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Abstract

Armed conflict that involve people’s movement for Right to Self-Determination or regime change incite State’s repressive apparatus – killing, maiming, torturing, enforced disappearances, arrests, harsh laws and legislations, etc. – to maintain its sovereignty. One of the widely utilized tools has been to put people under preventive detentions. Preventive detention adds a new dimension to ‘traditional penology’ which was more of a rehabilitating and corrective measure. In global south perspective, preventive detention has been used against the political opponents, activists, human rights defenders and common people who participate or align themselves with a group standing against the State. In Kashmir preventive detention law– Jammu and Kashmir Public Safety Act (PSA) – has been used rampantly to limit role and count of resistant voices. While utilizing the framework of “taxonomy of preventive detention” (Elias, 2009), this paper tries to locate PSA within the International Humanitarian Norms to see whether it stands in congruence with norms of justice or in contravention. This study advocates following “model code of preventive detention” for fairer implementation of the Act. This study utilizes information procured from secondary sources, including published reports, newspapers, dossiers, etc. and uses descriptive research design.

Keywords: Right to Self-Determination, Preventive Detention, Jammu and Kashmir Public Safety Act (PSA), Kashmir, Politics.

Introduction

On the eve of Indian independence from British rule in 1947, Kashmir – the then princely state, was divided into Indian controlled Jammu and Kashmir (JK) comprising the regions of Kashmir Valley, Jammu and Ladakh, and smaller area under Pakistani control called “Azad” Jammu and Kashmir (AJK) (Bose, 2003, p.2). According to the Partition plan, it was decided that Muslim majority areas would form Pakistan and Hindu majority areas would remain with India. According to the directives, Kashmir was to be

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acceded to Pakistan for being in religious, cultural, emotional and geographical congruence with the newly formed Muslim nation (Haque, 1991). On the other hand, the then Prime Minister of India—Pandit Jawaharlal Nehru reiterated another possibility at the time of signing of “Instrument of Accession” that future of the state of Jammu and Kashmir would be decided according to the wishes of the people under the auspices of United Nations resolutions (Bose, 2003, p. 38). This, however, could not materialize, as India asserted more and more control over time, which antagonized Pakistan and left Kashmir in limbo. Since then, Kashmir has been in a perilous conflict.

As Kashmir remained disputed between India and Pakistan in 1947, violation of the basic rights, institutional decay, and political malefeasance continued, which gave rise to armed insurgency in 1989 in Kashmir. Indian state engaged in full-fledged counter-insurgency campaign to annul the insurgency. This counter-insurgency campaign killed more than 60,000 persons (Hussain, as cited in Carter, Irani & Volkan, 2016). Thousands of people have been subjected to custodial killings and thousands of others still languish in jails. People were subjected to torture and inhuman treatment. Amid human rights violation in Kashmir, the resistance continued to manifest in one or the other form. India attempted to wane this resistance in Kashmir (Duschinski, 2009) through widely adopted tactics. Of the widely used tactics to suppress the dissenting voices was the indiscriminate use of Jammu and Kashmir Public Safety Act (PSA, hereinafter), more so in recent past (Hussain, as cited in Carter, Irani & Volkan, 2016).

Keeping in view the indiscriminate use of PSA, this paper attempts to explore the aim and objective behind its application. This paper aims to highlight the rights violations and injustice perpetrated by application of PSA and advocates the need to follow a “model code”, which would preserve and protect the rights of a detainee. It would make a significant contribution in the field of penology, as no academic scholarship has been published on the theme yet. Building evidence on the research, this paper provides suggestions, which would prove helpful for the effective and substantial utilization of the law and rehabilitation of detainees.

This paper explains the phenomenon of detention under the Foucauldian perspective which emphasizes that imprisonment, used by the authorities, is not being done with sole intent of rehabilitation, but is being utilized to achieve the political motives. Building on this argument, a section highlighting how the preventive detention has digressed from fundamentals, more so in conflict zones, has been explained. This is followed by a discussion on the historicity of preventive detention law in India and subsequently, contextualized with reference to Jammu and Kashmir. It is followed by main part of the article, which tries to show how the PSA vitiates the ‘model code’ and international humanitarian norms of justice.

**Indiscriminate Use of Public Safety Act (PSA) in Kashmir**

The exact number of detentions made under PSA is not known precisely, but its usage has been recurring. About 16,329 cases of PSA detention have been invoked since 1988, marked as beginning of armed insurgency in Kashmir (Maqbool, 2014). Amnesty International [AI] (2011) gives an estimate of about 8000–20000 cases of such detentions from 1991 to 2014. Contesting this estimate, a legal fraternity - Kashmir Bar Association gives an estimate of 40,000 cases of PSA registered since 1989 (Ganai, 2011). Between
2003-2010, 600 detentions were made under PSA. The usage has been vastly indiscriminate particularly during the recent uprising in 2008. In order to quell the uprising, 3,500 civilians were arrested and 120 were booked under PSA. In year 2010, the third consecutive year of mass uprising, 322 people were detained under PSA between short span of January to September. But the Jammu & Kashmir Home Department reported 334 detentions under PSA during period of 5 January 2010 to 14 February 2010 (Amnesty International, 2011, p. 13). Almost 133 persons were detained under this Act in 2015 (Yasir, 2016). About 582 PSA dossiers were signed by the executive authority (that is Deputy Commissioner) in just 74 days in the year 2016 (Maqbool, 2016). Even minors, over 700 in number have been booked under such law, which otherwise should be tried under the Juvenile Justice Act (Kashmir Life, 2015).

This argument of indiscriminate usage of PSA is further strengthened when seen vis-à-vis recent political development in state of Jammu and Kashmir (J&K hereinafter). On 5th of August, the disputed state of J&K was stripped of its special status by de-operationalizing the Article 370. This Article guaranteed special status to the state of Jammu and Kashmir providing it the right to have its own constitution and power to make laws on all matters except for defence, communications and foreign affairs. This specific Article rendered Indian legislation in state of Jammu and Kashmir non-applicable. This unilateral decision of abrogating the Article 370 by the Indian Parliament was considered illegal by legal luminaries and rights activists. As a result, the Indian Government apprehended an acrimonious response by the people of Kashmir. After de-operationalizing this Article, the indigenous constitution of the state of J&K was rendered inoperative. But, some of the legislations were retained by the Indian government in its newly framed “Jammu and Kashmir Reorganization Act, 2019”. One such retained Act is PSA, which was used to detain people perceived by Indian government as influential in mobilizing the people against this move. The excessive usage can be gauged by the fact that in a time period of just weeks after this episode, 4000 detentions were made (AFP, 2019) and about 230 PSA dossiers were signed (NewsClick, 2019). Even the former Chief Minister of state, Farooq Abdullah who was a loyal ally of Indian government in Kashmir was also detained under this Act. Over 252 habeas corpus petitions were moved to Srinagar High Court in a short span of 5 August until 19 September, 2019, which shows its excessive usage (The Wire, 2019).

Analyzing the trend from the available data (procured through Right to Information Act [RTI] from police department) it can be said PSA has been used irrespective of age. But the priority target has remained the young adults and youth in the age group of 20 years to 32 years. It is important to note that this analysis has not been done on the basis of total number of cases of PSA till date but on the basis of information procured through RTI available with JKCCS – a Civil Society group based in Srinagar, Kashmir. This available information was scrutinized and only those cases were considered in the analysis which contains information such as age, date of PSA, alleged reasons of arrest, and residence. The table 1 shows the number of cases booked under PSA against their respective age groups. It could be analyzed from the data (as in table 1) that mostly people are being detained in their productive age group. The person is believed to develop his potential up to fullest during this span of life. Detaining a person in such age group leads lifelong repercussions. Targeting youth does not only mean punishing the detainee alone.
but also the family, which is dependent on them. Hence, used as a collective punishment. Detention in such age group can be said to be very intentional for various possible reasons which may include – (1) expulsion of the category which is more robust, strong, productive and perceived as threat to the government and (2) to create fear among the people by setting these detainees as an example for others - that whosoever engages in the political activism and stands against the government policy will meet the same fate.

**Table 1. Trend showing the highest number of PSA cases against the age**

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>25 years</td>
<td>228 cases</td>
</tr>
<tr>
<td>22 years</td>
<td>227 cases</td>
</tr>
<tr>
<td>24 years</td>
<td>170 cases</td>
</tr>
<tr>
<td>30 years</td>
<td>168 cases</td>
</tr>
<tr>
<td>26 years</td>
<td>159 cases</td>
</tr>
<tr>
<td>27 years</td>
<td>152 cases</td>
</tr>
<tr>
<td>23 years</td>
<td>140 cases</td>
</tr>
<tr>
<td>21 years</td>
<td>134 cases</td>
</tr>
<tr>
<td>29 years</td>
<td>133 cases</td>
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<tr>
<td>28 years</td>
<td>132 cases</td>
</tr>
<tr>
<td>31 years</td>
<td>128 cases</td>
</tr>
<tr>
<td>32 years</td>
<td>124 cases</td>
</tr>
<tr>
<td>20 years</td>
<td>120 cases</td>
</tr>
</tbody>
</table>

**Theoretical Perspective**

Foucault in his scholarship “Discipline and Punish: The Birth of the Prison” (1977) adds an important theoretical perspective to the field of penology. Beyond the notion of rehabilitation that prison is believed to infuse, he emphasizes that prison is a form of control whereby the tactics or strategy is maneuvered to keep the detainee under control. In order to achieve this control, the body is put under the deprivations, obligations and prohibitions, which could be seen in the form of rigid rules and regulations. It makes detainees to behave in synchronization with what authorities want them to be. The prison is seen through the power perspective whereby the higher power authority i.e. State uses “power” to suppress the subjects i.e. lower power group in order to make them submissive and to make them conform to the particular ideology - *ideology-of-the-State*.

Implementation of PSA utilizes the same philosophy. A hegemonic authority utilizes or manipulates structures to achieve their political motive. To achieve this, the authorities coerce the group that possesses certain political aspiration and stand in opposition to the government. The authorities want these people to repudiate their political sentimentality. They want to make detainees docile and obedient to the diktats of the state, under the façade of instilling discipline and maintaining “public order and security of state”. The authorities use power and sub-standard procedure which grants them impunity and does not call for accountability and humaneness.
Preventive Detention in Conflict Zones - A Paradox

Preventive detention means detention of a person without trial or conviction on mere suspicion or apprehension. There is no universal definition of preventive detention. The word preventive means “to restrain” a person from any subversive activity that is apprehended from him after evaluating his past experiences (Sunil Kumar Samadhar VS Superintendent of Hoagly Jail, as cited in Ahmed, 2015) and detention means “keeping back” (Alamgir VS State AIR 1957, as cited in Ahmed, 2015). Therefore, preventive detention aims to prevent a person from doing something, which is likely to disturb public order. As cited by Justice Mukherjee in A. K. Gopalan vs State of Madras, that preventive detention is a precautionary measure. The aim is not to punish a person for having done something, but to intercept him from doing it (Ahmed, 2015). Preventive detention therefore, is not an ex-post facto law.

The preventive detention has been used widely in a variety of circumstances around the world. It is generally being used on the “grounds of dangerousness” (Bellinger & Padmanabhan, 2011). This kind of detention engulfs in it the category of “psychiatric patients, sexual offenders, drug abusers, habitual criminals” etc who are likely to pose threat to society. Based on the past behaviour, their future behaviour can be anticipated. This category of offenders involves high degree of certainty of future harm doing, which provides a justification for its use. However, application of preventive detention receives contestation, because it lacks objective evidence. It suspends due process of law, which is considered as a greatest violation done by the state against its citizens.

With changing geo-political scenario, a shift can be seen in its usage. Extending the argument of application of preventive detention, I argue that application of preventive detention laws in conflict zones has remained a paradox. It has digressed from its fundamentals. No doubt, it has been used to detain the ‘suspected terrorists’, but has remained prone to misuse at the same time. The lines of distinction are blurred between the combatants and civilians (Bellinger & Padmanabhan, 2011). As a result, we see its misuse against the activists, human rights defenders, advocates, writers, journalists and civilians for any obscure reasons. It is being used as a weapon by the State to achieve their ulterior motives by crushing the resistance and thereby perpetuating the rule of power (Ashrafual, 2008).

Although democratization provided a space for right to expression, but the reliance on preventive detention laws makes feel living in the age of colonialism. As colonialists, under the name of different laws (such as Deportation Laws) used to detain or deport the popular local power, whom the government perceives dangerous for the survival of their colonial regime. The deportation was being ordered, so that the influential personalities are denied any chance of influencing the local population (Peter, 1997). Similarly, in modern times, preventive detention in conflict zones is being used along the same lines and utilized as a tool to control and limit the sphere of dissenting voices. It is being used to cage the resistance, so as to deny them any chance of political mobilization and expression.

Historicity of Preventive Detention in Colonial and Post-Colonial India

In colonial India, the East-India Company Act was enacted in 1784 to strengthen the colonialism by entrusting powers to Governor General to secure and detain any person indulged or suspected of any dangerous activity, prejudicial and unsafe for British
settlements or possessions. With time, a number of similar legislations were passed such as Bengal Regulation Act III, 1818. The similar enactments were passed in Madras and Bombay. Defense of India Act (DoI) in 1915 and notorious Rowlatt Act, 1919 were passed to protect and defend the colony by detaining (resistant) persons under preventive detention (Abraham, as cited in Harding & Hatchard, 1993).

Yet, after gaining independence from British colonialism, nothing much seems to have changed in India. The legacy was inherited and the same oppressive laws were enacted in post-colonial India. India, initially endured to provide freedom to its people on one hand but on the other included the element of preventive detention in its newly framed constitution in 1950. Within a month after framing the constitution, preventive detention legislation was enacted, known as Preventive Detention Act, 1950 (PDA hereinafter). It was initially enacted for a year, but after amendments and re-amendments it continued till 1969. After the expiry of PDA, majority of the state legislatures passed their own special state legislations such as Orissa Preventive Detention Act, 1966; Rajasthan Preventive Detention Act, 1970; Maharashtra Preventive Detention Act, 1970 etc. Similarly, in Kashmir, PSA was enacted in 1978.

Preventive Detention in Kashmir- A Case Study of Public Safety Act (PSA)

PSA was promulgated by the then Chief Minister - Sheikh Abdullah in 1978, providing sweeping powers to authorities to detain any individual on mere apprehension or suspicion. PSA, may be considered as an iteration of Public Security Act, 1946 in colonial Kashmir, implemented to detain preventively the members of “Quit Kashmir Movement” on grounds of ‘public order’. It was replaced by Preventive Detention Act (PDA) 1954 in post-colonial Jammu and Kashmir. This Act was to apply for five years and would be expired automatically. Before its expiry, it was amended and replaced by Preventive Detention Amendment Act, 1958. This was subsequently amended in 1964 and 1967 (See Duschinski & Ghosh, 2017, p. 6). Then, in November 1977, Sheikh Abdullah- the then Chief Minister of State passed Jammu and Kashmir Safety Ordinance Act (SOA). Although, this enactment showed a great disapproval by the Janatha Party who was ruling at “centre”, demanded its revocation. But, not paying any heed, SOA wasmorphed within few months into Jammu and Kashmir Public Safety Act, 1978 (Wani & Desai, 2018).

The enactment of Act was justified by its stated rationale that it will be used against timber smugglers to protect the forest cover, but rarely has been seen timber smugglers booked under this law. In actuality, the Act has been used in order to achieve political gains and to control the resistant voices in Kashmir, who demand the political right of self-determination. This view is supported by Kazi (2012) as well. Kazi argues that, preventive detention law is not merely a legal tool, but much a political tool to suffocate the people of their expression and political aspiration (p. 17). This could be analyzed by the fact when it was invoked for the first time against Ghulam Nabi Patel- President of Kashmiri Motors Drivers Association (KMD) who had supported Janatha party in State elections in 1977 (Bhaskar & Srivastava, 2016, as cited in Wani & Desai, 2018, p.11). The same procedure was imitated by successive regimes – Farooq Abdullah, to sweep his political opposition in 1987 State elections. He resorted on detaining his political opposition – Muslim United
Front (MUF) members along with members of Jamat-i-Islami (Bhaskar & Srivastava, 2016; Wani & Desai, 2018).

Analyzing its course of usage, it can be said that it has been used for political vendetta. This intention can be analysed from the proclamation of Farooq Abdullah - the then Chief Minister of State of J&K against detained members of All Party Hurriyat Conference (APHC), an amalgamated group of pro-freedom groups in 1999, where he publicly said that he would “let them rot” in Jodhpur Jail where “nobody would be able to meet them”. Adding to this, he said that, “I am sending them to a place where they will see no hope” (Amnesty International, 2000, p. 2). It would be important to analyse what actually provides a way for its arbitrary use. This could be studied through various peculiarities mentioned in the Act, which provides police and executive authorities the power to utilize it without considering any substantial investigation. In other words, studying lacunas in its operationalization would give a fair idea about its arbitrary use and how it contravenes the norms of justice.

Operationalizing Public Safety Act

The executive authority of PSA is Divisional Commissioner or a District Magistrate. The operating procedure of PSA usurps the power of judiciary, hence proffers a way to use it unabatedly and unnecessarily. It is invoked on mere probable cause and lacks the substantial evidence. In order to make its implementation fairer and to avoid errors, consideration of “Model Code” could be taken as an imperative.

This section analyses the operationalization of PSA within the framework of “Model Code of preventive detention” and the “taxonomy of preventive detention”. The former case advocates that elements such as substantial investigation, reasonability need to be considered while utilizing preventive detention. The latter part tries to analyse the peculiarities in Act which stand in contravention with the International Humanitarian Norms, enhancing its arbitrariness.

Of Politics and Fairness of Public Safety Act

The nature of preventive detention is different from “traditional penology”. Traditional penology emphasizes on punishing and correcting individual offenders. Feeley and Simon (1992, as cited in Welch, 1996, p. 179) ascribes new term to preventive detention – “new penology”. New Penology adopts an actuarial approach in which the specialists asse the risks of certain subgroup and devise a strategy to control such aggregates. However, they used this concept in relation to immigrants, but here finds relevance. Here an analogy can be drawn between the one subset of population – immigrants and the other subset – people against the government (both are perceived as dangerous). The “new penology” heavily relies on imprisonment because its focus remains to improve social control by detaining high risk and dangerous groups. Meaning of ‘dangerous groups’ can be very subjective and context specific. Welch (1996) says that in case of American, African and Hispanic societies, immigrants are perceived as dangerous class because they are uneducated, illiterate and unemployed. In this work, the dangerous class includes the politically active persons who are being framed and perceived as dangerous by the State, because they challenge the status quo.
This sort of operationalization invokes an interesting debate among the scholars of penology. One of the widely discussed issues is – who is to be detained under preventive detention? Under what circumstances preventive detention can be authorized? And, how fair its use is? This section contextualizes these questions with regards to PSA within the framework of “Model Code” of preventive detention.

**Who is to be detained under Preventive Detention?**

Who to detain under preventive detention is debated among the pundits of penology. Ryan Goodman (2009) categorizes the persons who qualify for detention into four categories, as follows:

A) Regular armed forces and irregular armed forces that meet the criteria for third Geneva Convention or Additional Protocol I.

B) Direct participants in hostilities.

C) Civilians who are indirect participants in hostilities.

D) Civilians who are non-participants in hostilities.

Combatants in times of war however, are authorized for preventive detention, but what remains contested is the case of indirect participants and non-participants. Indirect participants include those who provide any logistic support or are part of subversive activity directed as part of assistance for enemy. The important question invoking debate is – should non-participants receive the same treatment as that of direct participants. This category (of indirect and non-participants) finds flexibility as mentioned in the Article 3 of Geneva Convention. They need to be given a humane treatment. On contrary, what has been observed is that preventive detention has been abused and exploited. The calibration between the direct participants, indirect and non-participants has blurred. As seen in case of PSA, the detained people are the common civilian protestors who project their political aspirations and show their anger and resentment against the violations committed by the State actors. The detentions have been made on the generalized reasons, which include alleged involvement in stone throwing and working as OGWs, as revealed in previous research studies (see Amnesty International, 2011; Bhawani, 2018).

This course of application necessitates a debate – does these alleged activities on which people are detained are really worth invoking PSA. This needs to be understood in a proper context. Kashmir has been engulfed in a political strife since long. A substantial amount of population irrespective of age are on streets engaged in stone throwing as a mark of protest, is a common phenomenon. Since, the law is ambiguous in itself, therefore violates the ‘principle of legality’. The definite criterion which categorizes the activities as public disorder and security threat is not mentioned clearly. It leaves the area wide open hence, prone to label any activity as threat to public order and security, without providing any justification and clearances. In addition to this, it violates ‘principle of distinction’ and ‘principle of proportionality’. These principles could be saved from erosion only when elements of ‘substantial investigation’, ‘reasonability’ could be taken into consideration.

**Compromising “Reasonability” and “Substantial Investigation”**

In order to show how the PSA compromises with the ‘substantial investigation’ and ‘reasonability’, the case of human rights defender in Kashmir – Khurram Parvez and case
of famous pro-freedom leader Masarat Alam and various other cases will be explained at breadth. Analyzing the nuances and peculiarities while executing PSA in such cases will help to conclude whether its implementation has been ‘substantial’ and ‘reasonable’.

Preventive detention demands that previous and over-all history of the accused need to be checked to decide whether a person to be put under preventive detention. Detention should be used as a last resort. But in case of PSA, it is not given significant consideration. The dossiers come directly from the police authorities to district magistrates for authorization (Jaleel, 2016). The executive authority is bound to investigate at their respective level. Only after the executive authority becomes satisfied that there is no other alternative to detention, the detention orders can be issued. But in case of PSA, at the executive level, no independent investigation is being done. The executive authority copies the reasons as are provided by police and authorize it. It would be no exaggeration to refer executive authorities as mere rubber stamps, given their method of working (For detailed description on dossiers see Bhawani, 2018). The, dossiers prove mere ipse dixit statements.

In order to substantiate the above statements, the case studies have been discussed in breadth. Khurram Parvez has been engaged in human rights advocacy in Kashmir. He was going to attend the UN General Assembly Session to Geneva in 2016 regarding the scenario of human rights in Kashmir. He was deported from New Delhi Airport back to Kashmir. On reaching Kashmir, he was put under preventive detention, citing the reason - “breach of public order”, subsequently booked under PSA. The dossier by SSP Srinagar sent to District Magistrate against him reads -

the subject (Khurram) has a long history of affiliation with secessionist organizations who advocate secession of state of J&K from the union of India and to achieve this goal (he) has been found resorting to illegal/unlawful activities since long, be it inciting the youth to resort to violence or gathering so (Raafi, 2016).

The PSA has been invoked on allegations of the SSP alone, with no attempt of independent counter-investigation by District Magistrate. In addition to this, four FIRs have been registered against him related to “breach of peace, endangering life or personal safety, attempt to murder”. All the four FIRs have been lodged in 2016 alone in a month and 20 days after killing of a Militant Commander- Burhan Wani (see Raafi, 2016). Since, the government claims in dossier that he (Khurram) has been engaged in such activities since long, therefore, the government should have tried to book him or register an FIR against him very early. But no such case history is found against him. Furthermore, the registered FIRs against him do not mention the name of Khurram anywhere (see Masood, 2016). This raises the apprehension of concoction and fabrication of evidences. To put it appropriately, the “stupid dossier” does not hold any evidential base.

The substantiability and reasonability does not hold merit when the invocation is politically motivated. Considering the case of Masarat Alam- a pro-resistance leader in Kashmir, who was released after four and half years in March 2015 by then Mufti government in J&K. Soon, in month of April, he was again re-arrested and booked under PSA. This PSA was invoked under the influence of New-Delhi – “central government”.
It was only after the criticism of the then union Home Minister- Rajnath Singh, the overnight addition of charges of ‘waging war against the country’ and charges related to sedition were included which led to the arrest of Alam again (Sharma, 2015).

This Act has also been misused by the police for vengeance. In case of PSA invocation against Mushtaq Ah Shah, alleged as Over Ground Worker (OGW) of Laskar-e-Toiba (LeT) – a militant outfit. His lawyer purports that the suspect holds a valid passport (passports are issued only, once the person gets clarification from both the state and “central government” intelligence agencies). Shah’s lawyer challenges the allegations claiming that the SSP has personal grudge with his client- Shah, because he had intervened when the SSP harassed some girls in another town (see Amnesty International, 2011, pp. 36-37). Also, it has been seen in some cases that PSA has been invoked after the girl refused to marry a renegade (Ikhwani) (Public Commission on Human Rights, n.d. p. 236).

This trend of reliance of state administration on PSA shows that it is being used to satisfy the political motives (Kazi, 2012). That is why the crucial elements such as ‘reasonability’, ‘substantial investigation’ which would help to maintain the Standard Operation Procedure of preventive detentions are suspended and receives no priority. Adherence to such mechanism would not let authorities to invoke PSA on mere probable cause and detain people for prolonged periods.

**Why this Compromise?**

The above cases discussed, challenges fairness of the Act at various counts. Firstly, what necessitates the need to detain a person under PSA when the criminal procedure is already in place? The need to resort on parallel system should arise only when the criminal procedure fails to address the serious threat adequately (Goodman, 2009). Moreover, under International Law, the preventive detention is permissible in declared state of emergency, but no such case is declared in Jammu and Kashmir neither in India (Human Rights Watch, 2006, p. 105).

The authorities have failed to explain what actually posits a need to create a parallel system when the laws regarding such activities are already well established. The ordinary law does contain well established provisions (such as Sec. 153A of RPC; Sec. 153B of RPC etc which could have been applied when Jammu and Kashmir was protected under Article 370, which gave it a special status. After de-operationizing this Article on 5 August, 2019, J&K lost its special status and makes Indian Penal Code (IPC) applicable in J&K). These provisions could tackle the situations that have been mentioned in the FIRs of detainees. The criminal code seems sufficient to deal with such situation. The recourse on preventive detention law can be considered illegal. For the sake of argument, if preventive detention may not be considered as illegal, but still it is an exception and need to be executed within the narrow limits. Otherwise it will be taking away the great right to liberty guaranteed by the Article 21 of the constitution.

This, undermining the criminal procedure and a huge reliability on PSA accentuates its political motives. It denotes that the government tries to prolong the detentions, as PSA bars any legal representation to be made by detainees. This keeps them ‘out of circulation’ which is often intensified by ‘revolving door detention’ policy (see Amnesty International,
2011, p. 61). It is being used to prevent the possibility of any political mobilization and expression.

**Incongruity with International Humanitarian Norms**

Besides maintaining the “Model Code”, there are recognized norms of justice prescribed in the form of international conventions and laws, which grants liberty and maintain dignity of an individual. These maintain reasonableness, focuses on standards of certainty to make detention fair and minimize the false positives. International Humanitarian Laws serve as *lex specialis*, with aim to attain a favorable position for detainees (Cassel, 2008). PSA fall short of these recognized norms of justice and liberty.

This section highlights the peculiarities in the Act, which violate International Humanitarian Norms. It has been analyzed within the framework of “taxonomy of preventive detention” (Elias, 2009) which focuses on five units of analysis such as: I) legal basis of detention, II) notification of charges, III) access to legal counsel, IV) right to fair and public hearing, V) rules regarding interrogation.

**Jammu and Kashmir Public Safety Act vis-à-vis Legal Basis of Detention:** International Humanitarian Norms demands legal basis of detention. The arbitrariness is highly objectionable. On contrary, PSA encourages arbitrary arrests contradicting the norms of justice as mentioned in ICCPR (see Article 9). It violates the right to produce before court within stipulated time, and right to compensation. It also contravenes Article 9 of UDHR, Article 7 of American Convention of Human Rights, Article 5 of European Convention of Human Rights and principle 9 and 12 of Body of Principles for Protection of All Persons under Any Form of Detention or Imprisonment.

**Jammu and Kashmir Public Safety Act vis-à-vis Notification of Charges:** Much emphasis has been given on mentioning the reasons of detention to the detainee within a stipulated time frame. As mentioned in Article 14 (3) of ICCPR, which provides that detained should be properly informed of the reasons of his detainment and should be tried without any delay. PSA contains certain peculiarities which delay such procedure thereby increasing its arbitrariness. PSA contradicts Article 14(3) of ICCPR by encouraging authorities under the guise of “exceptional circumstances” (see Article 13(1) of JKPSA, 1978) to delay the information regarding the reasons of arrest and not to “disclose information” (see Article 13(2) of JKPSA). This increases the chances of torture and ill treatment. Its equivocality shields the police and emboldens them to violate the human rights. ICCPR (see Article 2(3) focuses on to provide remedy to the detained, notwithstanding that the violation has been committed by persons acting in an official capacity. This stands contradictory to Section 22 of PSA barring any official from prosecution in any act “done in good faith”. It stands in contradiction with principle 10 and 13 of Principles of Detention and Article 5 (2) and 6 (3) (a) of European Convention on Human Rights (ECHR).

**Jammu and Kashmir Public Safety Act vis-à-vis Access to Legal Counsel:** Anyone who is detained is to be provided with access to legal counsel. But PSA limits the access of detainee to judicial authorities. It bars the legal representation (see Article 16(3) of
JKPSA). This violates Article 14(3)(b) of ICCPR, Standard Minimum Rules (Rule 93), Principles of Detention (Principle 17) and UN Basic Principles on Role of Lawyer.

Besides denying access to legal counsel, the detainees are usually arrested under successive PSAs. These successive detentions are being made on the same grounds (see cases of Mst. Zahida vs State of J and K and Ors, 2008, as cited in Amnesty International, 2011, pp. 58-60) which stand in contradiction with Article 7 of ICCPR which reads:

No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

In the case of Ibrahim Bachu Bağan vs State of Gujarat and ors (1985) the Supreme Court also ruled that when the preventive detention is quashed, the order to make fresh detentions on the same grounds shall not be available. But the PSA violates such norm.

**Jammu and Kashmir Public Safety Act vis-à-vis Right to Fair and Public Hearing:**
There has been a huge focus on granting public hearing to detainees. This has been promoted in Article 10 of UDHR, Article 14 of ICCPR, Article 7 of African Charter, Article 6 (1) of ECHR. The aim of these provisions is to provide a conducive environment so that detainees should not be compelled or coerced to testify against himself or to confess guilt coercively. It enhances transparency. But all this is being violated under PSA. The detainees are put in situations whereby they are threatened, tortured during interrogation (see Amnesty International, 2011, pp.26-28), hence coerced to accept the guilt they never committed.

**Jammu and Kashmir Public Safety Act vis-à-vis Rules regarding Interrogation:**
Torture and other ill human treatment have been highly condemned under International norms of justice. Such treatment is prohibited under Article 7 of ICCPR, Article 15 of Convention against Torture (CAT), Article 5 of UDHR, and Article 21 of Principles of Detention. On contrary, PSA ebb towards the side of police that emboldens them to perpetrate torture without any accountability.

**Conclusion**
Analyzing this Act, it becomes clear that PSA contravenes norms of justice. The provisions in PSA are not human-centric, but are pro-militaric, providing a culture of immunity to police authorities from judicial prosecution. It erodes the basic principles of justice making it punitive rather than being preventive. Its impunity has given rise to its arbitrary use. It makes situation so grave that even civilians are arrested under the façade of maintaining “public order and security of state”. The operationalization of the Act does not seem to be impartial. It is being executed without maintaining any reasonability and substantial investigation. This is being done to achieve the political motives rather than using as a legal measure for reformation or prevention. This has been deduced from the procedure how it is being operated. The detainees are denied the basic legal entitlements such as the right to representation, right to inform a detainee the reasons of his arrest, right to fair and public trial etc. This denial of rights puts detainees at a risk and vulnerable to
many violations. Denial of such facilities helps authorities to keep detainees in a complex and continuous loop of detention. It is analysed that the person detained under PSA, hardly finds a way-out. Even after the PSA is quashed, the detainees live in virtual confinement. By not maintaining the reasonable procedure and high standard of substantial investigation, it increases the chance of false positives, mistreatment and has created a system-of-no-exit (Ghosh, 2017). Keeping such procedure in view, it would be appropriate to call it a “legal black hole” (Steyn, 2004) as the PSA advocates for the prolonged detentions. This prolonged detention helps authorities achieve the motive of keeping the detainees and people away from their political engagements and provide no space for legitimate political dissent. To say, the political space is being constricted. Therefore, keeping in view the constitutional peculiarities and the methodology being adopted in its operationalization, it would not be an exaggeration to call it what Amnesty International calls “a Lawless Law”.

Suggestions for Improvement

As concluded from the above analysis, the authorities are seen to adopt a lackadaisical approach while operationalizing PSA. Such a pro-militaric law emboldens them to act carelessly, as it provides them immunity from judicial prosecution. In order to humanize their behaviour and to reduce the rate of false positives, some suggestions would be provided, as below:

1. The police should not be given a carte blanche. They need to be bound to a certain ‘moral code’ which held them accountable and makes the operationalization of Act very fair.
2. There is a need to develop a Standard Operation Procedure (SOP) which focuses on bringing the humaneness in attitude of police and move beyond the notion of reasonable doubt that makes them bound to act reasonably and substantial investigation given a due deference.
3. The powers given to the police need to be kept in check so that their interference in civil affairs is minimized. After re-entry into society, the power (surveillance and other related methods) should be checked so that it may not make detainees feel living in virtual confinement.
4. A need to maintain a rehabilitative and preventive approach by the various stakeholders involved.

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