the region. Preventive detention carries its sanction from constitution of India that is Art 22 (3), to be more specific. This study proposes to deconstruct the two models/approaches adopted by Indian State in J&K. Firstly that of Liberal genus which includes approaches by regimes including that one followed by Vajpayee. This approach relied upon assimilation and dialogue in order to gain the results and bring peace. Second one is more hawkish and Illiberal one which includes using state apparatus like Security agencies in order to subdue any kind of protest/dissent against the state and later on start a dialogue process with moderate factions. Using Jammu & Kashmir Public Safety Act, 1978 in order to keep people under Preventive Detention belongs to the second category. The challenges created and impact generated thereof are both for Democracy as well as for the families and detainees is a huge research gap which is not yet addressed in context of J&K (although we find lot of international literature on similar line). Further, although PSA is largely a counter-insurgency tool but there is meagre research done on the implications of preventive detentions on security scenario in J&K.

## **Chapter 3**

### **Political Relations of Jammu & Kashmir with Union of India: A Historical Account**

#### **3.1 Introduction**

Jammu and Kashmir has historically been a contentious, quite exasperating and extremely simmering issue. The two Asian nuclear armed countries have since 1947 locked horns three times over the absolute control over the state. After the unsuccessful attempt in 1947, Pakistan retains large swathes of land of J&K. India under the Nehruvian vision of secular-democratic ideology went for peaceful resolution of the dispute under the patronage of United Nations. But the internal relation with the state and its leadership has seen quite undulating circumstances and atmosphere of mistrust. Jammu and Kashmir has witnessed very good decades of peace and some ugly scenes of militancy that started in 1989-90. This chapter will analyse the political overtones of relation between Jammu and Kashmir and the government in centre over last seven and half decades and try to give general account of the frictions, convergences and divergences between the two constituents.

## **3.2 Main Events in Kashmir Relationship with Union of India**

The main political events in the relationship of Jammu and Kashmir start with the Delhi Agreement between the then Prime Minister of India Jawaharlal Nehru and then Prime Minister of Jammu and Kashmir Sheikh Muhammad Abdullah. The Agreement was historic as the Prime Minister of India agreed that Jammu and Kashmir residents can have special rights and privileges. Similarly, contrary to the position with other Indian States, J&K Assembly was given powers to legislate on 'residuary subjects'. According to the terms of this agreement, it was agreed that the State shall have its own flag. Even though the "Delhi Agreement" was rejoiced by Kashmiri nationalists, it became a bone of contention in the right-wing political fray of India. Later on through various historic events, this "strong" position of J&K was subsequently brought at par with other Indian States and even lower after abrogation of Article 370.

### **3.2.1 Indira-Abdullah Accord**

Indira-Abdullah Accord was signed in 1975 between Prime Minister of India, Mrs. Indira Gandhi and Sheikh Abdullah. Mirza Mohammad Afzal Beg signed it on behalf of Sheikh Abdullah & G. Parthasarathy signed it on behalf of Indira Gandhi. The main points of the Accord were that:

- ✓ Art 370 shall be the fulcrum of any arrangement/governance between Union of India & J&K.
- ✓ Residuary powers were to be exercised by State Legislature, but Parliament of India shall continue to exercise powers over areas that deal with sovereignty & integrity of India.
- ✓ The Accord failed to achieve an agreement on the issue of the Governor's and Chief Minister's nomenclature being reversed.
- ✓ Any sections of the Indian Constitution that have been amended or modified in order to apply to the State of Jammu and Kashmir may be changed or repealed by a presidential order in accordance with Article 370; each request will be evaluated on its own merits.

- ✓ That the State Government reviews any laws passed or granted to the State after 1953. Any subject pertaining to the concurrent list in order to protect the State of Jammu and Kashmir's right to have its own legislation on subjects like welfare initiatives, cultural concerns, social security, personal law, and procedural laws in a way appropriate to the State's unique circumstances..

### **3.2.2 Rajiv-Farooq Accord**

After Rajiv Gandhi became head of the Indian National Congress, another agreement was signed with Farooq Abdullah. After the Governor's Rule was overturned, Farooq returned to power in 1986, but only after both Congress and the National Conference agreed to form an alliance ahead of the 1987 election. This went against the wishes of the populace, and the state thereafter experienced a wave of violence.

### **3.2.3 Article 370**

When the erstwhile princely states gained independence from British control in 1947, they had the choice of joining either India or Pakistan. Jammu and Kashmir's admission to the Indian Union was due to Article 370 at that time. This permits J&K to make its own laws in all matters except economy, defense, foreign relations and communications. This provision set up a separate constitution and a separate flag and refused outsiders property rights in the State. The Article 370 was abrogated in August 2019.

### **3.2.4 Autonomy of National Conference**

Autonomy has been the election and party manifesto of National Conference. The Autonomy resolution was passed in state assembly in 2000 to reverse the State position to pre-1953 status. This includes nomenclature of Chief Minister to Prime Minister, Governor to Sadr-e-Riyast and reversal of all presidential orders since then.



### **3.3 Pakistani Misadventure, Nehruvian pacifism and Sheikh Abdullah's posturing**

Jammu and Kashmir has remained an independent princely state since eons. The political atmosphere has remained extremely volatile since the Mughal takeover, Afghan invasions and later on British, Sikhs of Punjab and later by Dogra conquests of mainly Jammu region (Snedden, 2015). In the backdrop of British starting to wind up in Asia and larger parts of Africa, India under the long and arduous efforts of Congress gained independence in 1947. Pakistan was also created in the same year which included erstwhile East Pakistan as well. East Pakistan got independence in 1971 with the efforts of India. Many princely states in India which included Junagarh, Hyderabad and Jammu and Kashmir remained independent. By the time almost 550 states of India were included in Indian Union, Junagarh and Hyderabad also subsumed in the Union by the arduous efforts of Sardar Vallabh Bhai Patel. Jammu & Kashmir had a peculiar situation. The Princely State of Jammu and Kashmir had a Hindu ruler with largely Muslim population. Several movements against the Dogra rule were started by tallest leader (Sheikh Abdullah) in J&K to fight the injustices. The earlier movements in J&K had a peculiar nature. They were not communal in character. The movements in J&K varied from being anti-India, Pro-India, pro-Pakistan and against any injustices like the movements led by Communists. It is very pertinent to mention that J&K enjoyed a good stint with Communist Party and its ideology and ideologues since formation of Communist Party of India (CPI). Sheikh Abdullah was a Kashmiri nationalist and very close to Jawaharlal Nehru. He led many movements in Kashmir against the policies by Dogra Regime that were anti-poor since 1931. Indian leadership under congress stalwarts always tried to woo Sheikh Abdullah to join India after British withdrawal. Maharaja Ranjit Singh was reluctant although not against India per se. According to Puri (1981), Maharaja was quite open to the idea given by Muslim Conference and Hindu Sabha that J&K should join the newly formed Pakistan. In fact, the Muslim Conference leader Chaudhary Hamidullah Khan urged the Maharaja to constitute a separate Constituent Assembly for J&K. Against this backdrop, while discussions were being held about the Accession, Pakistan decided to wage an asymmetrical war against India. Pakistan eyeing the

political uncertainty in Kashmir and India reluctance to annex Kashmir decided to use force. Numerous non-military combatants attacked Kashmir. By this misadventure Pakistan took over huge portion of Kashmir including present day Gilgit-Baltistan, POK, Aksai Chin, Shaksgam Valley (and Shaksgam valley eventually gifted by Pakistan to China in 1963). India retaliated to Pakistan aggression but could not gain ground beyond current positions of POK. It was not because of inability or lack of political will that India rested the case but both armies that of India and Pakistan were not equipped enough to stretch the 1947-48 war over Kashmir. Further, both the armies were led by British Generals who made friends of each other (Protip Sen, 1969).

Nehru wrote to Sardar Vallabh Bhai Patel on 27 September, 1947:

..to take some action...to force the pace and turn events in the right direction. We have definitely a great asset in the National Conference provided it is properly handled. It would be pity to lose this. Sheikh Abdullah has repeatedly given assurances of wishing to co-operate and of being opposed to Pakistan; also, to abide by my advice. I would again add time is the essence of the business and things must be done in a way so as to bring about the accession of Kashmir to the Indian Union as rapidly as possible with the co-operation of Sheikh Abdullah.

Patel heeded to this sagely advice by Nehru and he employed M.S. Golwalkar the RSS leader to do the job and persuade the Maharaja to join India. M.S. Golwalkar met Maharaja in October 1947 and persuaded him to recruit Punjabi Hindus and Sikhs into his militia (Anderson & Damle, 1987. P. 49). The common notion that J&K and its ruler joined India out of his 'free will' is a misnomer. According to V.P Menon, who was the Secretary in Ministry of States and a close confidant of Sardar Vallabh Bhai Patel says that Maharaja was hoping for the best while continuing to do nothing. Besides he was toying with the notion of independent Jammu & Kashmir (V.P. Menon, 1961. pp.377). The discriminatory and feudal policies of ruler of J&K against

Muslims provided the fodder for 1931 revolt. The regime had an overtly communal leaning. Muslims were deliberately kept at bottom of social hierarchy. Because of any dearth of organized movement, the Punjabi & Dogra armies crushed/coerced & oppressed the subordinate classes. The Kashmiri pandits were not immune to discrimination early on. They were deliberately kept out of gazetted posts despite having very good educational qualifications even better than Dogra's (Chandra, 1985. P.38). Muslims became the worst sufferers of Dogra regime in terms of communalism, racism & casteism. The pinnacle of discrimination was reached when judicial diktats allowed everyone except a Dogra to be hanged for murder (ibid, P-39). These bunch of policies over a period of time led mass uprising of Muslims against the Dogra regime. This was the first character of the uprisings of 1931. The second label was given by Sheikh Abdullah that of uprising of oppressed against the oppressor. This label was more attractive and gained popularity among the Indian National Congress. Nehru and Sheikh Abdullah shared common belief system and that was the secular character of the movements against the oppressor. This was also true of Indian struggle against British. Thus, British and Maharaja's regime were both seen as feudal, imperialist and oppressors. All J&K Muslim Conference emphasized the communal character of the Maharaja's policies. They made it more of a Muslim-Hindu struggle. Hence their position was close to Jinnah's call to join Pakistan. All Jammu & Kashmir National Conference made their position led by Sheikh Abdullah that oppression was because of class division and not because of religion. Their manifesto reflected the concerns of socialists and communists. They gained much popularity among Indian liberal and secular leadership under INC. AJKNC demands in Mirpur session of 1942 reflect the concerns more clearly

It was in the background of such political changes that the toilers formed one of the strongest detachments of the National Conference in the years 1940-50. Their impact was obvious in the Mirpur session of the National Conference in 1942 when it passed the resolutions sending greetings to the Red Army and expressing

its solidarity in the heroic fight against fascism. They provided the authorship to the Naya Kashmir manifesto of the National Conference (Ibid, P 4)

It is important to note that National movement in Kashmir gained momentum in the midst of Indian struggle against the British Raj. The anti-feudal struggle reached its pinnacle in 1946 under the leadership of Sheikh Abdullah when he claimed that their demand to end the tyrant rule of Maharaja against the people of Kashmir is the next logical extension of 'Quit India' Campaign launched by Indian National Congress. The statement on 15<sup>th</sup> May, 1946 in Srinagar was that:

The demand that the princely order should quit the state is a logical extension of the policy of 'Quit India'. When the freedom movement demands complete withdrawal of British power, logically enough the stooges of British imperialism should also go and restore sovereignty to its real owners, the people. . . the rulers of Indian states have always played traitor to the cause of Indian freedom. A revolution upturned the mighty Tsars and the French Revolution made short work of the ruling class of France. The time has come to tear up the Treaty of Amritsar and quit Kashmir. Sovereignty is not the birth right of Maharaja Hari Singh. Quit Kashmir is not a question of revolt. It is a matter of right (Prakash Chandra, p 40).

A.G. Noorani (1991. P-19) argues that it was very clear that sheikh Abdullah led movement was far ahead of the other movements like those led by Muslim League (J&K). Nehru wrote to Sardar Patel that Sheikh Abdullah is very "anxious to keep out of Pakistan and relies upon us a great deal for advice. But at the same time, he cannot carry his people with him unless he has something definite to place before them".

### 3.4 The Puzzle of Plebiscite and Nehru's ambivalence

Jawaharlal Nehru's position on Kashmir has seen ambivalence since 1947-1954. Earlier he had a clear position on Kashmir and that was Kashmir question will be addressed in accordance to the wishes of United Nations and 'people of the State'. Sheikh Abdullah & Nehru were on the same page on Kashmir question. Sheikh Abdullah believed in the democratic credentials of Nehru and trusted India. But gradually as communal forces raised their head in Jammu and rest of the country, Sheikh Abdullah was ambivalent between India & Pakistan as both were reeling under communal tensions. Kashmir wished to teach lessons of secularism to both India & Pakistan.

On 14<sup>th</sup> May, 1948 from Srinagar Indira Gandhi wrote to Nehru: "They say that only Sheikh Saheb is confident of winning the plebiscite...Personally, I feel that all this political talk will count for nothing if the economic situation can be dealt with. Because after all the people are concerned with only [one] thing - they want to settle their goods and to have food and salt" (Sonia Gandhi, *Two Alone, Two Together: Letters Exchanged between Indira Gandhi and Jawaharlal Nehru, 1940-1964*. Hodder and Stoughton, London, 1992. Pp. 551).

Nehru wrote reassuringly to Sheikh Abdullah on January 12, 1949 that "you know well that this business of plebiscite is still far away and there is a possibility of the plebiscite not taking place at all. I would suggest however that this should not be said in public, as our bona fides will then be challenged". (Jawaharlal Nehru. *Nehru Memorial Fund, Vol. 9. P. 198*). This was despite the fact that Nehru was a clear ardent of Plebiscite in Kashmir which was in accordance with the wishes of the people of J&K. It was J.L. Nehru who went to United Nations with the issue of K-dispute but later on played between realpolitik & being a first order democrat. Nehru always wished that Sheikh Abdullah be on his side and even on the question of full integration. But, as A.G. Noorani notes that, this incident opened a rift between the two leaders and the cause for future uncertainties in Kashmir. Nehru was quite a secular-democrat till sheikh fell in line but had to use force when he sniffed dissidence from Sheikh Abdullah. This came after the meeting of Sheikh Abdullah with his close confidants like G. M Sadiq, Maulana Masoodi, Mirza Afzal Beig,

Pandit Girdhari Lal Dogra, Bakshi Gh. Mohammad and Pandit Shamlal Saraf. This meeting was held on 9 June, 1953 and the exact minutes of the meeting are:

as a result of the discussions held in the course of various meetings, the following proposals only emerge as possible alternatives for an honorable and peaceful solution of Kashmir dispute between India and Pakistan: (a) Overall plebiscite with conditions as detailed in the minutes of the meeting dated 4th June, 1953. [This apparently was a reference to Maulana Masoodi's suggestion that the choice of independence be offered in the plebiscite.] (b) Independence of the whole state. (c) Independence of the whole state with joint control of foreign affairs. (d) Dixon Plan with independence for the plebiscite area [region wise disposition of the state].

G.M. Sadiq made some interesting observations like "if an agency consisting of India, Pakistan, Afghanistan, Soviet Russia and China could be created to supervise and conduct the plebiscite, I would suggest that we should immediately ask for an overall plebiscite. Failing this, we may ask for a supervision commission representing all the Members of the Security Council for ensuring free and fair plebiscite in the state".

When Nehru came to know about these developments, he warned Sheikh Abdullah of the consequences and reminded him that "doubts in the minds of leader's percolate to their followers and to the people generally...What is required is a firm and clear outlook, and no debate about basic issues...Personally, I have that clear outlook and have had it for these years" (Noorani, 1999).

Because Kashmir had wished to have its own constitution within the larger framework of Indian Constitution, elections were held for Constituent Assembly on 15<sup>th</sup> October, 1951. Several orders and notifications were issued in accordance with the wishes of this Constituent Assembly. These orders included— the Constitution

Amendment Order, the Constitution Second Amendment Order, Declaration under Article 370 (3) of the Constitution. Similarly, a Notification was issued whereby Yuvaraj Karan Singh was declared as Sadar-i-Riyasat of the State. Further, on 24 July 1952, Prime Minister Nehru announced in the House of the People an 8-point Agreement with the leaders of Kashmir in respect of Fundamental Rights, Citizenship, Head of the State, State Flag, Supreme Court, President's Prerogatives and Emergency Powers, and Financial Integration. The word spread like fire that Sheikh Abdullah was heading for an independent Kashmir. On this, Praja Parishad Party of Jammu started an agitation. They gave the slogan of "One constitution, One President and One Flag". This movement was supported by Jan Sangh, Hindu Mahasabha and Ram Rajya Parishad

### **3.5 Creating friends in Kashmir: The Nehruvian Ploy to 'win' over Kashmir**

Nehru did take lot of key steps in order to consolidate Indian position in Kashmir. The steps were basically on three fronts. Firstly, in order to win over Kashmiri population, he supported Sheikh Abdullah's movement under the banner of National Conference. Secondly, he vehemently put down the communal forces in Jammu under Praja Parishad backed by RSS ideology and thirdly he took the constitutional route and cemented Article 370 for Kashmir in Indian Constitution. Slowly and steadily, Kashmiri interests and those of Indian Union differed on many fronts. There were lot of disagreements between Nehru and Sheikh Abdullah and finally Nehru openly reneged on his commitment of Plebiscite. Sheikh Abdullah demanded larger autonomy for the state and an equal status with the rest of the union but Nehru put down this desire strongly.

Sheikh Abdullah was eventually put under fetters by Nehru on 8 August, 1953. Thus, the Nehru-Abdullah bonhomie ended with mistrust and mutual suspicion. Nehru ensured that Sheikh Abdullah's cohorts' revolt against him and these cohorts shall remain in close proximity with New Delhi. There were speculations that Sheikh Abdullah was close to British and Americans and hence might to a volte face. A close aide of Sheikh that is Bakshi Ghulam Muhammad took over the reins of the state. Bakshi Ghulam Mohammad was pro-India, a nationalist and a secular minded

individual. He treaded the same path as that of Sheikh Abdullah on the question of believing in secular-democratic ideals of India. Further he helped Nehru in delineating the question of self-determination from accession. Under Bakshi, Kashmir witnessed 'good' progress and good governance was the priority of the administration even though the corruption and nepotism were also rampant. Bakshi Ghulam Mohammad remained the Prime Minister of the state till 1964. The external dimension to the K-issue that is linked to Pakistan has always remained central to any discussion. General Ayoub Khan took over the reins in Pakistan through a military coup. This is when democracy died in Pakistan and a series of military rule gripped the nation. With this take over, Kashmir always since then has remained fulcrum of Pakistan's policy towards India. Pakistan began to pursue Kashmir more vehemently and strongly. Again, one important incident that happened in 1963 and changed the political course was the stealing of holy relic from shrine of *Darga Hazratbal* (Also referred to as *moe-e-muqadas*). Muslims rose against the 'Delhi-regime' in Kashmir and blamed it for the incident. Protests snowballed into major law and order issue. The State apparatus virtually seemed to collapse. This ended the Bakshi regime and Ghulam Mohammad Sadiq took over the affairs of J&K. This incident led Nehru to reconsider the detention of Sheikh Abdullah as he still commanded great deal of respect and foot holding among local masses. By 8<sup>th</sup> April, 1964, Sheikh and Afzal Beg were released and the cases against them famously named as Kashmir Conspiracy Case were withdrawn. Upon his release, Sheikh again raised questions about the full integration of State with Union of India. He even recommended that India and Pakistan form a condominium over Kashmir, or a type of Confederation with a particular place for Kashmir. This suggestion was rejected by General Ayoub Khan, who described it as ludicrous. After Nehru's death on 27<sup>th</sup> May, 1964 Sheikh tightened his grip on power. The political uncertainty from 1964-1965, largely arising out of differences between Bakshi and Ghulam Mohammad Sadiq led the central government dislodge the political institutions in the state and bulldoze changes through coercion. Subsequently, Congress government was installed in the state by shoving National Conference from the scene. People vehemently opposed the process. With only two options either to join Plebiscite front and Congress (which was deemed to be the stooge of centre), people were divided as never before. The Pakistan question again was raised strongly.



The mixture of disaffection towards centre was created by Sadiq's regime and central government's attitude and policies of bulldozing changes in the state without peoples' consent (Bazaz, 1967).

After the defeat in 1971 war, Sheikh Abdullah gave the idea of Plebiscite. He argued that the dispute with government of India is not about accession but the problem is about the *quantum of Autonomy* (Abdullah, 1993). Larger Autonomy since then has been the political bargaining tool for National Conference in the State. Under the 1974 Kashmir Accord also known as Indira-Sheikh Accord virtually sealed the bargaining power of sheikh further and drew the red lines for future. According to the Accord, Sheikh accepted the Jammu and Kashmir as the Constituent of Union of India and the point was made clear to him that Article 370 erosion could not be rolled back. The demand for restoration of 1953 position was also shunned permanently (Behera, 2000, P.324-25). Indira-Abdullah accord was viewed differently by Kashmiri leadership and quite differently by Indian leadership particularly under strong and centralizing leadership of Indira Gandhi. She argued that through the Kashmir Accord, Indian Constitution can be further applied to the State of J&K while Sheikh Abdullah argued that the Accord was first step towards realisation of Pre-1953 position. These were two extremes and led to the disenchantment between centre and State (Puri, 1968).

### **3.6 Rise of communalism in 1980's: Build up to the Secessionism and Militancy**

The Congress under Nehru was different as compared to Indira Gandhi. As discussed above, Nehru did surprise Sheikh Abdullah with his reneging on commitments but the secular credentials of Nehru were intact. He did not mix religion with politics. Neither did he whip the religious sentiments of any community for vote bank politics. This was in sharp contrast to the politics played by Indira Gandhi. She wished NC free valley and a strong base for Congress in both valley and Jammu division. Hence, she resorted to religious politics. This can be culled from her various statements she gave in Jammu and her quite diabolical attitude/policy in Kashmir.

During election campaigning in 1983 in Jammu Mrs. Gandhi announced that Jammu was part of “Hindu India” and this part has faced discrimination by “Muslim Kashmir” (Singh, 1995, P 25-30, Shorie, 1983, Pp-82-87). Congress tried to prop up famous Jamaat-e-Islami (JeI) against the National Conference (NC). Farooq Abdullah who took over reins from his father played communal cards in election campaigning. NC used to make its workers swear by Quran and rock salt (as a symbol of affiliation with Pakistan). Farooq Abdullah even aligned with Mirwaiz Farooq of Awami Action committee—this party was ardent supporter of Islamic teachings/leanings. The posturing of political parties along communal lines put an end to the secular credentials that Kashmir enjoyed in early decades. Religion and identity politics raised its head under mainstream parties both at centre as well as at the State level. Muslim identity of Kashmir was put against the Hindu identity of Jammu and Buddhist identity of Ladakh. Polls of 1983 were not in favour of Congress in the centre. Farooq Abdullah became undisputed leader of J&K and enjoyed a good rapport among the people of state especially the valley. Indira’s hegemony got challenged due to NC victory in valley hence she dismissed the Farooq Abdullah led government. This incident came as a shock to Kashmiri people. They lost hope in secular-democratic India. The positive development for the India was that Farooq Abdullah never turned hostile to the idea of India. He was always in search of new alliances at centre but never turned against the question of accession with the Union of India. According to the Farooq Abdullah’s assessment then governor in Kashmir Jagmohan was instrumental in ensuring defections in National Conference, which is why his government fell. The elections of 1983 also showed that Kashmir votes for ‘democratic’ parties and eschew the religious politics. Jamaat-e-Islami was rejected in 1983 elections. The events of 1986 when **Rajiv-Farooq Accord** was signed, a fresh blow was dealt to the secular credentials of J&K mainstream parties. The 1983 vote rejected hate & religious politics. But the alliance of Farooq with congress at centre shocked the Kashmiri psyche. Hitherto NC had shown to the electorate that it shall stand against hegemony of centre and will take a tough stand. The accord proved last nail in the coffin. Fundamentalist and secessionist tendencies gained ground in Kashmir (Puri, p.52). The events of mid-eighties provided fertile ground for the launch of religion-based parties for first time since Muslim Conference. Muslim

United Front (MUF) was launched which became the umbrella organisation of groups like JeI, the Qazi Nisar group called as *Ummat-e-Islami* and *Anjuman-e-Itehaad-ul-Muslimeen* led by Maulvi Abass Ansari. Muslim United Front consisted of many other affiliated groups like Muslim Education Trust, *Jamat-ul-Hadees*, *Idara-e-Tahkikat*, Shia group etc. (Verma, 1988, P.192-95).

MUF made an attempt to achieve all those things through constitutional means that it did not achieve by remaining out of the democratic ambit. But the open and brazen rigging of 1987 elections proved Achilles heel for Kashmir. The members of MUF who participated in 1987 elections who had also successfully won certain seats were taken by surprise. This rigging for them meant that democratic code has spatial constraints and it can't be applied ubiquitously anywhere. Syed Salahuddin—who later became the head of Hizbul Mujahideen contested from Amira Kadal Constituency. Yasin Malik who was later to form JKLF (Jammu & Kashmir Liberation Front) was his election agent. Thus, the secessionism was born out of the ill-conceived policies of Centre towards Kashmir. This included playing of communal politics as well as whipping of religious card for electoral gains. By 1989, the political uncertainty in Kashmir had reached its nadir when all the guiding principles that led Kashmir to join India in 1947 were undermined. That included erosion of Autonomy gradually promised under Art 370, undermining the democratic process & playing communal/religious politics by showing up 'Hindu-Jammu' against 'Muslim-Kashmir'.

### **3.7 1990's: Phase of Militancy & Authoritarian approach under P.V. Narsimha Rao**

By 1990's, Militancy in Kashmir reached its peak. JKLF became the main driver of militant tactics. They targeted political workers, CRPF & IB (Intelligence Bureau) officials. IB officials mainly consisted of Kashmiri Pandits and hence the targeting became communalised. In the guise of killing the IB officials, many Kashmiri Pandits were attacked. Thus, the large community of Kashmiri Pandits were demonised and portrayed as 'pro-India'. The militant approach & targeting of Pandits made them (Kashmiri pandits) to leave the valley. The government also played quite

lackadaisically and could not stop or reassure them the safety. According to some account's government machinery became totally dysfunctional. This was the time when largest number of young Kashmiri youth crossed the border for military training. The separatism got a shot in arm when they kidnapped the daughter of Home Minister of India Mufti Sayeed and demanded the release of its five members whose demands were later on met. This phase of militancy was the culmination of lot of factors that included blunders by central and state leadership and fragile nature of democratic institutions of the State itself (Widmalm, 1997). The central and state governments initially reacted to Kashmiri's militancy with absolute helplessness, uncertainty, indifference, and even with incompetence. New Delhi was conscious of the emerging crisis but did not completely understand the importance of coping with it and the insurgents were still enabled to establish deep roots in the valley (Marwah, 1995, P.60-63). The mixture of militancy with mass processions became a toxic cocktail that led to complete undermining of State authority. This is when after 1991 there was a complete shift in Central government's strategy towards Kashmir. Firstly, against the wishes of Farooq Abdullah, Shri Jagmohan was appointed the Governor of the State which led Farooq Abdullah to resign.

A.S. Dulat in his book *Kashmir: The Vajpayee Years* has given a detailed account of this incident. The Iron Fist State unleashed its various instruments in order to curb the lawlessness. Cordon & Search Operations started in the Srinagar in wee hours of January 19, 1990. People were hounded, arrested and tortured. Many processions against the atrocities and arrests were fired upon (Bose, *et al*, 1990). India tried the time and tested model that was successful in quelling insurgency in Punjab & Northeast. The strategy is to strike hard at militants and their sympathizers. The second step is to gain the confidence of moderates and saner elements and bring them to the fray. Finally, there is the slow rolling of political process in which moderates and break away factions usually participate (Gupta, 1995. P. 27).

The reaction to the brutal policy by centre in order to curb the secessionism and militancy had two effects. Firstly, the moderates came under direct fire by militants and hard-line faction of Hurriyat Conference. Many political leaders were killed who attempted to start peaceful dialogue with New Delhi. The killings included

Mirwaiz Maulvi Farooq—a soft separatist, Abdul Ahad Guru—the famous cardiologist from Sopore, again a moderate and Qazi Nisar, who was killed in 1994 in order to send a strong message that any kind of settlement that doesn't represent the 'genuine leadership' shall be targeted brutally.

Agha Shahid Ali has captured the scenes in Kashmir at the peak of militancy from 1990 to 1995 in these words:

Srinagar hunches like a wild cat; lonely sentries, wretched in  
bunkers at the city's bridges, far from their homes in the plains,  
licensed to kill . . . while the Jhelum flows under them, sometimes  
with a dismembered body. On Zero Bridge the jeeps  
rush by . . . Guns shoot stars into the sky, the storm . . . rages on  
. . . night after night . . . Son after son taken away, never to return  
from the night of torture (Agha Shahid Ali, P.3-5)

The challenge posed by the unrest the valley and their magnitude can be gauged by the fact that Jagmohan in his memoir *My Frozen Turbulence in Kashmir* claims that he pulled Kashmir out of Pakistan on 26 Jan, 1990. Simultaneously, P.V. Narsimha Rao started the policy of appeasing the moderate faction of Hurriyat led by Shabir Shah. Shah showed great promise and had even good contacts in New Delhi. Being a politician who had spent lot of time in jail, he enjoyed good rapport among the youth in valley & lot of myths were associated with him. In his book, former R.A.W chief A.S. Dulat has given a detailed account of Shabir Shah's stint with New Delhi and how much P.V. Narsimha Rao trusted him (Dulat, 2015. p-75-77). The Assembly elections in the state were due in 1996 hence Narsimha Rao wanted a thaw in the relations after the violence of 5 years. This was the period when Narsimha Rao made his famous statement while on his trip to Africa that Government was quite comfortable with any kind of political settlement with State of J&K & its leadership.

“The sky is the limit” was his famous line. This statement was later vehemently criticised by Jagmohan (2011). He argues that Narsimha Rao later on tried to sweep this statement under the carpet but the damage had already been done. Jagmohan in his analysis has been a vehement critic of appeasement of separatists in Kashmir. The prolonging of Kashmir crisis according to him is the unwise & ill-timely statements made from time to time by leaders in the Centre as well as those leaders that are at the helm of affairs in J&K. This was of course the line treaded by National Conference (NC) through their demand for “greater Autonomy” & later on PDP (Peoples Democratic Party) jumped into the band wagon by putting forth the rant of “Self-Rule” or Self-Governance. The parameters of these terms were never clear. Although by more Autonomy, NC wished that 1953 position of J&K be restored while as PDP’s position and premises of ‘Self-Rule’ were never clear. This position was of course rejected by central government when the report of State Autonomy Committee was rejected in 1999. Jagmohan has called the Politics of Autonomy nothing more than enlarging the ‘base of power’ by vested interests in the state (ibid, 2011).

Indeed, ‘weaning’ strategy wasn’t wholly successful but it did ensure that many separatists surrendered and joined the mainstream. The faction led by Shabir Shah and Yasin Malik began to talk peace and settlement, this was the reason hardliner Syed Ali Shah Geelani was chosen as the head of All Party Hurriyat Conference after the 1990 crises. Famous militant names who joined ranks with New Delhi & decided to hold unconditional talks were Babar Badar, Bilal Lodhi & Mohinuddin.

Between the years 1990 and 2002, after Vajpayee took over, elections were held in Kashmir in 1995 which were opposed by every political party in Kashmir including BJP, Congress, CPIM and NC. Charar-e-sharif crises led to the stalemate & dramatic atmosphere which led to the postponement of the elections (Charar-e-Sharif is the famous shrine situated in Central Kashmir’s Badgam District associated with Sheik Nooruddin—most revered saint in Kashmir). Later the elections were held in 1996.

Violence in Kashmir has seen a dramatic decline since Vajpayee bonhomie with Musharraf. Kashmir had witnessed a significant period of calm between 2002 and 2007. This period of ‘normalcy’ unfortunately wasn’t cashed in by the political dialogue through continuity (Staniland, 2003). The Manmohan Singh years after Vajpayee have been dubbed as ‘lost years’ by former RAW chief Amarjit Singh Dulat (2015).

### **3.8 Dovish Policies: The History of Interlocutors to Kashmir**

Indian Government apart from authoritarian, iron-fist and hard policies over decades to curb militancy in Kashmir has also from time to time resorted to consensus building and initiating dialogues with separatists. This process has been common cutting across the ideological spectrum in New Delhi. Congress had initiated this process and BJP—the Right wing leaning governments over the years have toed the line including by Vajpayee & Narendra Modi Government even though for a shorter span of time for later (Narendra Modi).

The all-party delegation led by Rajiv Gandhi was the first attempt made in 1990 during the beginning of militancy in the valley. Maulvi Umar Farooq was the only leader who was also the Chairman of Awami Action Committee, tried to bring various political factions at a platform in 1992. Apart from some former militants who tried to initiate dialogue including Ab Majid Dar, Balraj Puri (People’s Union for Civil Liberties) and Dr Karan Singh also participated in various dialogue initiatives.

The formal process of interlocutors was started in April 2001, when under the former Union Minister, KC Pant, the then government sent a soft signal to Kashmir. This was followed by Atal Behari Vajpayee led delegation to Kashmir to sense the ground realities in August 2000. The mission led by Pant was a failure and a non-starter because Hurriyat insisted that talks cannot go through without the involvement of Pakistan. Shabir Shah was the only separatist leader who met K C Pant. Other political leader that Pant Mission met was former CM of the State Mir Qasim. Pant mission also dealt a serious blow because of Parliament attack of December 2001 which was followed up with a bitter political bickering between India

& Pakistan and eventually led to Op-Parakram. In 2002, the Pant mission was formally disbanded & mission was wound up.

The year 2002 there was saw another attempt in the form of Kashmir Committee formed under Late Ram Jethmalani. 'Kashmir Committee' consisted of many eminent personalities like Dilip Padgoanker, Shanti Bhushan, Ashok Bhan, Jawid Laiq, Fali S Nariman & journalist M J Akbar. Separatists met this committee and held serious of talks but nothing concrete came out. There were later claims by Ram Jethmalani that an agreement was agreed upon with separatists that was vehemently opposed by Mirwaiz Umar Farooq.

Former Home Secretary N N Vohra in 2003 was appointed by BJP led government to find a solution to festering Kashmir problem. N N Vohra held and was able to rope in moderate faction of Hurriyat into talks. The mandate of this attempt made by centre was vague and not clear hence nothing serious came out. Further the stalemate was furthered by L K Advani who wanted discussions within certain frame of constitutionality. This attempt was further reinforced by Government in centre sending Arun Jaitley (late BJP leader) to talk with Government in J&K and various stakeholders. The ideological differences among various factions to the Kashmir issue made sure that political settlement always failed. Piecemeal attempts were also made through AS Dulat & RK Mishra (Journalist).



### **3.8.1 Two Round Table conferences**

Major thaw in J&K and Union of India relations came in 2006 when two Round Table Conferences were held which were announced by Dr. Manmohan Singh, then Prime Minister of India. All shades of political divide welcome the move. The first such RTC was announced in February 2006. The separatist camp led by Mirwaiz Umar Farooq and Shabir Shah actively welcomed the initiative but as usual, the Kashmir affairs were to be decided by hardliner SAS Geelani who proved to be too stiff for talks. The second RTC announced in May 2006 was held in Srinagar was attended by all shades of political opinion. But the strange thing about this RTC was that moderate faction led by Mirwaiz Umar Farooq jeered at the process because of the non-involvement of Pakistan in dialogue process. Shabir Shah & Yasin Malik also boycotted this dialogue process initiated by the centre.

Despite the fact that RTC held in 2006 saw a mixed reaction & engagement from Hurriyat camp, Prime Minister Manmohan Singh argued that lot of inputs have been garnered from the two conferences and they will lead to better policy towards J&K in the form of: -

- ✓ Confidence building measures (CBM's) for those that have braced the brunt of militancy.
- ✓ Better and engaging ties between people across LOC.
- ✓ Economic development and a promise for 'Good-Governance'.
- ✓ Strengthening of Centre-State Relations.

It was in 2010 that UPA-II under the then Home Minister P. Chidambaram announced the all-important group of interlocutors consisting of Radha Kumar, Dilip Padgoankar & M M Ansari. Radha Kumar was Jamia Milia Islamia Academic, Dilip Padgoankar—a well-known journalist and M M Ansari was former Information Commissioner. Mandate and the agenda of trio was defined as to initiate a process of gradual & uninterrupted dialogue with all sections of people/shades of opinion of J&K especially youth & students. The announcement of group of interlocutors came after the spate of violence in summer that year in which 100 youth lost their lives.

Life had come to standstill and a political step was indeed overdue given the violence that had erupted in summer 2010. The fuss around this group of interlocutors was that it lacked proper backing from New Delhi. Range of their outreach and to what extent they will negotiate remained questionable and a debate for evening street discussions. Dilip Padgoankar laid to rest all these speculations when he made this statement that “we would try to find out a solution through political negotiations with every stake holder for political settlement”. The group of interlocutors made many visits and met various groups and individuals that ranged from mainstream to college students to businessmen. Separatists remained as usual aloof to meeting with interlocutors and hardliner Syed Ali Shah Geelani accused the Centre of sending the interlocutors to please visiting US president Barak Obama. This bonhomie by New Delhi was brandished by him as ‘dirty trick’. His agenda was that unless New Delhi accepts these 5 points, there was no point in talking to the interlocutors: -

- ✓ Kashmir to be accepted as a disputed territory.
- ✓ That Kashmir needs to be demilitarised.
- ✓ That all political prisoners should be released.
- ✓ Those personnel responsible for summer 2010 killings should be prosecuted.
- ✓ That AFSPA should be revoked.

### **3.9 Vajpayee bonhomie & Manmohan Singh’s decade vis-s-vis Kashmir**

Vajpayee is the only leader who is revered in Kashmir cutting across the political divide. The separatists liked him, the mainstream believed in him while as the Pakistan felt confident in dealing with Vajpayee. Vajpayee made a historic speech in 2003 (April) wherein he extended his hand of friendship to Pakistan. Remember this came against the backdrop of Kargil attack and infamous 2001 Parliament attacks. He reiterated that gun was never the solution to any conflict but the consensus and dialogue was (Ehsan, 2018). The famous slogans he gave were *Kashmiryat*, *Insanyat and Jhamoryat*, these were the broad parameters within which Kashmir issue was to be resolved. *Kashmiryat* according to Nyla Ali Khan is not just the cultural

construct but also a political one. She argues in her book (edited) *The Parchment of Kashmir History, Society and Polity* (2012) that *kashmiriyat* revitalized & resurrected through cultural resuscitation and redressal of political issues. This was complete change in the policy of BJP camp from which Vajpayee came. The strong Nationalistic and one India slogan of RSS-BJP dealt a blow with this policy announcement. Analysts believe that this change in attitude culminated in the rift between Vajpayee & his RSS-BJP Right wing ideologue roots. Vajpayee didn't stop just at announcements but also walked the talk by opening up borders and starting bus service again between Delhi & Lahore which remained suspended after the 2001 parliament attack (Ganguly, 2001). The talks also proposed a bus service between Munabao (Rajasthan) to Kokhrapar (Sindh).

Separatist leader Ab Gani Bhat argues that Vajpayee rose above everything to find solution to the Kashmir problem. Despite many setbacks, he never gave up the hope in peace. In January 2001, Vajpayee famously declared in his speech at Kumarakom that Kashmir is a special case and it has to be dealt specially, that it is not important to follow the footsteps of past rather innovation is the need of the hour. Vajpayee declared that India has to be bold & innovative in order to bring peace to whole South Asia (Ganguly, 2003). The bold step taken by Vajpayee later on gradually culminated into range of CBM's and an excellent phase of peace for Kashmir. The CBM's include people to people contacts, opening up of other bus routes between two countries & discussion on other range of contentious issues including Siachen, Sir Creek, Drugs Trafficking, Economic engagement; peace & Security (Mishra, 2004).

The famous words of *Kashmiryat, Insanyat and Jhamoryat* (melting pot of Kashmiri culture, humanism & Positive Democracy) still evoke great response in valley. Vajpayee remains the doyen of India's Kashmir Policy who reiterated his desire to accomplish the solution to Kashmir problem outside the sphere of Indian Constitution. The offer was more of a symbolic gesture that created rift in Hurriyat conference and later it was split into two groups—those who joined talks with New Delhi, it included certain Hizbul Mujahidin Militants like Majid Dar. Vajpayee's approach was humane which came in after lot of repression faced by common

Kashmiri's, hence Vajpayee remained quite famous among masses as well. New mode of politics which included conducting of free & fair elections after crises hit 1996 elections culminated in 2002. This was the dream of genuine *Jhamoryat* promised to the people. People participated in hoards in the election of 2002. Nehruvian doctrine of conducting affairs in Kashmir which was followed by congress for decades included chicanery & chivalrous tactics was shunned by Vajpayee. Perhaps it was the healing touch which PDP (Peoples Democratic Party) patron Late Mufti Sayeed was talking about in his election manifestoes & party's official position. In 2016 after the unrest in the valley due to the killing of militant commander Burhan Wani, Mehbooba Mufti reiterated her demand from centre about the same phase of humanitarian & assimilative approach from New Delhi. Truly, after the loss of elections to UPA in 2004, Vajpayee's loss was more of a disaster for Kashmir rather than his party. As they say it was a breeze never seen thereafter (Shah, 2018).

As Prime Minister of India, Man Mohan Singh took over from Atal Bihari Vajpayee, who had done enough to entice both Kashmiri separatists and Pakistan under General Musharraf. Mr. Singh invited Vajpayee to be the special envoy on Kashmir issues after taking government in 2004. Unfortunately, he turned down the offer. However, Manmohan Singh discussed the line of action with former Foreign Minister Natwar Singh and Prime Minister Atal Bihari Vajpayee. By that September, both Musharraf and Manmohan Singh issued a joint statement committing both the countries on the path of peace and development. They reiterated that both the countries will strengthen Institutional contacts and immediate human Rights relief. Besides sending three-man team of interlocutors and then Home Minister to Srinagar to hold talks with all stakeholders, it is laudable that Manmohan Singh also devised what is popularly known as *Musharraf-Manmohan Formula*. According to this plan, border that is LOC (Line of Control) dividing two Kashmir's should become irrelevant, there should be free movement of people across the border, reduction in military presence in populated areas and Self-governance for internal management on both sides of LOC. In his book *The Accidental Prime Minister: The Making and Unmaking of Manmohan Singh*, author Sanjaya Baru argues about Musharraf-Manmohan formula that Manmohan Singh wanted Musharraf to take credit of the deal

and that this formula should be called as Musharraf Formula rather than attaching the name of Manmohan Singh (Suhasini Haider, 2014).

The positive thing about the ‘deal’ was that its positive results were seen on the ground, the troop movement was reduced, there was a general reduction in violence and militant attacks & infiltrations. Bus service between Srinagar & Muzaffarabad was started. Despite many positives, Manmohan Singh was not able to repeal the AFSPA (Armed Forces Special Powers Act) and the engagement with Hurriyat also diminished with time. This was later also admitted by Manmohan Singh in these words that “we had come very close to non-border & non-territorial solution”. (The Hindu, 2010)

The party’s control over Manmohan Singh was more than what he needed to assert. A S Dulat in his book, *Kashmir: The Vajpayee Years (2015)* has penned a chapter about Manmohan Singh’s legacy as the “*Manmohan Singh’s Lost Decade, P-270*”. That UPA didn’t judge between “right & wrong”, they were not able to carry forward the legacy of Vajpayee and got bogged down. The political pressure was huge of being soft towards Pakistan if dialogue with separatists had started. Sonia Gandhi when in opposition had met Mirwaiz but when she came to power she had stopped the process (P. 276-277). The tragedy with Dr. Manmohan Singh was that he couldn’t cash in on what had already been achieved by Vajpayee and could even visit once Pakistan—his place of birth during his 10-year tenure as Prime Minister of India. According to A.S Dulat it was the Political will that was missing in Manmohan Singh’s tenure not the bureaucratic apathy. The Mumbai attacks of 26/11 reversed all the hard work and everything was back to square one. Because Indian establishment believes that when Pakistani generals are frustrated they use force like the terror attacks in order to push the talks. But the general belief in Pakistan is that they regret that attacks of 26/11 because it derailed the political process and forward peace march on Kashmir.

The hanging of Afzal Guru under the Home Ministership of Sushil Kumar Shinde sealed the doors of separatists for talks and the message was clear and irritating. This decision of hanging Afzal Guru even surprised Omar Abdullah who

was the then Chief Minister of the state in 2013. “The solution to the India-Pakistan-Kashmir Gordian Knot was given to Dr. Manmohan Singh on a platter in 2004” but it was all messed up in 2014 when Narendra Modi took over the reins (Dulat, P.285).

### **3.10 Changing contours of India’s Foreign Policy under Narendra Modi and end of ‘Special Status’ of Kashmir—5<sup>th</sup> August, 2019**

Narendra Modi took over the office of Prime Minister of India in 2014 with a thumping win. With his electoral success and being an unopposed leader of his party, he invited the leaders of SAARC nations in his swearing ceremony, which was seen as a great thaw in India-Pakistan relations as Nawaz Sharif attended the ceremony. The message was big and resounding: that Mr. Modi means business and he shall conduct his affairs with Pakistan on soft terms. This also became evident when out of turn he landed in Pakistan at the wedding of Nawaz Sharif’s daughter without any official invitation and protocol. The Narendra Modi government surprised everyone because it came from Right-wing nationalist ideology with its roots in parent organisation RSS and won good number of votes on the anti-Pakistan rhetoric and bashing the terrorist tag of Pakistan. This bonhomie didn’t last long due to two suicide attacks in India carried at the behest Pakistan. One was the Pathankot attack carried out in Pathankot Airbase on 2<sup>nd</sup> January, 2016 & another one was carried out in September that year in the town of Uri. Response to the Pathankot attack was mature and reserved by India. India allowed quite unusually the ISI men into the base to collect the evidence. This action by India came in for lot of criticism & scepticism by general population in India and even former PM Manmohan Singh dubbed this exercise as an insult to Armed Forces (Chaudhary, 2019).

Lutyens Delhi’s Foreign Policy changed after Modi took over which had direct as well as indirect repercussions on India. Because any skirmish & antagonism has a direct impact on the peace process in Kashmir, India began to take positions in International Affairs and swayed towards USA rather than settling on the reminiscent of Non-Aligned Movement (NAM). This position was in tune with the global trend towards rise of alpha-male politicians which rose to power through the combination of global trend towards rise of Populism (Moffitt, 2016), rise of Right wing Nationalism

& Illiberal Democracy (Fareed Zakaria, 1997; Inglehart & Norris, 2016). The appointment of technocrat and seasoned bureaucrat—S. Jaishankar as India’s Foreign Minister showed the intention and penchant of N. Modi for boldness. It was S. Jaishankar who defined India’s role for New world order which shall have India’s interests at its core defined within its Nationalism plus India’s Nationalism will not be antagonistic to the interests of the world. This policy shall not be held hostage to the ‘dogmas’ of past (Express News Service, 2019). In his 4<sup>th</sup> Ramnath Goenka Lecture series, S. Jaishankar argued in detail various phases of Indian Foreign Policy and its new repositioning over the years that started from Bangladesh Liberation war under Mrs. Indira Gandhi, Reforms of 1990, Nuclear Tests conducted in 1998 (MEA, 2019). He again reiterated the fact that lack of response after 26/11 Mumbai attacks was so different from Balakot Operations—which were conducted in response to Pulwama attack on 14<sup>th</sup> February, 2019.

Abrogation of Article 370 was for sure the main aim of BJP/RSS agenda since its inception but the positioning of India after 2014 and US withdrawal from Afghanistan also speeded up the process. The speeding up hypothesis can be culled from the fact that BJP-PDP remained in coalition for many months giving up their differences and believing in Common Minimum Programme designed by Late Mufti Sayeed & Ram Madhav (then Party General Secretary of BJP). The fallout of Afghanistan gives a positive leverage to Pakistan vis-à-vis India, as Pakistan after US withdrawal can fully focus and divert its attention towards Kashmir. These apprehensions came true after the Doha deal which was brokered between USA and Taliban by Zalmay Khalilzad—US Special Representative for Afghanistan.

The abrogation of Article 370 and special status of Jammu & Kashmir is a combination of all these factors:

- ✓ Because it was the party manifesto of BJP/RSS
- ✓ Strategic repositioning of India & closing the disputed issues that have remained as reminiscent of past (say 1947)

- ✓ Fallout of USA pull-out from Afghanistan & future prospects that Taliban shall come to power in Afghanistan which might give strategic advantage to Pakistan & ISI.

The abrogation of Art 370 on 5<sup>th</sup> August suggests a ‘new normal’ for the relationship between Union & Jammu & Kashmir, because after 5<sup>th</sup> August, 2019 J&K ceased to have the status of a State. It was changed & bifurcated into two. Jammu & Kashmir being the Union Territory (with a Legislature) of India and Ladakh was separated & made into another UT without a legislature. So, the Geo-political history of Jammu and Kashmir can be summed as:

- ✓ Until 1947, Jammu & Kashmir has remained a Princely State under British suzerainty.
- ✓ Since the signing of IoA (Instrument of Accession), it became a State of India under special arrangement with a Prime Minister & a Sadr-e-Riyasat.
- ✓ In 1964, the post of Prime Minister was abolished and post of Chief Minister was created with Sadr-e-Riyasat replaced with Governor of State working at the behest of president of India.
- ✓ 5<sup>th</sup> August, State of Jammu & Kashmir was bifurcated & reduced further to Union Territory having a Legislature & Ladakh region separated from it.

### **3.11 Conclusion**

This was famously reiterated by Dr. Farooq Abdullah that when “Kashmir faces a choice between a democratic and secular India and an Islamic and military Pakistan, it will always choose India. It is only when it faces a choice between a repressive, communal India and an Islamic Pakistan that Islam may become a factor” (Singh, 1995, P-87). Kashmir has been a tragedy of errors and judgements which were deliberate, intentional and some unintentional. India has seen many internal disturbances since its inception as a nation in 1947. The challenges from Left wing extremism and secessionist tendencies in North East and Punjab have been managed



and some have been resolved also. But the real test of India policy in dealing with secessionism & extremism has come from Kashmir. Kashmir has also been a major challenge for India in its Foreign policy. Pakistan dimension and the tension between these two countries add to the anxiety in Kashmir. General population in J&K and in particular in Kashmir has remained quite peaceful during the first 5 decades of India's independence and signing of Instrument of Accession with J&K. By resorting to lackadaisical approach and managing of democracy in Kashmir, New Delhi spoiled the dish. This is when Pakistan took over and found sympathizers in Kashmir and Kashmir after rigging of 1987 elections fell back towards Pakistan. India has as usual followed in Kashmir the tried & tested method of weaning the extremists & militants and later on trying to woo the moderate faction in to the election fray. This strategy has worked quite well in North East (Mizoram) and Punjab but India has already had one shot of this policy for Kashmir in 1990's and insurgency then was at its peak. After the Narendra Modi as Prime Minister of India, he has tried to bury the "business as usual approach" to the Kashmir issue. The policy is 'no-engagement or no-leniency' towards extremism. This is officially also called as Zero-tolerance towards terrorism. But off late we have seen Narendra Modi Government engaging with NSCN (Nagaland Socialist Council of Nagaland) and there is intelligentsia in India that strongly feels that Indian Government should engage with Taliban also. What we are seeing after 2014 is that there is extreme level of alienation among the general population. Cross border terrorism is at an all-time high, insurgency and infiltration is at peak.

The number of cease fire violations has dramatically increased in last few years. After the abrogation of special status for Kashmir, Kashmir is internationalized as never before. But given the change in the global balance of power and big powers engaged in reviving their own economies & their sphere of influence, India should be least bothered about that. But keeping an issue festering for decades consumes the energies of a nation and also consumes lives. Given the fact that India has formally sent a message to Pakistan & International community that Kashmir is 'internal issue' of India and the fact has been accepted by world community at large, India has to settle and show more benevolence to deal with this 'internal matter' within 'humanitarian' boundaries. The abrogation of Art 370 has changed the position of

Kashmir but it has not changed the players to the game. Pakistan is still the neighbour of India, militants are still active in Kashmir, Hurriyat conference is still there and mainstream despite fetters are important factor to Kashmir Gordian Knot. India's J&K imbroglio simmers after the abrogation of Article 370 on August 5, 2019. The triangulation within which India has found itself while dealing with Pakistan and China is still a reality. Narendra Modi Government tried to reverse the earlier approaches of Vajpayee & Manmohan Singh vis-à-vis China & Pakistan. The fact remains that China is a big player and has its interests in Ladakh region of J&K and even occupies Aksai Chin. Vajpayee & Manmohan Singh as Prime Ministers of India tilted towards Pakistan (peace negotiations) in order keep the bigger player China at bay. Narendra Modi tried to reverse the equation by accommodating China (informal summits like Wuhan & Mamallapuram) and shoving Pakistan fiercely. The rise of nationalistic fervour, 'new' normal in J&K, Narendra Modi's posturing towards China and US withdrawal from Afghanistan are new equations that are developing in the great game of Kashmir along with the older equations that remain intact within Kashmir.

## **Chapter 4**

### **The Jammu and Kashmir Public Safety Act, 1978: Traversing Through Constitutionality and Historicity**

#### **4.1 Introduction**

The Jammu and Kashmir Public Safety Act, 1978 (J&K PSA) is an Administrative detention law in J&K which was enacted by Sheikh Abdullah led Government in order to keep the ‘timber smugglers out of circulation.’ J&K PSA works according to the constitutional framework as laid down in the Indian constitution. So theoretically and technically there is nothing unconstitutional in Jammu and Kashmir Public Safety Act, 1978. J&K PSA has got five chapters and 24 sections and sub-sections as amended from time to time. Chapter I gives the definitions and various descriptions under the said Act.

Chapter II is titled as ‘*Access to Certain Premises and Areas*’ which deals with certain Prohibited and Protected areas as notified by the Government. In other words, Government can declare certain areas as unauthorised for access to persons without permission. Hence no person can loiter or enter such area without permission of Government. Under Chapter II it is mentioned that if any person tries to forcibly entry such premises, he/she can be imprisoned for three months or fine or both. Both the Prohibited and Protected areas have to be notified by the Government. The Protected areas are to be notified in the interests of “defence or security of State”.

Chapter III is titled as “*Maintenance of Communal and Regional Harmony*” which deals with prevention of circulation of any document that has the potential of raking communal tensions or disturb public order. Such restrictions shall remain in force for three months and can be challenged in High Court.

Chapter IV is titled as “*Power to make orders detaining certain Persons*” which is quite potent section as well as controversial as it deals with detaining certain persons which the Government feels to be acting in any manner prejudicial to security of state or public order. Further such persons shall be detained who are involved in

smuggling of timber or liquor. The order for detention can be issued by District Collector or Divisional Commissioner. Section 13 mentions that the detaining authority has to provide the reasons of detention to detainee within 5-10 days. But if the authority feels that disclosing facts of detention impedes 'public interest' then such disclosure is not necessary [U/S 13(2)]. Advisory Boards are also mentioned under Chapter IV Section 14.

Chapter V deals with "*Miscellaneous*" subjects like Sec 22 gives protection to officers that no suit shall lie against them done in "good faith". U/S 21 no court has the powers to take cognizance of any offence under this Act unless the Public servant makes a report in writing.

Thus J&K PSA is very comprehensive and deals with various kinds of Preventive measures to be taken against various categories of persons. PSA, 1978 deals with three categories of preventive detentions: those who trespass certain notified areas, those believed to be detrimental to communal harmony either through their acts or ideas and those who act detrimental to "security of State" or "the maintenance of Public order". The Act defined "prejudicial to the maintenance of Public order" as "promoting/propagating or attempts to create hatred, enmity or disharmony on the grounds of race, religion, caste, region or community".

## **4.2 Preventive Detention in India: Constitutionality and Historicity**

Preventive detention quite interestingly finds mention in Part III of Indian constitution under Fundamental Rights section. Being one among many Liberal-Democratic countries across the world, this provision has raised many questions. The reason behind this provision seems to be that the background in which India got independence required certain laws that were authoritarian in character to preserve the unity and integrity of the country. Secessionism and subversive tendencies marred India at Independence. Pakistan's questions over Kashmir, the *Razakaar* movement in Hyderabad and other problems relating to the integration of states weighed high on the minds of the founding doyens of Indian Constitution. But Preventive detention was subjected to certain constitutional safeguards of course with exceptions.

"Any individual who is arrested has the right to be told about the reasons for arrest," according to Article 22 (1) (2) of the Indian constitution. Under Articles 32 and 226 of the Indian Constitution, he has a natural right to legal representation and other judicial remedies. As a result, the arrested individual must appear in front of a local magistrate within 24 hours. The catch is provided by Article 22 (3) of the Indian Constitution which prescribes exception to the rule and this is what gives legal sanction to the preventive detention laws in India by centre and states. The guarantees guaranteed under Article 22 (1) (2) "must not apply to immigrants and people arrested under Preventive Detention," according to Article 22 (3). The Constitution divides the legislative ability to implement preventive detention legislation between the centre and the states. The Centre has exclusive authority for detentions that come within India's Ministry of Defence, Foreign Affairs, and Security. A State can have its own statute for Preventive Detention at the same time.

Even if the Centre and States have their own laws, in the event of a contest in interpretation, the Central legislation will take precedence. India is a signatory to International Covenant on Civil and Political Rights (ICCPR). The pact was approved by India in 1979. However, India's objection under the ICCPR is that it should be in accordance with the Indian Constitution's Preventive Detention provisions (United Nations Treaty Collection, 1966).

### **4.3 Safeguards in the Constitution against abuse of Preventive Detention Laws**

- ✓ Article 22 (4) (7) provides for some safeguards against the abuse of Preventive detention laws. "No person shall be detained beyond 3 months under Preventive Detention law and in case of extension, the sanction by the Advisory Board is mandatory".
- ✓ That the detainee "shall be provided as soon as possible the grounds under which said person has been detained exception being that if the detaining authority deems it against the public interest to disclose".

According to D. D. Basu, Preventive Detention is resorted to when there is not enough evidence with the detaining authority and there is enough suspense that the potential offender shall commit the crime, it becomes imperative for the authority to detain the person. According to Lord Finley in *Rex V. Halliday*, 1917 AC 260 (PP-269), Preventive detention is not a punitive provision or a law but it has to be precautionary. The main objective of Preventive detention is to prevent future offence that hasn't been committed yet (House of Lords, 1917).

Preventive Detention in Kashmir has a long history running into colonial as well as post-colonial British history in collaboration with Dogra rule (Bose, 2007. P. 171). During the decade of 1930's due to the formation of Muslim Conference (which was largely to secure Muslim interests) started agitation and dissent against Dogra regime (Rai, 2004. P. 227). In order to suppress this movement, Preventive detentions were invoked in sync with the theme of Defence of India Act which was used by British imperialism to suppress Indian National Movement (Duschinski & Ghosh, 2017). The movement started by Muslim Conference was called 'Quit Kashmir Movement'. Public Security Act 1946 provided for indefinite preventive detention in the interests of Security of State, Public order and general public. Post-colonial Jammu and Kashmir replaced this Act with Preventive Detention Act 1954 and later amended in 1958, 1964 and 1967. Indian laws are mostly the hangover of British Imperialism so is Preventive Detention. However, it needs to be reiterated that British Parliament doesn't recognise Preventive detention in peace time while as India has Preventive detention for normal times also.

The British Parliament passed the Emergency Powers Act (1939) during World War II, which included provisions for Preventive Detention. The Secretary of State had the authority to detain anyone, if a person behaves in a way that jeopardises public safety or defence, he or she was to be held. The idea that Preventive Detention should be repealed was not convincing to the framers of the Indian Constitution, hence this provision was retained. To meet this desire, the Preventive Detention Act of 1950 was enacted. The Bill was introduced in parliament by Sardar Vallabhbhai Patel, who explained the reasoning behind the provision. Patel argued that the Act shall be used against those persons whose "avowed objective is to create disruption,

dislocation, and tamper with communications, to suborn loyalty and make it impossible for normal government based on law to function”. This provision was to be temporary in nature but since its passage, PDA, 1950 has continued through extensions every year till 1969.

It was in 1971 that Maintenance of Internal Security Act (MISA) was passed. In 1974, Conservation of Foreign Exchange and Prevention of Smuggling Activities Act was passed. This was likely to deal with smugglers, and other anti-social elements dealing with Foreign Exchange. This was an economic variant of MISA, 1971.

#### **4.4 Central and State Legislations for Preventive Detention**

- **Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974:** This Act is invoked when there is breach of foreign exchange. The breach might impose threat for National Security, hence need for this kind of legislation. This Act was also made operational during Indira Gandhi era.
- **National Security Act, 1980:** The National Security Act allows the government to detain a person if officials suspect he or she is attempting to disrupt public order or constitutes a threat to national security. The National Security Act of 1980 was passed during the reign of Indira Gandhi. A person can be held without charge for a maximum of 12 months under the Act. If a person constitutes a threat to India's international relations, he or she may be held under the NSA.
- **Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980:** This Act authorises federal and state officials to issue detention orders against people who “attempt to control the production, supply, or distribution of, or trade and commerce in, any indispensable component as defined by the Essential Commodities Act of 1955, for the purpose of profiting in a way that would directly or indirectly defeat the Act's goals”. If the Central Government sees that the price of a certain item is rising due to shortage, it directs state governments and

union territories to impose a stock-holding restriction for that commodity for a specified period of time. To discourage black marketing and price hikes, anybody selling this item, whether a wholesaler, retailer, or importer, is forbidden from stocking more than a set amount.

- **Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988:** This Law establishes prohibitions against money laundering and the diversion of precursor chemicals, as well as other comprehensive measures against drug trafficking. If it is essential to detain any person (including a foreigner) in order to prevent him from engaging in illicit trade in narcotic narcotics and psychotropic substances, make an order directing that such person be held.
- TADA (Terrorist and Disruptive Activities (prevention) Act), and POTA (Prevention of Terrorism Act), effectively allowed for administrative detention up to 6 months extended up to one year. TADA was repealed in 1995 & POTA in 2004.

#### 4.4.1 At Various State Level

- **The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 [SAFEMA]:** This Act also allows for preventive detention of persons who are involved in foreign exchange manipulation as it can have effects on national economy. This Act came into force on 25 January, 1976. There are 27 sections in this Act and applies for whole of India. As people are engaged in unethical actions such as violating income tax, wealth tax, and other regulations, all of which have a negative impact on our national economy. On the other side, there are some who keep properties obtained by unlawful methods in the names of their colleagues, relatives, and so on.
- **The Jammu and Kashmir Public Safety Act, 1978:** Jammu and Kashmir PSA was passed by Sheikh Abdullah Government in 1978 mainly to contain Timber smuggling in Jammu and Kashmir (as Timber smuggling



was very grave concern then in J&K). PSA was called as Preventive Detention Act in its earlier avatar.

- **The Maharashtra Prevention of Communal, Anti-social and other Dangerous Activities Act, 1980:** The Act provides to prohibit sectarian, anti-social, and other hazardous actions in Maharashtra, as well as things related thereto. This Act came into force on 27 August, 1980. This Act applies to those anti-social elements who try to create disharmony, create communal tensions, on the basis of race, religion, and colour or on the basis of language.
- **Assam Preventive Detention Act, 1980 (APDA):** The Assam government detains people under the National Security Act of 1980, but on July 19, 1980, the state Assembly passed the Assam Preventive Detention Act (APDA), which gave the state Assembly broad powers to detain people to prevent them from doing things that could jeopardise state security, public order, and other things. Any state government officer with the level of secretary or district magistrate has the authority to detain. The APDA's Sections 4 and 16 allow for arbitrary detention with no accountability. "A detention order may be carried out anywhere in India," it reads. It implies that the authority to preventively imprison anyone wherever in the country is based only on the state's judgment of character. Section 16 of the Constitution grants immunity to the state and its employees from prosecution or other legal action for acts committed in "good faith." When employed in the context of states, the phrase "good faith" "changes like clay according to the convenience of the state. As a result, the detained person's civil freedoms are violated (s). The draconian Armed Forces (Special Powers) Act of 1958 is also responsible for such protection from prosecution.
- **The Bihar Control of Crimes Act, 1981** This Act applies to control and suppress various anti-social elements in Bihar. This Act applies to all territory of Bihar. Anti-social elements according to the Act are people who lead any anti-social gangs, are involved in traffic of women or girls,

or those who promote hatred or communal tensions through speeches are acts. This Act allows for administrative detention up to 12 months.

- **Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, 1982:** Popularly also called as Goondas Act, received Presidential assent on 12<sup>th</sup> March, 1982. The Act allows for preventive detention of various repeated offenders related to sexual offences, drugs, alcohol and offenders or slum grabbers. This Act has jurisdiction over whole of Tamil Nadu and has similar provisions as that of other Preventive detention laws in other States.
- **The Gujarat Prevention of Anti-Social Activities Act, 1985** (provides for administrative detention for a period of up to twelve months. This Act is also popularly known as PASA Act. Habitual offenders can be kept in preventative detention for up to one year on the instructions of a district magistrate under the PASA Act. Upon confining a person, the authorities must notify the PASA Advisory Body within three weeks, and the board, which is chaired by a former high court judge, must inform the government whether or not the detention is legitimate. The detention order is cancelled if the board determines that there are insufficient reasons. A person committing offenses under the Information Technology Act can now be held under the PASA Act, thanks to the proposed change. If a person is discovered to be involved in a similar offense within three years of being convicted of gambling, he or she may be imprisoned. The three-year limit will be eliminated under the proposed revisions. The act would also apply to individuals who commit sexual harassment offenses under the Indian Penal Code and the Protection of Children from Sexual Offences Act, as well as those who harass borrowers or illegally take away their property.
- **The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, 1985** (allows for administrative detention for a

period of up to twelve months). Has similar application as that of Goondas Act of Andhra and Tamil Nadu.

- **The Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986** allows for administrative detention for a period of up to twelve months. This Act is similar to that of Preventive Detention Act of Tamil Nadu and applies to various categories of drug offenders, bootleggers, land grabbers etc.

The Jammu and Public Safety Act, 1978 was promulgated in accordance with the rules and checks laid down in Constitution of India. The Act allows for administrative detention of up to two years if a person acts in any way 'prejudicial to the security of State' and for one-year detention for those who act in any way 'prejudicial to maintenance of public law and order'. During 1950's to 1970, Preventive Detention Act (earlier version of PSA) was used against Plebiscite Front which was launched by Sheikh Abdullah's followers to seek Kashmir resolution under the auspices of United Nations (UN). Sumantra Bose in her book *Contested Lands* has documented this incident that around 350 officials and other members of this Plebiscite Front who supported this organisation covertly or overtly were arrested under Preventive Detention Act (PDA) and organisation was declared illegal (also cited in Shaheen Akhter, 2000. P 38-39). During the early decades of constitutional relationship between Union of India and Jammu & Kashmir which was fraught with mutual suspicion and mistrust, Preventive Detention was used extensively against political dissent, to manage rigged elections and hot borders. Preventive detention was used as a "political containment tool". (Duschinski & Ghosh, 2017). Sheikh Abdullah also used PSA against his rival Ghulam Nabi Patel and it is documented that Patel was first victim of PSA, 1978. Ghulam Nabi Patel was killed by HM (Hizb-ul-Mujahideen) in 2018 when both PDP and Congress disowned Gh Nabi Patel, who used to hop from one party to another.

Sheikh Abdullah during his tenure officially declared that Public Safety Act, 1978 shall be used against 'timber smugglers'. The official document said that PSA will be used to keep timber smugglers "out of circulation". It needs to be mentioned

that timber smuggling in Kashmir was then really a challenge for administration. According to the estimates of Jason Burke, this trade amounted to millions of pounds a year in Kashmir (Burke, 2010). In 2017, the then Minister of Forests, in J&K said in a written reply in Legislative Assembly that 702 people have been booked for forest smuggling and further argued that 8 persons have been detained under PSA (Outlook, 2017). So Public Safety Act has been used against timber smuggling but in rare cases not as a blanket law to stop timber smuggling offences. The Act has been used mostly as a tool to keep 'people out of circulation' (Chakravarty, 2016). During Sheikh Abdullah's tenure, J&K PSA was used to sabotage and suppress any political dissent but after the tumultuous era of 1990's, J&K PSA became a tool to book anti-state activists. Members of *Jamat-e-Islami* were booked, separatist and those who sympathised with them were also detained under this Act.

#### **4.5 PSA Detainees: Varying Account/Figures from Jammu and Kashmir**

According to the RTI reply sought by Manan Bukhari from Home Department, the number of detainees under PSA stands at 16329 since 1988 (cited by Aabid Bhat, 2019). Kashmir Bar Association says that actual figures are 40,000. Only 5597 incidents were included in a response to an RTI request made by JKCCS. According to Amnesty International, 334 people were arrested under the PSA between January 5 and February 14, 2010. In a written response to then-MLC Mohammad Ashraf Mir's query in 2012, then-CM Omar Abdullah confirmed that 1332 persons have been arrested under the PSA. Under PSA, 617 people were booked in 2010, 412 people were booked in 2011, and 303 people were booked in 2009. (PTI, 2012). CM Mehbooba Mufti indicated in a written reply to the erstwhile Jammu and Kashmir Legislative Assembly that 2400 detention orders were issued between 2007 and 2016. According to an RTI complaint made by Sheikh Ghulam Rasool, the chairman of the J&K RTI Movement, over 1000 persons were imprisoned under the PSA between March 2016 and August 2017 (IANS, 2018).

The RTI filed by legal cell head of Hurriyat Conference shows that there were 707 FIR's were filed against juveniles during similar periods. The district wise figures as sought in RTI reply were shown as: Sopore witnessed 230 detentions out of which

221 were booked once and only 9 youth were booked twice. Since 2008 in Shopian there were 121 detentions were made under J&K PSA. From Anantnag 567 detentions were done under PSA once and at least 18 were detained under PSA twice. The figures for Baramulla for same period were as 516. For Kulgam the figures were as 266 PSA detentions and 10 of them were booked twice. For Bandipora the figures remained at 167 detentions under PSA (Kashmir Times, 2014).

The figures prepared by NCRB and Greater Kashmir as documented in Amnesty International Report of 2011 are revealed in *Table 4.1* in tabular form from 1990-2008.

**Table 4.1**

*Detentions as revealed in Amnesty International Report titled: “A Lawless Law”—2011*

Source	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
NCRB										
as of 31 <sup>st</sup> Dec	NA	NA	NA	NA	NA	799	1022	725	303	269
Greater Kashmir	942	1070	976	1112	2118	1819	1560	414	460	441
Source	2000	2001	2002	2003	2004	2005	2006	2007	2008	
NCRB										
as of 31 <sup>st</sup> Dec	497	416	444	397	451	377	369	275	266	
Greater Kashmir	503	318	504	401	510	402	920	NA	NA	

## **4.6 Counterinsurgency and Detentions in Kashmir**

Kashmir has been the contentious issue simmering between India and Pakistan since 1947. Due to secessionism and separatism that started due to various factors as discussed previously, Kashmir has been on boil more so after 1989. After the armed rebellion started since 1990's, New Delhi resorted to various strategies in order to quell separatism, suppress militancy and bring various moderate factions into mainstream. This approach over the years culminated into WHAM (Winning-Hearts-And Minds) and COIN (Counterinsurgency strategies). WHAM in the context of Kashmir conflict implies many things. Combined with the Police surveillance and imposition from the State, these strategies have many a times had ill consequences as there is a deep distrust between Security forces and civilian population (Kaul 2011, P-195). WHAM has had good results if done at political level as in 2002-2005 under Vajpayee era. COIN includes Preventive Detention Act such as PSA and AFSPA (Armed Forces Special Powers Act) and various other forms of Iron-fist policies. Jammu and Kashmir being one among many States in India which has rampant corruption, there are very high chances of proliferation of 'economies feeding on conflicts' (CMS and TII, 2008).

AFSPA gives special protection to security agencies while operating in conflict zones. Galula (2013) has argued that the success of COIN involves dealing with insurgents with hard hand and creating a chasm between locals and militants so that operating against militants/insurgents becomes easier. Public Safety Act has been the potent weapon in the hands of State in order to douse the separatist tendencies and manage the behaviour of citizens in Kashmir in sync with the ideology of State. More than a tool for ensuring that potential criminals and anti-social elements are behind bars, PSA has a multi-dimensional role in the context of erstwhile State (J&K). Well known scholars, activists and anthropologists over the years have brought out the effects of PSA on detainees. Managing of detention of a person is a prolonged paperwork which works like a web is documented by anthropologists like Haley Duschinski and Shrimoyee Ghosh (2020). They argue that through loopholes in the Act itself, Security agencies ensure that detainee remains in permanent detention. Through J&K PSA, according to the authors, J&K remains in a state of 'permanent

emergency' (Duschinski & Ghosh, 2017). Since 1978, according to State Home Department response PSA is without any rules and procedures. No single set of standard operating procedures has been followed. The imposition of PSA is decided by the personal logic/discretion of officer concerned. This was revealed in response to an RTI reply filed by Shaikh Ghulam Rasool. The response he got varied from district to district and from State Home Department to various Deputy Commissioner offices. The reply by State Home Department said that each case is evaluated by concerned Deputy Commissioner keeping in mind the dossier submitted by SP/SSP concerned. The curious muddle of lack of SOP's (Standard Operating Procedures), rules, too much discretion in the hands of security agencies has led to a situation where detainees continue to be in detention on the basis of skewed logic used in detention dossiers. This can be illustrated by analysing certain cases.

The provisions in J&K PSA which security agencies use to by-pass the libertarian provisions under habeas corpus are as:

- 1) Section 8: Uses the vague and broad terms like 'security of state' and 'public order'. These terms have been left to detaining authorities to interpret and have not been defined in the Act. These terms include "secessionist ideology", "waging war against State", 'disturbing public order', and 'anti-national elements'. There are numerous documents and FIR's analysed by Amnesty International and other scholars like Haley Duschinski and Shrimoyee Nandini Ghosh which show the usage of these terms in addition to the proliferation of documentation during the course of detention which amounts to '*hyperlegality*' (Nasser Hussain, 2007). Hyperlegality is not the situation which arises due to absence of law but the suspicion about individual leads to proliferation of myriad & complex web of rules, institutions and authorities which eventually undermines the basic presumptions of Rule of Law.
- 2) According to the Act, the grounds of detention have to be cleared within 5-10 days but Section 13 (2) has given the discretion to the detaining authority not to disclose the facts in lieu of 'public interest'. This provision is used

frequently in order to deny the detainee bail if the security agencies wish to keep him 'out of circulation'.

#### **4.7 Peculiar Case of Mian Qayoom Which Substantiates Above Two Propositions of Section 8 and 13(2)**

- ✓ Mian Qayoom was the President of Jammu and Kashmir High Court Bar Association has been under Preventive detention since 5<sup>th</sup> August 2019. He was also detained in 2010 on various grounds. In 2010, the grounds of his detention were that the detainee has turned Bar Association into “*a secessionist outfit*” and that the Associations activities were illegal. In February, 2020, while sitting on his Bail application, Justice Tashi Rabstan argued in detail about the necessity for personal liberty and freedoms. The learned Judge Tashi Rabstan quoted Justice M. Y. Eqbal’s judgement about Art 22 in *The Secretary to the Government, Pubic (law and Oder-F) v/s Nabila and others (2015)*, that “where individual liberty comes into conflict with interest of the security of the State or maintenance of public order, then the liberty of the individual must give way to the larger interest of the nation” (Supreme Court of India, 2014). Quoting Sophocles, the High Court said that “Law can’t be enforced unless fear supports them” and that the preventive detention order against the detainee is “valid as authorities have no objective standard to rely upon”.
  
- ✓ The bail application was again heard in May, 2020 by Justice Ali Mohammad Magray and Justice V.C Kaul upholding the detention of Mian Qayoom by arguing that the detainee has not shunned the “secessionist ideology”. Court also directed the detainee to take advantage of ‘opportunity’ provided by Advocate General D C Raina that Mian Qayoom should declare that he has shunned the ‘secessionist ideology’ in letter and spirit. The Advocate General also made reservations regarding disclosure of grounds for detention citing privilege under Section 13(2) which says that reason of not disclosing the facts about detention can be withheld on the grounds of “public interest”. Mian Qayoom’s plea against



this order made by Hon'ble High Court through his counsel was that this order was "ex-facie unsustainable in in Law as it is premised on stale, irrelevant, remote, vague and imprecise and deficient grounds of detention". The plea argues that court order can't sanction State as an authority which does "thought policing", as it violates the right of privacy and dignity. The plea argued along the lines of K S Puttaswamy v/s Union of India 10 SCC 1 case where in it held that "tenets of Indian constitution bar the State from acting as a thought police and endows a person with the right to privacy as a facet of right to life and liberty" (Apoorva Mandhani, 2020).

#### **4.8 Advisory Boards under J&K PSA, 1978**

According to the J&K PSA, 1978, advisory boards are one of the most essential checks on executive power. They were established under Section 14 of the Act. The Chairman and two additional members make up this three-member body. The chairman should have served as a High Court Judge, and the other two members should be or be competent to be High Court Judges. In conjunction with the Chief Justice of the High Court, the Chairman and members are chosen. The chairman and members of this board have a three-year term that can be extended for another two years. It is within 4 weeks that the Government shall place before this non-judicial body (Advisory Board) the grounds of detention. The Advisory Board has to revert back within six weeks (previously eight weeks amended in 2012) its opinion to either withhold or revoke the detention order against the detainee in question. According to Section 16(5) there can be no legal representation of detainee before the Advisory Board and its proceedings are kept confidential.

Mr. M.L. Koul has held the office of Chairman of Advisory Board for more than 10 years in accordance with the very framework of the said Act. Pertinent to mention that M.L Koul was appointed the Chairman of the Advisory Board in November 2000 for a period of 5 years and later on given subsequently three extensions in December 2005, December 2008 and December 2011 (Mohinder Verma, 2013). After Mr Koul, Justice (Retd.) B L Bhat was recommended for the

post. In case of any difference of opinion among the members, the majority decision is given preference. Interesting fact about the advisory board is that even though it is 'advisory' in nature, the opinion of the board is binding on the State [Section 17(2)]. Mr. Venkatesh Nayak and Dr. Shaikh Ghulam Rasool who head J&K RTI Movement have got the information for their RTI query that the following persons have been the at the helm of affairs of Advisory Board (CHRI, 2018 a): -

- ✓ From 1989 to 2000, Justice I K Kotwal has been the Chairman, with Mr. Madan Mohan Gupta and Mr. Bashir-ud-din have been the members from 1989-2007.
- ✓ From 2000 to 2012, Justice M L Koul.
- ✓ From March 2018 to January 2019, the Chairman post was vacant and later (from 30 Jan, 2019) Justice (retired) Janak Raj Kotwal's name was cleared.
- ✓ From April 2007 to February 2010, Mr. Sewa Singh and Mr. Dev Raj have been members
- ✓ Up to March 2015, Mr. Subhas Chandra Gupta and Mr. Bashir Ahmad have served as members
- ✓ From 1978 to 1989 for 11 years there is no information as to who the Chairman of the Board was
- ✓ On June 15, 2020 two names were cleared as members for Advisory Board. Former Judges (District and Sessions) Aijaz Ahmad Mir and Davinder Kapoor.

#### **4.9 Performance of Advisory Board over the Years**

The role of advisory body in the context of detentions in Kashmir has seen lot of criticism and questioning. This can be analysed under following heads: -

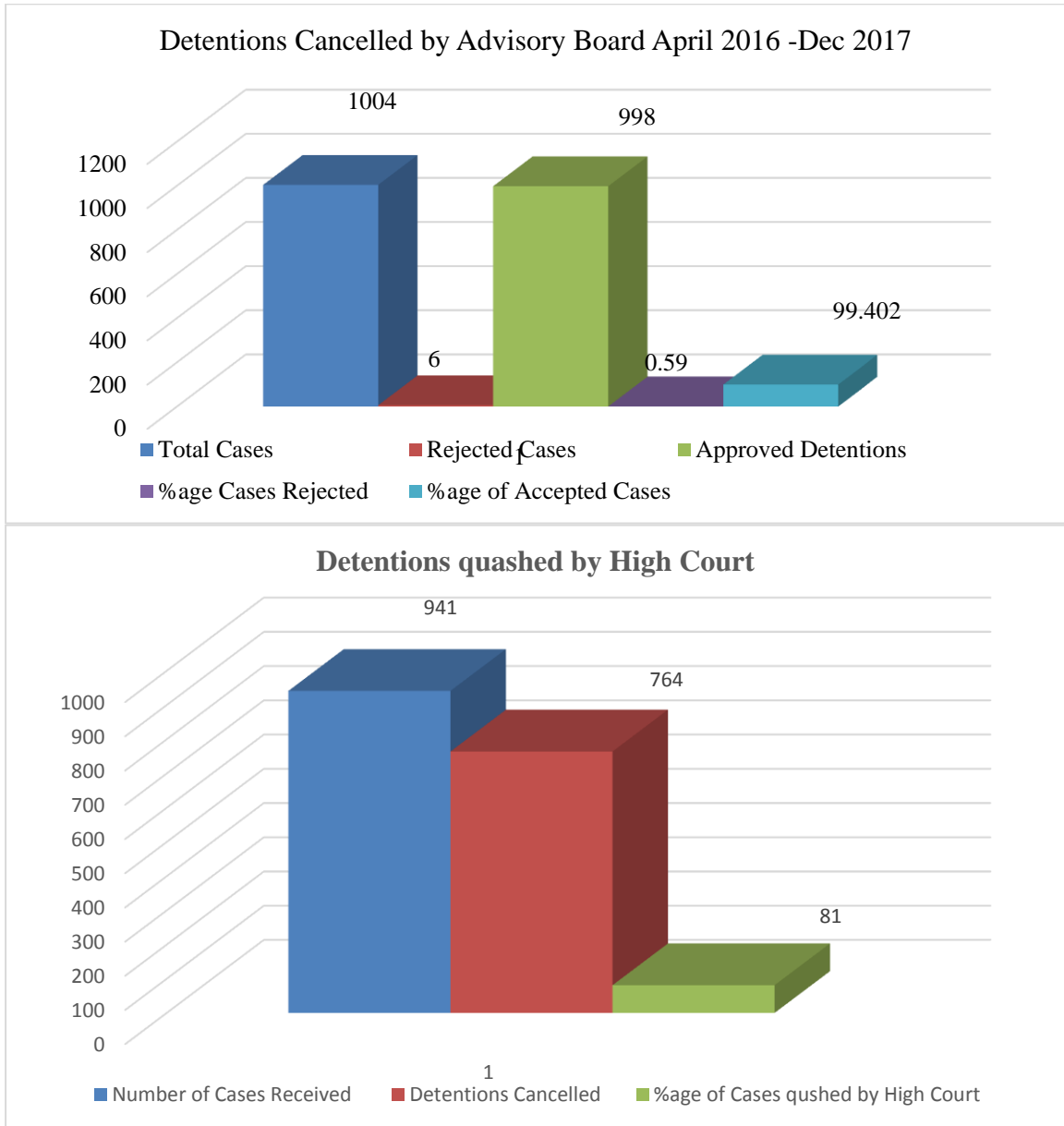
- ✓ Over the years it has been seen that there is lack of transparency in the functioning of Advisory Board. The names of Chairman and other members are not revealed. The official line is that this is done for security

reasons. According to the RTI Movement J&K, they have revealed through their study that Home Department of Jammu and Kashmir is also reluctant to revealing the postal address of Advisory Board (CHRI, 2018 b).

- ✓ According to the same RTI Movement of J&K and data it collected, 1004 cases of detention were sent to Advisory Board between April 2016 to mid-December 2017. The data revealed shows that 998 cases were confirmed by the Board while 06 cases of detention were revoked. This shows the upholding rate (sufficient cause for the detention) at more than 99% and the revoking of detention orders is just 0.59% (Figure 4.1). During the same period, High Court of Jammu and Kashmir has admitted that 941 cases seeking quashing of their detentions were heard out of which 764 were quashed which shows that more than 81% of the detention orders were struck down. This analysis reveals that there is a mismatch between how Advisory Board functions and how High court analyses the cases. The percentage of revocation by Advisory Board is just 0.59 per cent while in the same period, the quashing rate of detentions for High Court is as high as 81% (Figure 4.1).

**Figure 4.1**

*Showing the number of cases received by High Court and Detentions Quashed*



#### **4.10 Signing of Bonds under Section 107 of CrPC**

According to Section 20 (1) and (2), the Government can order the temporary release of the detainees upon adhering to the “directions” given under this Act. The “directions” are not specified in the Act but usually “directions” demand that the detainee observes good behaviour and doesn’t do anything that goes against the “security of the State” or disturbs the Public Order.

After the abrogation of Art 370 and detention of many activists, mainstream and separatist politicians, recently there were many media reports that politicians were released upon signing an affidavit in order to get released, but when asked about those affidavits many politicians have denied the reports. According to reports, the bond is a modified form of a regular instrument that prospective troublemakers must sign under Section 107 of the Criminal Procedure Code. The signatories have to sign that they will “not make any comment(s) or issue statement(s) or make public speech(s) hold or participate in public assembly(s) related to recent events in the state of Jammu and Kashmir, at the present time, since it has the potential of endangering the peace and tranquillity and law and order in the state or any part thereof for a period of one year”. Detainees have to deposit Rs 10,000 as surety, and in case of breach of the bond, the detainee has to pay Rs 40000. Again, in Srinagar women protesting in support of release of political prisoners which included NC leaders as well, were detained and were only released after they were made to sign the bond.

So technically, the process was quite legal but this goes against the tenets of Rule of Law and Constitutionality. Activists and attorneys said that the bond was unconstitutional, but government authorities supported it, although denying that such a bond existed. Usually, PSA detainees are not made to sign the Bonds and are not required as well but those persons detained for stone pelting are usually made to sign an affidavit in front of village elders so as to ensure good behaviour in future (Revealed by Key Informant). The issue regarding the signing of the Bond was raised because it was argued that this Bond which the Political detainees are made to sign is tweaked version of what is allowed under Section 107 of CrPC. Again, the legal opinion is divided on this issue because according to Advocate General DC Raina, it

was absolutely legal while as High Court Lawyer Altaf Khan had said that there can't be made any changes to the original bond and if made, those changes have to be in accordance with Law (Scroll Staff, 2019). Iltija Mufti the daughter of detained Mehbooba Mufti, also former CM of J&K, had also tweeted about the version of that bond which she alleged that her mother was made to sign (Annexure VI).

#### **4.11 Amendments to J&K PSA over the Years**

Jammu and Kashmir Public Safety Act has been amended many times over the years starting from 1987, 1990, 2002, 2011, 2012 and 2018. The changes made in 2012 and 2018 have been very significant. In 2011, Omar Abdullah Government amended the Act by enacting that the persons aged below 18 years of age can't be imposed with Public Safety Act. In 2012, major changes were made to section 8, 13, 14, 16 and 18 (a) (b). The significant one being that of Section 14 in which the term of office of Chairman and members was fixed at 3 years and extendable by 2 years. Again, a change was made to Section 16 in which "eight weeks" was substituted by "six weeks". In May 2018, J&K PSA was again amended in order to change the rules of appointment of Chairman of Advisory Board and other members. Instead of consultation by Home Department with Chief Justice of High Court, a Search-cum-Select committee shall henceforth appoint the chairman of Advisory Board. The Search-Cum-Select Committee shall consist of Chief Secretary as Chairman, Administrative Secretaries of Home Department and Department of law and Justice. Recently, April 1 2020, Central government after abrogation of Article 370, promulgated an ordinance wherein, the provision inserted in 2002 that "no person shall be kept in outside jails" was removed. Now the detainees under new rules can be transferred to jails which are outside the State giving reasons of overcrowding in prisons (Javaid, 2020).

#### **4.12 J&K PSA after abrogation of Article 370**

Following the abolition of Article 370 from India's constitution on August 5, 2019, detentions under the J&K PSA reached an all-time high. However, neither the

Home Ministry or the Government of India, nor the media have provided perfect information. Several media sources have found inconsistencies, while the Ministry of Home Affairs of the Government of India has provided a distinct set of data. We learn about certain numbers regarding detentions following August 5th from different national, international, and local press. According to The Hindu Report of August 18 2019, there were some 4000 persons arrested under detention law post abrogation of Art 370 (AFP, 2019).

According to the Ministry of Home Affairs (MHA) of the Government of India, 396 people have been detained in Kashmir under the PSA since August 2019, out of a total of 451 people detained in J&K, according to G. Kishan Reddy, Minister of State for Home Affairs, who stated in Rajya Sabha in response to a question. Since August 2019, a total of 7357 people have been put into preventive detention, according to the Ministry of State (News Desk, 2020).

The controversial move about August 5, 2019 detentions has been that almost all the mainstream politicians were detained under PSA including serving Member of Parliament Dr. Farooq Abdullah, previous Chief Ministers including Mrs. Mehbooba Mufti and Omar Abdullah. Apart from the formal detentions orders, many leaders including Mustafa Kamal, Muzafar Shah, Khalida Shah & Saifuddin Soz were detained through ‘verbal orders’ under section 107 & 151 (Amnesty International, 2019) . The main leaders of People’s Conference including Sajad Gani Lone and Shah Faesal of recently launched party J&K People’s Movement (JKPM) was also detained under J&K PSA, 1978. After serving months in detention, many leaders were released. The details are given in the Table 4.2. The interesting thing about the detentions of mainstream leaders was that the two former CM’s that is CM Mehbooba Mufti of PDP and Omar Abdullah of JKNC were detained under PSA for flimsy dossiers prepared by security agencies. Mehbooba’s dossier (Annexure VII) mentions her as “daddy’s girl” and “Kota Rani who rose to power by virtue of undertaking intrigues ranging from poisoning her opponents...” The dossier of Omar Abdullah mentions that “the subject had the potential and considerable influence over people, including the ability to attract voters to polling booths despite poll boycott calls and the potential for channelling energies of public for any cause”.





**Table 4.2***Details of Politicians detained under PSA along with date of released*

Politician	Date of Release	Party Affiliation
Salman Sagar	January 16, 2020	JKNC
Showkat Ganie	January 16, 2020	JKNC
Altaf Kaloo	January 16, 2020	JKNC
Nizamuddin Bhat	January 16, 2020	PDP
Muktiar Baba	January 16, 2020	PDP
Nazir Gurezi	January 18, 2020	JKNC
Ab Haq Khan	January 18, 2020	PDP
Mohammad Abass		
Wani	January 18, 2020	JKPC
Haji Abdul Rasheed	January 18, 2020	Congress
Ab Majeed Larmi	February 2, 2020	JKNC
Ghulam Nabi Bhat	February 2, 2020	JKNC
Mohammad Shafi	February 2, 2020	JKNC
Mohammad Yousuf		
Bhat	February 2, 2020	PDP
Farooq Abdullah	March 14, 2020	JKNC
Omar Abdullah	March 24, 2020	JKNC
Shah Faesal	May 3, 2020	JKPM
Peer Mansoor	May 3, 2020	PDP
Sartaj Madni	May 3, 2020	PDP
Sajad Lone	July 31, 2020	PC
Naeem Akhter	June 18, 2020	PDP
Ali Mohammad Sagar	June 17, 2020	JKNC
Ruhullah Mehdi		JKNC
Mehbooba Mufti	October 13, 2020	JKPDP

Source: Author's Tabulation

The common citizens, who have been detained under J&K PSA after 5<sup>th</sup> August, 2019 were the worst sufferers. Given their weak economic profile and largely dependent on daily wages, the ‘twin suffering’ of detention along with keeping the detainee outside valley has hit the families to hilt. Facts show that those families which have any member of family detained under PSA in outside jails say in UP or any other State of India have to shell extra money and run from pillar to post to get the sanction for meeting the detenu (revealed by Community members during field visits). As the case of Asif Ahmad shows that the detainees family suffered a lot in order to collect the money for meeting their son and arrange for travel. Detentions have economic and serious social costs which drains out the families emotionally also. The case was reported by The Wire (2020), where in the mother of Asif Ahmad namely Zamrooda runs from one h office to another office in order to get the sanction for meeting their son (Asif Ahmad) in Agra jail. The matter gets worse when a person informs her that Asif Ahmad is also craving to see her mother and might die in her desertion. Asif was picked up from his residence by declaring him “potential threat to peace” by the local administration and order was implemented by J&K Police.

It was in January, 2020 when Zamrooda applied for meeting her son in Agra. The clearance was given in February, 2020 when Srinagar authorities wrote to Central Jail Authorities in Agra. But the problem is much deeper and economical one as the family mostly relies on daily wages they were not able to collect Rs 15000 for Agra visit, hence were on the verge of begging. The parents of Asif demanded that their son be brought to local jail so that they can visit him regularly (Ahmad, 2020). The provision of transferring PSA detainees to outside jails was a new amendment which was made by Governor Satya pal Malik.

Jammu Kashmir Coalition of Civil Society (JKCCS) in collaboration with Association of Parents of Disappeared Persons (APDP) in their report Annual Human Rights Review 2019 have demonstrated and collected data which reveals that Government is not revealing the data of persons who have been detained under J&K PSA and what is the exact number of persons which have been lodged in various jails across India.

According to their study, which was compiled using data from the Jammu and Kashmir High Court Registry, there were 662 Habeas Corpus applications filed in the J&K High Court, the bulk of which (412) were filed after August 2019. According to the report, 64 and 59 Habeas Corpus applications were submitted in the Districts of Kulgam and Shopian, respectively. The inmates were held in several Uttar Pradesh jails, according to the statistics. For instance, the detainees were detained in jails of Varanasi, Prayagraj, Agra, Ambedkar Nagar, Lucknow etc. The average age of detainees in District Shopian was 31.87 while as the Average detention age in District Kulgam was 27.191. According to RTI filed by the researcher during this research, in Jammu and Kashmir High Court about the yearly disposal of cases of PSA shows that since 2015, a total of 3071 cases have been disposed. According to same RTI reply, High Court revealed that most of the record has been destroyed by 2014 floods hence no information was available before 2015 (Annexure V).

Mr. G Kishan Reddy, Minister of State for Home, responded on the floor of the House on 3 February 2021 to a query from Congress leader Ripun Bora (from Assam) and Shiv Sena leader Priyanka Chaturvedi that just 183 people had been held under the J&K Public Safety Act, 1978. The Minister went on to say that 613 people were held under the J&K PSA, including OGWs (Over Ground Workers), Stone-Pelters, and Separatists, and that 430 of them had been freed till February 3, 2021.

The interesting detention of 5<sup>th</sup> August 2019 was that of Dr Mubeen Shah. Due to international outcry for this businessman from Kashmir, he was released soon from the detention on December 7, 2019 (124 days of detention). His Wife, Asifa Mubeen had also challenged his detention in Supreme Court. Dr. Mubeen Shah again came to prominence recently when Joe Biden Administration took over in America. Joe Biden appointed Kashmiri origin woman Sameera Fazili as Deputy Director of National Economic Council and she is also cousin of Dr Mubeen Shah. It is believed that the family then used their connections in New York and Delhi to secure release of Dr Mubeen Shah (Subramanian, 2021).

#### **4.13 Revolving door and PSA detainees turned militants: A Case of Radicalisation**

“Revolving door” is quite an interesting phenomenon which has been recognised by activists and academicians over the years. Revolving door means that a detainee is kept in permanent detention by constantly imposing PSA detention orders even after he is provided relief by Judiciary. The security agencies ensure through loopholes in rules of J&K PSA and other stringent provisions that persons who they wish to ‘keep out of circulation’ are kept at bay and in continuous detention. There are many instances and cases where security agencies have resorted to multiple FIR’s and PSA against already detained persons in order to continue the detention and by pass the court orders.

Radicalisation has been one of the most important factors that has risen over the years in Kashmir. Even though the Security forces claim that every year, the number of youth joining militancy is decreasing which remains in hundreds but the radicalization has been increasing exponentially, which is manifest in growing alienation among youth (Bhat, 2019). Among many reasons for radicalisation, various scholars like Schmid (2013 a) argue that radicalisation has two sides. Violence which is the manifestation of radicalisation can happen from non-state actors which should be placed / studied in larger political context—pervasive politics, pressure politics and violent politics. On the other side, the potential and role of State ensuring radicalisation should not be dismissed.

Use of torture, unnecessary harassment, intimidation, extra judicial renditions etc. can have the potential of radicalisation of youth. The basic premise of the argument from Alex P. Schmid is that both State and non-State actors can have their role in radicalisation. Arun Kundnani (2012) argues that term “radicalisation” came into academic discussion since 2004 after the Madrid and London Bomb attack of 2004 & 2005. Kundnani further argues that due to ‘war on terror’, US and EU have developed and are investing heavily in analysts, scholars and academicians in order to develop a new lens in order to study the Muslims.

The Routledge Handbook of Terrorism (2015) identifies 50 causes of extremism and out of those various causes, following can help understand the root cause of radicalisation from stone pelting in Kashmir to militancy: -

- ✓ Political discontent is the root cause of Terrorism.
- ✓ If there is a persistent culture of *alienation and humiliation* which can lead to radicalisation and hence to extremism.
- ✓ If there is a collective desire for revenge against oppression.

Causes of radicalisation by Alex P. Schmid (2013 b) has been classified into three levels: -

- ✓ Micro-level: Issues involve feeling of alienation, marginalisation, discrimination, failed integration, humiliation and rejection.
- ✓ Meso-Level: This is the wider radical milieu which forms the missing link between militant and other aggrieved parties which serve as cohorts to radicalise and militarize the potential target.
- ✓ Macro-Level: - The position of government and society at home and abroad, the radicalization of popular sentiment and party politics, the strained majority – minority relations, particularly when it comes to international diasporas, and the function of the lack of socio-economic opportunity for entire sections of society, contributing to the mobilization and radicalization of the disgruntled, some of whom might be militant.

This phenomenon is quite manifest in cases of Sajad Ahmad Gilkar, Adil Bilal Bhat and Sameer Ahmad Bhat (Zargar, 2020).

**Case I:** Sajad Ahmad Gilkar was the resident of Nowhatta, Srinagar. He worked mostly as a daily wager and had to leave his studies mid-way due to poor financial conditions. Since 2008 uprisings in Kashmir, Sajad's family says that their son was persistently harassed by Security Agencies and that their house was raided more than 200 times. Sajad had 15 cases registered against him which included 3 PSA's. Sajad's father admits that his son was a stone pelter but it was constant harassment by security forces which forced him to join militancy. Murtaza, Sajad's brother recollects

that even their father was pulled by beard for not presenting Sajad before the Police (ONS, 2017). It was on 29<sup>th</sup> June 2017 that Sajad Ahmad Gilkar left his home in order to escape the police brutality and after some two weeks got killed in an encounter in Budgam area (Bashir, 2017).

**Case II:** Aadil Bilal Bhat a resident of Malangpora Pulwama, quite studious young man who had worked as a computer operator at the Air Force Station (Awantipora). His father worked in Jammu and Kashmir police. Due to continuous torture and raids at home as documented by his father and beating up of his brother Rayees, Adil joined militant ranks. His friends do confess that Aadil was a regular stone-pelter.

**Case III:** Sameer Ahmad Bhat, was the most famous militant in Drabgam Pulwama. His father confessed that he was quite hard working till he got into a scuffle with local Army when they raided a house. Sameer stopped them while they were entering the house in which there were only women. Sameer was booked for stone-pelting in the area by local police in March 2016 and after two months he joined militant ranks. Sameer Bhat was killed during a gun fight on April 30, 2018 (Majid, 2018).

Table 4.3 below shows that as many as 14 PSA detainees who turned to militancy. These men after being detained under PSA posed a huge security risk to the State as well as the democracy of the already volatile area. Thus, PSA needs a lot more in-depth study and proper imposition and feedback. Given the provisions of PSA are misused they can pose serious threat to the peace of region.

These three cases and names in Table 4.3 uphold the theoretical framework as provided by Alex P. Schmid that radicalisation is combination of various factors where both state and non-state actors play a role. In the context of Kashmir, constant humiliation, alienation, torture, conflict, lack of economic opportunities, harassment and intimidation and constant political instability all add to radicalisation. This includes both *Micro, Meso and Macro levels* of radicalisation as well.

**Table 4.3***Showing the list of PSA detainees turned militants*

S/No	Name of the Detainees turned Militants	Affiliation
1	Azad Lilhari	Hizbul Mujahideen
2	Asif Ahmad (Abu Ans)	TRF (The Resistance Front)
3	Bilal Ahmad Mohand	Hizbul Mujahedeem
4	Zubair Ahmad Turray (23 FIR & 8 PSA)	Hizbul Mujahedeem
5	Zeenat-ul-Islam	Al-Badr
6	Sajad Ahmad Gilkar	Hizbul Mujahedeem
7	Md Rafiq Bangroo	Hizbul Mujahedeem
8	Dawood Sheikh	Hizbul Mujahedeem
9	Lateef Ahmad Dar (Lateef Tiger)	Hizbul Mujahedeem
10	Shakoor Ahmad Dar	Lashkar-e-Toiba
11	Mubarak Ahmad Dar	Hizbul Mujahideen
12	Irfan Ahmad (Irfan Molvi)	Hizbul Mujahideen
13	Ayoub Lilhari (Ayoub Lone)	Lashkar-e-Toiba
14	Shakoor Ahmad Parray	Al-Badr

Source: Author's Tabulation through Primary data collection

#### **4.14 Detentions and Peace Building**

“No Justice. No Peace” was a political and social justice slogan which has been there since the killing of Michael Griffith by White mob in New York City in 1986. The placards with this slogan can be seen raised by various activists during environment conferences and against illegal detentions. State believes that in order to maintain the peace some sort of violence by State is necessary that is why we have Law and Order in the hands of State. Law and order plus development dovetail each other in achievement of goals of Good Governance. Societies never run on a linear

line, its peace-violence graph runs like a Sine wave. This is where in order to straighten the graph of peace that State has to resort to detentions. It can be said that in order to deliver justice, punishment is also a prerequisite. A criminal has to be shown the door of gallows in order to deliver the justice. That is why it is a truism that if there is no justice there can be no peace. Peace building by the State includes efforts on both Law and order front and developmental one. Of course, this can't be a one size fits all approach; since nation states have different threats and internal friction points which make peace building efforts of each state a unique phenomenon to study.

#### **4.15 Peace Building: Analysis of the Concept and Definitions**

Johan Galtung in his seminal work defines peace through these words by arguing that:

The definition of "peace" becomes a major part of scientific strategy. It may depart from common usage by not being agreed to 'by most' (consensus not required) yet should not be entirely subjectivistic ('agreed to by many). It should depict a state of affairs the realisation of which is not utopian ('not impossible to obtain), yet not on the immediate political agenda... (Galtung, 1969)

Johan Galtung's paper titled "Violence, Peace, and Peace Research" in 1969 with the objective of defining violence and providing a research agenda for peace research. Galtung begins by defining peace as the absence of violence, then goes on to suggest that how peace will be defined shall depend in the agenda of scholars working in domains of peace. He wants a wide agenda for peace research and as a result, he uses a very broad term of "violence". When human beings are affected in such a way that their physical and mental realizations fall short of potential realizations, violence ensues (Grovier, 2008). According to Galtung, violence must be physical and result in bodily injury at the hands of an agent who intends for that to be the outcome.



However, he criticises such notions as being too limited, saying that if peace is defined just as the absence of physical violence, the search for peace will be a morally and intellectually impoverished undertaking.

Usually peace is taken as antonym of war and in International studies; traditionally peace is defined as absence of war/violence. The traditional definitions of peace and war are mutually exclusive while peace refers to suspension of violent means altogether, war refers to presence of all those elements in a society which make peace a casualty. Peace refers to non-violence and war refers to violence. The end of peace refers to war while as need of war refers to peace. Mathematically, traditional concepts of war and peace can be said to be inversely proportional to each other. If one increases, the other decrease and vice versa.

$\text{War} \propto 1/\text{Peace}$

The traditional concept of peace studies did not take into consideration various nuance and intricacies in peace & war. While Peace is not always absent if there is violence similarly war is not always a better term which defines violence. As there can be violence but not war. Peace and violence can be present in a society at the same time.

Johan Galtung was first scholar to segregate the various degrees of peace and war. He came up with the concept that there can be various degrees of peace which he termed as Positive Peace and Negative peace. Johan Galtung famously argued that “negative peace is the absence of violence and war and Positive peace is the integration of human society”. The second part of this definition is where from this work shall pick the thread and apply on Kashmir. Yes, over the years there has been reduction in violence but has there been the integration of Human society?

Johan Galtung further argues that “an extended concept of violence leads to an extended concept of peace”. While the definition provided by Johan Galtung is useful in terms of peace in Kashmir vis-à-vis India, Kenneth Boulding’s definition of War and Peace shall be a better proposition in terms of war and peace between India and Pakistan. Boulding picked up from the definition of Johan Galtung and argued

that “all non-conflict is peace, but conflict can be divided into war and peace”. Boulding was basically arguing that it is not always true that States are at war with each other even if they don't have peace between them. War and peace run on separate continuum. India and Pakistan are not at peace with each other since 1947, they have fought 4 wars between themselves. Since 2014, the relations between the two countries have not been at the best and India has conducted Surgical Strikes against Pakistan and even Balakot happened but the two countries have carried out Track Two diplomatic engagements which have resulted in ceasefire in February 2020 between India and Pakistan and since then border areas have remained calm.

#### **4.16 Hybrid Peace Governance in Kashmir**

Today, conflict resolution is a high-profile subject that is taught at universities and talked on at numerous seminars and conferences. Experts in this subject are revered in various circles around the globe. However, conflict resolution is not a new concept. Only in our day has it been presented differently. Conflict resolution has been an integral element of human life since eons when humans first banded together to create communities and coexisted. We are also aware of nomadic tribes that have struggled for dominance over particular portions of territory and then reached agreements via dialogue and other ways to resolve the issue. Conflicts between these settlements, villages or cities, as they were called, have escalated since man developed systems of fixed settlements in specified geographic locations, with the goal of dominating ever bigger amounts of territory for each settled society. There are several examples of similar issues being resolved through discussion throughout history. Various philosophers of the classical age that is Plato, Aristotle, and Cicero and Machiavelli; Enlightenment philosophers such as Hobbes, Locke, Rousseau, and Kant; various Arab thinkers, such as Averroes, Maimonides, and Al-Farabi and Asian philosophers such as Kautilya, Confucius and Sun Tzu have all written great treatises on conflict resolution. Thus, from Socrates to John Rawls, philosophers have debated how citizens should be treated equally and how equality and freedom may resolve conflict.

Peace Studies have shown that violence is also an important dimension of peace studies. Violence leads to war, conflicts, deaths and destruction but passive violence which was also part of Gandhi's *Satyagraha* included more elements of non-violence than violence. In latter part of his political strategies, Gandhi called for non-cooperation with Government as well as strikes, Hartlas and burning of foreign cloth. The conflicts world over and the revolutions which we have witnessed didn't take Gandhi's ideology in totality but manoeuvred its principles in one way or the other

#### **4.17 Punishment and Discipline: Process as Punishment**

In Austria, Switzerland, and parts of the United States, such as Pennsylvania, inmates were used in public works projects such as cleaning city streets or fixing motorways. These criminals were paraded in front of the public in their infamous attire and shaved heads. The sport of the lazy and wicked, they frequently became enraged and instinctively exacted violent retaliation against the aggressors. They were burdened with iron collars and chains to which bombshells were connected, to be dragged around as they performed their humiliating job under the watchful eyes of guardians armed with swords. At the end of the eighteenth century or the beginning of the nineteenth century, this practice was almost universally abandoned. Despite severe condemnation, the public exhibition of convicts was maintained in France in 1831. The historical punishment strategies and techniques were all focused on bodies. It was Mably who formulated the new principles of punishment wherein he argued that "Punishment...should strike at soul rather than body".

#### **4.18 Do detentions under PSA lead to peace in Kashmir?**

Peace building in Kashmir is a complex process which involves various variables. Even though detentions aggravate the situation but detention in Kashmir under PSA's is just one factor which adds to already simmering atmosphere in valley. Although, it has been proven empirically in this work that detentions made through PSA do ensure peace in short-term (This opinion was also spelt out by security personnel and various Lawyers working on PSA cases that detention under PSA's do ensure peace and does actually work in favour of State agencies because most of the trouble mongers are picked beforehand by police which ensures that there is no

agitation on any issue) but the long-lasting peace in Kashmir has correlation with various factors that are external and internal to J&K environs.

The external factors depend on Pakistan which has been since 1947 involved in various wars with India including war of 1947, 1965 and 1999. Pakistan has also been directly and indirectly responsible for fomenting insurgency in Kashmir valley and has been involved in supporting terror groups like JeM (Jaish-e-Muhammad) and LeT (Lashkar-e-Toiba) (See Christine Fair). Peace in valley also depends upon the Political relations between India and Pakistan. Peace at borders and usually during successful ceasefire efforts, peace has also prevailed in Kashmir. Generally, good spells of peaceful relations between two countries of India and Pakistan has also given better breathing space in Kashmir.

Internally due to home grown insurgency in valley and discontent with New Delhi has again taken toll of peace in Kashmir. Due to adverse Law and Order conditions and seeing the larger security scenario in Kashmir, J&K has been mostly dubbed as conflict zone. During 1990's according to some estimates there were 10000 militants active in J&K. Because of this reason, New Delhi has operated in Kashmir through two extraordinary laws which include AFSPA & PSA. The local resentment against these Laws has also led to many a times adverse conditions for peace in Kashmir. Internal factors and disturbances in Kashmir have also led to numerous incidences of stone pelting against security forces. In order to neutralize terrorists, CASO's are launched. There are various terrorist sympathizers, called as OGW's (Over Ground Workers) who also add up to making peace difficult in valley. Recent reports by Security Forces have suggested that OGW's may be 'Hybrid Terrorists'/part-time terrorists who after conducting a terror act go back among civilians and live normal lives (PTI, 2021).

In order to analyse the impact on these various factors on peace in Kashmir, these variables have been analysed under following heads: -

**1. Pakistan** is one of the primary issues affecting peace in Kashmir. India and Pakistan have gone to war four times over the Kashmir dispute since 1947. For four decades, the two countries have been at odds, waging four wars in 1947-48, 1965, 1971, and 1999. Thousands of people have died in the conflict between two countries and despite bilateral and international engagement and vows, the thorny issue has yet to be resolved (Swami, 2006). When Pakistani tribesmen flocked to the help of Muslims in Kashmir in October 1947, the first war erupted. Jammu and Kashmir was one of 564 princely dominions that had to choose between joining India or joining Pakistan. India and Pakistan waged their second war in 1965. (Paul & Paul, 2005). Border clashes in the Runn of Kutch in April 1965, when Indian soldiers crossed into Pakistani territory, and the Pakistani army's operation Gibraltar, which began in August 1965 to support the "freedom movement" in Indian-controlled Kashmir, ignited the conflict. According to Indian authors like Sumit Ganguly, the Pakistani army went to war to recapture Kashmir from India (1999). Instead of restricting the fight to Kashmir, India opened the international boundary at Lahore and Sialkot (a daring action by Lal Bahadur Shastri), unleashing a full-fledged confrontation between the two countries. East Pakistan (now Bangladesh) launched civil war against the government of West Pakistan in March 1971. Pakistan's previous ruler, General Yahya Khan, has ordered action against suspected "Bengali separatists." Involved in the civil war, India publicly backed Bengali separatists seeking for independence from West Pakistan. At Bangladesh's request, India launched a ground, air, and naval onslaught against East Pakistan, forcing the Pakistani army to surrender in Dhaka in within 13 days and capturing 90,000 personnel as prisoners of war. Pakistani military and Kashmiri militants captured major locations on the Indian side of the Line of Control in May 1999, prompting an Indian counteroffensive. In order to bolster the Kashmiri independence movement, the Pakistani military planned to capture territory in the Dras-Kargil region. As a result, the two newly nuclear-armed states engaged in a limited war (Iqbal & Hussain, 2018). There are credible reports and serious facts which show that Pakistan sponsors terrorism in Kashmir and provides succour to various militant groups in

valley. The handlers of major groups are found in Pakistan (Trehan, 2002). Swami (2003) argues that keys to terrorism in Kashmir are held in Pakistan and it is Pakistan which determines the levels of insurgency in Valley. The author also argues that the insurgency in Kashmir of 1990's was not secular-nationalistic in character but had deep roots in Islamism. Pakistan has been behind various attacks within the territory of India like Parliament attack of 2001 perpetrated by Lashkar-e-Toiba, Mumbai attacks of 2008, Uri attack of 2016 and Pulwama IED attack which killed at least 40 security personnel in 2016. Christine Fair has long argued and analysed about deep connections between Lashkar-e-Toiba and Pakistan Army (see Fair, 2011; 2004; 2018).

2. **Dialogue with Pakistan** peace in Kashmir to a large extent depends on dialogue with Pakistan. Whenever there has been increase in violence in valley be it from State or anti-state elements, peace has prevailed and has been achieved through dialogue. New Delhi reliance on hard approach has been followed by soft-approach which includes efforts towards dialogue, conflict resolution and initiating various Confidence Building Measures. After the early violence during 1960's, 1970's or 1980's New Delhi had reached out to mainstream in Kashmir. The rigging of 1987 elections in Kashmir was followed by serious increase in militancy in valley which was dealt by hard hand by security agencies and it was followed by reach out to militants like Ishfaq Majeed and others who were brought to mainstream. This dialogue in Kashmir is always incomplete without dialogue with Pakistan. India and Pakistan have sat on a table at various occasions. It is not true that there has been not 'third-party' mediation between India and Pakistan. The tensions between two nuclear armed States have been eased-out at various occasions through mediation by USA, Russia or any Arab Nation.
3. **CFV's (Ceasefire Violations):** India, Pakistan and peace with respect to Kashmir is also dependent on situation at border. Hot borders often signify hotter relations between India and Pakistan. Indo-Pak rangers and posts close to borders exchange heavy fire against each other when there is mistrust and atmosphere of enmity between two nations. Whatever the case may be, the

Line of Control (LoC) has been a dividing line between these two countries since 1948. This dividing line, once known as the cease-fire line, is now known as the Line of Control (LoC). This separating line extends diagonally from Pakistan to China and, unlike the Punjab border or the Indo-Pak border farther south, is devoid of boundary pillars, making it a hypothetical rather than a real line.

To preserve the peace, the UN constituted an observation group in 1949, first the UN Commission and then, in 1951, the UN Military Observer Group, to mediate on Kashmir problem. The 1971 war between India and Pakistan was a disaster, and boundary delineations were once again a source of contention. India and Pakistan dubbed the 1949 ceasefire line the Line of Control after Bangladesh's independence in 1972. Furthermore, there was no third-party monitoring system in place. After a period of relative peace, tensions along the LoC progressively increased in the late 1980s, peaking in 1998, when both nations proclaimed themselves nuclear powers after testing nuclear weapons. As a result, the period leading up to the 2003 Ceasefire Agreement was especially stressful.

Happymon Jacob in his USIP paper argues through a deeper examination of ceasefire breaches over the last two decades reveals an entirely different picture and he comes up with following observations that during visits by Indian and Pakistani leaders to their respective sides in the region, special holidays, and occasionally local election borders remain hot, there are inadequately constructed legal and institutional procedures for border management between two sides, both sides flout norms and go in for large defence construction on their respective sides and especially for Indian side, it is during infiltration attempts that forward posts resort to huge shelling and same is true for Pakistani side when they have to infiltrate militants, Pakistani rangers also give free hand to their forward posts. The author also documents that during PM Modi's visit to Kashmir in 2015, Pakistani side increased the levels of shelling and in the course seven people lost lives on Indian side. Thus, it is quite common that during high profile visits, shelling on borders gets increased (Fire, 2017).

## Map 1

*Showing LOC and International Border*



Source: Google Maps

It is very important to understand that CFV includes range of shots fired within 24 hours from various locations at the border using myriad of artillery. This includes heavy arms as well. Lower level officers don't usually report every ceasefire violation to their top officials. Table 4.4 gives the details of Ceasefire Violations on LoC during 2001 to 2020. The data shows that there has been increase CFV's during and after abrogation of Article 370 which means Pakistan wanted to make a statement that it doesn't appreciate the changes in Jammu and Kashmir, while as CFV's got reduced during peace talks of Vajpayee and Musharraf. Thus hot borders depict how India and Pakistan relations work politically.



**Table 4.4***Ceasefire Violations between India and Pakistan since 2001-2020*

Year	CFV's	Casualties
2001	4134	Na
2002	5767	Na
2003	2841	Na
2004	4	Na
2005	6	Na
2006	3	Na
2007	21	3
2008	86	6
2009	35	6
2010	70	5
2011	62	3
2012	114	4
2013	347	5
2014	583	3
2015	405	10
2016	449	13
2017	36	1
2018	2140	NA
2019	3400	NA
2020	5133	NA

Source: Author's tabulation based on inputs from USIP Website and Official data from Ministry of Home Affairs

**4. Successful Infiltrations:** According to data accessed from Ministry of Home Affairs, it shows that since 2017 terrorist violence and infiltrations have increased in Kashmir valley. This has also led to increase in terrorists who have infiltrated and killing of terrorist has also increased. This data shows a

slight dip after implementation of ceasefire agreement between India and Pakistan in February 2021. After this ceasefire, infiltrations have reduced which resulted in reduction of foreign terrorists in Kashmir also. This is the reason that as of now (September 2021), foreign militant presence in Kashmir has decreased. According to various analysts, this dip in foreign militant presence in Kashmir might be strategic as Pakistan wants to show Kashmir insurgency as indigenous without any foreign intervention. Plus, Pakistan being on the grey list of Financial Action Task Force (FATF). Table 4.5 shows the terror incidents in Jammu and Kashmir since 2014 and terrorists killed. Data reveals that terror incidents since 2014 and terrorists killed have remained at a constant level.

**Table 4.5**

*Showing year wise terror incidents and terrorists killed in J&K*

Year	Terror Incidents	Terrorists Killed
2014	222	110
2015	208	108
2016	322	150
2017	342	213

Source: Ministry of Home Affairs Website

After 2016, since the killing of Burhan Wani in Kashmir, infiltration across the border has also increased which has resulted in increase of foreign militants in Kashmir and also increased net infiltration.

**Table 4.6**

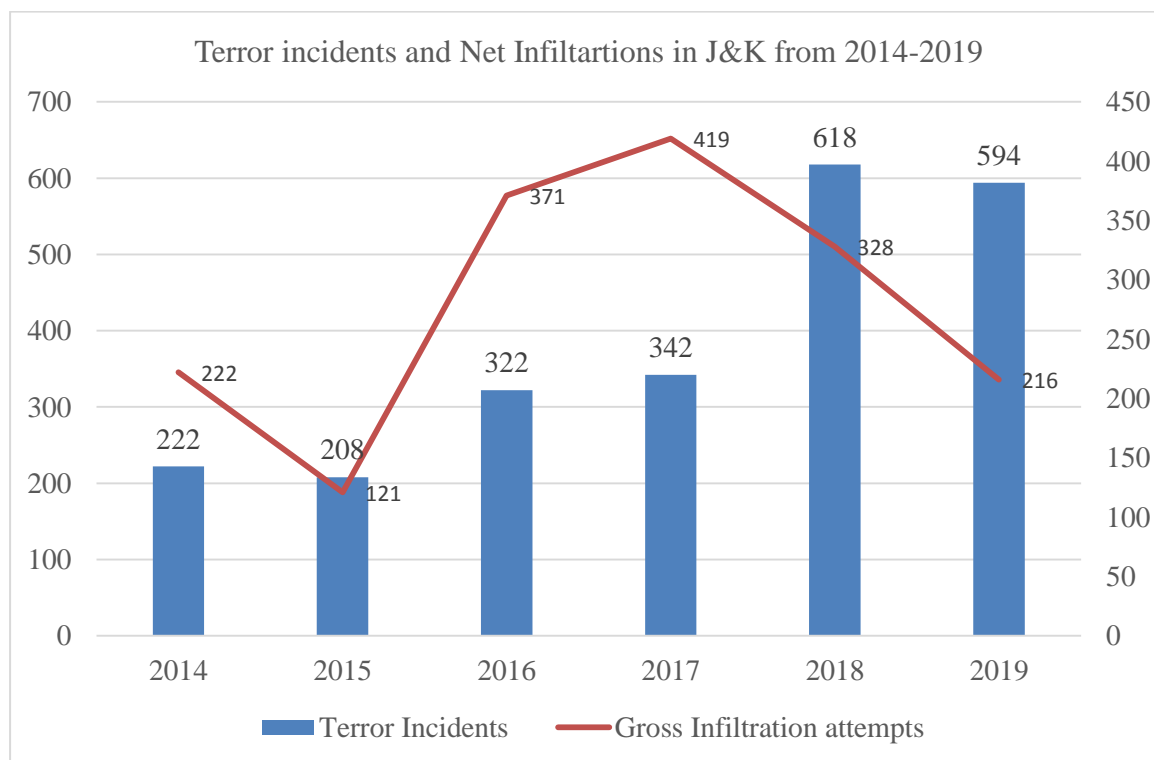
*Table showing Gross and Net Infiltrations since 2014*

Year	2014	2015	2016	2017	2018	2019
Gross Infiltration attempts	222	121	371	419	328	216
Net/Successful infiltrations	65	33	119	136	143	138

*Source: Author's tabulation based on Ministry of Home Affairs Website*

**Figure 4.2**

*Correlation between Terror incidents and Net infiltration*



Thus peace in Jammu and Kashmir is dependent on various factors which include India's relationship with Pakistan, Cease Fire Violations, Political atmosphere between New Delhi and Kashmir and various operations launched in Jammu and Kashmir by security forces. The data in Figure 4.2 shows that after infiltrations at the border because of foreign terrorist presence in valley, terror incidents also increased. For example from 2016-2018, infiltration count is high which means that in coming year's terror incidents shall also peak. This is the case of 2018 & 2019 where we see terror incidents showing upward trajectory.

The data shows that since the uprising of Kashmiri's against India in 1989 and rise of militancy, Pakistan has covertly or overtly supported militancy in Kashmir. Since the inception of militancy with the advent of JKLF (Jammu Kashmir Liberation Front), which was the first indigenous militant outfit in valley, foreign terrorists (jihadi's) have entered valley in hundreds and from 2001-2003, thousands of foreign terrorists (jihadi's) were killed. Table 4.7 below shows the trajectory of militancy and foreign terrorists killed in J&K since 1990's up to 2004.

**Table 4.7**

Terrorists killed since 1990-2004

Year	Total Terrorists Killed	Foreign Terrorists killed	Number of Surrendered Terrorists
1990	550	0	0
1991	844	2	612
1992	819	6	444
1993	1310	79	98
1994	1596	77	32
1995	1332	77	601
1996	1209	213	655
1997	1075	260	270
1998	999	406	187
1999	1082	548	109
2000	1520	870	104
2001	2020	1198	85
2002	1707	1063	159
2003	1447	1004	119
2004	263	217	24

Source: Thomas A. Marks (2004) India: State Response to Insurgency in Jammu & Kashmir – The Jammu Case, Low Intensity Conflict & Law Enforcement, 12:3, 122-143, DOI: 10.1080/09662840500072615.

The data shows that there is an increase in foreign terrorists in J&K since 1990 and has peaked in 2001-2003 and it is the same time during which there was a ceasefire agreement between India & Pakistan. The data and the peace through which Kashmir went after that phase shows that peace can be cultivated if India and Pakistan can get an understanding about Terrorism in Kashmir valley and that violence is in no one's favour be it India and Pakistan. The Jihadi groups have their own agenda's which transcend any Nationalistic boundaries and do pose a direct threat to any nation.

#### **4.19 Preventive Detentions: Current Jail Infrastructure**

The data accessed through RTI (Right to Information) reveals that currently in J&K there are 15 jails in which PSA detainees are held (Annexure IV). These jails are:

- ✓ Central Jail Srinagar
- ✓ Central Jail Jammu, KoteBhalwal
- ✓ District Jail Jammu
- ✓ District Jail Kathua
- ✓ District Jail Udhampur
- ✓ District Jail Rajouri
- ✓ District Jail Poonch
- ✓ District jail Kishtwar
- ✓ District Jail Bhaderwah
- ✓ District Jail Baramulla
- ✓ District Jail Kupwara
- ✓ District Jail Anantnag
- ✓ Special jail (Correctional Home) Pulwama
- ✓ Sub Jail Reasi

According to RTI replies by various jail authorities and Home Department of J&K, there is only one correctional Home in Pulwama, which is special jail to ensure counselling of juveniles and first time offenders. But according to RTI reply (Annexure VIII) by Superintendent Special Jail Pulwama as of 31<sup>st</sup> August, 2021, there are no PSA detainees in that jail (DS/SPJ/RTI/2021/1893-94). Since preventive detainees are meant to be in correctional homes, theoretically, Police Department considers every jail as “correctional home” but as per records Special Jail in Pulwama is a correctional home. But the data records show that very less number of prisoners detained under PSA are transferred to Special Jail Pulwama. The current precedent is to detain PSA detainees in far off jails across the country (Like UP or Haryana etc.); this exercise kills whole purpose of preventive detention which is meant to detain a person who has not committed any crime for time being till detaining authority is

satisfied that he/she can't do any harm. But what detaining in far off jails does is to put emotional and economic cost on families of detainees and make the process a kind of punishment for them.

#### **4.20 Conclusion**

The widespread misuse of preventive detention legislation, according to Soli Sorabjee, a well-known lawyer and former Attorney General of India, originates from a desire to escape a fair criminal record and revert to preventive custody as a replacement for a normal court case. This type of shortcut is unreasonably inconvenient. While preventative detention is an inherent evil, he maintains that its negative consequences may be minimised. When a person is detained, they still have basic human rights, such as the right to be treated with dignity. If unconstitutional emergency arrest orders are withdrawn, judges are not allies of accused. They fight for individual liberty, which is a fundamental human right. He also says that there should be no long-term detention and that the maximum period of incarceration should be 6 months. Detaining authorities, according to Sorabjee, need to be informed about the limits to their powers. A person should not be imprisoned on the basis of a remote suspicion based on a single conduct performed recently. Only in extraordinary circumstances could emergency imprisonment be used, such as when there is a demonstrable threat to public safety, national security, or the availability of essential supplies. A healthy balance between societal interests and personal liberty should be established. Its use against political opponents or critics, according to experience, carries the greatest risk of preventive detention. Furthermore, a competent advisory board and an independent judiciary are the true safeguards against pre-trial abuse. Detentions in J&K have a long and illustrious history that predates 1978. Many Kashmiri scholars connect the history of PSA to Sheikh Abdullah, and how the same PSA hounded his family after August 2019. However, preventative imprisonment was also utilised as a political tactic in J&K during the Dogra administration.

Preventive Detentions in J&K have modus operandi which can be divided into three categories that is: as a political tool, as a tool against militancy and separatism and as a tool against certain law and order situations. Indeed, Sheikh Abdullah during his tenure used PSA vehemently PSA against his political opponents and the charges made by BJP regime after 2019 against Political parties of J&K was an example of usage of PSA as a political tool as well as to contain widespread protests which might have arisen out of abrogation of Article 370. Public Safety Act in J&K is unique when we compare the Act with NSA of other Preventive acts across the country. The text of bare act reveals that the PSA is meant to contain the 'sentiment' in Kashmir in particular. New Delhi doesn't believe that J&K is a normal state which can be managed by normal laws hence we see rampant usage of emergency provisions like PSA, APSPA & UAPA (particularly after august 2019).



## **Chapter 5**

### **Preventive Detentions, Human Rights and Legal Intricacies addressed**

**by**

**Apex Court in India & High Court of J&K**

#### **5.1 Introduction**

Preventive Detention denotes a pre-emptive attempt by executive to bar a citizen from committing offence. This involves foreseeing various factors and requisite information about a citizen which culminates into deciding whether somebody is going to commit an offence. The detention of individual means an aggression on liberty and barring that individual from exercising certain Rights. The objective of Preventive Detention is 'preventive' and not 'punitive'. It is the intrinsic aim of punitive arrests to punish the criminals and the character of preventive Detention is to prevent a person from doing something which may breach law & order of the District/State or country.

India is among very few countries in the world which allows for Preventive Detention in peaceful times. International Commission of Jurists along with Special Rapporteur on States of Emergency has argued that Preventive Detentions should only be used in emergencies & when a nation is at war or in in external or internal danger (Fitzpatrick, 1994). Also, India has allowed Preventive Detention provision to be inserted in Constitution of India under Fundamental Rights Section. United States (USA) along with France are the countries which have opined in favour of making some basic rights for detainees as non-derogable during the drafting stage of ICCPR (Greer, 1993). Various countries around the world allow for Preventive detentions discussed below: -

**Bangladesh:** - In the original constitution of Bangladesh there is no mention of Preventive Detention. In fact, it was because of abuses from Pakistan during 1947 & 1971 that Bangladesh was reluctant to include Preventive Detention & continue with it after its independence. After Bangladesh began independent after 1971 war, in order to contain violence & Law and Order situations created due to economic backwardness, it deemed necessary to implore the provisions of Preventive Detention. Hence, Preventive Detention was inserted in Article 33 (by adding two new clauses) of the constitution by amending it under Constitution (Second Amendment) Act, 1973. Bari (2017) argues that it is perhaps the Indian & Pakistan constitutions (both have Preventive Detention mentioned under Fundamental Rights) that Bangladesh emulated and hence put Preventive Detentions under section of Fundamental Rights.

**Australia:** - Australia has a form of immigration detention whereby, immigrants to that country are detained till their status is not verified as a genuine asylum seeker. Also, in Australia, those people who are convicted as committed serious sexual or gory offences can be monitored under Preventive detention sections. Methven & Carter (2016) show how in New South Wales, various rules have been introduced whereby various civil liberties are curtailed and over the years these powers have been expanded.

**Brazil:** - Brazil has a strange detention law under which detainees are held without any court hearings. Thus, detainees serve sentences which are not specified and for indefinite periods. The sentence that detainees serve often exceeds the term they might serve when they commit that crime. Brazil has 4<sup>th</sup> largest prison population in the world and those serving pretrial detention stand nearly at 300,000 (Riberio & Ferraz, 2019). In Brazil, pretrial detention is used in five situations—if there is a threat to criminal investigation, if an offender is believed to influence the witnesses or tamper the evidence, if offender is believed to recidivate, if there is any chance that offender might be a case of recidivism, if there is any evidence or chance of financial harm to others (ibid, 2019).

**Costa Rica:** - Criminal Proceedings Code in Costa Rica allows for Pretrial detention of up to 12 months in certain cases & in “complex” cases up to 3 ½ years.

Between January and March 2013, according to Adaptación, 42 % of the remanded were freed within the first 15 days, 31 percent between 16 and two months, and 27 % between 61 and ten months. The expense of keeping someone in preventative custody is quite high, with studies indicating that it costs US\$45 a day to keep one inmate (Rico, 2013).

**Germany:** - Preventive Detention is called as *Sicherungsverwahrung* in Germany Criminal Code. Preventive Detention is reviewed after two years and is meted out to those held for grave offences & those who pose a threat to Public Safety. Article 17(1) No 2 of Bavarian Police Code states that “the police may take a person into custody if this is necessary to prevent the imminent committal or continuation of a crime”. Thus, the stress in German code is on “imminent” danger (Mueller, 2014).

**Japan:** - Japan allows for pre-trial detention of persons famously called as *Daiyō kangoku* which literally means a “substitute prison”. But in Japan there is a separation between investigation & professional corps. Investigative agencies are involved in the detention processes. The detention process can be extended from 72 hours to 23 days in total by investigative agencies and the detention period of 23 days can be further extended by applying more charges on detenu. According to Sato (2017), over the years this system of imprisoning without trial has brought much criticism of Japanese Law & order situation.

**New Zealand:** - Preventive Detention in New Zealand is imposed mainly against grave sexual offenders or other serious criminals which the investigative agencies believe that there are high chances of recidivism. Meek (1995) argues that Preventive Detention in New Zealand was extended in 1987 when John Douglas Bennet committed a grave offence when he was released after 6 ½ years upon serving his sentence for attempting rape & abduction. After 5 weeks into his release John again abducted a girl aged 25 and repeated same offence. Therein, John was sentenced to Preventive Detention for 12 years in attempted murder & 5 years for abducting the girl. Before this Act, Penal Policy Review Committee (1981) in New Zealand had argued in favour of abolishing what was there in Criminal Justice Act, 1954. Because, before this act, Preventive Detention was seldom used. After John

Bennett incident, Preventive Detention came to be used against repeated offenders & against grave offences & violent crimes (Gray, 2015).

***South Africa:*** - South Africa has Internal Security Act, 1982 which deals with Preventive Detention of persons who are suspected of being involved in terrorist activities. Section 29 of this Act provides wide ranging powers to security agencies to detain individual suspects. During the Apartheid Government, the security agencies detained persons under Terrorism Act, 1967 without warrants. McKinley (2013) argues that the legislation was actually used against social, political, cultural & economic resistance of any kind arising out of Africa under Apartheid regime in the guise of fighting terrorism.

***Malaysia:*** - Malaysia has Internal Security Act of 1960 which deals with detention without trial based on any charges of violence or terrorism. This Law was passed after Malaysia gained independence from Britain in 1957. ISA, 1960 was replaced by SOSMA Act, 2012 [Security Offences (Special Measures) Act]. Scholars have called it smoke and mirrors after SOSMA was passed because the Government replaced the ISA, 1960 with a promise that detainees shall be given a fair chance of trial in court but this was missing in new SOSMA legislation (Spiegel, 2012; Dhanapal & Sabaruddin, 2015).

***Pakistan:*** - Pakistan also has the extraordinary provision of detaining persons under Preventive Detention when there is threat to defence, external affairs, security of State, and maintenance of Public order. Even though Pakistan replaced/changed its constitution many times, but the Preventive Detention was retained in each one. In 1975 there were many changes made to Preventive Detention provisions because of political instability in Pakistan. The detention period was extended to 3 months while as the provision of providing reasons of detention to a detainee was increased from one week to 15 days (Mian, 1970). On 31<sup>st</sup> December, 2014, Nawaz Sharif, the then

Prime Minister of Pakistan claimed that Pakistan is in a State of War hence exceptional measures are required for exceptional times.

**Israel:** - Israel has Preventive Detention which addresses challenges at three levels. These three laws address three different challenges. The first is Emergency Authorities (Detention) Law, 1979 which deals particularly against domestic security challenges. The second Law is Incarceration of Unlawful Combatants Law, 2002 deals with challenges emanating from foreign nationals or issues with trans-boundary armed conflict. The third Law is Military Order Concerning Security Provisions (Consolidated Version) (no. 1651) 2009 which deals specifically with challenges arising out of West Bank (Saar & Wahlhaus, 2017).

**USA:** - USA adopted a Preventive Detention Law in 1984 which allowed Federal Courts to detain persons without trail. The most infamous Act passed was US PATRIOT Act under George W. Bush after 9/11 attacks which allowed for surveillance of foreign nationals and their detention indefinitely. This Act was passed in USA mainly to deter terrorists from planning attacks against United States of America (Cole, 2009).

## **5.2 Preventive Detentions and Human Rights**

Even though the word ‘Preventive Detention’ appeared as a matter of law in the GoI Act, 1935, and the Constitution, Justice Mukherjea stated in A.K. Gopalan vs. State (1950 SC 27) that there is no authorised definition of the term in India. The phrase comes from the wording used by Law Lords in England to describe the nature of imprisonment under Regulation 14(B) of the Defence of the Realm Consolidation Act, 1914, which was passed just before the onset of the First World War. In contrast to the phrase ‘punitive’, the word ‘preventive’ is adopted. Article 22(4)(7) of the Indian Constitution, which is found in the chapter on Fundamental Rights, imposes specific requirements on Parliament when implementing a legislation on preventive

detention, as well as providing certain safeguards to anyone imprisoned under such a statute.

Entry 9 of Union List reads as, “Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.”

Entry 3 of Concurrent List reads: -

1. “Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.”
2. Article 366 of the Constitution specifies a number of terms used in the document; however it does not define the term "preventive detention.

Following the onset of World War II, the British Parliament passed the Emergency Powers (Defense) Act, 1939, which permitted the creation of rules allowing for preventive detention. Regulation 18B, promulgated under Section 2(2) of the Act, reads as follows: -

If the Secretary of State has reasonable cause to believe any person to have been or to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in preparation or instigation of such acts and that by reason thereof, it is necessary to exercise control over him, he may make an order directing that he be detained.

In *Liversidge vs. Anderson* (1942 AC 206), the House of Lords observed that:

the object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence.

Thus, 'Preventive Detention' pertains to the detention of a person without charge or trial, with the goal of preventing the subject from not only acting in a certain way, but also from reaching a specific goal. There is no proof of wrongdoing, and no charge is made; the rationale is suspicion or a reasonable possibility of wrongdoing, rather than a guilty verdict, which can only be justified by legal evidence.

Human rights are defined as the inalienable rights including freedom, fairness in treatment, and sanctity of human guaranteed by the Constitution, incorporated in international agreements, and enforced by Indian courts, according to the Protection of Human Rights Act, 1993. In conclusion, all of the preceding aspects of human rights are in some manner tied to human dignity. While the United States developed a range of human rights rules and mechanisms, the 20<sup>th</sup> century also saw a significant number of human rights violations across nations and groups. Section 12(c) of the Protection of Human Rights Act of 1993 requires the National Human Rights Commission to examine jails and evaluate the different circumstances in which convicts are held, as well as provide suggestions. To ensure that inmates are treated humanely, various international conventions, norms, and legislation are in place. The 1948 Universal Declaration of Human Rights specifies that, "no one will be subjected to arbitrary arrest, imprisonment, or exile, as well as a right to life and freedom from torture or other cruel, inhumane, or degrading treatment or punishment". The International Covenant on Civil and Political Rights guarantees the right to personal liberty and security (ICCPR). It also adds that anyone whose liberty has been stripped away must be handled with courtesy and compassion for their inherent dignity. This

section, according to the Human Rights Committee, strengthens the ICCPR's anti-torture provisions. The ICCPR's clear requirement that all individuals deprived of their liberty be treated with compassion and regard for the inherent dignity of the human person strengthens the prohibition of treatment pursuant to the ICCPR's provisions banning torture. A Code of Conduct for Law Enforcement Officials and Standard Minimum Rules for the Treatment of Prisoners have been adopted by the United Nations.

Winston Churchill, has made this famous statement that: The public's attitude toward crime and criminals is one of the most reliable indicators of a country's culture. Unfailing faith that there is treasure, if you can find it, in the heart of every man; a continual heart-searching of all charged with the deed of punishment; indefatigable efforts towards the discovery of regenerative processes; unfailing faith that there is treasure, if you can find it, in the heart of every man (Charles Koch Institute, 2016).

The UN also adopted the Code of Conduct for Law Enforcement Officials and the United Nations Standard Minimum Rules for the Treatment of Prisoners. Torture of detainees is prohibited by our own Constitution and regulations. The Supreme Court has issued extensive instructions on the humane treatment of inmates in a number of historic instances. Yet, NHRC continues to receive human rights violations of detainees from various pockets of the country.

In a democracy, police behaviour must adhere to the Rule of Law, the Constitution, and legal restrictions. Indiscriminate arrests have been highlighted as one of the primary causes of corruption by the National Police Commission and the Law Commission on the Law of Arrest in October 2000. According to the National Police Commission's Third Report, approximately 60% of arrests were either unnecessary or unjustified, and such improper police action accounted for 43.2 % of jail spending. According to National Police Commission, "It is evident that a large number of the arrests were linked with relatively minor charges and cannot, therefore, be viewed as absolutely required from the standpoint of crime prevention". The continued confinement in jail of those who have been arrested has resulted in unnecessary expenditures for their upkeep. During the preceding time, it was



projected that 43.2 % of the expenditure in the associated jails was spent on just those detainees who in the end, did not need to be arrested at all. Despite the fact that the data in the National Police Commission Report are more than two decades old, the situation has not improved.

Under international human rights law, torture is prohibited at all times. No one shall be tortured or subjected to cruel, brutal, or degrading treatment or punishment, according to the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights. It is an unqualified privilege that is not subject to any limitations. Even in times of national emergency, when the nation's survival is threatened and its existence is formally declared, freedom from torture is a non-negotiable human right.

State parties to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984 are obligated to ban torture and are expressly forbidden from citing "higher orders" or "special circumstances" as justifications for torturous acts. Since the introduction of the Universal Declaration of Human Rights in 1948, the definition of "torture" has been substantially enlarged. In a traditional meaning, the term "torture" was used to describe a technique of questioning. The following forms of abuse have now been deemed to constitute torture or ill-treatment by international human rights bodies: harassment, psychological torture, abductions, forcible residence obliteration, unwanted sexual scientific or medical improvisation, physical punishment, abuse of authority in law enforcement, capital punishment, systemic racism, abuses in military confrontation, and gender-specific methods of torture or ill-treatment.

### **5.3 Constitutional Debates: Ambedkar, Patel & Bakshi Tek Chand**

Millions of refugees flooded into both countries after the Indian subcontinent was partitioned into India and Pakistan, dissatisfied with their status. The conflict in Kashmir that ravaged for decades after two countries went into war several times resulted into economic stress. External and internal threats led to a situation antagonistic to the country's macroeconomic stability which was largely uncontrollable for any nascent democracy. The recognition of these challenges, as

well as a desire to address them effectively so that civil liberties could flourish in an orderly society, compelled the framers of the Constitution to recognize preventive detention and impose such restrictions as would not jeopardize the gratification of the assured fundamental human rights. Necessary actions against rebellious and aggressive behaviour was required to confront the dangers of severe crises that India was expected to face while jumping into a new era. Peace and tranquillity had not become typical elements of life in India since its formation as a sovereign state. Congress which was at the helm of affairs then had to deal with subversive elements, external threats and an enemy called Pakistan. Political agitation for the sake of voicing grievances seemed to have no bounds, and misuse of personal liberty looked to be endangering the very fabric of a community that had only lately acquired sovereignty. Dr Ambedkar articulated the rationale for incorporating preventive detention into the Indian Constitution in the Indian Constituent Assembly in the following lines that, “it has to be recognized that, in the present circumstances of the country, it may be necessary for the Executive to detain a person who is tampering either with public order or with the defence services of the country. In such case I do not think that the exigency of the liberty of the individual shall be placed above the interest of the state” (CAD IX, 1496). This position was criticized by Bakshi Tek Chand who questions the very basis of detention in peace times. Thus, he argued that, “.... if there is any written constitution in the world in which there is provision for detention of person without trial in this manner in normal times” (CAD IX, 1529). To this Dr Ambedkar argued that laid there are enough safeguards in the constitution to prevent the abuse of Preventive Detentions. Dr Ambedkar argues that:

If all of us follow purely constitutional methods to achieve our objective, I think the situation would have been different and probably the necessity of having preventive detention might not be there at all. But I think in making a law we ought to take into consideration the worst and not the best there may be many parties and persons, who may not be patient enough to follow constitutional methods but are

impatient in reaching their objective and if for that purpose (they) resort to unconstitutional methods, then there may be a large number of people who may have to be detained by the Executive. In such a situation, would it be possible for the Executive to prepare the cases and do all that is necessary to satisfy the elaborate legal procedure prescribed? Is it practicable? (C.A.D. IX 1556)

Sardar Patel seconded the observations made by Dr. Ambedkar and argued that:

When law is flouted and offences are committed, ordinarily there is the criminal law which is put into force. But where the very basis of law is sought to be undermined and attempts are made to create a state of affairs in which, to borrow the words of (Moti Lal) 'men would not be men and law would not be law', we feel justified in invoking emergent and extraordinary laws (Lob Sabha Debates Feb.25 1950 P.976)

The efforts at the time of independence was to protect the freedoms, restore freedom, and ensure the security of the country, at a cost of incarceration. As formerly argued by Mr. G A Deshpande that "we cannot dig a well when the house is on fire". This form of legislation, which dates back to the days of the Civil War, has been kept on the books because it was thought necessary to battle specific types of situations with which the country was constantly confronted as a matter of sad necessity.

Even in times of peace, we have passed such laws because it is a question of dreadful necessity. Preventive detention is an administrative need that is likely to result in less human misery than alternative approaches for dealing with people who cannot be effectively punished for their actions, despite being a threat to public security and order.

In a lawful manner, a need for administrative detention emerges more in the sense that evidence available with the State may not be adequate to produce a charge or secure an inmate's court decision by credible proof, but it may be significant enough to warrant the confinement for factors similar to defence, foreign affairs, or national security. To summarise, the concept of preventative detention in the case of a dispute is well recognised. However, in recent years, it has been acknowledged that such laws are necessary in times of peace to prevent antisocial and subversive groups from undermining public welfare. Constitutional and other legislative laws have recognised and controlled it in India, Myanmar, Tanzania, Israel, and other countries.

#### **5.4 Assertions by Apex Court through various Judgments**

The protection to detainees is provided by the constitution itself. Various provisions in National Security Act as well as Public Safety Act provide detenu with various rights which have been time and again asserted by Supreme Court of India through various judgments. These judgments have ensured that too much power in the hands of executive is not misused. Various protections in detention laws and Rights of detainee prevented/protected/asserted by Supreme Court are as under: -

##### **1. Subjective Satisfaction**

- ✓ This is the most misused provision in Preventive Detention Laws. A person is detained on the subjective satisfaction of executive be it Divisional Commissioner or District Collector in J&K. But the subjective satisfaction has to be based on “facts” not “values”. It has to be a “factual judgement” not a “value Judgement”. This was reiterated by Supreme Court of India in Varinder Singh Batra V. Union of India & Ors. (1993). In this case Supreme Court also emphasized that if material relied upon or piece of evidence used for detention is not taken into consideration, then the detention order is not maintainable. Every time a detention order is issued there has to be application of mind. If the material is not supplied/provided to detenu, detention order is again vitiated. This was ruled by Supreme Court of India in Mohammad Salim Khatri v. Union of India & Anr. (1993); Madan Gopal v. Union of India & Ors. (1993).

- ✓ In [abid] R/T Mst. Ummu Saleema v. B.B. Gujral & Anr. 1981 SC 1191, Supreme Court asserted in the context of COFEPOSA section 3(1) that each a there is a failure of providing relevant material to detenu, there is violation of Fundamental Rights guaranteed under Article 22(5) of Constitution.

## **2. Providing Grounds of Detention**

- ✓ In re: Smt. B. Ramprannamma 1993 FAJ 485 [(cal Circuit bench at Port Blair) D B], it was decided that detainees must be given grounds of detention in the language that they understand. Again, the term “communication” as employed in Article 22(5) of the Indian Constitution is quite broad and forceful implying that detainees must be given well-intentioned information and grounds for detention in the language he understands best. In Harikisan v. State of Maharastra, AIR 1962 SC 911, and Hadibandu Das V. District Magistrate, Cuttak & Ors., AIR 1969 SC 43, this was reaffirmed.
- ✓ The Supreme Court held in Smt. Raziya Umar Bakshi V. Union of India that serving/providing grounds of detention to detainees is a valuable constitutional right, and that if the grounds are not provided in the language best understood by detainees, it will be considered as if no grounds of detention were provided at all. [AIR SC 1751, 1980].
- ✓ In Kubic Dariusz V. Union of India and ors., SC held that communication in Article 22(5) will mean providing detenu the ‘sufficient’ & ‘effective knowledge’ for making a representation. [AIR 1990 SC 605].

### **3. Exceptional Principle**

- ✓ Ibrahim Umarbhaya V. State of Gujrat & Ors., [(1993) 3 Crimes 730 (Guj) D .B] preventive custody should only be used in rare circumstances, and if there is no chance of the detainee being freed, preventive detention is unsustainable and should not be utilised.

### **4. Delay will amount to quashing of Detention order**

- ✓ In Daljit Singh Sandhu V. Union of India & Ors., 3 Crimes 629 (Delhi), it was held that if a detention order is delayed and there is no purpose after a period of time has passed, the detention order must be annulled. In this decision, the Apex Court further stated that custody should be held if the detaining authority can explain the delay. In cases such as T.A. Ab Rehman v. State of Kerala (1989) and Gurvinder Singh v. Under Secretary Home, Govt. of Punjab, these claims were made (1993).

## **5.5 Nonchalance, ‘Application of Mind’ & Indefinite Incarceration**

Detention of individuals across globe & in India has many reasons and dynamics. The detaining authority has lot of powers under detention laws to curb liberty of individuals/citizens. The Judiciary comes in as a savior and a forum where, liberty v. security of State argument is very well argued and debated on case to case basis. Judiciary in India particularly Supreme Court & various High Courts have upheld the liberty of citizens in case of detentions and have placed a broad set of guidelines through various judgments which have to be satisfied to the court as well as the detenu by the authority imposing the detention order. It was held in Asha Devi V. Shivraj & Anr., AIR 1979 and AYYA alias Ayub V. State of UP & Anr., (1989) that ‘*application of mind*’ is a vital principle when curbing liberty of citizens in case of detentions. The order of custody and the circumstances of detention must not be based on a shaky foundation or without a thorough examination. The required consequence of Article 22(5), in which the word ‘communication’ demands further explication and development, is the application of mind. In this regard, the Jammu

and Kashmir High Court has rendered several decisions. Justice Sanjay Dhar argued in the case of Mushtaq Ahmad Wani alias Channa of Kokernag, using the Apex Court judgement in Chhagan B. Kahar Versus Kalna & Ors. that a detention order can't be issued if the identical reasons were previously found to be inadmissible in court. "It is of no consequence if the further fresh facts disclosed in the grounds of the impugned detention order have been considered", Justice Sanjay Dhar said. In order to hold a person for the second or third time, 'new facts' concerning new detention orders are required.

A fortiori when a detention order is quashed by the court issuing a high prerogative writ like habeas corpus or certiorari, the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the court strikes down an earlier order by issuing a rule, it nullifies the entire order.

Thereby, the High Court quashed the detention order of Mushtaq Ahmad Wani and directions for his release were issued immediately (News Desk, 2021).

Nonchalant or cavalier attitude has been noticed in different cases of custody throughout India, resulting in a vitiated detention order. It was decided in Mohiuddin Tayab Sony V. State of Maharashtra & Anr., 1980 D.B, that the detaining authority issued the custody order in a mechanical and cavalier/nonchalant way. Justice Tashi Rabstan argued in Mysar Majeed V. State of J&K Ors. that while the High Court had quashed the earlier detention order of the detainee who was placed under order No 160/DBM/PSA/2018 dated 12th January 2018, which was quashed by the High Court under Order No 28/2018 dated 01 August, 2018, the High Court had not quashed the earlier detention order of the detainee who was placed under order No 160/DBM/PSA. Detenu was then held again under 136/DBM/PSA/2019, dated March 19, 2019. This detention order did not relate to any new facts, according to the Court. While passing a new order, the detaining authority alluded to a prior detention order, despite the fact that that order had been overturned.

Justice Tashi Rabstan quoted the Judgements in Apex Court made in case of Ibrahim Bachu Bafan V. State of Gujarat (1985) 2 SSC 24 in which it was held that same and identical grounds for new detention orders vitiates whole detention order. This case was made under Conservation of Foreign Exchange and provisions of Smuggling Activities Act 1974 (COFEPOSA), and Supreme Court argued that:

...the power conferred under clauses (a) and (b) of sub-section (1) of Section 11 is in fact extension of the power recognized under Section 21 of the General Clauses Act and while under the General Clauses Act, the power is exercisable by the authority making the order, the named authorities under clauses (a) and (b) of Section 11 (1) of the Act are also entitled to exercise the power of revocation. When the High Court exercises jurisdiction under Article 226 of the Constitution it does not make an order of revocation. By issuing a high prerogative writ like habeas corpus or certiorari it quashes the order impugned before it and by declaring the order to be void and striking down the same it nullifies the order. The ultimate effect of cancellation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in the High Court may be the same but the manner in which the situation is obtained is patently different and while one process is covered by Section 11(1) of the Act, the other is not known to the statute and is exercised by an authority beyond the purview of sub-section (1) of Section 11 of the Act. It is, therefore, our clear opinion that in a situation where the order of detention has been quashed by the High Court, sub-section (2) of Section 11 is not applicable and the detaining authority is not entitled to make another order under Section 3 of the Act on the same grounds (Website of High Court J&K).



The analysis of High Court observations in PSA detentions shows that it is not always true that detention orders are not served on flimsy grounds. Even High Court of J&K has held many detention orders as valid and detaining authorities have good reason to believe that the detenu can act prejudicial to security of State or Public Order. The case of Nisar Ahmad Qazi V. State of J&K & Ors., has held that the detenu has many FIR's against him & the detaining authority has good reasons to impose detention order against the detenu. Hon'ble Justice Sanjeev Kumar & Justice Rajnesh Oswal held the detention order in 68/DMP/PSA/18 dated 27 November, 2018 by stating that:

The detaining authority, as it transpires from the record, took note of the subversive activities, the detenu was involved in, as "OGW" and thereafter derived satisfaction that his remaining at large was likely to pose threat to the security of the State and thus slapped the detention order upon him. The detaining authority, in the grounds of detention, also took note of the fact that the detenu was under police custody but was of the opinion that remaining at large of the detenu was highly prejudicial to the security of the State and, therefore, the preventive detention of the detenu was necessitated.

Further the Judges noted that, "The Writ Court, on the basis of detention record, came to the conclusion that all safeguards viz. furnishing of grounds of detention along with requisite material and informing the detenu of his right to make representation against his detention had been scrupulously followed by the detaining authority and, therefore, there was no reason to interfere with the impugned detention order" (High Court in Case of Nisar Ahmad Qazi). In this context, Supreme Court has held that an order of preventive detention cannot be made on the ground that "the accused is otherwise likely to be released on bail". This observation was taken in Ramesh Yadav v. District Magistrate, Etah, (1985) 4 SCC 232 (Aftab, 2021).

## 5.6 Pre-trial detentions in India

India has vast population under pretrial detention which stands at 20 per one lac population. The situation across globe is that 32% prisoners around the world await trial (Bhandari, 2016a). According to International Centre for Prison Studies (ICPS) study, India, Pakistan and Bangladesh comprise 10.7% of pretrial detention population (see *Table 5.22* for details).

In India under trial prisoners (figure shown in *Table 5.1*) have increased by 2.15 % between 2018 & 2019. Figures in 2018 stood at 323537 while as the figures in 2019 were 330487 and during the same period, the percentage of detenues has increased by 35.19% (Prison Statistics India, 2019).

**Table 5.1**

*Figures showing under trials numbers and detenues in India (2018-2019);  
NCRB, 2019*

Year	No of Under trials	No of detenues
2018	323537	2384
2019	330487	3223

Supreme Court in various judgments has argued that criminal cases must be dealt on fast track basis. It has also observed that those cases where pre-trial detainee has completed half his sentence U/S 436 A of CrPC, must be released. This observation was spelt out in *Bhim Singh V. Union of India* case.

**Table 5.2**

*International Centre of Prison Studies (2010)*

Country	Pretrial detentions	%age of detainees to total prison population
India	254857	66.2
Pakistan	49582	66.2
Bangladesh	46919	69
Globally	3 million	32

With India witnessing a boom in its middle-class population, crimes are bound to get increased and hence pre-trial detainees and arrestees will also increase. Pre-trial detention is only allowed when there is genuine fear that the accused may abscond or the course of justice will get hampered. Excessive pre-trial imprisonment drives individuals into poverty all around the world. It drives working-class people into unemployment, insecurity, and poverty. It pushes people on the verge of poverty into poverty and further impoverishes those who are already impoverished. It stifles the growth of entire communities, wastes human potential, and misallocates government funds.

One method of determining the length of pre-trial detention is to count the number of days persons spends in custody. According to a European Commission report, since 2003, the average term of pre-trial detention in 19 of the EU's 25 member states was 167 days. Although data for other countries or areas is scarce, the global average is almost definitely higher than the European figure—the average term of pre-trial detention in Nigeria, for example, is 3.7 years. Pre-trial custody is more common in developed countries, with a higher aggregate number of inmates and a higher rate of detention. USA has the highest overall number of pre-trial detainees in the world. However, the average period of pre-trial custody in the US and across the industrialised world as well as the percentage of all convicts in pre-trial detention are

both extremely low. Although the prevalence of pre-trial detention in the developing world is low, the average length of detention and the proportion of all detainees are both high. In certain countries, pre-trial detainees account for more than three-quarters of all prisoners (Table 5.3).

**Table 5.3**

*Developing countries and pre-trial detention population; OSI, 2011*

Country	%age of pretrial detainees awaiting trial
Benin	80
Niger	76
Liberia	97
Bolivia	74
Mali	89
Haiti	78

The widespread usage of pre-trial confinement has resulted in a slew of negative effects. Individual lives are shattered, families are destroyed, and communities are degraded as a result of excessive pre-trial imprisonment. It also undermines the rule of law by promoting lawlessness and exposing those considered innocent to torture, sickness, and overcrowding in conditions far worse than those faced by most condemned inmates.

Individuals undergoing trial should be permitted to return to their families under international norms if they follow the law and present for trial on a fixed date. Individuals should only be held until trial under specific circumstances. There must be reasonable reasons to suspect the individual committed the alleged crime, as well as a serious risk of the person fleeing, constituting a threat to the community, or interfering with the legal process. Pre-trial detentions promote corruption and take a serious toll of socio-economic life of the detainee. Many a times recidivism is a

common feature if pre-trial detention is allowed to continue indefinitely (Rankin, 1964). Timely bail may at times allow an accused to save his job and get himself/herself a good lawyer. Pre-trial incarceration is known to erode defendants' abilities to portray him in a positive light for getting a noncustodial sentence by causing them to lose their jobs, housing, family, and other community links (Dunkel & Vagg, 1994; King & Jackson, 1973). An accused who has spent years in a prison cell, his appearance and personality in court may not inspire confidence.

Various Indian states, such as Jammu and Kashmir, Jharkhand, and Delhi and Bihar, have large percentages of pre-trial prisoners, with numbers ranging from 79 per cent to 75.2 per cent, 73.4 per cent, and 85.4 per cent, respectively. In India, there is a distinction between bailable and non-bailable offences. If a person is capable of executing a personal bond, he will be freed (Section 436 CrPC). The Supreme Court ruled in *State of Rajasthan v. Bal Chand* that bail must be a norm, not an exception. Pre-trial detentions in India occur in two situations under regular circumstances: To begin, a Judicial Magistrate can order an accused to be held in police custody under section 167(2) of the CrPC (in case investigation is not completed within 24 hours). The custody can be prolonged beyond 15 days up to 60 or 90 days if the Judicial Magistrate determines that there are sufficient grounds to justify the extension and the offence is penalised by more than 10 years. The Supreme Court declared in *Arnesh Kumar v. State of Bihar* 2014 8 SCC 273, that magistrates must satisfy themselves rather than relying solely on police reports. The second type of detention occurs under unusual circumstances, such as Preventive Detentions. In the case of *Haradhan Saha v. State of West Bengal*, the Supreme Court stated that Preventive Detentions should be used where there is a threat to public order, national defence, or international relations, or when there is a violation of security. Article 22(3) of the Constitution, coupled with section 107/151 of the Criminal Procedure Code, governs pre-trial detention/preventive detention in these instances. Detention is authorised for a maximum of three months and can be prolonged. In India, Preventive Detentions are not authorised to use bail provisions. Many basic rights and constitutional protections are denied to those arrested under Preventive Detention.

Graft is one area which gets proliferated when security agencies have too much discretion in arrests. Transparency International in its survey shows that 75 % people felt that Police was 'corrupt/extremely corrupt'. The number of respondents interviewed was 1025 (Transparency International, 2013). Bhandari, (2016 b) argues in her work that during investigation about delays in courts it was revealed that police has developed a certain unique code for graft which can be group in four categories that is *Nazrana*, *Shukrana*, *Hakrana* & *Zabrana*. The *Nazrana* depicts any payment made in order to be in good books with police official, *Shukrana* is used as a graft in order to show gratitude for work done by officials, *Hakrana* is a negotiated amount demanded to do a certain work and *Zabrana* is the delaying tactic to increase the amount of graft when something which is offered is not enough.

According to the Third National Police Commission Report, 60% of all arrests are "unnecessary/unjustified". This has a significant financial impact, accounting for up to 43% of all jail costs. The analysis demonstrates that the authority to arbitrarily arrest people is a big source of bribery for cops. In *Joginder Kumar V. State of UP* 1994 4 SCC 260, the Supreme Court cited this statement. The Supreme Court stated in *SS Mhetre V. State of Maharashtra* (2011) that "irrational and indiscriminate" arrests violate Human Rights. The expansion of the scope of prejudicial things by many state governments, particularly Karnataka and Tamil Nadu, is another problematic area in indiscriminate arrests. The Goonda Act of 1985 in Karnataka enlarged the scope of arrests conducted under preventive detention to include drug peddlers, bootleggers, sexual offenders, and other criminals, and the same is true in Tamil Nadu. This process ultimately puts a lot of strain on prisons and their resources.

Other areas through which under trials suffer is because of not enough manpower in judiciary and lack of enough Public Prosecutors. There are 30 million backlog cases in India. Estimates show that India requires 75000 judges in next three decades because courts have to deal with 150 million cases (Supreme Court of India, 2013). Because of the humongous overload in courts in various other cases, ruling in Preventive Detentions doesn't get enough time to be settled by courts. Hence in case of preventive detentions it is the process which becomes the punishment for detainees.

Lack of awareness about legal issues and not getting access to lawyers further aggravates the problem for pretrial detainees and Preventive detainees. Most detainees don't know about how to proceed about their case and how to seek justice. Legal awareness camps are attended mostly by lawyers and not by common citizens. Human Rights Law Network also raises this issue when it says that legal aid to poor is hampered by 'inaccessibility of poor to lawyers'. This provision is also mentioned in Article 39 A of Indian constitution. But lot of issues hampers this facility provided to poor. Even though the lawyer is provided under Legal Service Authority Act passed in 1995. The behaviour of lawyer with client provided under legal services gets aggravated over a period of time and many have complained that Lawyer demands money during the course of the case (Johari, 2018).

## **5.7 Conclusion**

Detention before trial should only be used when it is legal, reasonable, and necessary, according to the United Nations Human Rights Committee. Detention may be required "to prevent flight, tampering with evidence, or the recurrence of crime", or "when the individual concerned poses an obvious and significant threat to society that cannot be contained in any other manner". Tokyo Rules adopted in 1990 have given broad guidelines in case of pre-trial detentions. The main arguments are that Pre-trial must be resorted to only when it is absolute necessity, the alternatives to pre-trial detention must be used at early stage and must be resorted to keeping in view the liberty & dignity of individual and finally, the offender's right to be represented in a court of law must be protected at all costs (Duff, 2012). Preventive Detention in India is necessary evil but Supreme Court of India has given enough guidelines in various cases where unnecessary executive arbitrariness had been minimized. SC of India through various judgments has provided and explained contours of executive discretion and detenuess rights. While it is important and paramount to take firm decisions when Security of State and Public order are in danger, it is equally important that detenuess rights are taken care of, meaning that, detenuess is provided reasons of detention & in communication/language he understands best within

stipulated timeframe. It has been observed over the years that these provisions have been trampled up on. Preventive Detention Laws in India have certain exceptional principles which can be easily twisted by Security agencies to detain a person indefinitely. Indefinite incarcerations breed graft which in turn leads to corruption proliferation among security forces through illegal agents. It has been observed by judiciary that lots of dossiers prepared by SF's were repetition of past dossiers and were a perfect case of lack of application of mind by executive.



## **Chapter 6**

### **Data Analysis & Interpretation**

#### **6.1 Introduction**

Incarceration is a process whereby a detainee is put in a prison and is effectively snatched off of his/her liberty and other Fundamental Rights enjoyed by normal citizens. There is a philosophical and tight-rope walk debate which traverses through liberty and security of individuals as discussed in *Chapter 1*. Detentions deeply impact families of detainees, their friends, spouse, children and close nears and dears through psychologically, economically and socially. Mostly detainees are earning hands or heads of their families hence the social structure is adversely impacted and families are devastated economically. Incarcerations are increasing in both liberal-democratic countries including USA and Authoritarian/Communist countries like China. Incarceration as a phenomenon is universal and hence devoid of ideology of States throughout the world. Over the years, particularly after 9/11, detentions under US Administration has increased manifold. America has increased the detention rate of both Americans and non-Americans which has over the years perpetuated poverty (Broomhall, 2015). The case in point is of Abu Ghraib in Iraq & Guantanamo Bay detention centres in Cuba are well known to the world. Similarly, China has started its detention centres for Uyghurs in Xinjiang province in order to “correct” the behaviour of a millions of Muslims. The detention centres in Kashmir like Papa II (also called as Mama II) during 1990’s was quite unpopular because it was used for extreme torture & unaccounted deaths were associated with it. The detention centre was former government guest house for bureaucrats but eventually after rise in militancy in 1989 was taken over by Border Security Forces (BSF). William Dalrymple in *Kashmir: The scarred and the Beautiful* has given a detailed account of torture at Papa II. Various unpopular torture methods were carried out at Papa II which included electric shocks that resulted in deaths of thousands of individuals (see Basharat Peer’s *Curfewed Night* and Pankaj Mishra (2000) *Death in Kashmir*). Papa II was eventually winded up after the famous ruling by Supreme

Court in D.K Basu v/s West Bengal 1996, where in SC restricted detentions without trial.

According to Foucault, Prison system developed in order to ensure that the behaviour of erring citizens is in sync with the ideology of the State. It is only the Scandinavian counties where we find the detention rate on decline. So, the incarceration has more to do with Law and order and not the ideology of the State. The Law and Order is one of the prerequisites of modern States which have embarked on the path of Good Governance.

This chapter is an outcome of primary data collected from field using Questionnaire and FGD from districts of Kulgam and Shopian which are areas of south Kashmir and have been at the forefront when it comes to volatile populations who use anti-state activities like Stone throwing and other methods in order to achieve their ulterior goals. The Questionnaire included questions for actual detainees and family members who bear the brunt when their earning hand is incarcerated for months and years.

**Table 6.1**

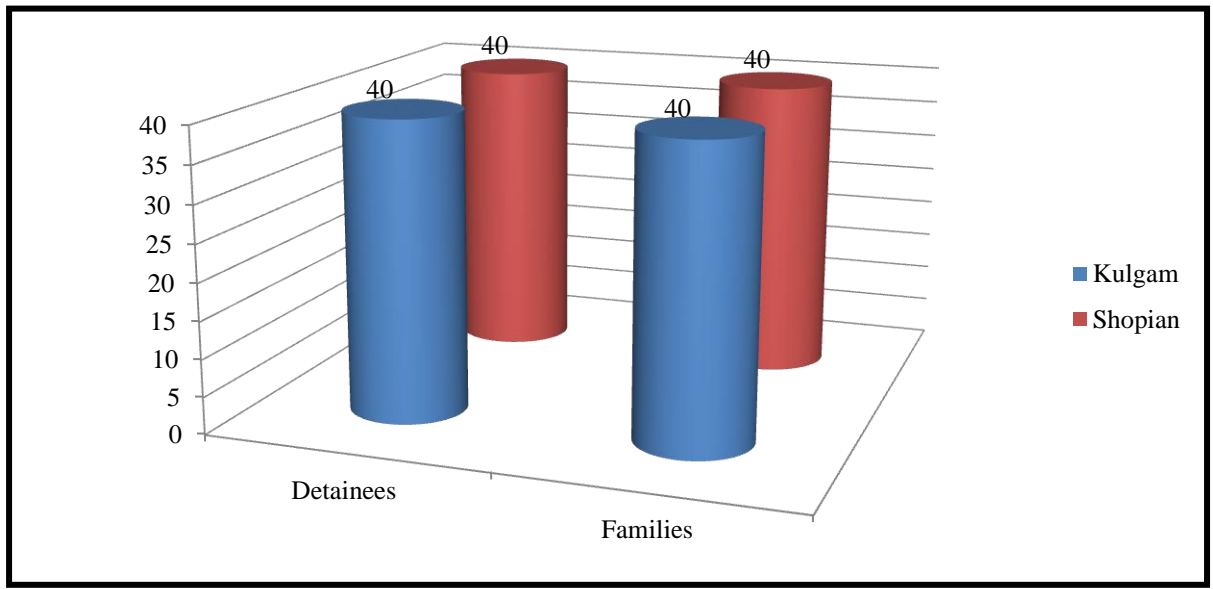
*Sample Size of the Study*

District	Sample Size (Detainees + Families)	Frequency	Percentage (%)
Kulgam	40 + 40	80	50%
Shopian	40+40	80	50%
Total	160	160	100%

Source: Primary Data

**Diagram 6.1**

*Sample Size of the Study*



There were 80 detainees chosen from District Kulgam and Shopian, and simultaneously, 80 families were also considered for this study. The two districts chosen have witnessed most number of detentions since 2008. Shopian and Kulgam constitute the Districts of South Kashmir— the area which includes two other Districts of Anantnag and Pulwama. South Kashmir has since 2008 witnessed extreme violence & has been constantly on the surveillance of Security Agencies.

## 6.2 Detainee Socio-Economic Profile

**Table 6.2**

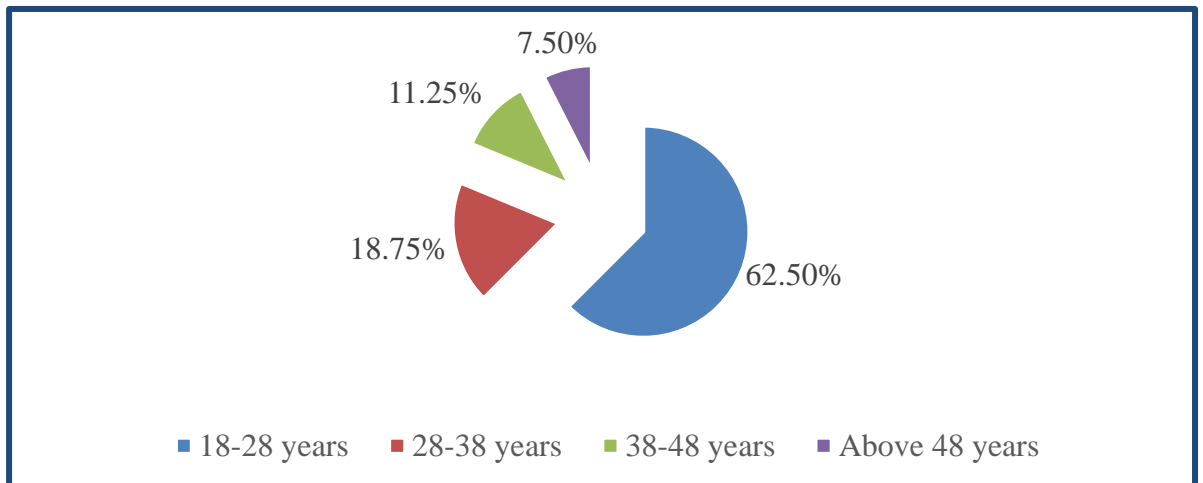
*Age of Detainees*

Age Category	Frequency	Percentage (%)
18-28 years	50	62.5%
28-38 years	15	18.75%
38-48 years	09	11.25%
Above 48 years	06	7.5%
Total	80	100%

Source: Primary Data

**Diagram 6.2**

*Age of Detainees*



The age categories denote that most number of people who are imposed with PSA are quite young. Their ages range from 18-25 years of age. This younger age limit also denotes that Security agencies must mostly focus on younger people.

**Table 6.3**

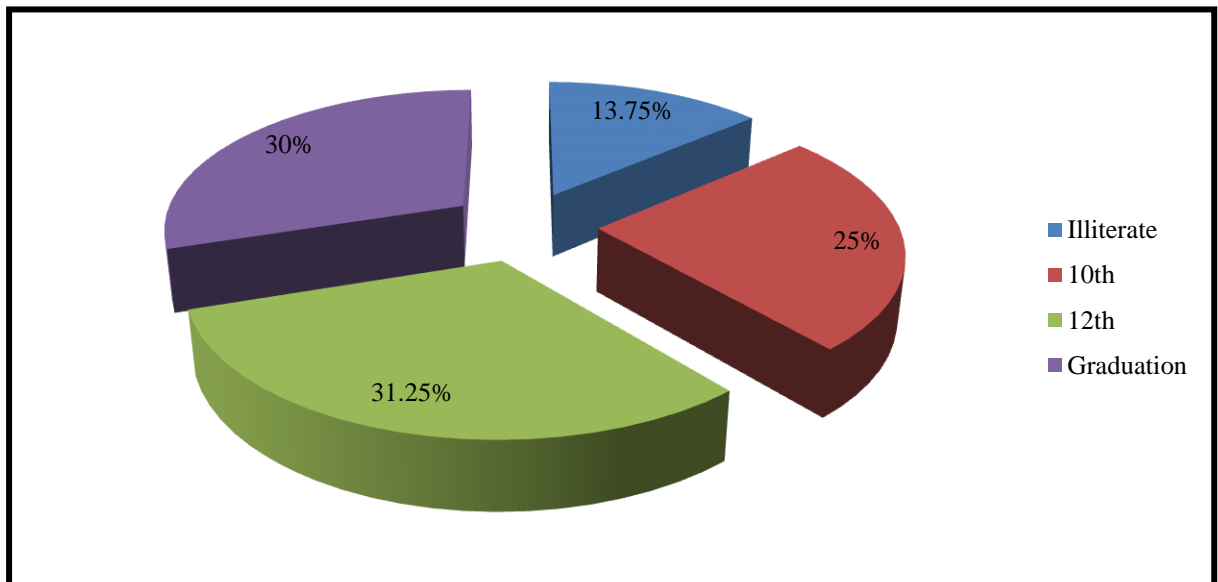
*Educational Qualification of Detainees*

Educational Qualification	Frequency	Percentage (%)
Illiterate	11	13.75%
10 <sup>th</sup>	20	25%
12 <sup>th</sup>	25	31.25%
Graduation	24	30%
Total	80	100%

Source: Primary Data

**Diagram 6.3**

*Educational Qualification*



If the data of Table 6.3 is collated with that of Table 6.2, we find that it is students usually studying in class 10<sup>th</sup>, 12<sup>th</sup> and college going students that fall prey to wrong propaganda and hence get caught under PSA. Those studying in 10<sup>th</sup>, 12<sup>th</sup> and college going students together constitute 86.25% of the total population. And

also, it can be interpreted that the PSA detainees also include a good percentage of college going students. The data also reveals that not many illiterate people resort to any measures against the interests of the State & Public Order.

**Table 6.4**

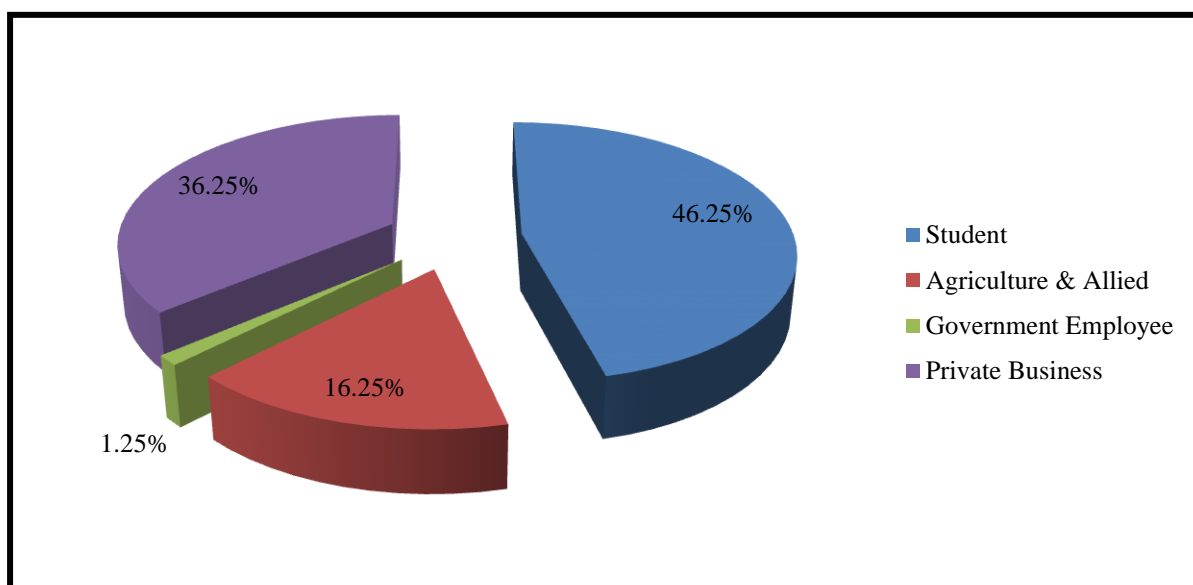
*Profession of Detainees*

Profession of Detainees	Frequency	Percentage (%)
Student	37	46.25%
Agriculture & Allied	13	16.25%
Government Employee	01	1.25%
Private Business	29	36.25%
Total	80	100%

Source: Primary Data

**Diagram 6.4**

*Profession of Detainees*



The respondents revealed that they were students and are continuing with studies which constituted up to 46.25%. Data shows that 1.25% worked with Government Department. As many as 36.25% said that they do Private business and 16.25% revealed that they worked as Agriculturists or in allied sectors. The data shows that PSA detainees come from various backgrounds but mostly it is young people & students who are detained under PSA (Diagram 6.4).

**Table 6.5**

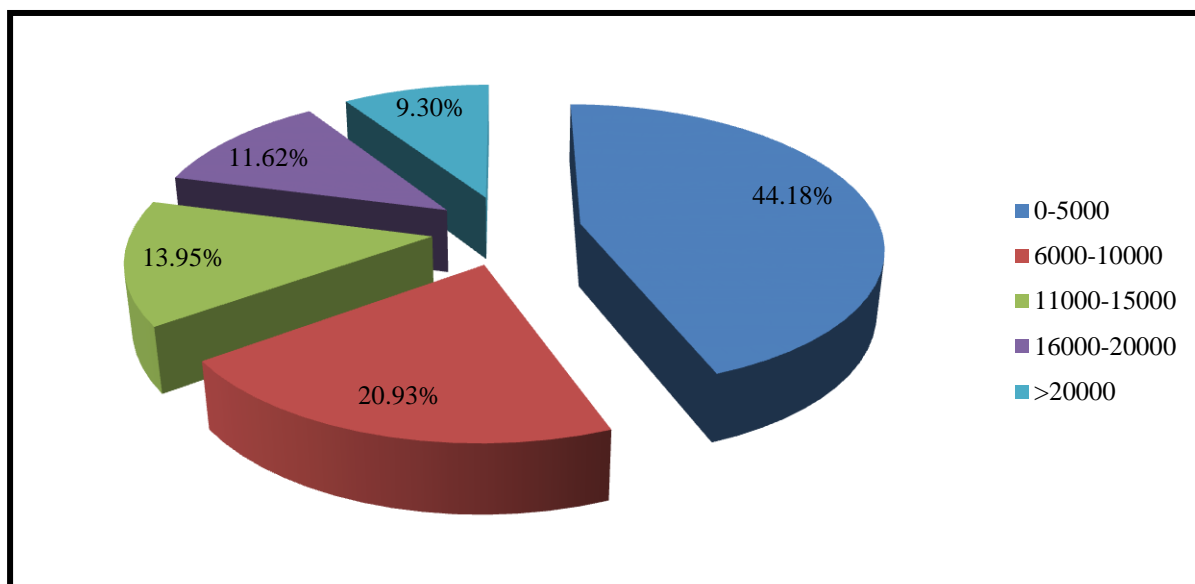
*Income of Detainees (Monthly)*

Income of Detainees (Monthly)	Frequency	Percentage (%)
0-5000	19	44.18%
6000-10000	09	20.93%
11000-15000	06	13.95%
16000-20000	05	11.62%
>20000	04	9.30%
Total	43	100%

Source: Primary Data

**Diagram 6.5**

*Income of Detainees (Monthly)*



According to the Table 6.5, 44.18% of detainees fall under the Rs. 0-5000 income group and 20.9% detainees fall under the Rs. 6000-10000 income group. While as, 13.95% of detainees fall under Rs. 11000-16000 income group and 11.62% of detainees fall under the Rs. 16000-20000 income group. However, 9.30% of detainees fall under the income group of more than Rs. 20000. Thus, it can be inferred from the above data that majority of the detainees detained under PSA have small incomes to meet their ends. Having minimal income means it has greater implications upon the legal proceedings of the detainee. Given the rise in inflation rates in J&K and unemployment as high as 21.6% in September 2021 (Masoodi, 2021), according to CMIE data; this adds to misery of families which have small incomes and their kin are detained under PSA in J&K or far of jails across the country.

**Table 6.6**

*Marital Status of Detainees*

Marital Status of Detainees	Frequency	Percentage (%)
Unmarried	67	83.75%
Married	13	16.25%



Total 80 100%

Source: Primary Data

According to Table 6.6, 83.75% of the detainees were unmarried while as 16.25% of the detainees were married.

**Table 6.7**

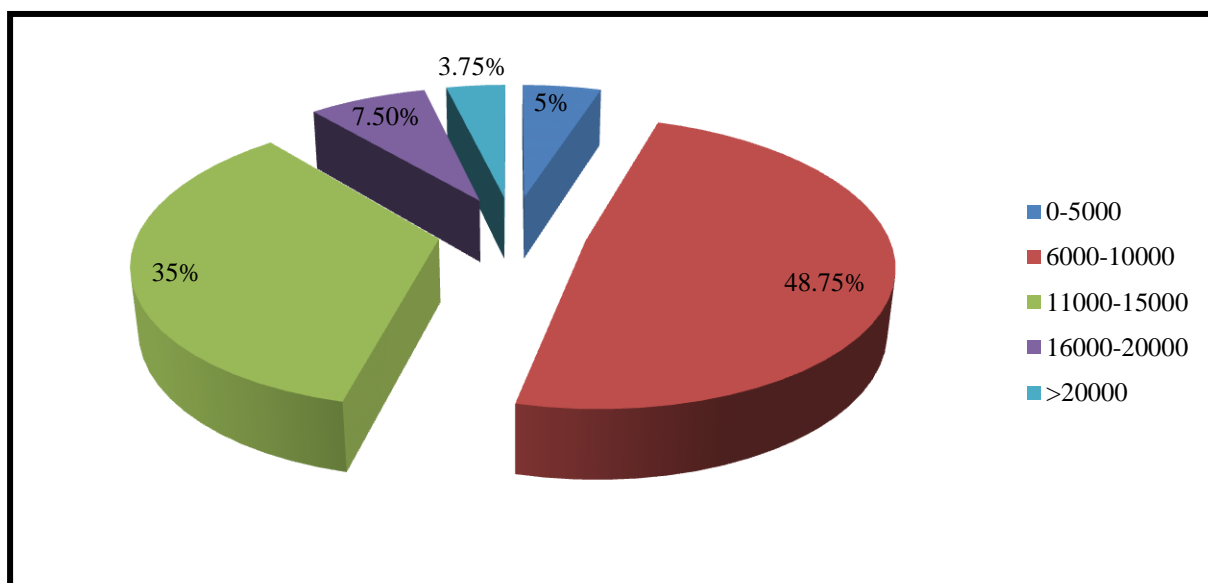
*Family Income of Detainee (monthly)*

Family Income of Detainee	Frequency	Percentage (%)
0-5000	04	5%
6000-10000	39	48.75%
11000-15000	28	35%
16000-20000	06	7.5%
>20000	03	3.75%
Total	80	100%

Source: Primary Data

**Diagram 6.6**

*Family Income of Detainee*



The family income of detainees showed that 48.75% of families had income ranging between Rs 6000-10000. Only 3.75% have income more than Rs 20000 per month. 7.5% respondents revealed that their income ranged between Rs 16000-20000. 35% revealed that their income was between Rs 11000-15000. The data reveals the correlation between income and family facing the detentions under PSA. As income decreases, the illegal activities increase and hence people fall prey to anti-state propaganda. Thus, it is important to invest in better employment opportunities, skills and absorb human capital in productive work. The destitution further aggravates the problem for the families as they have to spend lot on money in the process of getting the detention quashed by High Court or till PSA gets revoked.

### **6.3 PSA Detainees and their Experience with Incarceration/Detention**

Detentions under J&K PSA, in Kashmir happen for various reasons and in various circumstances. During the analysis into the working of the Act, it was found that PSA was imposed on opposition leaders by incumbent government during and even after 1978. But after rise of militancy in 1990's, PSA was used against Over Ground Workers, Stone Pelters and other anti-State ideologues. Table 6.8 analysis various circumstances under which PSA is imposed in Kashmir and particularly in Kulgam and Shopian.

**Table 6.8**

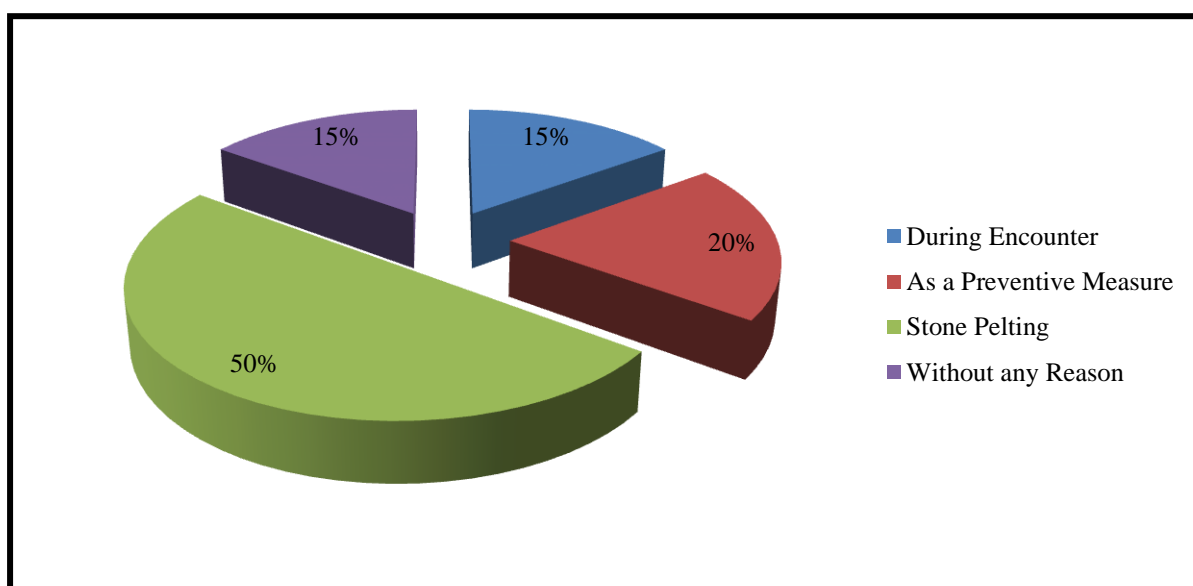
*Circumstances under which the Person was detained*

Circumstances Under Which the Person was Detained	Frequency	Percentage (%)
During Encounter	12	15%
As a Preventive Measure	16	20%
Stone Pelting	40	50%
Without any Reason	12	15%
Total	80	100%

Source: Primary Data

**Diagram 6.7**

*Circumstances under Which the Person was detained*



The data in Table 6.8 shows that 50% of detentions are made during stone pelting which is resorted to by local youth either during encounters or when security

personnel go for a visit through a specific area. The second category under which detentions are made is just as a ‘Preventive measure’ which stands at 20%. The detentions made during encounters and *prima facie* ‘without any reason’ stands equally at 15% (Diagram 6.7). As it is a fact that Kashmir valley witnessed serious stone pelting incidents during 2008, 2010 & 2016 uprisings. The case after 5<sup>th</sup> August, 2019 was different as has been earlier argued also that detentions were made beforehand hence there were meagre or negligible stone pelting incidents.

Further in J&K there are various security agencies operating like Jammu and Kashmir Police, CRPF, SOG and Indian Army. It depends upon the circumstances in which a person is picked and which agency initially detains a person. Most number of times it is J&K Police which ensures the detention but Indian Army and SOG has a primary role to play against insurgency operations. The data in Table 6.9 shows that even though usually detentions are made by Police but in J&K detentions can be made by various agencies. J&K police makes the most detentions under PSA with 47.50% of the cases (even if Army or CRPF detains a person he is later handed over to police after investigation).

**Table 6.9**

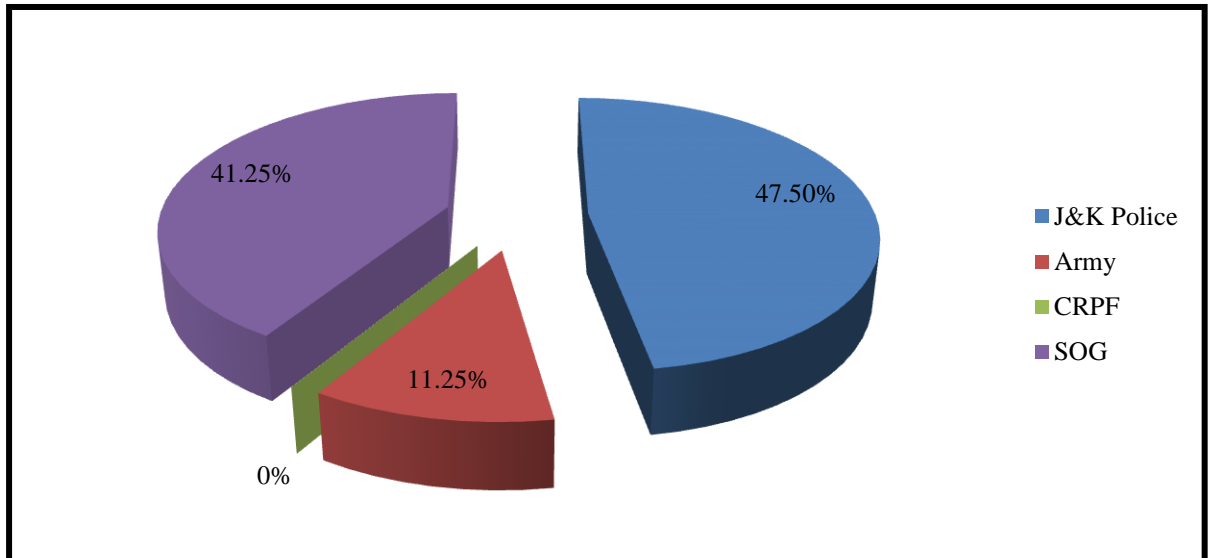
*Security Agency which ensured Detention*

Security Agency	Frequency	Percentage (%)
J&K Police	38	47.5%
Army	09	11.25%
CRPF	00	00%
SOG	33	41.25%
Total	80	100%

Source: Primary Data

### Diagram 6.8

*Security Agency which ensured Detention*



SOG which is the Special Operations Group working with J&K Police makes 41.25% of the detentions under PSA which are later handed over to J&K Police. Army also detains youth and the data shows that 11.25% of youth are detained usually during encounters and stone pelting incidents. The data also reveals that CRPF doesn't indulge in detentions and has good rapport with local populace (Diagram 6.8).

Generally, in case of Preventive detentions and persons who are picked on the basis of suspicion and during Stone Pelting, there remains a gap of few days between formal imposition of PSA and initial detention. It is during these days that primary investigation is done with detenee and usually some sort of torture takes place which is discussed in subsequent sections. Table 6.10 depicts this scenario and shows the analysis of gap between initial detention and imposition of PSA.

**Table 6.10**

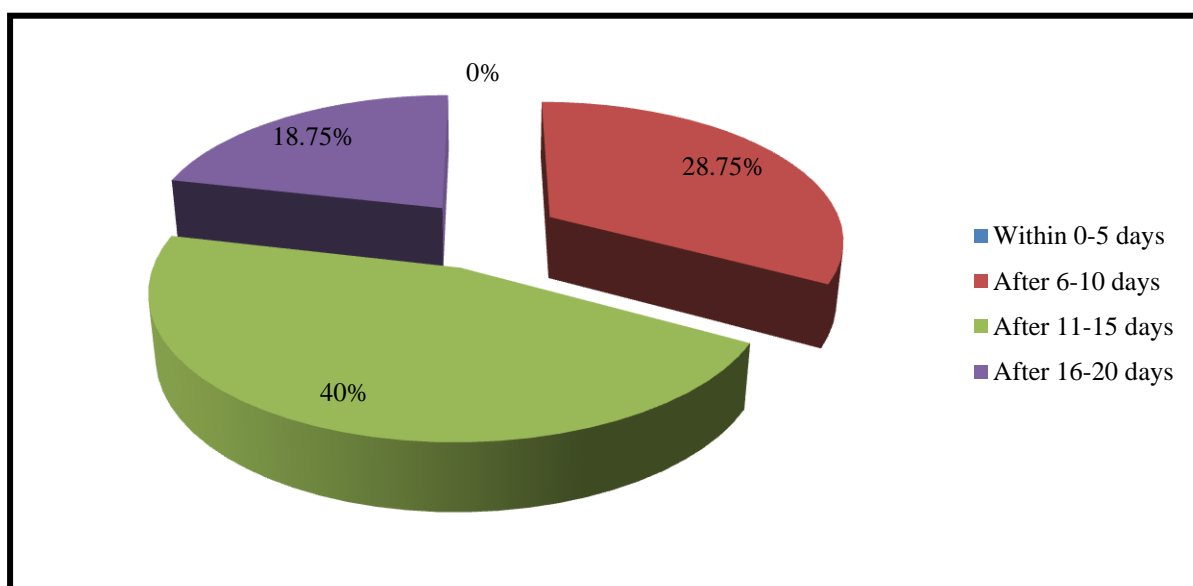
*Gap between Initial detention and imposition of PSA*

Number of Days	Frequency	Percentage (%)
Within 0-5 days	00	00%
After 6-10 days	23	28.75%
After 11-15 days	32	40%
After 16-20 days	15	18.75%
Total	80	100%

Source: Primary Data

**Diagram 6.9**

*Gap between Initial detention and imposition of PSA*



The data in Table 6.10 shows that there remains a gap of some days between the initial detention by Security Forces (SF's) and formal imposition of PSA. 28.75% of respondents said that it was after 6-10 days that PSA was imposed while as 40% of the respondents said that PSA was imposed after 11-15 days, 18.75% of the respondents said that PSA was imposed after 16-20 days. None of the respondents said that PSA was immediately imposed. The data shows that there is a difference

between what the Act says and what is practised in reality by security agencies (Diagram 6.9).

#### **6.4 Torture and types of torture faced by detenu in Detention**

As the data shows that there remains a gap between initial detention & formal imposition of PSA, the respondents revealed that during this period security agencies interrogate or torture the detainees who are detained under dossiers or information provided by intelligence agencies as being OGW's or having militant links. The UN Convention against Torture (UNCAT) defines torture as containing four elements:

- Extreme physical pain or suffering
- to obtain confession through coercion, intimidation or
- By or using official capacity to influence.

Most detention facilities exist solely to serve a punitive purpose and are overseen by government personnel, there is a higher danger of abuse leading to ill-treatment or torture. In most detention settings, the state has complete authority over detained or imprisoned individuals, who are generally held in a confined and isolated environment, making them particularly vulnerable. In India, UAPA accused individuals are even detained in *Anda* cells which are derogatory, punitive as well as instruments of breaking will of the accused (Lokaneeta, 2021). As a result, certain detention practices may infringe the prohibition on torture and ill-treatment when they would not otherwise. Furthermore, imprisonment circumstances might amount to torture and cruel, inhuman, or degrading treatment.

The data in Table 6.11 shows that 85% of the respondents faced torture during initial detention while 15 % said that they didn't face any kind of torture. The data reveals that most number of detainees go through initial torture (Diagram 6.10).

**Table 6.11**

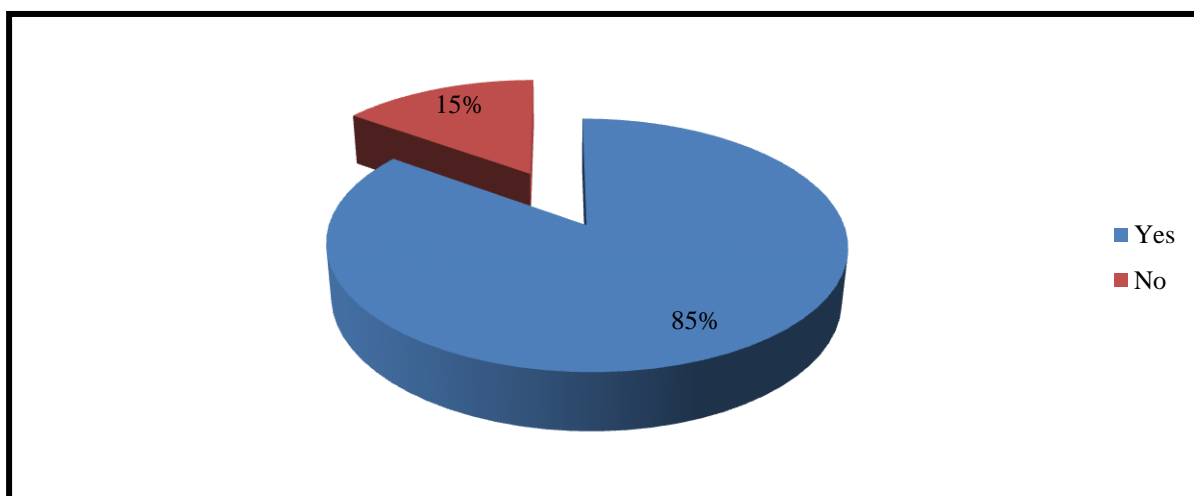
*Torture Faced during detention*

Torture Faced	Frequency	Percentage (%)
Yes	68	85%
No	12	15%
Total	80	100%

Source: Primary Data

**Diagram 6.10**

*Torture Faced during detention*



Since Table 6.9 showed that it is J&K Police detains most number of people but the SOG's (Special Operations Group) is mostly involved in torture. The data in Table 6.12 reveals that 54.41% of the respondents faced torture from SOG, 35.29% faced torture from J&K police and 10.29 % said that they faced torture from Army. There was no incident of torture from CRPF.



**Table 6.12**

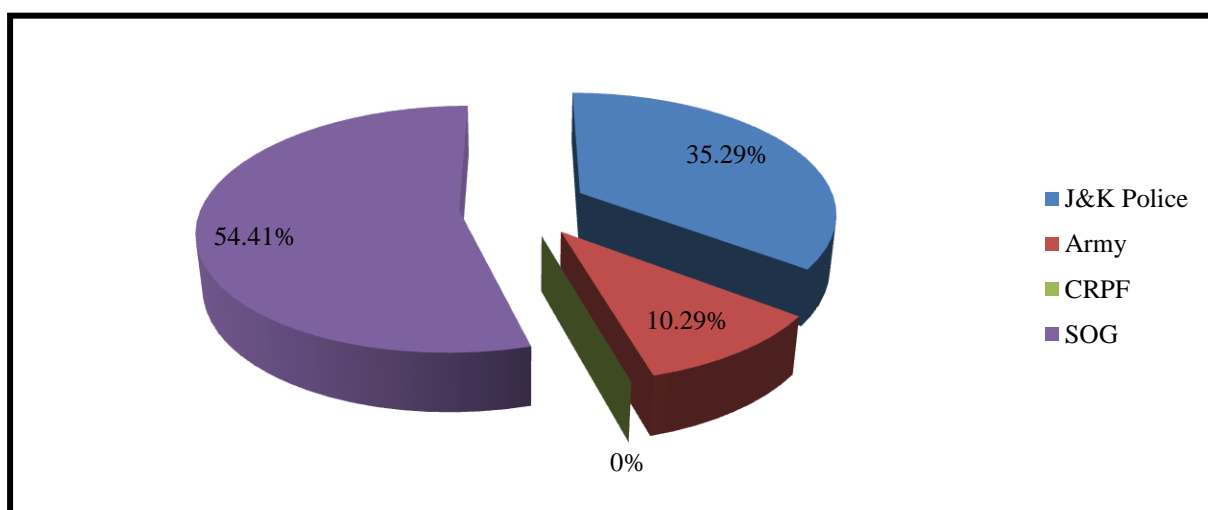
*Security agency involved in Torture*

Security Agency	Frequency	Percentage (%)
J&K Police	24	35.29%
Army	07	10.29%
CRPF	00	00%
SOG	37	54.41%
Total	68	100%

Source: Primary Data

**Diagram 6.11**

*Security agency involved in Torture*



There are various kinds of torture faced by detainees, usually in SOG camps. Torture has historical roots and range from various degrees which involves both inflicting pain on body and soul. Historically torture involved only infliction of pain on body but modern-day torture involves inflicting injury on soul. But apart from those methods which involve making a detainee feel mean and degraded by intimidation and foul language, many (not all, but (in) famous ones) punishment/torture strategies involve:

- **Beating (Slapping/Kicking):** This type of torture is common and prevalent in almost every country. General beating which involves kicking and slapping is initial torture in order to make a detainee feel different from normal and get a message to him that he is in unsafe hands.
- **Burning of tissues:** Burning of body parts or face using hot object like cigarette etc. can leave permanent mark on the face of criminal/ detainee. This can also be done using chemical and is prone to infection.
- **Injuries through penetration:** A sharp object usually knife or rod is used to cut tissues. Torture is horrifying in any form, but piercing traumas such as stab wounds and bullets are especially painful. According to a Boston University research, such injuries are unique among forms of torture in terms of causing long-term brain damage. Firearms and knives are capable of causing serious inside harm, frequently in ways that the offender can't foresee.
- **Asphyxiation:** Asphyxiation is caused by cutting the oxygen supply of criminal by putting pressure on the neck or using cloth. This increase in Carbon level in brain and can cause panic in victim's body.
- **Water Boarding:** Water Boarding involves putting the head of victim in a water tank till suffocation. This involves inflicting pain through asphyxiation because in water, oxygen gets deprived.
- **Stretching of Legs:** This method of torture involves pulling the legs of the victim beyond capacity either with the help of hands or by tying legs with rope and pulling in opposite directions. This method creates pressure on crotch and is widely used method in torture.

- **Electric Shocks:** Electricity as torture method was only used after electricity was discovered after 19<sup>th</sup> century, thus, electric shock torture methods aren't as old as many other frequently utilized methods. However, once established, electricity was quickly adopted as a means of torture. Electric shocks can be as simple as shocking a victim with a current delivered by cattle prod or other equipment connected to a vehicle battery. Shocks are employed as a form of torture because they are both inexpensive and effective. Furthermore, shocks tend to leave little physical evidence of the pain they cause.

According to Table 6.13, detainees face various kinds of torture which ranges from kicking, slapping or water-boarding.

**Table 6.13**

*Type of Torture faced*

Type of torture faced	Frequency
Beating (Slapping/Kicking)	22
Beaten by Wooden Logs	17
Water-boarding	16
Stretching legs beyond capacity	08
Electric Shocks to Private Parts	05

Source: Primary Data

As many as 32.35% of the detainees said that they were beaten randomly by Security agencies, which included slapping & kicking. 25% said that they were beaten with wooden logs, 23.52% said that they face water-boarding, 11.76% said that their legs were stretched beyond usual capacities, 7.35% that they were given electric shocks to private parts.

## 6.5 Providing Reasons of detention to detenu

A detainee has to be given reasons of detention according to Section 13 of the said Act, this is a right which has to be followed but in 77.5% of the cases the grounds were provided after 10 days as specified in the Act for exceptional cases. But it is also mentioned in section 13(2) of J&K PSA, 1978 that if the authority finds that disclosing facts of detention goes against the public interest, then disclosure is not mandatory. According to the J&K Public Safety Act 1978, the detenu has to be provided grounds of detention in a language understood by the detenu. Various Supreme Court judgements have also been pronounced to support this provision as well [Harikisan v. State of Maharashtra, AIR 1962 Sc 911; Hadibandu Das V. District Magistrate, Cuttak & Ors., AIR 1969 SC 43]. 90% of the respondents said that they were provided reasons of detention in a language they understood and mostly English language was used in dossiers. According to J&K PSA, detainee has to be provided reasons of detention within 5-10 days of detention but it was found that 77.50% of the detainees were not provided reasons of detention within those 10 days and 22.5 % said in affirmative that they were provided reasons of detention within 5-10 days (Table 6.14).

**Table 6.14**

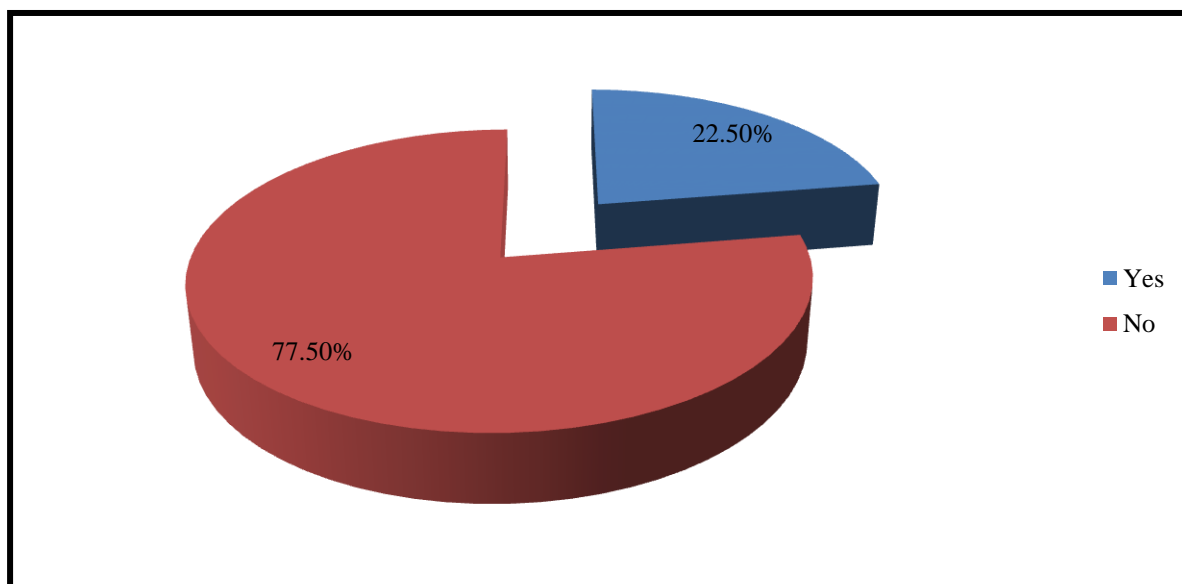
*Communication of Reasons/Grounds of Detention*

Communication of Reasons/Grounds of Detention	Frequency	Percentage (%)
Yes	18	22.5%
No	62	77.5%
Total	80	100%

Source: Primary Data

**Diagram 6.12**

*Communication of Reasons/Grounds of Detention*



In the above analysis of the data it is revealed that although the grounds of detention are provided to the detainee but same are provided with delay (Diagram 6.12).

**Table 6.15**

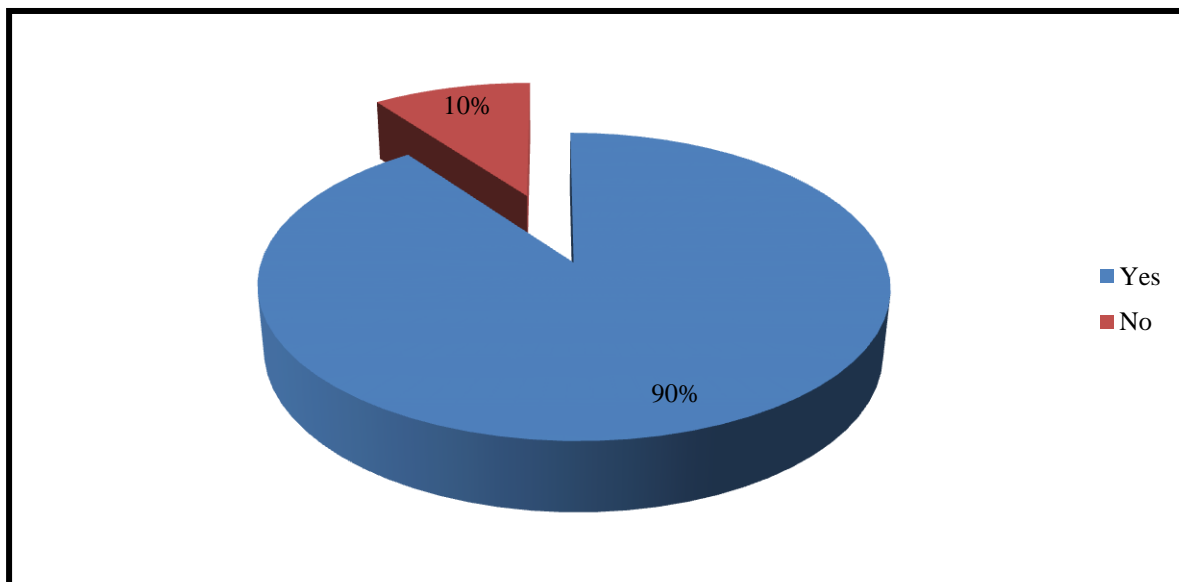
*Grounds of Detention were communicated in the language understood by detainee*

Grounds of Detention were communicated in the language understood by detainee	Frequency	Percentage (%)
Yes	70	90%
No	10	10%
Total	80	100%

Source: Primary Data

### Diagram 6.13

*Grounds of Detention communicated in the language understood by detenu*



According to Table 6.15, 10 % of the detainees said that they were not given the grounds of detention in language they understood the best. In *Smt. Raziya Umar Bakshi V. Union of India*, Supreme Court held that serving/providing grounds of detention to detenu is a precious constitutional right and if the grounds provided are not in the language best understood by detenu, it will mean that no grounds of detention were provided at all [AIR 1980 SC 1751].

### 6.6 Revocation of Detention and Role of Advisory Board

Advisory Board is constituted under J&K PSA, 1978 to review the material on the basis of which PSA has been imposed. A PSA detainee under Section 15 of the said Act has to be produced before Advisory Board within 4 weeks of detention. The data in Table 6.16 reveals that 65% of the respondents did not know anything about Advisory Boards while as 35% said that ‘Yes’ they know about Advisory Board. This provision is very pertinent in ensuring the accountability of PSA cases as more awareness about Advisory Boards will make the option of accountability and openness about the PSA cases much better.

**Table 6.16**

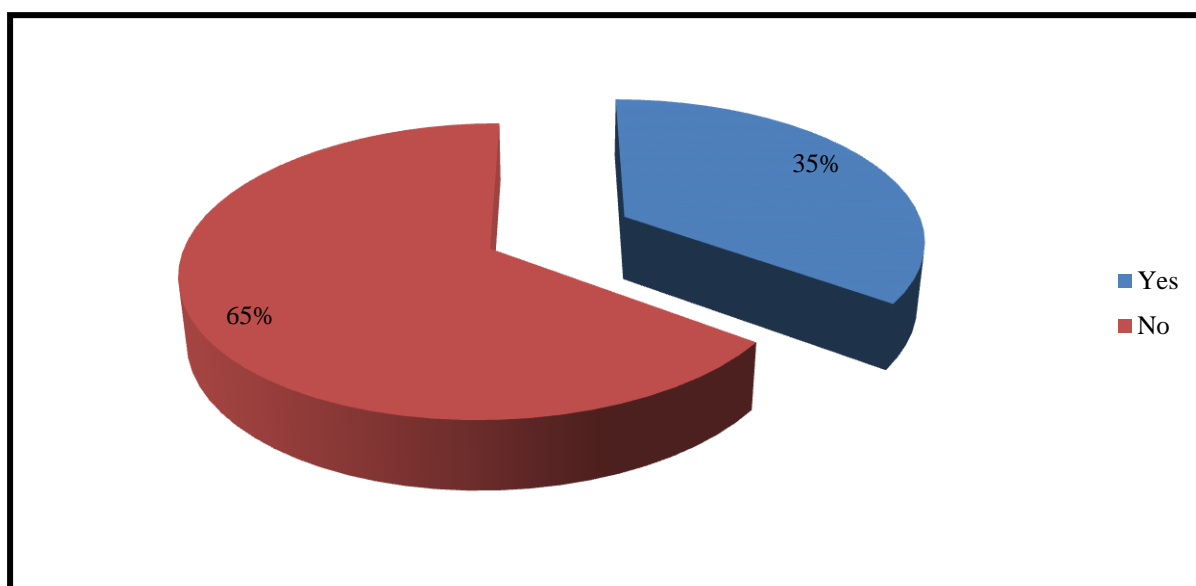
*Awareness about Advisory Board*

Awareness about Advisory Board	Frequency	Percentage (%)
Yes	28	35%
No	52	65%
Total	80	100%

Source: Primary Data

**Diagram 6.14**

*Awareness about Advisory Board*



The data according to Table 6.17 shows that not many detainees are actually produced before the Advisory Board. In fact, only 36% of the respondents said that they were produced before the advisory board (among those who knew about advisory board). A huge percentage of respondents 64% said that they were not produced before Advisory Board which goes contrary to the sections of the Act as spelt out from Section 14 to 17.

**Table 6.17**

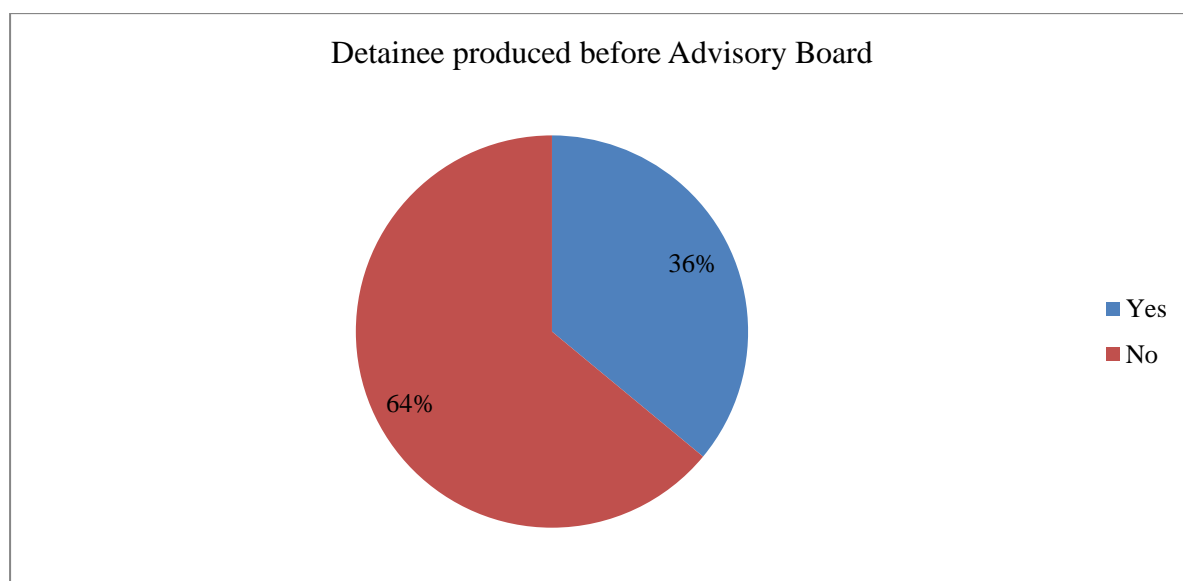
*Detainee produced before the Advisory Board*

Detainee produced before Advisory Board	Frequency	Percentage (%)
Yes	10	36%
No	18	64%
Total	28	100%

Source: Primary Data

**Diagram 6.15**

*Detention of Detainee revoked by Advisory Board*



According to Section 17(2) of J&K PSA, the detention order of a detainee can be revoked by Advisory Board if the Board is satisfied that there is not 'sufficient cause of detention of person concerned'. The data in Table 6.18 reveals that 20% of the detentions were revoked within 3 months after being detained under J&K PSA. Either after this an FIR is filed and usually the detainee has to fight his case in the court or detainee is detained after some time again under new or same dossier. As



many as 80% of the detainee said that their detention was not revoked within 3 months. According to Section 16 of the Act, it is within 8 weeks that the Advisory Board shall opine on the material and after hearing the detenu in person put its report before the Government and such finding is binding on the Government. The total time taken for revocation of PSA by Advisory Board collates to 84 days. Hence timeframe of 3 months has been provided in Table 6.18.

**Table 6.18**

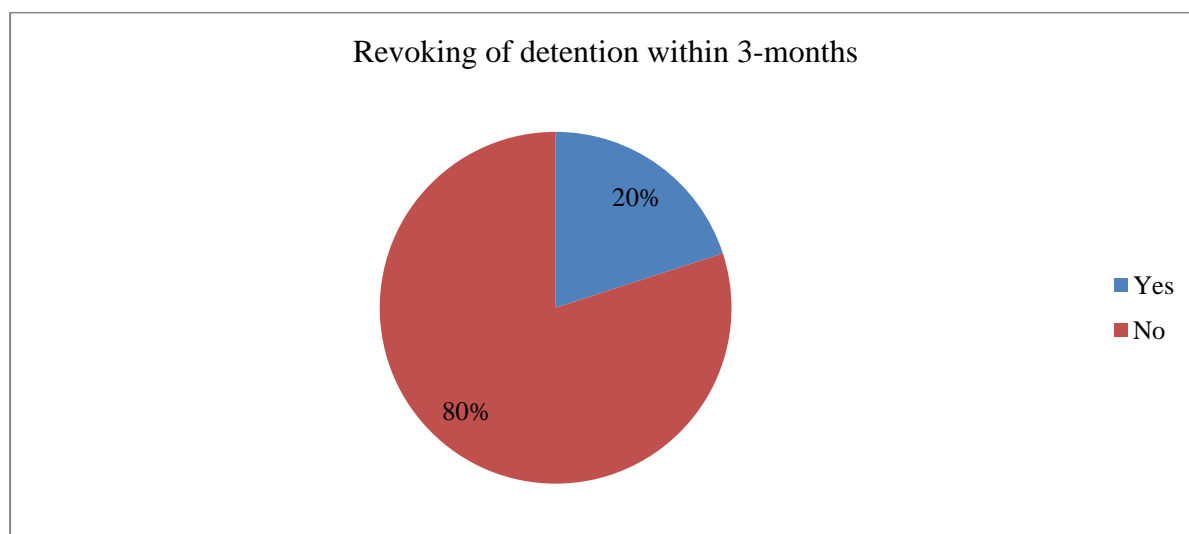
*Detention revoked within 3-months*

Detention revoked within 3-months	Frequency	Percentage (%)
Yes	2	20%
No	8	80%
Total	10	100%

Source: Primary Data

**Diagram 6.16**

*Revoking of detention within 3-months*



## 6.7 Frequency of imposition of PSA

Public Safety Act in J&K is very often used to keep people ‘out of circulation’ and they remain confined to jail. PSA is also imposed because there is no provision of bail like in criminal charges. If security establishment wishes to keep a person behind bars for years together, the objective can be achieved through PSA. This is the reason that repeated offenders and hardened criminals who very often get easy bails are booked under PSA in order to ensure continuous incarceration. Table 6.19 shows that 57.5 % of the cases in Kulgam and Shopian face one-time PSA, 40% of the cases are two-time PSA victims.

**Table 6.19**

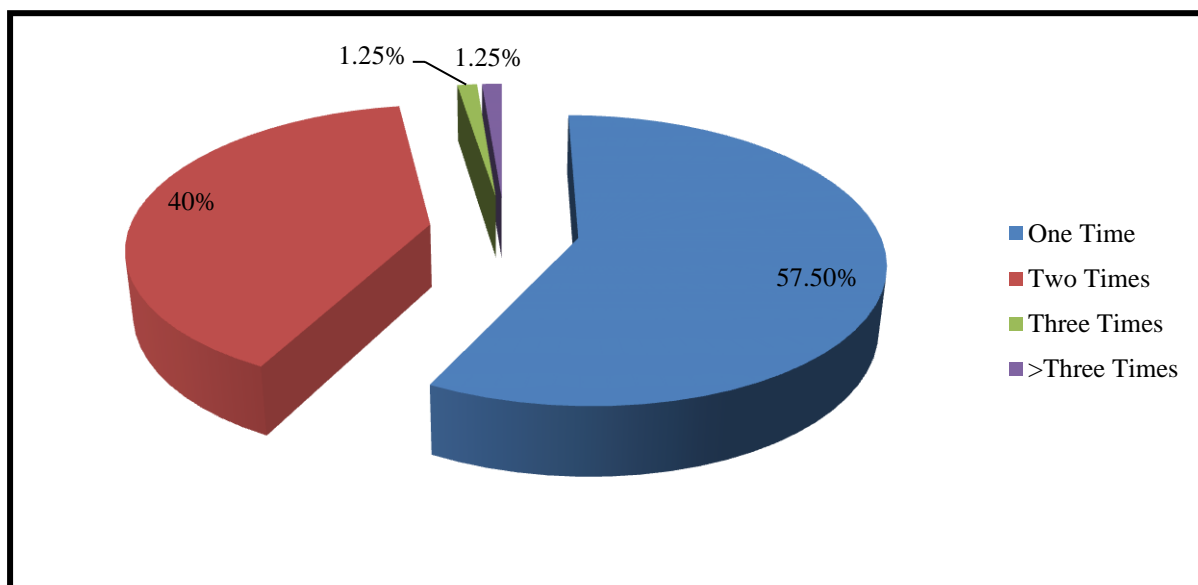
*Frequency of PSA imposed*

Imposition of PSA imposed	Frequency	Percentage (%)
One Time	46	57.5%
Two Times	32	40%
Three Times	01	1.25%
>Three Times	01	1.25%
Total	80	100%

Source: Primary Data

**Diagram 6.17**

*Frequency of imposition of PSA*



The cases where PSA is imposed repeatedly or after a gap is commonly termed as keeping detainees ‘out of circulation’. The frequency of imposition of PSA three or more than three times remains 1.25%. As many as 40% of the respondents revealed that PSA was imposed two times and 57.50% revealed that PSA was imposed only once. This shows that repeated PSA’s are imposed in rare cases and the detainee poses real threat to security or public order of the State (Diagram 6.17).

## **6.8 Duration of detention**

PSA detainees are kept under administrative detention depending upon the dossiers framed by Security agencies. Further if there is not enough strength in the case it is either revoked by Advisory Board or is quashed by High Court. The data in Table 6.20 reveals that as many as 11.25% of the respondents revealed that they were detained more than 12 months. 50% revealed that they were detained between 9-12 months, 20% of the detainees revealed that they were detained between 6-9 months, 8.75 % revealed that they were detained between 3-6 months and 10% detainees

revealed that they were detained between 1-3 months (Diagram 6.18). In J&K PSA detainees are detained for various months depending upon the threat they pose to public peace and State Security.

**Table 6.20**

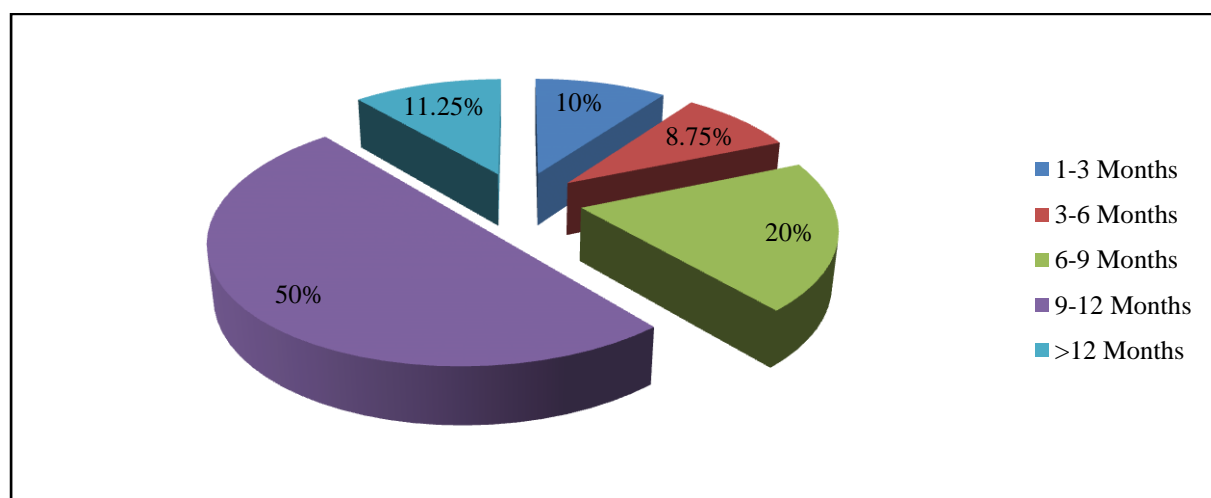
*Duration of detention*

Duration of detention	Frequency	Percentage (%)
1-3 Months	08	10%
3-6 Months	07	8.75%
6-9 Months	16	20%
9-12 Months	40	50%
>12 Months	09	11.25%
Total	80	100%

Source: Primary Data

**Diagram 6.18**

*Duration of detention*



## 6.9 Criminal Charges against the detainees

Even though Preventive Detention is a detention made under virtually no charge but it has been seen that over the period of time some detainees are imposed with criminal charges and hence are detained under UAPA, Arms Act or under NDPS Act etc.

**Table 6.21**

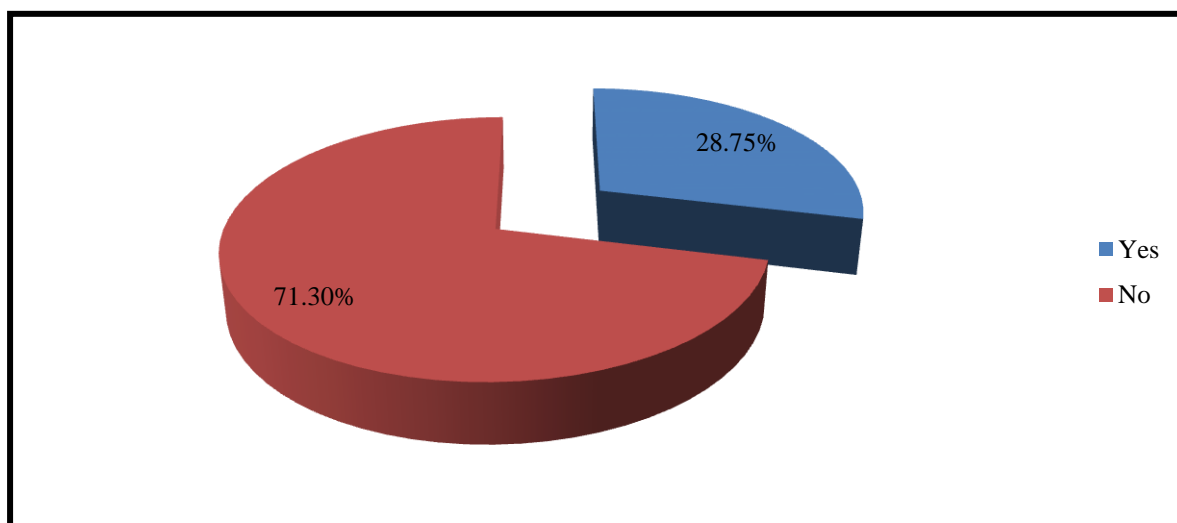
*Criminal Charges or FIR against the detainees*

Criminal Charges or FIR against the detainees	Frequency	Percentage (%)
Yes	23	28.75%
No	57	71.3%
Total	80	100%

Source: Primary Data

**Diagram 6.19**

*Criminal Charges or FIR against the detainees*



J&K PSA is a detention Act which is imposed when a dossier is prepared by security agencies and is signed by District collector or Divisional commissioner. PSA is imposed to prevent a person from committing any crime in the interests of state be it peace or Public order. Quite often after imposition of PSA, if there are any criminal charges against a detainee whether stone pelting or working with militants as OGW then an FIR is also lodged in that case. 71.30% of respondents revealed that there were no FIR's against them while as 28.75% revealed that there was/were FIR(s) against them (Diagram 6.19).

**Table 6.22**

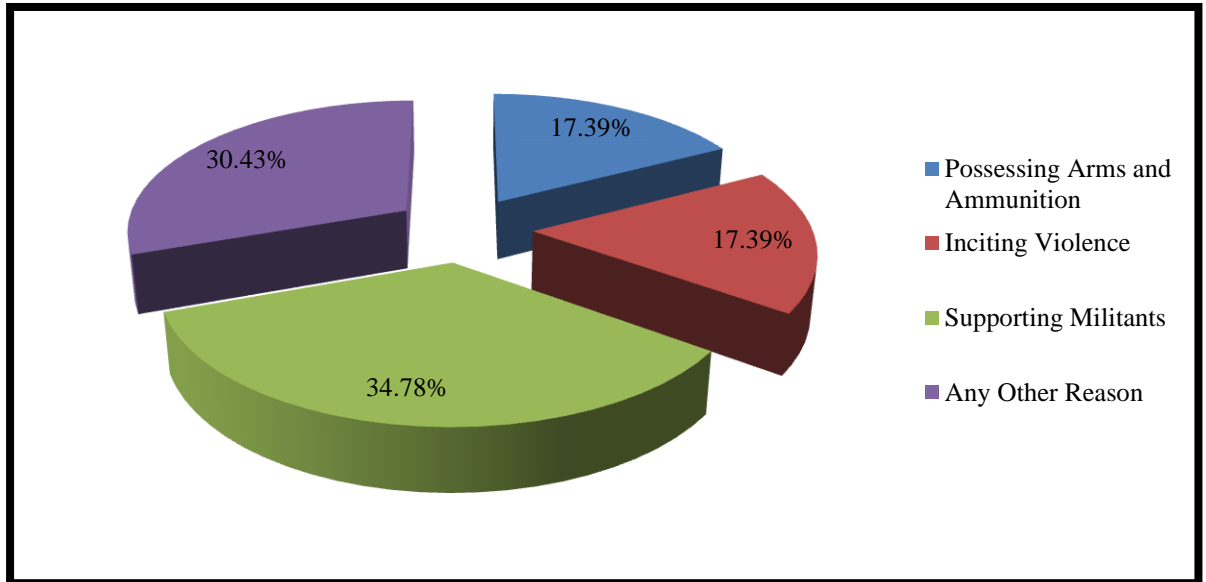
*Crime against which FIR has been lodged*

Crime against which FIR has been lodged	Frequency	Percentage (%)
Possessing Arms and Ammunition	04	17.39%
Inciting Violence	04	17.39%
Supporting Militants	08	34.78%
Any Other Reason	07	30.43%
Total	23	100%

Source: Primary Data

### Diagram 6.20

*Crime against which FIR has been lodged*



The data in Table 6.22 reveals that 34.78% of the respondents had FIR under various reasons which were not specified by them, 30.43% said that they had FIR's for supporting militants or being OGW's, 17.39% revealed that they had FIR's against them for either inciting violence or Possessing Arms & ammunition. The category under "other reasons" after verification was found that there were PSA's imposed in drug related cases also and as many as 9 persons [information collected through RTI] are presently detained under PSA for Timber smuggling (Annexure II). So, there are various sections of CrPC which deal with these crimes. After initial imposition of PSA, the detainees can later be arrested under various relevant sections of CrPC also.

**Table 6.23**

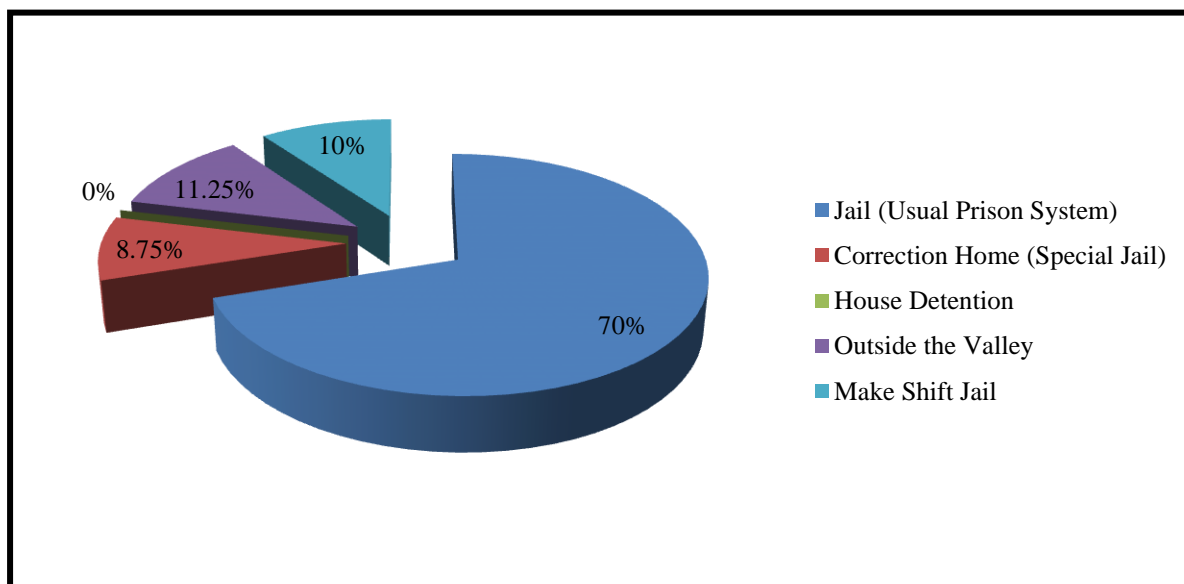
*Place of Detention*

Place of Detention	Frequency	Percentage (%)
Jail (Usual Prison System)	56	70%
Correction Home (Special Jail)	07	8.75%
House Detention	00	00%
Outside the Valley	09	11.25%
Make Shift Jail	08	10%
Total	80	100%

Source: Primary Data

**Diagram 6.21**

*Place of Detention*



The respondents (Table 6.23) revealed that 70% of the detainees were kept in usual Jails in J&K. 11.25% of the respondents revealed that they were sent outside valley and the cases rose after the amendment was made in 2018 to J&K PSA, 1978 under former Governor Satyapal Malik and dilution of Art 370 on 5<sup>th</sup> August, 2019. 10% of the respondents revealed that they were sent to make shift jails and there was



no case of house detention under J&K PSA in district Kulgam and Shopian. There is also system of correctional homes in J&K and 8.75% of the respondents revealed that they were kept in those correctional homes. It was also revealed through RTI response by Home Department that there is only one correctional home in J&K which is in Pulwama. But theoretically Home Department treats every jail for PSA detainees as a ‘correctional home’ (Annexure IV).

Jail inmates do influence each other and during this study as many as 57.50% of the detainees agreed that they have had some kind of influence by other inmates (Diagram 6.22). The theoretical arrangement should have been that Preventive detainees must not be mixed with criminals (also Jail manuals require that detainees are separated) but because of lack of infrastructure, it becomes compulsive that other inmates are mixed with preventive detainees. This observation was made by various jail authorities in their RTI replies like District Jail Rajouri, District Jail Kishtwar & District Jail Baderwah. District Jail Rajouri in its RTI reply specifically mentioned that, “due to lack of accommodation the detenu presently kept with another criminal” (Annexure IX). Subsequently, 42.50% argued that there was no influence.

**Table 6.24**

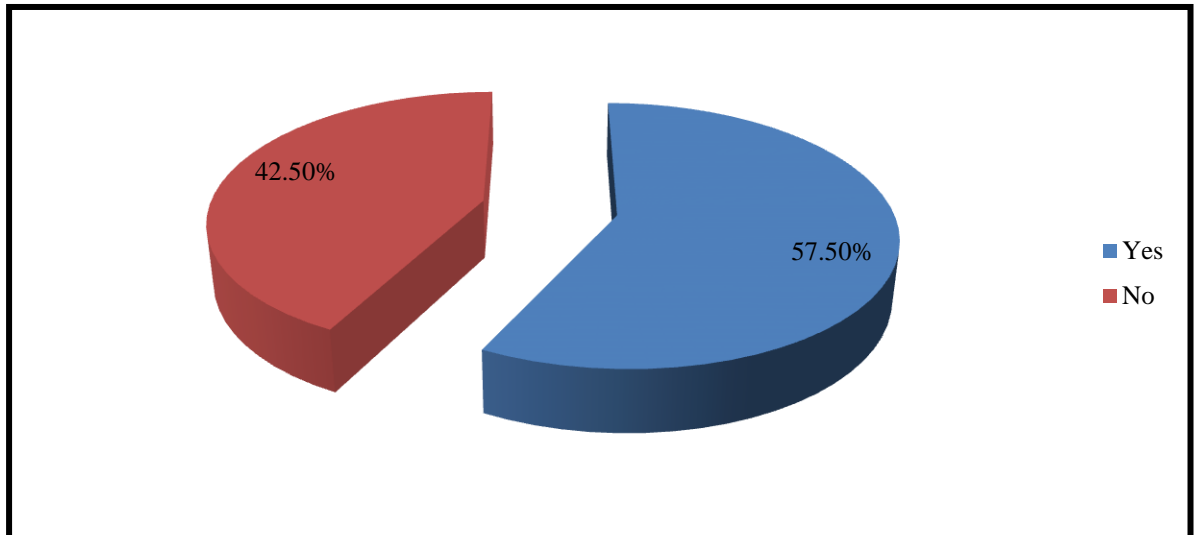
*Influence of fellow detainees on detenu*

Influence of fellow detainees on detenu	Frequency	Percentage (%)
Yes	46	57.5%
No	34	42.5%
Total	80	100%

Source: Primary Data

## Diagram 6.22

*Influence of fellow detainees on detenu*



Adjusting to jail conditions is also cumbersome; many detainees face various issues in initial days like suicide attempts, prison misbehaviour, emotional disorders & self-mutilation etc. (Adams, 1992). The RTI reply by Home Department and various jails in J&K revealed that there is mixing of hard-core criminals and PSA detainees because of lack of infrastructure. Only Udhampur jail authorities revealed that they have only 5 PSA detainees in the concerned District Jail and have good facilities to ensure that mixing of PSA detainees doesn't take place (Annexure V). But every possible measure is taken to segregate the first time offenders even though infrastructure is lacking (Annexure VIII).

**Table 6.25**

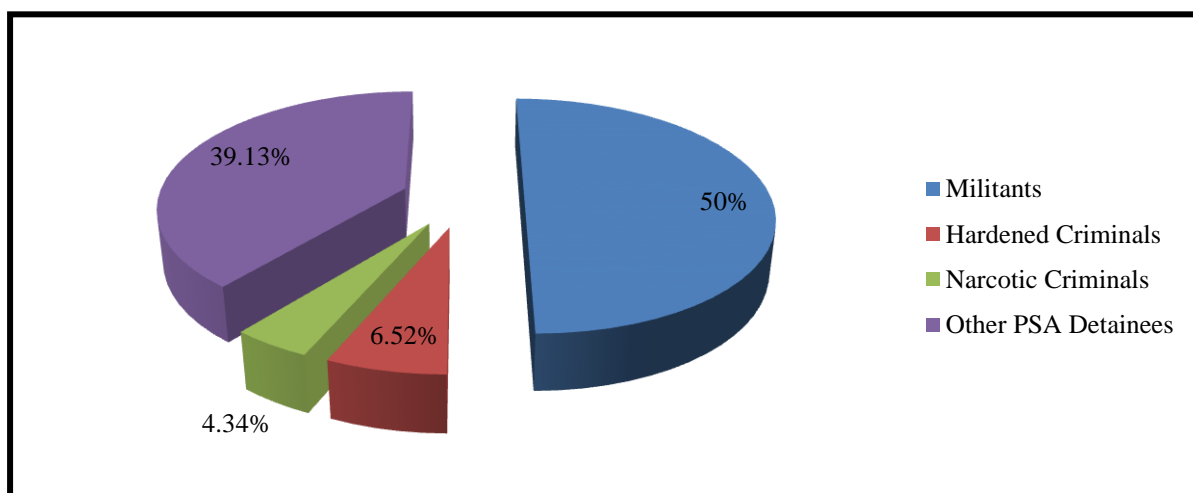
*Inmates influencing the detenu*

Inmates influencing the detenu	Frequency	Percentage (%)
Militants	23	50%
Hardened Criminals	03	6.52%
Narcotic Criminals	02	4.34%
Other PSA Detainees	18	39.13%
Total	46	100%

Source: Primary Data

**Diagram 6.23**

*Inmates influencing the detenu*



According to above data shown in Table 6.25, 50% of the detainees said that they were influenced by militants in jails, 39.13% said that they were influenced by other PSA detainees in detention, 6.52% said that they were influenced by Hardened criminals in detention, 4.34% respondents said that they were influenced by narcotic criminals. This shows that detainees under Preventive Detention laws must be separated by other criminals who face charges under various sections of CrPC.

**Table 6.26**

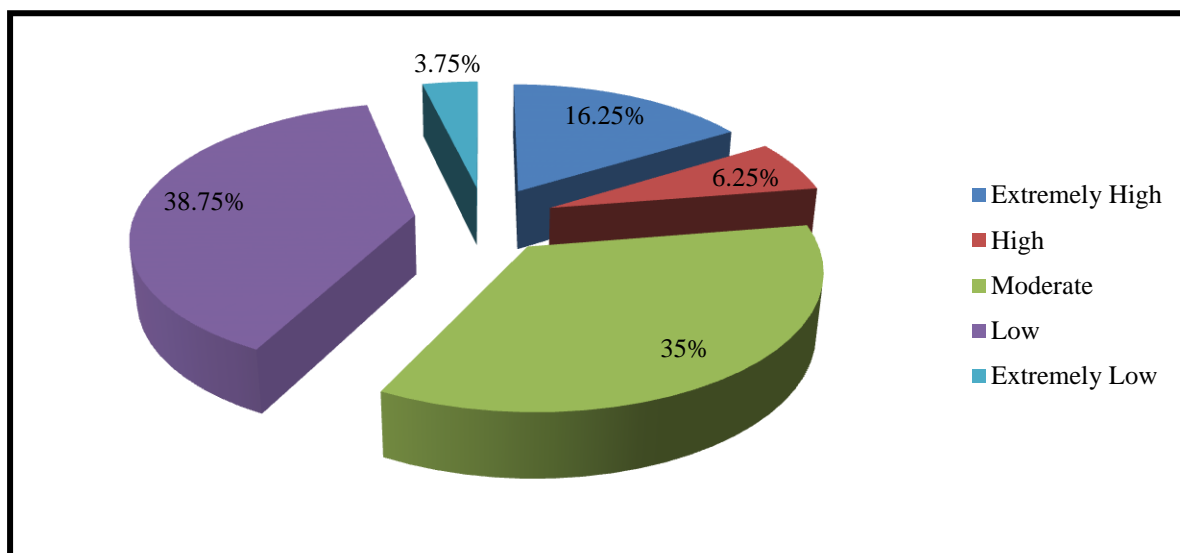
*Inclination for joining militancy*

Inclination for joining militancy	Frequency	Percentage (%)
Extremely High	13	16.25%
High	05	6.25%
Moderate	28	35%
Low	31	38.75%
Extremely Low	03	3.75%
Total	80	100%

Source: Primary Data

**Diagram 6.24**

*Inclination for joining militancy*



According to the data in Table 6.26, the detainees sometimes are so dangerously influenced in detention that they might pose threat to larger security scenario in J&K. This data also supported by the fact that various PSA detainees have actually joined militant ranks and have been killed in encounters. The data reveals that

16.25% of the respondents believe that their inclination towards joining militancy rose ‘extremely high’ levels after they were detained under PSA, 6.25% argued that their inclination towards same question is ‘High’, 35% that is 28 respondents said that inclination towards joining militancy is ‘moderate’, 38.75% of the respondents said that their inclination towards joining militancy is Low and 3.75% respondents said that inclination towards joining militancy is ‘extremely low’. The data shows that it is because of mixing of PSA detainees with other prisoners and making the process a punishment which becomes dangerous for larger interests of security agencies and in turn the State.

**Table 6.27**

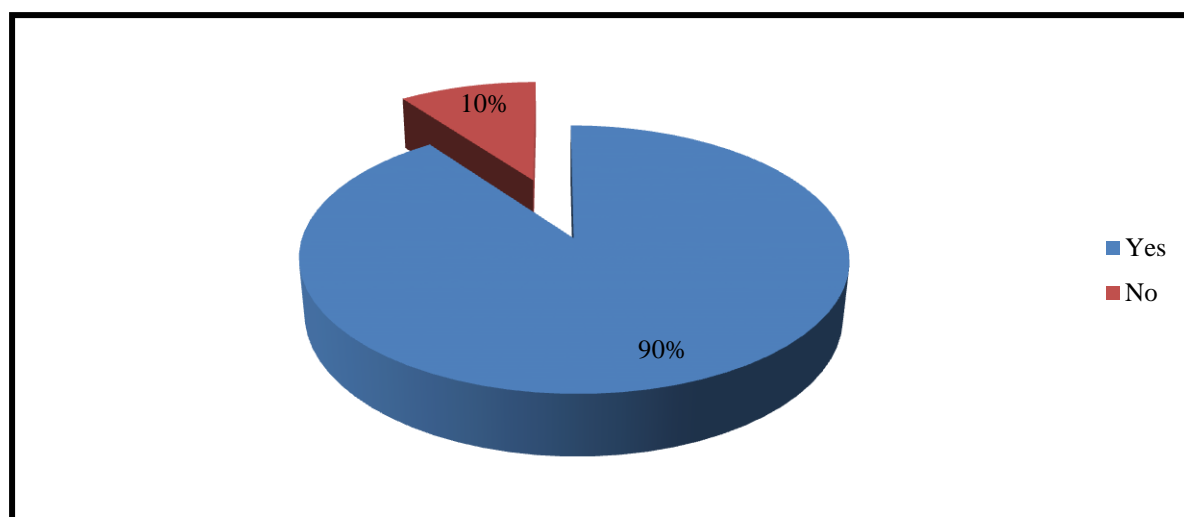
*Knowledge regarding Detention can be quashed by High Court*

Knowledge regarding Detention can be quashed by High Court	Frequency	Percentage (%)
Yes	72	90%
No	08	10%
Total	80	100%

Source: Primary Data

**Diagram 6.25**

*Knowledge regarding Detention can be quashed by High Court*



Another option (apart from revocation by Advisory Board) for detainees is to get their detention quashed by High Court. The data according to Table 6.27 shows that 90% of the respondents said that they knew that PSA can be quashed by High Court. Lower courts don't have any jurisdiction over PSA cases. Only 10% said that they don't know whether PSA can be quashed by High Court. The observations from the field showed that there needs to be some kind of awareness among the detainees about the legal intricacies and provisions whereby detainees can approach appropriate authorities for legal remedies.

**Table 6.28**

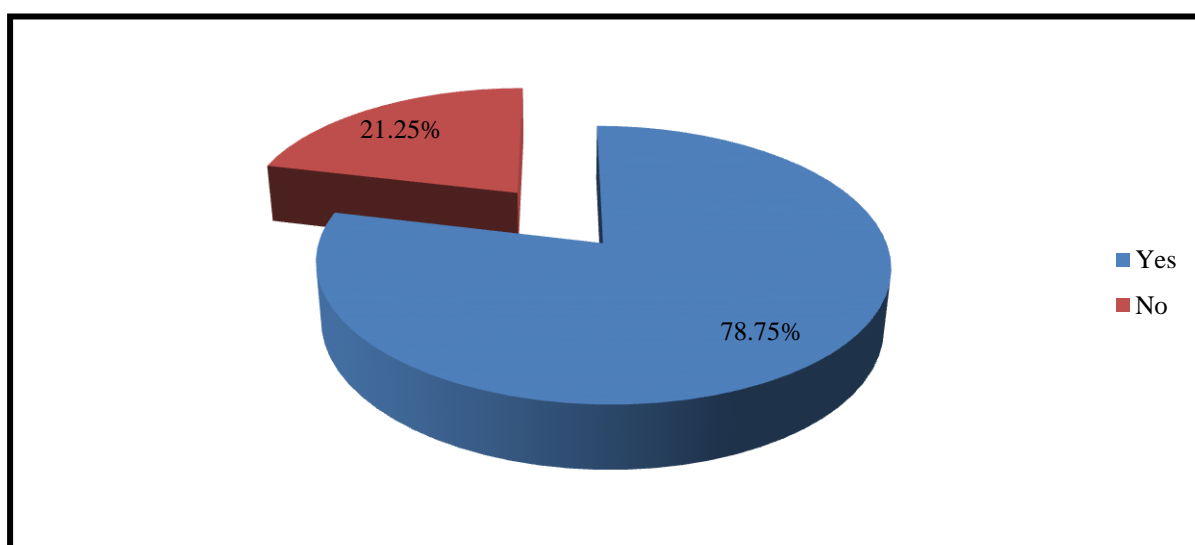
*Appeal to High Court*

Appeal to High Court	Frequency	Percentage (%)
Yes	63	78.75%
No	17	21.25%
Total	80	100%

Source: Primary Data

**Diagram 6.26**

*Appeal to High Court*



Even though 90% of the respondents knew that PSA can be quashed by High Court but a little low that is 78.75% actually go to High Court to appeal for quashing the PSA (Table 6.28). 21.25% respondents said that they have not appealed in High Court. Reasons put forward by detainees were many and prime reason articulated was that it is futile to appeal in High Court and better option is to serve the detention and get relief gradually when PSA detention period is over (strangely detainees strongly believed that they will be released after 3 or 6 months).

**Table 6.28.1**

*Relief by High Court*

Relief by High Court	Frequency	Percentage (%)
Yes	39	61.90%
No	24	38.09%
Total	63	100%

Source: Primary Data

**Diagram 6.26.1**

*Relief by High Court*

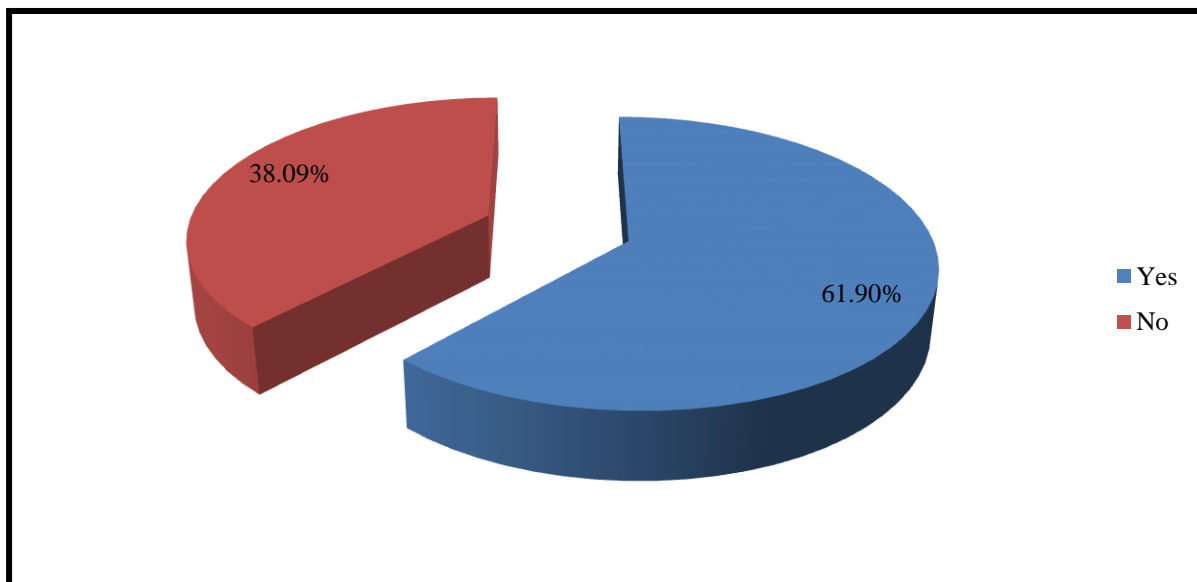


Table 6.28.1 shows the magnitude of relief provided to detainees by High Court. A healthy percentage of detainees that is 61.90% get their PSA quashed by High Court if 78.75% appeal in High Court. 38.09% said that their cases were not quashed in High Court. The data from above two tables shows that it is better for the PSA detainees to appeal in High Court against their detentions as the percentage of quashing the PSA goes high, but same is not case with the Advisory Board. Data accessed through RTI from High Court of J&K showed that year wise disposal as under:

- 2015 392 cases disposed
- 2016 648 cases disposed
- 2017 538 cases disposed
- 2018 460 cases disposed
- 2019 379 cases disposed
- 2020 463 cases disposed
- 2021 191 cases disposed till 20<sup>th</sup> August, 2021



**Table 6.29**

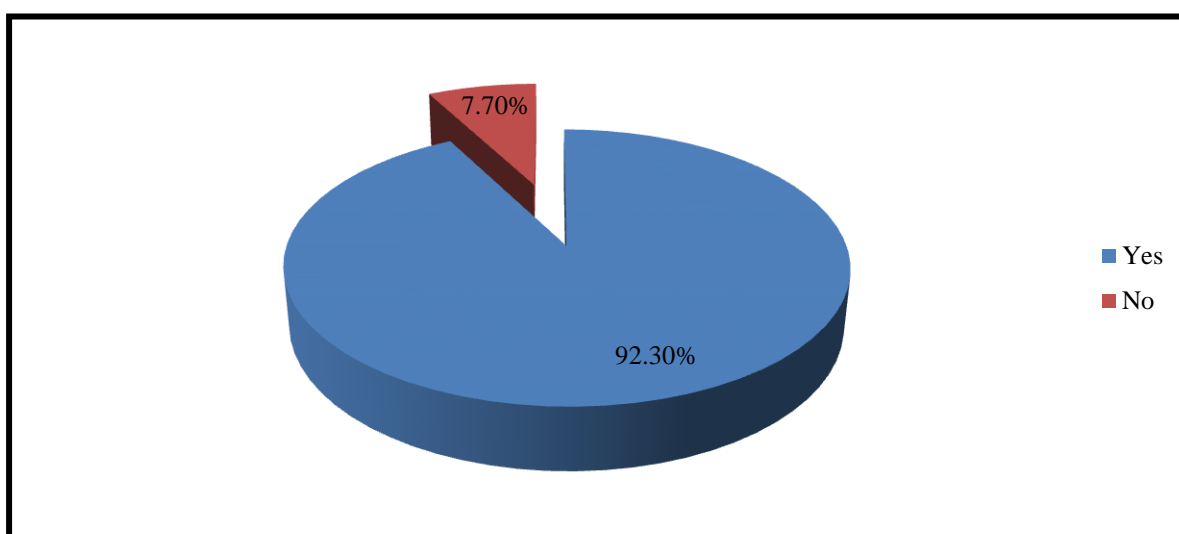
*Police Complying with Court Order*

Complying with Court Order	Frequency	Percentage (%)
Yes	36	92.30%
No	03	7.70%
Total	39	100%

Source: Primary Data

**Diagram 6.27**

*Police Complying with Court Order*



Almost all the cases in which High Court has directed that the detainee be released, it is immediately implemented by concerned authorities. 92.30% respondents said that they were immediately released by concerned authorities upon seeing the High Court order and they were released but just 7.70% said that there was some delay in implementation of the order (Diagram 6.27).

**Table 6.30**

*Repetition of Detention or tactics of 'keeping out of circulation'*

Repetition of Detention or tactics of 'keeping out of circulation'	Frequency	Percentage (%)
Yes	21	53.84%
No	18	46.15%
Total	39	100%

Source: Primary Data

**Diagram 6.28**

*Repetition of Detention or tactics of 'keeping out of circulation'*

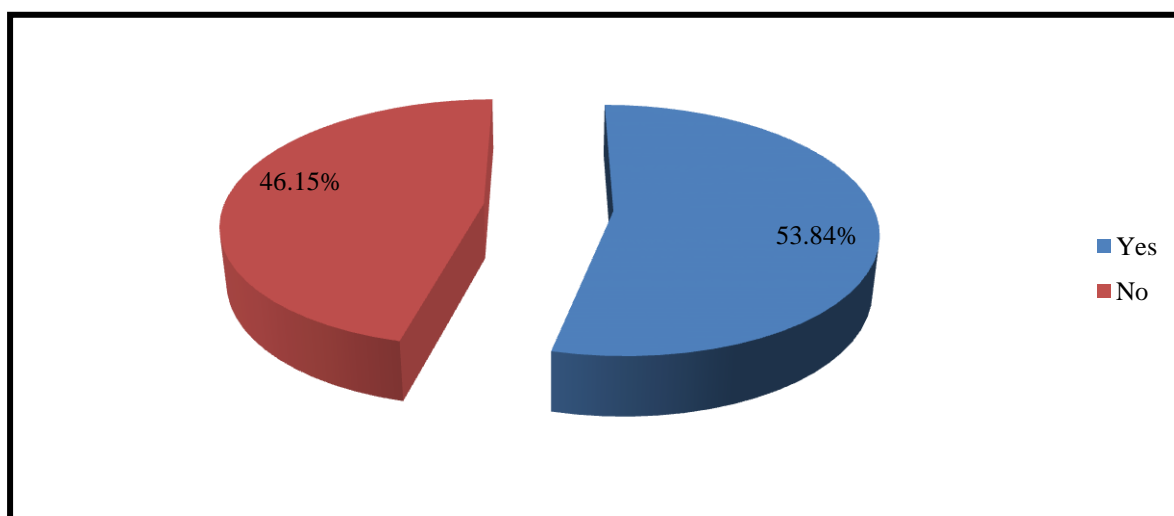


Table 6.30 shows that almost 53.84% cases of PSA detainees which were quashed by High Court were again after sometime detained by security agencies again. This data adds up to the argument were security agencies feel that detainee continues to be a threat to peace and larger public order/security. Further, the respondents who get detained under PSA multiple times don't appeal again and again before High Court because they conclude that security agencies want them in continuous detention till the behaviour of individual is not corrected. 46.15% said

that they were not imposed with any other detention order. Thus, in most of the PSA cases process becomes the punishment.

**Table 6.30.1**

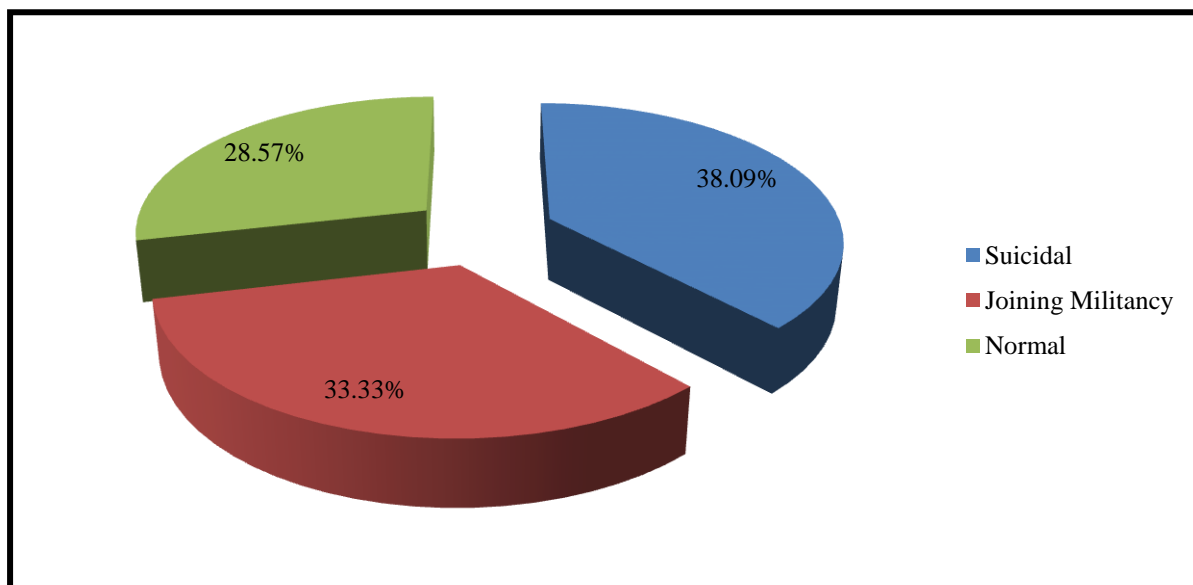
*Psychological impact after repeated PSA's*

Psychological Impact	Frequency	Percentage (%)
Suicidal	08	38.09%
Joining Militancy	07	33.33%
Normal	06	28.57%
Total	21	100%

Source: Primary Data

**Diagram 6.28.1**

*Psychological impact after repeated PSA's*



The data according to Table 6.30.1 gives insights about mental/psychological state of detainees when they are again detained under PSA after High Court quashes their judgement. 38.09% respondents said that their first mental reaction was 'suicidal', 33.33% said that they wanted to join militancy, and 28.57% respondents said their mental state was quite 'normal'. The data shows that making process the

punishment for PSA detainees is quite dangerous in certain cases. Repeated PSA's must be imposed with utmost care and proper assertion of new facts as also reiterated by Supreme Court & J&K High Court in various Judgements. This was reiterated by J&K High Court while quashing the PSA of Mushtaq Ahmad Wani of Kokernag Anantnag. The Judgement was pronounced by Justice Sanjay Dhar and the Judges also quoted observations made in Chhagen Bhagwan Kahar V/s N. L Kalna & Others. The Court in Wani's case observed that "If such previous grounds of detention are taken into consideration while forming the subjective satisfaction by the detaining authority in making a detention order, the order of detention will be vitiated...It is of no consequence if the further fresh facts disclosed in the grounds of the impugned detention order have been considered".

**Table 6.31**

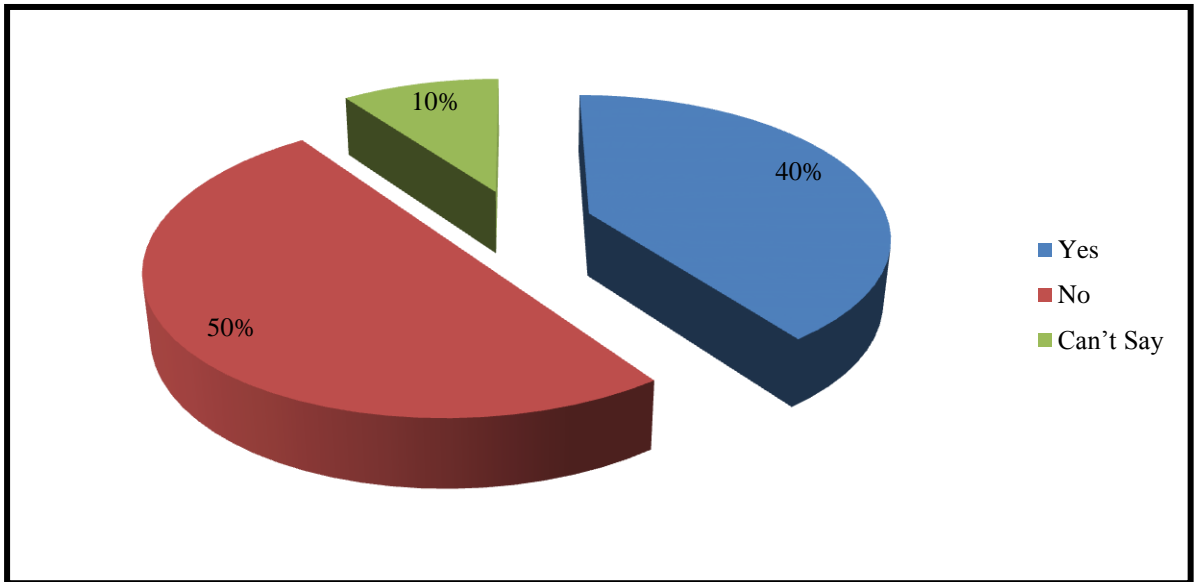
*Detentions and Political participation*

Detentions and Political participation	Frequency	Percentage (%)
Yes	32	40%
No	40	50%
Can't Say	08	10%
Total	80	100%

Source: Primary Data

**Diagram 6.29**

*Detentions and Political participation*



The data according to Table 6.31 reveals about the democratic leanings of PSA detainees. 50% said that they don't want to participate in electoral process while as good percentage that is 40% said that they will participate in electoral process and 10% were not sure about the same question. The data reveals that PSA detention impacts the democratic credentials of detainees. The Post-detention phase has also to be considered important by Security agencies. During detention, security agencies must ensure proper behavioural orientation of PSA detainees.

**Table 6.32**

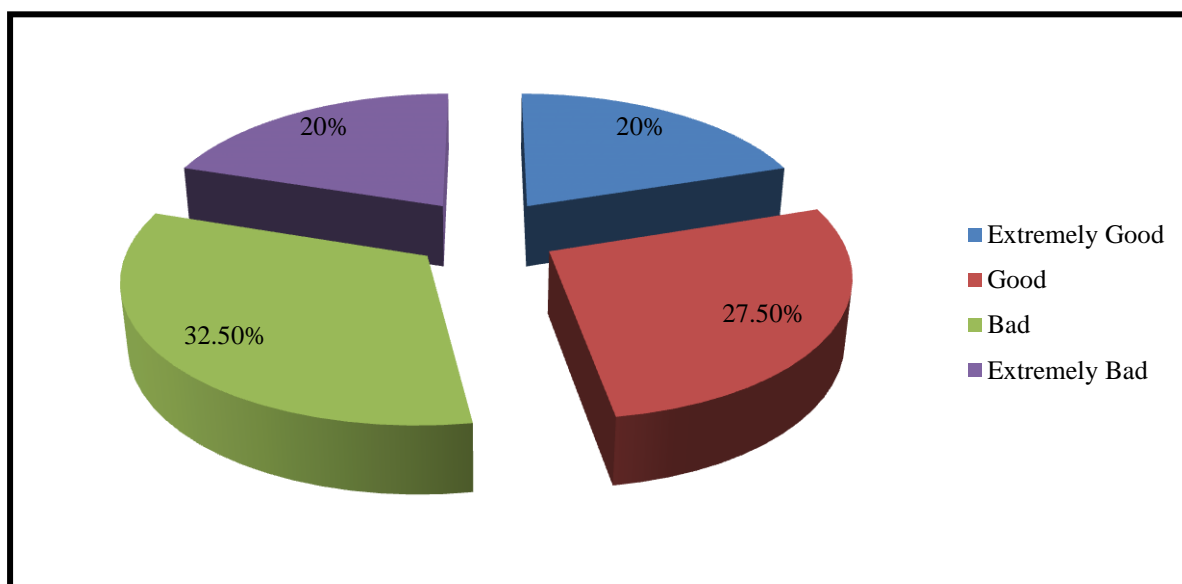
*Rapport of detainee with family*

Rapport of detainee with family	Frequency	Percentage (%)
Extremely Good	16	20%
Good	22	27.5%
Bad	26	32.5%
Extremely Bad	16	20%
Total	80	100%

Source: Primary Data

**Diagram 6.30**

*Rapport of detainee with family*



In order to analyse the impact of familial relations of detainee, the question was asked about the familial relations after detainee was released. The data showed that 20% of the detainees had ‘extremely bad’ relationship with families, 32.50% said that the relation was ‘bad’, 27.50% said that the relationship was ‘good’ and 20% respondents said that the relationship was ‘extremely good’ with the family after

release. The data reveals that detention has an adverse impact on familial relations of detainees and they suffer quite a lot after being released from the detention. Arditti, Lambert-Shute & Joest, (2003) have shown through exploratory studies that incarcerations lead to impact on familial relations, finances and adds to emotional pain of families (Diagram 6.30).

**Table 6.33**

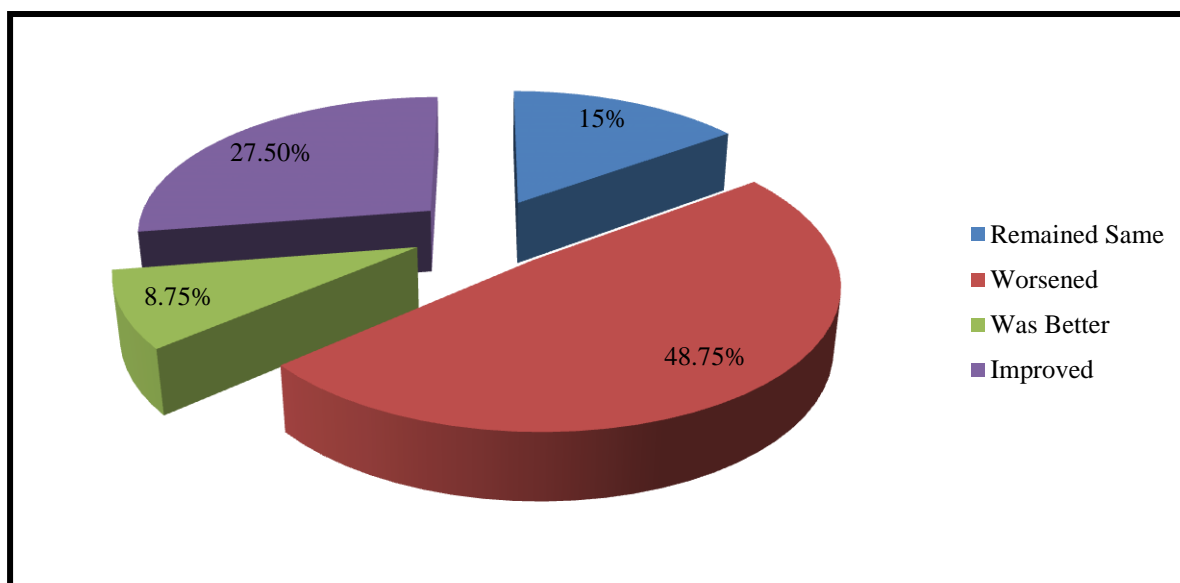
*Society's response towards detenu pre and post imposition of PSA*

Society's response towards detenu pre and post imposition of PSA	Frequency	Percentage (%)
Remained Same	12	15%
Worsened	39	48.75%
Was Better	07	8.75%
Improved	22	27.5%
Total	80	100%

Source: Primary Data

**Diagram 6.31**

*Society's response towards detenu pre and post imposition of PSA*



The data in Table 6.33 reveals the impact on social life of a PSA detainee. Whooping 48.75% respondents said that their social relationship pre-& post imposition of PSA got ‘worsened’, 27.50% respondents said that the relationship with society improved, 15% said that the relationship ‘remained same’ and just 8.75% respondents revealed that relationship with society actually was ‘much better’. The data shows that detention have adverse impact on social relationship of an individual in certain cases and PSA to many detainees becomes a social stigma and PSA detention is not something which is revered by society.

**Table 6.34**

*Detention and Impact on Job/Studies*

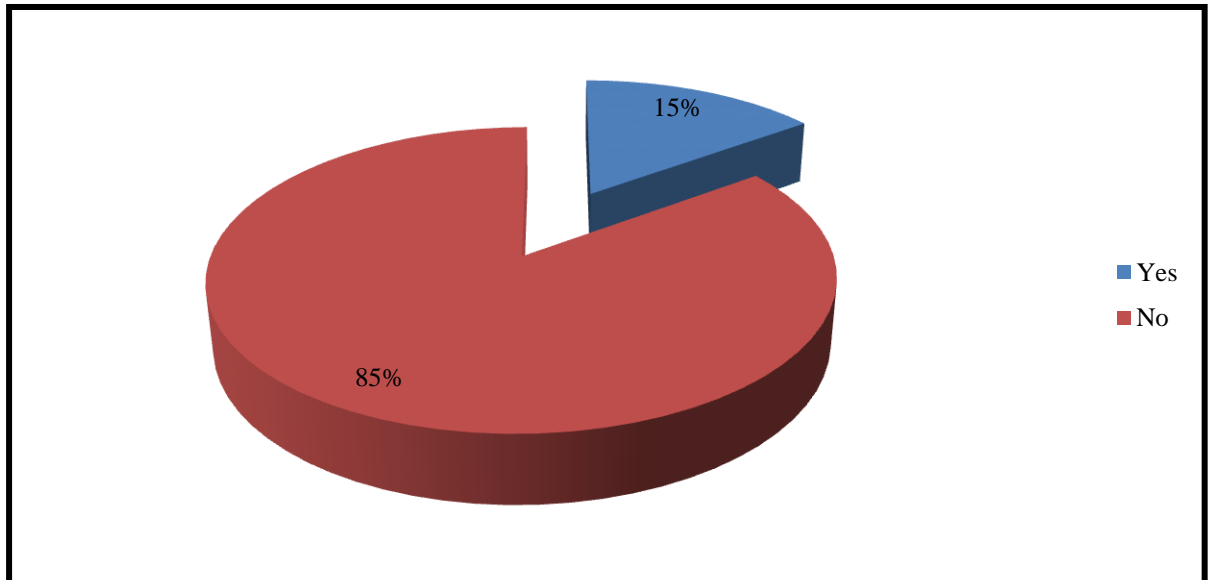
Detention and Impact on Job/Studies	Frequency	Percentage (%)
Yes	12	15%
No	68	85%
Total	80	100%

Source: Primary Data



### Diagram 6.32

#### *Detention and Impact on Job/Studies*



The economic impact of PSA on detainees was found to be phenomenal. 85% respondents revealed that they were not able to resume their studies/job normally. Only 15% respondents said that the post detention phase economically was okay and they were able to resume their studies/job normally. The data reveals that detainees suffer quite a lot economically after detention and they lose their survival/livelihood options and in most cases their economic life gets disrupted.

**Table 6.34.1**

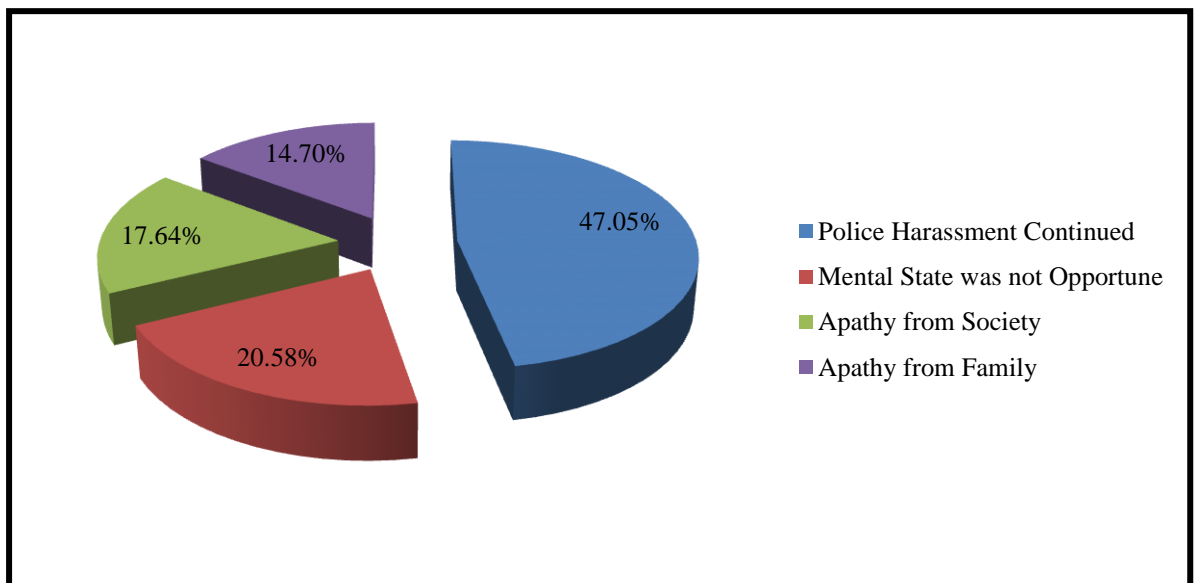
*Problems faced in resumption of normal life*

Problems faced in resumption of normal life	Frequency	Percentage (%)
Police Harassment Continued	32	47.05%
Mental State was not Opportune	14	20.58%
Apathy from Society	12	17.64%
Apathy from Family	10	14.70%
Total	68	100%

Source: Primary Data

**Diagram 6.32.1**

*Problems faced in resumption of normal life*



According to Table 6.34.1 which was logical extension of previous question, the respondents revealed the problems behind the normal resumption of life. The data shows that it is mostly the Police harassment which continues even after release of the detenu which was observed in 47.05% of the cases, 20.58% respondents said that

‘Mental state was not opportune’ after detention to continue with normal life, 17.64% respondents revealed that they face ‘apathy from society’, and 14.70% said that they faced ‘apathy from family’.

## **6.10 Detentions and Family Visitations**

Imprisonment disturbs the family life of detainees as well as family members. The family unit gets in disarray as your loved one is put behind bars. The contact with the incarcerated members is hard to get. It may come at a high cost and usually is difficult to arrange. The visitations are also curtailed and are confined to certain minutes. The family contact always reduces the stress from detainees and they may feel better after the interaction (Cochran, 2012). The family visits reduce recidivism in detainees and can get a better life if family visitations are allowed frequently & more easily (Bales & Mears, 2008). The parents especially mothers feel better if visits are allowed frequently (Poehlmann, 2005). The visitations also vary among incarcerated individuals. Suppose if an individual is frequently incarcerated, the number of visitations is reduced by the family. Shlafer, Loper, and Schillmoeller (2015, p-2) argue that the mode of interactions also matters and can be a better experience for inmate. Thus, the rules of visitation if made liberal & if contact-visits are allowed frequently, the authors argue can help in increasing proximity of inmate with family.

Inmates prior history substantially predict visits, according to existing research on criminal detention, and inmates with more severe detention encounters are less likely to be given visits (Cochran *et al*, 2014). Furthermore, prisoners convicted of such forms of serious or dangerous offences usually have meagre or no interaction with their children, as family members may consider visitation to be dangerous or harmful for the children (Shlafer *et al*, 2015). Finally, prisoners who have been confined for long time may have deteriorated or broken ties with their family, resulting in fewer visits (Cochran *et al*, 2014; Christian 2005). Caitlin & Branich (2017) have also studied the patterns of impact of family visitations on detentions.

The data collected for the above study shows that family visits did take place for detainees in Kashmir. The frequency of visits reduced after covid-19 & when people were detained in Jails outside valley like in UP, Rajasthan etc.

**Table 6.35**

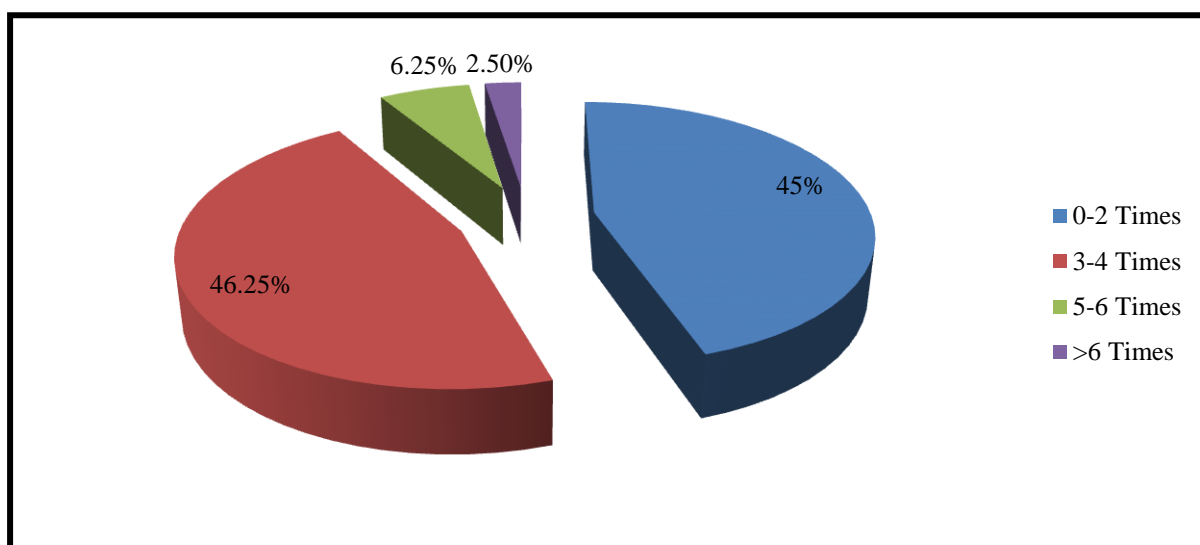
*Frequency of Family visits*

Frequency of Family visits	Frequency	Percentage (%)
0-2 Times	36	45%
3-4 Times	37	46.25%
5-6 Times	05	6.25%
>6 Times	02	2.5%
Total	80	100%

Source: Primary Data

**Diagram 6.33**

*Frequency of Family visits*



According to data in Table 6.35, it was revealed that 46.25% families visited jail 3-4 times, 45% families said that they visited jail 0-2 times, 6.25% families said

that they visited jail 5-6 times and 2.5% families said that they visited jail more than 6 times. The data shows that during detention period families make good number of visits to jails in order to meet the detainee which drains them psychologically as well as financially and emotionally (Diagram 6.33).

**Table 6.36**

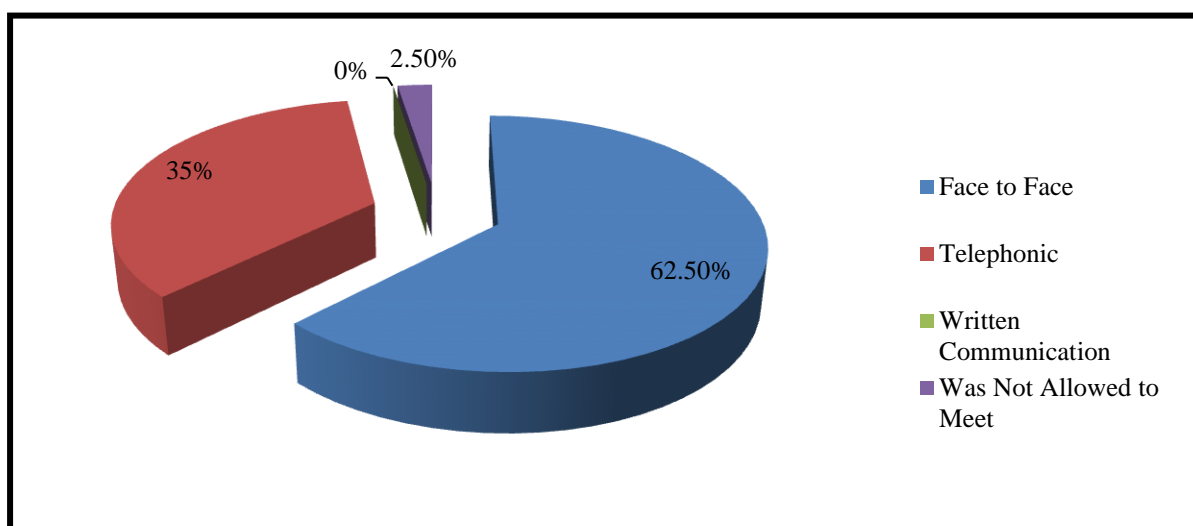
*Procedure of Meeting*

Procedure of Meeting	Frequency	Percentage (%)
Face to Face	50	62.5%
Telephonic	28	35%
Written Communication	00	00%
Was Not Allowed to Meet	02	2.5%
Total	80	100%

Source: Primary Data

**Diagram 6.34**

*Procedure of Meeting*



According to the above Table 6.36 it was revealed that 62.5 % families arrangement for meeting was 'face to face', 35% said that the meeting was

telephonic, no cases of written communication were revealed and 2.5% said that the meeting ‘was not allowed’. The data shows that police agencies/jail authorities are quite cordial in arranging the meetings of detainees with families which adds positively to the emotional wellbeing of detainee (Diagram 6.34).

**Table 6.37**

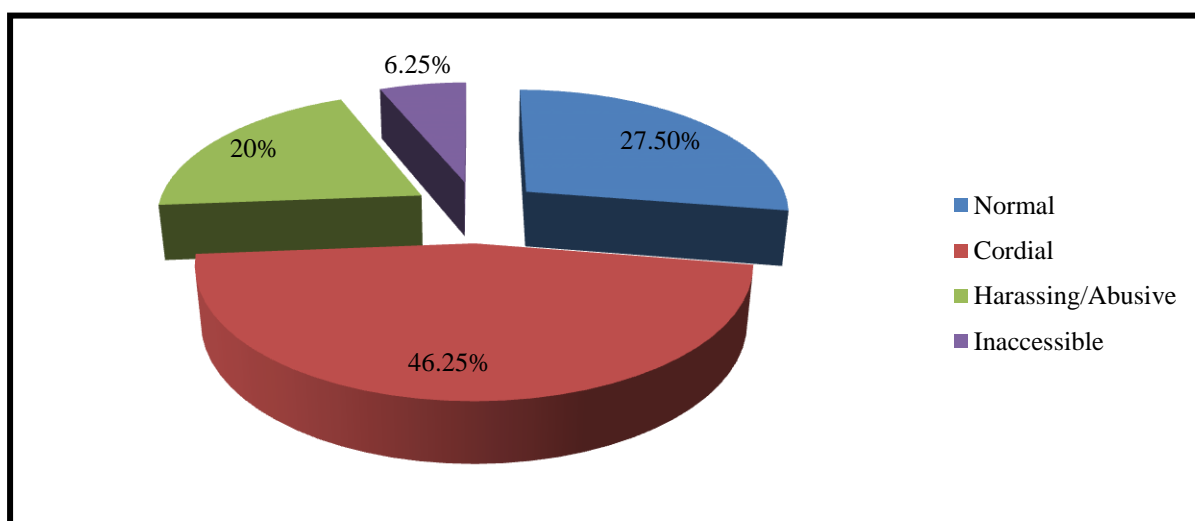
*Behaviour of jail authorities*

Behaviour of jail authorities	Frequency	Percentage (%)
Normal	22	27.5%
Cordial	37	46.25%
Harassing/Abusive	16	20%
Inaccessible	05	6.25%
Total	80	100%

Source: Primary Data

**Diagram 6.35**

*Behaviour of jail authorities*



The data in Table 6.37 shows that 46.25% of the families revealed that the behaviour of jail authorities was cordial, 27.50% said that the behaviour was quite

normal, 20% families revealed that the behaviour was abusive and just 6.25% said that they were inaccessible. The data shows that Jail authorities work professionally with the families of detainees in most of times. This brings out a good relationship between families and jail authorities.

**Table 3.38**

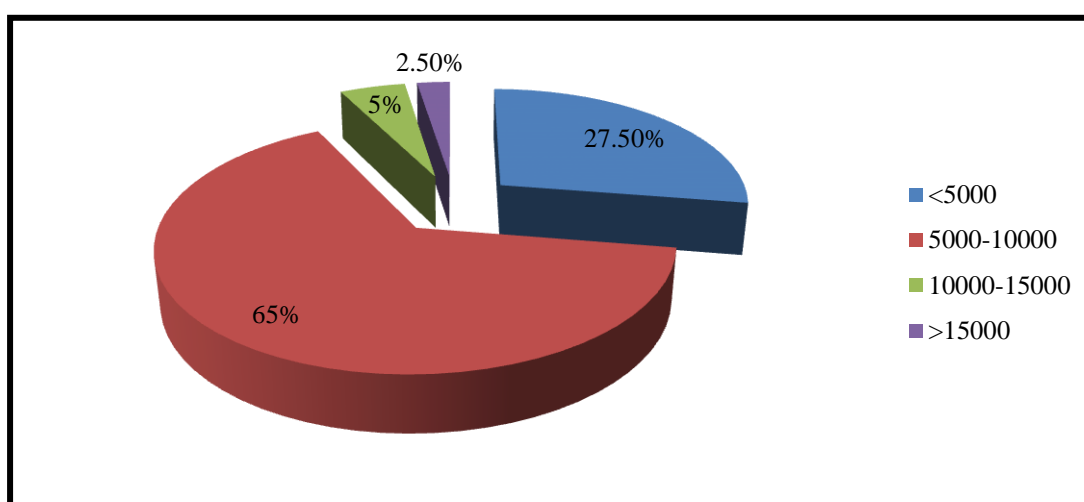
*Expenditure of family on jail visitations*

Expenditure of family on jail visitations	Frequency	Percentage (%)
<5000	22	27.5%
5000-10000	52	65%
10000-15000	04	05%
>15000	02	2.5%
Total	80	100%

Source: Primary Data

**Diagram 6.36**

*Expenditure of family on jail visitations*



According to Table 6.38, families spend huge sums during the detention of their kith or kin when visiting to jails. 65% of the families said that they spend

between Rs 5000-10000, 27.50% said that they spend less than Rs 5000 on each visit to jails/meet the detainee, 2.50% families said that they spend more than Rs 15000 and 5% families said that they spend between Rs 10000-15000 on jail visits. The difference is because of the reason that some families have to travel outside J&K to visit the detainees. The data collected through RTI (Annexure IV) reveals that jails authorities do also spend huge sums on detainees. Udhampur jail authorities revealed that during the period of 2008-June 2021 they spent Rs 5,523,739/= on PSA detainees, Baramulla Jail authorities revealed strangely that they had no instructions to spend money on PSA detainee while as Anantnag Jail authorities reveal to the RTI question that they spent Rs 216,363/- from 2008-June 2021. Thus, detentions take a huge toll on monetary coffers of both State as well as families. It is economically draining both State as well as families of detainees.

**Table 6.39**

*Economic Impact of detentions*

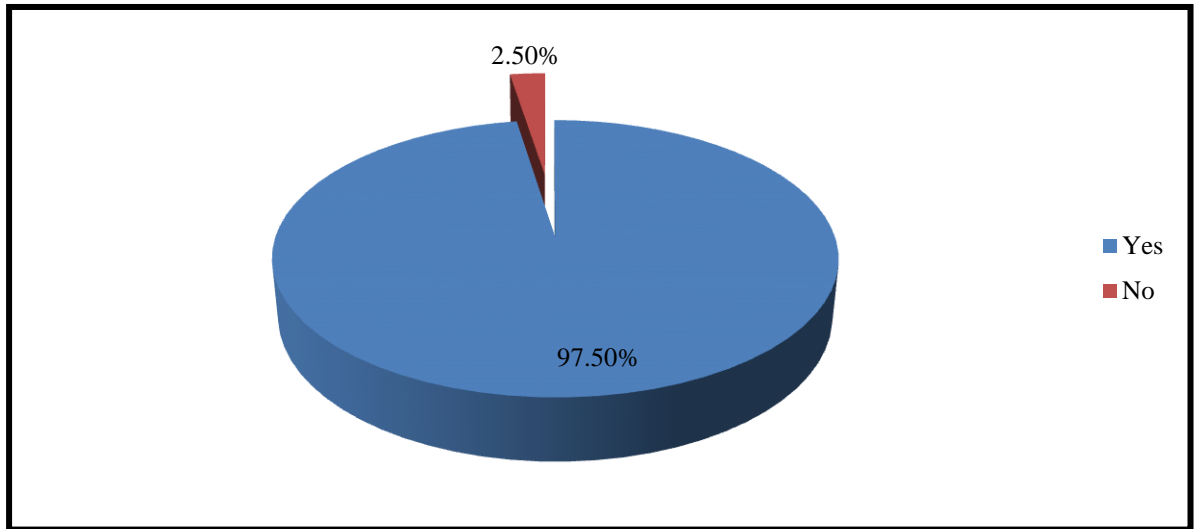
Economic Impact of detentions	Frequency	Percentage (%)
Yes	78	97.5%
No	02	2.5%
Total	80	100%

Source: Primary Data



**Diagram 6.37**

*Economic Impact of detentions*



According to Table 6.39, 97.50% families revealed that they have had negative impact on economic conditions and 2.50% families didn't witness any impact. The data supports the propositions that PSA detentions impact economic life of families of detainees.

**Table 6.39.1**

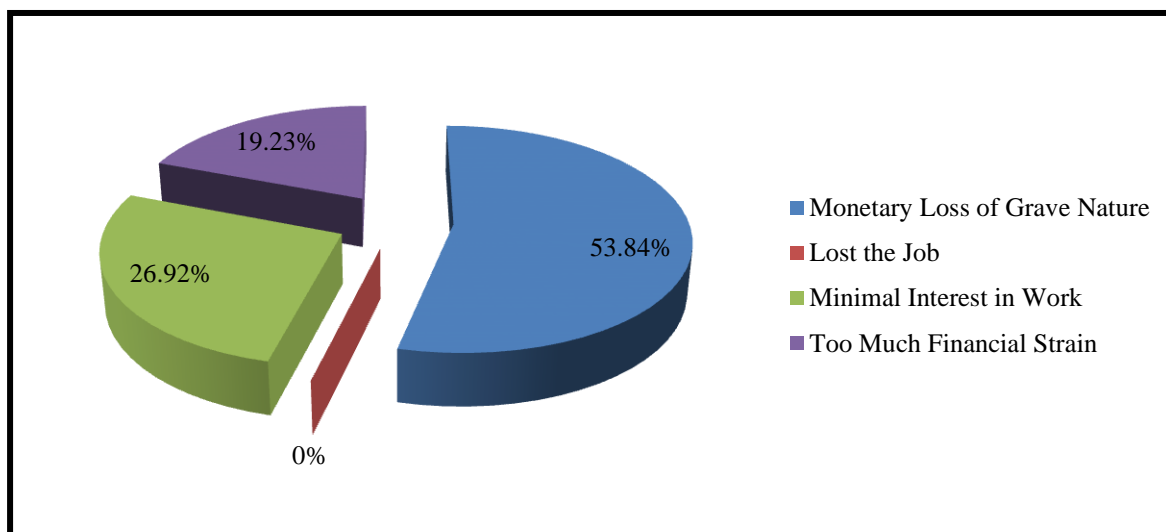
*Nature of Economic Impact*

Nature of Economic Impact	Frequency	Percentage (%)
Monetary Loss of Grave Nature	42	53.84%
Lost the Job	00	00%
Minimal Interest in Work	21	26.92%
Too Much Financial Strain	15	19.23%
Total	78	100%

Source: Primary Data

**Diagram 6.37.1**

*Nature of Economic Impact*



According to Table 6.39.1, 53.84% families revealed that they have had monetary loss of grave nature, 26.92% families revealed that they had minimal interest in work when their kith or kin was in detention, 19.23% families revealed that there was too much financial strain on them while as no family said that they lost any job during that period.

**Table 6.40**

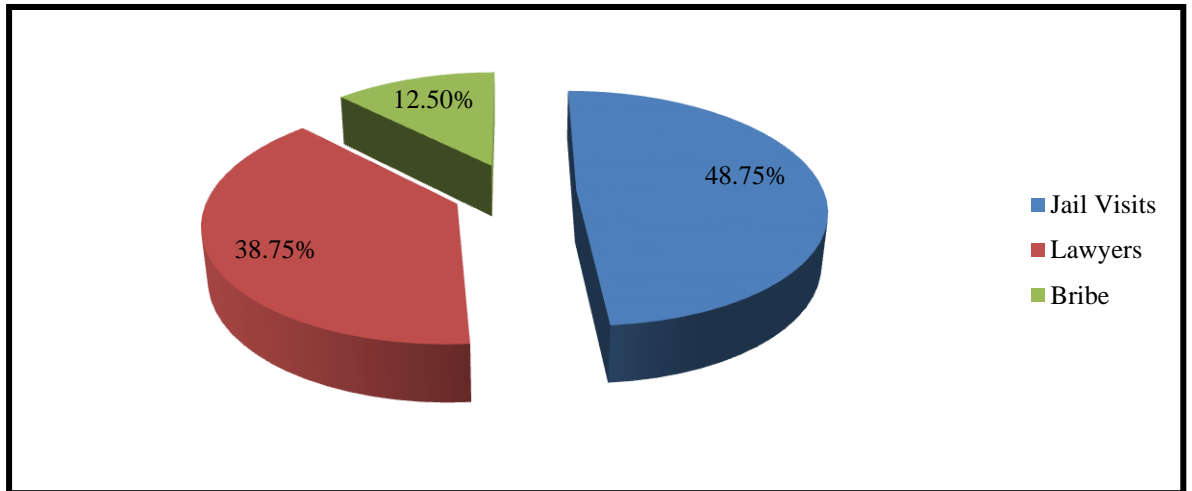
*Bulk of Money Spent*

Bulk of Money Spent	Frequency	Percentage (%)
Jail Visits	39	48.75%
Lawyers	31	38.75%
Bribe	10	12.5%
Total	80	100%

Source: Primary Data

### Diagram 6.38

#### *Bulk of Money Spent*



According to Table 6.40, 48.75% families revealed that bulk of money by them was spent on Jail visits, 38.75% said that bulk of money was spent on Lawyers as fees and 12.5% families said that they had to pay huge sums to security agencies as bribe to release their detainee. The data shows that jail visits are most cumbersome and detainees should be usually detained in detention centres close to their homes. Although police denied any charges of taking bribe but local population as well as some lawyers during Key informant interviews revealed that in rare cases taking of bribe is reported but they also reiterated that onus lies on families not to give bribe because according to CrPC both bribe giver and taker are culprits (Diagram 6.37).

**Table 6.41**

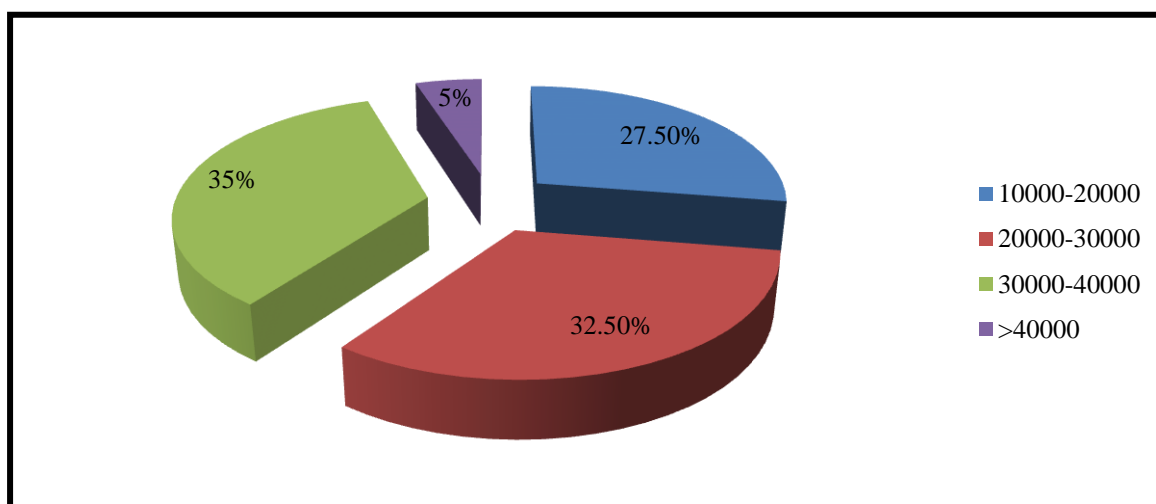
*Money Spent on Legal Proceedings*

Amount spent on legal proceedings	Frequency	Percentage (%)
10000-20000	22	27.5%
20000-30000	26	32.5%
30000-40000	28	35%
>40000	04	5%
Total	80	100%

Source: Primary Data

**Diagram 6.39**

*Money Spent on Legal Proceedings*



According to Table 6.41, 35% families revealed that they spend 30000-40000 on lawyers, 32.50% families revealed that they spend 20000-30000, 27.50% families revealed that they spend 10000-20000 on fees of lawyers and only 5% families revealed that they spend more than 40000 on lawyers as fees. Thus, the data shows that good amount of money is spend by detainee families on lawyers even though

there are various lawyers who take PSA cases for free and free legal aid is also available.

**Table 6.42**

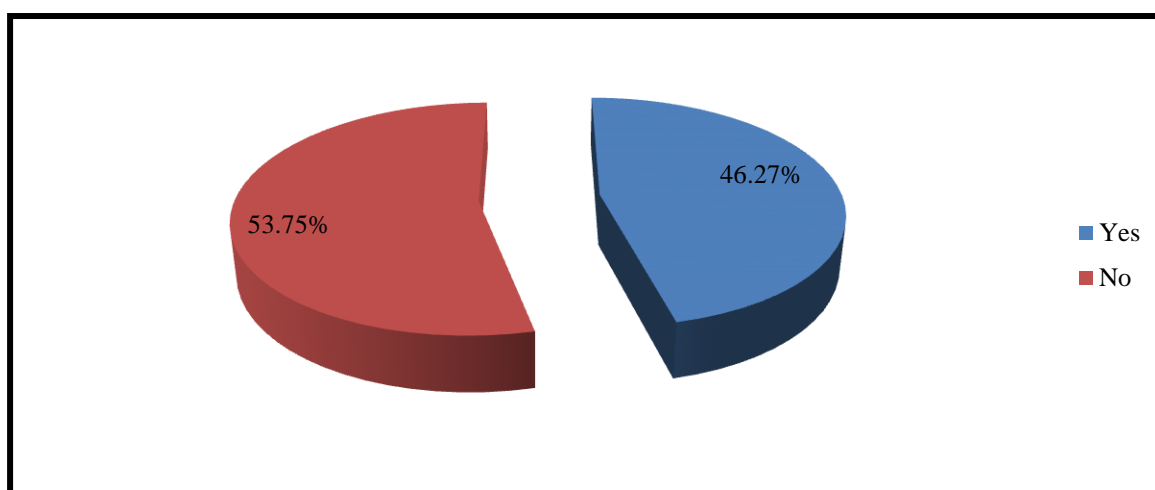
*Communitarian help felt by family*

Communitarian help felt by family	Frequency	Percentage (%)
Yes	37	46.27%
No	43	53.75%
Total	80	100%

Source: Primary Data

**Diagram 6.40**

*Communitarian help felt by family*



According to Table 6.42, 46.27% of the families said that due to financial constraints they were compelled to ask help from community members while as 53.75% families said that no need was felt to get community help.

**Table 6.43**

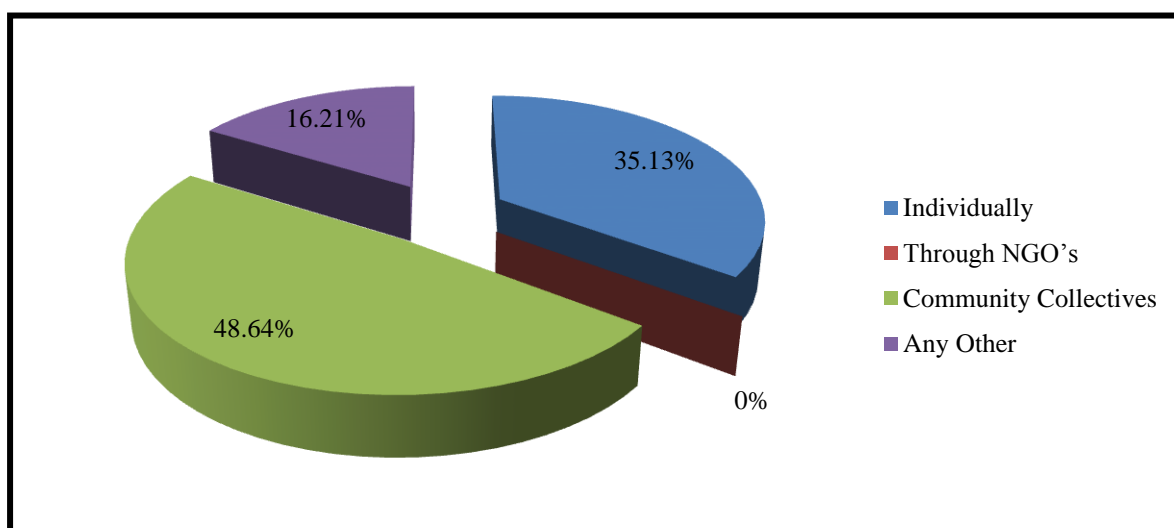
*Financial help by society*

Financial help by society	Frequency	Percentage (%)
Individually	13	35.13%
Through NGO's	00	00%
Community Collectives	18	48.64%
Any Other	06	16.21%
Total	80	100%

Source: Primary Data

**Diagram 6.41**

*Financial help by society*



The data in Table 6.43 reveals that most of the families who were in need of financial help were provided help through community collectives (48.64%), 35.13% families said that they sought help from individuals, 16.21% said that they received help from various sources which they didn't reveal.

**Table 6.44**

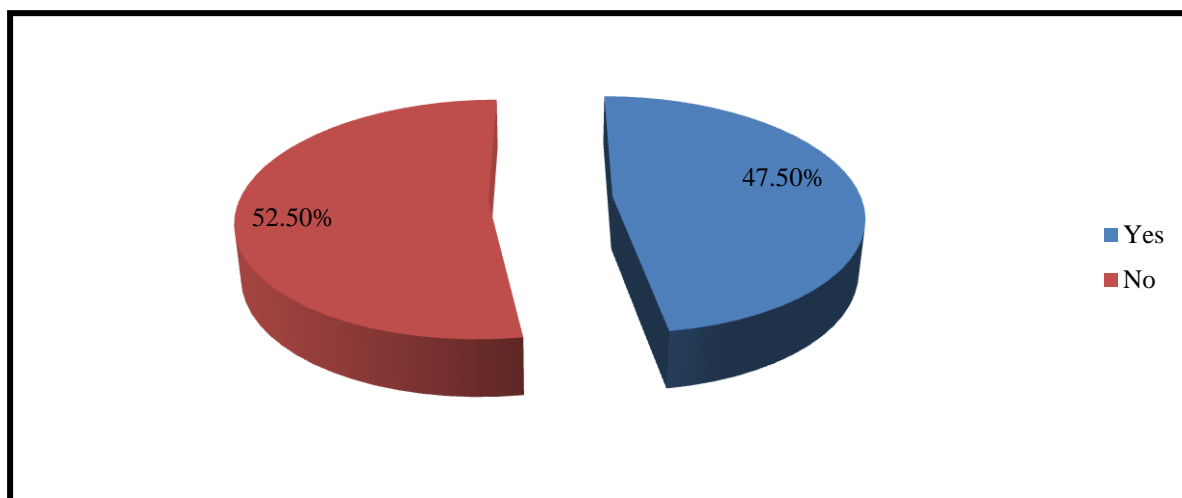
*Revival of economic conditions*

Revival of economic conditions	Frequency	Percentage (%)
Yes	38	47.5%
No	42	52.5%
Total	80	100%

Source: Primary Data

**Diagram 6.42**

*Revival of economic conditions*



According to data from Table 6.44, 47.50% families said that their economic condition revived after the detainee was released while as 52.50 % families revealed that their economic condition didn't revive even after release of detenu. The data shows that release of the detenu is no guarantee that economic condition can revive and usually it takes months for families to get back to usual course of economic condition.

**Table 6.44.1**

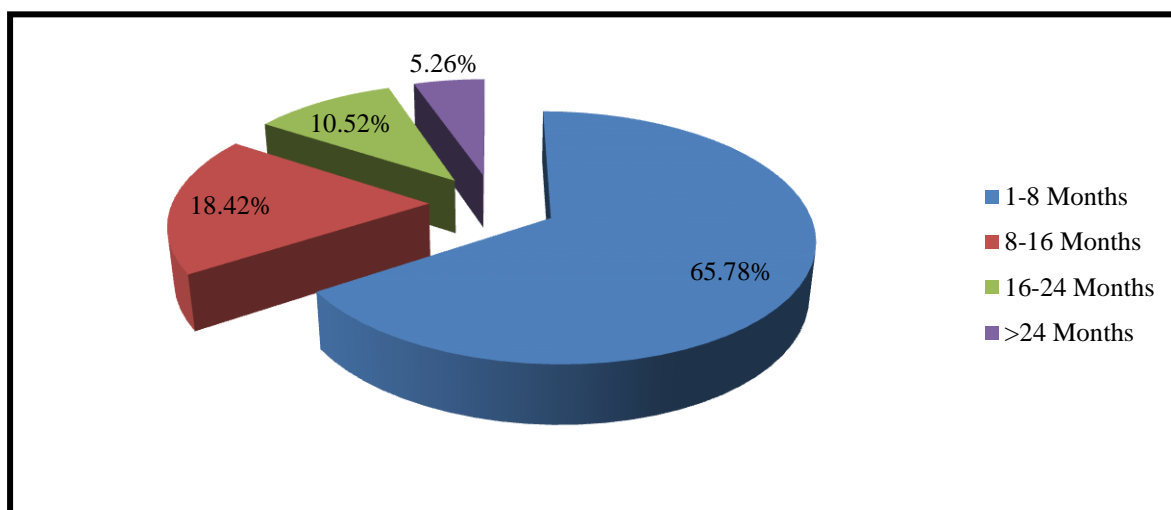
*Time period for revival of economic conditions*

Time period for revival of economic conditions	Frequency	Percentage (%)
1-8 Months	25	65.78%
8-16 Months	07	18.42%
16-24 Months	04	10.52%
>24 Months	02	5.26%
Total	38	100%

Source: Primary Data

**Diagram 6.42.1**

*Time period for revival of economic conditions*



The data according to Table 6.44.1 shows that 65.78% families revealed that it took the 1-8 months to revive their economic condition, 18.42% families said that it took them 8-16 months, 10.52% families said that it took them 16-24 months to revive their economic condition and 5.26% families said that it took them more than 2 years



to get back to normal economic course. The data shows that after the detainee is released in most of the cases families suffer economically and even after detainee is released; it takes months and years for families to get back on track and start their life normally.

**Table 6.45**

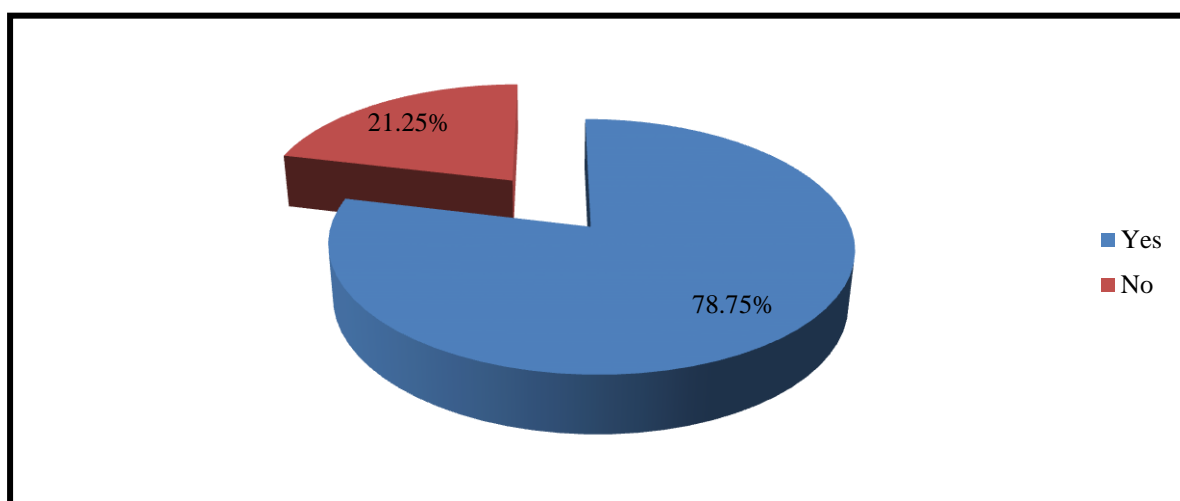
*Moral Support from Society*

Moral Support for the Family	Frequency	Percentage (%)
Yes	63	78.75%
No	17	21.25%
Total	80	100%

Source: Primary Data

**Diagram 6.43**

*Moral Support from Society*



The data according to Table 6.45 shows that some families also needed moral support during the detention period of their kith. While 21.25% families said that there was no moral support during detention period, 78.75% of families said that they

got enough moral support during that period. The data shows that even though a detainee personally & socially suffers a lot, but the families get good enough help both financial and socially from the society.

**Table 6.45.1**

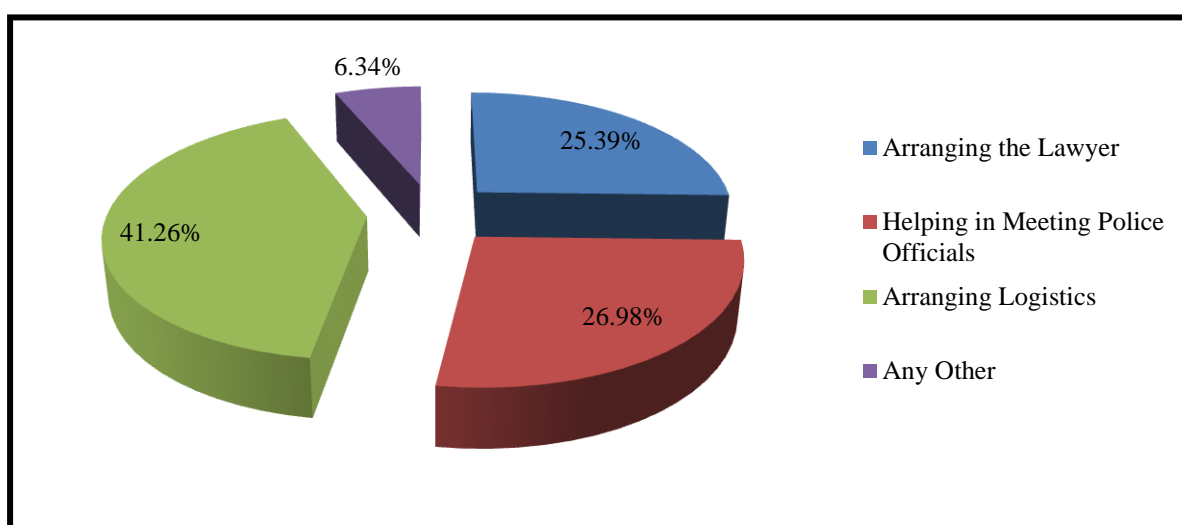
*Type of Moral Support*

Type of Moral Support	Frequency	Percentage (%)
Arranging the Lawyer	16	25.39%
Helping in Meeting Police Officials	17	26.98%
Arranging Logistics	26	41.26%
Any Other	04	6.34%
Total	63	100%

Source: Primary Data

**Diagram 6.43.1**

*Type of Moral Support*



According the Table 6.45.1, 26.98% families revealed that society helped them to meet the police official as during the detention families have to travel a lot during initial days; they do get lot of help from society in meeting with police officials & visits to local police stations. 41.26% families said that they got logistical support from the society, 25.39 % families said that society helped them in arranging or meeting the lawyers and 6.34 % families said that they got various other helps by the society.

**Table 6.46**

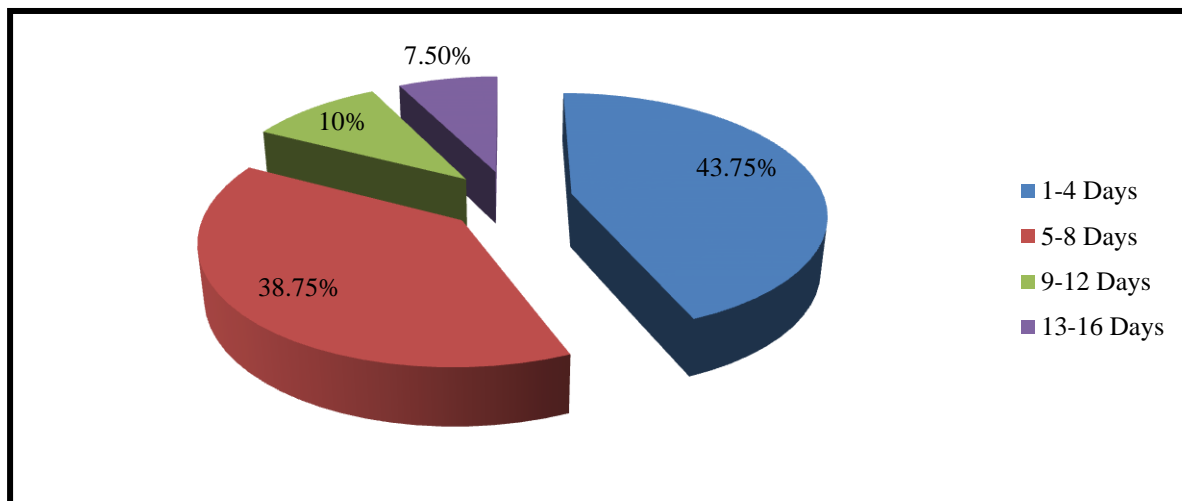
*Days in a month reserved for court proceedings*

Days in a month reserved for court proceedings	Frequency	Percentage (%)
1-4 Days	35	43.75%
5-8 Days	31	38.75%
9-12 Days	08	10%
13-16 Days	06	7.5%
Total	80	100%

Source: Primary Data

### Diagram 6.44

*Days in a month reserved for court proceedings*



The data in Table 6.46 depicts that families had to reserve good number of days for court proceedings in case there was any other FIR against the PSA detainee or he had applied for quashing of PSA detention in High Court. 43.75% of the respondents said that they had to reserve 1-4 days for court proceedings, 38.75 % said that they had to reserve 5-8 days for court proceedings, 10% said that they had to reserve 9-12 days while 7.5 % said that they had to reserve 13-16 days for court proceedings which involved meetings with lawyers as well. The data shows that on an average the detainees family has to spare at least 5 days in a month for court hearings and other legal obligations related to the case. This drains the detainee family both emotionally and psychologically (Diagram 6.44).

The data according to Table 6.47 reveals that in 8.75% of the cases, security agencies picked up another member of the family if actual accused was not available. This shows that the method of quid pro quo is also prevalent in J&K which makes families suffer emotionally as well. In 91.25 % of the cases families said that this is not done.

**Table 6.47**

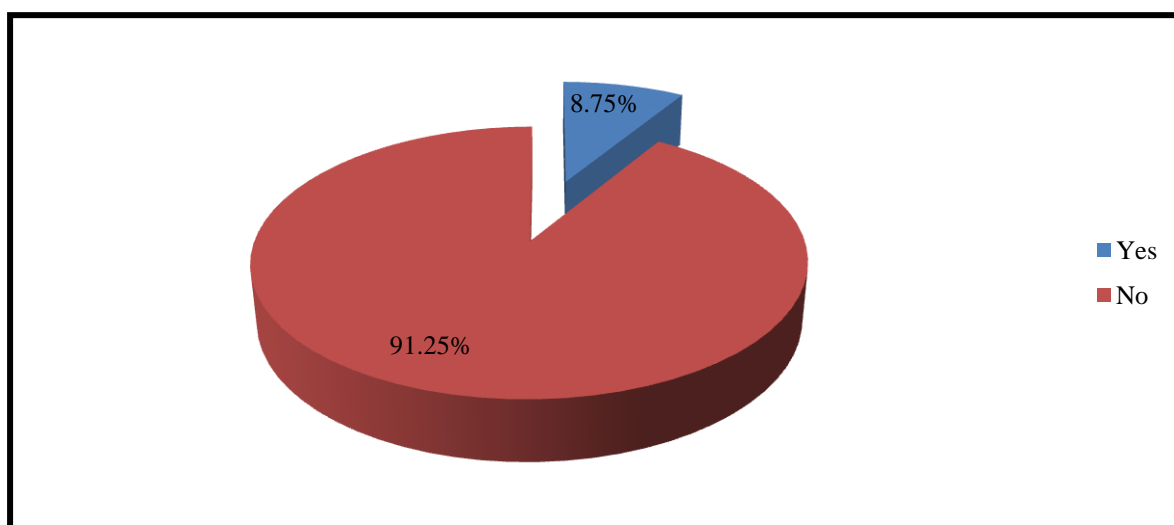
*Cases of detaining kith or kin if actual accused not available*

Cases of detaining kith or kin if actual accused not available	Frequency	Percentage (%)
Yes	07	8.75%
No	73	91.25%
Total	80	100%

Source: Primary Data

**Diagram 6.45**

*Cases of detaining kith or kin if actual accused not available*



It quite often happens that if security agencies don't find the actual detainee at house to pick they can go for quid pro quo method, whereby, security agencies pick any other family member and is only released when actual detainee produces himself before Security agencies. The data in Table 6.47.1 reveals that it is mostly the brother of detainee who is picked up in case detainee is not available at the time of detention (71.42%). In 28.57% of the cases it was father who was picked as substitute if actual detainee was not available.

**Table 6.47.1**

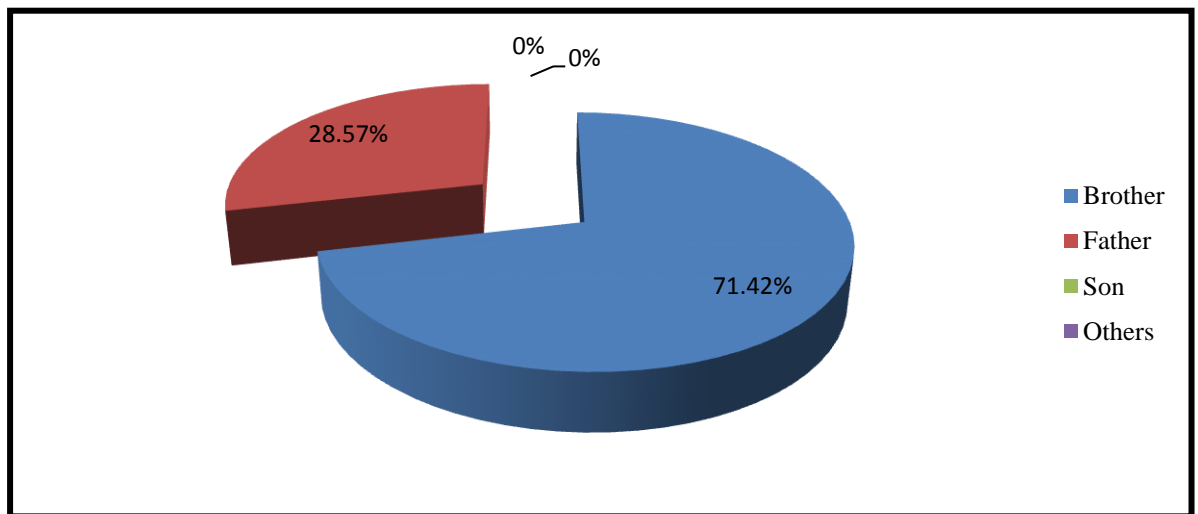
*Member of family picked*

Member of family picked	Frequency	Percentage (%)
Brother	05	71.42%
Father	02	28.57%
Son	00	00%
Others	00	00%
Total	07	100%

Source: Primary Data

**Diagram 6.45.1**

*Member of family picked*



## 6.11 Monitoring and Surveillance

Surveillance is one of the most trivialising trends in J&K and is also accepted by Security agencies as a fact. Recently IGP Kashmir also revealed that surveillance will be up on certain dates. Monitoring and surveillance of media houses, journalists and other intellectuals in Kashmir is very common. This was reported during a mail inadvertently sent by police department in November 2019 (Ahmad, 2019). Recently in 2021 J&K Government constituted a Task Force to monitor the employees of Union Territory who are involved in anti-national activities (Ashiq, 2021). Various high rank officials in J&K in Police Department are also at various occasions kept under surveillance as was case with Davinder Singh (former DySP of J&K police who was arrested for ferrying militants to Jammu) (Rashid, 2020).

**Table 6.48**

### *Monitoring and Surveillance*

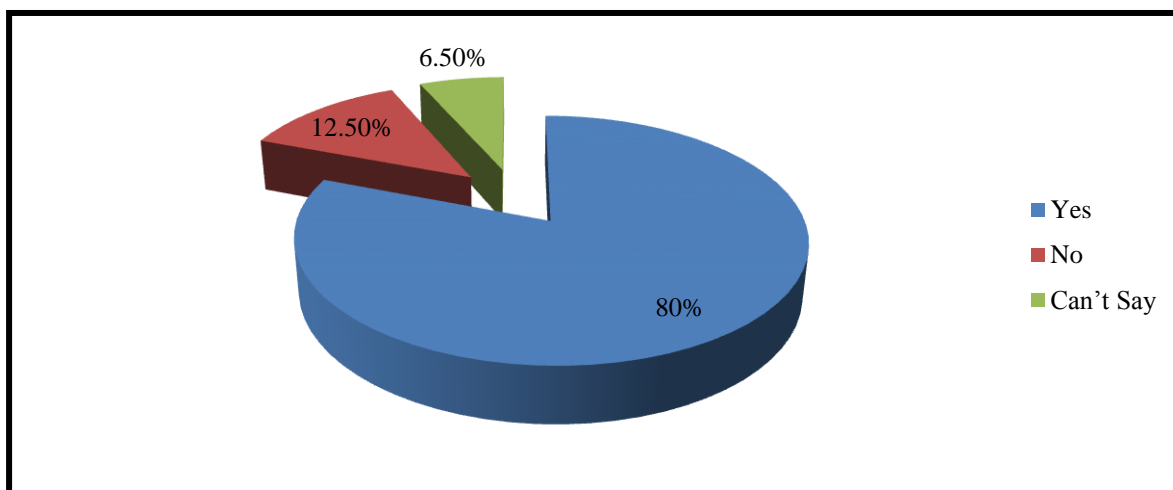
Monitoring and Surveillance	Frequency	Percentage (%)
Yes	64	80%
No	10	12.5%
Can't Say	06	6.5%
Total	80	100%

Source: Primary Data

The data according to Table 6.48 shows that 80% of the families of the detainees are under monitoring/surveillance by Security agencies. While as, 12.50% said that there wasn't any surveillance/monitoring and 6.50% were not sure about the same question.

**Diagram 6.46**

*Monitoring and Surveillance*



According to Table 6.47.1, 68.75% of the families said that they witnessed frequent visits by security personnel while as 18.75% said that they were monitored by agencies, 12.50% said that there was telephonic tapping.

**Table 6.48.1**

*Type of monitoring/surveillance*

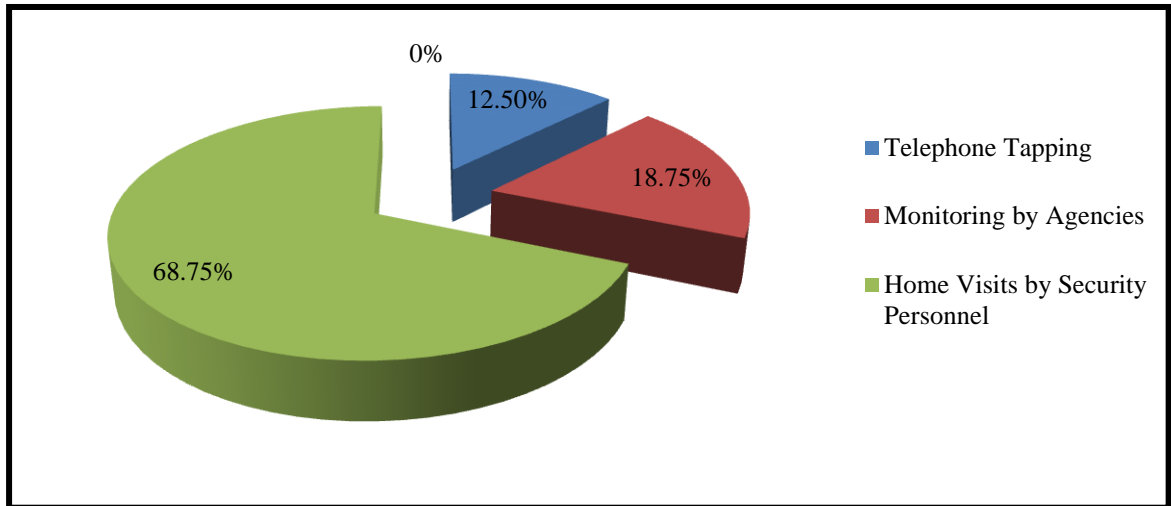
Type of monitoring/surveillance	Frequency	Percentage (%)
Telephone Tapping	08	12.5%
Monitoring by Agencies	12	18.75%
Home Visits by Security Personnel	44	68.75%
Any Other	00	00%
Total	64	100%

Source: Primary Data



**Diagram 6.46.1**

*Type of monitoring/surveillance*



The data reveals that there is a constant watch by security agencies on families of detainees which although not as efficient as Panopticon but is a good tool to reduce recidivism while at times it can be irritating for families.

## **Chapter 7**

### **Research Findings, Suggestions and Conclusion**

#### **7.1 Research Findings**

Starting as a law which has its roots in colonial and post-colonial world, Preventive detention has been extensively used in Jammu and Kashmir during various regimes including the Dogra regime and later under the rule of Sheikh Abdullah. We know from the various sections of this research that Preventive Detention Act was used under various avatars against Political opponents, dissidents, lawyers, militants, Street protesters, dissenters etc. More so, the findings of this study can be discussed under following heads: -

- J&K Public Safety Act has been a handy tool in the hands of security agencies to quell the dissent and protest whether in 2008, 2010, 2016 and 2019. Security agencies including Political Executive have claimed that after the watering down of Article 370, Public Safety Act, 1978 was used extensively and liberty of individuals was curbed but in the ‘larger good’ of erstwhile state which ensured that there were far less killings and hence peace prevailed. The political establishment was very well aware about the fact that in taking such a huge decision, miscalculations by security forces was a given but because of preventive detentions, situation was managed well. Those elements which could have created problems in terms of law and order at the behest of Pakistan were detained beforehand and there was virtually no loss of life during 2019-2020 periods or what can be called as Post-370 phase in Kashmir.
- Peace in Kashmir is dependent on various variables like equation of India with Pakistan, situation on border (Like effective/non-effective ceasefire), internal process of dialogue with separatists, and infiltration at borders (as Pakistan pushes terrorists across the border). Now In this long list you can add the usage of PSA. The thesis argues that PSA gives you immediate peace in case state anticipates any law and order situation but the botched imposition of PSA and overdoing it has the prospects of changing the peace equation. Because this research has shown that PSA detainees have turned to terrorism as well. Further there of thousands

disgruntled PSA detainees who face diminished economic and social prospects with hard approach from state on top.

- Politically speaking even if the detentions in Kashmir makes India to swallow bad monikers from international community but this is well within its jurisdiction in order to secure its volatile borders and manage peace in Jammu and Kashmir. Apart from political angle, this study finds that preventive detentions have a serious repercussion on the social and economic lives of individuals who are detained as well as for their families. There is lack of policy by the UT Administration or for that matter Ministry of Home Affairs which is apex agency to oversee J&K affairs to accommodate the dissenters and bring them into the mainstream. This study has found that the continuous process of detention in Kashmir has given way to ‘conflict entrepreneurship’ whereby, a parallel system of illegal extraction and exploitation of detainees and their families is taking place.
- This study has found that torture, intimidation, detention and working with Iron - fist against a volatile population works very well to a certain extent, but beyond that threshold, detentions prove detrimental and can push a dissenter, stone pelted, political opponent into militancy which leads to devastation of society at large.
- The findings of this research show that given proper care and accommodating nature of security agencies and State, protests and stone pelting in Kashmir can be brought under control. Giving economic opportunities to detainees and helping their families by State through soft approach will have a wider impact on law and order.
- Security agencies need to analyse the detainees and their economic background much more deeply and help those families which are in need; through this approach the need to slap PSA’s on detainees again and again will be minimised. Thus the “revolving door” and keeping detainees permanently detained for years together will be obliterated altogether. The security and administrative agencies have to be more careful when imposing fresh PSA’s because fresh PSA has to be imposed on fresh grounds as has been reiterated by High Court of Jammu and Kashmir in various cases. This will make sure that general population starts trusting the security agencies more and will not bring censure by judiciary against

administrative agencies, this will surely add up to the professionalism. During this research it was found that there is need of a very good system of social support for victims, needy and downtrodden in Kashmir, there is very little help from society towards the families and actual detainees under Public Safety Act. More awareness has to be generated that detentions under PSA is just a preventive measure and in no ways is the actual detainee a culprit or sinner. The difference between the two has to be made more glaring and clear.

- This study found that the jail system in J&K lags in capacity to hold the detainees in detention cells. Detainees under PSA are put in with hardened criminals, militants and drug addicts, which can prove detrimental and may actually worsen the situation. Empirical data in this study reveals that detainees get influenced by the people who surround them. They can get indoctrinated by militants or criminals and when they are released can prove a major headache for security agencies. So, there is a need to separate the cells of PSA detainees and other criminals/militants.
- Public Safety Act and detaining people under the pretext of causing harm in future is necessary evil in Kashmir. This thesis argues in favour of pressure to continue till normalcy is returned. J&K is not a normal state and is case *sui generis*. As militancy is in the last phase in Kashmir in the context of recent peace deal between India and Pakistan there is a need to reverse doctrine youth in Kashmir. But the process should be organic and genuine.
- The years of 2008, 2010, 2016 agitations were a disaster. The data in this study shows that agencies were late in anticipating the protests hence there was huge loss of life and property. The other argument is that the preventive detentions in those years that are 2008, 2010 and 2016 were affected much latter when the damage was already done. In 2019 and the huge decision which New Delhi took, there was high possibility of loss of life which was also anticipated by Ministry of Home Affairs (MHA) document. But the detentions and crackdown on anti-social elements, OGW's and political workers were carried out beforehand. Even though this measure puts India under the league of illiberal category (also recently called out as 'electoral autocracy') but the philosophy of protecting Sovereignty and

Integrity of nation demanded that these restrictions had to be put in place. India had to brace in for some criticism (for example in recent Freedom House ranking India was downgraded by Freedom House from “Free Country” to “partly Free” and Kashmir was also mentioned in this report) but this should be taken as ‘new normal’. If criticism comes at the cost of better Law and order/stability in this border region, let India grab it with both the hands.

- J&K PSA is not imposed on petty crimes in Kashmir; it is a preventive detention law in conflict zone. “*thou shall not kill*” and if one does so, Law takes its own course, similarly, during the investigation in this research it was found that PSA is imposed/slapped against those who throw stones at security agencies or those who work as OGW’s (Over Ground Workers) for militants or carry a certain ideology in their head like that of secessionism and separatism (like Jamaat-e-Islami). These are crimes which are ideological and come with a certain type of decision taken by a potential dissenter. What goes in his mind depends on the context within which he takes his decision of stone throwing, believes in ideology of separatism and secessionism. This is a case of decision making in illiberal environment. The illiberal environment demands an investigation and course correction along with the investigation into decision takers psychology. This study takes the basics from socio-economics of detainees and ends up finding that psychology of a detainee is also important aspect to study. Breaking the law/rule has corrective steps in IPC and CRPC but when it comes to preventive detention, State takes the usual route of detaining the usual suspects in routine prisons meant for other criminals. PSA detainees undergo usual imprisonment, torture and punishment as other criminals who are jailed under theft, murder, sexual assault etc. The argument of this thesis believes that response from State for detainees under PSA must be different which should involve making them believe in the same ideology as that of State.
- Preventive Detention is used by State against the crime which a suspect has not committed. M. Foucault argues that prisons should act as corrective centres. So, long as Preventive detentions in Kashmir remains confined to just prevent the crime from happening and doesn’t work on the second stage that is “correct the

behaviour of individuals”, this is not going to be handy for security agencies. The cost of detention for a detenu & his family according to this study is much higher compared to the crime which he has not even committed. This aspect gets brushed aside about detentions in Kashmir. According to this study, the cost of detention remains very high for lower & middle-class families who can't afford that their earning hand is in incarceration. This is not true for political class who were detained after abrogation of Article 370 & 35A, as State takes care of their daily needs—which includes food, medicines etc. Detentions in Kashmir go beyond the standard framework of mere detaining for purpose of detention, as this study has shown that the ‘process becomes a punishment’ for a detenu. So if we take detentions in Kashmir at its face value, that is when State believes that if it inflicts costs on detenu and his family so as to deter the detenu from committing a bigger crime or acting against the interest of public order or against Security of State, then, the State must also be equipped with better models and tools so as to have better information about detenu and hence prevent him/her from recidivism (as there is no policy with State Government to ensure that recidivism doesn't take place, Annexure III).

- Jammu and Kashmir Government has been reluctant to produce PSA detainees before Advisory Board. This is a must and is an obligation under J&K PSA, 1978 Under Section 14 & 15. According to the data collected in this study, it is clear that only 35% of the detainees know about Advisory Board. Detainees produced before Advisory Board is not a routine in J&K. The norm is flaunted and according to data obtained through RTI (Annexure III), Home Department revealed that during last three years that is 2019, 2020, & 2021 only 21 PSA detainees have been produced before Advisory Board and only 16 PSA's have been revoked by the Board. The percentage of revocation stands at 76.19 % which is quite good but the detainees in last three years has been in thousands since August 2019 decision. According to data collected in this study only 36% of the detainees said that their detention was revoked through Advisory Board.
- Preventive Detention in J&K under PSA is not just a detaining tool in the hands of security agencies but a tool of punishment (read process as punishment) as well. It is because of the fact that 85% of the detainees revealed that they faced

some sort of torture and it was in 54% of the cases that SOG was involved in the torture.

- In J&K generally and in Kashmir valley particularly, Preventive Detentions are carried out under the pretext of keeping Law and order under control and to take out those elements of society out of circulation who have the potential to create trouble. The data reveals that it was in 20% of the cases that detentions were made for preventive measure and 15 % of the detentions were made during encounters with militants. It needs to be mentioned that before 2019 encounter sites attracted large number of youth who used stone pelting in order to ensure that security agencies get distracted and militants flee. Majority of the detentions were made from these sites. SOG which is the Special Operations Group working with J&K Police makes 41.25% of the detentions under PSA which are later handed over to J&K Police. Army also detains youth and the data shows that 11.25% of youth are detained usually during encounters and stone pelting incidents.
- The social, economic and psychological impact on detainees is a well-known phenomenon of incarcerations around the world. This study brings to fore and adds to the existing literature that impact on families of detainees in Kashmir is a genuine and a definite ‘collateral consequence’ (see also Bales & Mears, 2008; Gaston, 2016; Arditti, 2005). The families get negatively impacted and incarceration of near kith or kin creates huge challenges for the families involved. Social, economic and psychological impacts are quite common challenges involved. Families have to arrange lawyers, arrange money, and have to travel outside J&K if the detainee is detained in different jails across the country. Many families get indebted to individuals outside banking system and also some families take loans from J&K Bank in order to get their finances arranged. Thus families experience social stigma, emotional stress & economic drain.
- After the amendments made to the PSA in 2018, PSA detainees are kept in jails outside valley. The families and detainees suffer a lot due to this amendment. Poor families have to travel thousands of kilometres and have to spend tens of thousands of rupees to meet their kin in far-off jails across the country. Many a times after travelling for days together and following hectic and arduous paper work to get permission to meet the detainee, families are denied meeting by the

jail authorities citing security reasons, which comes as a shock to poor families who have to go from pillar to post to get a glimpse of their kin. (Scholars like Johnna Christian (2005) show that family visitation to far-off jails is ‘exhausting and resource intensive’ and is a necessary collateral consequence of incarcerations).

- Detainees who face social stigma specifically have to withdraw from social relationships; they have to bear isolation and separations if they are in any romantic relationships. This largely diminishes their prospects of any social support base. Detainees require familial support up on their re-entry when they are released, this adds to the financial woes of families who during the incarceration of the family member have had to arrange the lawyers, transportation expenses (if detainee is detained outside valley), wear & tear, even get off their own work to meet the detainee. Mental health issue among families is a common phenomenon which includes stress, anxiety & depression.
- Surveillance and monitoring of population is quite common phenomenon among authoritarian regimes but off-late, Liberal states have also jumped the bandwagon, States love to monitor their population and know what their citizens are doing. Surveillance is common agenda across globe. Recently, central government was cornered on use of *Pegasus* an Israeli military grade spy ware technology which was used to monitor activities of opposition leaders, journalists, activists and also people belonging to incumbent. Similarly, Surveillance and monitoring the activities of people who have any tinge of going rouge or involved in anti-state activities is quite common in J&K. Even security agencies agree to this phenomenon and Military General Officer Commanding (GOC) Victor Force, Major General Rashim Bali, recently in an interview agreed that they check the phones of civilians and can do so at least for 20 minutes. During this study, it became evident that families and PSA detainees themselves after they are released by court or otherwise are watched upon & surveilled by ‘agencies’ in order to get information about militants or whether their (detainees) behaviour has changed or not.
- This study is an addition to the liberal counterinsurgency warfare literature (see Charles Bohannon, David Galula, Napoleon Valeriano, Frank Kitson, Roger



Trinquier and Edward Lansdale) where population is considered as an object of warfare and manipulation. Apart from US and Israel, various liberal countries including India have used 21<sup>st</sup> century liberal counterinsurgency warfare tactics to deal with insurgencies especially in Jammu and Kashmir. PSA potentially is a counterinsurgency tool in J&K, especially in trouble torn Kashmir. The population-centric counterinsurgency tactics calls for protecting and securing the population. In this study, these tactics in counterinsurgency were seen missing when it comes to giving proper care to families of PSA detainees.

- This study adds to the literature of Hybrid Peace Governance (see Kristine Hoglund & Camilla Orjuela, 2012) and argues that there are liberal/illiberal policies/programmes/rules collectively at play in Kashmir. This context offered by this study is essential to understand the framework within which peacebuilding actors operate in Kashmir which will surely help in identifying the reasons of conflict and their perpetuity in post-war societies. Quite contrarily to the existing literature which takes ‘liberal’ side as only through international interventions in States, this thesis brings to fore the point that liberal context can also be offered by constitutional framework of a country. And in this case, Liberal context is offered by Constitution of India and illiberal is at play in local settings of Kashmir.

### ***Peacebuilding, Incarcerations and Perpetuation of Emergency***

The constant incarceration under J&K PSA has given rise to a sort of ‘permanent emergency’ in Kashmir. Although a Law which is there since 1978, has gained a permanent character in the public discourse. The Act has been used to constantly keep individuals in jails in order to keep law & order under control.

Given that Preventive detentions prevail currently in democratic setups like USA, Israel & India, it is quite intriguing to balance the illiberal measure with liberal settings. In order to further dig deep into the functioning of PSA in India & particularly in Kashmir, various Key Informant interviews were organized. Across the interviews, it was found that PSA in Kashmir is a ‘necessary evil’, but there should be lot of accountability in imposing the PSA and more so, PSA should be used

“sparingly”. As was argued by Mr. Alam Jan (all names changed to ensure confidentiality), who works as Human Rights Activist & also as a Lawyer, working on the cases of preventive detentions that,

“...there is no place for a draconian law like PSA. Yes, it can be used in extraordinary situations but in Kashmir these extraordinary situations are continuing since decades now & that is why we can safely say that we are in a State of emergency (permanent State of emergency)...(it) is very difficult, it (PSA) has to be used very (very) sparingly, not at the scale used in Kashmir”.

For Professor Aalia, there isn't any country which is purely democratic in practical sense but what is to be done is to minimize the 'misuse' of the Act, as she argues that,

“...at present there isn't any country that is completely democratic in nature, including USA and of course India. So when it comes to preventive detention, there is some scope across any country in the world. However, what is unacceptable is the misuse or exploitation of this practice called preventive detention for serving the interests of State machinery. That is where there can't be any reconciliation with preventive detention in any society whether democratic or merely a namesake”.

Preventive Detentions in Kashmir have different meaning to different people. For State, and its security agencies it is a good tool to ensure that 'law & order' remains in check. But since the Act has been there for decades now, plus the situation has gone into abyss rather than in positive direction. For, those detained under the Act, they have to suffer along with their families through finances and emotionally. In this direction, Mrs Aalia & Mr Alam have contrasting views:

“Well, I don't have any statistics to credit or discredit preventive detentions in Kashmir. However, if you look at the interests of the State, well you can say it has served the purpose, whether legit or not that is a secondary question”.

And Mr. Alam argues that:

“It depends, if we look at it from the point of view of those who have been detained under this dreadful law, it has been used as a tool of suppression in Kashmir & as an enabler of oppression and even from the security point of view, I don’t think much success has been achieved because over the last 3 decades, we have seen things (situation) going from bad to worse. If PSA was panacea of all the problems of Kashmir, then we wouldn’t have been at this point of time where we see fresh PSA’s being lodged again & again”.

Peacebuilding in Kashmir is quite often linked to hard-approach by the State. But peace is determinant of various factors. Even though State can get immediate results through quick fixes but what we see is a “graveyards peace”. Mr. Alam Jan in this context argued that:

“The peace which the Indian State claims to have, we can safely say that it is the “peace of graveyard” and those detained under this dreadful Act, they have been detained under very vague & poorly broad definitions of “security of State” & “Public Order” & “anti-National activities”.

Plus his views regarding the question of Kashmir being a Law & order issue or a Political issue tilts in favour of later as he argued that:

“Of course, it (Kashmir) is a political issue & we have UN resolutions on Kashmir & we have Shimla Agreement on Kashmir. So it is more the L&O problem, as India portrays it to be at the international stage but domestically, within India, it says that it is a domestic issue ...that is the irony of the situation”.

Similarly, while interviewing senior Advocate of High Court Mrs. Ulfat, she vehemently argued that:

“Peace is a precondition for democracy unless there is no peace there can be no democracy in real sense”.

For peace to organically sprout in Kashmir there has to be genuine efforts for peace and that can be achieved through genuine electoral process missing in Kashmir since decades. Mrs. Aalia argues in order to support this proposition that:

“People’s political participation has been missing in real sense, all the way since 1947. The political representations from Kashmir hasn’t represented people’s political aspirations..., rather manipulated the people’s aspirations into a domain that serves the personal and party interests branding them as people’s aspirations”.

Central government has given a different logic to the representation of people in electoral politics of the erstwhile State while abrogating Article 370. Also, Mrs. Ulfat raised this argument in following words when she said in the context of representation of Kashmiri’s in electoral politics that:

“...this question has been well answered by GOI while abrogating Article 370 wherein they have said that from last 60 years there has been no true representation of Kashmiri’s in successive regimes”.

The philosophical understanding of detaining a soul is to garner the “good behaviour” from citizens, but at some point in time, there has to be assessment about the fact that if the tool the State is using is giving it the requisite outcome/ results. Mr Aalia argues that:

“...You can’t keep people under such detention forever. It needs to be followed up by a comprehensive political process something that has been lacking ever since eternity”.

And in the same breath, State has to follow certain constitutional doctrines and has to look at “proportionality” & “necessity” aspects of the usage of any Act. As argued by Mr Alam Jan that:

“It [PSA] is not a reasonable measure, because, we have to see the “doctrine of necessity” & the “doctrine of proportionality” under the International Human

Rights Instruments (Law) & it is disproportionate and its use has been disproportionate in Kashmir”.

Conflict breeds conflict entrepreneurs and that is where the perpetuity of conflict gets murkier and uglier. Conflict needs to be minimized and it is not only the people who make money in conflict but also the State agencies and conflict entrepreneurs do get their hands on the dirty money. The respondents agreed that as conflict ‘protracts’, the ripple off effect starts which breeds more conflict. Mrs. Aalia & Mr Alam in this context argued that:

“PSA not only proliferate conflict entrepreneurship but it is an evidence based fact that the more a conflict protracts, the more complicated the conflict becomes and more difficult it becomes to resolve or manage the conflict”.

And, Mr Alam was more comprehensive while deliberating on the similar theme that:

“there have been cases where we have seen that some people have taken money or we have seen corruption cases, wherein Police has taken some money but by and large we can’t say conflict entrepreneurship (is rampant)...”.

When the Key Informant was further pushed into the question of entrepreneurship as proliferated through Preventive detentions, he argued that:

mostly these families are poor they have to fight hard & engage lawyers & they have to leave their homes and usually we see that often the people who are booked under this draconian law they are the bread earners of their families, so it will be safe to say that it (PSA) destroys families altogether ... and yes there are cases wherein police has taken money from an accused

telling him that we (police) won't slap fresh PSA if you give some money  
 ...yes there are some instance.

More or less the themes captured around the focused group discussion did raise and touched on the above discussed concerns and areas. The themes captured are as: -

**Table 7.1**

*Themes expressed by Focused Group Participants*

Themes captured	Examples as raised by participants
<i>sui generis</i> aspect of Kashmir	<p>“Jammu and Kashmir is not a normal State like any other State of Union of India”</p> <p>“Kashmir is not treated like other Indian States”</p>
Negative impact	<p>“Detentions impact the lives of youth negatively”</p> <p>“Well... I do think that PSA has a negative impact”</p>
Detaining close to homes	<p>“Even though not a remedy but a good gesture could be that detainees are incarcerated in J&amp;K and not in far off States like UP or Haryana”</p> <p>“they should be detained close to homes...”</p> <p>“if you detained people in J&amp;K, families can meet their kith/kin regularly...”</p>
Tool of police repression	<p>“Administrative detentions as Tool of Repression by Police...”</p> <p>“police repression perpetuates for PSA</p>

	detainees”
Hectic judicial processes	“Judicial process has been made deliberately cumbersome in case of PSA”
Ignorance about judicial processes	“Ignorance about how to get relief when a person is detained under PSA; may be in other cases they do know...”
Radicalisation	“Radicalisation is there because of lack of any political engagement not solely due to lack of basic governance factors, but yes good governance will solve 70% of the problem”
Lack of Trust	“Lack of trust in electoral process except for few elections like that of 2002 and after that” “Well you know the electoral processes in Kashmir...” “Elections in Kashmir are managed...”

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*Note: Themes captured during Focused Group Discussion. The dairy notes and verbatim statements are added*

## 7.2 Suggestions

- As part of this study, its research and findings are involved, it can be safely argued that J&K especially Valley Kashmir is not a normal region where better Law and Order is given. Security agencies have toiled hard over decades to ensure that security situation and violence remains under control and at tolerable levels. As one Security official (during Interview) mentioned that, “We are fighting a War— it is a cross border war fomented by Pakistan through its proxies”. Security agencies need extraordinary laws in order to deal with extraordinary situations. As Amnesty Report mentions that Preventive Detentions should be repealed, this study doesn’t endorse that view but there must be amendments in the PSA, 1978 itself so as to ensure that this Act remains subservient to International Covenant

on Civil and Political Rights and there is serious accountability of each PSA case imposed.

- The Proceedings of Advisory Board, how members are appointed, their salaries and their way of working must be made public and should be brought within the ambit of Right to Information Act, 2005. As this study has shown that very little knowledge is available in public domain about the working of Advisory Board and its members, there is a serious mismatch between: which PSA detention is upheld by Advisory Board and which one is quashed by High Court? Higher percentages of cases of PSA are quashed by High Court which were previously upheld by Advisory Board. During the study it was found the actual detainees don't know anything about Advisory Board and they are not adequately represented, plus, PSA detainee is not psychologically strong enough to know intricacies of interacting with empowered body like Advisory Board. Hence this study recommends that PSA, 1978 must be amended so that it is made a mandatory provision that a lawyer and a family member should accompany a detainee when he is brought before the members of Advisory Board.
- It is further suggested that the terms used in the Act like "public order" and "security of State" must be defined properly by either Legislature or Judiciary so that the ambit remains clear for security agencies to operate. Given the ambiguity within these broad terms, security agencies game them in order to prolong a detention or ensure that a frivolous detention order is imposed.
- The time period of providing 'reasons of detention' with 5 to 10 days according to the Act must be made mandatory and should be provided in all cases and there should be no exception. This provision will increase the stature of India as a Liberal Democracy.
- It is suggested as part of this study that criminal acts done by any citizen must be punished and booked under proper sections of Indian Penal Code and PSA in those cases must be avoided. It has been found during this study that many drug peddlers are held under Preventive detention. If security agencies have good enough evidence against a person why is there a need to impose Preventive detention laws? Hence it is suggested that there must be clear delineation of imposition of sections of CrPC and PSA.



- The cases of torture, abuse of power and malafide PSA's must be investigated by an independent agency. It is a better proposition that visitors of PSA detainees must be properly treated and abuse must be avoided.
- The study suggests that amendments made during 2018 by Satya Pal Malik the then Governor of J&K, must be reversed so that PSA detainees are not detained in far of jails across the country like UP and Haryana etc. This increases the cost on State exchequer and families of detainees also suffer financially a lot. Further detaining a person far off from his home some thousands of kilometres away takes away whole purpose of detention. This amounts to punitive detention in terms of financial costs involved, psychological stress and societal pressures. This many a times aggravates the situation for State and works detrimental to its interests.
- A particular number of cases of PSA must be investigated by judicial body. This body must analyze the dossiers imposed within a year and analyse any malafide cases of PSA, if any. The erring officials must be brought to book under various sections of Law. It is therefore suggested in this context that Section 22 of the Act which gives special protection to officials against acts done in 'good faith' must be done away with. The importance of judicial review is also stressed under Article 8 of UNHCR, Principle 32 of the Principles of Detention, and IVth Geneva Convention in Article 43 and is also mentioned in Article 7 of African Charter. The suggestion is also in terms of what Greer calls 'Strong' or 'weak' judicial review. (Stephen Greer argues that strong judicial review means that there is detailed scrutiny of executive decision and whether detainee Rights have been taken care of while as weak judicial review means that courts don't have any expertise to scrutinize executive decisions hence judiciary only checks the subjective assessment of executive).
- Along with these measures, J&K PSA and detentions under this Act has caused a deep scare in the society. Under the guise of preventive detentions, conflict entrepreneurs have sprouted which has led to alienation and disgust among families of detainees and detainees themselves. Preventive detention puts huge financial, emotional and social cost on families which the State has to take care of.

The accountability aspect has to be strong and agile. Security forces have to be professional.

- The data in this study shows that the working of Advisory Boards has not been up to mark. These Advisory Boards have to be professional, transparent and remain independent of other organs in the district. Advisory Boards have to be accessible and should be known to every detainee. In order to address the alienation of families, State must provide some form of aid to families whose earning hand is in detention. This model by State was also adopted by Punjab Police and it works very well in connecting security agencies with families. And by so doing, there will be better rapport between detainees and security agencies.
- As has been reiterated by Supreme Court and has from time to time issued guidelines that along with NSA, UAPA, Citizen Amendment Act, 2019 (CAA), National Register of Citizens (NRC), PSA must be reviewed and misuse by state agencies must be minimised. This can be ensured only through amending various provisions which give overriding powers to police agencies.

### **7.3 Conclusion**

The Jammu and Public Safety is not a normal law to be used rampantly. The research around this thesis suggests that incarcerations under PSA have deep rooted ramifications; these ramifications can be divided into particular impacts and challenges. J&K PSA impacts lives of individuals upon whom it is imposed and their families. But more importantly, J&K PSA creates challenges for society & State as well. This thesis revolved around the hypotheses that J&K PSA is an effective tool in the hands of security agencies to manage security situation in J&K. It has come to fore after the research that Preventive detentions under PSA is necessarily a counterinsurgency tool in Kashmir in addition to a tool used to manage Law and order. Through data and analysis thereof it became clear that PSA imposition on time or for that matter if State anticipates protests and is able to impose PSA just at right time, L&O will remain under control and there will be less bloodshed on streets as we saw during 2008, 2010 & 2016 protests in valley. Secondly, PSA negatively impacts

the socio-economic life of detainees and their families. The prospects for their employment get diminished after PSA imposition. PSA comes with an indelible scar on the life of a detainee which remains with him/her throughout his/her life. Family ties, marriage prospects and romantic relationships get shattered. Families are caught in debt trap and hence forth, for the families it becomes difficult to sustain a detainee's family behind him. Families have to fight the legal battles along with supporting the family of a detainee as well. The dual burden of emotional, psychological and economic gets cumbersome day after day.

If we make the logical cross linkages between two outcomes, the situation becomes like this that State manages the situation using preventive detentions quite well but the aftermath of detentions is quite ugly. State doesn't have the effective mechanism in place to come out of this vicious cycle of preventive detentions in valley or in other words there is no policy in place to replace PSA. Detentions under PSA are increasing year after year and there is no plan B in place to reduce recidivism or PSA usage in itself. What the State is left with are disgruntled families and distressed detainee who are in the society in huge numbers without any counselling or for that matter there is no policy of reverse-doctrination. This aspect gets brushed under the carpet and this is where huge security challenge emerges for security agencies. Being a volatile state and proxy war going on in Kashmir, Jihadist groups easily capture these volatile youth and get them enrolled in militant ranks. This work documents various PSA detainees turned militants who have posed serious security challenge for the security agencies and for the peace of the State altogether. So, what basically starts as an act to bring peace ends up creating a whole new monster, eventually.

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## **Annexures**

### **Annexure I**

#### **INTERVIEW SCHEDULE**

*Dear Respondent:*

I am a Ph.D. scholar conducting research on **The Impact and Challenges of Jammu and Kashmir Public Safety Act, 1978: A study of South Kashmir** The information being sought from you is for research purpose only. So you are requested to express your views freely and frankly in a neutral and unbiased manner. The information supplied by you shall be kept confidential.

#### **Part A: Respondents**

##### **Personal Profile of Respondents**

Age of Detainee

Gender: Male/Female/Other

Marital Status: Married/Unmarried

Profession of detainee

Income of detainee

Income of Family

Year of detention







	<ul style="list-style-type: none"> <li>c) 6-9 months</li> <li>d) 9-12 months</li> <li>e) Greater than 12 months</li> </ul>
<b>Criminal Charges against the detainees</b>	
11.	<p>Whether there is any criminal charge against the detainee?</p> <ul style="list-style-type: none"> <li>a) Yes</li> <li>b) No</li> </ul> <p>If Yes, what is the crime against which FIR has been lodged?</p> <ul style="list-style-type: none"> <li>a) Possessing Arms and Ammunition</li> <li>b) Inciting Violence</li> <li>c) Supporting Militants</li> <li>d) Any Other Reason</li> </ul>
12.	<p>What was your place of detention?</p> <ul style="list-style-type: none"> <li>a) Jail (Usual Prison System)</li> <li>b) Correctional Home (Special Jail)</li> <li>c) House Detention</li> <li>d) Make Shift Jail</li> </ul>
<b>Influence by fellow inmates in detention</b>	
13.	<p>Whether you were influenced by fellow inmates in Detention?</p> <ul style="list-style-type: none"> <li>a) Yes</li> <li>b) No</li> </ul> <p>If yes, specify the inmates who influenced the detainee?</p> <ul style="list-style-type: none"> <li>a) Militants</li> <li>b) Hardened Criminals</li> <li>c) Narcotic Criminals</li> <li>d) Other PSA Detainees</li> </ul>

14.	<p>What were the inclinations towards joining militancy?</p> <p>a) Extremely High b) High c) Moderate d) Low</p>
<b>Legal Aspects of Detention and Awareness about quashing of detention by High Court of J&amp;K</b>	
15.	<p>Do you know that detention under PSA can be quashed by High Court?</p> <p>a) Yes <span style="float: right;">b) No</span> a)</p>
16.	<p>Whether the detainee has appealed in High Court?</p> <p>a) Yes b) No</p> <p>If Yes, has the detainee got relief in High Court?</p> <p>a) Yes b) No</p>
17.	<p>Do the detaining authorities comply with the court directions?</p> <p>a) Yes <span style="float: right;">b) No</span></p>
18.	<p>Have you faced repetition of detention under PSA or tactics of ‘keeping out of circulation’?</p> <p>a) Yes b) No</p>
19.	<p>Specify the type of Psychological impact after repeated PSA detention order?</p> <p>a) Suicidal</p>

	<ul style="list-style-type: none"> <li>b) Joining militancy</li> <li>c) Normal</li> </ul>
20.	<p>Does the detainee wish to participate in electoral politics including exercising his Rights of adult franchise?</p> <ul style="list-style-type: none"> <li>a) Yes</li> <li>b) No</li> <li>c) Can't Say</li> </ul>
<b>Social and Economic Impact</b>	
21.	<p>Rapport of detainee with family</p> <ul style="list-style-type: none"> <li>a) Extremely Good</li> <li>b) Good</li> <li>c) Bad</li> <li>d) Extremely Bad</li> </ul>
22.	<p>What has been society's response towards detenu pre and post imposition of PSA?</p> <ul style="list-style-type: none"> <li>a) Remained Same</li> <li>b) Worsened</li> <li>c) Was Better</li> <li>d) Improved</li> </ul>
23.	<p>Has there been any impact of detention on Job/Studies?</p> <ul style="list-style-type: none"> <li>a) Yes</li> <li>b) No</li> </ul>
24.	<p>What has been the problems faced in resumption of normal life?</p> <ul style="list-style-type: none"> <li>a) Problems faced in resumption of normal life</li> <li>b) Police Harassment Continued</li> <li>c) Mental State was not Opportune</li> <li>d) Apathy from Society</li> <li>e) Apathy from Family</li> </ul>
<b>Detentions and Family Visitations</b>	





	<ul style="list-style-type: none"> <li>a) Arranging the Lawyer</li> <li>b) Helping in Meeting Police Officials</li> <li>c) Arranging Logistics</li> <li>d) Any Other</li> </ul>
35.	<p>How many days in a month family have had to reserve for court proceedings?</p> <ul style="list-style-type: none"> <li>a) 1-4 Days</li> <li>b) 5-8 Days</li> <li>c) 9-12 Days</li> <li>d) 13-16 Days</li> </ul>
36.	<p>Cases of detaining kith or kin if actual accused not available?</p> <ul style="list-style-type: none"> <li>a) Yes</li> <li>b) No</li> </ul> <p>If Yes, Specify the family member picked?</p> <ul style="list-style-type: none"> <li>a) Brother</li> <li>b) Father</li> <li>c) Son</li> <li>d) Any Other (Specify)</li> </ul>
<b>Monitoring and Surveillance</b>	
37.	<p>Has there been any surveillance witnessed after detainee is released?</p> <ul style="list-style-type: none"> <li>a) Yes</li> <li>b) No</li> <li>c) Can't Say</li> </ul> <p>If Yes, Specify the type of surveillance?</p> <ul style="list-style-type: none"> <li>a) Telephone Tapping</li> <li>b) Monitoring by Agencies</li> </ul>

	c) Home Visits by Security Personnel d) Any Other (specify)
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**Part B: Key Informants**

1. How do you reconcile with Preventive Detention in Democratic Societies like India?
2. Has Preventive Detention served its purpose in Kashmir?
3. Is preventive Detention a reasonable measure in the hands of the State in order to garner 'good behavior' from citizens and hence can it lead to peace building in the region?
4. How do you see Kashmir conflict: Is it more a Law and Order/Governance issue or a larger Political issue that fans across geography and History?
5. Do you think J&K PSA and hundreds of detentions under it had helped manage the situation in Kashmir Post abrogation of Article 370?

6. Kindly contrast the ideal mechanism/policies that should have been in place for Kashmir from Centre with the actual policies that have been in vogue since 1947?
7. Don't you think that Preventive detention in J&K leads to proliferation of "conflict entrepreneurship\*"??
8. Give the contrast/reasons as to why some detainees are detained under J&K PSA, 1978 and some others are detained under ULA (P) Act [Unlawful Activities Prevention Act]?

[\* Conflict Entrepreneurship is a process whereby agencies, people, community members or State officials indulge in financial by aggravating the conflict or feeding on the crises. In this case, detaining people deliberately or otherwise in order to create financial opportunities.]

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**Annexure-II**

Government of Jammu and Kashmir  
**Home Department**  
Civil Secretariat, Srinagar/Jammu

**SPEED POST**

**MOST URGENT**  
**RTI MATTER**

Sh. Naseer Ahmad Bhat  
S/o Mushtaq Ahmad Bhat  
R/o Chawalgam Kulgam. 192231.

No. Home/PIO/RTI/88/2020

Dated: 15-06-2021

Subject:- Request for information under RTI Act-2005 by Sh. Naseer Ahmed Bhat.

Sir,

Kindly refer your RTI application received in this department on 24-05-2021. The required information/action is as under:-

Point No. 1,2 & 3.	Transferred U/s 6 (3) of RTI Act, 2005, to Public Information Officer, Police Headquarters, J&K, Srinagar (Copy of RTI enclosed), with the request to provide the requisite information to the RTI applicant directly within the stipulated time under an intimation to this department.
Point No. 4.	Presently 09 persons are detained in J&K under PSA for Timber smuggling <u>          </u>

### Annexure-III

Government of Jammu and Kashmir  
**Home Department**  
Civil Secretariat, Srinagar/Jammu

**SPEED POST**

**MOST URGENT**  
**RTI MATTER**

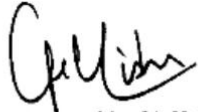
✓ Sh. Naseer Ahmad Bhat  
S/o Mushtaq Ahmad Bhat  
R/o Chawalgam Kulgam. 192231.

No. Home/PIO/RTI/113/2020 Dated: 26-08-2021  
Subject:- Request for information under RTI Act-2005, by Mr. Naseer Ahmad Bhat.

Kindly refer your RTI application received in this department on 17-08-2021 for information under Right to Information Act, 2005. The required information/action is as under:-

S.No	Information sought	Reply.
1	How many correctional homes are there in J&K for Preventive Detentions?	Transferred U/s 6(3) to PIO Prisons Department J&K, Srinagar vide this office No. Home/PIO/RTI/113/2020 dated 20-08-2021.(copy enclosed)
2	How many PSA detainees are there in those correctional homes?	
3	What is the age category of PSA detainees who are kept in those correctional homes?	
4	How many detainees under PSA have been produced before Advisory Board in last 3 years.?	21
5	How many detentions have been revoked by Advisory Board in last 3 years in UT of J&K?	16
6	Is there any policy by J&K Government to reduce recidivism of PSA detainees?	There is no such separate policy specifically for PSA detainees.
7	Is there any policy to detain PSA detainees separately from other inmates in UT of J&K? and	Transferred U/s 6(3) to PIO Prisons Department J&K, Srinagar vide this office No. Home/PIO/RTI/113/2020 dated 20-08-2021.(copy enclosed).
8	Is the current infrastructure of jails enough to ensure that there is no mixing of Preventive detainees with other hardcore criminals/undertrials?	

If you feel aggrieved by this disposal, you may file an appeal under the provisions of Section 19(1) of the Right to Information Act, 2005 before the First Appellate Authority i.e. Dr. Arvind Karwani, Addl. Secretary to Government, Home Department, J&K (Room No. 32 Ground Floor, Civil Secretariat, Jammu) within 30 days from the date of the issue of this communication.

  
(Gurpreet Singh) KAS  
(Public Information Officer)  
Deputy Secretary to the Government

Encl: A/A

Annexure-IV

GOVERNMENT OF JAMMU AND KASHMIR  
OFFICE OF THE DIRECTOR GENERAL OF POLICE  
PRISONS DEPARTMENT, J&K SRINAGAR

Shri Naseer Ahmad Bhat,  
S/O Mushtaq Ahmad Bhat,  
R/O Chawadgam Kulgam.  
Pin Code-192231, Mobile No. 7889888951.  
email: [naseerabbhatt253@gmail.com](mailto:naseerabbhatt253@gmail.com)

No. DS/RTI/2020/276/

4623-25

Dated: 27.08.2021

Sub:- Request for information under Right to Information Act, 2005 by Naseer Ahmad Bhat.

Sir,

Please refer your communication received by this office vide Home Department No. Home/PIO/RTI/113/2020 dated 20.08.2021 with regard to point No. 1, 2, 3, 7 and 8 on the aforementioned subject.

In this connection, the reply to the point (1) is as under:

S.No	Point(s)	Reply to point No. 1 is as under
1	How many Correctional Homes are there in J&K for preventive detention?	The following Jails are under the Administrative Control of J&K Prisons Department: Central Jail Srinagar, Central Jail Jammu, Kotebhalwal District Jail Jammu District Jail Kathua District Jail Udampur District Jail Rajouri District Jail Poonch District Jail Kishtwar District Jail Bhaderwah District Jail Baramulla District Jail Kupwara District Jail Anantnag Special Jail (Correctional Home)Pulwama Sub Jail Reasi

**Annexure-V**

OFFICE OF THE SUPERINTENDENT DISTRICT JAIL UDHAMPUR

Sh. Naseer Ahmad Bhat,  
S/o Mushtaq Ahmad Bhat,  
R/O Chawadgam Kulgam.  
Pin Code – 192231, Mobile No. 7889888951.  
Email: [naseerbhatt253@gmail.com](mailto:naseerbhatt253@gmail.com)

No: - DJU/MS/21/ *4697-98*

Dated:- *28*-08-2021.

**Subject: - Supply of information under Right to Information Act,2005.**

Dear Sir,

Please refer your RTI application received by this office on 28.08.2021 from Prisons Directorate vide letter no. DS/RTI/2020/276/4626-28 dated 27.08.2021, the requisite reply to point no. 1 stands submitted to you by the office of Director General of Police, Prisons J&K Srinagar vide letter no. DS/RTI/2020/276/4623-25 dated 27.08.2021 however, the reply to points 2,3,7 and 8<sup>s</sup> furnished as under that :-

NO	Point (s)	Reply		
	How many PSA detainees are there in those correctional homes?	At present 05, Detenues are lodged in District Jail Udhampur under PSA.		
	What is the age category of PSA detainees who are kept in those correctional homes?	18-25 years	25-35 years	35-45 years
		01	03	01
	Is there any policy to detain PSA detainees separately from other inmates in UT of J&K?	Yes, keeping them (detenues) in separate block from other inmates.		
	Is the current infrastructure of Jail enough to ensure that there is no mixing of Preventive detainees with other hardcore criminals / Undertrials?	Yes, enough infrastructure is available to prevent mixing of detenues under PSA from other hardcore criminals/ Undertrials.		

Annexure-VI

**UNDER SECTION 107 READ WITH SECTION 117 Cr.P.C**

I, \_\_\_\_\_ S/o \_\_\_\_\_  
R/o \_\_\_\_\_ do hereby solemnly declare as under

1. That on refusal to a bond executed under section 107 Cr.P.C for keeping the peace, the Executive Magistrate 1<sup>st</sup> class, Srinagar by an order dated: \_\_\_\_\_ detained me in \_\_\_\_\_.
2. That I undertake that in case of release from the detention, I will not make any comment(s) or issue statement(s) or make public speech(s) hold or participate in public assembly(s) related to the recent events in the State of Jammu and Kashmir, at the present time, since it has the potential of endangering the peace and tranquility and law and order in the State or any part thereof.
3. That I further undertake that in case of default or breach of this bond, I will pay an amount of Rs. 50,000/- as penalty to the State of Jammu and Kashmir.

Dated:

Signature

**Surety**

I/we \_\_\_\_\_ S/o \_\_\_\_\_  
Nationality \_\_\_\_\_ R/o \_\_\_\_\_ do hereby agree  
(individually / collectively) to remain surety(s) of \_\_\_\_\_  
In case of breach of bond by \_\_\_\_\_, I/We  
undertake to pay an amount of Rs. 50,000/- as penalty to the State of Jammu and  
Kashmir.

Dated:

Signature (s) / thumb impressions(s)

I certify that the surety(s) mentioned above are holding property more than the surety amount and hence capable of paying the surety amount of Rs. 50,000/- I shall be liable in case the surety(s) make the default.

Dated:

Signature (s) / thumb impressions(s)

## Annexure VII

**"Army thrashing civilians in the state is nothing new. But manhandling civil officers marks a new low. The valley & its people are being choked to a silent death. For how long will you oppress them in their own land? Is this what we deserve for choosing India over Pakistan?"**

The subject has been stoking gullible masses so as to create issues of disturbance in public order and demoralizing security forces by making unscrupulous statements vis-a-vis the security exercises being undertaken for safety and security of common people. The said fact is evidenced from her following announcements made in month of April-2019.

**"Kashmiris now need to seek permission to use roads that rightfully belong to them & pay taxes for seems like Gols plan is to reduce us to second class citizens in our own territory. The valley's story has all the elements of a Greek tragedy"**

**How can you restrict civilians on our main highway ? You want to smother Kashmiris change the demographics of J&K State and imprison them in their own land? Over my dead body."**

The subject is referred for her dangerous and insidious machinations and usurping profile and nature by the masses as "Daddy's girl" and "Kota Rani" based on profile a historical medieval queen of Kashmir, who rose to power by virtue of undertaking intrigues ranging from Poisoning of her opponents to ponyardings . Her divisive approach and potential and its spill over to other parts of the country is reflected by her following pronouncements:-

**" Fail to understand the need to pass the triple talaq bill especially since the Supreme Court had already declared it illegal. Undue interference seemingly to punish Muslims. Given the current state of the economy, should this really have been a priority?"**

Annexure VIII

OFFICE OF THE SUPERINTENDENT CENTRAL JAIL SRINAGAR

NO:-CJS/MJ/RTI/2020/1800-1801  
Dated:- 16.09.2021

Mr. Naseer Ahmad Bhat,  
S/O Mushtaq Ahmad Bhat  
R/O Chawalgam Kulgam, 192231  
Mobile Number 7889888951

Sub:- Request for information under Right to Information Act-2005.

Sir,

Relevant to the subject cited above and in compliance to the communication received from Directorate of Prisons J&K vide no:- DS/RTI/2020/276/4626-28 dated:-27.08.2021. In this connection the pointwise reply point no 2, 3, 7 and 8 is detailed as under:-

2)	How Many PSA detainees are there in those correctional homes	As on 15.09.2021, eighteen PSA detainees are lodged in Central Jail Srinagar								
3)	What is the age category of PSA detainees who are kept in these correctional homes	<table border="1"> <tr> <td>20-25 Years</td> <td>07</td> </tr> <tr> <td>25-35 Years</td> <td>04</td> </tr> <tr> <td>35-45 Years</td> <td>05</td> </tr> <tr> <td>45-60 Years</td> <td>02</td> </tr> </table>	20-25 Years	07	25-35 Years	04	35-45 Years	05	45-60 Years	02
20-25 Years	07									
25-35 Years	04									
35-45 Years	05									
45-60 Years	02									
7)	Is there any policy to detain PSA detainees separately from other inmates in UT of J&K	Yes, as per the provisions of J&K Jail Manual laid down in chapter XXIV detainees.								
8)	Is the current infrastructure of Jails enough to ensure that there is no mixing of Preventive detainees with other hardcore criminals/undertrials	Provisions are already in vogue for segregation of detainees with other hardcore/undertrials. However in case of overcrowding, every possible effort is being taken to lodge the PSA detainees with first time offenders involved in petty cases.								

## Annexure IX

### OFFICE OF THE SUPERINTENDENT DISTRICT JAIL RAJOURI

To.

Shri Naseer Ahmad Bhat  
S/O Mushtaq Ahmad Bhat,  
R/O Chawagdgam Kulgam  
Pin Code-192231, Mobile No.7889888951.  
Email.naseerbhatt253@gmail.com

NO: - DJR/MH/ 77/4-15 Dated: - 01. 09..2021  
Subject: - Request for information under Right to information Act,2005 by Naseer Ahmad Bhat  
Sir.

Please refer your communication received by this office through Prisons Headquarter vide No DS/RTI/2020/276/4623-25 dated 27.08.2021 with regard to point No 1,2,3,7 and 8 on the aforementioned subject.

S. No	Point(s)	Reply
01	How many correctional homes are there in J&K for preventive Detentions?	The reply has already been submitted by prisons Head Quarte vide No DS/RTI /2020 /276/4623-25 dated 27.08.2021
02	How many PSA detainees are there in those correctional homes?	One PSA Datenu presently lodged in Distric Jail Rajouri.
03	What is the age category of PSA detainees who are kept in those correctional homes?	Age approximately 60 years. Lodged by the order of DM Poonch, approved by the Home Department J&K UT vide order No Home/PB V/218 of 2021 dated 17.03.2021, and confirms order No Home/PB-V/277 of 2021 dated 9.4.21.
07	Is there any policy to detain PSA detainees separately from other inmates in UT of J&K and	Yes
08	Is the current infrastructure of jail enough to ensure that there is no mixing of preventive detainees with other hardcore criminal/ undertrials?	Due to lack of accommodation the detenu presently kept with another criminal.

Hence submitted for favour of your kind information.



### List of Publications

S.no.	Title of paper with author names	Name of journal / conference	Published date	ISSN no/ Vol. No, issue no	Indexing in Scopus/ Web of Science/UGC-CARE list (please mention)
1.	Peace Building and Tryst with Democracy in Jammu And Kashmir: A Historical Perspective Naseer Ahmad Bhat Dr. Rajvinder Kaur	History Research Journal	Sep-Oct 2019	0976-5425  Vol. 5 Issue 5	UGC
2.	Global Economy and Consumerism: An Analysis Naseer Ahmad Bhat Dr. Javaid Ahmad Bhat	European Journal of Molecular & Clinical Medicine	2020	2515-8260  Vol. 7 Issue 7	Scopus, Publon /Google Scholar, Directory of Open Access Journals
3.	EDUCATION IN KASHMIR: SCENARIO WITHIN DOUBLE LOCKDOWN— COVID-19 & CONFLICT Naseer Ahmad Bhat	PalArch's Journal of Archaeology of Egypt / Egyptology	2020	1567-214 X Vol. 17 Issue 7	Scopus

4.	Public Administration in the era of Illiberal Democracy, Artificial Intelligence and Big data Naseer Ahmad Bhat Dr. Rajvinder Kaur	History Research Journal	Nov –Dec 2019	0976-5425  Vol. 5 Issue 6	UGC
5.	Dilemma of Diversity for India: Traditional and “New” Themes in 21 <sup>st</sup> Century Naseer Ahmad Bhat Ms. Nisha Yadav	International Journal of Research and Analytical Reviews (IJRAR)	Sep 2020	2348-1269 2349-5138 Vol. 7 Issue 3	UGC
6.	Downward Spiral In Civil Service Anonymity And Neutrality: An Analysis Of Indian Bureaucracy During Rise Of Chauvinism And Right-Wing Nationalism Naseer Ahmad Bhat Ms. Bazila Shameem Ms. Nisha Yadav	PalArch’s Journal of Archaeology of Egypt / Egyptology	2020	1567-214 X  Vol. 17 Issue 7	Scopus

### **List of Conferences**

1. Two Days National Conference on Arts, commerce and Social Sciences. 17-18<sup>th</sup> January, 2020. ICSSR Sponsored at St. Wilfred PG College Jaipur.
2. Annual Labour Conclave, Vaishvik 2020 on 16<sup>th</sup> February, 2020 at Tata Institute of Social Sciences
3. 7<sup>th</sup> National Conference on Diversity and Development at Tata Institute of Social Science 2-3 March, 2020.
4. National E-conference on Education and Development: Post Covid-19 26<sup>th</sup> September, 2020, Organised by School of Education, Lovely Professional University.
5. International Conference on Equality, Diversity and Inclusivity: Issues and Concerns on 25<sup>th</sup> September 2021 by School of Humanities Lovely Professional University.
6. Nepal Institute of International Cooperation and Engagement (NIICE) International Studies Convention 27-29<sup>th</sup> August, 2021.

### **Book Chapters**

1. Naseer Ahmad Bhat, Firdous, Dar.2020. "Civil Society and Development: A Study of South Asia". *Works on SDG-2030: Ideas and Innovations*. Publication Division GEDY India.

## Newspaper Article and Op-eds

1	Reinterpreting Globalization: Impact of COVID-19 on Global Ideologies and Economics with Dr. Rajeesh CS <a href="https://niice.org.np/archives/4158">https://niice.org.np/archives/4158</a>
2	Sex Workers in Bangladesh: Tales of Destitution amidst the Pandemic with Dr Rajeesh CS <a href="https://niice.org.np/archives/4659">https://niice.org.np/archives/4659</a>
3	Chinese Engagements in Afghanistan <a href="https://niice.org.np/archives/6876">https://niice.org.np/archives/6876</a>
4	Peace Trajectory in Afghanistan: Analysing the Role of Stakeholder Nations with Dr. Rajeesh CS in NIICE <a href="https://niice.org.np/archives/4488">https://niice.org.np/archives/4488</a>
5	The Need to Reconnect with Kashmiri's on 23 March 2019 <a href="https://freedomgazette.in/2019/03/the-need-to-reconnect-with-kashmiris/">https://freedomgazette.in/2019/03/the-need-to-reconnect-with-kashmiris/</a>  This article was also lauded by Dr. Shashi Tharoor <a href="https://twitter.com/shashitharoor/status/1121692167825526784?lang=en">https://twitter.com/shashitharoor/status/1121692167825526784?lang=en</a>