

**SECURITY WITH
HUMAN RIGHTS**

**AMNESTY
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A 'LAWLESS LAW'

**Detentions under the
Jammu and Kashmir
Public Safety Act**

“We have to keep some people out of circulation...”

Samuel Verghese, then Financial Commissioner – Home, Jammu and Kashmir, speaking to Amnesty International in Srinagar, 20 May 2010

INTRODUCTION

Hundreds of people are routinely locked up under the Public Safety Act in the Indian state of Jammu and Kashmir (J&K). They are held without charge or trial in administrative or “preventive” detention on vague allegations of acting against “the security of the State” or against “the maintenance of public order”.

Detainees are mainly political activists, suspected members or supporters of armed groups, journalists, lawyers and protesters – including children. They are typically picked up for “unofficial” interrogation, during which time they have no access

to a lawyer or to their families. Once in formal custody, they are trapped in a cycle of detention, with orders for their incarceration issued back to back so that detainees remain, as quoted above, “out of circulation”.

The following is a summary of Amnesty International’s report, *A ‘lawless law’: Detentions under the Jammu and Kashmir Public Safety Act (ASA 20/001/2011)*. The report, based on research conducted by an Amnesty International team during a visit to the J&K capital Srinagar in May 2010, exposes how the Public Safety Act (PSA) violates international human rights

law and standards, and documents abuse of the law by state authorities at almost every stage of its enforcement.

Amnesty International analyzed government and legal documents related to over 600 PSA detentions, and interviewed former detainees, family members of current detainees, journalists, lawyers and state authorities. The research shows that instead of using the institutions, procedures and human rights safeguards of ordinary criminal justice, the authorities are using the PSA to secure the long-term detention of people against whom there is insufficient evidence for a trial or conviction.



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BACKGROUND

Since 1989, J&K has witnessed an ongoing popular movement and armed uprising for independence. Over the past decade, however, there has been a marked decrease in the overall numbers of members of armed groups operating in J&K. By the J&K police's own estimates, only around 500 members of armed groups now operate in the Kashmir Valley. But in the last five years, there has been a resurgence of street protests. Some of the protesters, most of them young, have resorted to throwing stones at security forces who, on many occasions, have retaliated by shooting at them.

Despite this apparent shift in the nature of opposition to the Indian state, there does not appear to be a change in the approach of the J&K authorities. They continue to rely on the extraordinary administrative detention powers of the PSA rather than attempting to charge and try those suspected of committing criminal acts. Between January and September 2010 alone, 322 people were reportedly detained under the PSA.

Above: Kashmiri Muslims prepare to throw stones at an Indian police officer during a protest outside the Jamia Masjid in Srinagar, India, November 2010.

Cover: Security force personnel enforcing a curfew at Lal Chowk in Srinagar, India, September 2008. © SHOME Basu



Above: Shabir Ahmad Shah is arrested by police while en route to Sopore and Baramulla, India. He has spent over 25 years in prison, most of it in administrative detention.



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“The government think that if they keep him away from us and make us all suffer, he will agree to remaining silent.”

Dr Bilqees, wife of Shabir Ahmad Shah, who has been in and out of prison, much of it in administrative detention, for a total of 25 years

GAGGING THE OPPOSITION

For the J&K authorities, the PSA functions as an expedient means of silencing political opposition. Many individuals are detained after being labelled as “anti-national” because of their support for an independent Kashmir. These individuals may have challenged the authorities through political action or peaceful dissent. This alone is enough to earn them detention under the PSA, despite the fact that they have not committed a recognizably criminal offence. Such cases could involve prisoners of conscience: individuals detained solely because of their peaceful exercise of their human rights.

Shabir Ahmad Shah has been in and out of prison for much of the time since 1989, when a popular movement and armed uprising for independence began in J&K. As the leader of the Jammu and Kashmir Democratic Freedom Party, he has been among the most vocal and consistent voices demanding an independent Kashmir. As a result, he has spent over 25 years in various prisons, much of it in administrative detention. His incarceration has been solely for peacefully expressing his political views. Shah was last released from prison on 3 November 2010, but since that time has been subject to periods of arbitrary house arrest.

At the time of Amnesty International’s visit to Srinagar in May 2010, Shabir Shah was in prison. Amnesty International was denied permission by the state authorities to meet with him, but was able to meet his wife, Dr Bilqees. “His continuing detention is a tactic to break his resistance,” she said. “The government think that if they keep him away from us and make us all suffer, he will agree to remaining silent. Even though he is concerned about our daughters who rarely see their father, he will not desert his principles.”

Shabir Shah is one of the most high profile of those detained under the PSA but he is only one among thousands who have been detained without charge or trial in this manner. According to the police, 15,600 people have been detained under the PSA over the past two decades.



Mohammad Rafiq Hakeem (*left*) and Naseema Hakeem, parents of 14-year-old Faizan Hakeem. Faizan was detained under the PSA in February 2011, aged just 14. The police insisted that he was 27 years old. He was released on 5 April, following an Amnesty International action.

Right: A school register shows Faizan's date of birth.



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THE PUBLIC SAFETY ACT

Several laws in J&K allow for administrative detention in J&K, but the PSA is the most commonly applied.

The PSA provides for detention for a maximum of two years at any one time. Section 8(1)(a) of the PSA, under which the majority of people are detained, allows for detention on grounds including “acting in any manner prejudicial to the security of the State”. However, the PSA does not define “security of the State”. Section 8(3)(b) allows for detention for “acting in any manner prejudicial to the maintenance of public order”.

The possibility of detention on such vague and broadly defined allegations violates the principle of legality, that is, that laws should be clear and their grounds and procedures

be as established by law. The principle of legality is required by Article 9(1) of the International Covenant on Civil and Political Rights, to which India is a party.

Such vague definitions grant the authorities sweeping powers, while also seriously diminishing any real possibility for detainees to contest the legality of their detention. Further, the PSA gives security forces immunity from prosecution for abuses of the Act. The PSA is also used to detain children as J&K laws allow for boys above the age of 16 to be treated as adults. This contravenes the UN Convention on the Rights of the Child, which India ratified in 1992.

MUSHTAQ AHMAD SHEIKH

Fourteen-year-old Mushtaq Ahmad Sheikh was arrested on criminal charges on 9 April 2010 for allegedly being part of a stone-pelting mob. Released eight days later, he was detained under the PSA on 21 April. The grounds of detention state his age as 19, although his family told Amnesty International that he was born in 1996 – a fact confirmed by the prison records. Unable to read English, his family were unaware that a petition filed by his lawyer challenging his detention also erroneously records his age as 19. Attempts to file an amended petition were delayed, first by the extended closure of the High Court over the summer of 2010 and later by the administrative detention of Mushtaq’s lawyer, M.S. Reshi. Mushtaq remained in detention until February 2011; his lawyer was released a month earlier.

“I thought I would be taken somewhere and killed. Officially I was not even in their custody and no one knew where I was – the police could just make up some story about my death.”

Jamali Khan, a former PSA detainee, in a meeting with Amnesty International in Delhi, 13 May 2010

VIOLATIONS UNDER THE PSA

Jamali Khan was detained under the PSA in December 2007. Although his detention order was quashed in September 2008 by the state High Court, he was not released. Instead, he was moved from the jail to the Joint Interrogation Centre (JIC) at Jammu. He was held incommunicado at the JIC from 19 September to 6 October 2008. He was not brought before a magistrate and was unable to contact anyone. He was not informed of the legal basis for his continued detention. On 6 October, he was moved to a police station in the nearby town of Udhampur where two days later he was told he could leave.

“I was confused when the policeman told me I could leave,” he said. “I looked outside the door of the police station and saw 20 to 25 armed men standing there with their guns... I was scared and remember thinking that this was the end.” Once they forced him into a police jeep, he felt safer. “I relaxed only when I realized we were heading back to the jail,” he explained, “they had got a new detention order against me, but at least I was still alive.”

Incommunicado detention, torture and an information vacuum are all features of detention under the PSA. When suspects are apprehended, instead of

being formally detained under the PSA, they are usually taken for “unofficial” interrogation and held incommunicado at a local police station or the main interrogation centre in Srinagar. Sometimes they are detained in secret facilities.

Suspects are kept for periods of about two days to two weeks, during which they are often tortured or otherwise ill-treated until they “confess” to the alleged crime. The entire process is informal, with family members told nothing of their loved one’s whereabouts, or why they have been taken.

This period of “unofficial” interrogation and detention occurs completely outside the bounds of legal process, and is not recorded on police or judicial records. Suspects are neither arrested nor issued with a PSA detention order. Their detention is therefore almost invariably illegal, and as such, arbitrary. Not only does it flout international law, but it breaches the Indian Constitution which requires that all those picked up in criminal proceedings must be brought before a magistrate within 24 hours of their apprehension.

FACILITATING TORTURE

Administrative detention facilitates torture and other ill-treatment as PSA detention orders are usually based on information obtained through confessions that are often coerced. This is all the more disturbing, given that the PSA provides security officers involved in its application immunity from prosecution for acts committed under the PSA. Impunity for human rights violations is effectively provided for by the law.

In an attempt to stop the use of torture in police custody, the Indian Evidence Act makes confessions to a police officer inadmissible as evidence in a court of law. However, this protection does not extend to administrative or unofficial detention as there is no process before a court of law. The vast majority of PSA detention orders are based on interrogation reports prepared by the police on the basis of confessional statements made by the detainee, often obtained after “sustained interrogation”, invariably during periods of illegal and often incommunicado detention.

JAVOID AHMAD NAJAR

Javid Ahmad Najar was an alleged former member of an armed group who had served many years in prison undergoing trial for killing a police constable, a crime for which he was ultimately acquitted. Subsequently, he was taken by police “for questioning in various pending cases”. The 2009 grounds of his PSA detention note, “during sustained questioning you broke down”. He was rearrested on the basis of his alleged disclosure that led to the recovery of three hand grenades and 10 rounds of ammunition from a graveyard. His lawyer (and the President of the J&K High Court Bar Association), Mian Qayoom, told Amnesty International that Najar had been tortured in police custody and forced to make a false confession as the police had little else to rely on. In July 2010, Mian Qayoom was himself detained under the PSA.

NO WAY OUT

Detainees cannot challenge the decision to detain them in any meaningful way. There is no provision for judicial review of detention in the PSA; and detainees are not permitted legal representation before the Advisory Board, the executive detaining authority that confirms detention orders. The UN Working Group on Arbitrary Detention, in a November 2008 opinion on 10 PSA cases from J&K, found that the detentions did not conform to the international human rights legal obligations by which India is bound.

Furthermore, state officials often implement this law in an arbitrary and abusive manner. Detaining authorities fail to provide material on which the grounds of detention are based to detainees or their lawyers. The grounds themselves tend to be a regurgitation of the “evidence” submitted by the police to the executive officer who, instead of evaluating it rigorously before deciding whether or not to issue the accused with formal grounds, simply rubber-stamps it.

In the 2007 case of Abdul Waheed Bhat, for instance, the grounds suggest that the authorities believe that mere suspicion and speculation were sufficient to detain him. The document states that he was



Above: Central Jail Srinagar

arrested and interrogated after being picked up “in suspicious condition” near where the police found a large haul of weapons. It eventually concludes, “If you ha[d] not been arrested, you could definitely [have] crossed IB [international border] in order to get training in militant camps in Pakistan and after your return to India/J&K, you would have definitely designed your nefarious activities into action, proving highly pre-judicial to the security of the state”.

Vague and general allegations made as a justification for detaining individuals under the PSA are often supplemented by allegations that equipment and ammunition have been recovered at the time of arrest. In 120 PSA cases (20 per cent of the total cases) studied by Amnesty International for this report, recovery of equipment and ammunition (other than guns or explosives) was alleged. However, the frequency with which these allegations appear belies the low conviction rate for this crime in J&K. Only 0.5 per cent of all individuals tried for possession of unlawful arms and ammunition in J&K are convicted – over 130 times lower than the national average in India.

“[A]fter your return to India/J&K, you would have definitely designed your nefarious activities into action, proving highly pre-judicial to the security of the state.”

Extract from grounds for the detention of Abdul Waheed Bhat, 2007

HIGH COURT PETITIONS

Detainees can and do approach the High Court by filing habeas corpus petitions to quash their order of detention – often successfully. But Amnesty International’s research clearly shows that the J&K authorities consistently thwart the High Court’s orders for release by re-detaining individuals under criminal charges and/or issuing further detention orders, thereby securing their continued incarceration. The ultimate decision as to whether PSA detainees are allowed to go free lies with an executive Screening Committee made up of government officials, police and intelligence officials whose deliberations are not open to any public scrutiny.

The High Court regularly quashes individual detention orders, but fails to challenge the abusive practices of serial detention used by the state authorities. Further, judges rarely call for investigation into allegations of illegal detention or torture despite their vast constitutional powers. Amnesty International is unaware of J&K High Court judgements that have directed action to be taken against officials for non-observance of court orders or that have ordered investigations into claims of torture and illegal detention of detainees. In the words of one human rights lawyer, “The entire approach of the High Court is lackadaisical and procedural”.

CONCLUSION

Amnesty International acknowledges the right, indeed the duty, of the state to defend and protect its population from violence. However, this must be done while respecting the human rights of all concerned.

Amnesty International takes no position on the guilt or innocence of those Kashmiri suspects alleged to have committed human rights abuses or recognizably criminal offences. Nevertheless, everyone must be able to enjoy the full range of human rights guaranteed under national and international law. By using the PSA to incarcerate suspects without adequate evidence, India has not only gravely violated their human rights but also failed in its duty to charge and try such individuals and to punish them if found guilty after a fair trial.

India has so far chosen to ignore the calls of UN human rights mechanisms in relation to its administrative detention regime. In a meeting with Amnesty International delegates in Srinagar in May 2010, where concerns about PSA detentions were raised, the then Additional Director General of Police (Criminal Investigation Department) of Jammu and Kashmir asked, “What rights are you talking about? We are fighting a war – a cross border war.”

Such opinions, and the practices that result, run directly counter to commitments made by India in ratifying international human rights treaties, and assertions regularly made by government officials at both the state and central level that democracy and the rule of law should prevail in Jammu and Kashmir.

Far from building confidence in the rule of law among the Kashmiri population, the widespread and abusive use of administrative detention risks undermining the rule of law and reinforcing deeply held perceptions in the next generation that police and security forces are “above the law”.



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GHULAM NABI SHAHEEN

Ghulam Nabi Shaheen, General Secretary of the J&K High Court Bar Association, was detained under the PSA in July 2010 for organizing public rallies calling for the release of Mian Qayoom. Qayoom, who is President of the Bar Association, had also been detained under the PSA earlier that year and was released after repeated detention orders in April 2011. Although the High Court quashed Shaheen's detention order twice, he was rearrested in prison itself and taken by police to an interrogation centre in Jammu for his alleged connection with another case. A third detention order was issued in February 2011 and a habeas corpus petition challenging that detention went before the High Court. Shaheen was eventually released in April, shortly after Qayoom. Amnesty International is concerned that the use of the PSA against the President and the General Secretary of the Bar Association reflects broader attempts by the state authorities to intimidate the Bar Association as well as other lawyers who take up cases of human rights violations in the courts.

Above: Family of Ghulam Nabi Shaheen, General Secretary of the J&K High Court Bar Association, who was released from administrative detention on 13 April 2011.



Above: Security personnel wearing riot gear stationed near the Jamia Masjid, Srinagar, India for crowd control, March 2011.

RECOMMENDATIONS

To the Government of Jammu and Kashmir:

- Repeal the PSA and end the system of administrative detention in Jammu and Kashmir, release detainees or charge them with recognizably criminal offences, and try them in a court of law in line with international fair trial standards.
- Immediately end illegal and incommunicado detention.
- Introduce safeguards to ensure that those detained are brought promptly before a magistrate, are given access to relatives, legal counsel and medical examination, and are held in recognized places of detention pending trial. Moreover, any allegations of violations of these safeguards should immediately be subject to independent investigation and those responsible brought to justice.

To the Governments of India and Jammu and Kashmir:

- Carry out an independent, impartial and comprehensive investigation into all allegations of abuses against detainees and their families (including allegations of torture and other ill-treatment, denial of visits and adequate medical care), make its findings public and hold those responsible to account.

To the Government of India:

- Extend invitations and facilitate the visits of the UN special procedures including particularly the UN Special Rapporteur on torture and the Working Group on Arbitrary Detention.

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Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

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Amnesty International
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom

amnesty.org