



# Human Rights and Dystopia by Jammu and Kashmir Public Safety Act, 1978.

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*Abstract:*

*Human rights are sine qua non for the overall development of society. Aristotle has rightly said, Man is a social animal meaning thereby a human being cannot live in isolation he is always dependent upon his fellow companions, in order to live a dignified life. Some rights which a human by birth possesses are inherent. Those inherent rights are basically natural rights which everyone must enjoy without any restriction or sanction imposed by the state. Generally human right is a natural law, which directly emanates from God and no one have a authority to encroach upon it.*

*The Jammu and Kashmir Public Safety Act, 1978 popularly known as PSA is a preventive detention law enforced in the state of Jammu and Kashmir since 1978. The main purpose of this legislation was primarily to check the rapidly growing smuggling of timber in the state. Later on the provisions of this Act were used by government to restrict the innocent people from exercising their basic freedom guaranteed by law. Even the judiciary has raised its concern over the working of this preventive law, as many times this law has been termed as "Lawless Law" by the Hon'ble Supreme Court. Since 1978 this law has jeopardized the lives of people living in the state. In one of its provisions it is clearly mentioned that a person can be arrested or detained on a mere suspicion without following the due procedure of law. At international level, the human rights watchdog has also termed this law as a blot to the basic human rights. The excruciating problem of this act is that it increases the problem of those people who are living in the vicinity of the protected place or area, because the act does not provide any specific nomenclature for the place which is going to become prohibited or protected area, so those living in that area have to follow exodus or live in terror because anytime their loved ones may be detained.*

***Index Terms: Human Rights, Preventive Detention, arbitrariness, public disorder, security***

**Introduction:**

Human Rights are inalienable which a state must ensure to its populace without any discrimination. Human rights are also called natural rights as these rights emanates from the supreme authority. But it is not easy task to ensure these rights to every individual. We have many astounding epitome of countries which are unable to provide their citizens the basic natural rights, like Syria, Myanmar, Iraq, Yemen, etc. India is doing its assiduous work to provide all rights which maybe envisaged in all civilized societies. Our country which was under British subjugation for a long period of time has witnessed the plight of its citizens and dearth of basic human rights which ultimately prompted our founding fathers to ensure such a society where everyone regardless of his or her background is guaranteed and protected by these basic rights. The Constituent Assembly deliberated in details these rights while making the country's constitution which is the supreme law of the land in the present context. The reason for such deliberation was to establish such a society which is governed by the rule of law and to make people aware about their rights which they were denied during the British rule.

The concept of human rights is not new but it has a long history which every society tries to ensure in order to provide a dignified life to the people. It was recognized by Hobbes, Locke, and Rousseau in their famous theory of Social Contract. It has source in divine law as well, every religion whether Hinduism, Islam, Christianity has always wondered around it. With the advancement of time its significance has gained momentum not because it began to be recognized but because people are getting aware of these rights and acknowledged how to avail it against state also. There are many aficionado of Human right who castigate strictly every act violating human right by the State as well.

The term 'Human Rights' which is used since the outbreak of world war second gained importance in contemporary debates and became a universal phenomenon. After the adoption of Universal Declaration of Human Rights (UDHR) on December 10, 1948 by the United Nations, it was seen by many as a sign of optimism for the better protection, promotion and enforcement of human rights. Today the concept of human rights includes civil and political rights. It is the first and foremost responsibility of any state to protect and promote human rights. It is an obligation of the state to create conditions for peaceful existence which enable human rights to be enjoyed by every individual in that state. With the increasing risk of violation of human rights resulting from the activities of the state as well as non- state actors, International Law in its universal or regional manifestation guarantees and promotes the enforcement and observance of human rights.

The Public Safety Act which is in operation throughout the state of Jammu and Kashmir is a glaring example of misuse of legal provisions that violates basic human rights. This law from the day of its enforcement has changed the definition of human existence, where its provisions have been used arbitrarily to curb down the basic rights of life, liberty, speech and expression which are indispensable in any country governed by rule of law. It gives unbridled powers to the law enforcing agencies to detain or arrest any person on the basis of a mere suspicion irrespective of the fact that the said suspicion has been designed to meet malicious ends. Like misuse of the Public Safety Act provisions to curb down freedom of assembly and protest against misuse of government policies .The justification for such detention given by the authorities is that such elements are likely to disturb public order and are prejudicial to the maintenance of

peace and tranquility in the state. As we are well aware about the fact that the state of Jammu and Kashmir is passing through a difficult phase since October 1947 when the Instrument of Accession was signed by the then maharaja of state Hari Singh and the Indian prime Minister Pandit Jawaharlal Nehru. This is the main official document which creates the relation of the state of Jammu and Kashmir with the rest of India. The main contention of the people of state is that the state has not merged with India as the other princely states did but it was a temporary agreement made between the two on the condition that the final or permanent solution with regard to the future of state will be decided by the people of the state by exercising the right to self determination or the plebiscite as promised by the then Indian leadership.

The Act has given enormous powers to the state to curb the basic freedoms that raise their voice against the abuse of power by the administrative authorities. The authorities in return charged the innocent people under this draconian law without giving them opportunity of fair trial. As the life of general public is getting adversely affected by this law, so it has become one of the main reason for increase in brouhaha all over the state and joining of general public and student into various militant organizations. In recent times this law has shattered the dreams of thousands of people who become scapegoats at the hands of state authorities. The law is so barbaric that it has not even spared the minors who are languishing behind prisons on false assumptions that they may disturb law and order in the state. In the valley of Kashmir, every family has a heart wrenching story to narrate as to how this law has severely affected their daily lives. They are not belligerent but they are demanding a dignified human existence. Social and economic setback which they face is beyond imagination. Due to the alarming rate of detentions people are struggling for their daily needs as there are families where the sole bread owner is under detention without any concrete evidence and his family at home is not able to satisfy the basic needs of life which includes food, education, health, proper sanitation and hygiene. Lack of finances to sponsor education and instability in the education system has further aggravated the already existing rate of unemployment among the younger generation which constitutes nearly 76% of the total population of state under 40 years of age (census 2011). The state which is famous for tourism industry is being badly affected by these preventive laws and as a result the annual GDP of the state diminishes at an alarming rate. The detention under this act is also described as “revolving door detention”. It is a mechanism under which government redetains a person under this preventive law without following the due procedure which is termed as complete disregard to International Humanitarian Law. Under Public Safety Act, a person can be detained for up to two years without charge or trial if the authorities think that such person is threat or danger to the state. The authorities booked hundreds of people each year in order to “keep them out of circulation”. The ongoing human rights violations are crystal clear to describe how the state authorities have failed to fulfill the mandate guaranteed by the human rights law.

Facts do not cease to exist just because they are ignored. Likewise the violation of constitutionalism cannot be ignored by arbitrary provisions of Public Safety Act. India is a signatory of International Human Rights Convention. Inappositely Public Safety Act used to detain individuals for years at a time without trial, depriving them of constitutional safeguards, otherwise applicable in Indian law. In the case of *Kishore Singh v. State of Rajasthan AIR 1981 SC 625*, the Apex court succinctly recalled, human dignity is a clear value of our constitution not to be bartered away for mere apprehension entertained by jail officials. An accused person is presumed to be innocent unless and until proven guilty, this is the edifice of our criminal

justice system. But this founding principle is not being followed while dealing with the cases relating to the state of Jammu and Kashmir. Thousands of people are kept in incarceration by the authorities illegally. Only in one year between March 2016 and August 2017 more than one thousand people were arrested. No rule or standard operating procedure (SOP) is followed, revealed in an RTI filed by Sheikh Ghulam Rasool which is the ardent violation of rule of law. People are punished although they have committed no offence. On the basis of mere suspicion how anyone can be denied his natural right to liberty. This enigmatic approach would no longer be helpful for the authorities to control the resentment among the common people. The institution of judiciary is also ostensibly hapless in protecting the basic rights. There are hundreds of cases where individuals were acquitted by the judiciary but the state authorities are so reluctant in releasing them instead of that court order they further implicate them under different charges.

The altercation between government and public is four decade old. Since 1989 it has witnessed an ongoing freedom movement and armed uprising for their independence. Armed forces regularly carry on gruesome retaliation on militants and innocent civilians. Although it is the right of the state to defend and protect its population from external aggression and internal disturbance and to ensure that government is carried on in accordance with the provisions of the constitution. However it should be done while respecting human rights of innocent public. It is the duty on the part of a state to charge and try those offenders, who found guilty by speedy and fair trial. It can be said that Public Safety Act is a stymie between India and Kashmir.

The significance of speedy trial has been observed by the Supreme Court in a leading case of *Hussainara Khatoon (No.1) v. Home Secretary, State of Bihar AIR 1979 SC 1360* as an essence of criminal justice system. In an another landmark judgment pronounced by the Hon'ble Apex court in *Maneka Gandhi v. Union of India AIR 1978 SC 597*, has observed that right to fair trial is an integral part of Article 21 of the constitution which guarantees right to life and personal liberty to every individual.

Moral consideration cannot be kept at bay while dealing with the criminal justice system. Where the only bread winner of a family has been detained, his family suffers psychological trauma and mental distress. They are being foisted to lead a life of pauper. Their children are always prone to crime, which becomes a fertile ground for easy radicalization by terrorist organizations. Their women have to face lot of challenges in normal course of life. By this way their frisked life are detrimental for the stability of government. When an innocent person is punished then he naturally inclines towards the commission of crime. Every action have equal and opposite reaction, likewise when anyone's life is spoiled on a mere apprehension then he would retaliate with the person or authority which is responsible, in a gravest manner.

The ongoing human rights violations are self explanatory to describe the extent of human tragedy endured by the Kashmiri people. All these gross human rights violations prompted the United High Commissioner for Human Rights, Zeid Ra'ad Al Hussein to state that, " we had previously received reports and still continue to do so, claiming the Indian authorities had used force excessively against the civilian population under its administration. I believe, an independent, impartial and international mission is now

needed crucially and that it should be given free and complete access to establish an objective assessment of the claims made by the two sides”<sup>1</sup>

### **Bone of contention:**

The United Nations Charter and the two additional protocols i.e., ICCPR & ICESCR guarantee the right of self-determination. It is a right by which people freely determine their political status and pursue their social, cultural, and economic development. The United Nations General Assembly has passed several resolutions with the regard to the status of Jammu and Kashmir which both the countries have accepted (i.e., India & Pakistan).

The Resolution 47 of 21<sup>st</sup> Apr, 1948

The Resolution 51 of 3<sup>rd</sup> June, 1948

The Resolution 80 of 14<sup>th</sup> Mar, 1950

The Resolution 91 of 30<sup>th</sup> Mar, 1951

The Resolution 122nd of 24<sup>th</sup> Jan, 1927

United Nations commission on India & Pakistan (UNCIP) Resolutions of 13<sup>th</sup> august 1948 and of 5<sup>th</sup> January 1949 all these declare that the final decision with regard to the permanent solution Kashmir problem in dispute will be in accordance with the will of people expressed through the democratic method of free and impartial plebiscite conducted under the auspices of United Nations. Denial of this fundamental right to the people of Jammu and Kashmir is a gross violation of International Law. Article 3 of UDHR provides that everyone has a right to life, liberty, and security of a person. But on the other hand by imposing curfew, the State administration suppresses the civil liberties of the people and also inflicts collective punishment for the entire population. The International human rights law prohibits arbitrary deprivation of life under any circumstances, Article 6 of ICCPR, prohibits derogation from the right to life, even during occasions of emergency. ICCPR Articles 4 and 7, explicitly ban torture, even in times of national emergency or when the security of the state is threatened.<sup>2</sup> By deploying more than seven lacks troops in the State, it become one of the most militarized zone in the world. The armed forces are given absolute impunity to deal with the law and order situation in the state. There are laws which give absolute power to the security forces to shoot at sight while dealing with the public resentment. This privilege enjoyed by these agencies results in escalation of antagonism and the situation became bad to worse on routine basis. These draconian laws violate the international norms and fundamental human rights to which India is a leading signatory. Many times the armed forces or the other security agencies oppose the move to repeal these draconian laws under which they are enjoying an absolute immunity.

Preventive detention is different from punitive detention imposed by a court of law. Preventive detention law has been used in many countries as a weapon to meet any danger or threat to a nation during extraordinary situation. The preventive detention law was first implemented by Britishers during the First World War. The purpose behind this law was to protect their internal security and defense.

<sup>1</sup> Zeid Ra'ad Al Hussein, Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, at the 33rd session of the Human Rights Council, UNHR, (sep. 13, 2016 01:40 pm), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20474>

When this law was revoked in many European countries, India regularly implements law which mainly relies on preventive detention. Although it is tool available to control any extraordinary dangerous situation. The government of India's justification in implementing this law into its domestic affairs was to meet the challenges of internal security and public order. After achieving independence the growing insurgency which was likely to erupt prompted the Constituent Assembly to incorporate the law of preventive detention to save the infant democracy of India. The main challenge before the government at that time was emerging naxalite movement, communal disharmony, religious fundamentalism, illegal immigration. It was because of the growing apprehension which compelled the founding father to incorporate such a regressive law which is having tendency to curb anti-national activities. During the Constituent Assembly debate one of the member asked regarding preventive detention that, "whether a thing is poison or not cannot be tested by swallowing it". The sixty eight years of experimentation on preventive detention law clearly indicates that it has repeatedly and severely violated the basic natural rights.

### **Historical background of Preventive Detention Law in India:**

Preventive detention law is a brainchild of Britishers under whose subjugation India was ruled. In the year 1784 the British East India Company drafted a law which permitted the governor general to detain a person on mere suspicion who would be involved in any kind of activity which might be dangerous or prejudicial to the maintenance of peace and security of the British establishment. In the year 1919 the Britishers promulgated the infamous Rowlatt Act in which the provisions for preventive detention were laid down. This barbaric law was applied during peacetime to strongly putdown any dissenting voice or expression. Instead the people of India castigated the harmful effects of this tyrant law but it was later on incorporated under the Indian constitution as well. The first preventive detention Act was enacted by the Indian Parliament on 26 February 1950.

The founding father who drafted the constitution was in dilemma whether to insert this provision or not. On the one hand they want to give every individual absolute fundamental right but on the other hand they were serious in dealing with the arising dreadful situation which the novel nation was facing. Amid August 1947, the question before the Constituent Assembly was to give power to the parliament and state legislatures in order to make law on preventive detention, despite several oppositions, the Constituent Assembly was concerned about the abuse of potent power of preventive detention law. Dr. Bhim Rao Ambedkar, chairman of the drafting committee expounded the need for preventive detention by referring to uncertain political development in near future after the enforcement of Indian constitution, striking, "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."<sup>3</sup> Due to the prevalent exigencies, turmoil, violence and political fragility after partition were given as justification for the inclusion of preventive detention law under the constitution even during peacetime.

<sup>3</sup> Volume IX [30th July to 18th September, 1949]- Constituent Assembly Debates-Official Report; Reprinted by Lok Sabha Secretariat, New Delhi, 4th Reprint-2003, page 1498 to 1572

## Protection of Detainees under Preventive Detention Law:

There were heated and extensive debates in the Constituent Assembly with respect to provide balance between individual liberty and power of government to detain a person under article 15 of draft constitution. Later on it expanded the purview of article 15 whether to opt between procedure established by law and due process of law, regarding preventive detention law. The Constituent Assembly was uncertain whether to provide greater confidence to the court or the legislature because procedure established by law leaves little scope than the other contrasting expression of due process of law. The prophecy made by K. M. Munshi is proved correct that the power to make preventive detention law would be abused by the legislature, if the majority party in the house passes the resolution in hurried way which as a result gives enormous power to the executive and the police. On the other hand some members were anxious that the court might be incapable to review the preventive detention law. But Dr. Ambedkar who remained neutral in the concerned debate was of the opinion that few jurists would subvert the democratic process if confidence for making preventive detention law is delegated to court by due process of law. When the whole debate was put to vote the expression 'procedure established by law' was adopted which as a result severely diminished the role of judiciary. Dr. Ambedkar discussed in detail the inherent right of detainee which follow the principle of natural justice, he opined that on making arrest the detainee must be communicated the grounds on which he was arrested. Secondly, detainee must be allowed to engage a legal practitioner of his choice to represent him before the court of law. And finally, the detainee must be produced before the nearest magistrate within 24 hours of his arrest. However such guarantees were not available to persons who detention is mandated by preventive detention law. At the final stage of debate, it was later on decided that the ground of arrest under preventive detention shall be communicated to the arrested person. In addition to this law the provision was inserted that any detention based on certain specific ground the disclosure of which is against the public interest then the ground of arrest may not be revealed.

### Law of Preventive Detention and the Indian Constitutional

India despite being one of the largest democracies on earth is the only country which provides law regarding preventive detention. The Indian constitution expressly provides provisions with regard to arrest or detention of certain persons on the basis of mere suspicion. There are other laws also passed by the legislature which further expands the scope of preventive detentions in India. Here, we will discuss and analyse the law of preventive detention as provided under the Constitution.

**Article 22 of the Constitution of India deals with Protection against arrest and detention in certain cases:**

*(1) No person who is arrested shall be detained in custody without being informed, as soon as may not be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.*

*(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.*

(3) Nothing in clauses (1) and (2) shall apply —

(a) To any person who for the time being is an enemy alien; or

(b) To any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) An Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as judges of a high court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) Such person is detained in accordance with the provisions of any law made by Parliament under sub clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) The procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).<sup>4</sup>

Keeping in mind the constitution assembly debates with regard to preventive detention, relevant provisions were enshrined under the present constitution Article 22 clause (1) & (2) provided protection to those who are arrested ordinary law of crime, this general law is subject to exceptions which are laid down under clause (3) of Article 22. Article 22 deals with two separate matters: (1) persons arrested under the ordinary law of crimes and (2) person detained under the law of ‘preventive detention’. Clauses (4) to (7) of Article 22 provides the procedure which is to be followed if a person is arrested under preventive detention. In *A. K. Gopalan v Union of India*<sup>5</sup> Paatanjali Shastri, J., explaining the necessity of this provision said: “The sinister looking feature, so strangely out of place in democratic constitution, which insists personal liberty

<sup>4</sup> Bare Act, Constitution of India, Universal Law publications.

<sup>5</sup> AIR 1950 SC 27

with the sacrosanctity of a fundamental right, and so incompatible with the promises of its preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of infant republic”.

### **Constitutional safeguards against Preventive Detention Law:**

The Indian constitution has recognized the law of preventive detention, it has also provided safeguard to mitigate the harshness by placing restriction on the legislative power conferred on the legislature. The safeguards guaranteed to an arrested person under preventive detention law are laid down in clauses (4) to (7) of article 22. Which are as following?

- (a) Review by advisory board.
- (b) Communication of grounds of detention.
- (c) Detenue’s right of representation.

#### **(A) Review by Advisory Board**

Clause (4) of Article 22 has been amended by the 44<sup>th</sup> constitutional amendment act, 1978. The changes made by the amendment are discussed below:

#### **Position before 44<sup>th</sup> Amendment act, 1978:**

Clause (4) provided that no person who has been detained under preventive detention shall be put behind bars for more than three months unless an advisory board constituted of person who are or have been qualified to be high court judge has reported before the expiry of the said period of three months founded on the sufficient cause for such detention.

#### **Position after the 44<sup>th</sup> Amendment Act, 1978:**

This amendment has supplanted new clause for clause (4) which diminished the maximum period of preventive detention from three months to two months. The detention can be extended beyond two months only with the permission of advisory board. Another important change made by this amendment is relating to constitution of advisory board. It can be constituted in accordance with the recommendation of concerned high court. The board shall consist of a chairman and not less than two other members.

Article 22(5) guarantees two important rights which are available to a person who is under detention or who has been arrested under the provisions of preventive law. These rights are briefly states as follows.

#### **Right of Communication**

1. The detaining authority must “as soon as may be” communicate to the person the grounds of detention

It requires that after the order of detention is passed by the detaining authority, the grounds on which such person is detained shall be communicated to him so as to provide him an opportunity to defend his or her order of detention. . It further provides that the detaining authority is not obliged to disclose those grounds upon which the order of detention is made which it considers that such disclosure will affect the public interest.

## Right of Representation

2. To provide “the earliest opportunity” of making representation against the order of detention.: Another important protection or safeguard available to the person detained is to arrange his representation in the court of law in order to contest his or her claim before the appropriate authority. This protection should be provided to the detune at an earliest otherwise it will amount to gross violation of his or her human right. There is no constitutional obligation under article 22 (5) to consider the representation made by detenu before the confirmation of detention order and in absence of any statutory requiring consideration of representation prior to confirmation of detention order, it can be considered after the confirmation of detention order.<sup>67</sup>

## Preventive Detention and the Jammu and Kashmir Public Safety Act, 1978

In accrual to the various preventive detention laws enacted since 1947, several states in India have enacted laws relating to preventive detention. One of the glaring examples of such legislation is Jammu and Kashmir public Safety Act, 1978. The preventive detention provided under the Constitution is dealt concurrently by the Union and State legislatures. The law is so harsh in nature that is has infringed the basic rights of detainees .Section 8 of the Act provides detention for the period up to one year for those persons acting in any manner which is in contravention of maintenance of public order. It further provides detention up to two years in cases where a person acting in such a manner which are prejudicial to the security of state.

The issuing authority of Public Safety Act who is the concerned District Magistrate or Divisional Commissioner must communicate or inform the state authority about the order of the grounds on which such detention is made. The Advisory Board duly constituted must determine the validity of grounds of detention within the period of eight weeks. If the Advisory Board finds the reason for such detention as valid then the government may continue the detention of the person for such period as the things fit or proper and may at any time revoke or modify the order of detention. The impunity from punishment is given to those who make detention while acting in good faith. The Public Safety Act practical implementation has prone even worse because the detaining authority do not follow the basic requirement to inform a detainee about his or her reason of detention. The preventive detention under Public Safety Act provision has been used arbitrarily in order to eliminate political opposition. Person who were booked under Public Safety Act face various obstacle which include delay in judicial procedure weak court orders, lack of sufficient evidence and enforcement.

## Judicial Response:

While the judiciary has exercised some power to enforce the limited procedural protection contained in Article 22 of the Indian Constitution and certain preventive detention legislation, in general the court has had little ability to overcome the legislation. With respect to enforcing procedural protection, the Supreme Court have made significant attempt to preserve and give some weight to the limited guarantees found in

<sup>6</sup> K. M. Abdulla v. Union of India, AIR 1991 SC 74

<sup>7</sup> J. N. Pandey, The Constitutional Law of India, 320-330 (Central Law Agency, 50<sup>TH</sup> edn, 2013)

Article 22 as well as the preventive detention laws. As the court stated in *Ram Krishna Bhardawaj v State of Delhi and ors*<sup>8</sup>, preventive detention is a serious invasion of personal liberty and such meagre safeguards as the constitution has provided against the improper exercise of power must be jealously watch and enforced by the court.<sup>9</sup>

### **Pragmatic Approach and the Public Safety Act:**

After the killing of a young Kashmiri rebel Burhan Wani on 8<sup>th</sup> July 2016 who fired the new generation the political discourse of Kashmir has altered to a very large extent. Since then Kashmir has witnessed a fresh cycle of violence which is still going on. After his death protests broke out in the entire valley and as a result of which authorities imposed indefinite curfew and booked hundreds under public safety act. The atrocities committed by state authorities were of such a nature that even minor children were made victims of this inhuman law. There were examples where Public Safety Act was slapped on children wearing lotto shoes for the simple reason that by such physical appearance there are apprehensions that in near future such children might join militancy and create law and order problem so it is better to book them under Public Safety Act.

The International Human Rights watch has made several protests in this regard and urged the authorities in Jammu and Kashmir to end the use of Public Safety Act which arbitrarily detains people on mere suspicion. The use of Public Safety Act to detain people particularly children violates basic human rights and its excessive use in recent years undermines the rule of law. Mir Shafqat Hussein, an advocate representing Public Safety Act detainees said, arresting minors and booking them under Public Safety Act is definitely going to have an effect on their psyche and physical well being. Meenakshi Ganguly, the South Asia Director Human Rights Watch said "detaining children under public safety act is not only unlawful, but could have negative repercussions for years to come."<sup>10</sup> A recent development took place in the history of this preventive law by way of an amendment in the year 2012 which prohibits the detention of children under eighteen (18) years of age. This move is welcomed by the members of civil society who believes that this drastic change will improve the system at the gross root level and ease out the sufferings of all those minors who are languishing in detention centers.

The Jammu and Kashmir government 'is holding hundreds of people each year without charge or trial to keep them out of circulation,' alleged an Amnesty International report. Criticizing the state authorities, the human rights organization in its latest report has described the Public Safety Act, commonly used against separatists and suspects, as a 'lawless law'. In its report 'A Lawless Law: Detentions under the Jammu and Kashmir Public Safety Act', the organization documents how 'the Public Safety Act is used to secure the long-term detention of individuals against whom there is insufficient evidence for a trial. Over the past decade, there has been a marked decrease in the overall numbers of members of armed groups operating in the state. But in the last five years, there has been a resurgence of street protests. Despite this apparent shift in the nature of the unrest, state authorities continues to rely on the Public Safety Act rather

<sup>8</sup> AIR 1953 SC 318

<sup>9</sup> A. G. Noorani, Challenges To Civil Right Guarantees In India, 1-20 (Oxford University Press, 1<sup>ST</sup> edn. 2012)

<sup>10</sup> HUMAN RIGHTS WATCH, INDIA: CEASE WRONGFUL DETENTIONS IN JAMMU AND KASHMIR, (OCT.15, 2016, 12:00PM),

<https://www.hrw.org/news/2016/10/15/india-cease-wrongful-detentions-jammu-and-kashmir>

than attempting to charge and try those suspected of committing actual crimes. The Public Safety Act undermines the rule of law and reinforces deeply held perceptions that police and security forces are above the law.<sup>11</sup> Preventive detention is being routinised as an instrument of state repression.<sup>12</sup>

### Conclusion:

The structure of preventive detention is based on flimsy ground. There was never an adequate justification for the delegation of such savage power to the Parliament and state legislatures through the sacred book of Constitution. At the time of drafting of the provisions of Constitution, it was said that political turmoil, violence, and communal harmony were offered as answer, and in contemporary circumstances other puerile explanation of internal order, external relation, emergency, smuggling, and the most abused one, terrorism. By using imprecating power a person cannot work in good faith. The response given by judiciary acting as savior of the constitution is not complacent. By seeing the number of amendments made in our constitution it has proved that the drafting committee was also not impeccable. Giving quibbling excuses would not resolve the problem, instead it would increase more.

The provision of preventive detention law should be abolished. A person cannot be denied his natural right of liberty on mere suspicion, accompanying the refusal of rule of law as well. It has become the cause of suffering to many innocent lives. The Indian judiciary must come forward to review all the provisions pertaining to preventive detention laws and to provide access to due process of law to all detainees and finally keep heightened accountability in the proper execution of power. Judiciary should keep a continuous watch on the misuse of power by the executive and the legislature, and allow it to go only in cases of extreme exigencies, inclusive to following all the principles of natural justice system.

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