



# Imprisoned Resistance

5<sup>th</sup> August and its aftermath

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*The effect of the decision to abrogate Article 370 of August 5th has resulted in complete unity here. The hartal is the self expression of the people's will and not a hurriyat call. Now again Kashmir has become an international issue and that is necessary. The flip side is the increased militarization, which implies increased torture and humiliation*

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Imprisoned Resistance: 5<sup>th</sup> August and its aftermath  
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*Some, who have closed their eyes, are wide awake.  
Some, who look out at the world, are fast asleep.  
Some who bathe in sacred pools remain dirty.  
Some are at home in the world but keep their hands clean.*

Lal Ded<sup>1</sup>

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<sup>1</sup>“The Poems of Lal Ded translated by Ranjit Hoskote” <http://poetry.sangamhouse.org/2013/08/the-poems-of-lal-ded-translated-by-ranjit-hoskote/>

# Summary

An eleven-member team comprising advocates, trade union and human activists and a psychiatrist visited the Kashmir Division from September 28 – October 4, 2019. The broad objective of the team was to understand the situation persisting in the two months since the abrogation of Article 370, and, second to assess the quality of access to justice in these compelling circumstances. The team comprised Aarti Mundkur (Advocate, Bengaluru), Amit Sen (Psychiatrist, New Delhi), Clifton D' Rozario (Advocate and All India People's Forum, Bengaluru), Gautam Mody (New Trade Union Initiative, New Delhi), Lara Jesani (Advocate, Mumbai and People's Union for Civil Liberties), Mihir Desai (Senior Advocate, Mumbai and People's Union for Civil Liberties), Nagari Babaiah (People's Democratic Forum, Bengaluru), Ramdas Rao (All India People's Forum, Bengaluru), Saranga Ugalmugle (Advocate, Mumbai/Goa), Swathi Seshadri (Independent Researcher, Bengaluru) and Veena Gowda (Advocate, Mumbai and People's Union for Civil Liberties).

The report is based on our visit to different districts in the Kashmir valley, our visits to the High Court, District Courts and other quasi judicial institutions, our interactions with the lawyers, health and mental health professionals, traders, people of Kashmir and victims of state perpetrated violence. Details of the same are covered in the report.

Between August 5 and 6, 2019, two presidential orders, C.O. 272 and C.O. 273, were issued that had the effect of abrogating Article 370 and Article 35A, and effectively dismantled the limited protection afforded to Jammu and Kashmir in self-governance, territorial integrity and the collective rights to land and livelihood. By the 6<sup>th</sup> evening, the Jammu and Kashmir Reorganisation Act, 2019 was also passed by both the houses of Parliament, which bifurcated Jammu and Kashmir state into 2 union territories – Jammu and Kashmir (union territory with state legislature), Ladakh (union territory without state legislature). Vide notification dated 9<sup>th</sup> August, the appointed day for the bifurcation Act, was declared to be October 31, 019.

Since the midnight of August 4, 2019, anticipating a widespread resistance from the people, there has been a complete blackout in the Kashmir valley. All communication services like landlines, mobile phones, internet and even postal services had been blocked by the government. All schools, colleges, educational institutions and offices were ordered to be closed until further orders, and student hostels were asked to be vacated with immediate effect. Already there were 6.5 lakh armed forces in the Kashmir Valley including 1.3 lakh police force. Additionally, 1.4 lakh armed forces were moved into the Valley just before the announcement on August 5, 2019. However, in what is nothing short of a covert operation by the government, no information of their plans to unilaterally bring about the above policy changes was provided to the people of Kashmir, who were completely kept in the dark, let alone be consulted. One can only imagine the manner in which this contributed to breeding fear, uncertainty and anxiety.

As lawyers, activists and a medical doctor, we felt it important out of a sense of solidarity for the people of Jammu and Kashmir, but also out of a sense of responsibility to understand the situation first hand on the ground, in order to advance the true spirit of a democratic society and hold our elected government and the institutions of democracy accountable for their actions.

This report seeks to draw attention to the history of Jammu and Kashmir valley while understanding the events just before and after the August 5, 2019. Along with the collective aspirations of the people of Kashmir, the ongoing committed resistance of the people, the

resulting structured state violence on them and the systematic denial of legal recourse and justice to the people, we trace the judicial trend to people's issue while locating it in the present context based on facts and events since August 5, 2019.

### **Normalcy, redefined**

We realised that the narrative that was presented by the Indian government with the help of media houses was far from the reality. There has been a determined, systematic effort on the part of the Indian state to portray a sense of normalcy in the valley to justify their unilateral action of snatching the autonomy the Kashmiri people had over their land. The Indian government and the mainstream media have consistently propagated that normalcy by showing images of traffic flow in Srinagar, done by creating roadblocks to artificially create traffic jams, which were recorded then by drone cameras. Traveling within Srinagar and other towns and within the Valley has for the most part become a near impossibility unless people have access to a vehicle of their own. J&K State Road Transport Corporation (JKSRTC) has suspended operations since August 5. Only those with private vehicles are able to travel, that too with much difficulty given the barbed wires at multiple locations.

Though landline services were eventually restored, we learnt that very few houses actually have functioning landlines, since most people today use mobile phones. Though the mobile phones and internet services have been shut down, we found out that several middle level government employees with a functioning mobile telephone and some service providers to the government as well. Yet not only have the people of the Valley have been deprived of this basic necessity, but the arrogance of the Indian state is such that they are told that people lived without phones in the past and that it is not a basic right.

Besides this, the Primary Health Centres (PHCs) are barely working or are closed and people undertake immense hardship to reach Srinagar for medical treatment. PHCs at village level and district hospital are functioning. Tertiary hospitals located in Srinagar are difficult to access and is an expensive feat. Anganwadis are closed since August 5. The schools were shut in the beginning and though they have now been opened by the state, parents have not been sending their kids to schools, both- as a matter of protest as well as due to their fear of the safety of their children.

The situation of the press was no different. Many newspapers have discharged their reporters since they are unable to pay salaries. A journalist we met informed us that there was constant surveillance and policing at the only Media Centre in Srinagar and at the Srinagar Press Club, creating an atmosphere of fear and intimidation in which journalists could not possibly function with any semblance of independence. The situation in Kashmir has led to a complete loss of press freedoms. On the other hand, people we met unanimously communicated their anger and the sense of betrayal felt by them, to a major part, towards the bias and false reporting by the Indian mainstream media, and also towards the silence of the local media in the face of numerous newsworthy truths of the hardships, violations and tragedies faced by the people, which were not making it to the newspapers.

The people in the Valley called the abrogation of Article 370, the militarization, communication blockade, undeclared curfew and movement restrictions, as a siege. In response they have adopted the *hartal* or shutdown, which is on across the Valley, in all cities and villages. All commercial establishments are voluntarily closed except for two hours in the morning and in the evening. This is part of their resistance against what they term a 'military occupation', and they

are confident to continue with it indefinitely, since they have been trained all these years to adjust to such a situation

Expressing their discontent, the locals informed us that, *“They say there is a Hurriyat Calendar but there isn’t, there is only the calendar of the ‘Uparwala’. The Government thought there will be widespread bloodshed and protests but God has told us to keep silence not the Hurriyat. We have done nothing, everything has been done by the Government. They send away the tourists and the yatris. The yatris left without even a darshan. We would not have done anything, we carry them on our backs.”*

This being the situation of the basic fundamental requirements of a functioning democratic state, we realised that the Valley was no where close to being called “normal”.

### **Structured state violence**

Besides the massive militarisation, the surveillance and control by the army is unprecedented. Even the houses are not the safe spaces that homes are meant to be, since the armed forces can barge in anytime. The power of the weapon is thrust in their faces at every street corner. The constant convoys of armed vehicles on the roads forcing them to wait on the sides is the bare armed power of the Indian State staring them down.

Since August 5, 2019, armed forces are conducting raids on villages and localities in the city almost every night, and most definitely if there is any protest or incident of dissent on the part of the people. We heard that the villages were rendered sleepless because of the nightly raids, harassment, humiliation and torture. It appears that the modus operandi of the raids is more or less similar whether they are conducted jointly by the army, paramilitary forces and the police, or by any of them independently. People said that they barge into the village screaming abuses and throwing stones on the houses breaking window panes. Almost all the homes in the villages and some neighbourhoods in Srinagar, have broken windows owing to the stones thrown by the army. The people feel that the night raids are not accidental and are designed to terrorise. This is accentuated by the practice of torture not just in the army camps and police stations, but also right outside the houses, on the streets and in the local mosques. These night raids, coupled with the high density of militarization, are a method of saturating control. The specific instances of the same as narrated to us are enumerated in the report at length.

We further encountered, numerous cases of illegal detentions of minors and adults alike. There are cases of torture by the armed forces. In some instances, the torture is carried out with loudspeakers on, for the surrounding community to hear the victim scream as he is getting brutalised. We also met with families wherein there have been deaths due to tear gas shelling at the protesters. What remains a big question in this situation is, when the armed forces and other bodies of the state are indulging in such violations, where is the innocent victim supposed to go for redressal?

One person told us that: *“The Army is fighting a war against our society and religion; this is not any security action anymore. They do not look at us as human beings with rights or feelings. This is what we have to now fight against. It’s a fight for azaadi and the right to live as human beings”*. This is the new normal in the Valley.

### **Inaccessible justice?**

Rule of law and democratic governance demands strong institutional checks and balances. Judiciary ought to step in to check excesses by the executive and parliament to ensure rule of



law and protection of human rights. Access to justice according to the people of Kashmir has been a mere mirage.

Advocates who we met in the High Court as well as the district courts informed us that, while the entire judiciary has been rendered non-operational due to the communications blockade and movement restrictions, the lawyers too have taken the decision to boycott the regular court proceedings over the abrogation of Article 370, communication blockade and systemic clampdown by the State and treatment meted out to lawyers..

Advocates further spoke of the lock down of communications resulting in litigants being forced to come in person to meet their advocates. They stated that they are unable to communicate with each other or with their clients, causing a great deal of difficulty and hampering of their work.

Prior to August 5, 2019 there were approximately 200 habeas corpus petitions pending, now there are more than 600. From August 5, 2019 more than 330 Habeas Corpus petitions had been filed till September 30, 2019. There are countless detentions that are unlawful, hence, no one except the State knows how many persons are illegally detained. The people said there are reports that more than 13,000 people have been unlawfully detained. In many instances the draconian PSA is slapped arbitrarily on people. Many detainees are being transferred outside the State of J&K, which, the lawyers said, was intentionally done in order to prevent family members and lawyers appearing for those detailed from having access to them.

One advocate from the TADA court highlighted that, the practice from 2016 onwards, was for the police to invoke the provisions of UAPA even in stone pelting cases and since most of the stone pelting FIRs were "open FIRs". Post August 5, 2019, scores of youth and men were being picked up and charged in these FIRs which were in some cases more than a year old. He also informed us that in many cases, even after the accused secured bail, the SHO had been directed not to execute the bail orders. Meanwhile, the accused were being booked in further cases, thereby ensuring continued incarceration. We were also informed that trials were merely getting adjourned since witnesses in most cases were unable to come to the courts.

Alarmingly, the advocates informed us that they are operating in an atmosphere of terror since most of their elected representatives in the Bar Associations of the High Court and the districts were arrested and detained under PSA while others have been threatened with the same fate if they speak against the Central Government's unilateral decisions to abrogate Article 370.

This being the state of the justice system in Kashmir, where there is massive reprisals, surveillance and clampdown on advocates and their right to practice itself, courts are barely functioning and when they are functioning they seem to be furthering the will of the executive instead of putting check on it. People have reached a point where they have almost completely refused to engage with the machinery of the state. Not only is there no faith in the local judiciary but now there's a declining faith of getting justice in the Supreme Court as well. Trauma, not just on the body, but on the mind as well

A child psychiatrist from the Team did the rounds of the mental health services in Srinagar, on day 2 and 3, and interacted with psychiatrists, therapists, counsellors and social workers who are providing mental health services in Srinagar and other places in the valley. It was observed that the blatant abuse of power, the violent aggression and extreme forms of abuse (physical, sexual and emotional) unleashed on the Kashmiri people has caused deep and destructive trauma that may take generations to heal. Not only has it caused extreme suffering

and a plethora of mental health disorders of unprecedented proportions, it has also manifested in the seething anger, acute polarization and paranoia, a complete lack of trust and hardening of attitude towards the Indian state.

### **Conclusions and recommendations**

There is no doubt the decision of the Indian government has been opposed by various sections of Indian society too, including the members and organisations of this Team, and demands have been made that status quo ante as on August 4, 2019 including restoring all constitutional and legal provisions that were available to the state of Jammu and Kashmir on that date. This would require repealing of the parliamentary decisions of August 5 and 6 August 2019 and rescinding the Presidential orders C.O. 272 and C.O. 273 along with the repealing of Jammu and Kashmir Reorganisation Act, 2019. With this the government must release all those imprisoned on and after August 1, 2019, and lift the lockdown in all its forms - barricades, communication, transport and all government services as well as restore all civil, political, social and economic rights. Following this, in order to find a lasting and peaceful solution the Government of India must

1. Recognise that a dispute exists between peoples of Jammu and Kashmir and the Indian government.
2. Repeal the Jammu & Kashmir Public Safety Act 1978 and the Armed Forces (Jammu & Kashmir) Special Powers Act 1990.
3. Withdraw all army and para-military forces from civilian areas of Jammu and Kashmir.
4. Open a transparent unconditional dialogue with the peoples of Jammu and Kashmir and their representatives so as to address peoples' aspirations to determine and define their own destinies through democratic means and to find a political solution that respects the democratic will of the people in accordance with human rights and international law.

# 1. Our mandate

Between August 5 and 6, 2019, two presidential orders, C.O. 272 and C.O. 273, were issued that had the effect of abrogating Article 370 and Article 35A, and effectively dismantled the limited protection afforded to state of Jammu and Kashmir in self-governance, territorial integrity and the collective rights to land and livelihood<sup>2</sup>. By the 6<sup>th</sup> evening, the Jammu and Kashmir Reorganisation Act, 2019 was also passed by both the houses of Parliament, which bifurcated Jammu and Kashmir into 2 union territories – Jammu and Kashmir (union territory with state legislature), Ladakh (union territory without state legislature). Vide notification dated 9<sup>th</sup> August, the appointed day for the bifurcation Act, was declared to be October 31, 2019.<sup>3</sup>

In the week preceding the announcement the Government of India had issued an advisory asking all visitors to the Valley - tourists, Amarnath Yatris<sup>4</sup>, outstation students, migrant labour - to leave, citing intelligence reports of an imminent terrorist attack<sup>5</sup>. This was accompanied by an additional deployment of 1.4 lakh armed forces. Anticipating widespread resistance in the Valley, the government disconnected all landline and mobile telephone services and internet across the Valley and suspended the public bus and railway services in the intervening night of August 4 - 5. All schools, colleges, educational institutions and offices were ordered to be closed until further orders, and student hostels were asked to be vacated with immediate effect. In what is nothing short of a covert operation by the government, no information of their plans to unilaterally bring about the above policy changes was provided to the people of Jammu and Kashmir, who were completely kept in the dark, let alone be consulted. One can only imagine the manner in which this contributed to creating fear, uncertainty and anxiety.

Since then, accounts of widespread state repression including a communication blockade, mobility limitations and curfew, full or partial closure of government services and state conducted violence in the form of torture, detention and arrests including of minors, night raids, destruction of property, custodial killings have been reported

As lawyers, activists and a medical doctor, we felt it important out of a sense of solidarity for the peoples of Jammu and Kashmir, but also out of a sense of responsibility to understand the situation first hand on the ground, in order to advance the true spirit of a democratic society and hold our elected government and the institutions of democracy accountable for their actions.

An eleven-member team comprising advocates, trade union and human activists and a psychiatrist visited the Kashmir Division from September 28 – October 4, 2019. The broad objective of the team was to understand the situation persisting in the two months since the abrogation of Article 370, and, second to assess the quality of access to justice in these compelling circumstances. The team comprised Aarti Mundkur (Advocate, Bengaluru), Amit Sen (Psychiatrist, New Delhi), Clifton D' Rozario (Advocate and All India People's Forum, Bengaluru), Gautam Mody (New Trade Union Initiative, New Delhi), Lara Jesani (Advocate, Mumbai and People's Union for Civil Liberties), Mihir Desai (Senior Advocate, Mumbai and

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2 Ghosh, Shrimoyee Nandini (2019), One Nation, One Flag, One Constitution?. Retrieved from <https://www.raiot.in/dismantling-370-in-kashmir-part-1/>

3 *Annexure 2: Abrogation of Article 370: Myths and Realities*, is a note which unpacks the myths propagated by the State as reasons for the abrogation

4 <https://static.toiimg.com/photo/imgsize-556437,msid-70503375/70503375.jpg>

5 <https://timesofindia.indiatimes.com/india/jk-govt-asks-tourists-amarnath-yatris-to-return-as-soon-as-possible-top-developments/articleshow/70502443.cms>

People's Union for Civil Liberties), Nagari Babaiah (People's Democratic Forum, Bengaluru), Ramdas Rao (All India People's Forum, Bengaluru), Saranga Ugalmugle (Advocate, Mumbai/Goa) Swathi Seshadri (Independent Researcher, Bengaluru) and Veena Gowda (Advocate, Mumbai and People's Union for Civil Liberties).

This report seeks to draw the attention to the history of Jammu and Kashmir valley while understanding the events just before and after the August 5, 2019. Along with the collective aspirations of the people of Kashmir, the ongoing committed resistance of the people, the resulting structured state violence on them and the systematic denial of legal recourse and justice to the people, we trace the judicial trend to people's issue while locating it in the present context based on facts and events since August 5, 2019.

Below are some of the key questions that guided our visit to the Valley:

1. Functioning of the lower Courts in terms of its regular work including remands/ trials.
2. Specific focus on the manner in which the High Court has been dealing with Habeas Corpus Petitions
3. Functioning of Juvenile Homes and the Juvenile Justice Board
4. How are the courts dealing with protestors, and whether they are produced before courts, released or detained?
5. What are the general and working conditions of lawyers and Bar Associations?
6. What is the procedure being followed when persons including children are detained, are there detention orders, grounds for detention, duration of detention?
7. Instances of allegations of violations of Civil and Political rights of people, allegations of use of extra judicial method by armed forces and instances of Instances of firing and pellet guns
8. What will be the implications of the abrogation of Article 370 and 35A on the status of permanent residents, federalism, land rights of Kashmiri residents?
9. Impact on the lives of Kashmiris - livelihood, education, right to health, public transport, access to basic amenities

The team visited the following places / met the following people in the Kashmir Valley to document the current situation:

- Bemina, Tengpora, Galwanpora, Anchar, Illahi Bagh in Srinagar
- Villages in districts Pulwama, Shopian, Kulgam, Baramulla
- Courts: J&K High Court (including a meeting with Chief Justice), District Courts in Srinagar, Kulgam and Shopian, TADA Court. Jammu and Kashmir State Human Rights Commission (including meeting with Justice (Rtd.) Bilal Nazki, Chairperson)
- Juvenile Justice Board (JJB) and Child Welfare Committee (CWC), Srinagar
- Health: Met with psychiatrists, medical health professionals, therapists, counsellors and social workers who are providing mental health services
- Economy and Trade: Met with hawkers, traders and representatives of the JKCCI. Visited Post Office a public sector banks, Srinagar, the Parimpora and Sopore *mandis*
- Police: Efforts to meet the DGP and IGP were unsuccessful since we were turned away at the reception stating they were not available presently and there was no saying when they would be available
- Representatives of the Kashmiri Pandit Community

A clarification on the term armed forces used in the report: In this report we have used the term armed forces to refer to all forms of state military and para military forces. Where we are clear

on which wing of the armed forces (for e.g. army, Central Reserve Police Force (CRPF), Rashtriya Rifles (RR), Sashastra Seema Bal (SSB), Border Security Force (BSF), Special Task Force (STF), J&K police etc.) has been referred to in the testimonies and other reports, we mention them specifically.

*All names have been changed to protect identities*

## 2. History of broken promises

*The history of the Kashmir dispute dates back to pre-independence and pre-partition times when the British ‘sold’ the Kashmir Valley to then Dogra King Gulab Singh on March 16, 1846. The Kashmiris have since then been struggling against state oppression and tyranny. Since accession in 1947, the people have been engaged in a struggle for democratic rights and self-determination as was promised through the Instrument of Accession. In this section we look at a brief history constitutional history of the state of Jammu and Kashmir from 1947 and the role of the United Nations, leading to the current context of the abrogation of Article 370 and rendering inoperative Article 35A of the Constitution of India*

The history of the Kashmir dispute from 1947 has been a constant battle between the Kashmiri peoples and the Indian government. This couplet by Mirza Ghalib written almost a century ago describes the roots of the dispute very well, "*Nahi kuch subha-o-zunnar ke phande mein girai/wafadari mein sheikh-o-brahman ki aazmaish hai*" (The loop of the rosary and the sacred thread cannot hold any one / The real test of the Sheikh and the Brahmin is in their faithfulness).

At the time of India's independence, the state of Jammu & Kashmir (henceforth referred to as J&K) was a princely state in British India under the rule of Maharaja Hari Singh. The Indian Independence Act, 1947<sup>6</sup> was passed on July 18, 1947 dividing the then British India into two independent Dominions, i.e. India and Pakistan, from August 15, 1947, and stating that the British treaty relationships of 'paramountcy' with princely states would automatically lapse, thus restoring them to full sovereignty. The Act was adopted on August 15, 1947 by the India Order (Provisional Constitution), 1947. Section 6(1) of the Act enabled an "Indian State", formerly a princely state, to accede to India by its ruler executing an Instrument of Accession (IoA)<sup>7</sup>. No format for such accession was provided. In addition, such an Instrument required acceptance as per Section 6(1). At the time of independence the then Maharaja of the princely State of J&K, Hari Singh decided at least for the time being to remain independent. He signed a standstill agreement with Pakistan and was seeking to negotiate a similar agreement with India.

By September 1947, the Maharaja's sovereignty over Jammu and Kashmir was under severe threat, with growing anti- Dogra rebellions in Poonch-Rawlakote,<sup>8</sup> and Gilgit and Baltistan<sup>9</sup>. Between early October and November 1947,<sup>10</sup> massive communal massacres in the Jammu district leading to the killings or expulsions of an estimated 200,000 Muslims. Meanwhile, Pathan and Afridi tribals from the North West Frontier and Hazara region, who had intensified their raids on the Maharaja's territories, with Pakistani military support, also perpetrated several atrocities particularly in the town of Baramulla, as they progressed towards Srinagar via the Jhelum valley road.<sup>11</sup> At the verge of losing his kingdom completely the

6 [http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga\\_19470030\\_en.pdf](http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf)

7 [http://www.centralexcisehyderabad4.gov.in/documents/history/1947\\_2.PDF](http://www.centralexcisehyderabad4.gov.in/documents/history/1947_2.PDF)

8 [https://www.india-seminar.com/2013/643/643\\_christopher\\_snedden.htm](https://www.india-seminar.com/2013/643/643_christopher_snedden.htm)

9 <https://www.amazon.com/Gilgit-Rebellion-Major-Mutinied-Partition/dp/1473821878>

10 <https://www.aljazeera.com/news/2017/11/forgotten-massacre-ignited-kashmir-dispute-171106144526930.html>

11 <https://kashmirilife.net/before-pathan-raids-issue-31-vol-10-190588/>

Maharaja fled from his State capital at Srinagar and was compelled to seek military help from India, to quell the internal and external threats to his kingdom. The Indian government conveyed that it was unwilling to render such military help unless the Maharaja legally acceded to the Dominion of India, citing International law. Thereafter the Maharaja signed an Instrument of Accession (IoA) on October 26, 1947.

India and Pakistan thus went formally at war within months of the birth of their respective nations. They would wage war three more times in 1965, in 1972 and in 1999, two of these directly over Kashmir. India and China would also wage a war over the territory of Ladakh in 1962. Besides these conflicts, there have been innumerable almost constantly occurring exchange of artillery fire, and other cease fire violations along the Line of Control (the working boundary between India and Pakistani territory in Kashmir) resulting in the loss of hundreds of civilian and military lives, on both sides of disputed Kashmir, over the years.

The IoA is an international treaty between two independent sovereign rulers; Maharaja Hari Singh of the princely State of J&K and the Government of India. The Maharaja, while acceding to India had, in terms of Clauses 7 & 8 of the IoA, reserved a right not to commit himself to accept the Constitution of India in toto or fetter his discretion to enter into a future arrangement with the Government of India, and his sovereignty would continue as provided under this Instrument. The Governor General Lord Mountbatten conditionally accepted the Accession by his letter dated October 27, 1947<sup>12</sup> wherein he clearly stated that ***“as soon as law and order have been restored in Kashmir and her soil clear of the invader the question of the State’s accession should be settled by a reference to the people.”*** Similarly, the White Paper on J&K published by the Government of India early in 1948<sup>13</sup> recorded: ***“In accepting the accession, the Government of India made it clear that they would regard it as purely provisional until such time as the will of the people of the State could be ascertained.”***

During the days immediately after the recent abrogation, there was a lot of misinformed discussion on who was responsible for the creation of Article 370 and who took what position on J&K at the time. Post abrogation of Article 370, we encountered much misinformation and selective / partial information on the subject being circulated. Unlike the other princely states of British India, accession of J&K was a conditional one and negotiated on the part of India by the entire Union Cabinet which included Jawaharlal Nehru, Patel Ambedkar, Mukherjee and others. The suggestion that Jawaharlal Nehru alone took decisions linked to India’s relationship with Kashmir is entirely false and is fabricated history. Article 370 was the product of an intense period of negotiations over a period of five months, between May and October 1949 between Jawaharlal Nehru, Sheikh Abdullah and Sardar Patel, and endorsed by Shyama Prasad Mookerjee as member of the Union Cabinet<sup>14</sup>. Further to this it was debated and adopted in the Constituent Assembly. The suggestion that Article 370 was unilaterally inserted by Jawaharlal Nehru is far from the truth. Shyama Prasad Mukherjee’s own objections to article 370 were first made on 26 June 1952<sup>15</sup> a full two-and-a-half years after the Indian Constitution was adopted long after he had resigned from the cabinet and formed the Jan Sangh. *Annexure 3: Ambedkar, Patel and Gandhi on Kashmir*, outlines positions taken by Ambedkar, Patel and Gandhi on the matter.

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12 Noorani, A. G. (2015), Kashmir’s Accession to India strictly “conditional”. Retrieved from <https://www.greaterkashmir.com/news/gk-magazine/kashmirs-accession-to-india-is-strictly-conditional/>

13 Govt. of India, *White Paper on Jammu & Kashmir*, Delhi 1948, p.46.

14 Article 370: A Constitutional History of Jammu and Kashmir, A.G. Noorani

15 <https://www.hindustantimes.com/india/shyama-prasad-mukherjee/story-J6ST2hkuXUhOAXI3eZJDVK.html>

## 2.1 India approaches United Nations Security Council (UNSC)

On January 1, 1948, the Indian government took the Kashmir dispute to the UNSC under Article 35 of the United Nations (UN) Charter. Before the UNSC, the Indian government took the stand that it was prepared to conduct a plebiscite to conform to the wishes of the people and shall abide by the outcome of such plebiscite. Pakistan denied its role in the tribal “invasion” and made counter allegations against the Indian government, regarding the involvement of Dogra state forces in the widespread violence and massacres in Jammu, the invalidity of the Instrument of Accession, and the illegitimacy of the entry of Indian troops onto Kashmiri soil given the ruler’s pre-existing stand-still agreement with Pakistan.

Pursuant to investigations and deliberations, a five-member commission called for withdrawal of troops of both countries and brokered a ceasefire between India and Pakistan. The UN commission drew up a resolution dated 5<sup>th</sup> January 1949<sup>16</sup> calling for a plebiscite in Kashmir, which was accepted by the Indian government. The attempts for resolution under the auspices of the UNSC however did not bear fruit, although they went on upto 1964-1965.

The Indian government changed its stand pursuant to the Simla Agreement arrived at between India and Pakistan in 1972, after India’s victory in the Bangladesh war. It claims that the agreement’s terms to “*settle their differences by peaceful means through bilateral negotiations*” renders the UNSC resolutions redundant, though the Agreement also specifically mentions that “*the principles and purposes of the Charter of the United Nations shall govern the relations between the two countries.*” This position is questionable in the absence of the Indian government having obtained the approval of the peoples of J&K or their democratically elected representatives.

Flowing from this position, India has historically refused to allow the UN Military Observers Group (UNMOGIP), mandated by the United Nations to monitor the maintenance of truce along the disputed border access to the border regions within its territory. Most recently it has also refused access to the UN Office of the High Commissioner of Human Rights (UNOHCHR), in 2016, constraining the office to publish its report on human rights violations in the region on the basis of remote monitoring. Meanwhile, Pakistan has continued to demand implementation of the UNSC resolutions. It has allowed UNMOGIP access to regions in its territory, though it also refused access to the UNOHCHR making its own permission conditional upon India providing access on its side of the disputed territory. A summary of the proceedings before the UN Security Council is annexed as *Annexure 4: UN on Kashmir – A summary of the dispute before the UN Security Council*.

## 2.2 Formation of the Constituent Assembly and the framing of the J&K Constitution

At the same time as signing of the IoA the J&K Maharaja appointed the hitherto jailed popular peoples leader as the Emergency Administrator of J&K<sup>17</sup>. Subsequently, on March 5, 1948, the Maharaja appointed an interim government making Sheikh Mohammed Abdullah the Prime Minister and appointing a Council of Ministers, who was to take steps as soon as normal

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<sup>16</sup> [https://shodhganga.inflibnet.ac.in/bitstream/10603/93870/23/23\\_appendix%208.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/93870/23/23_appendix%208.pdf)

<sup>17</sup> <https://mea.gov.in/articles-in-indian-media.htm?dtl/15757/Himalayan+transition>



conditions were restored to hold elections based on the principal of adult franchise to elect a National Assembly that would frame the Constitution of J&K.

India in the meantime adopted its Constitution and with it transformed itself from a British Dominion to a Republic on 26 January 1950. This Constitution by way of Article 370 gave the State of J&K the right to have its own Constitution, independence over all matters except foreign affairs, defence and communications. While all other princely states which had acceded to India agreed to abide entirely by the Constitution of India, J&K alone was given a special status under the Constitution. Article 370 mentioned that only Article 1 (which defines boundaries of India) and Article 370 would be automatically binding on J&K. The items in the LoA, namely defence, communications and foreign affairs could be extended to J&K by the President of India after consultation with the state government while any other items of the Indian constitution could be extended to J&K only with the concurrence of the J&K Constituent Assembly. Moving Article 370 (then Article 306 A) in the Constituent Assembly<sup>18</sup> N. Gopalswami Ayyangar stated in clear terms ,

*"Again, the Government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic or wish to go out of it. We are also committed to ascertaining the will of the people by means of a plebiscite provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be guaranteed. We have also agreed that the will of the people, through the instrument of a Constituent Assembly, will determine the constitution of the State as well as the sphere of Union jurisdiction over the State."*

This view of the Mr. Ayyangar was accepted and the article was adopted by the Assembly without opposition.

The foregoing spirit notwithstanding the autonomy J&K was granted under Article 370 has however been systematically eroded over the decades by the Indian government and the same has been ratified at different occasions by the Supreme Court of India. The Indian state has consistently betrayed its own promise of Article 370 and spirit that went with it.

In 1951, State of J&K elected a Constituent Assembly<sup>19</sup> on the basis of adult suffrage, in highly compromised and widely boycotted elections. The Constituent Assembly, which was the body responsible for creating the state's constitution, convened its session on 31.10.1951. Once this was convened the state government lost all authority to accord any concurrence to the Union. In response, the Security Council passed Resolution 91 of 1951 affirming that the convening of the Constituent Assembly and any action it might attempt to take to determine the *"future shape or affiliation of the entire state or part thereof" of Kashmir* "would not constitute a disposition of the State in accordance with the principle of a free and impartial plebiscite conducted by the UN."

In 1952, 'Delhi Agreement'<sup>20</sup> was arrived at between some representatives from the J&K government and those of Indian government in order to endorse the main principles that would govern the future relationship between India and Jammu and Kashmir, including the nature of citizenship Kashmiris, the future role of the monarch and the autonomy guaranteed to Kashmiris

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<sup>18</sup> Constituent Assembly of India Debates (Proceedings) Volume X. Retrieved from [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/10/1949-10-17](https://www.constitutionofindia.net/constitution_assembly_debates/volume/10/1949-10-17)

<sup>19</sup> Jammu & Kashmir Constituent Assembly Debate Part 1, First Volume, 1951 – 1955. Retrived from <http://www.jklegislativeassembly.nic.in/debates/debate%20Part%20I.pdf>

<sup>20</sup> Delhi Agreement, 1952. Retrived from <http://jklaw.nic.in/delhi1952agreemnet.pdf>

to frame their own constitution and fundamental rights, independent of the Indian constitution. By 1953 it was clear that Sheikh Abdullah was taking increasingly articulating public positions advocating for Kashmiri sovereignty and the right to self determination. He was preventively detained in August of 1953 on “national security” grounds , and remained in Indian prisons more or less continuously for the next two decades without ever being convicted of any crime. He was unconstitutionally replaced by an administration headed by G.M Bakshi his deputy Prime Minister and a strong Indian loyalist. Shortly thereafter, in February 1954, the Constituent Assembly ratified the state’s accession to India. In pursuance of this ratification, the President of India promulgated the Constitution (Application to J&K) Order, 1954 ostensibly placing on a final footing the applicability of the other provisions of the Indian Constitution to J&K. There is a strong feeling amongst a lot of Kashmiris that the 1954 Order as well as the subsequent Constitution of J&K was a betrayal of the Kashmiri people.

The 1954<sup>21</sup> Presidential order stated that :

- (i) The State was guaranteed territorial integrity. No change in the name or boundary of the State could be brought about without the consent of the State Legislature. This was an exception to Article 3 of the Indian Constitution.
- (ii) It extended the Indian Constitution’s citizenship provisions to the residents of the territory of Jammu and Kashmir. Proviso to Article 7 stated that the State's permanent residents, having migrated to Pakistan, returning to the State either under a permit for resettlement or under a law for permanent return, sion of indian citizebe deemed to be a citizen of India.
- (iii) It extended the Indian Fundamental Rights chapter to Jammu and Kashmir with several significant qualifications. The restrictions to freedom of speech and expression were subject to additional qualifications of “security of state”, and were to be as deemed reasonable by the state legislature. Preventive detention provisons would not be subject to judicial review, on grounds of violation of Fundament Rights. It also introduced Article 35A which states that the status, and rights accorded to Permanent Residents of Jammu and Kashmir will not be subject to challenge by “other citizens” of India on grounds of violating their fundamental rights. The writ jurisdiction of the Indian Supreme Court was extended to the territory.
- (iv) Emergency Proviosns relating to President’s Rule on the occurrence of an internal emergency, applicaple to other states were not applicaple to Jammu and Kashmir.
- (v) Indian Palrliaments jurisdiction to enact laws for Kashmir in several further legislative subjects, not amonst the three mentioned subjects, and not previously extended by Constitutional order (1950) was extended.

All these actions, culminating in the recent August 2019 ssteps are perceived as unconstitutional, and a breach of the promise of plebiscite.

The Constitution of the State of J&K was adopted on November 17, 1956 and came into force on January 1, 1957. On January 24, 1957, UN passed another resolution<sup>22</sup> stating that such actions would not constitute a final disposition of the State. But for Indian state it was clear that the State of J&K is an integral part of the Union of India. It was further made clear through the Constitution of the State of J&K that the head of the State would be ‘Sadr-i-Riyasat’ who was to be an elected member. This was unlawfully changed to ‘Governor’ appointed by the Centre in 1966 through a Presidential Order. Once the Constituent Assembly dispersed on November 17,

<sup>21</sup> The Constitution (Application to Jammu and Kashmir) Order, 1954. Retrieved from [http://jklaw.nic.in/constitution\\_jk.pdf](http://jklaw.nic.in/constitution_jk.pdf)

<sup>22</sup> UN Security Council, *Security Council resolution 122 (1957) [The India-Pakistan Question]*, 24 January 1957, S/RES/122 (1957), available at: <https://www.refworld.org/docid/3b00f1f057.html> [accessed 15 October 2019]

1956, after adopting the Constitution of J&K, the only authority which alone could (i) provide more powers to the Union and (ii) accept Union Institutions other than those specified in the IoA, vanished. However, the mode of passing Presidential orders to continuously extend more legislative subjects and Indian constitutional provisions to Kashmir, was adopted by successive governments, effectively rendering the Constitutional promise of autonomy redundant. It is also widely believed that the State Government during these times did not represent the people of J&K or their will. B. K. Nehru, Governor of J&K from 1981 to 1984 writes in his memoirs: *“From 1953 to 1975 Chief Ministers of that State had been nominees of Delhi. Their appointment to that post was legitimised by the holding of farcical and totally rigged elections in which the Congress Party led by Delhi’s nominee was elected by huge majorities”*.<sup>23</sup>

It is thus clear from the above history of the manner of integration of Jammu and Kashmir into India that Article 370 was transitory only in the sense that the right to decide permanently on the relation between India and J&K was to be finally determined by the Constituent Assembly of J&K through the Constitution of J&K. Without the sanction of the Constituent Assembly no further changes could be made. The Constituent Assembly dissolved in 1957 and therefore there was no question of making any further changes to the relation between India and J&K by the Indian state under Article 370.

## 2.3 Continued occupation and militarisation of Kashmir by the Indian state

This being the constitutional history of the relation between State of J&K and India, Indian rule over a major part of disputed J&K since independence of India, has turned the Kashmir valley into a garrisoned territory and the world’s most militarised zone<sup>24</sup> by the end of the 20<sup>th</sup> century and it has stayed that way ever since. There have been 700,000 - military and para military - armed forces permanently deployed in the Kashmir valley to control the population, which according to the 2011 census was approximately 70 lakhs<sup>25</sup>. This is the Indian government’s response to the resistance of the people for their democratic rights. Referring decisions to the people is the only way to ascertain the people’s will and this was done at the time of Junagadh and Sikkim<sup>26</sup> joining the Indian union but somehow this has eluded the people of Kashmir.

When for four decades, political rights were denied in J&K, willfully using “constitutional” means by the Indian government including through the subversion of elections, led to a people’s movement for independence from the Union. It is unsurprising that this movement came to be supported both directly and indirectly by the Pakistan government culminating in the never ending standoff between both governments promoting armed state and non-state actors at the cost of the J&K people. Since 1989, the conflict in J&K has resulted in the disappearance of

23 “Nice guys finish second”, 1997, B.K.Nehru as quoted in *The Kashmir Dispute: 1947 – 2012*, A. G. Noorani (pg 61)

24 “Children in J&K living in most militarised zone of the world” <https://www.outlookindia.com/website/story/children-in-jk-living-in-most-militarised-zone-of-the-world-318-killed-in-15-yea/310230>

25 [https://web.archive.org/web/20180222105221/http://www.jkcnvis.nic.in/administrative\\_demography.html](https://web.archive.org/web/20180222105221/http://www.jkcnvis.nic.in/administrative_demography.html)

26 A plebiscite was held in Junagadh on 28.02.1948 after the administration of the state was taken over by the Government of India in November 1947. For more details please see Chapter 6 of ‘Integration of the Indian State’ by V.P. Menon. A referendum was also held in Sikkim on 14.04.1975 to confirm the resolution passed in the Sikkim assembly on the state’s merger with India. For more details please see Introduction of ‘The Kashmir Dispute, 1947 - 2012’ Volume 1 by A.G. Noorani

more than 8000 persons, the killing of more than 70,000 Kashmiris, and the presence of 6000+ unmarked mass graves.<sup>27</sup>

While the peoples of J&K have been in conflict with the Indian state at least since the early 1950s, till 1987 the struggles for popular sovereignty and democratic rights were locally motivated and were non-violent. From 1988 the phase of armed resistance began, which abated between 2004 and 2007 yielding to a new phase of non-violent resistance.<sup>28</sup> There have been instances of heightened conflict due to specific events. Some of the more prominent instances are: Resistance to the Indian governments actions returned in 2008 wherein huge protests began after the state government transferred 40 hectares of forest land to the Shri Amarnathji Shrine Board - the organisation which organises the Amarnath Yatra. The transfer of forest land was protested as it was seen as Indian government's designs to consolidate its control <sup>29</sup>. Then in May 2009, there were again unprecedented protests against the rape and murder of two young women by Indian armed forces in Shopian village<sup>30</sup>. This sentiment persisted through 2010, where tens of thousands<sup>31</sup> took to the streets in protest against killings of civilians and several hundreds injured, many of them due to Indian armed forces firing into the unarmed civilian protesters. 2016 marked a new level of sustained protest following the killing of the Hizbul *Mujahideen* commander Burhan Wani<sup>32</sup> by armed forces. Wani's funeral, attended by tens of thousands of young people, held in his hometown of Tral, where armed forces once again turned on the mourners. This opened up a new cycle of resistance, marked by stone pelting, which in turn was met by the vicious pellet guns employed by armed forces.

## 2.4 UN on Human Rights Violations in Kashmir

The UN, especially through the United Nations Human Rights Council has time and again raised concerns about human rights abuses in J&K. In 1991, the UN Human Rights Committee categorically stated that the Armed Forces (Special Powers) Act, 1958 (AFSPA) imposed in J&K, was violative of several provisions of the International Covenant on Civil and Political Rights (ICCPR)<sup>33</sup>. A note on AFSPA is annexed as *Annexure 5: Note on the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990*.

During India's Universal Periodic Review (UPR) several member states of the UN have recommended repeal of AFSPA. In September 2016, Kashmiri civil rights activist Khurram Parvez was detained under the draconian J&K Public Safety Act, 1978 (PSA), a day after being prevented from attending the 33<sup>rd</sup> UN Human Rights Council in Geneva, prompting UN High Commissioner for Human Rights to issue a communication urging India to release him<sup>34</sup>. He was finally released after 76 days of detention.

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27 Alleged Perpetrators, IPTK-APDP, 2012: page 1

28 "The Militarised Zone", Angana P. Chatterji

29 JKCCS & EQUATIONS, 2017 "Amarnath Yatra: A Militarised Pilgrimage"

30 "Women's Deaths, and Inquiry's Findings", Enrage Kashmir. Retrived from <https://www.nytimes.com/2009/12/25/world/asia/25kashmir.html>

31 "Tens of thousands protest Indian rule in Kashmir". Retrived from <https://www.ctvnews.ca/tens-of-thousands-protest-indian-rule-in-kashmir-1.538910>

32 "Kashmir clashes over militant Burhan Wani leave 30 dead". Retrived from <https://www.bbc.com/news/world-asia-india-36761527>

33 "Human Rights Violations in Jammu & Kashmir - A Report". Retrived from <https://www.outlookindia.com/website/story/human-rights-violations-in-jammu-kashmir-a-report/211099>

34 "UN experts urge India to release prominent human rights defender detained for over a month". Retrived from <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20697&LangID=E>

The UN released its report dated June 14, 2018<sup>35</sup> on the “Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan”, reporting gross human rights violations, including excessive use of force by Indian armed forces, illegal arrests and detentions, communication blockades etc. This was followed by an update report dated July 8, 2019<sup>36</sup> on the “Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019”, reporting continuation of the abuses. Both the UN reports have been summarily rejected by the Indian government.<sup>37</sup>

## 2.5 Abrogation of Article 370 in August 2019

The latest event leading to recent unprecedented clampdown was August 5, 2019, when a Presidential Order, G.S.R.551(E) C.O. 272<sup>38</sup> - The Constitution (Application to Jammu and Kashmir) Order, 2019 was passed by the President of India allegedly in exercise of the powers conferred by clause (1) of article 370 of the Constitution. This order supersedes the Constitution (Application to Jammu and Kashmir) Order, 1954 by which special status had been granted to J&K. It also therefore does away with Article 35A and 35(3). The Rajya Sabha, on the same day i.e. August 5, 2019 passed the Jammu and Kashmir (Reorganisation) Bill, 2019, unanimously. This reorganised the state of Jammu and Kashmir into: (i) the Union Territory of Jammu and Kashmir with a legislature, and (ii) the Union Territory of Ladakh without a legislature. The Union Territory of Jammu and Kashmir will be administered by the President through an Administrator appointed by him known as the Lieutenant Governor. The Union Territory of Ladakh will be administered by the President, through a Lieutenant Governor appointed by him. On August 6, 2019, a Declaration, G.S.R.562 (E) C.O. 273<sup>39</sup> was issued by the President under Article 370 (3) of the Constitution of India by which Article 370 while remaining on the text of the Constitution was effectively nullified and abrogated. The Jammu and Kashmir Reorganisation Act, 2019 received presidential assent on August 9, 2019 and it will be effective from October 31, 2019<sup>40</sup>.

Immediately following the abrogation of Article 370 on August 5, 2019, the UN spokesperson stated that the latest restrictions imposed on Indian-administered Kashmir are deeply concerning and "will exacerbate the human rights situation"<sup>41 42</sup>. However, UN Chief Antonio Guterres issued a statement through his spokesperson, refusing to mediate on a request made by Pakistan, citing the Simla Agreement on bilateral relations between the countries<sup>43</sup>. He

35 <https://www.ohchr.org/Documents/Countries/PK/DevelopmentsInKashmirJune2016ToApril2018.pdf>

36 “Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019”. Retrieved from [https://www.ohchr.org/Documents/Countries/PK/KashmirUpdateReport\\_8July2019.pdf](https://www.ohchr.org/Documents/Countries/PK/KashmirUpdateReport_8July2019.pdf)

37 <https://www.hindustantimes.com/india-news/india-rejects-un-report-on-rights-abuse-in-kashmir/story-GmbDEGuiJ5DzoTM4mTfnfM.html>

38 <http://egazette.nic.in/WriteReadData/2019/210049.pdf> (not accessible as on October 28, 2019).

39 <http://egazette.nic.in/WriteReadData/2019/210243.pdf> (not accessible as on October 28, 2019)

40 <http://egazette.nic.in/WriteReadData/2019/210412.pdf> (not accessible as on October 28, 2019)

41 Kashmir dispute: UN ‘deeply concerned’ over restrictions. Retrieved from <https://www.bbc.com/news/world-asia-india-49273999>

42 <https://www.unmultimedia.org/avlibrary/asset/2428/2428882/>

43 UN chief recalls Simla Agreement; appeals to India, Pak for restraint. (2019) Retrieved from <https://www.tribuneindia.com/news/nation/un-chief-recalls-simla-agreement-appeals-to-india-pak-for-restraint/815426.html>

however asked both countries to maintain maximum restraint. A closed-door meeting of the UN Security Council was held at the insistence of Pakistan and China on August 16, 2019, to discuss the Kashmir issue. However no resolution was reached nor was any press action issued, with the dispute being dismissed by most members as bilateral matters between India and Pakistan<sup>44</sup>. On August 16, 2019, a joint communication was issued by the UN experts on Arbitrary Detention; Enforced/Involuntary Disappearances; Extrajudicial, Summary or Arbitrary Executions; Freedom of Opinion and Expression; Freedom of Peaceful Assembly and of Association; and Human Rights Defenders regarding the restrictions imposed in Jammu and Kashmir and violations to the right to life<sup>45</sup> (please see *Annexure 6: Joint communication by the UN experts on Arbitrary Detention; Enforced/Involuntary Disappearances; Extrajudicial, Summary or Arbitrary Executions; Freedom of Opinion and Expression; Freedom of Peaceful Assembly and of Association; and Human Rights Defenders*), followed by a press release dated August 22, 2019 urging India to end the communication lockdown in Kashmir<sup>46</sup>. The UN High Commissioner, Michelle Bachelet, expressed deep concern on the situation in Kashmir in her opening address on September 9, 2019 at the 42<sup>nd</sup> UN Human Rights Council in Geneva<sup>47</sup>. On September 27, 2019, Pakistan Prime Minister Imran Khan, in his speech before the UN General Assembly in New York, castigated India for its crackdown on Kashmir<sup>48</sup>. Meanwhile the Indian Prime Minister deliberately dodged mention of Kashmir in his speech, even as his arrival at the UN Headquarters was met with civil society protests in solidarity with the people of Kashmir.<sup>49</sup>

## 2.6 Week preceding the abrogation: Creating a paranoia

Below we seek to highlight the situation in the valley since the beginning of August 2019 till the 1<sup>st</sup> week of October 2019.

July and the beginning of August are unforgettable in the minds of the Kashmiris we met. Media reports indicate that just towards the end of July, almost 38,000 additional troops were deployed in Kashmir<sup>50</sup>, with further additions being made subsequently in early August<sup>51</sup>. There was panic and anxiety about what was going to happen and hence there was a rush for essential provisions. People were angry about the heightened presence of armed forces on the streets, increased number of camps, the schools and other public places having been taken over by the armed forces, imposition of movement restrictions and heightened security protocols.

<sup>44</sup> Roth, R. (2019). UN Security Council has its first meeting on Kashmir in decades- - and fails to agree on statement. Retrieved from <https://edition.cnn.com/2019/08/16/asia/un-security-council-kashmir-intl/index.html>

<sup>45</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24803>

<sup>46</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24909&LangID=E>

<sup>47</sup> We are 'burning up our future', UN's Bachelet tells Human Rights Council. (2019) retrieved from <https://news.un.org/en/story/2019/09/1045862>

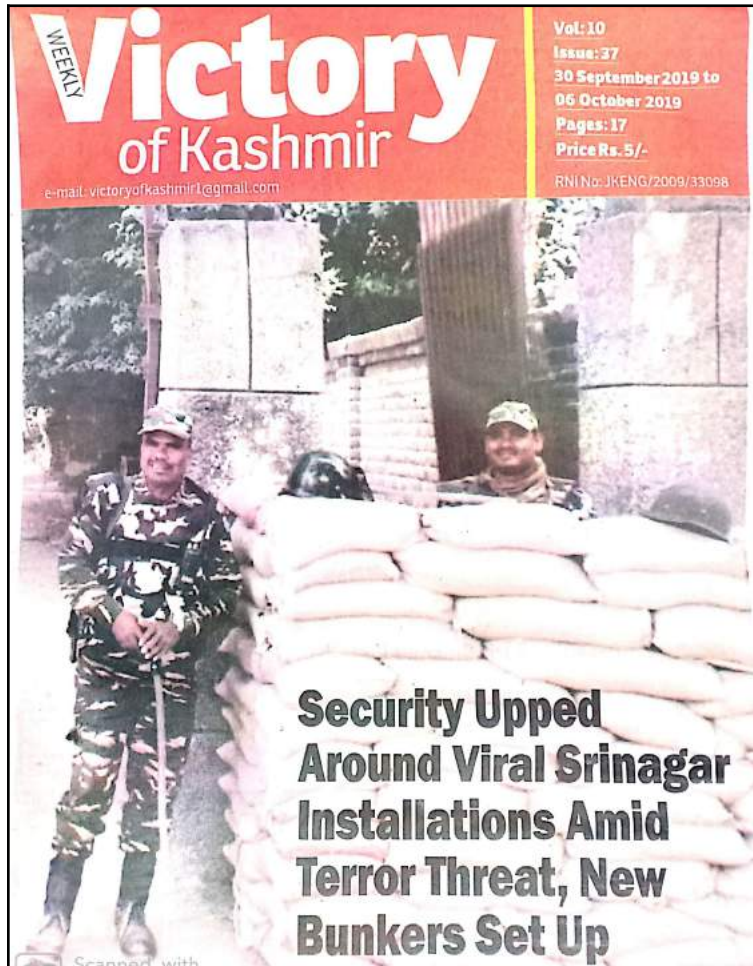
<sup>48</sup> Gladstone, R. Virella, K. (2019). Imran Khan Warns of Kashmir 'Blood Bath' in Emotional U.N. Speech. Retrieved from <https://www.nytimes.com/2019/09/27/world/asia/khan-modi-united-nations.html>

<sup>49</sup> Pakistan PM warns of 'bloodbath' in Kashmir, India's Modi silent. (2019). Retrieved from <https://www.aljazeera.com/news/2019/09/pakistan-pm-warns-bloodbath-kashmir-india-modi-silent-190927162542407.html>

<sup>50</sup> Why massive deployment of troops is taking place in Kashmir. (2019). Retrieved from <https://timesofindia.indiatimes.com/india/why-massive-deployment-of-troops-is-taking-place-in-kashmir/articleshow/70495966.cms>

<sup>51</sup> Negi, Manjeet.S. (2019). 8,000 more troops deployed in Jammu and Kashmir after govt. moved to revoke Article 370. Retrieved from <https://www.indiatoday.in/india/story/8000-troops-deployed-jammu-and-kashmir-govt-revoke-article-370-1577356-2019-08-05>

Newspapers had been neutralised. An atmosphere of terror and panic was deliberately created in the Valley even as rumours were afloat that some “big” decision, like abrogating Article 370 of the Indian Constitution was about to be taken. Elders believed that these rumours were baseless and they felt that the Indian Constitution would protect them. After the events of August 5, 2019 they were shell-shocked.



Kashmiris say that the decision on August 5, 2019 was taken in a cowardly manner. One person we met said, *“Indian government has committed grave illegality and caused injustice to Kashmiris. Without a State assembly they could not have done this. This is nothing but “goondagiri”. To top that, they have brought in lakhs more of armed forces and clamped down on the Kashmiri people.”* Outside of shutting out the Valley completely while announcing this decision, falsehoods were officially floated in the form of the Security Advisory issued on August 2, 2019 by the State Government of Jammu and Kashmir, which stated as follows:

*“Keeping in view the latest intelligence inputs of terror threats, with specific targeting of the Amarnath Yatra, and given the prevailing security situation in the Kashmir Valley, in the interest of safety and security of the tourists and Amarnath Yatris, it is advised that they may curtail their stay in the valley immediately and take necessary measures to return as soon as possible.”*

*– By Order of the Government of Jammu and Kashmir*

As a consequence of this advisory, fear and panic spread in the Valley while the tourists and Amarnath Yatris scrambled out of the Valley. The armed forces compelled thousands of migrant labour from Bihar, Uttar Pradesh and other parts of India to leave the Valley. People we met in Kashmir, expressed their sorrow at the way these migrant labourers were treated by the armed forces when they were forcibly thrown out of the village. They said that the jawans were extremely disrespectful towards these migrant labourers, abused them physically and verbally, and forcefully drove them out of the village. Kashmiris were sad that tourists were turned away from Kashmir and asked what wrong had they done to tourists, for them to be treated that way.

One of the journalists we spoke to asked us if there is any accountability left in the face of such falsehoods going unquestioned by everyone, including the media. Workers at the Sopore *mandi*<sup>52</sup> were very angry about the lies bandied around in the security advisory, especially of the terror threats on which basis tourists, yatris and the labourers from other states were driven out. *“What happened to those threats? Are the people in India foolish or scared that they listen to such blatant lies and keep quiet”*, they asked.

Students faced immense hardships as all colleges were forcibly closed and hostels forcibly vacated. One young man, a student of Kashmir University, reported how on August 4, 2019, the outstation students from National Institute of Technology (NIT) were asked to pack up their bags and leave the hostel. Since the NIT campus is near Kashmir University, local students including him went to help them pack, knowing what is happening in Kashmir is not the fault of these outstation students. The armed forces came to pick up the non-Kashmiri students, and dropped them to the airport so they could leave Kashmir. The local students were also told to pack up and get ready since vehicles were being organised to take them to their villages. However, no help arrived. Consequently, the Kashmiri students were left stranded in the midst of the curfew without food and water on August 5, 2019, even as they waited for the armed forces to return. Eventually they were physically driven out of the hostels by the armed forces and, left with no option, walked back to their villages, which took more than a day in the case of some students.

Even more shocking for people was all forms of communications going dead on August 4, 2019. It happened all of a sudden, without any formal order or warning, without any reasons or explanations. Mobile phone networks, internet services, and landline phone connectivity were all discontinued and the communication blockade was enforced with an iron hand leaving the people of Kashmir completely isolated. Public and private transport was ordered to stay off the roads.

This continuing communication blockade, notwithstanding the restoration of landlines much later<sup>53</sup>, and strict restrictions on movement of ordinary people continue to severely affect their lives. There was a technology siege, designed to compel people to not leave their houses and to saturate control until it reaches a dead end.

On August 5, 2019, 144 Cr.P.C. was clamped all over Kashmir and people were locked in their houses as severe restrictions on movement were put in force. Incidentally there was no media coverage possible during the initial days which ensured an information and news black-hole in the valley.

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52 Meaning market in Urdu

53 After our visit, in mid October, Postpaid mobile phone services have been restored on the state-run BSNL network in the Kashmir Valley after over 72 days of the lockdown in Jammu and Kashmir. Wani, A. (2019). Postpaid mobile phone services restored in Kashmir 72 days after lockdown Internet still off. Retrieved from <https://www.indiatoday.in/india/story/post-paid-mobile-services-restored-in-kashmir-valley-1609122-2019-10-14>



During our visit we have learnt about, and experienced, the absolute and complete internet and telecommunication shutdown (except for landlines), severe restrictions on mobility, and the annihilation of the right of speech including the right to know in the face of sweeping curtailment on information sharing in the Kashmir valley. As one person said, *“We are sitting in the dark. Decisions are being made about us in Delhi by people who do not have a clue about the history and cultural ethos of the Valley. No doubt there is fear and anxiety, especially in the immediate days following August 5<sup>th</sup>, 2019, but this is not replaced by pure rage. We know what we want, and we will find ways to get it. This is a siege that we are experiencing in the Valley, but we’ve been trained by the Indian State to deal with this situation, and we will.”*

The worst of the Indian state has always been played out in Kashmir, and the events preceding and following Article 370 are only a more horrific testament of that.

### 3. The new normal in Kashmir

*Normalcy in Kashmir, has been the cry of Prime Minister Modi and Home Minister Amit Shah. In fact, the very basis for the decision of stripping Kashmir of its special status was to make Kashmir normal and achieve its full and complete integration with India. Thus, providing an opportunity, as per their argument, to reach out to Kashmir and bring them development and peace, opening a new chapter in the history of Kashmir. In Annexure 2 we have exposed the farcical nature of these claims; here we will focus on the 'normalcy' that has been brought to Kashmir as it continues to date.*

One of the most devious methods of creating the image of normalcy was the creation of traffic jams in Srinagar by using roadblocks and drone cameras. Road blocks were used to artificially create traffic jams, which were recorded then by drone cameras. It was these images that were then used to project 'normalcy'. The Police even impound vehicles for minor traffic violations and file cases in courts in order to show normalcy in their area.

We encountered a different kind of normalcy which was chilling. A typical scene that we witnessed when we visited Baramulla old town, brought home to us how this new normal has etched itself into people's daily lives. It was a stone pelting<sup>54</sup> incident involving youth at one end of a busy lane, and the army at the other, who were busy collecting stones and throwing them back at the stone throwers. A police van was rushed into the lane in order to capture the youth. Meanwhile, a woman and a child were warily waiting on the road side for the stone throwing to stop. Life went on as usual in the rest of the neighbourhood.

#### 3.1 Restricted mobility

A lifelong resident of inner city Srinagar described the roadblocks put in place after August 5, 2019 as the first step in the subordination of the people of Kashmir. He said for a person who knows his way around the city well, in the absence of any transport he thought it okay to walk the two kilometres to the hospital to see his doctor, but when he set out he found what was a familiar route for him turned out to be a "maze of road blocks which took me nearly an hour-and-a-half when it should have at best taken me half an hour. On my return three hours later, believing that I by now knew the maze and would be home in an hour-and-a-half, I found that the route had been reset and had now to struggle through a new maze which took me two-and-a half hours. The Government of India does not even want the people of Kashmir to know the way from their home to the hospital. This is the new normal of everyday life in Kashmir"<sup>55</sup>.

Traveling within Srinagar and other towns and within the valley has for most become a near impossibility unless people have access to a vehicle of their own. The city bus service in Srinagar operated by the J&K State Road Transport Corporation (JKSRTC) has suspended operations since August 5, 2019 as have the services between various towns. No one at the JKSRTC office was able to tell us if there was any order of the Corporation or one issued by

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<sup>54</sup> Stone pelting is a hallowed tradition in Kashmir, especially among the youth and the poet Zareef Ahmad Zareef has traced the origin of stone pelting to the unpopular Mughal rule over Kashmir in the sixteenth century when young men, known as 'Dilawar' would pelt stones at the patrolling Mughal soldiers (The Kashmir Dispute: 1947 – 2012, A. G. Noorani at pg 77).

<sup>55</sup> 1. Kashmir: Srinagar a maze of razor wires and steel barriers. (2019) Retrieved from <https://www.aljazeera.com/news/2019/08/kashmir-srinagar-maze-razor-wires-steel-barriers-190813115830621.html>  
2. Hussain, A. (2019). Kashmir's main city a maze of razor wires and steel barriers. (2019). Retrieved from <https://www.apnews.com/aa7048cf325646298fb773d7cb12d3b6>

Government to suspend the JKSRTC services. Some private buses have resumed operations but these are extremely limited. We did also learn that there was one regular night bus to Jammu and back. This one service apart there is no bus service of any regularity within Srinagar, within Kashmir or to outside Kashmir. Prior to August 5, 2019 there were at least 30 buses, both public and private, between Srinagar and Jammu. This has made travel difficult and also expensive as people are forced to pay several times more for transport. For those in the villages, since there are very few landlines and, these are not working, people were unable to contact anyone beforehand or in emergency situations and had to take a chance and physically travel all the way to the city amidst high security for their medical and other needs.

In one of our discussions with the people we were informed that the prevailing atmosphere was such no one ventures out of their homes since they are not sure if they would return, and the anxiety and panic that is caused in the family when anyone travels now is too much to bear, especially given the lack of communications.

No internet meant no way of purchasing air tickets. Air tickets could only be purchased at the airport or were available at the Tourist Facilitation Centre in the City.

As one person said *“even the celebrated Kashmir railway system from Qazigand to Baramulla has been completely shut since 5<sup>th</sup> August. Running the railway is the central government’s job. Why have they shut it down? What are they afraid of? Are they afraid of normalcy?”*

## 3.2 Communication Blockade

Leaving the home is perhaps the second thing that every person in the 21<sup>st</sup> century does on a ‘normal’ day. The first act in all probability is accessing one’s mobile telephone. The shutdown of mobile telephony and both mobile and fixed line services<sup>56 57</sup> has been debilitating to daily life. It has brought all forms of social communication from daily exchange of wellbeing between parents and children and of course social exchanges, at deaths within the family and community, at festivals, etc., to the most basic access to public and especially essential services<sup>58</sup>. A man we met in a village in South Kashmir narrated how their family got news of the death of a family member living in another village in the region, who had died on one morning following the abrogation, only in the night following the death. They had to rush to make arrangements with great difficulty amidst the blockade to attend the funeral. We came across several references of the inability to reach doctors and ambulances. We also learnt that there were instances of houses destroyed by fires<sup>59 60</sup> that could have easily been doused had there been access to telephones so that fire engine services could be called.

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56 With phone lines dead, no internet, voices from Kashmir incommunicado. (2019). Retrieved from <https://www.indiatoday.in/india/story/article-370-with-phone-lines-dead-no-internet-voices-from-kashmir-incommunicado-1577992-2019-08-06>

57 All Landline Exchanges In Kashmir To Be Restored, Cellphones Still Out. (2019). Retrieved from <https://www.ndtv.com/india-news/all-landline-exchanges-in-kashmir-to-be-restored-cellphones-still-out-2095758>

58 Mir, S. (2019). The Kashmiris are Still Waiting to Speak. This Time, Their Voice Will Carry Far. Retrieved from <https://thewire.in/rights/india-jammu-kashmir>

59 Bhattacharya, A. (2019). Quiet and on the edge. Retrieved from <https://himalmag.com/quiet-and-on-the-edge-kashmir-reportage-srinagar-2019/>

60 Mishra, A. (2019). Kashmir lockdown: Fire department requests restoration of 101 service for emergency response Retrieved from <https://www.indiatoday.in/india/story/kashmir-lockdown-fire-department-requests-restoration-of-101-service-for-emergency-response-1591860-2019-08-26>

The government has repeatedly asserted that access to fixed line phones has been restored<sup>61</sup>. While this was indeed the case in Srinagar and some areas, these constitute only 1% of total phone connections of which we learnt that nearly two-thirds are with the Government<sup>62</sup>. In some of the villages we visited in South Kashmir, people reported that no or very few landlines were working. Of course the Government has also claimed that the people of Kashmir did not always have mobile telephones and the internet and lived perfectly<sup>63</sup> and that the withdrawal of these services is not a human rights violation<sup>64</sup>. The fact remains that human life has become inextricably linked to mobile telephone and the internet. Government has played a leadership role in advancing the connection between daily life and digital technology. From accessing Ayushman Bharat<sup>65</sup> to making a bank transaction<sup>67</sup> everything is now linked to the proverbial OTP (One Time Password). Hence from the inability to get an ambulance in a medical emergency to not being able to receive the financial cover for necessary medical treatment, the people of Kashmir remain unconnected.

Ironically, while the communications blackout is in force in Kashmir, the Kerala High Court has affirmed that the right to be able to access the internet was a part of the fundamental right to life and liberty, as well as privacy and also noted that freedom of speech and expression included an obligation to ensure the free flow of information, and, therefore, access to the infrastructure that enabled communication (including the internet). The Court refers to two international resolutions in the course of its reasoning: (1) Resolutions 23/2, adopted by the Human Rights Council of the UN General Assembly, which called upon States to (i) promote women's exercise of freedom of opinion and expression online and off-line, as well as (ii) facilitate equal participation in access to and use of the internet, and, (2) Resolution adopted by the UN General Assembly on July 14, 2014, which called upon States to promote and facilitate access to the internet and develop information and communication facilities and technologies in all countries. The court noted that mobile phones had become an integral part of daily life and it was an essential means to survive with dignity and freedom.<sup>68</sup>

The government has claimed that they are willing to install 10,000 new BSNL fixed line phones<sup>69</sup>. According to a newspaper report, 6000 applications have been received from September 4,

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61 Qadri, A. (2019). **Kashmir's central phone exchange remains shut**. Retrieved from

<https://www.tribuneindia.com/news/jammu-kashmir/kashmir-s-central-phone-exchange-remains-shut/820700.html>

62 Detaining Opposition leaders in J&K deeply undemocratic'. (2019). Retrieved from

<https://www.thehindu.com/news/national/detaining-opposition-leaders-in-jk-deeply-undemocratic/article29478999.ece>

63 Phones, internet little use for us, mostly used by terrorists: J-K Governor Satya Pal Malik. (2019). Retrieved from

<https://www.indiatoday.in/india/story/phones-internet-little-use-for-us-mostly-used-by-terrorists-jammu-and-kashmir-governor-satya-pal-malik-1592759-2019-08-28>

64 Amit Shah denies there are curbs in J&K, says lack of phone connection is not human rights violation. (2019). Retrieved from <https://scroll.in/latest/938897/amit-shah-denies-there-are-curbs-in-j-k-says-lack-of-phone-connection-is-not-human-rights-violation>

65 Gupta, Das. M. (2019) Kashmir internet lockdown hits Modi govt's Ayushman Bharat as patients forced to pay bill. Retrieved from <https://theprint.in/india/kashmir-internet-lockdown-hits-modi-govts-ayushman-bharat-as-patients-forced-to-pay-bill/298710/>

66 Ayushman Bharat is a central government scheme aimed to help economically weaker sections who are in need of health care facilities

67 Banking with full communication lockdown: Travails and risks bankers face. (2019). Retrieved from <http://www.newindianexpress.com/nation/2019/sep/23/banking-with-full-communication-lockdown-travails-and-risks-bankers-face-2037785.html>

68 Judgment dated 19.09.2019 of the Kerala High Court in W.P.(C) No. 19716 of 2019. Retrieved from [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-364655.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-364655.pdf)

2019 but only few phones have been installed depending on the availability of the equipment or cabling existing in the locality<sup>70</sup>. At the same time local BSNL offices in the state have been shut down. People have to go to the Srinagar Lal Chowk exchange office to apply for a fixed line. A 75+ year old retiree who hitched rides for the 16.5 Km from his suburban Srinagar residence to reach Lal Chowk to apply for a landline was told *“there is no feasibility for a landline until he can find 50 new subscribers in his area for new landlines to be provided”*. Another person was told that *“there is no feasibility since there are no cables left in the area”* where the person lives. A member of the staff at the Lal Chowk exchange said that to the best of knowledge *“except in government offices no new landlines had been issued”*.

We did find that access to mobile telephones was not quite absent. We found several even middle level government employees with a functioning mobile telephone and in some cases we even with found service providers to government. A Public Prosecutor we met in District Court at Srinagar proudly flaunted how his mobile phone was working owing to his *“important position in assisting the government”*. We learnt that people who are ‘white listed’<sup>71</sup> have functioning mobile phones. This suggests that not just those directly in the employment of government but also those assisting the government in pursuing its task have been selectively provided mobile network while those outside this circle and the civilian population of Kashmir have been deprived of it by design.

### 3.3 Government Services Discontinued

Rather like the telephone system, the post office has also been shut save for the General Post Office (GPO) at Srinagar which is open until 2 p.m, though no postal stamps are sold<sup>72 73</sup>, from where people can send out letters outside Jammu and Kashmir by Speed Post alone. The sorting offices have been closed since 5<sup>th</sup> August. Post has neither been collected nor been delivered since 5<sup>th</sup> August. One person felt that this was to ensure that no applications under the Right to Information can be filed and government is under no obligation to respond to them within the stipulated time. Another person we spoke to said that *“this is to ensure that no one can send a notice on any issue to government”*. We did hear during our interaction with lawyers at the District Court that the lack of a functioning postal system has become a barrier to serving of notices<sup>74</sup>.

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69 <http://www.newindianexpress.com/business/2019/oct/11/communication-clampdown-in-kashmir-a-goldmine-for-bsnl-2046054.html>

70 <https://www.tribuneindia.com/news/jammu-kashmir/bsnl-customers-made-to-run-from-one-office-to-another/842148.html>

71 Javaid, A. (2019). J&K has 2 sets of cellphone numbers — those on ‘white list’ work, ones on ‘black list’ don’t. Retrieved from <https://theprint.in/india/jk-has-2-sets-of-cellphone-numbers-those-on-white-list-work-ones-on-black-list-dont/297182/>

72 Retrieved from <https://mobile.twitter.com/IndiaPostOffice/status/1161179116546117634>

73 Courier service remains suspended. (2019). Retrieved from <https://www.dailyexcelsior.com/courier-service-remains-suspended/>

74 Rao, M. Yadav, A. (2019). Crackdown on lawyers narrows road to justice in Kashmir. Retrieved from <https://www.aljazeera.com/news/2019/09/crackdown-lawyers-shrinks-road-justice-kashmir-190920073101403.html>

# POLICE HEADQUARTER JAMMU & KASHMIR SGR

## EXTENSION IN DATE

**Ref: - This Hqrs e-NIT No. 70 of 2019 dated 05 09.2019**

Various dates in respect of this Hqrs e-NIT No 70 of 2019 dated 05.09.2019 have now been re-fixed as under.

<b>Last date and time of downloading e-NITs from J&amp;K state e-procurement portal www.jktenders.gov.in</b>	<b>09.10.2019 up to 1600 hours 09</b>
<b>Last date and time for online submission of Bids</b>	<b>09.10.2019 up to 1600 hours</b>
<b>Last date and time for submission of samples in Police central store Srinagar/Jammu</b>	<b>10.09.2019 up to 1600 hours.</b>
<b>Time/ date and place for online opening of Technical bids only</b>	<b>11. 10.2019 at. 1100 hours at J&amp;K Police Hqrs Peerbagh Srinagar</b>

**DIPK: 0986/M**

*Greatest Kashmir*



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**Sd/-(Mubassir Latifi)JKPS  
AIG (Provision/Transport)  
For Director General of Police,  
J&K-Srinagar**

A clerk at the Srinagar GPO told us that if post office savings accounts have been “entered into the system then account holders can withdraw in Srinagar GPO irrespective of where in the Kashmir valley the account is held”. On the day we were at the post office (October 1, 2019) we met an elderly man who took four hours to travel the 20 kilometres from a village beyond Ganderbal to draw from his post office savings account but could not draw money because the “system was down”. There was a board at the front of the post office which said as much but the Central Reserve Police Force (CRPF) jawan objected to our photographing it. With regard to Post Office savings bank accounts, only online can undertake transactions (deposits or withdrawals).

At the Srinagar main branch of a leading public sector bank a person of managerial rank told us that commercial and private transactions in the branch were down to less than 10% of their monetary value when compared to prior to 5<sup>th</sup> August<sup>75</sup>. He also told us that he learnt from his peers heading bank branches that dealt with government finances that apart from government salaries government transactions too were negligible, since construction and development work was at a standstill. We also learnt that several bank branches outside the centre of Srinagar were non-functioning or only partially functional<sup>76</sup>.

<sup>75</sup> Banking amid lockdown? Door to door. (2019). Retrieved from <https://www.telegraphindia.com/india/banking-amid-kashmir-lockdown-door-to-door/cid/1706849>

<sup>76</sup> Apples hang rotting on trees in Kashmir as lockdown puts economy in tailspin. (2019). Retrieved from <https://www.indiatoday.in/business/story/kashmir-lockdown-apples-rot-tourism-business-economy-article370->

Education has come to a grinding halt. Even earlier the District College in Pulwama used to function only 2 days a week, when the syllabus would be taught, however now it is completely shut. Schools are also closed. The future of the youth and students is uncertain. One troubled youth said, *“instead there is one janaza (funeral) to attend everyday”*. The Anganwadis are closed since the abrogation. Schools are officially open in some areas but there is no attendance of teachers and students. Teachers come rarely to school only to sign attendance registers out of fear of losing their jobs. The Divisional Commissioner insists that the teachers go and collect students and bring them to the school, but this too is not working.

The Primary Health Centres (PHCs) are barely working or are closed and people undertake immense hardship to reach Srinagar for medical treatment. Public Health Centres at village level and district hospital are functioning. Tertiary hospitals located in Srinagar are difficult to access and expensive.

We learnt that public buildings, including schools and PHCs have been occupied by the armed forces since July 2019. We heard of how the Border Security Force (BSF), from the intervening night of August 3 and 4 to date, has taken over and occupied the classrooms and the grounds of the Government Higher Secondary School, Kreeri and Government Boys High School, Watargam, as also the compound premises of the Primary Health Centre, Delina, all in Baramulla district.

### 3.4 Disruption of livelihood and commerce

The financial stability and economic security in the village has been affected by the shutdown by the Indian state and *hartal* following abrogation. In a village in Pulwama district, we were informed that baking, which is the major business in the village, has been affected. Tourism has also been affected in the Valley. However, the locals are determined to carry on the *hartal* and support each other through this period of uncertainty.<sup>77</sup>

Life has literally come to a standstill in Kashmir with commerce and livelihoods being severely affected and complete disruption of civic life in regard to transport, communications, education, health, etc. Representatives of the Chamber of Commerce, Srinagar, while saying this clarified that, *“the hartal by the businesses is not a hartal per se but a logical response to the lock down by the State”*. We were told that the industrial area outside Srinagar that had employed 11,000 Kashmiri workers has shut resulting all these workers losing their jobs.

The famous Kashmiri apple industry with an annual turnover of Rs. 10,000 crores has taken a big hit. 30% of this produce used to go to local *mandis*. Apples also comes from Pulwama, Kulgam, Budgam, Anantnang and Sopore which grow huge quantity of apples, unlike Shopian which focuses on lower production of apples but of higher quality. We visited the Sopore apple *mandi*, which is the 2<sup>nd</sup> largest fruit *mandi* in Asia. It bore a deserted look except for armed forces milling around and a handful of trucks. We met with some of the workers in the *mandi* and learnt that they had just had their union meeting to take stock of the situation. Following is what we've learnt from them: On a normal working day during the apple season, about 350 trucks are filled and carry apples out of the *mandi*. Each truck carried about 1200 crates of apples. The average cost of the apples in each truck is between Rs. 5 – 6 lakhs at the very

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<sup>77</sup> More information regarding the hartal is covered in Section 4.2 (check section no.)



least. The *mandi* has 800 *fuds*<sup>78</sup>. The direct and indirect employment due to the *mandi* is to about 10,000 labourers. Post August 5, 2019, the army has put concertina wires all around the *mandi* and fenced it off and scores of armed forces (police and CRPF) are posted at the *mandi*. This has created an intimidatory atmosphere due to which farmers and others are scared to come. We learnt that the decision to abrogate Article 370 was taken right in the middle of the apple season and has affected apple sale dramatically. We were informed that the direct loss to the apple industry was about Rs. 20 crores per day, while the indirect loss is about 50 crores per day. Lakhs of farmers and thousands of labourers were suffering from loss of livelihood and earning and this was crippling. Agricultural produce was impounded by the armed forces and sometimes the payment for purchases were made in kind.

To put normalcy on display government has directed the National Agricultural Cooperative Marketing Federation (NAFED), which has turned out to be a non-starter. This is the first time that the industry has taken such a hit and previously during the troubles in 2008, 2010 and 2016 the *mandi* was working fine.

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**NEWS**

30.09.2019

## Why Centre's apple purchase is a forbidden fruit in J&K



contacts with whom they have old business ties; 40% come to the mandis to participate in the bidding process where they interact with buyers.

The government has also said it will encourage and provide security to truck drivers to come to the mandis and collect the produce.

**For small farmers**

Mr. Choudhary, however, said the market invention scheme was not a bid to disrupt the decades-old trade practice. "We are expecting demand and supply to be disrupted in our favour. Earlier the big farmers were selling apples to old dealers for a price. Now the government is offering a better price. So far, 50,000 growers have registered with us; our scheme will help the 40% farmers who are not able to sell it to anyone," Mr. Choudhary told The Hindu. He added that government would take care of the transportation.

An official said the government was offering ₹900 a box instead of the ₹500 fixed by the dealers before the clampdown.

Mr. Choudhary said the administration was advertising its scheme through radio, pamphlets and local cable channels.

He said the idea was to eliminate the

**BK NEWS DESK/SRINAGAR**

Mohammad Younus Bhat is not impressed with the government's offer to buy apples from farmers in Jammu and Kashmir at double the market rate.

Mr. Bhat of Shopian in south Kashmir the

the apple production in the country.

The severe restrictions imposed in J&K since August 5 following the revoking of the State's special status under Article 370, included curbs on vehicular movement which hit the transport of the fruit. The official restrictions were followed by threats and

To extend the impression of 'normalcy' government brought in the National Agricultural Cooperative Marketing Federation (NAFED), with CRPF protection, to whom farmers could directly sell their apples. The government's assumption being farmers fear militants and hence

<sup>78</sup> Platforms indicating that 800 companies were involved in the purchase and sale of apples



are not selling. At Srinagar's Paripora Fruit Mandi and its environs, that we visited, was like a ghost town. Not a single trader's office or godown was open and not a single truck was present. The mandi trading area has been taken over by NAFED. But for half a dozen NAFED staff and their CRPF protectors the place was abandoned. There were no apples, or any other fruit or goods for that matter, in sight. Of course, unsurprisingly, NAFED staff refused to come on record. We learnt from them that they buy, on a good day, 1000 boxes of apples that are brought to them mostly by the J&K police in name of farmers. This they added was less than 1% of the apple trade of the mandi on a normal day. This is despite the fact that NAFED is offering a 50% on the market price.

We met with apple farmers and traders some distance from the mandi. They told us "does the Indian government think we are beggars that we'll sell our produce to them at a premium". When we asked them how they would settle the advances they had taken from traders in Jammu or Delhi a trader explained: "in Kashmir there is an old tradition. We will not let non-Kashmiris down. We will not cause them losses. If I have taken an advance of a certain amount then I will pass on apples up to the value of the advance. This is an accepted practice in a hartal. The rest of the apples will just rot on the trees."

Another significant industry in Kashmir is production of leather goods, which also has suffered due to the lockdown. People of Srinagar said that previously they were sale of 300 - 400 hides but now (since August 5, 2019) they had to bury it all.

A leading member of a trade and industry association said that there had been an across the board job losses<sup>79</sup>, across the state of Jammu and Kashmir and in Delhi and elsewhere, where points of trade exist for goods and services to and from the state because of the shutdown. On an average each business shutdown would have resulted in at least 10 direct and indirect jobs lost – 8 within the state and 2 outside it.

The owner of a start-up said *"at the Rangreti Industrial Park alone has contributed to the loss of 11,000 IT jobs that are entirely dependent on the internet. These are almost all young people below the age of 35"*<sup>80</sup>. So far Mr. Modi was talking of digital India now he is saying that non-digital Kashmir will be integrated into India". Another said *"with no internet Modi-Shah are going to win the hearts of Kashmiri boys and girls"*. Beyond the emotion, we learnt that two businessmen who tried to restart their business in Jammu and Delhi had already lost all their clients by the time they got up and running outside the valley<sup>81</sup>.

*"Who shut everything down? Who brought economic life to a standstill? Government of India ordered the shutdown. They shut down the Amaranth Yatra. They asked tourists to leave. They asked migrant workers to leave. Nobody in Kashmir has ever asked anybody to leave. Who created this abnormal situation? Now they tell Kashmiris resume your normal life. Are the people of Kashmir monkeys that they will sit when the government says sit, stand when the government says so. Normalcy will not return. They must bring back Article 370 and Article 35A. Lift all restrictions and release all political prisoners"* said a carpet exporter.

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<sup>79</sup> Kashmir conflict: Woes deepen as lockdown stifles economy. (2019). Retrieved from <https://www.bbc.com/news/world-asia-india-49956960>

<sup>80</sup> Haq, ul. S. (2019) As Kashmir lockdown enters third month, several youth risk losing jobs. Retrieved from <https://www.indiatoday.in/india/story/as-kashmir-lockdown-enters-third-month-several-youth-risk-losing-jobs-1606958-2019-10-07>

<sup>81</sup> Hassan, A. (2019). Kashmir Restrictions and Threats Have Upset the Jammu Apple Cart, Say Traders. Retrieved from <https://www.news18.com/news/india/kashmir-restrictions-and-threats-have-upset-the-jammu-apple-cart-say-traders-2323929.html>

The trade and industry association member was clear: *“Article 370 gave J&K the extra edge to protect the interests of the state of traders, farmers and workers. Now that is gone. Of course this will affect everyone in the state, but, the maximum effect will be on the traders in Jammu. They control all the trade of Kashmir valley and Ladakh. 70% of all Jammu trade is with the rest of the state. Jammu is a gateway to the other two regions of state. The largest apple merchants, walnut merchants are all from Jammu. What will they do now? 90% of the industry in Jammu caters to the state. Who will they now produce for when people from all over India can supply here. We will survive because we grow the apples and make the carpets but what will the Jammu traders do?”*

Also all the benefits from across the Line of Control (LOC) trade have been to Jammu traders. They are able to supply goods that are needed in in Azad Kashmir. Now that, that trade has been completely shut they are losing here too.

*“Who is going to pay for our losses? Who is going to pay for overdue interest and loan defaults? Under the new law, many businesses have already come under the purview of the IBC. Who is going to protect these businesses?”*<sup>82 83</sup>

Thousands of businesses have been forced to shut because of the government’s actions. *“With the order directing tourists to leave about 50,000 tourist taxis, 1000 houseboats, 1500 hotels and 650 shikaras came to a standstill”*<sup>84</sup>.

A senior government employee who was terrified at being named said that, *“attendance at government offices, especially at the Civil Secretariat, was improving. On most days attendance was about 70%. Of course the government cannot enforce anything”,* he said. *“since they have turned off the internet so the biometric attendance system is not working”*<sup>85</sup>. Apparently, employees fill their attendance for days they were absent for when they come to work in the manual registers so government can show high attendance. *“So far there is no victimisation but there is an order warning disciplinary action against employees keeping away from work”*. We also learnt that there has been a government order issued on some date after August 5, 2019 directing government departmental heads to provide lists of government employees who are known to indulge in political activity or are members of a political group. We were unable to verify the existence of such an order<sup>86</sup>. The government employee added that the Civil Secretariat staff was working solely on delivering the bifurcation<sup>87</sup> and along with that focused on delivering central government development schemes.

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82 Zagar, A. (2019). Business Losses Cross Rs 5,000 Crore in 2 Months, Says Kashmir Chamber. Retrieved from <https://www.newsclick.in/business-losses-cross-rs-5000-crore-2-months-says-kashmir-chamber>

83 Bakshi, A. (2019) Dystopia vs development: The Kashmir paradox. Retrieved from <https://www.livemint.com/mint-lounge/features/dystopia-vs-development-the-kashmir-paradox-11571377960811.html>

84 Maqbool, M. (2019). Despite claims to the contrary, all’s still not well in Kashmir

Retrieved from <https://www.nationalheraldindia.com/opinion/jammu-and-kashmir-despite-claims-to-the-contrary-all-is-still-not-well-in-kashmir>

85 Majid, S. (2019). No internet! Biometric attendance defunct in Kashmir. Retrieved from

<https://www.deccanherald.com/national/north-and-central/no-internet-biometric-attendance-defunct-in-kashmir-765136.html>

86 Officer designated to monitor daily attendance of govt employees (2019). Retrieved from

<https://www.greaterkashmir.com/news/jammu/officer-designated-to-monitor-daily-attendance-of-govt-employees/>

87 Gupta, Das. M. Bharajwaj, A. (2019) How 5 key sectors of J&K are getting a makeover before state becomes UT. Retrieved from <https://theprint.in/india/5-key-sectors-jk-getting-makeover-before-state-becomes-ut/307403/>

### 3.5 More of the normal

A senior journalist said that the vibrant print journalism of the valley has come to a standstill. Many newspapers have discharged their reporters since they are unable to pay salaries. Much of the print media has been reduced to “pen drive journalism” with the major source of news being daily pen drive handed out by the state government’s information department<sup>88</sup>. A journalist we met informed us that there was constant surveillance and policing at the only Media Centre in Srinagar and at the Srinagar Press Club, creating an atmosphere of fear and intimidation in which journalists could not possibly function with any semblance of independence. The situation in Kashmir has led to a complete loss of press freedoms. On the other hand, people we met unanimously communicated their anger and the sense of betrayal felt by them, to a major part, towards the bias and false reporting by the Indian mainstream media, and also towards the silence of the local media in the face of numerous newsworthy truths of the hardships, violations and tragedies faced by the people, which were not making it to the newspapers.

The narrative is the same when it comes to the judicial system too. While the courts are open in Srinagar and other district, accessing these courts or expecting them to deliver justice is a far cry. The consensus among the advocates we met is that the independence of the judiciary is compromised when it comes to any matter relating to the armed forces and this has left them disillusioned with the judiciary. Thus, the lack of any urgency in either the habeas corpus matters in the High Court or the blockade and restrictions matters in the Supreme Court, comes as no surprise to them.

One lawyer told us that: *“Even under so-called normal circumstances judges cannot function independently due to pressure from the agencies. People fear legal action and only 3-4% of the victims go to court. There are 8 lakh military deployed in Kashmir and hence the army presence is always looming. The phones of all the lawyers are tapped. All institutions are infiltrated by the Intelligence Bureau. The SHRC is also a part of the Home Department. The centre decides who should be released under PSA and then judges do what they tell them to. Most of the trials end in acquittals. Judges delay cases, transfer undertrials to different districts, who are then not produced due to lack of escorts. 5<sup>th</sup> August has created an extraordinary situation, and the courts are not passing any orders against the government even in blatantly illegal arrests and detentions of even minors.”*

Another lawyer said: *“The question is – Is the Judiciary independent? – so far as Kashmir is concerned, it is a conflict zone and a police state and people are not free. There is anarchy and the judiciary has been made non-functional. PSA is misused and there are thousands of stone pelting cases. They can arrest anyone as and when they chose to do so. This is sinister violence of the armed forces and in PSA cases the Deputy Commissioners act like rubber stamps as does the judiciary. So many Commissions are appointed but nothing changes, nothing concrete happens. Harsh laws have to be removed. The national media has tarnished our image and our children outside are being harassed. There is impunity and the orders are not respected.”* There are large number of contempt petitions pending in the High Court as orders are not implemented.

Several lawyers spoke a deep psychosis of fear that has spread- causing a lawyers to be concerned about their own safety, fearing all manners of backlash and reprisal. They were all of

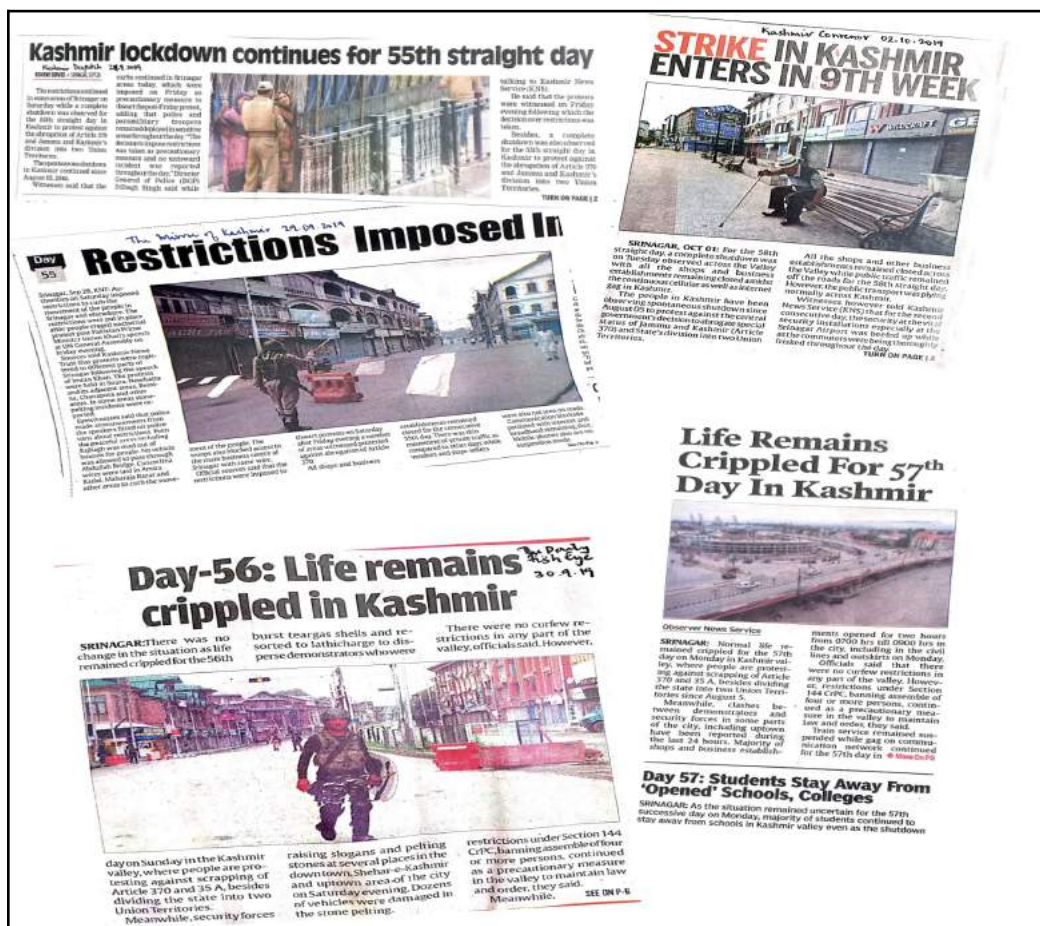
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<sup>88</sup> Bukhari, Shujaat.T. (2019). When Journalism Went the Offline Way & Kashmiris Put out Newspaper Ads to Reach Out to Their Kin. Retrieved from <https://www.news18.com/news/opinion/when-journalism-went-the-offline-way-kashmiris-put-out-newspaper-ads-to-reach-out-to-families-2351175.html>

the view that the alienation of the people of Kashmir was now complete.

### 3.6 The People's *Hartal*<sup>89</sup> in the face of the siege

Though the Government claims that 'normalcy' is restored and that there is no curfew or restrictions in Kashmir, the truth could not be further. People of the Valley have responded to the repression with their own shutdown or *hartal*. There appears to be a seamless transition between the curfew and *hartal*. As one person said, "kabhi curfew hain to kabhi *hartal*". It can be extended to mean that somewhere it's a curfew, and somewhere it's a *hartal*. But the initiative is with the people now, who are converting the state-initiated curfew to lock down the valley, to a people's *hartal* as a spontaneous act to register their protest and resistance.



The people here call the abrogation of Article 370, the militarization, communication blockade, undeclared curfew and movement restrictions, as the siege. In response they have adopted the hartal, which is on across the Valley, in all cities and villages. People say that, "All commercial establishments are voluntarily closed except for two hours in the morning and in the evening. This is part of our resistance against this military occupation, and we are confident to continue with it indefinitely, since we have been trained all these years to adjust to such a situation."

While on the one hand, an entire Valley has been brutalized and abnormalized, the government is trying every method possible to produce an image of normalcy, at least for the nation and the

<sup>89</sup> Meaning Sometimes it is a curfew sometimes the people's shut down

international community to believe. In Srinagar, street vendors from an area in Srinagar told us that the armed forces allow them to vend only if they do so throughout the day! They are not allowed to vend if it is only for hours in the morning and evening.

One person told us: *"The people's hartal has nothing to do with the anger that they feel today. It is their quiet resistance."* Of course there are sporadic incidents of stone pelting but nothing on the scale of previous years.

The effect of the decision to abrogate Article 370 has resulted in complete unity in the Valley. Everyone we spoke to, belonging to any community, class or gender, are united in their belief of betrayal and dream of the right to determine their future. The *hartal* is the self expression of the people's will and not a Hurriyat call. A youth from Pulwama told us, when we were about to leave that: *"This is a people's hartal without leadership and is an expression, against India and its Government, and it will continue till Azaadi."*

*"Closed shops, no public transport?"* screamed the government ads on the front pages of Kashmir's newspapers on October 11, 2019. After more than two months of convincing Indians and the world that the situation in Kashmir was normal, the government finally made this admission on the front pages of several local newspapers on Friday – in the form of these full-page advertisements. These ads, in effect are an appeal to the people of Kashmir to lift the *hartal*.

Further expressing their discontent, the locals informed us that, *"They say there is a Hurriyat Calendar but there isn't, there is only the calendar of the 'Upperwala'. The Government thought there will be widespread bloodshed and protests but God has told us to keep silence not the Hurriyat. We have done nothing, everything has been done by the Government. They send away the tourists and the yatrics. The yatrics left without even a darshan. We would not have done anything, we carry them on our backs."*



People said that there is no political investment to keep the political system going, and the process of political divestment is not complete. The clarity and coherence of their political demand is inescapable. The *hartal* is also a period of thinking and reflection, as opposed to reacting; a weighing of options at hand; a stand-off situation, hence there is much less stone pelting than in 2016, and the protests have been sporadic and unorganized. Militancy, it appears, is still considering its own strategies rather than reacting – people are also waiting. Whatever it is there is a determination to resist the oppression at all costs.

The government brought the clampdown and siege to immobilize people, yet people have subverted this plan and responded with their own *hartal*. Shoura, Anchar and other localities and villages are the other face of the resistance. In what appears as a limited space, the spontaneous *hartal* underway, is the one immediate expression of resistance that the people are voluntarily deploying in full measure: unlike in the past, when the Hurriyat called for a *hartal*. This is a self-imposed shutting down of business and trade, schools and courts, which hurts the people enormously, but they see it as an effort to take the initiative away from the all-powerful military state hell-bent on beating them down into total submission. The indefinite *hartal* is their weapon against the state-ordained lockdown. It is a low-intensity resistance, even as the future course of the resistance is being contemplated. This resistance is most remarkable, staring in the face of naked military aggression and domination.

The impunity of the army, the police and other agencies in violating their bodies and minds has saturated the contempt the people have for the forces. People are emphatic that there is no stopping now even if Article 370 is brought back, it will end only with '*Azaadi*'. The *hartal* is theirs and is spontaneous, and has not been called by any political or community leaders, who were all put under preventive detention prior to and following the abrogation. The people say that now there is no political middle ground, and it is a fight for freedom or death.

### **Anchar: The Liberated Zone**

When we approached Anchar area, the armed forces were stationed outside the village. This area is on the banks of Anchar lake. People have dug up the entrance to the area and barricades setup to prevent the entry of the army. Inside the village the residents have formed a committee to manage civic matters, including movement of residents in and out of the area, and restrictions on interacting with army. In fact, Anchar is seen as a kind of 'liberated zone' where administration is carried on entirely by local residents.





When Article 370 was abrogated, large scale protests took place on August 23, 2019 in Shoura (the region in which Anchar is located), Ahmednagar, Nowshera and others in which more than a lakh people participated. The protest was entirely peaceful and there was no stone pelting or any other kind of violence. The CRPF stopped the protestors who were marching to the Jamia Masjid, trying to detain as many youths as possible. There were many injuries and doctors sneaked in, avoiding the police and offered medical help. After this incident, the people of Anchar dug up roads and put in road blocks to disallow the armed forces from entering the area. Drones and helicopters are regularly sent in, especially on Fridays. Hence the residents are keeping vigil day and night. Until now about 70 people from this area have been arrested and detained, some of whom have been lodged in the Agra jail.

When the army makes attempts to come into the village, the boys resort to stone pelting to stop them. The residents told us that boys here bare their chests to the army to show that they are ready to face bullets and pellets. The army tried to seal the local shrine but could not do so.



Outside the local mosque, our team met with a local political leader who said that, *“Shoura had a history of heroes who fought against Maharaja Hari Singh, now people of this area will lead the fight against Modi. People from Ladakh and Jammu regions will also join them in a joint struggle.”*





## 4. State Oppression

*State violence and oppression is not new in Kashmir. Post August 5, 2019 while on the one hand a siege was the new normal, violence and oppression increased to proportions reminiscent to the 1990s. In this chapter we present in detail the extent of oppression and tyranny deployed by the state with the aim to instil terror among the people of the Valley and to emotionally break the people, in an attempt to silence them.<sup>90</sup>*

Médecins Sans Frontières which has worked extensively in the Valley, especially on mental health issues, in 2006 reported<sup>91</sup> that almost half (48.1%) said they felt only occasionally or never safe and that in the period 1989-2005, people frequently reported crackdowns<sup>92</sup> (99.2%), frisking by armed forces (85.7%) and round-up raids in villages<sup>93</sup> (82.7%). Further, it found, damage to property (39%) or the burning of houses (26.3%) was considerable and interviewees reported witnessing (73.3%) and directly experiencing themselves (44.1%), physical and psychological mistreatment, such as humiliation and threats. In addition, people were forced to perform labour (33.7%) or to give shelter to combatants (18.4%). In the same period, one in six respondents (16.9%) were legally or illegally detained. A shocking finding is that torture appears to be widespread among those detained (legally or illegally): 76.7% said they were tortured while they were in captivity. The report further states that sexual violence is a common strategy used to terrorise and intimidate people in conflict, but in Kashmir it is an issue that is not openly discussed. Nevertheless, 11.6% of interviewees had acknowledged that they had been victims of sexual violence since 1989.

### 4.1 Massive militarization

As you enter Kashmir you are faced with the 'normalcy' promoted by the Prime Minister Mr. Narendra Modi and the Home Minister Mr. Amit Shah. On our flight from Delhi to Srinagar, we were 10 among the handful of civilian passengers, including a few Kashmiris, while the majority were military and para military 'jawans' speaking in all languages from across India. About fifteen minutes before touchdown, the crew, unlike the norm, made an announcement to shut all window shades. One curious jawan seated behind us tried to open his window shade to look down, only to have a crew member pleading with him to pull it down immediately, as she could lose her job for this. As the flight landed, mobile phones were instinctively pulled out and switched on, this was immediately followed by a wry smile or a laugh or rolling eyes at the absurdity of the situation. At the arrival terminal, a "Welcome to Paradise" ticker flashes at us opposite the conveyor belt for baggage.

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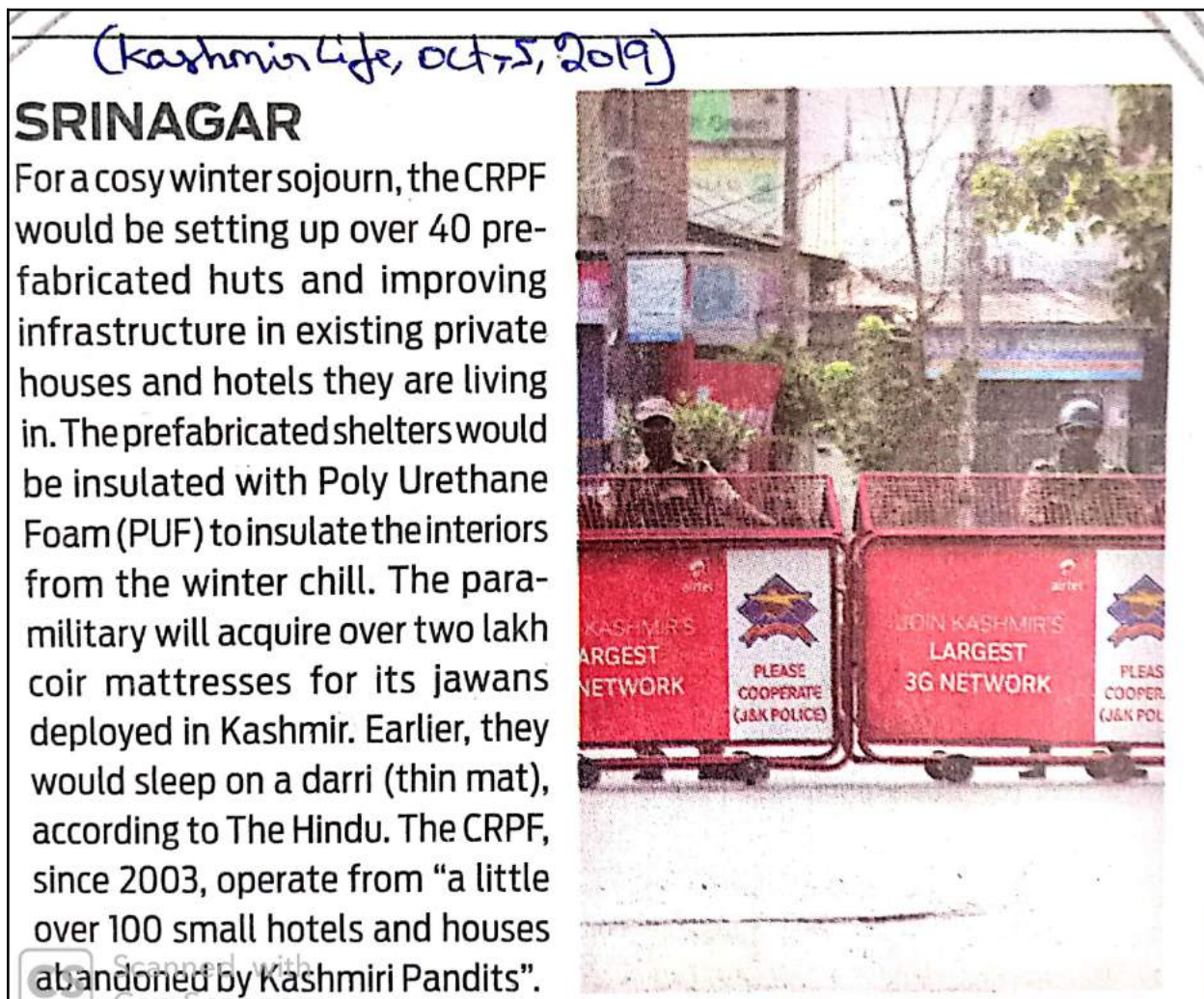
90 The courts have made observations and passed orders in cases where people have faced state violence. A summary of these cases are presented in Annexure 7: "The Wages of Conflict and the Courts"

91 "Kashmir: Violence and Health – A quantitative assessment on violence, the psychosocial and general health status of the Indian Kashmiri population", November 2006, Médecins Sans Frontières

92 Houses are surrounded and all family members are asked to stay in one room while the houses are searched

93 All inhabitants of a village are gathered in the central square while security forces search for "terrorists" often using informers who name "suspects"

All along the route from the airport to the centre of Srinagar, the shops are closed, the city is in *hartal*, except for armed forces posted at metres from each other, bunkers, barricades, concertina wires blocking the roads. Apart from this and a few street vendors, the streets were desolate. The city bears the look of an extended army camp. Over the next few days we noticed that this is how the city looks in all parts. This is the case in the entire Valley. Army camps, bunkers along the roads and in the mountains is the normal here. People informed us that militarization has increased manifold now. We were told that Baramulla and Sopore, which we visited, are the red zones in the valley and hence are even more militarized than other parts of the valley. As the militarization has been stepped up, meadows and forests in Gulmarg and Baramulla have been taken over by the armed forces and permanent structures are being built on these lands.



A journalist told us that the total population of Jammu and Kashmir is about 1.25 crores with about 80 lakh people living in the Kashmir valley. Today this region houses 8 lakh armed forces. The deployment of forces in 2019 has been based on the State's estimate of the number of armed personnel needed in the event that the resistance in the valley would be five times than that was experienced in 2016! Already there were 6.5 lakh armed forces in the Kashmir Valley including 1.3 lakh police force. Additionally, 1.4 lakh armed forces were moved into the Valley

just before the announcement<sup>94</sup>. The armed forces in the Valley primarily is the army and the various paramilitary forces like the BSF, CRPF, IRP, etc. along with the J&K police including its counter-insurgency wing, the Special Operations Group (SOG), alternately called the Special Task Force (STF). Added to these are the intelligence agencies, Special Police Officers (SPOs), Village Defence Committees (VDOs) etc.

The surveillance and control by the army is unprecedented. *"We live in an area where even breathing is restricted,"* one of the people we spoke to said. Though the practice of checking and frisking existed since the 1990s, it has increased manifold in the days with Kashmiri people being regularly required to produce their IDs and all vehicles are checked. It soon became clear that this treatment is exclusively reserved for Kashmiris when the teams visiting villages were allowed to pass freely at checkpoints, while as two-wheelers and cars with Kashmiris were being stopped at every juncture. At the only point where a car of our Team was stopped while returning to Srinagar from a visit to South Kashmir, the officer quickly let it pass after peeking in to find Indian passengers. One young man painfully said that, *"even in our own land we are not allowed to move freely and are required to show our identification to army people from outside"*. The harassment suffered at the checkpoints is adding to their mental stress and anxiety. One man reported how the roads were barricaded on his way back from Srinagar where he had taken his sick grandfather for cancer treatment to SKIMS, Soura, Srinagar, and he was stopped at the checkpoint at Jehangir Chowk and harassed, humiliated by the army and made to show his ID card and recite his name and village, even as he informed them that he was taking his grandfather back home from cancer treatment. He said the army insisted on producing an Aadhaar Card as a valid ID.

One journalist told us that the data collection for surveillance is massive and computerised. The details of people and physical description of places including places like hotels and public places has been digitised. Therefore they have details of most people and places on the tips of their finger, making the surveillance in the Valley of unprecedented proportions. Like one of the people said, *"woh to hamare ghar ke andhar pahunch gaye hain"*<sup>95</sup>.

Today no Kashmiri can breathe except in the presence of the armed forces. People we met kept referring back to the 1990s to explain that present phase is an elevated next phase of militarisation in the Valley which includes more camps, bunkers and restricted zones. It is as if an endless war is being against the Kashmiris over 2 generations, and there is no cessation of this policy of aggression. Even their houses are not the safe spaces, as the armed forces can barge in anytime. The power of the weapon is thrust at their faces at every street corner. The constant convoys of armed vehicles on the roads forcing them to wait on the sides is the bare armed power of the Indian State staring them down. Like Jean Dreze states<sup>96</sup>: *"How can you say situation is normal when you have deployed thousands of army personnel? Not only that you have blocked the internet and there is complete lock down. I think this is going to make things worse. From their point of view, the alienation continues, the violence continues, the repression continues. It is only in the mind of Home Minister Amit Shah that the situation is normal."*

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94 "Forces deploy 1 million to guard every inch of Kashmir Valley". Retrived from <https://www.deccanchronicle.com/nation/current-affairs/180819/forces-deploy-1-million-to-guard-every-inch-of-kashmir-valley.html>

95 Meaning they have entered our homes

96 Vishwadeepak. (2019). Economist Jean Dreze: Article 370 helped reducing poverty in Jammu and Kashmir. Retrieved from <https://www.nationalheraldindia.com/india/economist-jean-dreze-jandk-more-developed-than-gujarat-special-status-helped-reducing-poverty>



## No restrictions in J&K; entire world supports abrogation of Article 370: Amit Shah

**NEW DELHI:** Union Home Minister Amit Shah on Sunday said there are no restrictions in the Kashmir Valley now and that the entire world has supported the move to abrogate the special status given to Jammu and Kashmir under Article 370.

Shah also said that Jammu and Kashmir will be the most developed region in the country in the next 5-7 years because of the bold step taken by Prime Minister Narendra Modi on August 5.

The Home Minister also criticised the opposition for spreading "misinformation" about restrictions in the valley.

"Where are the restrictions? It is only in your mind. There are no restrictions. Only misinformation about restrictions is being spread," he said address-

ing a seminar on national security.

The home minister said out of the 196 police stations in Kashmir, curfew was lifted everywhere, and only in eight police



stations areas CrPC 144 was imposed where five or more persons cannot gather.

Referring to the recently concluded United Nations General Assembly, Shah said all world leaders have supported India's move on Article 370.

"All world leaders ■ SEE ON P-6

CS Scanned with The Daily Fish Enc 30.09.2019

To say that the common sentiment is against the presence of the armed forces would be a gross understatement. Over the decades there has been systemic and widespread violence on the part of the armed forces including enforced disappearances, deaths, unmarked and mass graves, custodial torture and sexual violence, which the army and the Indian state denies.

*Zulm*<sup>97</sup>, is the one word that rings throughout Kashmir and is a part of every conversation. What makes the oppression even more blatant and suffocating is the systemic denial built into everything.

In doing so the Indian state has simultaneously, delegitimised itself in the eyes of the people, and, denied them any access to justice. Post August 5, 2019 the same continues, in a much more exaggerated form. The apparatus of terror and control operates in the form of night raids, arbitrary arrests and detentions, prolonged incarceration, torture and sexual assault, checkpoints and frisking, convoys and bunkers, all meant to prevent any protest or clampdown on any dissent against the unilateral and illegal decision of the central government. The impunity with which the armed forces are operating, coupled with the political assault in the form of removal of special status, are pushing the people of Kashmir to a point with few alternatives.

To this is added the new language of Islamophobia in the words and actions of the armed forces, government and the media. People are being tortured in custody and made to say "Jai Sri Ram". There is a concerted attack against the exercise of freedom of religion (as described

<sup>97</sup> Zulm in Urdu means oppression or tyranny.

later). One person told us that: *“The Army is fighting a war against our society and religion; this is not any security action anymore. They do not look at us as human beings with rights or feelings. This is what we have to now fight against. It’s a fight for azaadi<sup>98</sup> and the right to live as human beings”*. This is the new normal in the Valley.



## 4.2 Night raids as a mode of collective punishment

*“Raatein katilana hai”<sup>99</sup> and “raat ko army aur police wale aate hain aur bahut zulm karte hain”<sup>100</sup>* is what we heard in every place we visited. In one of the villages in Pulwama, people said that since August 5, 2019, armed forces were conducting raids on villages and localities in the city almost every night, and most definitely if there was any protest or incident of dissent in that area. We heard that the entire village was rendered sleepless because of the nightly raids, harassment, humiliation and torture.

The modus operandi of the raids, we were told, is more or less similar whether they are conducted jointly by the army, paramilitary forces and the police, or by any of these forces independently. *“They barge into the village screaming abuses and throwing stones at the*

<sup>98</sup> Azaadi in Urdu means freedom

<sup>99</sup> Meaning the nights are deadly

<sup>100</sup> Meaning The army and police come at night and oppress us a lot

houses breaking window panes. Almost all the houses in the villages and some neighbourhoods in Srinagar, have broken windows owing to the stones thrown by the army. One of their favourite taunts is that they are going to choose girls from this village to get married to and that they are going to take over all the land in the village and nothing can be done to them. During these raids, which are usually past midnight, the Army jawans are usually drunk though not the police. The men are rounded up on the main road and their mobile phones are taken away from them and checked. Simultaneously the armed forces enter all houses in the name of conducting checks, women and girls are physically frisked by male army personnel, are sexually abused and molested. If they try to defend themselves they are physically abused.” We were told that the sexual abuse is rampant, as one youth said, “Maa kya hote hain, behan kya hote hain, unko kya maloom”<sup>101</sup> In a village we visited we were told, “Of late, people shut the doors and windows and stay indoors at night, in fear of raids. The armed forces now come and arbitrarily throw stones at windows to instigate the people to step out and if they do so, they force in and ransack the house. This harassment continues all night, leading to fear and mental breakdown amongst those in the neighbourhood”. In several villages we were told that the jawans take away whatever they please and any protest is met with the choicest of abuses and beatings. In another village we were informed that even the SOG robs gold and money during these raids. The jawans taunt people saying that “sala azaadi maangta hai, Modiji azaadi diya hai”.

#### **Women Speak....**

We also spoke to a group of women separately who told us that they were petrified because the forces barge into their homes at night by climbing over the walls of the house. The women told us that they are so full of fear that they even discourage the girls in the village from wearing good clothes. They even ask the brides to get out of their bridal clothes soon after the wedding day.

The girls are advised to wear *firan*<sup>102</sup>, so that their bodies are not seen and the material being thicker they feel more protected when security forces enter their homes and touch them. The women are scared for the safety of the younger women and are sending them away to their relatives homes or even getting them married at a young age.

They said, “When they enter homes they take away our jewelry and on one occasion when one of them complained to the SHO and fought with him, he called the man who was part of the raid and found her jewelry on him. In an incident narrated to us by a woman, during one such raid, a woman addressed one of the officers as ‘Bhai’ and he reprimanded her saying “I am nobody’s bhai and don’t call me that.”

The women also added that even though these were tough times they will stand up for each other. When the forces enter their houses they take shelter in each others house.

Amongst other incidents, people told us that youngsters are experiencing symptoms of heart attack. The doctor who they accessed with great difficulty, informed them that it was an anxiety attack and that 70% of young boys and girls who visited him were suffering from depression. A young girl told us how she woke up in the morning shivering despite wearing a sweater and a blanket. Another had given her entrance exam for Aligarh Muslim University and is

101 Meaning they don’t know what a mother and sister’s worth are

102 Firan is a loose upper garment traditionally worn by people of Kashmir



unable to find out the results due to the blockade.

Young girls spoke of how they miss their friends they are unable to meet and see each other. "We have nowhere to go and are feeling suffocated in their homes and feel like committing suicide attimes. All we want is our *izzat*<sup>103</sup> and *azaadi*."

Another woman whose husband is in the police force said, "*our children have no mustaqbil*<sup>104</sup> due to the constant conflict and his ghastly blockade."

In one village near Pulwama, one of the men said "*We are unable to protect our mothers, wives and daughters, this is something we cannot tolerate. Every night, the RR, SOG, Police and CRPF come into our villages, some of them drunk and play around with our women, saying that now, Kashmiri women are available to them. The jawans force everyone to shout 'Jai Sri Ram' and mercilessly thrash anyone who does not*". They also laughed and said that this *Beti Bachao*<sup>105</sup> campaign is nonsense and the only thing happening in Kashmir today is the violation of women's rights.

We heard of a particular tactic employed by the armed forces that is downright perverse and criminal. People said that sometimes plain clothed army officers impersonating as *mujahideens* by sporting beards and long hair would knock on a door in the village and forcibly enter and demand for food. Usually this is done during the day. Such visits would be followed by night raids conducted by the army, which would allege that the family had entertained *mujahideens* and pick up young men, harass the family members and raid the house using that excuse.

The people are anguished by this terror they face every night and the indiscriminate filing of cases. They tell us that the youth and men cannot step out after 8.00 p.m. since there is no guarantee that they would return. In several villages we were informed that, the youth don't stay in the villages in the night for fear of being picked by the armed forces in the night raids. Further, that army does not allow for any vehicles to ply on the road from 8.00 a.m. in the evening till 6.00 p.m. in the morning.

Overall, the night raids are said to not sudden and unplanned but designed to terrorise. This, poeple say, is accentuated by the practice of torture not just in the army camps and police stations, but also right outside the houses, on the streets and in the local mosques. These night raids, coupled with the high density of militarization, are a method of saturating control.

### 4.3 Destruction of property as a mode of terrorising

Broken window panes is one common sight across the Valley, every person we met blamed the armed forces for this. In village after village, locality after locality, we heard the anger and anguish in voices of people as they related the manner in which the armed forces threw stones and broke window panes and damaged vehicles parked outside their houses. In some instances, they narrated how the armed forces stormed into the houses and vandalized it by breaking TVs, fridge and mobiles and destroyed their food grains.

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103 Meaning honour

104 Meaning future

105 Beti Bachao, Beti Padhao ' is a campaign of the Government of India that aims to generate awareness and improve the efficiency of welfare services intended for girls in India.

In colony after colony in Srinagar, when we visited peoples homes we were taken through the house by the women and showed the extensive damage and loss caused to them. The woman in one of the homes told us that the CRPF and the J&K police had come into the house, broken window glasses, opened their refrigerator thrown all the food out including the meat from the goat sacrifice made during Bakri Eid. She said “about 8 - 10 of them came in and pulled out everything, opened the cupboard and tore the clothes. They mixed salt and turmeric powder, threw oil on the floor and damaged vessels. They even broke the new LED TV and the washing machine”. She told us how she sold her gold earrings to buy a new TV. It is not merely the damage of the property and the resultant financial burden on the family but it surely causes a lot of mental trauma to recover from. Her husband told us that, *“The earlier Deputy Superintendent of Police (DSP) was a good person, when the boys were about to pelt stones he personally spoke to the boys and dissuaded them from pelting stones. So there was no pelting in the locality, peace was maintained. However after the abrogation of Article 370 there were some minor incidents of stone pelting. The present DSP is very aggressive and violent.”*

One of the other women from a neighbourhood in Srinagar informed us that the armed forces who entered and ransacked her house and even pulled her dupatta from her head. Another woman said the police beat her and fractured her hand. They picked up her brother and when she went to the police station to release him they hit her again in the police station. They hit her mother on her head and injured her eye. Her brother was released after 3 days with no explanation or documentation.



Photographs of broken LED TV, damaged window panes, torn clothes in the vandalism done by the armed forces in the houses in Mansoor Colony, Bemina, Srinagar.



In the Quimoh region of Kulgam we saw houses and vehicles that were damaged reportedly by the armed forces and that they also threw out the refrigerator, TV set and other items from the houses and broke them in public view, causing fear and panic among the villagers. One person commented that, *“the army had been doing all it can to terrorise the people”*.

#### 4.4 Arbitrary arrests and illegal detention

Arbitrary arrests and detention is the norm. In every village we went to, we were informed of young boys and men from that village, being held under illegal detention either in the nearby army camp or at the police station. Most of the times the arbitrary arrests happen during the night raids, where the army picks up a few boys and take them to the nearby Joint Interrogation Camps (JIC) for “questioning”.

In one of the villages, 5 – 8 men were picked up by the Rashtriya Rifles (RR), South Order at 11.30 p.m. following night raids. Two of the men, were present at our meeting. Their family runs a bakery, which was shut due to the *hartal* and threats from the army. The men informed that they were not even part of any protest or any incidents of stone pelting and were yet targeted. They informed that the RR arbitrarily conducted night raids at their homes and dragged them out. The mother of the men said that the father was beaten when he tried to follow them out pleading them to stop and was told he would be killed if he came after them. She said the RR officials were drunk and ruthlessly beat her sons. When the wife of one of the men begged the officials to let him go, the officials threatened to shoot her.

From the various conversations we had we also learnt that during the time the boys and men are in illegal detention and custody, the family members run between the army camps in the area and the police station trying to locate those detained. This is the worst time for the family especially since they are unaware of the whereabouts of the missing persons, and there is no legal recourse whatsoever or no way of seeking help of family members given the communication blockade. For those family members at home, this time when the others are searching for those illegally detained is the most anxious time since they constantly fear that even they too would be arrested and tortured. Those picked up are illegally kept in the camps of the armed forces for one night or days on end as per the whims and fancies of the armed forces during which time they are subject to torture and humiliation. They are also compelled to do forced labour in the camp. After the armed forces are done with him, they are released to the police who keep them in the police lockup for days on end. Once they reach the police station, it is the turn of the police to terrorize, intimidate and humiliate those detained. The police make monetary demands from the family members to release those arrested. These amounts range from Rs. 20,000/- and Rs. 30,000/-. Depending on the police cases are filed against those arrested including fixing them in old cases where there are open First Information Reports (FIRs).

We met a 15 year old boy and his family and learnt about the traumatic experience they had faced, which we are narrating below:

The boy is studying in the 9<sup>th</sup> grade at the Government School. His father works as a driver. There was minor incident of stone pelting in the neighbourhood and they walked out around 4.00 p.m. to see what was happening. The DSP of Humhama police post, Budgam Police Station came walking along with other policemen and caught the boy by his neck. They dragged him for half a km. They beat him with a drainage pipe and also with a butt of a gun on his back and neck. This was witnessed by several passersby. They then took him to Humhama Thana (Post –*Budgam Police station, Airport Road*) and beat him up again there. He suffered several injuries on the arms, back and the left leg. They kept him locked up. The Station House Officer (SHO) would repeatedly come and ask for names of boys who had pelted stones. The boy had never pelted stones and was not aware of boys who do so.

There were about 9 boys in the Thana lock up along with him. They brought two other boys after him and he was one of the youngest among the boys in the lockup. One of the boys was beaten so badly that his legs were broken. There was another who was mentally challenged.

The two families got to know of the incident later in the evening and went to the Humhama police post but were misinformed that the boy were at the Budgam Police Station. As a result, the families went there to search for the children, only to be informed that the boys weren't there as well. Then finally when they came back to the Humhama Police Post, the policemen acknowledged that both the boys had been arrested because they had abused the police.

The families were informed that both would be released by evening but were not released. Thereafter, this became a routine exercise and the families were daily told that the boys would be released in the evening by 9.00 p.m. the fathers would be allowed to speak to them in the lock up.

The police at one point of time even asked the men in the families not to come to the police station and send the women instead. One boy's father fell at the feet of the DSP and begged for the release of his child but all in vain. Both the families had to walk to the police post and back due to the restrictions and non-availability of public transport.

There was no FIR or any other document filed or given to the parents, so they were unable to move the court for the boys' release. They were kept in the Thana for 6 days, they were given food but it was inedible. Both the boys were finally released together on 11<sup>th</sup> August, after being detailed for 6 days in the regular lock-up along with other adult detainees.

They were only released after the elder brother of the 15 year old gave a *maafinama*<sup>106</sup>. He signed on a blank sheet and was not shown what was written in the document. The family was asked to pay Rs. 15,000/- for the boy's release and Rs. 1000/- for his food in the lock up. The brother paid the money which he had to borrow.

Several people we met reported that those who had been kept in the jail, either illegally or with documentation were made to pay for the half cooked and inedible food that was fed to them for the period they were in jail. The amount ranged between Rs. 1000 - Rs. 5000 for a range of 2 -

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106 Meaning apology

7 days.

The police did not take the 15 year old boy to the doctor but the family did. He was immediately taken to the Bone and Joint hospital for check-up. Two days after his release he ran away from home and tried to commit suicide. His father found him near the bypass. On 14 August he developed a heart problem (palpitations due to anxiety) and was examined and treated in JVC hospital and is now under medication. His parents also stated that he is undergoing extreme mental trauma and hardly speaks about the details of what happened in the lock up. The family sent him to his maternal uncle's house for a few days to recuperate but he continues to be anxious and depressed.

We also met with the families of the 4 young men who were in the TADA Court when we visited and asked them the details of the incident leading to the arrest of these young men. We were informed that they were picked up during the a night raid in their village during which the women and girls were molested and sexually abused. The boys were illegally held in the nearby Army camp where they were tortured and then taken to the police station. The family members were thereafter informed that it was an old case of stone pelting and that serious provisions of UAPA had been invoked. During this entire time the family members were unaware of their whereabouts. They were extremely heartbroken about the manner in which the young boys were tortured and humiliated and were agitated at the immense hardships heaped on them post August 5, 2019. They are unable to contact anyone since there is no landline in their village and are scared to let their families out of sight also due to the possibility of arbitrary arrests and detentions. They said that ever since they learnt the whereabouts of their boys they have been trying to get them out on bail but this was proving to be difficult.

Several people we met reported that those who had been kept in the jail, either illegally or with documentation were made to pay for the half cooked and inedible food that was fed to them for the period they were in jail. The amount ranged between Rs. 1000 - Rs. 5000 for a range of 2 - 7 days.

People were particularly angry and anguished with the decision to incarcerate detainees outside the State. Family members of detainees we met explained the impossibility of traveling to unknown cities in unknown States to try and meet those detained in a prison system that they had no access to. They were also scared about their own safety in making these trips, saying *"aapke yahaan to lynch mob hai"*<sup>107</sup>. This is outside of the huge financial implications involved in accessing the judiciary to secure the release of their loved ones and the huge travel and stay expenses especially now when there is no livelihood.

## 4.5 Community bonds as another form of collective punishment

A new practice of community bonds has been introduced along with the illegal detentions. Many are detained and released after a few days (1 day to 15 days) after obtaining community bonds before the Superintendent of Police (SP). The SP demands that 50-60 residents from the community appear before him (called *"Mulakkat"*) and take responsibility that the detainee shall not participate in any protest and to maintain peace in the area. Earlier J&K police used to be in charge of law and order but this time the CRPF has taken over. They pick up youth and detain them without producing them before a magistrate. In some cases in the villages of Shopian, in addition to community bonds, individual bonds before magistrates are also taken from those detained.

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<sup>107</sup> Meaning there are lynch mobs operating in India

Newspapers have reported that a 11-year-old was illegally picked-up under section 107, J&K Criminal Procedure Code 1989 (which permits preventive detention), on August 5, 2019 while a 9-year-old and an 11-year-old were picked up on August 7, 2019 from Batamaloo.<sup>108</sup> These were not stray incidents and we learnt it was the normal practice for young boys to be picked up and thereafter released after community bonds were secured from the villagers and local committees. Newspaper reports are replete with details of instances of violence on children during this period.

During our visit we learnt that scores of men and young boys have been arbitrarily picked up in village after village under the guise of proceedings under section 107/151 of the Jammu and Kashmir Code of Criminal Procedure, 1989. People informed that in most villages there were arrests under section 107/151 CrPC, and the local *auqaf*<sup>109</sup> committee was forced to give community bonds to the Tahsildar to get the arrested boys released.

Section 107 allows preventive detention order to be passed by an Executive Magistrate after conducting a show-cause inquiry, where a suspect refuses to furnish a personal bond/ surety to prevent breach of peace. There is no notion of community bonds in law and in fact it amounts to collective punishment. It is a practice that has emerged with the complete involvement of the top police leadership. Dilbag Singh, the Jammu and Kashmir Director General of Police, in an interview with Indian Express<sup>110</sup> admits the use of community bonds and proudly claims that “... *In some 300 cases, we have used community bonds to pick up and then release stone-pelters in Srinagar alone. And if 10 people come to seek release of 10 people per case, we have successfully engaged 3,000 people. They are released the same day...*”

In Kulgam, we heard of another practice. Lawyers we met informed us that there has been no stone pelting incidents since August 5, 2019, yet boys are picked up on the basis of criminal cases registered with regard to incidents of stone pelting last year on the basis of “open FIRs”. One Advocate narrated to us the case of one family that had come to him that day for preparing an Affidavit cum undertaking / bond for a young boy detained on the charge of stone pelting. The family informed him that the DSP has demanded a bribe of Rs. 50,000 along with an affidavit cum undertaking from the brother that the detainee will not indulge in stone pelting. The lawyer said that the police had been using old open FIRs of stone pelting to arbitrarily arrest youth instead of filing new FIRs. However in some cases new FIRs are also being filed.

## 4.6 In-lieu arrests

We heard that one of the accepted practices is the arrest of any male family member in lieu of a person whom the armed forces are looking for, until the required person turns themselves in.

Sometimes, when the army does not find anybody who it is specifically looking for, it picks up other members of the family, especially the brothers or the father and take them to the army camp, tortures them for a few days, and then releases them with the threat that if the sought for member is not given up to them, then the entire family would be picked up and tortured again. Every single village and locality we visited had such a tale to tell.

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108 Mathur, A. (2019) 9-year-olds among 144 minors detained in Kashmir since Article 370 abrogation. Retrieved from <https://www.indiatoday.in/india/story/children-among-minors-detained-kashmir-article-370-abrogation-reports-1605322-2019-10-01>

109 Auqaf is a Muslim religious or charitable foundation created by an endowed trust fund

110 If we pick up 5, we keep one... just a few hundred with us: J&K DGP. (2019). Retrieved from <https://indianexpress.com/article/india/jammu-and-kashmir-dgp-arrests-lockdown-valley-5978211/>

In a colony in Srinagar we met with a family where a Owais, 19-year old, accused of stone pelting, has been detained under PSA and transferred to Agra while others were arrested and spent illegal time in the police lock-ups while the police searched for Owais. On August 9, 2019, around 5.00 p.m. when a raid was conducted by J&K police in the area after incidents of stone pelting took place earlier, the same day. DSP Furqan and SHO. Adil along with police and STF teams entered their house and asked the family if Owais was at home. However, Mir had gone out with local friends to play cricket. One of the policemen tried to hit Mir's sister, cursed her and broke windows of their houses. His brother- in-law, Ghulam was arrested instead of Owais and kept in detention in Bemina Police Post till August 10, 2019 evening and then released.

In a village in Kulgam we met with a man, who was just released after 15 days of illegal detention. The man informed us that he had been released at 9.30 p.m. the previous night after 15 days of detention. He said that earlier on the day he was picked up, his son was sitting with 5 - 6 boys on the road, when they sighted an approaching army truck. Since there had been earlier instances when the army would come into the village and shower pellets on groups of people on the road, the boys got scared and quickly started dispersing. While running away from the site, his son's phone fell on the ground. His son did not realise until he was nearing home and informed his father after he came home. Since his mother was unwell and needed to be taken to SKIMS in Srinagar for treatment, his son left with her soon thereafter. Realising that since the phone may have been found by the army and they would soon arrive to question his son, the man went to his neighbours to seek help to accompany him to the police station to inform them that his son had dropped the phone. However, the neighbours were scared due to the daily crackdown by the army and not wanting to risk their safety, they refused to come. Finally, he went to the Nambardar, who told him that since it was late in the evening he would accompany him next morning to the police station. He accordingly went home.

However, at midnight, the STF and army arrived in the night at their home. They had the phone with them and asked him if it belonged to his son. He said yes it was his son's and explained that he had dropped it while running because he was scared. They asked for his son and he informed that he had gone to Srinagar with his mom and would return shortly when he would bring him to collect the phone. However, the army was not willing to listen and entered the house and started breaking things. Then they dragged him out of the house, hitting him along the way and dropped a tear gas before leaving the house and locked the door from outside. He showed us the burn marks where the tear gas was dropped in his house and the broken windows. His mother, daughter and other women and children of the family were in the house and started suffocating. His daughter cried for help from the window. His mother even fainted a couple of times and had to be taken out from the window. It is only after the army left that some neighbours came and opened the door. His grandson has had to be taken to the hospital 3

times since the incident. He on the other hand was dragged for ½ km before being put in the van and taken to the camp. He was tortured and kept there for the night and then taken to the local police station (Wanpu Police Station). He was kept in the lockup for 15 days and released only on the condition that he would produce his son within the next 3 days or else they would return on the 3<sup>rd</sup> day and destroy the house and wipe out his family. He was devastated and crying while talking to the team. He said he had to make a decision in the next 3 days.

Meanwhile his son was scared and had not returned home after hearing of the incident, they had no clue of his whereabouts. He was under tremendous stress and apprehensive of what would happen when the army came. He said that his sister was an Indian Reserve Police constable and she has also been warned not to interfere by the superiors if she wants to keep her job. He said in another house next door, both father and son have run away and don't sleep at home at night. The mother and sister live alone at home under fear of the army. Most boys in the village had pellet injuries and pellets were used frequently by the army on locals. He said that he himself drives a Sumo and he has had to replace the windows of his car have been broken by the army at least 15 times, which he has had to replace the windows, even though he cannot afford it, it is daily torture and perversion.

He said that the stories of others is even worse. He spoke of a boy who was in the lockup with him. He said that he was tortured so much by the army for one month at the camp that he lost his mental balance. He was thrown in the lockup where this man was lodged at 2 a.m. Instead of helping him or letting him go, the DSP would call him Ghajini<sup>111</sup>. In spite of the man's repeated prodding this boy was unwilling to speak. Another man who had lost his eye in a pellet injury, had got bail but the police was not letting him go. The family had spent 7 lakhs on his case and his brother would come every day pleading to the police to let him out since he had got bail, but the police would say come tomorrow every day. One night, the police took him out of the cell at 12.30 a.m. and took him away. The next morning the brother came hoping for his release, however he was told he is taken to the interrogation centre, without providing him any details. He went from one place to another but was unable to find him. Everyone in his village, his family had been waiting for him and were left devastated and crying. Such is the mental torture. He lamented that the Indian government and army don't consider Kashmiri's as human beings. There are many other cases like his in the village, he is hopeless and does not know what to do when the army comes. He said they are only waiting for a permanent solution and freedom from this torture and inhuman treatment.

## 4.7 Deaths

It is extremely difficult to state with certainty the number of civilian deaths in the Valley on account of the absolute state control being exercised post August 5, 2019. We have documented some of these tragic loss of lives having met with some of the bereaved members of the families.

1. The first person to lose his life was Osaib Altaf, a 17-year old boy who drowned in the Jhelum after his family and friends say he was chased by armed forces personnel on August 5, 2019, hours after it was announced in parliament that Article 370 was being scrapped<sup>112</sup>. The Juvenile Justice Committee in its Report<sup>113</sup> to the Supreme Court has placed on record the report of the Director General of Police which states in regard to

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<sup>111</sup> This is in reference to the eponymous hero of the 2008 Hindi film Ghajini ('inspired' by the English film Memento) who suffers from a condition that renders him unable to remember anything for more than a few minutes.

this death as follows: “*Osaib Altaf: The incident as reported has been found to be baseless as no such death has been reported to the police authorities as per verification report received from the filed documents.*” A subsequent news report<sup>114</sup> has brought out the ordeal of the family in getting an FIR registered, and medical certificate issued, in regard to death of Osaib Altaf. The irony is that the police are refusing to register an FIR despite repeated efforts by the family. The funeral videos of the poor boy is further proof of the no-death stance of the police<sup>115</sup>.

2. Another casualty was Fahmeeda Shagu (34 years), who died from suffocation caused by tear gas in an uptown neighbourhood of Srinagar on August 9, 2019<sup>116</sup>. We met with the family members of the deceased Fahmeeda and learnt that she was 34 years old house-maker married to Mohammad Rafiq Shagoo. It was August 9, 2019 and stone pelting was going on a Shastra Seema Bal (SSB) camp, situated right next to the colony, since morning. In its response, J&K police was aggressively firing tear gas shells to disperse the protesters. Rafiq, Fahmeeda’s husband, was at home along with his brother, sister, father, cousin, paternal aunt and Fahmeeda. Fahmeeda gave him some curtains to cover the windows to protect them from being broken by the Police. Some windows had already been broken by the Police earlier in the week. After fixing the curtains, Rafiq went outside for some work and Fahmeeda was preparing tea for the family in the kitchen in the ground floor. It must be around 6.30 p.m. when more than a dozen tear gas shells were fired by the police. Tear gas smoke entered their house and Fahmeeda came outside the house due to suffocation. Her husband returned home the same time and found Fahmeeda lying on the ground, surrounded by a few people. She was taken to the hospital on a scooter. She was coughing badly at the time and coughed out some blood as well. However, she was conscious and showed the blood to Rafiq. They reached JVC hospital around 7.00 p.m. Fahmeeda informed the doctor that she is not able to breathe properly and immediately fell unconscious after that. A suction cup was put on her mouth and the doctors tried to resuscitate her for the next 40 minutes but could not save her. She was declared dead at 7.40 p.m.

After much running around and effort, Rafiq received the hospital records August 14, 2019. Simultaneously, Rafiq also tried to meet the police officials to register an FIR and to get an investigation started in the matter. However, he could only meet D.O. Manan after being avoided and ignored by police officials several times. Manan had been transferred to Qamarwari police post following Fahmeeda’s death. D.O. Manan did not agree to register their FIR stating the reason that the olice cannot register a complaint against themselves. He also warned Rafiq “not to mess with the Police” and was offered the post of a SPO. Manan also asked him to meet the DSP after 10 days. Rafiq did so and met DSP Furqan to get a complaint registered in the matter. However, he received a similar response from him. DSP Furqan also warned him to not mess with the Police,

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112Ahmad, M. (2019). ‘Graves Don’t Lie’: Srinagar Family Rubbishes Govt Report Denying Their Son’s Death. Retrieved from <https://thewire.in/rights/graves-dont-lie-osaib-altaf-srinagar-family-rubbishes-govt-report>

113Report of the Juvenile Justice Committee of the High Court of Jammu and Kashmir in W.P. (Civil) No. 1160/2019 titled Enakshi Ganguly & Anr vs. Union of India and Ors.

114Ahmad, M. (2019). ‘Graves Don’t Lie’: Srinagar Family Rubbishes Govt Report Denying Their Son’s Death. Retrieved from <https://thewire.in/rights/graves-dont-lie-osaib-altaf-srinagar-family-rubbishes-govt-reporthttps://thewire.in/rights/graves-dont-lie-osaib-altaf-srinagar-family-rubbishes-govt-report>

115Funeral Video Busts ‘No Deaths, No Kids in Jail’ Report J&K Police Sent Supreme Court. (2019). Retrieved from <https://thewire.in/rights/kashmir-child-death>

116Parvaiz, A. (2019). Srinagar Hospital Records Disprove Home Minister’s ‘No Teargas, Pellet Use’ Claim. Retrieved from <https://www.factchecker.in/srinagar-hospital-records-disprove-home-ministers-no-teargas-pellet-use-claim/>

**Fig:** Medical report of Fehmeeda dated 09.08.2019 reflecting cause of death to be a “toxic gas”, “allegedly due to teargas inhalation”.

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9/0/19 7:40 PM  
 Patient is suspected to have while  
 some time ago. Patient just seen had developed  
 (Alleged by Targis Shokeh)  
 sudden cardiac arrest, immediately  
 CPR was started according to latest  
 ACLS protocol. At time of start  
 of CPR at 7 PM  
 Pulse - Not measurable  
 BP - Not measurable  
 RR - No respiratory effort  
 SpO<sub>2</sub> - Not measurable  
 CPR was continued from 7 to  
 7:40 PM. At 7:40 PM 9/0/2019  
 Pulse - Not measurable  
 BP - Not measurable  
 RR - No respiratory effort  
 SpO<sub>2</sub> - Not measurable  
 Pupils - 8/6 fixed dilated  
 ECG - All flat lines

Airway 1st  
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Patient was found could not be revived  
 back - Patient was declared dead  
 on 9/0/19 at 7:40 PM. Possible  
 cause of death could be? Myocardial  
 MI (ACS)? Massive PTE? cardiac  
 rupture. Actual cause of death  
 could be ascertained after autopsy.

Senior Resident  
 Deptt. of General Medicine  
 CVRMH, DGH, DGH  
 09/00/19

FOR PATIENT SAFETY, report any side effect (Adverse Drug Reaction) to  
 AMU, Dept. Clinical Pharmacology: (02) 941981883, (02) 0194-241016 Ext.  
 -2126/2104 or  
 IPC (Toll free) 1800-180-3024

1. On August 22, 2019, a 65-year-old man died reportedly due to tear gas inhalation at Lalusheshgaribagh, Srinagar. There had been a small protest on August 20, 2019 in the

next locality and a lot of shelling near the house. A family member of the deceased remarked, *"anything can happen on a Friday"*. The boys were being chased. The police and CRPF do not see your age gender they beat everyone. A tear gas canister fell inside house around 3.45 p.m. Due to the prevailing situation they were unable to take him to the hospital and just took him to the local doctor. They were not even allowed to leave the house and took him to the doctor much later. His condition deteriorated hence, on August 21, 2019 they took him to the hospital. He died on August 22, 2019.

We met members of the family including the nephew of the deceased. They told us that only three houses in the locality had a landline, so there is just no form of communication in this locality. One member told us, *"we have never witnessed this level of a blockade. We have surel witnessed killings in the past but not this kind of isolation."*

1. Asrar Ahmad Khan (17 years), is another unfortunate vitim. On September 4, he succumbed to his injuries at Srinagar's SMHS hospital. According to his friends and family, the boy was injured on the evening of August 6, when paramilitary forces hit him with pellets while he was playing with friends outside his house<sup>117</sup>.

We met Firdous Ahmed Khan and Sahina Firdous, parents of Ashrar (17 years) who died in pellet firing. On August 6, 2019 at 5.30 p.m., he was playing carrom in the playground when two CRPF vehicles moved towards this group of boys. The boys tried to run away. CRPF opened pellet firing in which he was injured. He was taken to the hospital but the doctors suggested that he needed further treatment which was not available in Government hospital. The hospital in its diagnosis specifically mentions the cause of wounds as shelling and pellet injury.

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<sup>117</sup> Ahmad, M. (2019). 'Can a Stone Do This?': Family of Srinagar Youth Who Died Refutes Police Version. Retrieved from <https://thewire.in/rights/srinagar-kashmir-pellet-gun-death>

ON FOR DRUGS

Ward: Sice 4.1 bed 2 R/T 3000

Bed No: 13

http://his.9090/HIS/newPatient/show/20008817mlcId=19

**Sher-i-Kashmir Institute of Medical Sciences**  
(Soura, Srinagar)

PATIENT REGISTRATION CARD Rs. 10.00

Patient Type: Emergency Category: General

Patient ID: **1452895** Reg. Date: 06 Aug 2019 06:46 PM  
Print/Re-Print Date: 06 Aug 2019 06:46 PM

NAME: **ASRAR** Sex: Male

RESIDENCE: ELAHIBAGH, SRINAGAR

AGE (YY.MM.DD): 18:0:0 SO/DOWO

Unit: SURGICAL A/E RECEPTION (Emergency)-1

Initial Diagnosis: tergas shell Issued By: 3825

DATE	OBSERVATIONS, DIAGNOSIS, TREATMENT	INVESTIGATIONS
	<p>Shell / Blast / Pellets injury</p> <p>01895 15/18 Ey V5 H6</p> <p>Pupils BIL ASRIL</p> <p>Multiple pellets on Head</p> <p>on eye, blood</p> <p>As Bulbous chemo</p> <p>6-7</p>	

To download online investigation Reports: Visit [www.shimaa.in](http://www.shimaa.in) or Click Patient Reports Link or Visit Patient ID & Order No from Cash Receipt

06-08-2019, 06:47

The family did not have means to afford going to a private hospital. His face was riddled with pellets. He succumbed to the injuries. Ashrar's parents were very angry and grief stricken and shared with us their impressions about their son. His mother told us that her son was peace-loving, studious and fond of cricket and arts. They had invested a lot of hope in him. They were very proud of the son who had been doing well in school and was preparing for medical entrance examination. He was their eldest son, their sole support and wanted to become a doctor. He would never throw stones at police as he was not a *Mujahid*. The parents said that now they have nothing to live for. According to the police statement in the press conference after the incident, Ashrar was a regular stone thrower. But in reality there are no stones in the playground where the incident took place.

The parents stated that earlier this month, CRPF tried to enter the village but were stopped by a group of villagers. They see this attack by CRPF as a retaliation for that incident.

A lot of people came for the funeral procession and the police blocked the entrance to the park. During the time of burial, the CRPF challenged the procession and tried to stop the gathering by firing tear gas. Two journalists sustained injuries. The police sealed the burial ground for 4 days after which there was some relaxations.

2. People we met Pulwama said that, "a boy from Chandigam village was taken to a camp and tortured so much that when he returned and committed suicide", This was also

reported in the press<sup>118</sup>.

3. During our visit to the District Court, we heard about the horrific custodial killing of one a 28-year old labourer from a village Nandpor. He belonged to the Gujjar community. According to members of his family, there was stone pelting in the locality and as is the normal practice a night raid was conducted during the intervening night of September 2, 2019, and the victim was picked up from his home by police. For 4 days, he was kept in illegal detention at Qalamabad police station. It is only when the news got out that the victim was in Qalamabad police station, that the police approached the night Tehsildar and the victim was remanded to police custody for one day. However, on the same night, the victim was found dead in police custody. The family was informed on the September 6, 2019 that the victim has committed suicide but upon arrival in the police station, the family members saw that the victim was hanging upside down from the ceiling and his throat was strangulated. The victim has three minor brothers and an ailing mother, who is blind. The family said that the victim had torture marks on his body. The police (SHO was Abdul Ahad Najar, Police Station Qalamabad) has conducted post-mortem. When they collected the body, there was a huge protest at Haral-Watapora. People were agitating against the killing. The government on September 7, 2019 launched a Magisterial Inquiry into the killing to be headed by Designated Tehsildar. Police has filed an FIR under the Jammu and Kashmir Forest Act, 1987 (illegal smuggling), which is ruled out by the people. However, the FIR under the law is just a cover up. The family being very poor, unaware and under pressure of the police have not filed any counter FIR but as per law the police have to conduct inquest.

## 4.8 Pellet gun injuries

The disturbing use of pellet guns still continues in the Valley and there is no estimate of the number of injuries caused by its usage post August 5, 2019. Besides meeting with the parents of Parvez, who died due to pellet injuries, we also met with some of the victims of pellet gun injuries and the pattern of its usage is as indiscriminate as it has been previously.

In one village where we were informed that on August 31, 2019, the Special Operations Group (SOG) came into the village in the evening at which time the boys were playing cricket in the ground. Unilaterally, they started tear gas shelling first, and fired pellets and even bullets upon the boys. Two people were injured by pellet guns, including a 50 year old woman who was passing by. The other victim, being a 20 year old boy, who was injured by the pellet gun has lost 70% of his eyesight and is unlikely to recover completely. After he was injured, he was taken on a bike to Sub-district Hospital at Chattargam, due to non-availability of ambulance services on account of the communication blockade. Seeing the serious nature of his injuries, he was taken by ambulance to SKIMS in Srinagar on the recommendation of the doctor, where he is undergoing treatment. The boy's father was picked up immediately following the pellet firing and kept in illegal detention for 4 days, when he was tortured.

In a village in Kulgam, we met youth with pellet injuries. Most of them do not even go to the hospital to get them removed fearing that cases would be filed against them

We met another pellet injury victim at a village in Baramulla who was injured at about 11.30 p.m. on September 16, 2019 during a night raid conducted by the police. His face was riddled with

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<sup>118</sup> Kashmir boy dies by suicide after allegedly being beaten by soldier Retrieved from <https://thewire.in/rights/kashmir-boy-dies-by-suicide-after-allegedly-being-beaten-by-soldiers>

pellet injuries as was his shoulder and back. He was in great amount of pain and discomfort when we met him. According to him, on September 16, 2019, he was home watching T.V. when he heard some noise on the streets. This was around 11.30 p.m. and when he looked out the window, he saw a large police force in the street below. A man knocked at their door, and when he opened the door, 15 policemen rushed in with the SHO, and started climbing the wall to go over to the next house. They said that they were looking for another youth, who incidentally had received pellet injuries during a protest in 2008, to which he asked the police why they were harassing Danish who was a heart patient, extremely weak and indisposed. At this point, stone pelting began outside on the street. The family switched off the lights and he peeped outside and saw an old man was lying on the street injured, so he went to help him, when there was a burst of pellet fire at him injuring him on right side and face. He was taken to SMHS and next morning, and operated upon. Due to the seriousness of the injuries, he was taken to an hospital in Amritsar, from where he had returned just a few days before the Team visited him. He is scheduled to return to the hospital in Amritsar for advanced surgery. He still has 2 pellets that are embedded in his skull, and the doctors are evaluating options since it is a highly risky to remove them. On that day, 4 other youths received pellet injuries including a woman whose chest is riddled with pellets.

On our enquiry with the SHRC into the use of pellet guns, we were informed that there are almost 600 cases relating to pellet gun injuries pending before the SHRC from 2016 to August 5, 2019. The Chairperson was very candid in stating that one of the difficulties in passing orders was that in certain cases the name of the victims did not match their hospital records since they did not give their correct names when they were taken for treatment. He added that this was solely due to the fact that stone pelting cases are registered against any victim of pellet gun. He stated that the SHRC had compiled details of pellet gun injuries from three sources: victims approaching the SHRC directly, information received from the Deputy Commissioners and details from human right activists. He provided us with a printout of *"Details of Pellet Victims of 2016 Unrest"* which states that just in the year 2016 there were 1423 victims in Srinagar district, 137 victims in Ganderbal, 4 victims in Budgam district, 1237 victims in Baramulla district, 48 victims in Kupwara district, 47 victims in Kulgam district, victims in Pulwama district, 860 victims in Shopian district and 164 cases registered directly at the SHRC i.e. 3967 pellet victims. Other than this there were 164 cases filed at the SHRC by pellet victims in the years 2017 and 2018.





## 4.9 Torture

Reports of torture at the hands of the armed forces is not new to Kashmir and there is a plethora of evidence on the same, notwithstanding the outright denials of the same by the army and the Indian state.

We met with two torture victims in just one village near Pulwama. They told us that there was stone pelting in their village one day, and in the night the army conducted a night raid. 5 – 8 men were picked up by the RR, South Order at 11.30 p.m. during the night raids, including these two persons. Their family runs a bakery, which was shut due to the *hartal* and threats from the army. The men informed that they were not even part of any protest or any incident of stone pelting and were yet targeted. They informed that the RR arbitrarily conducted night raids at their homes and dragged them out. The mother of the men said that the father was beaten when he tried to follow them out pleading them to stop and was told he would be killed if he came after them. She said the RR officials were drunk and ruthlessly beat her sons. When the wife of one of the men begged the officials to let him go, the officials threatened to shoot her. Both of them were illegally detained and tortured brutally in a van in the village itself until 3.30 a.m. in the morning. Their screams filled the village through the night. Clearly this was done to terrorise and instil fear in the entire village. The two men who spoke to the members of the team detailed the brutal torture techniques employed on them, including electric shocks on their body and private parts and beatings with rods and wire. One of the men informed that when any of them would become unconscious due to the torture they were given electric shocks to wake them up and the torture thus continued. When they asked for water, they were given drainage water and fed mud. They reported that the RR officials forced them to say “*Jai Shri Ram*” and also told them that they will now marry Kashmiri women. At 3.30 a.m. they were all thrown out of the van near the village Masjid and left on the road. In the early morning when people came to the Masjid, they found them and took them to the hospital / medical facility in the village. The doctor examining them has noted that the injuries were caused due to torture. Both were admitted to the hospital. They said that their whole bodies had turned black with torture and burning by electrocution. One of the men shared a picture of his back taken 8 days after the incident of torture, showing black marks of torture.



*Torture marks on the body of a victim, man aged about 25 years, in Pulwama District, Kashmir*

We heard that torture, illegal detention and night raids were common in the region around the Zaldora camp. In these villages young men were picked up by the RR and first taken to the Zaldora camp and tortured for days before being dropped at the police station, where formal charges were filed. Young men from the other villages are picked up daily and taken to Tahab camp by the RR. The men stated that a few days back, a boy from Chandigram village was taken to a camp and tortured so much that when he returned and after seeing his brutally tortured body, his friend committed suicide, fearing the same fate.

We heard dreadful stories of physical torture of youth in Shopian. People reported that youth were kept in detention centres along with dogs. In a camp Mujeeb, age 40, brother of an active militant, and Salman were tortured on 11.08.2019 at night. The camp had a detention centre with loud speakers beaming the sound of torture in the camp so that the entire village would come to know about the happenings in the camp. Villages are raided at night so that there is less resistance. Such detention also includes minor. In Shopian, 7 boys were taken in detention. Razak was brutally tortured and electrical shocks were applied on his genitals. He hasn't slept since then except on a night when there was a funeral in the next house so he was sure the army would not raid his house and take him away. Wasim, a boy who showed the militants the way to the village before August 5, 2019, was also tortured.

We met with Mujeeb, brother of an active militant and were told that he and Salman were tortured on August, 11 2019 at night. The incident took place on August 11, 2019 at around 2.00 a.m.. A day before Eid—there were no Eid prayers in the 11 mosques of a village in Shopian - the Indian army picked up Mujeeb, whose brother had become a militant, and severely beat him up. Army men (44 RR, Chilipora Camp) came into their house and asked the whole family to come outside. The other two families who live in adjacent houses were also asked to come out. They were made to gather outside and were then searched. Mujeeb's cousin, Mohammad, was asked to accompany them as they had to search a house in the locality. But took Bashir instead. He was taken outside their house premises near the Mosque and was told, "370 is no more, get back your brother". His brother is a militant, who has been away from home for the past 15 months. Mujeeb told them, "I'll go and look for him tomorrow and if I'm able to find him, I'll ask him to come back". They searched their houses, took 4 mobile phones of the family members, including Mujeeb's, but, apparently could not find anything. Then he was beaten up to pulp for 45 minutes. He was punched on his face, kicked and also beaten with a staff. Then they took his I.D card and told him to report to the camp at 11.00 a.m. next day. He went to the camp next day with his cousin, uncle and father, but, only Mujeeb was allowed inside the camp. His mobile phone was again taken by them. There was again brutally beaten and tortured for another 45 minutes and the same was done with loud speakers on "*for all to hear*" the screams of the tortured victim and get terrorised. He said that he can't remember anything thereafter as he fell unconscious. His cousin, Abdul Hamid Dar, was asked to come and take Mujeeb who was lying unconscious on the ground. As per Farookh, "*he was like a dead body*". His cousin had to pick his brother on his back and take him home. Then the family took Mujeeb to District Hospital Pulwama and it took him 3 hours to regain consciousness at around 5.00 p.m. Bashir has bruises all over his body and his right foot was fractured. Thereafter a 2<sup>nd</sup> incident took place on 13th August, 2019 at around 1.00 a.m. when 2 army men came in civilian outfits and again asked both the family members (Mujeeb's and Farooq's family) to come out of their houses. They said, "*there is a crackdown in the area by the forces*". Then the forces entered Mujeeb's house and started ransacking their property. They poured kerosene into 2 drums with quintals of rice, poured hair oil on their mattresses, water on their flooring, broke their crockery and other

utensils and mixed all their edibles and masalas. Mujeeb was asked, "Why do you have fever?", and then they further taunted him by saying, "come to the camp, we will treat you".



*Torture marks on the body of a victim, man aged about 40 years, in Shopian District, Kashmir, from raids and torture by army following 5<sup>th</sup> August 2019*

Another boy, 19 years old was grazing cows outside the village when the soldiers met and confronted him. They said they could not believe that he was a peasant since he was wearing jeans. They took away his Aadhar card and asked him to collect it the next day. When he went to collect it, the forces slapped him hard and asked him to come again the next day. Another boy was caught and asked to show his bare back. They didn't find any injury marks so they hit him till he started bleeding.

In Baramulla, we were told that: *"Civilian killings, torture, unmarked graves, enforced disappearances, custodial killings and fake encounters are common in this region. Bloodshed and torture have been rampant in the last 30 years. Dead bodies were thrown into the rivers and have not been recovered. There is a methodology of torture: water boarding, electrocution, iron rod inserted into the body, body parts damaged, and so on. AFSPA is the licence given to the Army. All army officers who carried out torture have been decorated with Vir Chakra etc. The army high command stresses the disciplinary nature of the institution, but no accountability attaches to army personnel; not a single officer has been jailed or punished."*

Besides torture there is the daily humiliation and harassment that is faced by the people.



Mobile phones are taken away on flimsy pretexts and when they go to recover their mobile phones, they are given old mobiles instead and asked to take away any. Moreover, the jawans would make them open their phones which they would pry into and pass comments about the photos and messages on the phone.

One person told us: *“Torture is common and can be ignored over time. Physical wounds heal, but what about the torn soul. But it’s the humiliation and aggression of the forces that is difficult to endure. Love begets love, and hate begets hate. Every night there are crackdowns and raids taking place in the name of search operations, where drunk jawans humiliate and torture the people and sexual crimes are rampant as well but not spoken off because of social stigma.”*

In Kulgam we were told that the modus operandi in the district was for the armed forces to pick up boys and young men, without any FIR or any paperwork, take them to the interrogation centers where they are tortured and brutalised, then dropping them at the local police station where often an FIR is lodged against them. We were told that: *“When these boys (and at times bodies) are returned they are maimed”* and when we sought for them to clarify what they meant, they said in a low voice, *“All the orifices of their body are dilated, please understand that”* We were told that given the nature of violence when sexual, the victims are not able to speak up about it. *“They are threatened not to speak up before the Magistrate. Due to fear of further torture and harassment of family members, the boys do not report the abuse to magistrates when produced. Medical records do not reflect the injuries.”* A lawyer in Kulgam informed us that they have been dealing with horrific cases of violence and 90% of the arrested boys and young men are violated. *“The worst interrogation centres are in this district”*, they say.

The preceding sections dealing with illegal detentions, in lieu arrests also enumerate the instances of torture meted out by the police and the armed forces.

## 4.10 Forced Labour

We learnt from the villages in Shopian and Pulwama that young men and boys are picked up from the villages and taken to the camp in the morning for forced labour of constructing their camp. They are made to work all day but not paid a single penny. Persons in illegal detention are also taken to camps where they are made to do construction work. There is an Industrial Growth Centre in Lassipora, Phulwama, where boys were taken from here and made to do *begar*<sup>119</sup> for camp related work, mowing loans, construction work etc. under compulsion and with no payment. Anyone who was found on the road (for example, even a car driver) could be caught and taken to do begar.

Trucks carrying bricks, construction material for local deliveries are forcibly stopped and diverted to the camps and the goods stolen for construction of the camp.

## 4.11 Religious freedom trampled on

People are extremely angry with the manner in which their religious rights have been trampled on in the past two months.

All across Kashmir, on Friday, people are not allowed to offer namaz at the main masjid and can only do so in the local smaller masjids. We were informed that on Fridays they are not allowed to go to the main road and for the first 15 - 20 days they were not even allowed to go out of their localities.

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<sup>119</sup> Meaning Forced labour

People told us that members from the IB (intelligence) are sometimes present in the mosques. This is done to keep track on the sermons of the Mullahs. We were also told that some Mullahs have been interrogated and beaten up by the Army and compelled to record their sermons and take it to the army camps to prove that nothing related to Article 370 or any such was spoken. Even some youth are forced by the armed forces record the sermons and deliver the recordings to them.

When asked about the “normalcy during Eid” [as portrayed by the Indian Government and the mainstream media in India] we were informed that even during Eid they were not allowed to go to the main Masjid. In Budgam we were informed that post August, 5 the bus that used to ply till Airport Road, Budgam had been stopped and so there was no way for them to get to the main Masjid.

In colonies in Srinagar, we were also informed that the main Masjid was closed even during Eid and it is closed even now. *“It was worst during Eid. While we were allowed to do Namaz in the local mosque we could not go to the larger Jama Masjid. We were not even allowed to distribute qurbani.”*, lamented a few of them.

The treatment meted out to them during Eid and Muharram have forced them to think this way. On Eid, they were not allowed to do *qurbani*, or visit their relatives to celebrate the festival, or even do namaaz at the ‘Bada Masjid’. The youth were particularly angry that they were not allowed to celebrate Eid in the bada masjid. They are also angry that the jama masjid in Srinagar has been forcibly shut by the authorities. One of them asked *‘is there any instance where Hindus are not allowed to go to their temples or that the temples are forcibly locked by the army or police anywhere in India?’* He said that *we are the people who stand by the Amarnath yatris from all across India and support their religious belief, but today, in our own land, we are not allowed to celebrate festivals or offer namaaz in our bada masjids. The army is going to decide where and how we pray. This is zulm and we are not going to take it.’*

In Srinagar, for Muharram the people were disallowed from celebrating it like they traditionally do and even the procession was not allowed. Instead the armed forces resorted to brutal violence, including the use of pellet guns and tear gas, on the religious procession on the 2<sup>nd</sup> to 11<sup>th</sup> Muharram (August – September 2019) in Zadibal, Srinagar. Two children were illegally detained and tortured with bamboo sticks, until the sticks broke. A false case was lodged on all the men who were arrested at Zadibal Police Station and Sama Police Station. The procession was not allowed on the main route and the side lane routes where there was no restriction was shelled and pelleted.

People are convinced that now this is transformed from an attack on Kashmir, into an attack on Kashmiri Muslims.

## 5. Violations of the Law

*The law, in Kashmir, is militarised. Arbitrary arrests and detentions have been carried out on a mass scale in the Valley, both, in preparation for August 5, 2019 and in the face of resistance subsequently. Preventive detention laws have been used systematically to create a political vacuum and to terrorise Kashmiri society. In this chapter we will understand the brutal violence of the law on the people.*

### 5.1 On Arrests

On account of the Central Government's decision, thousands of persons have been detained vide proceedings under section 107/151 Jammu and Kashmir Code of Criminal Procedure or under PSA, 1978, immediately around August 5, 2019.

According to a government report dated September 6, 2019, more than 3,800 people had been detained since August 5, 2019 and about 2,600 of them had since been released<sup>120</sup>. Those detained include political leaders and activists from parliamentary and non-parliamentary parties, lawyers, civil society activists, religious leaders, activists of mass organisations and several hundreds of young people from across localities.

Three ex-Chief Ministers of J&K, Farooq Abdullah, Omar Abdullah, and Mehbooba Mufti, have been detained since August 5, 2019. On September 16, 2019, Farooq Abdullah was detained under the Public Safety Act (PSA). Despite the government's claim that no one has been placed under house arrest, many leaders and politicians, such as former J&K Chief Minister Farooq Abdullah, Srinagar Mayor Junaid Azim Mattu, Congress leader Taj Mohiuddin, Communist Party of India (Marxist) member Mohammed Yousuf Tarigami, and Kashmiri pro-independence leaders Syed Ali Shah Geelani and Mirwaiz Omar Farooq, have been under house arrest.<sup>121</sup> Unionist parties in the valley have simply been annihilated by the clampdown and arrests.

There is no certainty about the number of people who have been detained or continue to be detained. There is also no figure of those arrested post August 5, 2019 on account of protests or stone pelting or any such act of resistance. Such being the case, there is absolutely no estimate of the number of persons, including juveniles, who have been or continue to be illegally in detention, either in army camps, or in police stations, or in circulation between the two.

While there is fear and anger about these widespread preventive arrests, people we met expressed their disillusion about the mainstream political parties and their leadership: *"These parties are the collaborators who brought the BJP into the Valley and were responsible for all the draconian laws, including PSA, and today, they are facing the music. These were the people who trumpeted support for India in the Valley and misled the people. Today, they stand completely exposed and do not have much popular sympathy for their plight. In the eyes of many people in Kashmir, these leaders had no political commitments and merely acted as*

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<sup>120</sup> India jailed thousands in Kashmir crackdown – official data Retrieved from <https://www.trtworld.com/asia/india-jailed-thousands-in-kashmir-crackdown-official-data-29730>

<sup>121</sup> "Update on human rights violations in Indian-administered Jammu & Kashmir since August 2019", 26<sup>th</sup> September 2019, FIDH – International Federation for Human Rights

*dalals striking deals and collaborators. The people felt indignant at having to pay the price for their misdeeds. The top bureaucrats who are wreaking atrocities against the people were appointed by the Mehbooba government. All this is clear from the fact that there has not been even one protest against their arrest. Even their MPs have not resigned in protest”.*

## 5.2 Arrest and detention of juveniles

We went into a home primarily to discuss a reported case of illegal detention of a minor (17 years). We were met by members of the family and the boy himself. The boy worked as a mechanic in a local auto dealership. Both his parents are tea vendors.

We were informed that a few incidents of stone pelting had taken place in the evening in their neighbourhood. Also, windows of a few houses, near the entrance of the colony, were broken by the armed forces. Moreover, Eid prayers were not allowed by the government in a mosque located near the entrance of the colony.

On August 18, 2019 a week after Eid, there had been some incident of stone pelting. When it stopped, the boy was sitting on a wall around 5 p.m., after a match of cricket. They saw 2-3 people coming towards them and heard someone shout “run”, so they ran. They ran into a house to hide. The women started to scream so the armed forces heard them and found the house they had entered. The armed forces came in and pulled out the 3 - 4 boys who were hiding. Each boy had about 4 - 5 officers holding and beating them up. They hit them on their back with a baton which was witnessed by the residents of the locality.

The Duty Officer (DO) of Humama, Wilayat Hussain and other police were in civilian clothes. They took the boys to the lock up and they kept them there for about 7 - 8 days. They beat them on the first day and they constantly abused them with *maa-behen ki gaali*<sup>122</sup>. They were given food but it was uncooked and inedible. There were 5 boys in lock-up. Toilets were attached to the lock up but there was no door and it was not clean. They were not allowed to bathe for 7 - 8 days. It was dark in the lockup and they would have to light a candle around 3 pm.

When the boys did not return home the parents began to look for them. They looked till 11.30 p.m. and then they were informed that the boys had been taken to the police station. They were scared that their son had been killed. They went to *Hyderpore/Humama* but could not find him. As he had been picked up outside their locality he had been taken to *Humama*. They came to know where the boy had been detained only the next day however the boy was informed that his parents were aware of his detention only two days later.

The family was not allowed to meet him except the elder brother who was allowed to see him on the 3<sup>rd</sup> day for 2 minutes. They were not allowed to enter the gate of the police station and would be thrown out by the guard. They were not given the reasons or grounds of detention. There was no FIR they were not given any reference. The parents were allowed inside only when they were releasing the boy and they needed to sign the document.

They had met a lawyer and prepared bail papers but as there was no case number they could not file it. The police then told them not to waste money on bail but to give them money instead and they would release the boy. The boys brother paid the police around Rs. 15,000 and also

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122 Sexist verbal abuses

Rs 1000 for his food and then the boy was released. They were threatened that he would be sent to the Juvenile home which would be worse unless they gave them the money.

The boy detained had mild polio when he was 6 months old and had undergone surgery so has been physically weak ever since. He has been so traumatized by this that he is unable to share his experience in detail.

When releasing the boy the parents were asked to sign a community bond. They were not given a copy or allowed to read they were informed that they have given guarantee that he won't protest again and if he does, they will be responsible. As the locality was not originally from the locality they did not have anyone elder from the community to sign the community bond so they had to request the man who called Azaan to sign. The police took the signature of the auto driver who had taken them there as a witness.

Another report details the arrest and detention of several boys, some aged as young as 12 years old, in Srinagar city having been picked up from their houses in night raids by the police, CRPF and the STF<sup>123</sup>. Similarly another report points to the arrest in Pampore of three boys walking home from the neighborhood mosque including Farhan Farooq, a 13-year-old who was then held in a jail cell at the local police station in this Kashmiri town 10 miles outside of Srinagar<sup>124</sup>.

Most of the reports appearing in the media form the basis of Writ Petition (Civil) No. 1166/2019 titled Enakshi Ganguly and Anr. Vs. Union of India and Ors, filed in the Supreme Court in the aftermath of August 5, 2019, seeking to highlight the illegal detention of children in Kashmir and seeking appropriate relief. The Petitioners have argued, therein, that J&K is passing through an 'extraordinary situation' and the Court ought to ensure that no excesses take place against women and children, who are admittedly most vulnerable in such tense situations. On September 20, 2019 the Supreme Court issued a direction to the Juvenile Justice Committee of the High Court of J&K to file a report with regard to the allegations made in the writ petition.

As expected, and is the practice, the State has refuted every single incident of illegal arrest, detention and torture. The Juvenile Justice Committee in its Report<sup>125</sup> to the Supreme Court has placed on record the report of the Director General of Police wherein it is stated as follows: *"It is pertinent to state that no child has been kept or taken into illegal detention by the Police authorities as strict adherence is placed on the provisions of the Juvenile Justice (Care and Protection of Children) Act..."* It is stated that the incidents of juveniles being pickup up and illegally detained, as alleged in the petition, are *"... nothing but facts having been imagined from thin air..."*.

However, the report does admit that (para 3(9)): *"... It happens often that when minor/juveniles indulge in stone pelting that they are momentarily held on the spot and sent home. Some of*

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123 Chakravarty, I. Zagar, S. (2019). When even a 12-year-old buying bread in Kashmir gets detained in police sweep, 28.08.2019, Retrieved from <https://scroll.in/article/935411/ground-report-when-even-a-12-year-old-buying-bread-in-kashmir-gets-detained-in-police-sweep>

124 Masih, N. Slater, J. (2019) Among the 3,000 detained by Indian authorities in Kashmir: Children. Retrieved from [https://www.washingtonpost.com/world/asia\\_pacific/among-the-3000-detained-by-indian-authorities-in-kashmir-children/2019/08/29/1616b5c0-c91c-11e9-9615-8f1a32962e04\\_story.html](https://www.washingtonpost.com/world/asia_pacific/among-the-3000-detained-by-indian-authorities-in-kashmir-children/2019/08/29/1616b5c0-c91c-11e9-9615-8f1a32962e04_story.html)

125 Report of the Juvenile Justice Committee of the High Court of Jammu and Kashmir in W.P. (Civil) No. 1160/2019 titled Enakshi Ganguly & Anr vs. Union of India and Ors.

*these incidents are exaggerated beyond proportions and inimical elements often give flight to febrile imagination”* while the Annexure to the Report reveals that the police have arrested 144 children under 18 years of age between August 5 and September 23 this year. These include one 9-year old and several children below even 14 years. 92 children have been arrested under sections 107/151, the preventive detention provisions of the Criminal procedure Code.

Further the allegation that juveniles have been detained under PSA too stands established in light of the Juvenile Justice Committee Report<sup>126</sup> wherein it is admitted as follows (para 5): *“It may be added here that in certain cases regular Habeas Corpus Petitions, challenging regular detention orders passed by the District Magistrates against them under Public Safety Act, the detainees have claimed to be juveniles...”*

Our experience substantiates the reports of the widespread violence, arrests and torture of young boys. We met with the Legal Officer of the JJB at Kulgam and learnt that there were 14-15 cases of juveniles picked up post August 5, 2019 and that they had secured bail for all juveniles, and the matters were under investigation.

### 5.3 Proceedings under section 107/151

During our visit we learnt that many of men and young boys were arbitrarily picked up in village after village under the guise of proceedings under section 107/151 of the Jammu and Kashmir Code of Criminal Procedure, 1989. People informed that in most villages there were arrests under section 107/151 CrPC, and the local *auqaf* committee was forced to give community bonds to the Tahsildar to get the arrested boys released.

It is necessary to understand that there is no notion of community bonds in law and in fact it amounts to collective punishment, which has been detailed in the Chapter 3. Of course, it is a practice that has emerged with the complete involvement of the top police leadership.

When the Team informed the Chairperson, SHRC, of what they had seen especially the abuse of 107 CrPC, PSA cases, torture, night raids, etc. the Chairperson had no comments and said that the SHRC has tried its best to protect human rights whenever cases have come before it. He referred to the order dated August 13, 2019 passed in SHRC/147/2012 and clubbed matters where the SHRC has taken cognizance of the mechanical manner in which orders are passed under section 107/151 CrPC by the Naib Tehsildars and had recommended to the government to take away these magisterial powers from the Naib Tehsildars.

Jst. Bilal Nazki, Chairperson, J&K SHRC informed us of an order dated August 13, 2019 in SHRC/147/2012 and clubbed matters wherein the SHRC has found that:

*“The Orders under section 107/151 are passed by Magistrate mechanically in most of the cases. Magistrate are Naib Tehsildars who appeared to have no knowledge or training in dealing with matters related to fundamental rights like right to liberty. Right to Liberty is the most precious precious right of every citizen and a person cannot be deprived of this right by mere asking on police inspector or even a police constable. These cases have a pattern that a police officer comes to Naib Tehsildar who happens to be a magistrate with a request to detain a person u/s 107 because of imminent danger to public order. There are hundreds of persons detained in this fashion throughout the State and a long list is before the Commission. One of the order which is a sample order is passed in case of Irshad Ahmad Khan Vs State o J&K. It appears, police has kept proforma whenever they*

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126 Ibid.

need to take a photo copy of a proforma and fill the blanks like the name of the person they want to arrest and the date. This proforma makes an interesting reading. According to this sample order: **"The SHO reports to the executive Magistrate that while on patrol the police found a person in suspicious circumstances who has no source of income and therefore came to the conclusion that he would be making his living by doing some illegal acts, therefore, the person was apprehended and is being produced before the Magistrate for taking action u/s 109 Cr.PC"**

The Magistrate on receiving this report on the same day passes an order for ordering detention of the person produced before him. This order also makes an interesting reading, which is addressed to Superintendent Central Jail, Srinagar: **"You are hereby informed that the person under detention was not able to produce any bail, therefore, you are ordered to receive him in jail and keep him in Central Jail, Srinagar till next date i.e. 07-12-2016. Order was passed on 02-12-2016."**

The request of the police and the order of the Magistrate both show that the detention was illegal. Under section 107 only show cause notice could be given and no order can be ordered. There is another pattern that on the date fixed by the Magistrate such detained persons are not produced before the Magistrate but Superintendent Jail sends a letter to Magistrate that remand be extended as the detenu could not be produced because of the law and order problem. This process goes on and on and it appears we are living in rule of Jungal where an Executive Magistrate can deprive a person's liberty for an indefinite period of time without giving any reasons.

The Proforma reads that the patrolling party had seen a person with utmost care, the police was able to arrest the person and is being produced before the Executive Magistrate and on the same day the Magistrate passed detention order and on the top of it he wrote section 107. This order was addressed to superintendent jail, Srinagar. He directed the Superintendent Jail to keep the custody of the detained person till 07/12/2016. Surprisingly, there is a pattern that the Superintendent Jail does not produce the detenu on the date mentioned in the warrant but he sends a request that because of law and order problem the detenu cannot be produced. This is the worst type of violation of human rights. The matter is well settled by the Supreme Court in a famous case *Madhu Limaye Anr V/S Ved Murti & Ors*, that people cannot be detained mechanically u/s 107 without informing them of the allegation, without even giving them a show cause notice as to why they should not be asked to file a bond, without giving them opportunity to produce the bond they are detained for months together and only once they are produced before the Magistrate and the Magistrate go on extending the detention period.

I would have recommended action against these officers but I have met some of them. They are Naib Tehsildars most of them have no training/knowledge whatsoever to deal Cr.PC or law relating to Personal Liberty. Most of them have not even read chapter 8 of the Cr.PC. Therefore, I am not recommending any action against these officers but I am recommending government to consider taking away the magisterial powers from Naib Tehsildars. These powers should be exercised ideally by Judicial Magistrate and such of the Executive Magistrates who are well trained. The government shall make arrangements for having refresher courses for all Executive Magistrate so that right of liberty of a citizen is not compromised. With these recommendations the matter on disposed of."

Given the lack of any documents in the possession of people arrested under Article 107/151, it is seen that the pattern identified in the SHRC order still seems to apply to the arrests in the wake of August 5, 2019.

## 5.4 Detentions under the J&K Public Safety Act, 1978

In anticipation of, and on account of the decision on J&K, the State Government has indiscriminately invoked the Jammu and Kashmir Public Safety Act, 1978, which allows for detention upto 2 years.

*“Every illegitimate action by the Army is sought to be legitimised by draconian laws...we are fearing an army occupation as well as a legal occupation”.*

*“In Kashmir Valley, as in other sites of occupation, law is central to the project of establishing, enacting and maintaining repressive authority and militarised governance through extraordinary legal measures and everyday jurisprudential practices alike”<sup>127</sup>.*

**Jammu and Kashmir Public Safety Act, 1978 (PSA):** Jammu and Kashmir Reorganisation Act, 2019 repeals more than 150 State laws but this is not one of the laws which has been repealed.

PSA was brought into effect in 1978. It was much later that the legislation was frequently used to control militancy-related incidents. Under this Act, the government can declare any area as ‘protected’ and exercise authority to regulate the entry of any citizen in the protected area. Attempts to forcefully enter the designated areas invite prosecution. PSA gives the J&K government the power to detain anyone who “acts in any manner prejudicial to the maintenance of public order”. This detention without trial happens under the pretext of maintaining public order. Lawyers advise clients not to apply for bail for at least 1.5-2 months, otherwise they can be charged under PSA.

Section 8 of the PSA provides for arresting and imprisoning a person without trial for upto one years on mere suspicion of the district executive authorities that they may disrupt law and order in the state or for two years, on grounds that they may act in a manner prejudicial to the state. Thereby, it permits detention without judicial intervention up to two years. If a person is detained on apprehension that he will disturb public order he can be detained for 1 year while if he is detained as a threat to security of state he can be detained for two years.

However in 2012, the act was amended to provide in the case of first-time offenders or

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<sup>127</sup> Duschinski, H. Hoffman, B. (2011) “Everyday violence, institutional denial and struggles for justice in Kashmir”. *Race & Class*. 52 (4). 44-70. 46.



individuals who act against the security of the state for the very first time-the detention period for such individuals was reduced from two years to six months. But the option of extending the term of detention to two years was kept open, if there is no improvement in the conduct of the detainee.

Section 22 further provides that no suit, prosecution or any legal proceeding shall lie against any person for anything done or intended to be done in good faith in pursuance of this Act. These provisions of the act give same impunity to armed forces as are given under AF(JK)SPA.

The Divisional Commissioner or a District Magistrate may issue a detention order. Once a person has been detained, the detaining authority must inform him or her of the grounds of detention within 10 days of detention in a language they understand. The detained person must also be given an opportunity to make a representation against their detention to the government.

All detention orders and representations made by detained persons must be placed before an Advisory Board within four weeks from the date of the detention order. The Advisory Board is a government-appointed three-member body, composed of High Court judges or individuals qualified to be judges of a High Court. The Advisory Board is responsible for reviewing the detention order, representation by the detained person, and any other information it considers necessary, to determine whether or not there is sufficient cause for the detention of the person. The government must act in accordance with the Advisory Board's conclusions in either confirming or revoking the detention order.

The detention of persons below the age of 18 is prohibited, following amendments to the Act passed in 2012.

In May 2018, the government of Jammu and Kashmir passed an ordinance (an executive order) which changed the manner in which the members of the Advisory Board were selected.

In the wake of the Pulwama attack, in August 2018, scores of detainees were slapped with this law, and J&K Governor Satya Pal Malik had approved an amendment to move detainees to jails outside the State.

Detentions under PSA have been an ongoing phenomenon. For e.g. in 2016 there have been over 600 detentions under the PSA<sup>128</sup>. A boy named Mustafa was first arrested when he was 14 years old under the Arms Act, tortured brutally by the army, the BSF, and the CRPF and by the time he was 22 years he had 23 FIRs lodged against him and had been acquitted in 5 cases. He had 7 successive PSA detention orders foisted on him which were all quashed by the High Court, but he had not been released despite the orders and the acquittals. These detention orders under PSA are called “revolving door PSA”. Once a judge asked him after Eid, how it had been to which he replied “*ghulamon ki koi Eid nahin hoti*”<sup>129 130</sup>.

128 Noorani, A.G., (2016). Retrieved from <http://www.greaterkashmir.com/news/opinion/story/233265.html>.

Maneksha, F. (2019). The Public Safety Act Is a Political Weapon For the Government in Kashmir. Retrieved from <https://thewire.in/government/public-safety-act-kashmir>.

129 Jammu and Kashmir Public Safety Act, 1978. Retrieved from <http://www.refworld.org/docid/3ae6b52014.html>.

130 He eventually joined the militants and was killed in April, 2018 and was buried opposite the court complex. At the time of his funeral, there was stone pelting at the court complex. Saraswat, P. (2017). Zubair Ahmed Turay and

This law, and preventive detention in general, has been subject to judicial scrutiny, and in this regard, reference The J&K High Court has held that<sup>131</sup>:

*“... The security of the State definitely is a prime concern. A person who affords to cause any type of insecurity has to be deterred by having resort to preventive laws but before having resort to preventive laws, it has to be born in mind that as a necessary corollary while passing preventive orders, a cherished right to liberty gets curtailed. The curtailment of liberty can be imperative but only when it shall be reasonable and shall be warranted on the basis of a cogent material. Human right has to be respected. Respect for such right can be ensured only when safeguards provided for respecting such right as envisaged by the preventive laws itself in tune with the constitutional mandate are strictly complied with by the concerned authorities. The duty is cast on the Detaining Authority both to issue preventive orders and also to safeguard the human rights. The authority has to balance the two. The authority has to shun the path of casualness and arbitrariness. jugglery of words used in the grounds of detention or the order of detention shall not be a substitute for exercise of valuable powers vested in the authority...”*

In regard to preventive detention the Supreme Court has stated that<sup>132</sup> preventive detention is often described as a "jurisdiction of suspicion". It further held that:

*“33. Prevention detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles. It follows, therefore, that if the ordinary law of the land (Indian Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.*

*34. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: Was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Indian Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal.”*

However, in reality, detention orders are issued at will without any scrutiny or evaluation by the competent authorities.

It has been used indiscriminately in the wake of the August 5, 2019 decision. The irony that this law has been invoked against Farooq Abdullah, whose father introduced the law, is not lost on the people. The top political brass of all political parties in Kashmir are currently arrested under PSA and in detention. The people in the Kashmir Valley have no sympathy for the PSA cases slapped against this political leadership and cannot help but laugh at the irony of the situation. As one man said, *“they were the defenders of the Indian state, who justified the gradual erosion*

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the “Missing Men” of Kashmir’s Militancy. Retrieved from <https://www.thequint.com/news/india/zubair-ahmed-turay-kashmir-shopian-militancy>

131 Ghulam Nabi Samji v. State, MANU/JK/0227/2010, High Court of Jammu and Kashmir

132 Rekha v. State of Tamil Nadu, MANU/SC/0366/2011, Supreme Court of India, (2011) 5 SCC 244

*of our sovereignty and justified the torture, killings, incarceration by the armed forces, and today the very same Indian state has treated them like criminals!”*

The State is yet to put out the figures but the estimates are that hundreds of people have been detained under this law. Lawyers we met informed us that the dossiers prepared under the PSA, also called grounds of detention, indicate that people have been booked for alleged offences in the past. They added that most of the people charged under the PSA have been detained on grounds of “likely to disturb public order,” which amounts to “thought” crimes. Without any reason whatsoever hundreds are shifted to jails outside the state, and family members are completely in the dark about their whereabouts.

That the law is abused and used as a political tool to silence dissent is apparent from the fact that, in a written reply to the Legislative Assembly of Jammu and Kashmir in January 2017, the then-Chief Minister Mehbooba Mufti stated that from 2007 to 2016, over 2400 PSA detention orders were passed, of which about 58% were quashed by courts<sup>133</sup>. Yet it continued to be used, and the Chief Minister stated in the Assembly in January 2018 that 525 people had been detained under the PSA in 2016, and 201 in 2017<sup>134</sup>. Government statistics are often inconsistent. According to information obtained through Right to Information (RTI) applications, over 1000 people were detained under the PSA between March 2016 and August 2017<sup>135</sup>. As of now, there is no certainty about the number of people who have been legally detained on account of the abrogation of Article 370 either under section 107/151 proceedings or under PSA. There is no figure of those legally arrested post August 5, 2019 on account of protests or stone pelting or any such act of resistance. Such being the case, there is absolutely no estimate of the number of persons, including juveniles, who are illegally in detention, either in army camps, or in police stations, or in circulation between the two.

Based on a newspaper report, at least 4,000 people were arrested and held under the PSA though authorities have repeatedly declined to provide a tally of how many people have been taken into custody, apart from confirming more than 100 local politicians, activists and academics were detained in the first few days after the state was stripped of its semi-autonomous status<sup>136</sup>.

## 5.5 Casual invoking of J&K Public Safety Act, 1978

In reading some of the detention orders passed under PSA, we find that PSA has been slapped rather casually, without application of mind and without an appreciation of the law.

**Mr. Zahid Firdous Mir detained under PSA Order No 73-DMG-PSA-2019 dated 08.08.2019:** According to the grounds of detention in the order of the Deputy

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133 Response to Starred A.Q. No. 123, Jammu and Kashmir Legislative Assembly Budget Session 2017, as cited in “Tyranny of a ‘Lawless Law’”, Amnesty International

134 Geelani, Rizwan, S. (2018). 726 persons detained under PSA in 2 years, says Govt. Retrieved from [www.greaterkashmir.com/news/jammu/726-peretained-under-psa-in-2-years-says-govt/272067.html](http://www.greaterkashmir.com/news/jammu/726-peretained-under-psa-in-2-years-says-govt/272067.html), as cited in “Tyranny of a ‘Lawless Law’”, Amnesty International

135 Commonwealth Human Rights Initiative (CHRI). (2018). No Rules, SOPs for ordering preventive detentions under J&K PSA. Retrieved from [www.humanrightsinitiative.org/blog/no-rulesops-for-ordering-preventive-detentions-under-jk-psa](http://www.humanrightsinitiative.org/blog/no-rulesops-for-ordering-preventive-detentions-under-jk-psa). (Not accessible on October 28, 2019)

136 4,000 people arrested in Kashmir since India revoked autonomy. (2019). Retrieved from <https://iuvmpress.com/45350> and <https://www.thehindu.com/news/national/about-4000-people-arrested-in-kashmir-since-august-5-govt-sources-to-afp/article29126566.ece>

Commissioner, Ganderbal he is a 19-year-old orphan, unmarried labourer, whose mother was killed in cross-fire during an encounter and whose father was killed by unknown suspects and his body was recovered from the Jhelum river. The sole reason for PSA being slapped against him is his alleged involvement in one solitary case of stone pelting in FIR No. 158/2019 punishable for offences under 147, 148, 149, 336 and 427 of RBC of Police Station Ganderbal. The grounds of detention further states that “... *The prevailing transformative politico-legal situation and the anxiety prevailing in the Society is likely to be exploited by the subject by not only involving himself directly in activities prejudicial to the maintenance of public order but also in provoking and causing disruptive activities to be acted out as a manifestation against the peaceful decorum of the Society, Public Order and maintenance of the writ of the State...*”

**Tanveer Ahmad Ganie detained under PSA Order No 46/DMG/PSA of 2019 dated 10.08.2019:** According to the grounds of detention in the order of the Deputy Commissioner, Bandipora, he is 26-year-old and is charged under PSA under the “apprehension that he will provoke and instigate the people of his locality to protest against the abrogation of Article 370 and Article 35A” and that his “seditious instincts are evident from the fact of his involvement” in one solitary case of stone pelting in FIR No. 84/2019 u/s 148, 149, 336, 307 RPC of Police Station Bandipora

**Muzafar Ahmad Dar detained under PSA Order No 38/DMG/PSA of 2019 dated 10.08.2019:** Aged 33 years he is detained under PSA on the sole ground that he is affiliated with the Awami Itihad Party<sup>137</sup> and is close to the Party supreme and has taken part in rallies organized by the Party. The grounds of detention in the order of the Deputy Commissioner, Baramulla, without providing any details, merely states that “... *your present activities are prejudicial to the maintenance of public peace and order...*”. As per the dossier, there are no criminal cases against this detainee.

**Shabir Ahmad Wani detained under PSA Order No 27-DMKPSA of 2019 dated 07.08.2019:** Aged 35 years, the grounds of detention in the order of the Deputy Commissioner, Kupwara, reveals that he is under detention on the ground that he is likely to mobilize people against the Central Government’s decision and that he “...*is likely to pose a great threat to the maintenance of essential services and supplied as he is hell bent on enforcing illegal shutdown of markets and smooth flow of traffic.*”

Some news reports have also commented on the farcical manner in which PSA has been invoked. One such report<sup>138</sup> states that the detention orders for the two political workers - issued by the District Magistrate of Baramulla on August 10, 2019 - read the same. The first is made out for a 55-year-old political worker of the National Conference (NC) from Hygam Sopore in Baramulla. The second is made out for a 55-year-old political worker from the Jammu and Kashmir People’s Conference (JKPC) from tehsil Pattan. In both cases, the grounds for detention offer no specific proof to support a series of

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<sup>137</sup> Sheikh Abdul Rashid, popularly known as Rashid Engineer, is the President of the Party and he was a legislator from the Langate Assembly seat in north Kashmir. Immediately after the abrogation of Article 370, he was arrested by the National Investigation Agency in connection with a case related to the funding of terror activities in Kashmir. Rashid is the first mainstream politician to have been arrested by the NIA in the case. He was earlier questioned in the case in 2017 and again summoned earlier this week. NIA arrests former Jammu & Kashmir MLA Rashid Engineer in terror-funding case. (2019). Retrieved from <https://m.economictimes.com/news/politics-and-nation/nia-arrests-former-jammu-kashmir-mla-rashid-engineer-in-terror-funding-case/articleshow/70611263.cms>

<sup>138</sup> Sharma, B. (2019). Modi Govt Breaking Detention Laws In Kashmir As Thousands Are Jailed. Retrieved from [https://www.huffingtonpost.in/entry/modi-govt-detention-kashmir-thousands-jailed\\_in\\_5d935408e4b0e9e760531e94](https://www.huffingtonpost.in/entry/modi-govt-detention-kashmir-thousands-jailed_in_5d935408e4b0e9e760531e94)

unsubstantiated assertions. For the NC worker, the government writes, *“You have been found to be one of the main limb for spreading anti-national sentiments among the populace of area of Hygam Sopore in order to vitiate peaceful atmosphere. You are trying to mobilise the people of area of Hygam Sopore and other adjoining areas against the abrogation of Article 370 which ultimately creates grave law and order situation.”*

For the JKPC worker, the government writes, *“You at every available opportunity exhort the general public to raise a voice against the government established by law. You are reported to have stressed the general public to continue the secessionist activities and arousing anti India sentiments in them which poses a major threat to the maintenance of public order. It has been closely observed that you are nurturing the secessionist ideology and in fact you are motivating others to indulge in similar activities. You have been indulging in anti national/anti social activities in order to disturb the peaceful atmosphere of Tehsil Pattan, so that the situation worsens in the area. You are an anti-social element and you have been coming into the adverse notice of the police for creating an atmosphere of unrest.”*

As pointed above in the Nazir Ahmad Ronga is under detention on the following ground: *“Whereas you are very vocal against abolition of Article 370 and 35 A of the Constitution, India and also against the bifurcation of the erstwhile Jammu and Kashmir State. You have led many protests marches and created problems within the district of Srinagar. Besides instigating youth in general and party workers and youth belonging to your community in particular your capacity can be gauged from the fact that you are able to convince your electorate to vote in huge numbers during poll boycott.”*

Advocates in the High Court said that mostly all dossiers submitted by the police under PSA have stock grounds, are generic and sometimes allude to other cases that are there against the Accused/ Detenu. Even the orders of the Magistrate ordering the detention are not reasoned or are the same in all cases. There is no application of the law or mind. They referred to this one case, where one of grounds states that the person sought to be detained had encouraged people to come out and vote during the last elections and hence he has the ability to influence public opinion and use this to encourage people to protest against the abrogation. This, according to advocates, is on the face of it ridiculous as encouraging people to exercise their franchise becomes the basis of a ground of detention.

## 5.6 Transfer to other states

An ingenious method of furthering the mental trauma has been the transfers of deteneus to jails in other parts of the country including Uttar Pradesh, Rajasthan, Bihar and other places which people are still unaware of. During our visit we saw some of the transfer orders and have found that this power to transfer detenues outside of the State is a result of an amendment to PSA, on July 13, 2018, by the Governor which omitted the proviso to section 10, which mandated that permanent residents of the State shall not be lodged in jails outside the State<sup>139</sup>.

- Government order no:-Home/PB-V/1107 of 2019 dated 07.08.2019, 26 PSA deteneus were transferred to District Jail, Agra, Uttar Pradesh
- Government of Jammu and Kashmir Home Department order no:-Home/PB-V/1165 of

139 The Jammu and Kashmir Public Safety (Amendment) Act 2018

2019 and Home/PB-V/1173 of 2019, dated 08.08.2019, 20 PSA detainees were transferred to District Jail, Bareilly, Uttar Pradesh

- Government of Jammu and Kashmir Home Department order no:-Home/PB-V/1233 of 2019 dated 09.08.2019, 24 PSA detainees were transferred to District Jail, Lucknow, Uttar Pradesh
- Government of Jammu and Kashmir Home Department order no:-Home/PB-V/1257 of 2019 dated 10.08.2019, 16 PSA detainees were transferred to Central Jail, Naini (Prayagraj), Uttar Pradesh
- Government of Jammu and Kashmir Home Department order no:-Home/PB-V/1405 of 2019 dated 18.08.2019, 30 PSA detainees were transferred to Central Jail, Varanasi, Uttar Pradesh
- Government of Jammu and Kashmir Home Department order no:-Home/PB-V/1411 of 2019 dated 20.08.2019, 30 detainees were transferred to District Jail, Ambedkarnagar, Uttar Pradesh
- Government of Jammu and Kashmir Home Department order no:-Home/PB-V/1431 of 2019 dated 21.08.2019, 30 detainees were transferred to Central Jail, Agra, Uttar Pradesh.
- Government of Jammu and Kashmir Home Department order no:-Home/PB-V/1532 of 2019 dated 02.09.2019, 30 detainees were transferred to District Jail, Ambedkarnagar, Uttar Pradesh.
- Government of Jammu and Kashmir Home Department order no:-Home/PB-V/1588 of 2019 dated 04.09.2019, 30 detainees were transferred to Central Jail, Agra, Uttar Pradesh.

As per the records available with the Team atleast 240 persons have been shifted to jails outside the State. None of these orders contain any reason for having transferred the detainees to the other states.

We met with some of the families whose members were detained under PSA. Their anger is palpable and they believe that PSA has been specifically used to terrorise the communities against raising their voices against the decision of the central government. In some of the villages in Pulwama we were informed that several young men have been arrested from their village and have been shifted to jails in other states, and their families are struggling to meet them. These families do not have the financial wherewithal to be able to travel to far-flung cities across India which are alien to them. We met with the family of Mir (refer to testimony in section 4.6) from Firdous Colony, Srinagar, who is aged 19 years and works as a car cleaner in a private school. Charged under PSA he has been shifted to Agra jail without any prior information to the family. The family was asked to go and visit him in Agra Jail. However, they do not have information regarding the exact location of the premises where Mir is kept or the procedure to get an appointment to be able to meet him.

They said that the arrests were made stating that they had indulged in stone pelting. One of them asked *"How is it that the punishment for stone pelting in Kashmir is preventive detention in some far-flung jail, while those who lynch in India are acquitted? Is this the notion of justice in your country?"*.

RTI application filed by activist Venkatesh Nayak with the Agra Central Prison for full details on prisoners from J&K and the conditions under which they were being held in the prison, has been denied by the Agra jail authorities. The reason cited for the denial is that it constitutes "third-

party” information and that it may endanger someone or identify informers<sup>140</sup>. Nayak’s earlier RTI application to the Home Ministry demanding copies of orders issued for detaining / arresting leaders and members of political parties currently active in J&K, shutting down internet / telecom services, requiring Amarnath Yatris / tourists to leave etc. and details of political leaders, RTI activists, social activists etc. from J&K who have been detained or are in police / judicial custody which the name of their location, was also denied. Surprisingly, the Home Ministry replied back stating that it did not have any papers relating to the restrictions imposed nor any details of detentions or arrests<sup>141</sup>.

## 5.7 PSA against lawyers

Advocates whom we met work under challenging circumstances. They voiced the concerns that we heard from the common Kashmiris but particularly highlighted the special treatment meted out to the lawyer community in the Kashmir Valley where several leading advocates had been arrested and charged under PSA and some transferred to jails outside the State.

Among the first arrested after the military lockdown in the Kashmir Valley were the President of the High Court Bar Association of Jammu and Kashmir, Mian Abdul Qayoom and former president, Nazir Ahmad Ronga. If Ronga, a former president of the J&K Bar Association, is lodged in a district jail in Ambedkar Nagar, the current president of the Bar, Miya Abdul Qayoom is currently incarcerated in the Agra central jail<sup>142</sup>. The police also booked the presidents of the bar associations of Baramulla district court, advocate Abdul Salam Rather, and of Anantnag district, Fayad Sodagar.

In grounds of arrest of Miya Abdul Qayoom, the police wrote: *'We apprehend that you (referring to Qayoom) will motivate people to agitate against abrogation of Article 370'*.

In his PSA dossier, the District Magistrate of Srinagar has accused Ronga of being affiliated to the Hurriyat Conference led by Mirwaiz Umar Farooq. The charges say that being a lawyer by profession Ronga had been *“looking for criminal cases which were sub-judice against the separatists.”* Ronga has been accused of *“organising seminars, rallies and formulate various programmes”* allegedly *“aimed at creating large scale law and order problem during the 2008, 2010 and 2016 unrests.”* Ronga is also accused of being vocal against *“abolishing Article 370 and 35A of the constitution of India and also against bifurcation”* of erstwhile J&K State<sup>143</sup>.

Mr. Mohammed Ashraf Bhat, detained under PSA Order No DMS/PSA/129/2019 dated 26.09.2019, is the the J&K Bar Association’s general secretary. The grounds of detention alleges that he is *“... develop drastic ideology and became a regular member of J&K High Court Bar Association, where you were influenced by ideology of patron of J&K High Court Bar Association Mian Abdul Qayoom who motivated you to join separatist camp. Since you were inclined towards separatist ideology and readily accepted offer to join Hurriyat (G). You were*

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140 Agra jail denies RTI request on Kashmiri detainees. (2019). Retrieved from

<https://www.thehindu.com/news/national/agra-jail-denies-rti-request-on-kashmiri-detainees/article29714473.ece>

141 Venkatesh, N. (2019) Home Ministry Believes in Internet Ban, Mass Detention, But Not in Paperwork.

Retrieved from <https://thewire.in/government/home-ministry-believes-in-internet-ban-mass-detention-but-not-in-paperwork>

142 Sharma, B. (2019). Modi Govt Breaking Detention Laws In Kashmir As Thousands Are Jailed. Retrieved from [https://www.huffingtonpost.in/entry/modi-govt-detention-kashmir-thousands-jailed\\_in\\_5d935408e4b0e9e760531e94](https://www.huffingtonpost.in/entry/modi-govt-detention-kashmir-thousands-jailed_in_5d935408e4b0e9e760531e94)

143 Naseer, G. (2019) Arrests Under PSA Amount To 'Thought Crime', Say Kashmir Lawyers As 100s Remain Under Detention. Retrieved from <https://www.outlookindia.com/website/story/india-news-arrests-under-psa-amount-to-thought-crime-say-kashmir-lawyers-as-100s-remain-under-detention/339932>



*looking after criminal cases which were sub-judice before various courts against separatists this have given you a prominent position in separatist camp.... Whereas you are vocal against abolishing of Article 370 and 35(A) of the Constitution of India and the bifurcation of erstwhile J&K State....”*

Advocates state that they are unable to voice any opinion regarding the abrogation. They say that alienation from the rest of India is complete on account of the “constitutional fraud” that has been perpetrated. They are under a constant fear of reprisal and backlash from the State if they were to speak out. Not a single advocate we met was of the view that the abrogation would lead to any sense of peace and stability.

## 6. Access to Justice

*Courts have held that a person's access to justice is part of Right to Life<sup>144</sup>, the denial of which undermines public confidence in the justice delivery system. The right of access to justice has been recognised as one of the fundamental and basic human rights in various international covenants and charters<sup>145</sup>. This must be understood, both in a quantitative dimension and also to mean qualitative access to justice. This chapter examines the status of the realisation of this right in Kashmir grappling with a complete information and communication blockade, movement restrictions and terror.*

Rule of law and democratic governance demands strong institutional checks and balances. Judiciary ought to step in to check excesses by the executive and parliament to ensure rule of law and protection of human rights. Access to justice according to the people of Kashmir has been a mere mirage.

With the communication blockade, transport services not functioning and intermittent curfew in different parts of the valley, the courts have become inaccessible spaces and thus, justice dispensation, far-fetched. The lawyers were all of the view that there is a paralysis in judicial functioning that goes beyond the immediate boycott that they have called. Everyone we met told us that the Courts are merely an instrument for the Government and in turn justify the acts of oppression against the people of Kashmir. *"It is a larger systematic problem when dossiers under PSA are mindlessly accepted by Magistrates while passing detention orders"*. More and more people in Kashmir have started perceiving Courts as just another institution of the legitimising gross violations of human rights. Hence, even the court premises have become the site of resistance and protests. Having witnessed how the integrity of the courts have compromised, lawyers say that they have been forced to strike.

We met with the Chief Justice of the Jammu and Kashmir High Court, Jst. Gita Mittal, and had a long discussion with her, where we informed her about our visits across the Valley, and shared with her the various human rights violations and illegalities that people shared with us including the instances of illegal arrests, detention and torture of innocents including children, violence against women, especially during the night raids conducted by the armed forces, that we had learnt of. Further, we raised our concern about the arrests of lawyers in Srinagar and other parts of the valley post the August 5, 2019. We also raised the issue of pendency of Habeas Corpus Petitions and hurdles created in access to justice. The Chief Justice did take pains to tell us about the systems that have been and are being put in place to enable people to access courts even from remote areas, which begs the question does it really translate to access to justice? As she informed us that the meeting was off the record and we are unable to give any more details of the discussion.

### 6.1 Our unwelcome presence

We had two very interesting interactions with the Public Prosecutors (PPs) during our visit to the Srinagar district court.

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<sup>144</sup> See *Imtiyaz Ahmad vs State Of U.P. & Ors* (2012) 2 SCC 688

<sup>145</sup> See Article 14(3) of the International Covenant on Civil and Political Rights

While the Team was observing the proceedings in the TADA/UAPA Court, the Special PP (dressed in civilian attire) called one of the Team members and asked him what he was doing in the court. When the Team member replied that he was part of a Team that was visiting the Valley to assess the situation in the Valley, including access to justice, and in this regard they were observing the Court proceedings, he was warned that they cannot sit in Court and must leave. In a rather menacing tone he said that leave now, and come only if you get the permission of the Judge. The Team member replied that the court proceedings were open to public and in any case they were all lawyers and hence had the right to sit in court, to which the Special PP asked for the name of the Team member and noted it down. When asked to give his name, he replied that he was the Spl PP and that was sufficient. He then said that the Team was wrong in coming to Court and should get the permission of the Judge before entering the Court, and left the Court.

Soon after, on the corridors outside the court hall, a lawyer member of the Team, was accosted by a man in civilian attire just outside the court hall and asked why she was in the court, what was the purpose of her presence here and who was she looking for. On not receiving a reply, the man introduced himself as M. Javed Ahmed and informed her that he was a state appointed special PP for the fast track Court. The lady lawyer was then joined by another lady lawyer from our team. They told him the exact reason they were in Court. Mr. Javed Ahmed then warned in an almost threatening tone to both the women lawyers from the team that they should be careful and not indulge in any “political” activity. He then said, if however, we are interested in doing any apolitical or academic work, we could then contact him on his cellphone number which he gave us. When asked how is his cellphone working when all the phone services are off, he informed us that since he is a PP his phone services are functioning.

## 6.2 High Court

In the High Court at Srinagar we met several lawyers and the representatives of the Bar Associations. They informed us that, while the entire judiciary had been rendered non-operational due to the communications blockade and movement restrictions, the lawyers too have taken the decision to boycott the regular court proceedings over the abrogation of Article 370, communication blockade, systemic clampdown by the State and the arrest of lawyers and prominent members of the Bar Associations.


In the High Court there were only a few advocates in robes appearing in some matters and there were not too many litigants. In our discussion with the members of the Bar we learnt that all the Advocates endorsed the call made by the Bar Association to boycott regular court proceedings. The Bar Association has identified and designated 6 lawyers to appear in urgent matters such as challenges to detention orders passed under the PSA, Habeas Corpus Petitions or applications for family members to visit those detained.

We were informed that prior to August 5, 2019 there were approximately 200 habeas corpus petitions pending, now there are more than 600. From August 5, 2019 more than 330 Habeas Corpus petitions had been filed till September 30, 2019. There are countless detentions that are unlawful, hence, no one except the State knows how many persons are illegally detained. They said there are reports that more than 13,000 people have been unlawfully detained. The family members of those who are detained unlawfully are apprehensive that if they complain about the detention or were to approach the Courts for Habeas Corpus or any other relief, then as a

counter PSA would be slapped and it would become impossible to get them released. Hence, they rather bide their time and hope for release from illegal detention.

## Article 370 Abrogation

# Habeas Corpus Pleas In HC Cross 500 Mark, 343 Shifted To Outside Jails



MONITORING DESK *The Legitimate*  
25/4-4/10/2019

**A**mid the continuous shutdown across the Kashmir valley over abrogation of Article 370, the Jammu and Kashmir High Court received the highest number of Habeas Corpus pleas this year seeking whereabouts of the persons detained by government under Public Safety Act (PSA).

Following the huge number of pleas, the High Court Bar Association also formed an eight member panel to represent the detainees in the Court and offer them all possible legal aid.

The notification issued by the Bar Association advocates Bashir Ahmad Tak, Mir Majid Bashir, Wajid Haseeb, Shah Ashiq Hussain, Zia-ur-Rehman, Syed Musaib, Naseem Qadri and Javaid Rasheed have been nominated to file habeas corpus petitions and represent the detainees before the High Court.

A massive crackdown was launched by state

vis-à-vis the detainees, to approach the following members who have been requested by it to appear for such detainees by filing habeas corpus petitions. The government admits that over 250 people have been booked under the PSA and majority of them have been shifted to outside jails.

As per the reports, following the abrogation of Article 370, the authorities have shifted 343 persons in outside jails of whom the majority is slapped with PSA.

"They have been shifted in Uttar Pradesh and Haryana jails in an order to avoid any problem with law and order in Kashmir valley," reports media.

"239 persons were lodged in four jails of UP and 104 at two jails in Haryana."

In UP, the inmates are lodged in jails at Agra, Varanasi, Bareilly and Ambedkar Nagar.

Among the detained leaders include former Bar president *Mian Qasim* and top business leader *...*

One of their primary concerns in the Habeas Corpus proceedings is the Court and the government's reluctance to hear and proceed with these matters. There are delays at every stage, including at the registry, regarding service of notice etc. Most of these cases were stuck at the stage of service and reply and none were at the stage of hearing or orders. Lawyers who appear for the Government (Government Advocates) are appearing in the High Court, however have been instructed not to accept service in Habeas Corpus petitions in court. A Government Advocate is said to have submitted before the High Court that they had directions from the government not to accept service in court and it would have to be sent to the concerned departments. Given that the postal system is not working, Advocates are forced to take out hand summons (*dasti*) and personally serve the summons in these cases. This causes immense delay in the hearing of petitions. On being served, the State takes 3 weeks to file a reply/ objections to Habeas Corpus petitions. Advocates said that a habeas corpus petition typically takes 3 weeks for orders but now it takes 6-8 weeks. This ensures that a person is held without effective hearing in their case for months.

Advocates pointed out to Rule 8 of the Case Flow Management Rules, 2010 (GAD Letter No. GDC-15/CM/2010 dated 3/3/2010) of the J&K High Court which mandates that:

*“The Notices in respect of writ of habeas corpus, where the person is in custody under orders of the State Government or Central Government, shall invariably be issued by the Court at the first listing and shall be returnable within 48 hours. The State Government or the Central Government, as the case may be, may file a brief return enclosing the relevant documents to justify the detention. The matter shall be listed after notice on the fourth working day after issuance of notice, and the Court shall consider whether a more detailed return to the writ is necessary, and, if so required, shall give further time of a week and three days time for filing a rejoinder. **A writ of habeas corpus shall invariably be disposed of within a period of fifteen days.** It shall have preference over and above the fast track cases.”*

Habeas corpus matters are to be disposed off in 15 days, yet post August 5, 2019 there is not a single order passed or petition disposed. This in effect strikes at the heart of the very purpose of Habeas Corpus petitions, rendering it toothless.

Advocates also spoke of the lock down of communications resulting in litigants being forced to come in person to meet their advocates. They are unable to communicate with each other or with their clients, causing a great deal of difficulty and hampering their work. Further, the Courts are also forcing litigants to ask their lawyers to appear despite the strike, thereby compelling the lawyers to break the strike. It is said that the Chief Justice herself went to the Lawyers canteen and asked the lawyers to appear in their matters, however the strike continues. Advocates told us that in the day and age when the entire judiciary is moving towards more and more digital platforms, in Kashmir today they are being pushed back in time to the extent that now they are dependent on printed cause lists and no access to the High Court website or any other legal website necessary for their practice. Like they said, *“Imagine you’ll practicing in Bangalore or Mumbai for even a single day then maybe you will understand the manner in which the legal practice and access to justice is affected”*.

Regarding deteneus being transferred outside the state the lawyers said that it was intentionally done in order to prevent family members and lawyers appearing for those detained from having access to them. When the president of the Bar Association was arrested he was transferred to Agra Jail within two days.

We were also informed that in one case, an order granting permission for family members to visit a detainee was passed. However later the same day seemingly under pressure the judge modified the order stating that his earlier order granting access to family members be kept in abeyance. In effect nullifying his earlier order granting access. We were unable to access the orders online. Further, we were told that sudden administrative changes were made regarding assignment of cases on account of certain orders being passed by judges. This has caused further concern amongst lawyers regarding the unbiased functioning of the High Court.

Under these circumstances the advocates who we spoke to unequivocally said that there is a systematic effort being made to spread fear among lawyers that those who are vocal and express any form of dissent shall be detained. Many referred to a “fear psychosis”. “It is like being stripped of your robes and made to walk in public naked”. That while Kashmiris were used to betrayals by the Indian State, the abrogation of Article 370 was, as it were, the last nail in the coffin, and that now the demand is the right to determine their own future and nothing less.

## 6.3 District Courts

The first impression of the court complexes in Kashmir is that of alienation and intimidation. The court complexes are all severely guarded by armed forces, barricaded, with concertina wires and high compound walls with barbed wires. The Shopian district court, for instance, has a very hostile environment with a huge jail-like gate, barbed wires and the presence of a military garrison. One notices at least 2 CRPF vans inside a very small court complex. The same was true when we visited the Kulgam district courts.

As one enters the Srinagar district court, the court complex is barricaded. In spite of the seemingly “normal” functioning court, the courtrooms here too appeared to be missing lawyers clad in their black and white attire. The court complex is heavily barricaded with the presence of armed forces and the police. On further enquiry we noticed that the courts were open, yet matters were not taken up except for bail matters, PSA/UAPA remand hearings and where the parties appeared party-in-person, and the lawyers were following the boycott call for regular hearings. We also saw that all the lawyers, including the Public Prosecutors, were clad in civilian clothing, which they informed us was due to security concern as advocates perceived threat of attack and as a matter of protest against the State for the effective abrogation of Article 370, the communication blockade and systemic clampdown by the State. A lawyer stated that it is the first time in his life that he is not wearing a black suit and tie to court.

The court complex in Srinagar had a busy look while the district courts at Kulgam and Shopian bore a completely deserted look. In spite of the seemingly “normal” functioning court, there were no lawyers clad in their black and white attire in the district court complexes. While there were some litigants in the Srinagar district court, there were hardly any litigants in any of the other district courts. Litigants and even Advocates are unable to attend court as there is no communication or transport and there are strict restrictions of movement around the Valley.

We learnt that the courts were open and “functioning”, yet matters were not taken up except for bail matters, UAPA remand hearings and where the parties appeared party-in-person. There are no other cases going on in courts. The court has been granting adjournment, recording that the matter is adjourned “*due to prevailing circumstances (halat)*”. As no one is appearing in cases post 5th August, court sends the Police to homes of the accused in pending charge-sheets/challans etc. to appear and dispose the cases. Traffic challans are being issued and people asked to appear in courts so as to show disposal. The increased militarisation, checkpoints, checking, arbitrary clamping of curfew without any prior warning and restrictions on movement, has meant that litigants and lawyers are unable to reach their offices. The circumstances are such that people are scared to venture out of their houses for any reason, let alone for court. A lawyer told that us that fundamental rights in Kashmir are completely suspended and there is no right to dissent, let alone the right to access to justice.

We noticed that those few lawyers appearing in the District Courts, including the Public Prosecutors, who were appearing in matters, were clad in civilian clothing, which we then learnt was both as a form of protest, and also due to security concern since advocates are being targeted by the State. A lawyer stated that it is the first time in his life that he is not wearing a black suit and tie to court and he is not sure what lies in the future. The lawyers informed that they are only advising clients in cases under UAPA, PSA and CrPC 107/151 and appearing in bail matters only, while the general law practice is suspended on account of the Hartal. One lawyer said that their income has been badly affected, but they intend to continue the Hartal with each other's support.

Lawyers said that as regards the work in trial courts, in the past, if litigants or lawyers were not present, trial court judges would observe on the order sheets “that due to prevailing circumstances, the case is adjourned”. However, the lower judiciary has been directed not to adjourn cases and pass orders even if no one appears in the cases. They have also been directed not to make such observations as the same will mean an admission that the situation is not normal. Advocates state that this is giving an impression of normalcy and functioning. The lawyers are concerned that adverse orders will be passed in cases both in the High Court and lower courts.

Advocates at Shopian district court informed us of how a few lawyers were grilled and tortured which had a chilling effect on them. The people too do not approach lawyers as they know that the Judiciary is not in a position to help. The security and surveillance at the court premises are also increased and the advocates come under the State and armed forces scanner even more. But now they are left with no choice since, more and more people in Kashmir have started perceiving Courts as just another institution of the legitimising gross violations of human rights. We were told that during protests sometimes stones fall on the court premises shattering window panes. Lawyers shared that previously they used to get the windows repaired and broken panes replaced, but now they have stopped. Having witnessed how the integrity of the courts have been compromised, they understand the sentiments of people and stand in solidarity with them.

## 6.4 TADA/UAPA Court

The TADA court at Srinagar district court complex is the only designated court for charges under UAPA in Kashmir, therefore the families and the lawyers from all other districts have to travel to Srinagar to appear at the TADA Court. With the communication blockade, transport services not functioning and intermittent curfew in different parts of the valley, the courts have become inaccessible spaces. An Advocate we met narrated how in one of his cases, the disposal order came on 5<sup>th</sup> August, however he had no way of informing the client. It is only when he chanced upon the client who was looking for him in the Jammu and Kashmir High Court, Srinagar on the day before our visit that he could finally inform his client of the status of the matter.

We had discussions with some of the advocates, including those who had come from other districts in the Valley, to the TADA court. One of these advocates who regularly practices in the Handwara district court had come for a bail hearing to the TADA court at Srinagar in a matter where 4 youth, including one minor, were charged under UAPA in a stone pelting case. The practice from 2016 onwards, he said, was for the police to invoke the provisions of UAPA even in stone pelting cases and since most of the stone pelting FIRs were “open FIRs”, post August 5, 2019, scores of youth and men were being picked up and charged in these FIRs which were in some cases more than a year old. He also informed us that in many cases, even after the accused secured bail, the SHO had been directed not to execute the bail orders. Meanwhile, the accused were being booked in further cases, thereby ensuring continued incarceration. He informed us that in anyway court proceedings were not possible since August 5, 2019 as trials were merely getting adjourned since witnesses in most cases were unable to come to the courts.

We met with the families of the 4 young men and asked them the details of the incident leading to the arrest of these young men. We were informed that the Army and police conducts nightly raids in their village and rounds up the men in the village and searches each house during which time the women and girls are molested and sexually abused. In regard to the 4 young



men, we were told that it was an old case of stone pelting and the serious provisions of UAPA had been invoked. The boys had been picked up and then illegally held in the nearby Army camp where they were tortured and then taken to the police station. During this entire time the family members were unaware of their whereabouts. They were extremely heartbroken about the manner in which the young boys were tortured and humiliated and were extremely agitated at the immense hardships heaped on them post 5<sup>th</sup> August. They are unable to contact anyone since there is no landline in their village and are scared to let their families out of sight also due to the possibility of arbitrary arrests and detentions. They said that ever since they learnt the whereabouts of their boys they have been trying to get them out on bail but this was proving to be difficult.

They said that since this was the sole designated Court in Kashmir, and people were having a nightmare of a time getting to Court in Srinagar from their far-flung village on every date of hearing especially given the communication blockade and movement restrictions. They said that for each trip to Srinagar they incur very high expenses since they have to hire a private vehicle. They also said that every time they head out to Court for the bail hearing, there is no guarantee that they would return to their houses or that their families would be there when they return, such is the torture and harassment from the Army and police.

## 6.5 J&K State Human Rights Commission (SHRC)

The team also met with Justice Bilal Nazki, the Chairperson of the J&K State Human Rights Commission. He said that there was no clarity as to what happens with the pending matters, after 31st October, 2019 when the term of the Commission ends.<sup>146</sup> Due to this, and since the Supreme Court is seized of the matter, the SHRC has not taken up any matter pertaining to post 5th August developments in view of “propriety” and no suo motu cases have been registered. Only 5 cases, not related to the conflict, were registered in the past 2 months whereas previously there used to be 5 cases a day. On our enquiry into the use of pellet guns, we were informed that there are almost 600 cases relating to pellet gun injuries pending before the SHRC from 2016 to August 5, 2019.

The Chairperson was very candid in stating that one of the difficulties in passing orders in pellet gun victim cases was that in certain cases the name of the victims did not match their hospital records since they did not give their correct names when they were taken for treatment. He added that this was solely due to the fact that stone pelting cases are registered against any victim of pellet gun injuries.. He stated that the SHRC had compiled details of pellet gun injuries from three sources: victims approaching the SHRC directly, information received from the Deputy Commissioners and details from human right activists. He provided us with a printout of “*Details of Pellet Victims of 2016 Unrest*” which states that in the year 2016 there were 1423 victims in Srinagar district, 137 victims in Ganderbal, 4 victims in Budgam district, 1237 victims in Baramulla district, 48 victims in Kupwara district, 47 victims in Kulgam district, victims in Pulwama district, 860 victims in Shopian district and 164 cases registered directly at the SHRC i.e. 3967 those injured by pellet guns. Other than this there were 164 cases registered by victims of pellet gun injuries in the years 2017 and 2018.

When the Team informed the Chairperson of what they had seen especially the abuse of 107 CrPC, PSA cases, torture, night raids, etc. the Chairperson had no comments and said that the

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<sup>146</sup> The Jammu and Kashmir government has ordered, on 26.10.2019, the winding up of the Jammu and Kashmir State Human Rights Commission (SHRC) among other commissions w.e.f. 31.10.2019. <https://timesofindia.indiatimes.com/india/jk-orders-human-rights-and-accountability-bodies-shut-so-new-ones-can-spring-up/articleshow/71780280.cms>

SHRC has tried its best to protect human rights whenever cases have come before it. He referred to the order dated August 13, 2019 passed in SHRC/147/2012 and clubbed matters where the SHRC has taken cognizance of the mechanical manner in which orders are passed under section 107/151 CrPC by the Naib Tehsildars and had recommended to the government to take away these magisterial powers from the Naib Tehsildars. He also pointed out to the SHRC Annual reports for the years 2016-17 to 2017-18 which contains the orders passed by the SHRC on a broad range of human rights violations of the people in Kashmir.

When it was pointed out that there are serious allegations of torture and human rights violations, SHRC indicated that it has, even in the past, issued many important orders in cases of enforced disappearances, unmarked graves, forced occupation of land by armed forces, custodial violence, extrajudicial killings, sexual violence, and other cases arising out of the conflict in the state. However, in spite of some strong recommendations of the SHRC against violence perpetrated by the state, the government refuses to submit itself to the jurisdiction of SHRC. The state's denial to act on the recommendations of the SHRC effectively renders the commission a 'toothless tiger'. Placed as *Annexure 8 is Brief Summary of Cases in the SHRC*, where the orders have been summarized, while here we detail a few of the important orders passed in the last few years:

### **6.5.1 SHRC order dated March 26, 2018 on Enforced disappearances**

A large number of cases that have been brought before the SHRC pertain to enforced disappearances with complaints stating that the lost one was taken forcibly by unknown persons or in some cases the army jawans and in some cases militants. The common thread though is the grief and anguish of the family that has no knowledge of the fate of the lost one.

In one case<sup>147</sup> the SHRC observed as follows: "... *This commission also takes judicial notice of the fact that this State in year 2000 was passing through worst type of turmoil and number of disappearances had taken place and many militant related crack downs, combing operations and cross firings had created panic among the masses.,,*" Thereafter the matter was disposed off directing as follows: "... *There are a number of cases of this nature coming the commission. It is true that dependents of such disappeared persons have no proof as to what happened to such persons. Equally the government has no proof that such persons have either crossed to the other side of the border or were consumed by ongoing situation in the state for many decades. However, under law a person whose whereabouts are not known for seven years to those who should normally know their whereabouts can be presumed dead. Since the number of such persons is quite large, and it is also fact that the families suffer. Therefore, government must take care of such families. It is directed that government may frame a scheme which would give some welfare to dependents of such persons, as the state is a welfare state. If persons disappears and his family suffers and government is not in a position to answer about the fate of such missing persons. Government must come to the rescue...*".

### **6.5.2 SHRC order dated October 26, 2017 on Unmarked Graves:**

The SHRC has also dealt with the inescapably horrific practice of unmarked graves in the Kashmir Valley. In one case<sup>148</sup> it was admitted that there were 1486 graves in Poonch and 594 graves in Rajouri, which were unmarked and unidentified and another 1351 graves which were marked and identified, hence the SHRC reiterated its order passed previously in another matter

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147 SHRC/259/2017 decided on 26.03.2018

148 SHRC/IA/502/2012 (258/2011) decided on 26.10.2017

relating to unmarked graves in the districts of Baramulla, Bandipora and Kupwara , The SHRC directed, inter alia, that the dead bodies in the graves shall be identified by all available means and techniques, prosecution of those behind these crimes and the constitution of an *independent body to go in all questions/aspects regarding unmarked graves, disappeared person, identification of buried/dead bodies etc. and to make necessary recommendations.*

### **6.5.3 SHRC orders in 2017 on loss of lives and injuries due to conflict:**

Perhaps most cases pertained to the complaints of loss of life and injuries to civilians in the conflict, wherein the SHRC has passed numerous orders directing payment of compensation and other relief as per the various Schemes of the State Government. In one such case<sup>149</sup> the SHRC directed payment of compensation towards death of a 12-year-old boy in an explosion in Baramulla District at an encounter site due to failure of the forces in sanitizing the site after the encounter. In this instance, there was an encounter that took place at village Ladoora Rafiabab on September 2, 2015, where after the encounter, the boy found an unexploded shell at the encounter site which he took home and tried to open which exploded killing him and injuring his mother. The SHRC held that *“In view of the report of the DGP J&K there is no doubt that the boy died due to negligence of the police. Unexploded explosive shells cannot be left in such a way that an innocent boy will pick it up as a toy and get killed”*. In addition to monetary compensation, the SHRC directed the DGP J&K to initiate action against the officers/officials who were responsible for negligence of their duties.

In another matter<sup>150</sup> the SHRC took cognizance of the excessive force used by the armed forces thus killing a Naidkhai youth namely Farhat Ahmad Dar and held that *“... one cannot escape the conclusion that indiscriminate and excessive force used by the police resulted in the death of a young boy who was a student of 11<sup>th</sup> class...”*. Farhat was shot in the chest during a stone pelting incident in regard to which the Magistrate in his report concluded that the action taken by the police *“... is not coterminous with their status and ultimate loss could have been avoided by resorting to non-lethal methods of firing on non-vital parts or in such manner that no human life would have lost.”*

One shocking matter<sup>151</sup> which the SHRC had to deal with pertains to the case where, in 2005, the petitioner's son had gone for some labour work and unfortunately he was caught in the crossfire between the army and militants in 2005 and was killed. The authorities declared his son to be a Pakistani militant and buried his body along with two militants who were killed in the encounter. It is only after the efforts of the family members that an enquiry was conducted and the body exhumed and identified as the body of his dead son. Thereafter his son was re-buried at Kishtwar graveyard. Despite this woeful incident no relief or compensation was given as per the Scheme, hence the complaint to the SHRC was made, which directed payment of compensation of Rs. 5 lakhs.

### **6.5.4 SHRC orders in 2017 – 18 on forcible occupation of land by armed forces:**

There are cases also in regard to the forcible occupation of civilian's land by the army forcing them to run from pillar to post for compensation. The resident of Panzgam, Kupwara, filed a

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149 SHRC/130/2015 decided on 10.08.2017

150 SHRC/46/2014 decided on 21.08.2017

151 SHRC/02-J/ of 2017 (SHRC/341-s of 2012) decided on 16.08.2017

complaint<sup>152</sup> before the SHRC that 6 ½ kanals of her land was taken over by the army camp and insufficient money was paid to her, wherein the SHRC directed the Deputy Commissioner, Kupwara to look into. In another case<sup>153</sup> filed by the Kashmiri Pandits, presently residing in Jammu, it is stated that they migrated from their village due to the turmoil in 1990 and immediately thereafter the BSF 103BN has occupied their land in Kherman Nandram, Handwara and not paid rent since 1990. During enquiry by the SHRC it is admitted that the BSF has been in occupation since 1990 and it is only since January 2015 that rent is being paid continuously. SHRC, taking these undisputed facts into account, has directed that the arrears of rent since 1990 ought to be paid immediately.

We also asked him whether any action had been taken on the “human shield” case, to which we were informed that a case<sup>154</sup> was registered in regard to the incident, wherein the SHRC has held that there has been a violation of the human rights of Feroq Ahmad Dar who was tied by ropes to an army vehicle and that he was subjected to torture and humiliation and hence directed payment of compensation of Rs. 10,00,000/- (Rupees Ten Lakhs).

## 6.6 Juvenile Justice Board (JJB) and Child Welfare Committee (CWC)

We visited the JJB and CWC in the district of Srinagar on October 1, 2019. There were sittings of the JJB and CWC on the day we went. At the JJB we met with the Magistrate and one other social worker member and one person of the clerical staff. The Magistrate informed us that there were 3 juveniles who had been produced before the Board after August 5, 2019 but they had all been released on bail and none were in detention. All three cases were that of stone pelting. The Magistrate also informed us that so far no juvenile has ever been convicted. When asked if the JJB makes spot visits to police stations to check whether any juveniles are have been detained in the police station, we were informed that they do not make such visits and are only concerned with those juveniles brought before them.

The JJB informed us that the Chief Justice of the J&K High Court had called the Magistrates serving in all districts on JJBs for meeting to discuss the detention of juveniles following the Supreme Courts Order. The Magistrate of the Srinagar JJB denied that any juveniles were being unlawfully detained. He also added that juveniles are almost always released on bail. He also said as per his knowledge no juvenile was arrested under UAPA or detained under PSA.

In comparison the JJB, CWC members said that the communication lock down had severely impacted their work. In fact, they said they were not able to connect with CWCs in other districts and much of their work depends on this sort of interaction. The CWC also told us that most of the children produced before them are from outside the state, in cases of child labour etc and they spend a lot of time sending the children back to their home states. Their work of this nature has come to stand still on account of the communication lock down.

The CWC members stated that in several child care institutions (CCI), several children had been sent back to families around the August 5, 2019. They said this would be shown by the child care institutions as if children were on “leave”. According to them, this would have been done as the CCI would not have staff, uncertainty of food supplies etc. They were not aware of

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152 SHRC/116/2014 decided on 25.05.2017

153 SHRC/67-J/2014 decided on 22.02.2018

154 SHRC/115/2017 decided on 10.07.2017

the exact number of children who may have been sent home or to extended family/ relatives. They would have to evaluate the situation when communications etc. were restored.

On the day of our visit October 1, 2019, the JJB office in Kulgam District was closed and so was the CWC. A lawyer who is affiliated with the District Child Protection Unit from 2017 informed that they are however functioning from the District Court from August 5, 2019 and looking into cases of juvenile arrests. He said that 50% juveniles are arrested under UAPA. He said that they have managed to secure bail for all of the juveniles. He reported 14-15 cases for bail post August 5, 2019, where the matter is still under investigation. He also reported 9 cases prior to August 5, 2019, where the matters were at the stage of charge sheet presentation. He conceded that however these are cases which reach JJB and do not include illegal detentions and wrongful arrests of minors by police. He said while earlier there was some level of monitoring possible at police stations to identify such cases, it is no longer possible to go to the police station, since there is no cooperation, it is unsafe and hostile. 90% juveniles are implicated in false cases. Juveniles are asked to plead guilty and give bond in petty cases, while in UAPA they plead not guilty and go through trial. Acquittals have been obtained in 2 cases from 2018.

## 6.7 Reprisals, surveillance and clampdown on advocates and their right to practice

The advocates informed us that they are operating in an atmosphere of terror since most of their elected representatives in the Bar Associations of the High Court and the districts were arrested and detained under PSA while others have been threatened with the same fate if they speak against the Central Government's unilateral decisions to abrogate Article 370. They said that though advocates have always been in the line of fire in Kashmir, the difference this time is the collective manner in which the lawyer fraternity has been targeted. Besides mass arrests of leading advocates, there is the gnawing awareness of surveillance and reprisals. Many Advocates spoke of an emergency like situation that prevailed all the time.

Advocates state that they are unable to voice any opinion regarding the abrogation. They say that alienation from the rest of India is complete on account of the “constitutional fraud” that has been perpetrated. They are under a constant fear of reprisal and backlash from the State if they were to speak out.

Kashmir, we were informed, has a lawyer fraternity that is very much with the Kashmiri struggle and hence have faced state repression as a consequence. Since the 1990s, lawyers have been put behind bars for their professional work of representing their clients, and, in some instances have had to pay the price of their lives at the hands of the State and non-State actors including Abdul Ghani Lone<sup>155</sup> and Jaleel Andrabi<sup>156</sup>.

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<sup>155</sup> Abdul Ghani Lone was practicing advocate for decades, an MLA and former Minister, who brought together different organizations and parties under the banner of the All Party Hurriyat Conference. He was gunned down by some unidentified gunmen on May 21, 2002.

<sup>156</sup> Jaleel Andrabi was practicing advocate, human rights activist and a strong advocate for independence of Kashmir. As an Advocate practicing in the Srinagar High Court, Mr. Andrabi fought against illegal detention and torture of prisoners, filed several habeas corpus petitions and documented cases of arbitrary arrests and detention, custodial killings and disappearances. Mr. Andrabi was also the Chairman of Kashmir Commission of Jurists, a human rights organization. He represented this organization at United Nation's 47<sup>th</sup> session in Geneva, Switzerland in 1995. According to the lawyers, he was abducted by the RR on March 8<sup>th</sup>, 1996 and could not be traced despite the filing of a criminal case and habeas corpus petition. On 18<sup>th</sup> March 1996, his body was found floating in the river

One of the lawyers we met in Kulgam told us about the UAPA case that had been filed against him last year when he put up a facebook condemning the death of several youth at an encounter site in Larou, due to the negligence of the police and army in failing to comply with the standard operating procedure for sanitising an encounter site. He was arrested under UAPA, and that criminal case has been stayed by the High Court.

We were informed at least 30 lawyers may have been arrested from across Kashmir, but there is no confirmation due to the communication blockade and the State failing to make public the list of persons arrested around August 5, 2019.

Mohammed Ashraf Butt, the J&K Bar Association's general secretary, has been booked under sections 107/151 and is lodged in the central jail in Srinagar.<sup>157</sup> According to the lawyers in the High Court, Mohammad Ashraf Bhat, was arrested after he issued a notice that the lawyers should plead cases of the PSA detainees and other people arrested since August 4, 2019 in the Kashmir Valley.

When we enquired about the status of access to justice in Baramulla District, we were told that we could draw our own conclusions from the fact that the leading lawyer, Mr. Abdul Salaam Rather, who is also the President of Baramulla District Bar Association has been charged under PSA and arrested and other lawyers too face the same fate if they raise their voices.

Post 5<sup>th</sup> August, very few bail applications have been filed by the people. The Lawyers told us that even though there are illegal and arrests especially from the night raids, people rarely approach lawyers because they know that the judiciary is not in a position to help. So they approach the SHO or the Army. Only cases registered under PSA go to court. UAPA cases come up before the TADA court in Srinagar, where the bail applications are filed. One of the lawyers said that: *"Lawyers are currently on strike. The judicial magistrate and additional magistrate try routine cases. Nowadays, many vehicles are impounded by the police for minor traffic violations such as not wearing seat belts. This is being done by the police to show normal activities in courts."*

*"Because of the communication blockade, people are forced to come out to meet us in the courts. Normally, clients would have just made call. The movement of people on the roads is being shown as normalcy"*

Lawyers state that they cannot go with the litigants to the police station lest the police detain them. Practising human rights law in Kashmir is a practise in despair. There is a sense of despondency today. One Advocate said: *"...the system has failed here. It is a total failure of the system, whether designedly or otherwise...No justice is given"*, yet, *"Even if we don't get justice, the cases are a way of fighting and registering protest."* Thus, even despite the disillusionment and frustration is the tenacity to carry on the struggle for the pursuance of the rule of law in Kashmir.

Another Advocate while speaking of what he says is a Constitutional fraud played on the people of Kashmir said *"We are being expected to fight in this system after being stripped of our robes."*

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Jhelum. He had clearly been tortured with his eyes gouged out and shot in the head. Faysal, M. (2017). The murder of Jaleel Andrabi. Retrieved from <https://lostkashmirhistory.com/the-murder-of-jaleel-andrabi/>

157 Ibid

*It is like being naked in the streets”* Many Advocates spoke of an emergency like situation that prevailed all the time.

## 6.8 Supreme Court of India

Post 5<sup>th</sup> August there have been several matters brought before the Supreme Court. Some of these matters were habeas corpus petitions challenging detentions, some pertain to the communication blockade and clampdown while others challenge the abrogation of Article 370 and the reorganisation of the State of Jammu and Kashmir.

### 6.8.1 Habeas Corpus petitions

On August 19, Communist Party of India (Marxist) General Secretary Sitaram Yechury moved such a petition<sup>158</sup> seeking the production before the Supreme Court of former party MLA from Kashmir, Mohammad Yousuf Tarigami. Yechury argued that he was unable to contact Tarigami. When he tried to visit the party leader, he was stopped by the authorities from entering Srinagar. He also stated that Mr. Tarigami was not in good health and was required to be brought to All India Institute of Medical Sciences (AIIMS), New Delhi, for better medical facilities. The matter was heard on September 28, 2019 wherein the Court allowed Sitaram Yechury to go to Kashmir and meet Mr. Tarigami. Further the Court clarified as follows: *“We make it clear that if the petitioner is found to be indulging in any other act, omission or commission save and except what has been indicated above i.e. to meet his friend and colleague party member and to enquire about his welfare and health condition, it will be construed to be a violation of this Court’s order.”* The matter was then taken up on September 5, 2019 wherein the Court considered the report submitted by Sitaram Yechury and directed the shifting of Mr. Tarigami to AIIMS, New Delhi and directed that *“...He will be allowed to be accompanied by one family member of his choice.”* The matter was then taken up on 16.09.2019 wherein the Court noted that Mr. Tarigami was discharged from AIIMS, and that there were no restrictions on him to return to Srinagar. The Court made it clear that the matter was to be kept pending for a decision on the validity of the alleged detention of the petitioner claimed to be without any authority of law with effect from August 5, 2019.

In another habeas corpus petition<sup>159</sup> was filed by one Mohammad Aleem Syed, a law graduate from Jamia Milia University in Delhi to meet his family in Anantnag, as he has not been able to contact the family members since August 4, 2019. The Supreme Court passed an Order on 28.08.2019 wherein the Court “permitted” him to travel Anantnag, Kashmir to meet his parents and after ensuring their welfare, to report back to the Court on the next date fixed and he was directed to immediately file an affidavit of the events that have transpired pursuant to the order of this Court, on his return. The Court also directed that: *“...If required, adequate police protection shall also be provided to the petitioner and also to his parents on proper identification...”* This matter too is currently pending.

In another petition<sup>160</sup> filed on September 04, 2019 the Supreme Court allowed Iltija, daughter to former Jammu and Kashmir Chief Minister Mehbooba Mufti, to travel to Srinagar to meet her mother despite objections from the Government. On September 5, 2019 the Court passed the following Order: *“From the deliberations that have taken place, we are of the view that the State Government has not and does not intend to prevent the petitioner from coming back to Srinagar from Chennai, where she is presently staying and meeting her mother. The petitioner may*

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158 Sitaram Yechury v. Union of India, Writ Petition (Criminal) No. 229/2019

159 Mohammad Aleem Syed v. Union of India, Writ Petition (Criminal) No. 225/2019

160 Iltija v. Union of India, Writ Petition (Criminal) No. 250/2019



*accordingly return to Srinagar on a date of her choice. She would be free to meet her mother in private. So far as moving around in other parts of Srinagar is concerned, the petitioner would be free to do so subject to requisite permission from the district authorities as and when necessary.”* With the said order, the petition was disposed off.

Incidentally, Vaiko, whose decades-old friendship with Farooq Abdullah is well-known, moved the Supreme Court in a petition<sup>161</sup> seeking the issuance of a writ of habeas corpus directing the respondents to produce the body of Dr. Farooq Abdullah, former Chief Minister of Jammu and Kashmir before the Court and set him at liberty. On September 30, 2019, the Supreme Court disposed off the matter stating that: “...After the filing of the writ petition, Dr. Farooq Abdullah, has been detained under the Public Safety Act. The said detention is open to challenge before the appropriate forum. In that view of the matter, we find that no live issue remains to be adjudicated in this writ petition. The same is, accordingly, dismissed. The petitioner is at liberty to approach the appropriate forum, if so advised...”

Habeas corpus petitions, especially in cases of preventive detention, are said to be the protection accorded to people against “executive and legislative despotism”<sup>162</sup> to ensure that wide powers bestowed on a government “were not abused to mutilate the liberties of the people”. Faced with a total information blockade, communication lockdown and movement restrictions, arbitrary detentions carried out in the dark and in an atmosphere of terror and panic, Petitioners have moved habeas corpus cases before the Supreme Court, as also the High Court. We have detailed, in the preceding chapters, the manner in which the habeas corpus petitions before the High Court are dealt with no sense of urgency. In the Supreme Court, instead of passing orders to the authorities to produce people before it, to verify if the detention is as per the procedures established by the law, has merely ‘permitted’ the petitioners to go to Kashmir and ‘meet’ the individuals who were under detention.

Thus when the Supreme Court adopts this “innovative”<sup>163</sup> remedy of telling the petitioners to travel to Kashmir to meet the people who are allegedly detained, instead of directing for them to be produced before the Court, it has effectively exempted the government from responding to questions of legality, which is yet to be looked into in the pending cases of Yechury and Syed. Whereas in the case of Farooq Abdullah, the Supreme Court has evaded examining the question of legality despite taking judicial notice of the fact that his detention under the Public Safety Act was “after the filing of the writ petition”, almost like a consequence of the petition for his release having been filed.

This approach brings back bitter memories of the infamous decision of the Supreme Court in the ‘habeas corpus case’<sup>164</sup>. The view upheld by the majority therein, was that the proclamation of emergency “bars maintainability of a writ petition for habeas corpus where an order of detention is challenged on the ground that it is mala fide or not under the Act or not in compliance with it.” Here, H. R. Khanna, J. dissented and held that the remedy for the enforcement of the right to life or liberty would not stand suspended even if the right to enforce Article 21 is suspended since “The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the rule of law.” He further held that while wide powers to order preventive detention are vested in the State, there is no antithesis between the power to detain

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161 Vaiko v. Union of India, Writ Petition (Criminal) No. 256/2019

162 A. K. Roy v. Union Of India And Anr, AIR 1982 SC 710

163 Bhatia, G. (2019) *Judicial Emergencies: Law and Practice*. Retrieved from <https://indconlawphil.wordpress.com/2019/10/12/judicial-emergencies-law-and-practice/>

164 ADM Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521

and power of the Court to examine the legality of such a detention: *“The impact upon the individual of the massive and comprehensive powers of preventive detention with which the administrative officers are armed has to be cushioned with legal safeguards against arbitrary deprivation of personal liberty if the premises of the Rule of law is not to lose its content and become meaningless... “.*

This decision has been the subject matter of much criticism, rightly and necessarily so. It was a dark spot in India’s legal history where a pliable judiciary sacrificed its independence and commitment to the Constitution and emerged as an able ally of an undemocratic regime. Commenting on the majority judgment, the then Chief Justice of India, Venkatachalliah, in the Khanna Memorial Lecture delivered on February 2, 2009, observed that the same be *“confined to the dustbin of history”*.<sup>165</sup> In fact, the Supreme Court finally acknowledged that there is no doubt that the majority judgment of this court in the ADM Jabalpur case violated the fundamental rights of a large number of people in this country.<sup>166</sup>

Though the view of the majority in ADM Jabalpur was implicitly overruled by subsequent decisions<sup>167</sup>, it was expressly overruled in Puttaswamy’s case<sup>168</sup> only in 2017, and while doing so, the Court held that *“The power of the Court to issue a Writ of Habeas Corpus is a precious and undeniable feature of the Rule of law.”* The Court, in seeking to decisively lay down the judicial terrain of habeas corpus, held that *“A constitutional democracy can survive when citizens have an undiluted assurance that the Rule of law will protect their rights and liberties against any invasion by the state and that judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these, most precious rights. The view taken by Justice Khanna must be accepted, and accepted in reverence for the strength of its thoughts and the courage of its convictions.”*

This mandate has not been discharged by the Supreme Court in the habeas corpus cases brought before it in the context of the undeclared emergency in Kashmir. The assurance that “judicial remedies would be available to ask searching questions and expect answers” has not been met.

## 6.8.2 Petitions challenging communications lockdown

### 6.8.2.1 Anuradha Bhasin Vs. Union Of India [W.P.(C) No. 1031 /2019 filed on 10.08.2019]

Status: Pending - to be listed on November 05, 2019

Anuradha Bhasin is the Executive Editor of Kashmir Times newspaper and has moved the Supreme Court seeking immediate relaxation of all restrictions on mobile, internet and landline services in Jammu and Kashmir and the strict restrictions on freedom of movement in order to enable journalists to practice their profession. It is argued in the petition that there is absolute and complete internet and telecommunication shutdown, severe restrictions on mobility and sweeping curtailment on information sharing in the Kashmir valley, at a time when significant political and constitutional changes are being forged by the Parliament of India to the status of Jammu and Kashmir, is fuelling anxiety, panic, alarm, insecurity and fear mongering among the residents of the Kashmir valley. The press has not been able to contact reporters in other districts. Reporters are not being allowed to go to “sensitive” areas. She has also argued that the information blackout is a direct and grave violation of the right of the people to know about the decisions that directly impact their lives and their future.

<sup>165</sup> Ramdeo Chauhan @ Rajnath Chauhan v. Bani Kant Das and Ors, AIR 2011 SC 615

<sup>166</sup> Ibid

<sup>167</sup> I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1

<sup>168</sup> K.S. Puttaswamy and Anr. v. Union of India and Ors, (2017) 10 SCC 1

The matter was taken up on 16.08.2019 wherein it was ordered to be listed along with Writ Petition (Civil) No. 1013/2019 (filed by Manohar Lal Sharma). Thereafter the matter was listed on September 5, 2019, when the following order came to be passed:

*“List the matter for final disposal on 16.9.2019. Service of notice on unserved respondent nos. 2 to 4 be effected through the standing counsel for the State of Jammu & Kashmir during the course of the day. It will be open for the respondents to file their counter affidavit, to which reply may be filed well in time to enable the Court to hear the matter on the date fixed.”*

On September 16, 2019, when the matter was taken up and heard, the following order was passed:

*“List the matter on 30.9.2019. In the meantime, the Union of India and the State of Jammu & Kashmir shall file their respective affidavits which will also indicate their response(s) to all the interlocutory applications. The State of Jammu & Kashmir, keeping in mind the national interest and internal security, shall make all endeavours to ensure that normal life is restored in Kashmir; people have access to healthcare facilities and schools, colleges and other educational institutions and public transport functions and operates normally. All forms of communication, subject to overriding considerations of national security, shall be normalized, if required on a selective basis, particularly for healthcare facilities.”*

Thereafter the matter was again taken up on October 1, 2019, when the following order was passed:

*“The applications for intervention/impleadment (I.A.Nos.136292/2019, 139141/2019, 139555/2019, 140276/2019 and 140514/2019) are taken on record. It is made clear that no further applications for intervention/impleadment shall be entertained. Liberty is granted to file additional documents in support of the applications for intervention/impleadment with a copy in advance to the counsel for the opposite side. The affidavit filed on behalf of respondent No.2 – State of Jammu and Kashmir today in the Court is taken on record. Respondent No.1 - Union of India is directed to file an affidavit within a week’s time with a copy in advance to the counsel for the petitioner.”*

On October 16, 2019, the Supreme Court passed the following order:

*“When these matters came up for hearing today, learned Solicitor General appearing for the Union of India made a submission that after filing the counter affidavit in these matters, certain further developments have taken place and some of the restrictions imposed have been relaxed, particularly with reference to mobile connectivity as well as the landlines services etc. and, therefore, he wants to file another additional affidavit indicating the steps taken by the Government about relaxation of some restrictions. He also made a request to accommodate him for a week only. During the course of hearing, we are informed by the learned Senior counsel appearing for the petitioners that the orders which are issued by the authorities relating to the restrictions imposed have not been provided to them so far. When we asked the learned Solicitor General about the non supply of orders issued by the authorities relating to the restrictions imposed, particularly with respect to the cell phone services as well as Section 144 proceedings, he claims privilege over those orders. He, however, states that those orders can be produced before this Court. However, if for any reason, learned Solicitor General does not want to give a copy of those orders to the petitioners, we request him to file an affidavit indicating the reasons for claiming such privilege. Let the matters be listed for further hearing on Friday, the 25th October, 2019.”*

#### **6.8.2.2 Tehseen Poonawalla Vs. Union Of India, W.P. (C) 1017/2019, filed on 07.08.2019**

Status: Disposed off on September 5, 2019

This petitioner was disposed of on September 5, 2019. The Court held that: *“As the issues raised in these writ petitions are being gone into by the Court on September 16, 2019 in another writ petition i.e. W.P.(C) No. 1031/2019, we do not see any necessity of formally admitting these petitions. The petitions are not entertained and are disposed of. It will be open for the petitioners, if so advised, to seek impleadment in the pending matter (i.e. W.P.(C) No. 1031/2019) where issues raised are similar.”*

Thus, two more petitions were filed seeking removal of the restrictions imposed on media reportage of the situation in the state and ensuring supply of essential services to the people. The issue of communication blockade was raised in the Supreme Court in the very first week of the said blockade. The Attorney General gave a mere assurance to the court that the issue will be settled soon, and the court somehow accepted the said assurance of the state without passing any effective order. It has been more than 2 months since the said communication blockade has been imposed and the Supreme Court still fails to see any kind of urgency in restoring the basic fundamental right to communication. More importantly the state had refused to disclose the orders and reasons for such communication blockade.

In its order dated September 16, 2019 in Anuradha Bhasin's case, the Court held that: *“The State of Jammu & Kashmir, keeping in mind the national interest and internal security, shall make all endeavours to ensure that normal life is restored in Kashmir; people have access to healthcare facilities and schools, colleges and other educational institutions and public transport functions and operates normally. All forms of communication, subject to overriding considerations of national security, shall be normalized, if required on a selective basis, particularly for healthcare facilities.”* Instead of reviewing the orders of the executive and putting checks and balances on the power of the executive, the judiciary seems to be further enabling the blatantly callous and unconstitutional acts of the state.

Further in the same matter, the Solicitor-General claimed privilege and refused to disclose the orders to the petitioners and said that the state could disclose them to the court. In the order dated October 16, 2019, the Supreme Court records that if the Solicitor-General wants to claim "privilege" over the orders, then the Court "requests him to file an affidavit indicating the reasons for claiming such privilege." It is pertinent to note that if the Court allows such a "privilege" to the state, to yet again hide behind the "sealed cover" orders, the court would be furthering the, unjustifiable and unaccountable, abuse of power by the state in restricting the rights of citizens which cannot be subject to legal privilege.

The Supreme Court ought to direct the state to make the said orders public and not allow for another sealed paper to be given to the court. The people of Kashmir have a right to information with respect to the orders passed for prohibiting their communication with each other and the world outside by means of restrictions on telecommunication, postal services and internet ban. If no access is given to the people to these orders, they will basically be denied any opportunity to even challenge the arbitrariness or legality of such orders. The Supreme Court cannot be seen to be allowing such blatant abuse of law at the hands of the state.

Unfortunately the approach adopted by the Supreme Court is not merely a striking echo of the habeas corpus case, but also an echo of the tumultuous political and ideological war raging in the nation.

### 6.8.3 Petition on violation of the rights of children

#### 6.8.3.1 Enakshi Ganguly and Anr. v. Union of India, WP(C) No. 1166/2019, Filed on 06.09.2019

Status: Pending, next hearing date November 5, 2019

Eminent child rights expert, Enakshi Ganguly and Professor Shanta Sinha, first Chairperson of the National Commission for Child Rights (NCPDR), have filed a Public Interest Litigation has been filed in the Supreme Court against the illegal detention of children in Jammu and Kashmir in the wake of revocation of Article 370 and bifurcation of State. This petition is based on several reports appearing in the media. The Petitioners have argued, therein, that Jammu and Kashmir is passing through an 'extraordinary situation' and the Court ought to ensure that no excesses take place against women and children, who are admittedly most vulnerable in such tense situations.

When the matter was taken up on 16.09.2019 the Petitioners stated that access to the High Court of J&K was seriously affected by the present situation in the State, hence the Court requested the Chief Justice of the High Court to submit a report on the above issue forthwith.

This report was taken on record on the next date of hearing i.e. September 20, 2019. The Court then went on pass the following order: *"As the issues highlighted pertain to alleged detention of children, we direct the Juvenile Justice Committee of the High Court of Jammu & Kashmir to undertake an exercise with regard to the facts stated in the writ petition and revert to us within a week from today."*

The Juvenile Justice Committee of the High Court of J&K thereafter submitted its report to the Supreme Court which has been referred to earlier in this report. Suffice to state that the JJC has, in regard to the various allegations of child rights violations, not conducted any independent enquiry and has solely placed on record the report of the Director General of Police, which needless to add, denies all allegations. However, the JJC in its report, admits that there are regular Habeas Corpus Petitions pending before the High Court wherein challenge is made to the detention orders on the ground of the deteneus being juvenile.

Incidentally the Juvenile Justice Committee in its Report<sup>169</sup> to the Supreme Court has placed on record the report of the Director General of Police wherein it is stated as follows (para 3(3)): *"... The area falling under police station Soura had witnessed substantial disturbance in which even minors were found to be involved..."*

The matter has since come up on October 1, 2019 and October 15, 2019 and the Petitioners have filed their reply to the JJC Report while the Centre is to file its reply to the same. The matter rests here, and the Court has passed no other orders in regard to the serious allegations and instances detailed in the petition.

### 6.8.4 Challenge to Article 370 abrogation and J&K Reorganisation Act:12<sup>170</sup>

Nine PILs (excluding the one disposed of) have been filed challenging the Parliament's decision to abrogate Article 370 by amending the definition of Article 368 of the Constitution and allowing Constitution and other laws of India to be applicable in J&K. Petitions have also challenged the

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<sup>169</sup> Report of the Juvenile Justice Committee of the High Court of Jammu and Kashmir in W.P. (Civil) No. 1160/2019 titled Enakshi Ganguly & Anr vs. Union of India and Ors.

<sup>170</sup> Placed as Annexure 9: Note on the development of jurisprudence around Article 370 is a detailed Note on the development of jurisprudence around Article 370

J&K Reorganisation Act. Petitioners have contended that these changes could not have been passed by the Parliament without the approval of the Constituent Assembly of the state. The petitions have raised contentions that the principle of federalism<sup>171</sup> and democracy are being violated. All these petitions are listed to be heard along with the Constitution Bench matters (Writ Petition (Civil) No.1013/2019 etc.) on November 14, 2019.

**6.8.4.1 Manohar Lal Sharma Vs. Union Of India, W.P. (C) 1013/2019 filed on 06.08.2019**

Petitioner is a Delhi-based lawyer.

**6.8.4.2. Shakir Shabir Vs. Union Of India, WP(C) No. 1048/2019 filed on 09.08.2019**  
The Petitioner is a J&K-based lawyer.

**6.8.4.3. Farooq Ahmad Dar Vs. Union Of India, WP(C) No. 1082/2019 filed on 09.08.2019**  
The Petitioner is a Ganderbal-based businessman.

**6.8.4.4. Inder Salim Alias Inder Ji Tickoo Vs. Union Of India, W.P.(C) No. 1062/2019 filed on 13.08.2019**  
The Petitioner is a Delhi-based artist Inder Salim alias Inder Ji Tickoo.

**6.8.4.5. Shah Faesal v. Union of India, W.P.(C) No. 1099/2019 filed on 19.08.2019**  
The Petitioners include IAS officer-turned-politician Shah Faesal and politician Shehla Rashid

**6.8.4.6. Radha Kumar v. Union of India, WP (C) No. 1070 / 2019 filed on 17.08.2019**  
The Petitioners include Former MHA appointed interlocutor Radha Kumar, Air Vice Marshal (Retd.) Kapil Kak, Major General (Retd.) Ashok Kumar Mehta and other senior retired bureaucrats.

**6.8.4.7. Muzzafar Iqbal Khan Vs. Union Of India, WP (C) No 1104/2019 filed on 27.08.2019**  
Petitioner is a Retired judge of District Court in J&K and now a social worker.

**6.8.4.8. Soayib Qureshi Vs. Union Of India, WP(C) No. 1068/2019 filed On 09.08.2019**  
The petitioner is a lawyer.

**6.8.4.9. Mohammad Akbar Lone Vs. Union Of India, WP(C) No. 1037/2019 filed On 10.08.2019**  
Petitioner is a member of the National Conference.

**6.8.4.10. Vineet Dhanda Vs. Union of India, W.P. No. 1079/2019, filed on 20.08.2019**  
Status: Disposed off on September 5, 2019  
The Petitioner is a lawyer and his self-declared pro-government petition states that people are creating a vitiated atmosphere and provoking trouble in J&K and this should be stopped. This matter was disposed of on September 5, 2019 by the following order: *“As the issues raised in these writ petitions are being gone into by the Court on 16.9.2019 in another writ petition i.e.*

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<sup>171</sup> Supreme Court has time and again reiterated that federalism is part of the basic structure of the Indian Constitution. A Note on Supreme Court's views on federalism in the context of J&K is at *Annexure 10: Note on Federalism in the context of J&K.*

*W.P.(C) No. 1031/2019, we do not see any necessity of formally admitting these petitions. The petitions are not entertained and are disposed of. It will be open for the petitioners, if so advised, to seek impleadment in the pending matter (i.e. W.P.(C) No. 1031/2019) where issues raised are similar."*

The 9 petitions were listed on August 28, 2019 before a 3-Judge Bench. During the hearing, Attorney General KK Venugopal told the Bench that the situation in J&K is "sensitive". Solicitor General Tushar Mehta argued that any move in this issue will have international repercussions and urged the court to not issue any notices in the case. The Supreme Court, however, issued a notice to the Centre and said these matters were serious in nature and also said that these must be considered by a five judge Constitution Bench and will be heard in the first week of October

The matter came up before the Constitution Bench on October 01, 2019. The Court directed for the copies of the petitions to be served and for the counter affidavits and rejoinders to be filed and posted the matter to November, 14 2019 for further directions. The Court also directed the Registry not to entertain any other Writ Petitions on these issues in the future.

Clearly the court again showed no sense of urgency in deciding the issue though it was argued by the Petitioners who challenged the Reorganisation Act that, once the delimitation process starts after the reorganisation law is implemented, the effect would be irreversible. The court, however, did not intervene instead gave the state four weeks' time to file counter affidavits and fixed the next date of hearing on November 14, 2019 - a fortnight after the Reorganisation Act is implemented

### 6.8.5 Earlier petitions

Incidentally there are petitions filed earlier that also need to be mentioned here.

#### **6.8.5.1. We the Citizens of India vs. Union of India, W.P.(C) No. 722/2014, filed on 23.07.2014**

Status: Pending

This is a Delhi based NGO which filed the first petition challenging the constitutional validity of Article 35A in 2014.<sup>172</sup> The last order was passed on August 31, .2019 directing that the matters be listed in the second week of January, 2019. The case is now listed on November 14, 2019 along with the Constitution Bench matters (W.P.(C) No. 1013/2019.

#### **6.8.5.2. West Pakistan Refugees Action Committee Cell-1947 vs. Union of India, W.P.(C) No. 871/2015, filed on 06.11.2015**

Status: Pending

This is the second petition challenging Article 35A<sup>173</sup>. On August 12, 2016 the Supreme Court ordered that the matter be heard along with W.P.(Civil) No.722 of 2014. The case is next listed on November 14, 2019 along with the Constitution Bench matters (W.P.(C) No. 1013/2019.

#### **6.8.5.3. Dr. Charu Walli Khanna vs. Union of India, W.P.(C) No. 396/2017, filed on 03.05.2017**

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<sup>172</sup> Roy, D. (2019) Kashmir Never Separated from Indian Dominion': A Look at 3 Petitions Challenging Article 35A. Retrieved from <https://www.news18.com/news/india/kashmir-never-separated-from-indian-dominion-a-look-at-3-petitions-challenging-article-35a-2-2047285.html>

<sup>173</sup> Ibid



Status: Pending

In this petition filed by Charu Wali Khanna, lawyer and former member of the National Commission for Women, and Seema Razdan Bhargava, a doctor, challenge is made to Article 35A<sup>174</sup>. The last time the matter was taken up was on August 14, 2017 when it was directed to be listed along with W.P.(Civil) No.722 of 2014. The case is now listed on November 14, 2019 along with the Constitution Bench matters (W.P.(C) No. 1013/2019).

**6.8.5.4. Kali Dass<sup>175</sup> v Union of India, W.P.(C) No. 756/2017 filed on 14.08.2017**

Status: Pending

The matter has only been taken up once on September 4, 2017 wherein the Court directed for it to be tagged along with W.P.(Civil) No.396 of 2017. On October 24, 2019, the Court directed the case be heard along with the Constitution Bench matters (Writ Petition (Civil) No.1013/2019 etc.).

**6.8.5.5. Radhika Gill v Union of India, W.P.(C) No. 398/2018 filed on 31.01.2018**

The challenge in this petition is to the validity of the 1954 Presidential Order on the ground that it violated their fundamental rights, including the right to equality, the right to non-discrimination, the right to equality of opportunity in public employment and the right to reside<sup>176</sup>. The matter was heard on August 1, 2018 and directed to be tagged along with W.P.(Civil) No.722 of 2014.

**6.8.5.6. Reapan Tikoo vs. Union of India, W.P.(C) No. 924/2018 filed on 02.08.2018**

On October 24, 2019, the Court directed this matter be heard along with the Constitution Bench matters (Writ Petition (Civil) No.1013/2019 etc.).

**6.8.5.7. Major Ramesh Upadhyay vs. Union of India, W.P.(C) No. 1092/2018 filed on 23.08.2018**

The lead petitioner is a former army officer and an accused in 2008 Malegaon blast case<sup>177</sup> who filed a petition challenging the validity of the Constitution of Jammu and Kashmir. The matter has come up only once on November 13, 2018 wherein the Court directed for it to be tagged along with W.P.(Civil) No.396 of 2017. On October 24, 2019, the Court directed the case be heard along with the Constitution Bench matters (Writ Petition (Civil) No.1013/2019 etc.).

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<sup>174</sup> Chakravarty, I. (2017). Article 35 A: Three challenges to the 63-year old law on 'permanent residents' of Jammu and Kashmir. Retrieved from <https://scroll.in/article/848147/anecdotal-evidence-three-cases-make-a-bouquet-of-arguments-against-article-35a-in-kashmir>

<sup>175</sup> J&K keeps fingers crossed as SC likely to hear pleas on Article 35A this week. (2019). Retrieved from <https://www.theweek.in/news/india/2019/02/25/kashmir-keeps-fingers-crossed-as-sc-to-hear-pleas-on-article-35A-this-week.html>

<sup>176</sup> Constitutionality of Article 35A. Retrieved from [www.scobserver.in/court-case/constitutionality-of-article-35a/know-the-parties-article-35a-case](http://www.scobserver.in/court-case/constitutionality-of-article-35a/know-the-parties-article-35a-case)

<sup>177</sup> Malegaon blast accused retired Major Ramesh Upadhyay to contest 2019 Lok Sabha election from Jadavpur. (2018). Retrieved from <https://www.timesnownews.com/india/article/2008-malegaon-blast-accused-retired-major-ramesh-upadhyay-to-contest-2019-lok-sabha-election-from-jadavpur/280294>

## 7. Kashmir 2019 – A Mental Health Report

A child psychiatrist from the Team did the rounds of the mental health services in Srinagar, on day 2 and 3, and interacted with psychiatrists, therapists, counsellors and social workers who are providing mental health services in Srinagar and other places in the valley. Many professionals were reluctant to talk openly as they feared that that would impact their services adversely. The names of the professionals are therefore being withheld.

Mental health services, it was said, have grown exponentially in Kashmir in the last 15 years, with the help of dedicated professionals who have created facilities to do extensive training (formal and informal), wide scale service development, worked collaboratively with Government and Non Government (National and International) organisations as well community leaders and workers. It was also said that every district in Kashmir has a psychiatrist and associated mental health professionals; there is now a dedicated child mental health unit in Srinagar which also reaches out to grass root workers, such as those in Anganwadis, orphanages and Child Friendly Spaces (CFS), for awareness building and training. This, then, could count as one of the best mental health facilities amongst all states in India. Medical Health facilities have been kept open and functional, despite the lockdown and curfews, by the sheer determination and hard work of the professionals and staff.

However, the services and their functioning has been badly hit by the current crisis. The footfall of children and families, of both new registrations and follow up cases, saw a sharp decline in the month of August 2019, after the shutdown, especially in the districts of Srinagar, Pulwama and Kulgam. The numbers are picking up slowly but are nowhere near the footfall in June – July 2019. It is believed that the lack of transport, communication and lack of trust in Govt. agencies might have contributed to this decline. Attempts by Medical Health professionals to reach out to the community was met with extreme hostility from local youth at first, but they have found innovative ways of collaborating with community leaders and workers to provide Psychological First-Aid (PFA) to children from smaller towns and villages. The clampdown on all forms of communication has hugely hampered the exchange of notes and important data between the different Medical Health centers and organisations in the state, which is essential for good practices of mental health.

The children and adolescents coming for PFA, in two districts, were reporting extreme violence by armed forces and night raids – as corroborated through reports from other team members of this group who have visited various villages and towns in different districts – which has created an atmosphere of terror and panic amongst young people and their families. They were sharing experiences of paralysing fear, acute anxiety, panic attacks, depressive and dissociative symptoms, post traumatic symptoms, suicidal tendencies and severe anger outbursts. Grass root workers are unable to refer children showing clear signs of trauma and abuse, to more centralised facilities that are better equipped to deal with such complex cases, due to the lack of transport and connectivity. There is a marked increase in psychological distress in 70% (as estimated through a recent survey) of the population, although how it translates into mental health disorders is yet to be seen. Professionals working on the ground believe that the aftermath of this imbroglio and the trauma suffered by thousands of people will become evident in the months and years to come.

Widespread disruption of daily life across the state has had a profound impact on the lives of children. There is no school, no routine or structure, no healthy recreation, and no sense of

safety or predictability, which are essential for normal growth and emotional development. Children from orphanages have been sent to homes of relatives and extended family with whom they share no parental bond. This is likely to have a deep and lasting impression on these children's development and emotional wellbeing. Medical Health professionals feel utterly helpless, realizing the long term effects and yet unable to do anything about it.

Some professionals spoke of the effect of the restrictions and uncertainty on their own mental health. Looking after their own children and families, dealing with deep seated fears and anxiety in their own homes has taken a toll on their efficacy at work. One senior psychiatrist described it as a constant state of paranoia which has made people in the community mistrust any and every one. The ones who have proximity to each other have attempted to support one another, have group discussions and find novel ways of coping with such unprecedented stress.

There were reports of extreme impact in young people, often teenagers, who were subjected to torture and abuse, in the form of "Acute Reaction to Stress" and "Post Traumatic Stress Disorder". There were two reported suicides and of many young people running away from home due to fear of persecution or possible dissociative states (as they appear to be as per the descriptions). Amongst the young people with pellet injuries, the ones who did not end up with a disability, were financially stable and had family/social support, did better psychologically than the ones who did not have the same. The second group, most commonly presented with Depression or Post Traumatic Stress Disorder.

Despite the extremely stressful circumstances, most Medical Health professionals showed huge resolve and motivation to reach out to the community and provide any kind of support or help they could muster. They were ready to work and collaborate with any agency that were willing to offer genuine help.

## 8. Concluding Remarks

We travelled across Kashmir, and spoke with a large number of people from across society. The abrogation of Article 370 is in a sense the proverbial last straw that erodes whatever hope that may have existed of a peaceful and just resolution of the people's demands for democracy. It comes, for people, at the end of decades of a systemic and systematic erosion of their hopes and aspiration, at the end of decades during which the promises and assurances made to them by the Indian government have been belied and at the end of three decades of extreme physical brutality, psychological warfare and pervasive intrusive panoptical control.

The freehand given to the armed forces by virtue of laws which allow for almost anything to do be done under the garb of "maintaining law and order" in the valley has resulted in absolute impunity. This impunity enjoyed by the armed forces has led them to use the bodies and minds of Kashmir's people as a political territory to perpetuate violence. The numerous instances of alleged killings, tortures, rapes and vandalism committed by the armed forces calls for investigation and those responsibility for such actions assigned. The Indian state cannot be seen to be allowing it's forces to commit such gross human rights violations without them having to face any consequences.

The blatant abuse of power, the violent aggression and extreme forms of abuse (physical, sexual and emotional) unleashed on the Kashmiri people has caused deep and destructive trauma that may take generations to heal. Not only has it caused extreme suffering and a plethora of mental health disorders of unprecedented proportions, it has also manifested in the seething anger, acute polarization and paranoia, a complete lack of trust and hardening of attitude towards the Indian state

The Indian government's hubris, cowardice, high-handedness, and lack of accountability from August 5, 2019 has been recognised by Kashmir's peoples as an effort to change the composition, shape and face of Kashmir itself. They recognise that this time around the forms of violence, subjugation and subordination and not just military but are accompanied with an ideological nationalism too. As one person, who has faced illegal detention many times before said: 'they may have beaten me, tortured me but never before did they demand I say '*Jai Sri Ram*'.

Amidst a seeming calm every one we spoke with, bore an extreme anger at what the government has done. They said: '*It's better to have war than to have this*', or "*Azaadi or death is the only choice*'. People were clear that the political middle ground has been extinguished and that everyone was willing to face the might of the Indian State. This resolve has translated into the indefinite and complete people's *hartal*. The *hartal* defines the political space of Kashmir today. The *hartal* represents people's urge to take back control, the struggle for democracy and self-rule all in the face of the lockdown. The *hartal* marks a point of departure so to speak, from the illusory possibilities within the present political framework, the focus of the resistance as its next steps are contemplated. The other face of the resistance today is in places like Anchar, downtown Srinagar and old Baramulla, is the persistence of the *dilawars*.

Reality is that this people's response was not in the Indian governments playbook and even on this 88<sup>th</sup> day since August 5, 2019 that we place this report in the public domain does the government know where to go besides more hubris, ideological posturing, false and fake news and above all a fiercer employment of violence and arms against people by the state. This is the

shape of 'normalcy' that the Indian government is persisting with as it takes apart basic norms of a democracy and the very foundations of the 'Republic'.

## 8.1 The Will of the people of Kashmir

*"We have been using a shawl for all these years to cover our bodies. There are several, maybe 10 holes in it. Yet we have been using the same shawl. There is today a 11<sup>th</sup> hole in it and we will continue wearing the shawl"*, an old man in Anchar summarised the situation and the will the people with this metaphor.

*"We will starve, but we want our freedom..."*

*"Our children might die, but we want freedom...."*

*"We will not earn this year due to the hartal, but we are clear, the hartal is here to stay, we want freedom...."*

No matter whom we spoke to, in whatever contexts the discussions were taking place, every narrative was interspersed with *"We want freedom"*. Every Kashmiri we met across the entire Valley were unequivocal about their will, that for Freedom.

While we were not able to speak with the Sikhs in Baramulla, we were told that their will is Freedom too. We met a key leader of the Kashmiri Pandit community in Srinagar who shared the same sentiment of betrayal as that of the Kashmir's Muslims. He said, *"Normalcy hasn't yet been established, as it is made out to be. The volcano is yet to erupt. Even if you integrate J&K completely with India, normalcy won't be restored. In the last 30 years, due to the existence of 370, there was hope of reviving the Kashmiri people's movement."*

The impunity of the army, the police and other agencies in violating their bodies and minds has saturated the contempt people have for the forces. People are emphatic that there is no stopping now even if Article 370 is brought back, They say their struggle will now end only with 'Azaadi'.

Kashmir's society has come to be transformed since August 5, 2019. The divisions that exit within most societies have disappeared. *First*, the whole political spectrum has collapsed into one with the division between parliamentary parties and non-parliamentary parties have ceased even as the cadre of the mainstream regional parties no more offer a political middle ground. *Second*, the generational divide has for all practical purposes disappeared with the hitherto pacifist older generation speaking the same language of resistance as of the young. *Third*, there is collapse which has as yet not been fully articulated, but is possibly emerging which is the divide between Kashmir's society and Kashmir's state apparatus. The erosion of these divisions in society contributes to the strength of the resistance.

## 8.2 The State of the law

With the loathing and revulsion towards the armed forces, distrust and contempt for the Indian government, Kashmir's peoples have lost confidence in the judiciary too. This is a view that has evolved over time as a report of Yale Law School found that the Kashmiri justice system—both the courts themselves and the legal process for victims seeking to bring human rights claims—falls short of international standards. It further states that: *"Although the Kashmiri judiciary*

*attempts to review independently the actions of other branches of government, the judiciary exists within a highly sensitive conflict situation, where executive and military prerogatives are regarded as sacrosanct. Many lawyers of the Jammu and Kashmir Bar Association reiterated that the judiciary functioned as if it were a branch of the Indian executive, whose long - standing official position is that Kashmir is an atoot ang (integral part of India). As such, the Kashmiri judiciary, despite its purported independence, has played an instrumental role in ensuring the Indian government's ability to maintain its control over Kashmir and combat militant separatist groups operating in the region."*

People have become wary of approaching the courts to seek relief since they have seen with their own eyes and experienced the impunity with which the armed forces operate. Be it mass atrocities such as Kunan Poshpora and Sopore or the individual allegations of illegal arrest, detention, torture, custodial death, enforced disappearances, etc. have not met with justice. More recently the staying of the FIR against Major Aditya Kumar who is alleged to have shot five children who were alleged stone pelters, by the Supreme Court has deepened this disillusionment.

People have reached a point where they almost completely refuse to engage with the machinery of the state: perhaps this explains why no complaints have been filed with any state authority or the SHRC. While there is the awareness of the risks associated with reaching out to the state's apparatus, there is also a sense of futility in doing so. Such is the repudiation of the democratic institutions of the state that are meant to serve as 'a check and balance' against an authoritarian government and its uncontrolled armed forces.. As one man said, *"Everyone keeps attacking us, including the politicians, armed forces, media bureaucrats and even your judiciary! We have no more faith left."*

Post August 5, 2019 this has only intensified. Not only is there no faith in the local judiciary but now there's a declining faith in the Supreme Court. While there is hardly any hope that the habeas corpus cases will be heard expeditiously in the High Court, the order passed by the Supreme Court on September 16, 2019 when the petition involving the challenging to the communication blockade has further added to the alienation since it is believed that there is no regard for the Kashmiris and their rights. To recall the said Order read as follows: *"The State of Jammu & Kashmir, keeping in mind the national interest and internal security, shall make all endeavours to ensure that normal life is restored in Kashmir; people have access to healthcare facilities and schools, colleges and other educational institutions and public transport functions and operates normally. All forms of communication, subject to overriding considerations of national security, shall be normalized, if required on a selective basis, particularly for healthcare facilities."*

There can be little doubt that the Supreme Court reinforced its deference to the executive through its failure to take suo moto action against the Indian government for placing 1.25 crore people under siege and suspending their fundamental rights.

As one advocate said: "our alienation from the rest of India is complete on account of the "constitutional fraud" that has been perpetrated by government and has been upheld by the courts through their inaction et we are kept under a constant fear of reprisal and backlash from the State if we speak out". And then the other advocates said in unison, *"public referendum, demilitarisation and restoration of special status to Kashmir are the minimum demands even for a dialogue to begin with the Indian State"*.

The government has used every platform to claim that the people of Kashmir have welcomed the abrogation and that it has been done in their economic and social interests. Yet, in Barmaulla Kulgam, Pulwama, Srinagar and Shopian, we were told, *“If the Indian state is so clear that this (being with India) is the will of the people, then why don’t they put it to vote. They should have no cause for concern as according to them Kashmiris will vote to choose to be with them.”* Perhaps what the Indian government says even it knows is not quite the truth hence our constitutional provisions of Right to Life have been set aside because of the communal greed of the ruling government. Until this question is addressed Jammu and Kashmir will remain a matter of dispute.

A reputed writer on Kashmir question said to us before we left Srinagar: *“if the Indian government thinks it can make Kashmir an integral part of India, then the Kashmiri’s may well decide to make India an integral part of Kashmir...if the Indian government wants to get out of this it will have to rewind its action”*. When an entire people speak about a government’s action not hearing that voice is almost always at everyone’s peril.

We also believe that the Supreme Court of India, above all, must step in when the fundamental rights of any person are transgressed by government actions.

The persistence with which government is violating the fundamental rights of the peoples of Jammu and Kashmir and the failure of the Supreme Court and High Court to address these violations not just takes down their democratic rights but takes apart the very principles of democracy that our republic is founded on.

All people have a right to determine their own future. It is an acknowledgement of and respect for this right that brings peace in society. This right must be enjoyed by the people of Jammu and Kashmir too.

There is no doubt the decision of the Indian government has been opposed by various sections of Indian society too, including the members and organisations of this Team, and demands have been made that status quo ante as on August 4, 2019 including restoring all constitutional and legal provisions that were available to the state of Jammu and Kashmir on that date. This would require repealing of the parliamentary decisions of August 5 and 6 August 2019 and rescinding the Presidential orders C.O. 272 and C.O. 273 along with the repealing of Jammu and Kashmir Reorganisation Act, 2019. With this the government must release all those imprisoned on and after August 1, 2019, and lift the lockdown in all its forms - barricades, communication, transport and all government services as well as restore all civil, political, social and economic rights.

Following this, in order to find a lasting and peaceful solution the Government of India must

2. Recognise that a dispute exists between peoples of Jammu and Kashmir and the Indian government.
3. Repeal the Jammu & Kashmir Public Safety Act 1978 and the Armed Forces (Jammu & Kashmir) Special Powers Act 1990.
4. Withdraw all army and para-military forces from civilian areas of Jammu and Kashmir.
5. Open a transparent unconditional dialogue with the peoples of Jammu and Kashmir and their representatives so as to address peoples’ aspirations to determine and define their own destinies through democratic means and to find a political solution that respects the democratic will of the people in accordance with human rights and international law.



# Annexures

## Annexure 1: Abbreviations

AFSPA	Armed Forces (Special Powers) Act, 1958
AIIMS	All India Institute of Medical Sciences
BSF	Border Security Force
CFS	Child Friendly Spaces
CrPC	Criminal Procedure Code
CRPF	Central Reserve Police Force
CWC	Child Welfare Committee
DSP	Deputy Superintendent
FIR	First Information Report
GPO	General Post Office
ICCPR	International Covenant on Civil and Political Rights
IoA	Instrument of Accession
J&K	Jammu & Kashmir
JIC	Joint Interrogation Camp
JKPC	Jammu & Kashmir People's Conference
JKSRTC	J&K State Road Transport Corporation
JJB	Juvenile Justice Board
NIT	National Institute of Technology
PFA	Psychological First-Aid
PHC	Public Health Centre
PP	Public Prosecutor
PSA	J&K Public Safety Act, 1978

RR	Rashtriya Rifles
RTI	Right to Information
SHO	Station House Officer
SHRC	Jammu & Kashmir State Human Rights Commission
SOG	Special Operations Group
SP	Superintendent of Police
SPO	Special Police Force
STF	Special Task Force
TADA	Terrorist and Disruptive Activities (Prevention) Act, 1987
UAPA	Unlawful Activities (Prevention) Act, 1967
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSC	United Nations Security Council
UPR	Universal Periodic Review
VDO	Village Defence Committee

## Annexure 2: Abrogation of Article 370: Myths and Realities

(Compiled using existing material)

### WHAT HAPPENED?

The Union Government passed a Presidential Order under Article 370(1) of the Indian Constitution, to supersede the 1954 Presidential Order, which, along with several other Presidential Orders, specifies which provisions of India's Constitution apply to Jammu and Kashmir. The superseded Order was unique in that it lays out most of the details on the special status accorded to Jammu and Kashmir under the Indian Constitution.

The new Presidential Order issued on 5<sup>th</sup> August states that all provisions of the Indian Constitution shall apply to the State of Jammu and Kashmir. In addition to the provisions of the Indian Constitution, Jammu and Kashmir will also be subjected to a new Article 367(4) which effectively says:

- The Constitution will be construed as applying to Jammu and Kashmir;
- References to the Sadr-i-Riyasat of Jammu and Kashmir shall mean "Governor";
- References to the Government of Jammu and Kashmir shall mean Governor acting on the aid and advice of the Council of Ministers;
- Reference in Art 370(3) of the Constitution of India to "Constituent Assembly" of the State shall mean "Legislative Assembly of the State".

### MYTHS REGARDING ARTICLES 370 AND 35A<sup>178</sup>

**MYTH 1:** *"J&K integration with India took place in October 1947. Article 370 came into force in 1952, Article 35A came in 1954, four and seven years later respectively. How can Articles 370 and 35A be a condition precedent to merger?"*

**REALITY:** The Instrument of Accession (IoA) was signed by Raja Hari Singh, then ruler of J&K on October 26, 1947. The IoA itself said that Parliament could only legislate on defence, external affairs, communications and some ancillary subjects in respect of J&K. Clause 5 clearly says that "The terms of this my Instrument of Accession cannot be varied by any amendment of the Act or of Indian Independence Act unless such amendment is accepted by me by an Instrument supplementary to this Instrument". Clause 7 said: "Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future constitution."

In other words, there were many things left pending in the IoA and these were to be settled through negotiation in the coming years. Remember that in 1947, Pakistani forces and tribal militias had invaded Kashmir and were on the verge of annexing the whole of the state. In fact, this is what forced Raja Hari Singh to turn to India – otherwise he was vacillating. India rushed troops to Srinagar and the war went on till 1949. After that, negotiations on how to lay out the laws and governance mechanism started. Meanwhile, in order to preserve the spirit of IOA and reassure the Kashmiri ruler, Article 370 was moved in India's Constituent Assembly in May 1949 and passed in October 1949 to become part of the Indian Constitution. In 1950, 1952 and 1954

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<sup>178</sup> The first 4 myths of the 5 is the reproduction of an article "Some Myths about Article 370, 35A and Kashmir" by Subodh Varma published in Newsclick on August 8, 2019. <https://www.newsclick.in/Some-Myths-About-Article-370-35A-Kashmir>

Presidential Orders to settle various issues were passed. Both Nehru and Patel were part of these negotiations, blowing away the other myth that Patel was opposed to Article 370. The RSS was, at that time, propping up an agitation against the land reforms initiated by the Sheikh Abdullah government (appointed by the Raja), cloaking it as a demand for full integration of J&K. Most land was vested with Dogra and Pandit landlords, so the RSS was simultaneously giving it a communal colour, since most peasants tilling the land were Muslims. Perhaps that's why they do not choose to remember the complex history of that period.

What about Article 35A? RSS/BJP propaganda hides the fact that way back in 1927, Raja Hari Singh had passed a Hereditary State Subject Order which allowed only to residents of the state to own land and right to government office. Subsequently, this was included in the J&K Constitution by the state's Constituent Assembly. Because the IoA insisted that only those subjects in the Indian Constitution that were permitted would extend to J&K, the rights of state subjects also had to be preserved. This was done by the Presidential Order of 1954 which inserted Article 35A.

**MYTH 2:** *"Autonomy given under Article 370 caused alienation of Kashmiri people from India."*

**REALITY:** Home Minister Amit Shah asserted that Article 370 was the root cause of spread of terrorism while many RSS/BJP leaders have been saying this for years. As a corollary, it is also said that the article was the source of sentimental belief in a separate Kashmir, providing ground to cross-border terrorists to exploit.

The harsh reality is that it is the erosion of Article 370, in letter and spirit, that has led to increasing disenchantment of Kashmiri people and their search for a way out. First, look at the erosion in letter. Since Article 370 provided for extending provisions of law to J&K through Presidential Orders, issued after concurrence of the State Assembly, this method has been used extensively. By the 1954 Order, almost the entire Constitution was extended to J&K. Out of the 97 entries in the Union List, 94 have been made applicable to the state and out of the 47 entries in the Concurrent List, 26 have been extended to the state. This has largely reduced the powers of the J&K state government. In all, Article 370's provisions were used at least 45 times to extend provisions of the Constitution to J&K.

In this way, not only have the rights of the state been increasingly restricted, the spirit of the section has been violated by simply getting the state government to rubber stamp such extensions. Not that there should be no extensions at all. But so many? And that too by routine approval.

Not only this, the state's own Constitution was amended several times using Article 370. For instance, Article 356 was extended removing a similar provision in the J&K Constitution (Article 92) which called for President's concurrence for imposing President's rule. Extension of President's rule were done using Article 370. Even Article 249 (power of Parliament to make laws on State List entries) was extended to J&K without an Assembly resolution but through a recommendation of the Governor.

Many of these measures were used in the past (by Congress governments) to manipulate the politics of the state – to install ministries or impose President's Rule. The BJP government itself played the same game in the previous term. And, now they have upturned the whole thing lock, stock and barrel.

**MYTH 3:** *"Development was not possible because Article 370 didn't allow it."*

**REALITY:** This is one of the most ludicrous of all myths created by the present government. Referring to the effective scrapping of Article 370, Arun Jaitley tweeted: ""The decision of the government will help the people of J&K the most. More investment, more industry, more private

educational institutions, more jobs and more revenue." Many of the MPs who spoke in the Rajya Sabha and Lok Sabha waxed eloquent on the so-called benefits that would accrue with the removal of special status, including J&K will now become part of Global India", etc.

How did Article 370 stop any government from providing or encouraging more investment and industry in the state? Already most provisions of the Constitution, including Union list entries were extended to the state. Most laws were also extended. The Union governments of the day could have undertaken any economic measures or schemes/programmes they wanted in J&K. In fact, all these years, there were wild promises of special packages, including the one made by PM Modi himself in 2015 for Rs 80,000 crore (of which about Rs.66,000 crore only actually materialised, till 2019).

The truth is that no government at the Centre – whether Congress or BJP/NDA – seriously undertook a complete package which included both economic and political measures that would provide sustainable and long-term benefits to J&K. The attitude was always that of distributing largesse and that too in a very myopic manner. Later, as the militancy took roots, all pretence of economic uplift was abandoned except when elections were in the offing.

What Jaitley and others really mean is that by removal of Article 35A, land will now become available and so, real estate sharks can gobble it up and deploy it for setting up private businesses including "private schools" as Jaitley innocently specifies. Whether this will happen or not is for the future to reveal. It is difficult to believe that private investment will flow into J&K even as the people there are discontented and uncertain.

**MYTH 4:** *"Art 370 and Art 35A, and the arrangement they enshrine, were unique to J&K."*

**REALITY:** This is a popular myth but wholly untrue. Immediately after Article 370 in the Constitution is Article 371 in which various sub-articles exist giving similar special status to various regions/states based on the ethnic histories and cultures of the areas. These include: 371A for Nagaland; 371B for Assam; 371C for Manipur; 371D and E for Andhra Pradesh; 371F for Sikkim; 371G for Mizoram; 371H for Arunachal Pradesh; and 371I for Goa. Among the main provisions (except for Goa and Andhra Pradesh) are included provisions for land ownership, Governor's role, etc. In other states too, there are laws preventing non-domiciliary persons from owning land like Himachal Pradesh (under its own HP Tenancy and Land Reforms Act, 1972). So, it is not as if J&K had something unique. It is notable that most states having such special laws that preserve local customs and culture or prevent land alienation have a special history and demographic composition (for example, tribal population) which calls for sensitive handling and assurances about rights. The same was the case with J&K.

**MYTH 5:** *"Since Article 370 was designed to be temporary, it has been ceased. Reference in this regard is to the "Heading" given to Article 370. Some also proclaimed that Article 370 is still existing with some "modifications and exception" as contemplated in the Article 370(3)"<sup>179</sup>*

There can be no dispute that the provision is temporary, or, that it has not ceased completely. The first statement, however, does not answer the basic issue, temporary in relation to what and why, while the second appears to be mere trickery. The question "why temporary" begs an answer primarily. Connected with this is the issue of status of the Constitution of Jammu and Kashmir and the "Constitution Assembly" for enacting it.

While the Constitution of India was being debated, certain events of great importance occurred

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<sup>179</sup> This section reproduces parts of the article "Reality and Myth of Article 370" by Dinesh Dwivedi which was published in Newsclik on August 20, 2019. <https://www.newsclik.in/Reality-Myth-Article-370>

in the State of J&K. The signing of the instrument of Accession, the Rulers proclamations issued in 1948 and 1949, the establishing of a popular government in J&K, the presence of representatives of J&K in the Constituent Assembly of India as well as the debating of Article 370.

The March 1948 and November 1949 proclamations clearly contemplated creation of a Constituent Assembly for J&K to enact its Constitution. These proclamations note that the Constitution of India was shortly to be promulgated and that it would apply to J&K temporarily, to govern its constitutional relationship with India. They further ordered that the Constitution framed for the State would supersede all other provision as and when it commences.

This is how Article 370 of the Constitution of India, which commenced from January 26, 1950, began to temporarily regulate the constitutional relationship between India and J&K. The temporary character of Article 370 means only this that it would subsists to govern the said relationship till the Constituent Assembly enacted the Constitution of Jammu and Kashmir. This temporary character is also highlighted in the debates of the Constituent Assembly of India (See Article 306A [draft of Article 370]).

The Constituent Assembly of J&K was constituted in 1952 by direct election and began its task of framing the Constitution of State. It was enacted and promulgated in 1956-1957. The provisions of Article 370 continued to regulate the constitutional relationship between India and J&K in the interregnum. This vital guiding inference indisputably follows from the reading of Instrument of Accession, as well as the Rajah's proclamations of 1948 and 1949.

What is important to note is that the Constituent Assembly was not created under Article 370. Though it notices the existence of the Constituent Assembly for the state under Article 370(cl 2&3), it does not regulate it. Article 370 does, in fact, recognise the importance of the Constituent Assembly as a reflection of the will of the people of Kashmir and their special status. It does not create it. It would, at this stage, be prudent to refer to the debates on draft Article 306A (Article 370). N. Gopalaswami Ayyangar observed on page 424 Vol. X of the debates as follows:

*“Again the Government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic or wish to go out of it. We are also committed to ascertaining this will of the people by means of a plebiscite provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be guaranteed. We have also agreed that the will of the people, though the instrument of a Constituent Assembly, will determine the Constitution of the State as well as the sphere of Union jurisdiction over the State.”*

*Again he observed;*

*“At present, the legislature which was known as the Praja Sabha in the State is dead. Neither that legislature nor a Constituent Assembly can be convoked or can function until complete peace comes to prevail in that State. We have therefore to deal with Government of the State which, as represented in its Council of Ministers, reflects the opinion of the largest political party in the State. Till a Constituent Assembly comes into being, only an interim arrangement is possible and not an arrangement which could at once be brought into line with the arrangement that exists in the case of the other States.”*

The scope of Article 370(3) was also explained during the debates by Ayyangar, which is an eye-opener. “Article 370(3) would operate only on the recommendation of CA of Jammu and Kashmir when its work was completed. The exceptions and the modifications under Article 370

(3) (proviso) can only be provided by CA of Jammu and Kashmir and no other body or authority”.

This was the constitutional relationship between the Union and the State, that was visualised by framers of the Constitution of India. It follows that the Constitution of Jammu and Kashmir was clearly overriding in regulating this relationship, as and when enacted, independent of Article 370. The ceasure of Article 370 does not repeal the Constitution of Jammu and Kashmir in any way. The said Constitution was framed with full knowledge and consent of its framers as well as the Union of India.

For those who claim that Article 370 still survives, though with such exceptions and modification, as enacted by the Presidential Order, they ignore the vital fact that Article 370 can neither be ceased nor modified/truncated except on the recommendation of the Constituent Assembly.

There was an objective behind this provision. No sooner the Constitution of J&K was enacted, Article 370 lost its purpose. After its enacting, the Assembly would then have recommend to the President for a Presidential Order, as contemplated in Article 370 (3). No other agency could do it. This was the clear intent of the framers. The entire exercise of power under Article 370 by the President is totally otiose and redundant.

## **REALITY REGARDING THE PROCESS OF ABROGATION<sup>180</sup>**

### **The President's Order is passed under Article 370(1): What does that mean?**

An order passed under Article 370 (1) of the Indian Constitution by the President can be passed only under Article 370(1)(d). Article 370(1)(d) effectively provides that notwithstanding anything in the Indian Constitution, provisions of the Indian Constitution other than Article 1 and Article 370 can be made to apply to Jammu and Kashmir with any modifications and exceptions that the President may deem fit, by presidential order. In short, a Presidential Order like Monday's can apply a modified version of provisions of the Indian Constitution other than Article 370 and Article 1 to Jammu and Kashmir.

In a nutshell, because of Article 370(1)(d) of the Indian Constitution, Monday's Presidential Order cannot cause Article 370 and Article 1 to apply in a modified form to Jammu and Kashmir.

### **But the 5<sup>th</sup> August Presidential Order only applies Article 367 to Jammu and Kashmir in a modified form, so what's the problem?**

On the face of it, Monday's Order only applies Article 367 in a modified form to Jammu and Kashmir. However, the devil lies in the details of the way in which Article 367(4) will now apply to Jammu and Kashmir.

As described earlier, Article 367(4) as applied to Jammu and Kashmir will in turn make Article 370(3) apply to Jammu and Kashmir (by modifying the reference to the "Constituent Assembly of the State" to mean "Legislative Assembly of the State" as described above). Thus, if the Presidential Order cannot cause Article 370 to apply in a modified form to Jammu and Kashmir directly, the Order cannot achieve the same outcome indirectly, through the funnel of Article 367(4).

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<sup>180</sup> This section reproduces the article 'Article 370 and removal of Kashmir's special status: Devil lies in ways which Article 367(4) will now apply to Jammu and Kashmir' by Malavika Prasad which appeared in the Firstpost on August 6<sup>th</sup>, 2019. <https://www.firstpost.com/india/understanding-article-370-and-removal-of-kashmirs-special-status-devil-lies-in-ways-which-article-3674-will-now-apply-to-jammu-and-kashmir-7115631.html>



But if the Indian Constitution says that Article 370 can be applied to Jammu and Kashmir, then why does Article 370(1)(d) prohibit applying a modified version of Article 370 to Kashmir?

Article 370 of the Indian Constitution provides all those elements of the Indian Constitution which will apply to Jammu and Kashmir, namely:

- The powers of the Indian Parliament that shall extend to the territory of Jammu and Kashmir;
- Article 1 and Article 370 of the Indian Constitution will apply to Jammu and Kashmir;
- Provisions other than Article 1 and Article 370 can be made to apply to Jammu and Kashmir in a modified form by a Presidential order provided either concurrence or consultation of the Jammu and Kashmir Government is taken, depending on what is being modified.

Clause (3) of this Article 370 clarifies that all of the above requirements can be overridden by the President in a "public notification" declaring that Article 370 of the Indian Constitution shall have no force or have partial force in the Indian Constitution, so long as the Constituent Assembly of the State of Jammu and Kashmir also consents.

The force of Article 370's text lies along two vectors:

- One vector of Article 370 is in clause (1), which can cause provisions in the Indian Constitution other than Article 1 and 370 to apply to Jammu and Kashmir (in Article 370(1) and (2)) and;
- Another vector of Article 370 is in clause (3), which applies within the Indian Constitution, and also applies to Jammu and Kashmir in an unmodified form, to sustain the special status of Jammu and Kashmir as delineated in the rest of Article 370

By the Presidential Order, modified Article 367(4) as applied to Jammu and Kashmir causes Article 370(3) to be applied to the State of Jammu and Kashmir by replacing "the Constituent Assembly" with the Jammu and Kashmir "Legislative Assembly". However, Article 370(3) applies to India too, in the Indian Constitution. So even if this Presidential Order modified Article 370(3) as applied to Jammu and Kashmir, the Indian Constitution's Article 370(3) continues to require the Jammu and Kashmir Constituent Assembly's concurrence. This Presidential order cannot modify the text of the Indian Constitution, even if it modifies the text of the Indian Constitution as it applies to Jammu and Kashmir. Therefore, for any action under Article 370(3) to be valid for India, we would still need the Constituent Assembly of Jammu and Kashmir to consent.

In short, for the purposes of the Indian Constitution, any modification of Article 370(3) as applied to Kashmir, even if it were valid, would not touch Article 370(3) as it applies in India.

**But the Constituent Assembly no longer exists in Jammu and Kashmir, so is there anything India can do now?**

Many hold the view that Article 370 may not be abrogated at all, legally. This idea merits some exploration.

The constitutionally legitimate way to abrogate Article 370 will be for the President to issue a public notification abrogating Article 370, under Article 370(3) of the Indian Constitution as applied to India. In fact, the Rajya Sabha has attempted to recommend that the President pass

such a notification in its "Statutory Resolution". Such a notification would only have been valid, in India, if the Constituent Assembly of J&K had consented to the abrogation — which needless to say, no longer is in existence.

One conceptual way of thinking about this issue is that Article 370 embodied the terms of a treaty between the State of Jammu and Kashmir (under the Maharaja) and the Dominion of India which laid out the terms on which Jammu and Kashmir would join the dominion. The embodied form of the treaty in Article 370 of the Indian Constitution, represents the coming together of two sovereign territorial units. Therefore, it is important to remember that the Indian Dominion was not bestowing a concession on Jammu and Kashmir, as commentary sometimes propagates. In this background, the Constituent Assembly of J&K would have been the representative of the sovereignty of Jammu and Kashmir, on questions of whether Article 370 would stop having force in the Indian Constitution.

Therefore, one can argue theoretically that J&K is free to decide that it will be represented by any legislative body instead of the Constituent Assembly, on the question of ending Article 370's operation — which is a question of ending the treaty between Jammu and Kashmir and the Union of India. There is no situation in which India can decide for Jammu and Kashmir that a State Assembly can stand in for the Constituent Assembly. This is because, as shown earlier, Article 370(3) continues to apply to India regardless of how the Presidential Order modifies it for Jammu and Kashmir.

In short, only if both Jammu and Kashmir and India were in consensus could Article 370 have been abrogated, and that too by proceeding under Article 370(3) and not Article 370(1) of the Indian Constitution. So long as Jammu and Kashmir wants to retain special status in regard to the Indian State, Article 370 is effectively incapable of revocation or abrogation. The Supreme Court has thus also held that Article 370 is permanent, effectively.

### **Is there any way in which President's Order can be considered constitutionally legitimate?**

Even if we can somehow ignore that the President's Order attempts to extend Article 370(3) of the Indian Constitution to Jammu and Kashmir — which Article 370(1)(d) does not allow the President to do — there is no way to save this Order. This is because a Presidential Order under Article 370(1)(d) requires the "concurrence of the Government" of Jammu and Kashmir, if it aims to extend the Indian Constitution to Jammu and Kashmir on matters not covered by the Instrument of Accession. This is specially provided in the second proviso to Article 370(1).

We know that Jammu and Kashmir has been under President's rule for over a year now. This implies that Jammu and Kashmir is not governed by its own elected representatives, but is being run by an officer of the President of India — presently Governor Satya Pal Malik. Therefore, it remains unclear as to how the Indian Government can argue that it has obtained the "concurrence" of the Government of Jammu and Kashmir.

Some myths and realities about Kashmiri society

**MYTH 6<sup>181</sup>:** *J&K women were not empowered*

**REALITY:** Women in J&K had far superior rights when compared to their mainland counterparts.

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181 Refer to National Family Health Survey – 4 Retrived from <http://rchiips.org/nfhs/NFHS-4Reports/Jammu&Kashmir.pdf>

For instance, a daughter got an equal share of the father's property as a son, regardless of whether she was married or not. Women education indices are above the national average and are comparable with women in Delhi and Kerala. <insert numbers here>

**MYTH 7<sup>182</sup>:** *Women lost their right to property after marrying an outsider*

REALITY: A woman from J&K marrying an outsider did not lose her right to property in J&K. It was the other way around, in fact. The husband would not gain property rights in J&K by marrying a local woman.

**MYTH 8:** *There are no Indian companies in J&K*

REALITY: All telecom operators (Airtel, Jio, BSNL, etc) are present in J&K. All major car dealers (Maruti Suzuki, Hyundai, Ford, Tata, etc) are operate within J&K.

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182 Refer to Karan Thapar's interview with Prof. Faizan Mustafa

### Annexure 3: Ambedkar, Patel and Gandhi on Kashmir

Rewriting and fabricating history and facts to suit its interests is a time and tested ploy, that has been particularly deployed in selling the abrogation of Article 370 to the people of India. The BJP government has been using Patel as their mascot and are trying to capture Patel's vision within the framework of fundamentalism in garb of nationalism. In one of the rallies, Modi made a statement that *"Had Sardar Vallabhbhai Patel been India's first Prime Minister, a part of my Kashmir would not have been with Pakistan today"*.<sup>183</sup> The online machine of the right-wing are also spreading quotes apparently of Ambedkar to say that against Article 370 of the Constitution. Given the generous misinterpretation of Patel and Ambedkar's stand on Kashmir, it is necessary that there be a fact check of the same.

Article 370 was the product of an intense period of negotiations over a period of five months, between May and October 1949 between Jawaharlal Nehru, Sheikh Abdullah and Sardar Patel, and endorsed by Shyama Prasad Mookerjee as member of the Union Cabinet<sup>184</sup>. It is necessary to point out that when the Article<sup>185</sup> was introduced in the Constituent Assembly by N. Gopalaswami Ayyangar on 17 October 1949, he stated that: *"...Again, the Government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic or wish to go out of it. We are also committed to ascertaining this will of the people by means of a plebiscite provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be guaranteed. We have also agreed that the will of the people, through the instrument of a constituent assembly, will determine the constitution of the State as well as the sphere of Union jurisdiction over the State...."*, and thereafter it was adopted by the Assembly. Both Patel and Ambedkar were part of this decision of the Constituent Assembly.

#### *i. Patel on Kashmir:*

According to V Shankar, Sardar Patel was content to leave Kashmir if the ruler felt fit and in the state's interest lay in joining Pakistan.<sup>186</sup> In fact two months before Independence, on visit to Kashmir between June 18 and 23, 1947. Lord Mountbatten told Maharaja Hari Singh *"that if Kashmir joined Pakistan, this would not be regarded as unfriendly by the Government of India"*. Patel had given assurance to Viceroy with respect this matter.<sup>187</sup>

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183 Sowmiya Ashok, Sardar Vallabhbhai Patel's views on Kashmir problem: What the record says, <https://indianexpress.com/article/explained/sardar-vallabhbhai-patels-views-on-kashmir-problem-what-the-record-says-5060077/>. (12.02.2019)

184 Article 370: A Constitutional History of Jammu and Kashmir, A.G. Noorani

185 Introduced as draft Article 306A, later to be numbered as Article 370

186 Shankar: My Reminiscences of Sardar Patel, 1974, p. 127. See also, Gandhi: Patel: A Life, 1991, p. 439. Read *"to leave the decision to the Ruler (of Jammu and Kashmir)"*, and that *"if the Ruler felt that his and his State's interest lay in accession to Pakistan, he would not stand in his way"*.

187 Menon: Integration of the Indian States, 1956, p. 395. See also; Rajmohan Gandhi, Patel wanted Hyderabad for India, not Kashmir – but Junagadh was the wild card that changed the game, <https://scroll.in/article/884176/patel-wanted-hyderabad-for-india-not-kashmir-but-junagadh-was-the-wild-card-that-changed-the-game> (27.06.2018)

As per Rajmohan Gandhi, Patel's soft approach towards Kashmir changed when he heard that Pakistan had accepted Junagadh's plea to accession.<sup>188</sup> On November 14, 1947, Patel gave a speech in Junagadh, where he said that *"If Hyderabad does not see the writing on the wall, it goes the way Junagadh has gone."* Also, *"Pakistan attempted to set off Kashmir against Junagadh. When we raised the question of settlement in a democratic way, they (Pakistan) at once told us that they would consider it if we applied that policy to Kashmir. Our reply was that we would agree to Kashmir if they agreed to Hyderabad."*<sup>189</sup> When Mehr Chand Mahajan, the Prime Minister of Maharaja Hari Singh, demanded the instant presence of Indian soldiers in Srinagar as the forces in Pakistan were *"making preps to enter Kashmir in large numbers"*, while Nehru shunned him away, Patel gave reassurance by saying that *"you are not going to Pakistan"*.<sup>190</sup> Gandhi also writes that though Patel hinted being unhappy about the way the issue of Kashmir was being handled, but he never gave his own solution.<sup>191</sup>

At a public meeting in Bombay on 30 October 1948, Sardar Patel in his speech said: *"Some people consider that a Muslim majority area must necessarily belong to Pakistan. They wonder why we are in Kashmir. The answer is plain and simple. We are in Kashmir because the people of Kashmir want us to be there. The moment we realize that the people of Kashmir do not want us to be there, we shall not be there even for a minute.... We are asked why we are in Kashmir. the reply is clear. If the Muslims in Kashmir tell us to go away, we will get out. We shall not let Kashmir down."* (The Hindustan Times, 31 October 1948)<sup>192</sup>

Historian Srinath Raghavan, claims that Sardar Patel was an architect of Article 370. It is acknowledged that meetings on constitutional implication of Article 370 took place in presence of Patel and some even took place in his residence as is clear from the letter dated 17.05.1949 from N. Gopalaswami Ayyangar to Sardar Patel. Raghvan also suggests that the provisions of Kashmir's autonomy were diluted long time ago. Further in the letter that Patel wrote to Nehru on 3<sup>rd</sup> November, 1949 justifying the alternations in the draft suggested by Sheikh Abdullah he states that *"After a great deal of discussion, I could persuade the party to accept all the changes except the last one, which was modified so as to cover not merely the first Ministry so appointed, but any subsequent."*<sup>193</sup> Although it may be too ambitious to make a statement that Patel was architect of Article 370, it can safely be said that Patel was very much in thick of deciding the substance of the relationship between Kashmir and India, as it crystallised in the form of Article 370.

#### *ii. Ambedkar on Kashmir:*

Just like Patel, Dr. B. R. Ambedkar is also being misquoted by BJP leaders like M. Venkaiah Naidu.<sup>194</sup> As per this quote, Dr. B.R Ambedkar had refused to draft Article 370 of Indian Constitution by saying: *"You wish India should protect your border, she should built roads in your areas, she should supply you food, grains and Kashmir should get equal status as India. But government of India should have only limited powers and Indian people should have no*

<sup>188</sup> Gandhi: Patel: A Life, 1991, p. 439, See also; Hindol Sengupta, The truth about Sardar Patel on Kashmir, <https://medium.com/@hindolsengupta/the-truth-about-sardar-patel-on-kashmir-4a5d8d443259> (26.06.2018)

<sup>189</sup> G M Nandurkar (ed.): Sardar Patel Centenary Volume 2, p. 62

<sup>190</sup> Rajmohan Gandhi, 1991: p. 442.

<sup>191</sup> Rajmohan Gandhi, 1991: p 518.

<sup>192</sup> The Kashmir Dispute: 1947 – 2012, A. G. Noorani (pg 129)

<sup>193</sup> Durga Das, Sardar Patel's Correspondences 1945-50, Navjivan Publishing House, Ahmedabad, 1971, p. 310.

<sup>194</sup> Ajoy Ashirwad Mahaprashasta, Factcheck: Venkaiah Naidu Used Fake Quote to Claim Ambedkar Opposed Article 370, <https://thewire.in/politics/venkaiah-naidu-ambedkar-kashmir-article-370>

*right in Kashmir. To give consent in your proposal, would be treacherous thing against the interest of India and I, as a Law Minister of India, will never do."*

This, however, is not a quote by Ambedkar. It is a fabrication. Ambedkar's writings and speeches are well documented and this quote is not to be found anywhere even in the Collected Works of Ambedkar. On the contrary, this supposed quote is the fabrication of the Sangh parivar, most specifically of Balraj Madhok, a Jammu-based Sangh parivar activist who spent his lifetime campaigning against Article 370, in an article published in the RSS mouthpiece, Organiser, in its Deepawali edition of November 14, 2004!<sup>195</sup>

Dr. B.R Ambedkar was a strong believer of the constitutional values. He was a democrat. He strongly advocated for Right to self-determination. Ambedkar proposed the idea of zonal plebiscite and tried to protect the autonomy of Kashmir by refusing to include Kashmir as part of India under the Representation of People's Act.

Dr. Ambedkar's views on Kashmir can also be seen in his speech on 10<sup>th</sup> October 1951<sup>196</sup>, which is reproduced below:

*"Our quarrel with Pakistan is a part of our foreign policy about which I feel deeply dissatisfied. There are two grounds which have disturbed our relations with Pakistan – one is Kashmir and the other is the condition of our people in East Bengal. I felt that we should be more deeply concerned with East Bengal where the condition of our people seems from all the newspapers intolerable than with Kashmir. Notwithstanding this we have been staking our all on the Kashmir issue. Even then I feel we have been fighting on an unreal issue. The issue on which we have been fighting most of the time is, who is in the right and who is in the wrong. The real issue to my mind is not who is right but what is right. Taking that to be the main question, my view has always been that the right solution is to partition Kashmir.*

*Give the Hindu and Buddhist part to India and the Muslim part to Pakistan as we did in the case of India. We are really not concerned with the Muslim part of Kashmir. It is a matter between the Muslims of Kashmir and Pakistan. They may decide the issue as they like. Or if you like, divide into three parts; the Cease fire zone, the Valley and the Jammu-Ladakh Region **and have a plebiscite only in the Valley**. What I am afraid of is that in the proposed plebiscite, which is to be an overall plebiscite, the Hindus and Buddhists of Kashmir are likely to be dragged into Pakistan against their wishes and we may have to face same problems as we are facing today in East Bengal. Ambedkar's views were praised by most of the national as well as international newspapers including the Manchester Guardian."*

It is apparent that Ambedkar advocated for plebiscite as a principled position and not merely in relation to Kashmir, as seen from these excerpts from Volume 15 of Ambedkar's writing:

*"I have been able to study the part played by the Government of India in connection with the negotiations that have been taking place on the settlement of the Kashmir issue, I am sorry to say that I have not read a single word which I can describe as a positive and not a negative suggestion on the part of the Government of India to settle this question. All that they are dealing with is the question of military allotment. The question of plebiscite is in no way new in the history of the world. One need not go*

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<sup>195</sup> <https://thewire.in/politics/venkaiah-naidu-ambedkar-kashmir-article-370>

<sup>196</sup> How Prime Minister Jawaharlal Nehru Ousted Dr. B.R. Ambedkar from the Cabinet: The Full Story, <https://dharmadispatch.in/how-prime-minister-jawaharlal-nehru-ousted-dr-b-r-ambedkar-from-the-cabinet-the-full-story/>. (14.04.2019)

*back to the ancient past to find precedents for settling questions of this sort by plebiscite. After the First World War, I certainly remember there were two questions to be settled by plebiscite. One was the question of Upper Silesia and the other was the question of Alsace-Lorraine. Both these questions were settled by plebiscite, and I am sure that my hon. Friend Shri Gopalaswami Ayyangar, with his mature wisdom and sagacity, must be knowing of this. It is not possible for us to borrow something from the line of action taken by the League of Nations with regard to the plebiscite in Upper Silesia and Alsace-Lorraine which we can usefully carry into the Kashmir dispute and have the matter settled quickly so that we can release Rs. 50 crores from the Defence Budget and utilise it for the benefit of our people ?”<sup>197</sup>*

As pointed above, Ambedkar advocated a “zonal plebiscite” to resolve the Kashmir dispute. Even the “Election Manifesto of the Scheduled Castes Federation”, which he authored in 1951, said thus: *“On the Kashmir issue, the policy adopted by the Congress Government is not acceptable to the Scheduled Castes Federation. This policy if continued will lead to a perpetual enmity between India and Pakistan, and the possibility of war between the two countries. The Scheduled Castes Federation believes that it is essential for the good of both countries that they should be good and friendly neighbours. For this purpose the proper policy to adopt towards Pakistan should be based upon two considerations. (1) There should be no talk about the annulment of the partition of India. Partition should be accepted as a settled fact not to be reopened and that the two countries to continue as two separate sovereign States. (2) **That, Kashmir to be partitioned– the Muslim area to go to Pakistan (subject to the wishes of the Kashmiris living in the Valley) and the non-Muslim area consisting of Jammu and Ladakh to come to India.**”<sup>198</sup>*

Same year, at a press conference on October 27 in Jalandhar in Punjab, reporters asked Ambedkar about his view on what could be the solution to the Kashmir problem. This was his reply: *“I fear that a plebiscite in Jammu and Kashmir may go against India. In order to save Hindu and Buddhist population of Jammu and Ladakh, from going to Pakistan, in such an eventuality, **there should be zonal plebiscite in Jammu, Ladakh, and Kashmir.**”<sup>199</sup>*

### *iii. Gandhi on Kashmir*

Gandhi visited Jammu and Kashmir only once in his life, reaching Srinagar on August 1, 1947, two weeks before Independence, where he is said to have been welcomed by leaders of the National Conference and refused the hospitality of Maharaja Hari Singh, although he did meet him.<sup>200</sup>

Before his travel on July 29th during his speech at the prayer, Gandhi said the following:

*“Kashmir has a Maharaja and also the subjects of the Maharaja. I am not going to suggest to the Maharaja to accede to India and not to Pakistan. This is not my intention. The real sovereign of the State are the people of the State. If the ruler is not the servant of the people then he is not the ruler. This is my belief and that is why I became a rebel*

<sup>197</sup> Dr. Babasaheb Ambedkar: Writings and Speeches, Volume 15 p.840, available on [https://www.mea.gov.in/Images/attach/amb/Volume\\_15.pdf](https://www.mea.gov.in/Images/attach/amb/Volume_15.pdf).

<sup>198</sup> Dr. Babasaheb Ambedkar: Writings and Speeches, Volume14, Part Two (pages.1317-1327), [https://www.mea.gov.in/Images/attach/amb/Volume\\_14.pdf](https://www.mea.gov.in/Images/attach/amb/Volume_14.pdf).

<sup>199</sup> Dr. Babasaheb Ambedkar: Writings and Speeches, Volume 17, available on [https://archive.org/stream/Dr.BabasahebAmbedkarWritingsAndSpeechespdfsAllVolumes/Volume\\_17\\_02\\_djvu.txt](https://archive.org/stream/Dr.BabasahebAmbedkarWritingsAndSpeechespdfsAllVolumes/Volume_17_02_djvu.txt).

<sup>200</sup> <https://scroll.in/article/939156/mistakes-were-made-on-both-sides-of-this-i-have-no-doubt-gandhi-on-kashmir-weeks-before-he-died>

*because the British claimed to be the rulers of India and I refused to recognise them as rulers. Now they are about to leave India... The people of Kashmir should be asked whether they want to join Pakistan or India. Let them do as they want. The ruler is nothing. The people are everything. The ruler will be dead one of these days but the people will remain....*<sup>201</sup>

Gandhi was of the opinion that on the question of integration with India, it was crucial that all the rulers hear the desires of the people while making the decision. In the context of Kashmir he said:

*"The Congress wants to establish democratic rule. It will not act against the interests of the Princes either. But the Princes will be able to retain their position only when they become the trustees of their subjects like the Raja of Oundh. A small principality like Oundh will be long remembered only because it bowed to the sovereignty of the people. As against this, the State of Kashmir, although it is worth millions, will be wiped out if it does not listen to the voice of its people. Hitherto these rulers may have behaved arrogantly with the support of the British authorities; but now they must realize that their authority issues from the people....."*

Historian Ramchandra Guha argues that had Gandhi been alive, he would perhaps have been most appalled by three events in the modern history of Kashmir: the arrest of Sheikh Abdullah by the Nehru government in 1953, the ethnic cleansing of the Pandits by Islamic jihadists in 1989-90, and the unilateral abrogation of Article 370 and the savage crackdown by the Narendra Modi government on Kashmiris in 2019, the last especially given that an Indian government had refused to "make the choice in accordance with the wishes of the people".<sup>202</sup>

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201 Speech at Prayer Meeting, New Delhi, July 29, 1947 from the book "Mahatma Gandhi and Tourism", Satyanarayan, Gandhi Peace Foundation, New Delhi, 1996

202 <https://www.telegraphindia.com/opinion/gandhi-in-kashmir-gandhians-on-kashmir/cid/1698228>



## Annexure 4: UN on Kashmir – A summary of the dispute before UN Security Council

It was India that approached the UN Security Council under Article 35 of the UN Charter<sup>203</sup> to complain about the invasion of Kashmir by Pakistani nationals, making it an international issue. The UN Security Council passed resolution nos. 38<sup>204</sup> and 39<sup>205</sup> in January 1948, calling upon India and Pakistan to take measures to improve the situation and establishing a Commission of the Security Council comprising of representatives of three of its members states to investigate the facts under Article 34 of the UN Charter<sup>206</sup>, and to attempt mediation of the dispute and execute as well as report back on the directions given to it by the Security Council. On 21<sup>st</sup> April 1948, the UN Security Council passed resolution no. 47<sup>207</sup> recording that both India and Pakistan desire that the question of the accession of J&K to India or Pakistan should be decided through the democratic method of free and impartial plebiscite, and recommended that governments of both countries ceasefire and create proper conditions for holding such plebiscite. It also increased the strength of the UN Commission for India and Pakistan (UNCIP) to 5 members and instructed the UNCIP to mediate with both governments to restore peace and order and to hold plebiscite. Pursuant to this, the UNCIP adopted a resolution at its meeting held on January 5, 1949<sup>208</sup>, recording the acceptance of both India and Pakistan to hold plebiscite and that such plebiscite shall be carried out after ceasefire is carried out and true arrangements as well as arrangements for holding plebiscite have been completed (*Annexed*).

Ceasefire was reached later on in 1949 and the UNCIP was disbanded pursuant to resolution no. 80<sup>209</sup> dated March 14, 1950 in light of the above agreement reached by both countries for a ceasefire, demilitarisation of J&K and for determining its final disposition in accordance with the will of the people. An UN Representative was also appointed in place of the UNCIP to supervise the implementation of the agreement between the countries. The resolution also contemplated the appointment of a Plebiscite Administrator at the appropriate stage of demilitarisation. Sir Owen Nixon was appointed as UN Representative to India and Pakistan and went on to submit his report to the UN Security Council on his failed attempts to dialogue with both countries. The UNCIP passed resolution no. 91<sup>210</sup> dated 30<sup>th</sup> March 1951, accepting the resignation of Sir Owen Nixon while recording only the points of difference preventing agreement between the countries from the report and directing appointment of an UN Representative to succeed him. An United Nations Military Observer Group in India and Pakistan was also established to supervise the observance of ceasefire. At this juncture, the General Council for the “All Jammu and Kashmir National Conference” had adopted a resolution recommending the convening of a Constituent Assembly for determining the future shape and affiliations of the J&K State. It was clarified that the convening of the Constituent Assembly or any action that assembly might take would not constitute a disposition of the State in accordance of the will of the people expressed

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203 <https://www.un.org/en/sections/un-charter/un-charter-full-text/>

204 <http://unscr.com/en/resolutions/doc/38>

205 <http://unscr.com/en/resolutions/doc/39>

206 *Supra note 1*

207 <http://unscr.com/en/resolutions/doc/47>

208 <http://www.mofa.gov.pk/documents/unsc/Resolution%20adopted%20at%20the%20meeting%20of%20the%20United%20Nations%20Commission%20for%20India%20and%20Pakistan%20on%205%20January%201949.pdf>

209 <http://unscr.com/en/resolutions/doc/80>

210 <http://unscr.com/en/resolutions/doc/91>

through the democratic method of a free and impartial plebiscite to be conducted under the auspices of the United Nations. This was reiterated by UN Security Council even post formation of the J&K Constituent Assembly and in resolution nos. 122<sup>211</sup> dated 24<sup>th</sup> January 1957 and 123<sup>212</sup> dated 21<sup>st</sup> February 1957.

Sir Owen Nixon was succeeded by Dr. Frank Graham as the UN Representative to India and Pakistan. He went on to write four reports in 1951-1952, recording the lack of agreement between the countries on demilitarisation<sup>213</sup>. In March 1953, Graham finally suggested to the UN Security Council that both countries should negotiate directly rather than through an UN Representative<sup>214</sup>. In August 1953, Prime Minister of Pakistan, Mohammad Ali Jinnah and Prime Minister Pandit Jawaharlal Nehru issued a joint communique confirming the agreement for plebiscite and agreeing to iron out preliminary issues which had held up the process and to appoint a Plebiscite Administrator by end of April 1954<sup>215</sup>. Joint Committees of Indian and Pakistani civil and military experts also held preliminary discussions in December 1953 on the questions of plebiscite and demilitarisation<sup>216</sup>. However, the negotiations between the countries broke down by 1954, even as India continued its assurance honour its agreement to accede to the Kashmiri people's will<sup>217</sup>. Even the futile attempts by the UN Security Council came to a standstill by 1964-1965. The issue was left unresolved, leaving it for the countries to negotiate directly. The last time the UN Security Council took up any matter remotely concerning Kashmir was in 1971<sup>218</sup>. Pursuant to the Simla Agreement arrived at between the countries in 1972 which established the Line of Control in Kashmir, the government of India claims that the agreement renders the prior UN Security Council resolutions redundant, while the government of Pakistan has been demanding their implementation.

## **UN - Post Abrogation of Article 370**

Immediately following the abrogation of Article 370 on 5<sup>th</sup> August 2019, the UN spokesperson stated that the latest restrictions imposed on Indian-administered Kashmir are deeply concerning and "will exacerbate the human rights situation"<sup>219</sup>. However, UN Chief Antonio Guterres issued a statement through his spokesperson, refusing to mediate on a request made by Pakistan, citing the Simla Agreement on bilateral relations between the countries<sup>220</sup>. He however asked both countries to maintain maximum restraint. A closed-door meeting of the UN Security Council was held at the insistence of Pakistan and China on 16<sup>th</sup> August 2019, to discuss the Kashmir issue. However no resolution was reached nor was any press action issued, with the dispute being dismissed by most members as bilateral matters between India

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211 <http://unscr.com/en/resolutions/doc/122>

212 <http://unscr.com/en/resolutions/doc/123>

213 <http://web.stanford.edu/group/tomzgroup/pmwiki/uploads/2626-1952-10-K-a-AJG.pdf>

214 Brecher, Michael. "Kashmir: A Case Study in United Nations Mediation." *Pacific Affairs*, vol. 26, no. 3, 1953, pp. 195–207. JSTOR, [www.jstor.org/stable/2753284](http://www.jstor.org/stable/2753284)

215 Korb, Josef. "The Kashmir Dispute After Six Years." *International Organization*, vol. 7, no. 4, 1953, pp. 498–510. JSTOR, [www.jstor.org/stable/2704850](http://www.jstor.org/stable/2704850)

216 [https://www.epw.in/system/files/pdf/1965\\_17/40/un\\_s\\_failure\\_in\\_kashmira\\_factual\\_survey.pdf](https://www.epw.in/system/files/pdf/1965_17/40/un_s_failure_in_kashmira_factual_survey.pdf)

217

<https://search.archives.un.org/uploads/r/united-nations-archives/4/5/4/4545db244121c0e6edbf7be855774ad7bd55f75528d74ffa30dad98766e584e/S-0900-0006-04-00001.pdf>

218 <https://edition.cnn.com/2019/08/16/asia/un-security-council-kashmir-intl/index.html>

219 <https://www.bbc.com/news/world-asia-india-49273999>

220 <https://www.tribuneindia.com/news/nation/un-chief-recalls-simla-agreement-appeals-to-india-pak-for-restraint/815426.html>

and Pakistan. On 16<sup>th</sup> August 2019, a joint communication was issued by the UN experts on Arbitrary Detention; Enforced/Involuntary Disappearances; Extrajudicial, Summary or Arbitrary Executions; Freedom of Opinion and Expression; Freedom of Peaceful Assembly and of Association; and Human Rights Defenders regarding the restrictions imposed in Jammu and Kashmir and violations to the right to life<sup>221</sup> (*Annexed*), followed by a press release dated 22<sup>nd</sup> August 2019 urging India to end the communication lockdown in Kashmir<sup>222</sup>. The UN High Commissioner, Michelle Bachelet, expressed deep concern on the situation in Kashmir in her opening address on 9<sup>th</sup> September 2019 at the 42<sup>nd</sup> UN Human Rights Council in Geneva<sup>223</sup>. On 27<sup>th</sup> September 2019, Pakistan Prime Minister Imran Khan, in his speech before the UN General Assembly in New York, castigated India for its crackdown on Kashmir<sup>224</sup>. Meanwhile the Indian Prime Minister deliberately dodged mention of Kashmir in his speech, even as his arrival at the UN Headquarters was met with civil society protests in solidarity with the people of Kashmir<sup>225</sup>.

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221 <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24803>

222 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24909&LangID=E>

223 <https://news.un.org/en/story/2019/09/1045862>

224 <https://www.nytimes.com/2019/09/27/world/asia/khan-modi-united-nations.html>

225 <https://www.aljazeera.com/news/2019/09/pakistan-pm-warns-bloodbath-kashmir-india-modi-silent-190927162542407.html>

## Annexure 5: Note on the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990

A state version of the 1958 Act<sup>226</sup> being the Armed Forces (J&K) Special Powers Act, 1990<sup>227</sup> (AFSPA) was passed by the Parliament during President's rule in 1990. This Act applies to "Disturbed Areas" of J&K and confers special powers on the armed forces operating in such areas. Section 3 of the AF(JK)SPA provides that if the Governor of the State or Central Government is of the opinion that the whole or any part of the State is in a disturbed and dangerous condition that the use of armed forces in aid of the civil power is necessary to prevent certain activities, they may, by notification in the official Gazette, declare the whole or any part of the State to be disturbed area. These activities include terrorist acts directed towards overawing the government, activities directed towards disclaiming, questioning or disrupting the territorial integrity of India etc. While in 1990, only six districts of Kashmir and Rajouri and Poonch districts of Jammu were notified as disturbed areas, the government in 2001 notified the whole of J&K (leaving out Leh and Kargil) as disturbed under section 3 of AF(JK)SPA<sup>228</sup>.

Section 4 of the AFSPA sets out the special powers of the armed forces. It provides that any commissioned or non-commissioned officer or any other person in the armed forces in order to maintain public order may fire upon or use force, even amounting to death, against any person, if he is of the opinion that it is necessary for maintaining public order. The officer is authorised to destroy any premises, public or private, from which armed attacks are made or are likely to be made or are attempted to be made or any structure used as training camp for armed volunteers or utilised as a hideout. The officer can arrest, without warrant, any person who has committed a cognisable offence or against whom a reasonable suspicion exists or is about to commit a cognisable offence and is empowered to use force as necessary for the purpose. The officer can enter and search, without warrant, any premises to make any arrest or to recover any person or any property suspected to be stolen or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises and seize any property. The officer can stop, search and seize any vehicle reasonably suspected to be carrying any person who has committed a non-cognisable offence or against whom a reasonable suspicion exists that he or she has committed or is about to commit non-cognisable offences.

Section 7 of AFSPA prohibits the institution of any prosecution, suit or legal proceeding against any person in respect of anything done or purported to be done in exercise of the powers conferred under the Act, unless it is made with the previous sanction of the Central Government. Under the ambit of this provision, the officers are granted complete impunity for any action purported to be done under the Act. Meanwhile, section 197 of the Criminal Procedure Code, 1989<sup>229</sup> which applies to J&K provides that when any officer of the central government is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties, no Court shall take cognizance of such

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226 Armed Forces (Special Powers) Act, 1958, extending to the North-east states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura (See at [https://mha.gov.in/sites/default/files/armed\\_forces\\_special\\_powers\\_act1958.pdf](https://mha.gov.in/sites/default/files/armed_forces_special_powers_act1958.pdf))

227 [https://mha.gov.in/sites/default/files/The%20Armed%20Forces%20%28Jammu%20and%20Kashmir%29%20Special%20Powers%20Act%2C%201990\\_0.pdf](https://mha.gov.in/sites/default/files/The%20Armed%20Forces%20%28Jammu%20and%20Kashmir%29%20Special%20Powers%20Act%2C%201990_0.pdf)

228 <https://www.thehindu.com/news/national/other-states/jk-not-under-disturbed-areas-act/article7033478.ece>

229 [https://indiacode.nic.in/bitstream/123456789/4813/1/code\\_of\\_criminal\\_procedure%2C\\_samvat\\_1989.pdf](https://indiacode.nic.in/bitstream/123456789/4813/1/code_of_criminal_procedure%2C_samvat_1989.pdf)

offence except with the previous sanction of the Central Government. In the case of persons employed with the State government, previous sanction of the state government is required.

In this manner, the AFSPA grants the armed forces extensive executive powers to search and arrest without a warrant and detain people without time limits, to open fire if they feel the situation demands it. As a result, the armed forces routinely engages in torture and inhuman against detainees and civilians. The victims of such torture in J&K are rendered entirely remediless, thereby emboldening the officers to perpetuate gross human rights abuses, which have been continuing as can also be seen from the testimonies in this Report. The Central Government has not granted sanction to prosecute army officers in a single case, not even in the 50 cases recommended by the J&K government in 20 years, citing lack of evidence<sup>230</sup>. There is no accountability on the criteria employed or disclosure of procedure to be followed or norms to be applied while denying sanction for prosecution. Even an application filed under the Right to Information Act for details on the cases where sanction was denied with the Ministry of Defence and the Indian Army were refused on the ground that the files were not available with them<sup>231</sup>.

*De jure* impunity has been provided to the armed forces from prosecution in the form of AFSPA, which violates the fundamental rights enshrined in the Indian Constitution and the international principles on human rights. The provisions of AFSPA violate several international conventions, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights and also under the UN Convention Against Enforced Disappearances (UNAED) and the four Geneva Conventions and optional protocol prescribing code of conduct in times of armed conflict. Several committees and experts from the United Nations have called for the repeal of AFSPA<sup>232</sup>. The 2018<sup>233</sup> and 2019<sup>234</sup> reports of the UN on the situation of human rights in Kashmir only go on to confirm the gross human rights violations by the Indian army in the context of the impunity enjoyed by them.

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230 <https://www.outlookindia.com/website/story/in-20-years-centre-denied-prosecution-sanction-under-afspa-in-all-cases-recommen/307132>

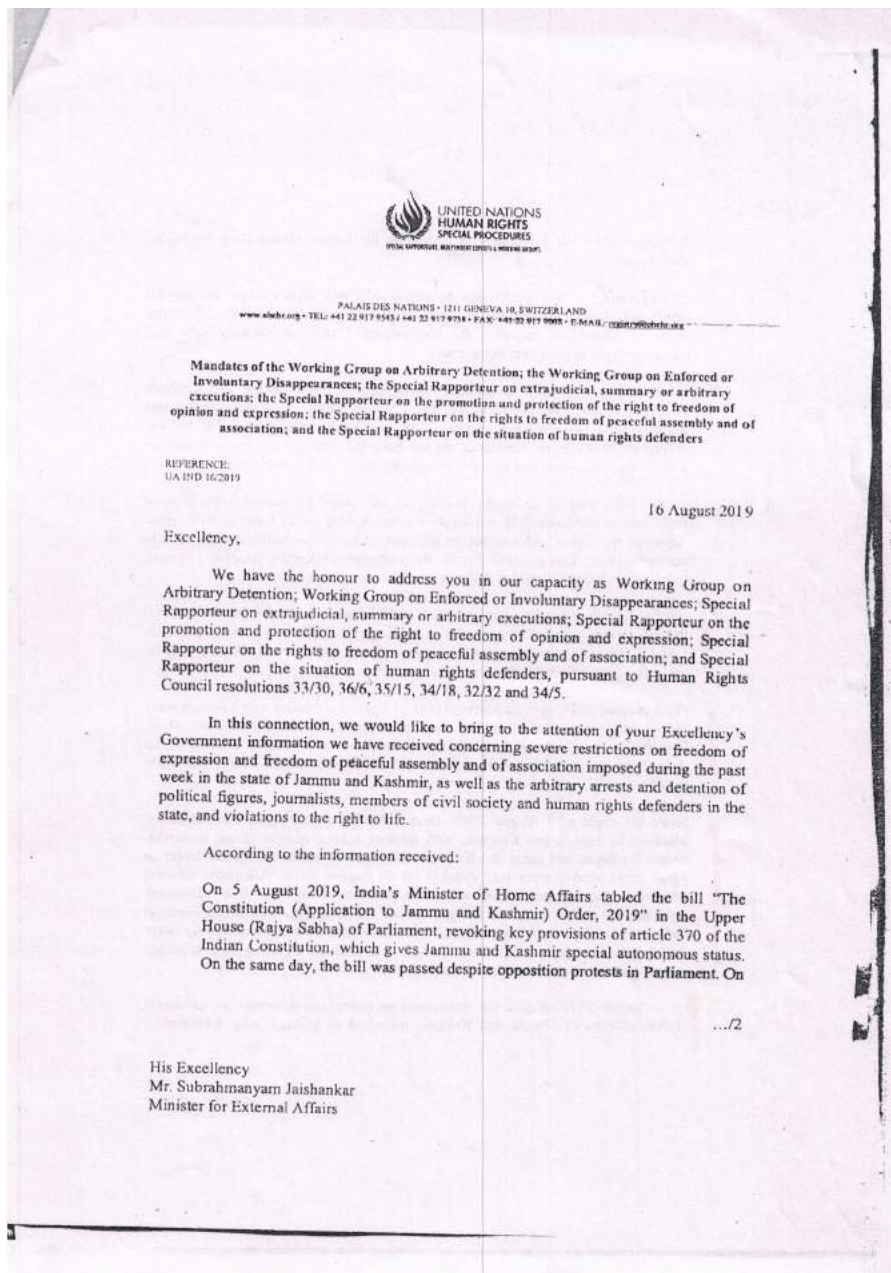
231 <https://www.humanrightsinitiative.org/blog/denial-of-sanction-to-prosecute-defence-personnel-under-jkafspa-defence-ministry-and-indian-army-deny-they-hold-caserelated-records-and-procedural-information>

232 <https://www.hrw.org/legacy/backgrounder/2008/india0808/>

233 <https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf>

234 [https://www.ohchr.org/Documents/Countries/PK/KashmirUpdateReport\\_8July2019.pdf](https://www.ohchr.org/Documents/Countries/PK/KashmirUpdateReport_8July2019.pdf)

## Annexure 6: Joint communication by the UN experts on Arbitrary Detention; Enforced/Involuntary Disappearances; Extrajudicial, Summary or Arbitrary Executions; Freedom of Opinion and Expression; Freedom of Peaceful Assembly and of Association; and Human Rights Defenders





Indian security forces opened fire using live ammunition, rubber bullets, pellet guns and tear gas, reportedly causing significant injuries.

Reports suggest that security forces have raided private homes during the night and arrested boys and teenagers.

Reportedly, the whereabouts of some of the individuals arrested or abducted in Jammu and Kashmir, including children, remain unknown.

While we do not wish to prejudge the accuracy of the above allegations, we express our deep concern over the severe restrictions on the rights to freedom of expression and freedom of peaceful assembly and of association, and violations to the right to life, in Jammu and Kashmir, and remind your Excellency's Government that such rights are protected under articles 6, 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR), acceded to by India on 10 April 1979.

We wish to express our concerns over the adverse effects that the shutting down of the internet and telecommunication networks, as well as landline and television channels, may have on these rights, especially on the right to disseminate and receive information and the right to peacefully assemble and associate, including online. With particular regard to internet access, we recall that the same rights that people have offline must also be protected online, see e.g. CCPR/C/GC/34 para. 12, UN General Assembly resolution 68/167, Human Rights Council Resolutions 26/13 and 32/13, as well as the Report by the Special Rapporteur on the Freedom of Expression A/HRC/35/22 paras. 76 and 77. The complete shutdown of the internet and telecommunication networks would appear to contravene the fundamental principles of necessity and proportionality that must be met by any restriction on freedom of expression. Shutdowns fail to reach the established test for restrictions to the right to freedom of opinion and expression under article 19(3) of the ICCPR, as well as for restrictions on the freedom of peaceful assembly and of association under articles 21 and 22(2) ICCPR.

Access to the internet and telecommunications networks are crucial to prevent disinformation, and they are crucial to protect the rights to health, liberty and personal integrity, by allowing access to emergency help and other necessary assistance. Access to telecommunications networks is also crucial to ensure accountability of authorities for possible human rights violations, including the excessive use of force against peaceful protesters and others. We express our deep concern that the network disruptions will fuel chaos and unrest in Jammu and Kashmir, and that they contribute to a climate fear and uncertainty in the population.

We express our grave concern at reports on the use force by the authorities, including live ammunition. We recall that allegations of violations to the right to life in Jammu and Kashmir have been the subject of multiple communications by special

We express additional concern over the imposition of Section 144 of the Code of Criminal Procedure in region, that blanket bans on the right to freedom of peaceful assembly are intrinsically disproportionate, because they preclude consideration of the specific circumstances of each proposed assembly (A/HRC/23/39, para. 63).

We would also like to refer to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders, in particular articles 1, 2, 5(a), 6(b) and (c), and 12.

With reference to the above, we remind Your Excellency's Government of the duty under human rights law to provide effective remedies to victims, including the duty to conduct investigations promptly and in accordance with the principles of independence and impartiality. Where investigations reveal violations of human rights, those responsible must be prosecuted and punished, see CCPR/C/21/Rev.1/Add.13 paras. 15 and 18.

The full texts of the human rights instruments and standards recalled above are available on [www.ohchr.org](http://www.ohchr.org) or can be provided upon request.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the rights of citizens of Jammu and Kashmir in compliance with international instruments.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

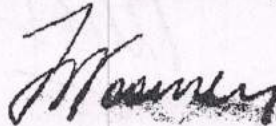
1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide information on the legal basis of the alleged communication network shutdowns in Jammu and Kashmir under both domestic law and international human rights law.
3. Please provide information on the measures taken to ensure that the use of force by the authorities in Jammu and Kashmir is compliant with human rights standards, particularly the right to life.
4. Please provide information on measures taken to ensure that any interference in the right to peaceful assembly in Jammu and Kashmir is in



no way prejudice any opinion the Working Group may render. The Government is required to respond separately for the urgent appeal procedure and the regular procedure.

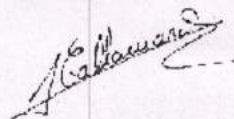
This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

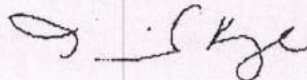


Leigh Toomey  
Vice-Chair of the Working Group on Arbitrary Detention

Bernard Duhaime  
Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances



Agnes Callamard  
Special Rapporteur on extrajudicial, summary or arbitrary executions



David Kaye  
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression



THE SECRETARY-GENERAL / LE SECRÉTAIRE GÉNÉRAL

DATE 16 August 2019

TO His Excellency  
Mr. Rajiv Kumar Chander  
Ambassador Extraordinary and Plenipotentiary  
Permanent Representative  
Permanent Mission of India  
to the United Nations Office and other international organizations in Geneva  
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REF: UA IND 16/2019

PAGES: 9 (Y COMPRIS CETTE PAGE INCLUDANT CETTE PAGE)

SUBJECT: JOINT URGENT APPEAL FROM SPECIAL PROCEDURES

Please find attached a joint urgent appeal sent by the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders.

I would be grateful if this letter could be transmitted at your earliest convenience to His Excellency Mr. Subrahmanyam Jaishankar, Minister for External Affairs.



6 August 2019, the bill was also passed by the Lower House (Lok Sabha) of Parliament.

The revoking of key provisions of article 370 will also change the special privileges enjoyed by citizens of Jammu and Kashmir under article 35A of the Indian Constitution, including the reservation of state government jobs and exclusive right to own land in the state.

On 5 August 2019, the Government introduced the bill "Jammu and Kashmir (Reorganisation) Bill, 2019" in the Rajya Sabha, which bifurcates Jammu and Kashmir into two Union Territories. The Lok Sabha also passed this bill on 6 August 2019. Union Territories do not have the same autonomy as states in India's federal system and are administered by the Federal Government.

In the days leading up to the passing of the above-mentioned bills, tens of thousands of additional troops from the Central Armed Police Force (CAPF) were deployed to Jammu and Kashmir in addition to the half-a-million troops already stationed there. Citing terror threats, the authorities allegedly ordered pilgrims, tourist and students to vacate the area.

Further, a curfew was brought into effect and Section 144 of the Code of Criminal Procedure was imposed in the whole of the Kashmir Valley and in some places in Ladakh, including Kargil, prohibiting any gatherings of more than 4 people, amounting to a blanket ban on peaceful assembly.

On 4 August 2019, several leading political figures in Jammu and Kashmir were placed under house arrest and have since been placed in administrative detention. Reportedly, hundreds of journalists, members of civil society, human rights defenders and other prominent citizens of Jammu and Kashmir have also been detained.

Since the night of 4 August 2019, there has been a near total communication blackout in Jammu and Kashmir, with internet access, mobile phone networks, phone landlines, and cable and Kashmiri television channels cut off. Websites of local news media were last updated on 5 August 2019. Allegedly, several journalists have reported that authorities are restricting their free movement especially to access town and villages outside Srinagar city. As a result, regional and national news media have been unable to independently and extensively cover the current situation and citizens of Jammu and Kashmir are struggling to access information on the situation in the state.

On 9 August 2019, despite the restrictions on peaceful assemblies, an estimated 10,000 citizens of Jammu and Kashmir protested in Srinagar city. Reportedly,

procedures mandate holders, including IND 8/2019. The right to life under article 6 ICCPR restricts the use of force by authorities. As indicated by the Human Rights Committee, "States parties are expected to take all necessary measures intended to prevent arbitrary deprivations of life by their law enforcement officials, including soldiers charged with law enforcement missions", CCPR/C/GC/36 para 13. This includes a duty to use less-lethal weapons wherever possible, and to take adequate safeguards before employing less-lethal weapons, *Id.* paras. 13 and 14. In this connection, we would also like to draw the attention of your Excellency's Government to the Code of Conduct for Law Enforcement Officials, in particular article 3, and to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, in particular principles 9, 12, 13 and 14. Lastly, we remind that any deprivation of life contrary to domestic or international law would constitute an arbitrary deprivation of life, *Id.* para. 12. Thus, for example, the use of force resulting in the death of demonstrators exercising their right of freedom of assembly would constitute a violation of the right to life under article 6 of the Covenant, *Id.* para. 17.

Furthermore, without expressing at this stage an opinion on the facts of the case and on whether detentions of the abovementioned individuals were arbitrary or not, we would like to appeal to your Excellency's Government to take all necessary measures to guarantee their right not to be deprived arbitrarily of their liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 ICCPR.

We express our most grave concerns over reports alleging the enforced disappearance of individuals by the security forces. This constitutes a clear and serious violation of international human rights law. We also wish to express grave concern over the general heightened risk of enforced disappearances, which may proliferate against a backdrop of mass arrests and restricted access to the internet and other communication networks. In this regard, we would like to refer to the International Convention for the Protection of All Persons from Enforced Disappearance, which India signed on 6 Feb 2007, as well as to the Declaration on the Protection of All Persons from Enforced Disappearance. In particular, we underline that no one shall be subjected to enforced disappearance (article 1 of the Convention and 2 of the Declaration), that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance (article 1 of the Convention and 7 of the Declaration) and that individuals should only be held in officially recognized and supervised places of deprivation of liberty, that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family and that accurate information on the their place or places of detention, including transfers, shall be made promptly available to their family members (article 17 of the Convention and 10 of the Declaration).



accordance with the law, pursues a legitimate aim and complies with the requirements of necessity and proportionality.

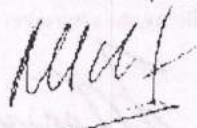
5. Please indicate what steps have been taken to inform family members of reportedly detained individuals about their fate and whereabouts.
6. Please provide information on the legal basis on which journalists have been denied free movement across the Kashmir Valley.
7. Please provide information on the legal basis on which scores of Kashmiri politicians, journalists, members of civil society and human rights defenders have been detained.
8. Please provide information on the legal basis of the alleged arrests of boys and teenagers.
9. Please provide information on whether the authorities have initiated investigations in compliance with human rights standards of promptness, impartiality and independence, following alleged violations of human rights law during its law enforcement operations in Jammu and Kashmir.
10. Please indicate what measures have been taken to ensure that human rights defenders in India are able to carry out their peaceful and legitimate work in a safe and enabling environment without fear of threats or acts of intimidation and harassment of any sort.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person responsible of the alleged violations.

We intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

We would like to inform your Excellency's Government that after having transmitted an urgent appeal to the Government, the Working Group on Arbitrary Detention may transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such urgent appeals in

Clement Nyaletsossi Voule  
Special Rapporteur on the rights to freedom of peaceful assembly and of association



Michel Forst  
Special Rapporteur on the situation of human rights defenders

## Annexure 7: The wages of conflict and the Courts

5. Judgments of the Supreme Court relevant to illegal arrest and torture of persons:
  - a. D.K. Basu vs. State of West Bengal
  - b. Naga People's Movement of Human Rights vs. Union of India
  - c. Extra Judicial Execution Victim Families Association (EEVFAM) and Anr. Vs. Union of India & Anr
6. Supreme Court on the arrest of minor under PSA
7. High Court order on enforced disappearance at the hands of armed forces:
8. High Court order on illegal arrest and torture of boy at the hands of RR:
9. Bijbehara Massacre:

The instances on torture, extra-judicial killings, sexual violence, custodial deaths, enforced disappearances and other human right violations in Kashmir, reported by the civil liberties and human rights organizations, and recorded in orders passed by State Human Rights Commission are also reflected in some of the decisions of the High Court of Jammu and Kashmir and the Supreme Court of India.

Before looking at some of the specific orders of the Courts in this regard, there are few decisions of the Supreme Court that need to be remembered in this context.

### **D.K. Basu vs. State of West Bengal:**<sup>235</sup>

In *D.K. Basu vs. State of West Bengal*, the Supreme Court considered, among others, the question of arrest and custodial violence. The Court noted that apart from the police, there are several other governmental authorities including the CRPF, BSF, the State Armed Police, etc. which have the power to detain and interrogate a person, and issued judicial notice that: "... *There are instances of torture and death in custody of these authorities as well...*". Having done so the Court held as follows:

*"...The action of the State, however must be 'right, just and fair'. Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21... He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or drive knowledge about his accomplices, weapons etc. His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be a qualitative difference in the methods of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is not answer to combat terrorism. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to 'terrorism'. That would be bad for the State, the community and above all for the Rule of Law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. that the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of this human rights except in the manner permitted by law."*

### **Naga People's Movement of Human Rights vs. Union of India:**<sup>236</sup>

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<sup>235</sup> AIR 1997 SC 610

<sup>236</sup> (1998) 2 SCC 109

In *Naga People's Movement of Human Rights vs. Union of India*, the Supreme Court upheld the validity of Armed Forces (Special Powers) Act, 1958, and while doing so observed as follows:

*"There is one other aspect which cannot be ignored. The primary task of the armed forces of the Union is to defend the country in the event of war or when it is face with external aggression. Their training and orientation defeat the hostile forces. A situation of internal disturbance involving the local population requires a different approach. Involvement of armed forces in handling such a situation brings them in confrontation with their countrymen. **Prolonged or too frequent deployment of armed forces for handling such situations is likely to generate a feeling of alienation among the people against the armed forces who by their sacrifices in the defence of their country have earned a place in the hearts of the people. It also has an adverse effect on the morale and discipline of the personnel of the armed forces. It is, therefore, necessary that the authority exercising the power under Section 3 to make a declaration so exercises the said power that the extent of the disturbed area is confined to the area in which the situation is such that it cannot be handled without seeking the aid of the armed forces and by making a periodic assessment of the situation after the deployment of the armed forces the said authority should decide whether the declaration should be continued and, in case the declaration is required to be continued, whether the extent of the disturbed area should be reduced.**"*

The Court also considered the submission that there has been widespread abuse of powers conferred under the Act by the personnel of the armed forces and held as follows:

*"In order that people may feel assured that there is an **effective check against misuse or abuse of powers by the members of the armed forces** it is necessary that a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act should be thoroughly inquired into and, if it is found that there is substance in the allegations, the victim should be suitably compensated by the state and the requisite sanction under Section 6 of the Central Act should be granted for institution of prosecution and/or a civil suit or other proceeding against the person/persons responsible for such violation...."*

**Extra Judicial Execution Victim Families Association (EEVFAM) and Anr. Vs. Union of India & Anr.:**<sup>237</sup>

Between 1979 and 2012, more than 1500 people were allegedly killed in extrajudicial executions by security personnel in Manipur. A collective of victims, Extrajudicial Executions Victim Families Association (EEVFAM) and Human Rights Alert, an NGO, filed a writ petition in the Supreme Court of India in 2012 to seek justice. In this matter the Supreme Court has made observations that are applicable to the situation in Kashmir.

*"91. Be that as it may, what is of significance is that this Court has implied that the armed forces of the Union could be deployed in public order situations to aid the civil power and on such deployment, they shall operate in cooperation and conjunction with the civil administration and until normalcy is restored. This view is predicated on and postulates that normalcy would be restored within a reasonable period. **What would be***

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<sup>237</sup> Extra Judicial Execution Victim Families Association (EEVFAM) and Anr. Vs. Union of India & Anr. (2016) 14 SCC 536



***the consequence if normalcy is not restored for a prolonged or indeterminate period? In our opinion, it would be indicative of the failure of the civil administration to take effective aid of the armed forces in restoring normalcy or would be indicative of the failure of the armed forces in effectively aiding the civil administration in restoring normalcy or both. Whatever be the case, normalcy not being restored cannot be a fig leaf for prolonged, permanent or indefinite deployment of the armed forces (particularly for public order or law and order purposes) as it would mock at our democratic process and would be a travesty of the jurisdiction conferred by Entry 2A of the Union List for the deployment of the armed forces to normalize a situation particularly of an internal disturbance.”***

Having observed so, the Supreme Court holds that:

*“110. There is no doubt from the records of the case that Manipur has been and is facing a public order situation equivalent to an internal disturbance. The tragedy is that this situation has continued since 1958 – for almost 60 years... A generation or two has gone by and issues have festered for decades. It is high time that concerted and sincere efforts are continuously made by the four stakeholders – civil society in Manipur, the insurgents, the State of Manipur and the Government of India to find a lasting and peaceful solution to the festering problem, with a little consideration from all quarters. It is never too late to bring peace and harmony in society.”*

The Supreme Court in this matter considered the deaths of more than 1500 persons at the hands of the armed forces, which the Court held had to be enquired into and dismissed the bogey of the one-hand-tied-behind-its-back as follows:

*“123. The problem before the courts tends to become vexed when the victims are alleged to be militants, insurgents or terrorists. In such cases, how does anyone (including the court) assess the degree of force required in a given situation and whether it was excessive and retaliatory or not? Scrutiny by the courts in such cases leads to complaints by the State of its having to fight militants, insurgents and terrorists with one hand tied behind its back. This is not a valid criticism since, and this is important, in such cases it is not the encounter or the operation that is under scrutiny but the smoking gun that is under scrutiny. There is a qualitative difference between use of force in an operation and use of such deadly force that is akin to using a sledgehammer to kill a fly; one is an act of self-defence while the other is an act of retaliation.”*

Relying upon *Naga People’s Movement of Human Rights* (supra), the Supreme Court held that:

*“125...Causing the death of a person is certainly an offence, but whether there was a “reasonable connection” between the death and the official act or whether excessive force or retaliatory force was used in the act has to be determined at an appropriate stage. It does not matter whether the victim was a common person or a militant or a terrorist, nor does it matter whether the aggressor was a common person or the State. The law is the same for both and is equally applicable to both...”*

*126. In other words, the decision of the Constitution Bench requires that every death caused by the armed forces, including in the disturbed area of Manipur “should be thoroughly enquired into” if there is a complaint or allegation of abuse or misuse of power. All of us are bound by this direction of the Constitution Bench which has been given to assure the people that there is no abuse or misuse of power by the armed forces.”*

*“135. It must be held, and there can be no doubt about it, that in view of the consistent opinion expressed by this Court, that an allegation or complaint of absence of a reasonable connection between an official act and use of excessive force or retaliatory force will not be countenanced and an allegation of this nature would always require to be met regardless of whether the State is concerned with a dreaded criminal or a militant, terrorist or insurgent. It must also be held that to provide assurance to the people, such an allegation must be thoroughly enquired into. This is the requirement of a democracy and the requirement of preservation of the rule of law and the preservation of individual liberties...”*

The Court also held as follows:

*“139. In any event, before a person can be branded as a militant or a terrorist or an insurgent, there must be the commission or some attempt or semblance of a violent overt act. A person carrying a weapon in a disturbed area in violation of a prohibition to that effect cannot be labeled a militant or terrorist or insurgent...”*

*“140. Similarly, though in a slightly different context, it was held by this Court in Indra Das v. State of Assam<sup>59</sup> after referring to and relying upon Arup Bhuyan v. State of Assam<sup>60</sup> that mere membership of a banned organization does not incriminate a person. He might be a passive member and not an active one and so it is necessary to prove that he has indulged in some act of violence or imminent violence...”*

Having held as detailed above, the Supreme Court passed a grave caution:

*“143. ... In this regard, it is worth recalling what the Constitution Bench said in Naga People's Movement of Human Rights - our armed forces are not trained to fight and kill our own countrymen and women. To this we may add that ordinarily our armed forces should not be used against our countrymen and women...If members of our armed forces are deployed and employed to kill citizens of our country on the mere allegation or suspicion that they are 'enemy' not only the rule of law but our democracy would be in grave danger.”*

Keeping this law in mind, it is necessary to further highlight that the judiciary has had occasion to deal with cases arising from torture and disappearances enforced by the Army in Kashmir. Below is a brief summary of some of the cases.

### **Supreme Court on the arrest of minor under PSA:**

Detention of juveniles under PSA is perhaps not that new a practice in Kashmir. In *Jaya Mala vs Home Secretary, Government*<sup>238</sup> a petition for writ of habeas corpus for the release of Riaz Ahmed who was detained under the Public Safety Act, 1978. Detenu was arrested and detained on 18.10.1981. The Court dealt with two main grounds urged were, firstly that FIRs have been registered in regard to each incident set out on the grounds, and secondly, that he was a minor at the time of his arrest and detention. The Court held as follows:

*“7. In respect of each incident set out in the grounds F.I.R. has been lodged. If every infraction of law having a penal sanction by itself is a ground for detention danger looms*

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<sup>238</sup> *Jaya Mala vs Home Secretary, Government*, AIR 1982 SC 1297

large that the normal criminal trials, and criminal courts set up for administering justice will be substituted by detention laws often described as lawless law. There is not the slightest suggestion that witnesses are not forthcoming in respect of the alleged infraction of law. **Why the normal investigation was not pursued is a question difficult to answer.** ... It is not made clear in the return why normal procedure of investigation, arrest and trial has not been found adequate to thwart the criminal activities of the detenu. It is not for a moment suggested that power under the preventive detention law cannot be exercised where a criminal conduct which could not be easily prevented, checked or thwarted, would not provide a ground sufficient for detention under the preventive detention laws. **But it is equally important to bear in mind that every minor infraction of law cannot be upgraded to the height of an activity prejudicial to the maintenance of public order.** Non-application of mind of the detaining authority becomes evident from the frivolity of grounds on which the detention order is founded.”

“9 ...Undoubtedly, therefore, the detenu was a young school going boy. It equally appears that there was some upheaval in the educational institutions. This, young school going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bounds of law. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. **One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer.** In our opinion, in the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed....

#### **High Court order on enforced disappearance at the hands of armed forces:**

3. *Mohammad Sultan Mir vs State Of Jammu And Kashmir*<sup>239</sup> was filed due to the failure to comply the order in a habeas corpus petition directing the release of Ali Mohammad Mir who was picked up from Kralapora Market Kupwara by the BSF. The Court concluded as follows:

“ 5. In these circumstances, the arrest and custodial disappearance of detainee Ali Mohd Mir at the hands of BSF man of 66 Bn. stationed at Trehgam during relevant period is a positive finding of fact...”

The Court further held that:

“15. ... Ali Mohd Mir was a teacher in the Education department posted at the relevant time in Govt. Higher Secondary School Kralapora, Kupwara and while on way to attend his duty in the school, he was arrested by the BSF people and thereafter not heard of. His custodial disappearance has taken place on way to attend his duties. The award of appropriate compensation has to reckon with the pain in body and mind distress impoverishment, indigence, loss of life and death. Contextually adequate monetary compensation has to be an effective remedy for redressal of **the serious infringement of fundamental right to life of the citizen in question by the B.S.F. personnel for which State is vicariously responsible.** ...”

And passed the following directions:

“17. ...Rs. One lakh is awarded as just and proper compensation to be paid by the Union of India and BSF... to the children and wife/dependents of the deceased... It

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239 *Mohammad Sultan Mir vs State Of Jammu And Kashmir*, 2001 CriLJ 301

*is left to the Union of India whether to recover this amount of compensation or part thereof from the officer (s) or personnel actually responsible for the wrong done. ...Any observations made to justify and sustain this order shall not affect or have any bearing in any proceedings or on criminal prosecution pending or initiated against the concerned BSF personnel/officers in connection with the death of Ali Mohammad Mir."*

4. *Mushtaq Ahmed Chacha vs The State And Or*<sup>240</sup>, pertains to the illegal arrest and disappearance of Mushtaq Ahmed Chacha who was arrested on 9-7-1995 by 41st Bn. BSF. during crackdown of Maharaja Gunj area of the city of Srinagar. The Court held as follows:

*"9. Obviously the stand of the BSF and State Police is self destructive to reveal custodial disappearance of Mushtaq Ahmed Chacha in circumstances not admittedly explained or brought to light. Their conduct and actions have violated law as per evidence recorded, fact-situation and circumstances of the case. The conclusions of the enquiry officer cannot be said to be unreasonable or not based on material/evidence. The attempt on the part of State Police and the BSF to cover up or hush the matter is writ large on record. The only conclusion to be drawn is that Mushtaq Ahmed Chacha has disappeared while in physical custody of the respondent No. 3, the main and chief culprit in the matter. Conduct of the respondents is blameworthy and they cannot escape the responsibility for custodial disappearance of the subject..."*

22. *In the facts and circumstances of this case and in the view of the matter I have taken, an amount of Rs. one and a half lac is awarded (1.5 lac) as just and proper compensation 'to be paid by the respondents to the father and mother among other defendants of the deceased. The compensation shall be payable within a period of three months unless the time is extended on sufficient cause shown. It is left to the Union of India and State Government whether to recover this amount of compensation or part thereof from the officers or personnel actually responsible for wrong done and in particular respondent No. 3. However, it is placed on record that the award of compensation hereto would be taken into account for adjustment in the eventuality of awarded compensation in any other proceedings being taken for recovery of compensation on the very grounds of subject of instant writ proceedings with a view that this amount of award of compensation is not recovered by the petitioner over again.*

23. *A criminal case shall be registered about custodial disappearance of Mushtaq Ahmed Chacha at the concerned P/S, in case the above disappearance of Mushtaq Ahmed Chacha is not covered by the FIRs lodged with the Police Station(s). The investigation shall be taken to its logical conclusion. The investigation shall be completed as far as possible within a period of four months."*

5. In *Abdul Rashid And Ors. vs State And Anr.*<sup>241</sup>, one Fayaz Ahmed Beigh was working as a Camera-man with University of Kashmir in Department of Central Asian Studies. He was taken in custody and whisked away by the personnel of STF/SOG camp Lethpora Awantipora of District Pulwama, from the University campus. The parents and other family members of the boy, on search and enquiries came to know about his arrest by the STF team. Petition was filed in the High Court praying for registration of First information report

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240 *Mushtaq Ahmed Chacha vs The State And Or*, 2002 CriLJ 3904

241 *Abdul Rashid And Ors. vs State And Anr.* 2007 (2) JKJ 550.

for the disappearance of the detainee. However, this writ petition was withdrawn on 29.04.1998, on the presentation of the petitioner that her husband has approached Human Rights Commission in the matter which has taken cognizance of the case and fairness and propriety require writ petition to be withdrawn. SHRC awarded Rs. 5 lacs as interim relief. SHRC's order read:

*"We therefore, hold in firm words that Fayaz Ahmad Beigh S/o Ab. Rashid Beigh R/o Nowshera, was arrested by Sh. H.R. Parihar, SP, Operations, Awantipora and his subordinates namely Mohd. Amin SOG Lethopra, Rattan Chand Constable No. 602 JKAP and Abdul Rashid Trail, (killed in mine blast Trail), during the pendency of this enquiry. The said team after having taken into custody Fayaz Ahmed Beigh from Kashmir University Campus on 6-9-1997, caused him to disappear by foul play against the norms of law on the subject of arrest. The disappearance of Fayaz Ahmed Beigh by giving it a shape of escaping while in their custody, allegedly during recovery proceedings at Nowshera, due to heavy firing by unknown Militants is a made up, concocted and baseless story put forth by the defence, is far from iota of truth and in our opinion, the said team appear to have been hand in glove to liquidate the person of Fayaz Ahmed Beigh, while in their custody under the drama of arrest on 9-9-1997 and subsequent alleged recovery in the intervening night of 9/10-9-1997. Equally, Abdul Rashid Khan, the then SHO, Soura, at present SDPO, Pattan has fallen in line to commit the crime by giving legal cover to the disappearance of Fayaz Ahmed Beigh and creating false evidence by registering a false case and supporting the same before the Commission."*

Faced with the failure of the State Government to take any action in regard to the SHRC Order, the parents filed a writ petition seeking a writ of mandamus for directing the respondents to comply with orders of SHRC. The High Court of Jammu and Kashmir directed the State Government to register an FIR against the erring officials and held that:

*"8. ...The Human Rights Commission has meticulously and in detail found basis on facts and law for the petitioner's version/case that Fayaz Ahmed's case is one of "custodial disappearances", from police custody..."*

*"The disciplinary proceedings against erring officers/police personnel involved in the custodial disappearance of the subject Fayaz Ahmed and responsible for the wrong done shall be simultaneously launched, processed and concluded promptly.*

*..*

*Having regard to the facts and circumstances of this case, just and proper quantum of compensation in Public Law jurisdiction is assessed at Rs. 2, lacs for the wrong of custodial disappearance in breach of public duty by the State Government and its police agencies, in as much as, it has failed to protect the fundamental rights of the subject Fayaz Ahmed Beigh a State subject citizen of India, unless the State Government decides to pay the full amount of Rs. 5 lacs as recommended by the Human Rights Commission. The compensation shall be payable within a period of two months, unless time is extended for cause shown."*

6. A habeas corpus petition was filed concerning the disappearance of one Ghulam Qadir Sheikh S/o Subhan Sheikh R/o Gund Sunthipora Kralpora, Kupwara on 08.03.2000. Ghulam Qadir Sheikh, the detenu, was arrested during the intervening night of 08/09-03-

2000 by the Army Personnel of 14th Rajput Rashtria Rifles, posted at that time at Panzgam Kupwara. It is contended that the Army Personnel of above named Unit again came to the residence of the petitioner along with the detenue, who was in custody and searched the house of the petitioner. Nothing adverse was found during the search process and the Army Personnel left the house of the petitioner along with the above named detenue. The Court arrived at the conclusion that the armed forces cannot be absolved of their responsibility in regard to the disappearance of the son of writ petitioner, and allowed the writ petition awarding compensation for an amount of Rs. 10 lacs. Letters Patent Appeal was filed against this judgment. The court observed that<sup>242</sup>:

*“On the meticulous examination of evidence lead by the petitioner in support of her claim it is emphatically clear that her son has been whisked away by the army personnel of 14th Rajput on 08th of March 2003 and in the first instance she was allowed to meet with her son at Payarpora Camp thereafter neither she was allowed to meet with her son nor her son’s dead body was handed over to his family members. The family members of the said Ghulam Qadir Sheikh have in unequivocal terms stated that it was 14 Rashtriya Rifles army personnel under the command of Major Agarwal who raided the hose of the petitioner’s son and took him in the camp for further investigation. The evidence further reveals that on next day morning petitioner’s son was again brought in this house and the house was raided and no illegal arms and ammunition was recovered during the search. The evidence also further reveals that the said Ghulam Qadir Sheikh was not connected with any political, non-political or militant organizations. The evidence of the village Headman as well as Chowkidar cannot be lose sight of who have clearly stated that they were present on the day when the army personnel came to the hose of the petitioner’s son and he was apprehended by them. They have further stated they have been assured them that he will be released soon. The village headman has further stated that his father has conveyed the picking of a civilian by Army to the police concerned in writing but did not see the petitioner’s son till now. The petitioner has established her claim that her son has been picked up by the army personnel, although it is not clear by which unit he was picked up. It has been mentioned that unit was headed by one Major Agarwal.”*

#### **High Court order on illegal arrest and torture of boy at the hands of RR:**

In *Abdul Rehman Dar vs State And Ors*<sup>243</sup> (27.11.2006), petitioner’s son was apprehended by Rajput Rifles from his house on 10.04.1990 and tortured in custody. After this incident the petitioner’s son was mentally deranged and suffered from Chronic Schizophrenia. The petitioner claimed Rs. 20 Lakhs as compensation from the State-respondents who were responsible for the causing this illness to the petitioner. Petitioner also claimed additional Rs. 45000/- under the Government Order No. 732-GR (GAD) of 1990 dated 10.07.1990 read with Government Order No: 125-GAD of 1997 dated 27.01.1997. The State-respondents have held the petitioner’s son ineligible to the grant of ex gratia relief. His son was, however, awarded an amount of Rs. 30,000/- out of the Chief Minister’s Relief Fund. The Court observed that;

*“8. Perusal of the two documents referred to hereinabove and other documents forming part of the records reveal that the State Government had admitted and acknowledged*

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242 State of J&K and Ors. v. Gh. Qadir Sheikh., HCP No. 251/2000

243 *Abdul Rehman Dar vs State And Ors*, 2007 (1) JKJ 557

*the factum of Mohd Ayub Dars detention in illegal custody of the Security Forces as also his having suffered permanent disablement rendering him incapable of earning his livelihood. It was probably because of this acknowledgment that the petitioner was paid an amount of Rs. 30,000/- out of discretionary grant of the Chief Minister.”*

The Court also said that;

*“13. The State Government, have admitted and acknowledged, in its various nothings, that the petitioner's son had suffered permanent disablement during his illegal custody with the Security Forces. Petitioner's son has suffered because of no fault of his. He has been deprived of his right to life and liberty guaranteed under Article 21 of Constitution of India. The Security Forces which had detained petitioner's son, were working under control of the State Government. State Government is thus liable to compensate petitioner's son. This has, however, not happened. State Government has thus, failed to discharge its constitutional obligation to process the case of the petitioner and award him compensation for permanent disablement and confinement of his son in custody...”*

### **Bijbehara Massacre:**

The facts of the Bijbehara Case are that on 22.10.1993, after Friday prayers, about 2000 to 3000 persons assembled near Jamia Masjid, Bijbehara, Anantnag district and held a peaceful protest against the siege of Hazratbal Shrine. The mob went towards National Highway peacefully to express their sentiments and were raising slogans, when, without any provocation, the BSF personnel from 47th Bn. indiscriminately fired on by, from three sides, resulting in the death of 31 civilians and 75 people were injured.

The Government ordered a magisterial enquiry into the incident. Enquiry Magistrate Bijbehara Firing Case has submitted his report to the State Govt. vide No. EM/BFC/93/23-24 dated 13.11.1993 with the following findings:

1. On 22.10.1993 a procession of 2000 to 3000 people was taken from Jamia Masjid Bijbehara against Hazratbal siege. The procession was entirely peaceful and unarmed. There was no armed militants amongst the demonstrators.
2. It has been established beyond any shadow of doubt that firing upon the procession was absolutely unprovoked and the claim made by the security forces that they were forced to retaliate the firing of militants for self defence is baseless and concocted.
3. The enquiry conducted falsifies the assertion of the BSF personnel that total 51 bullets were fired by them. Actually, besides the cold blooded killing of 31 persons some 73 persons were injured.
4. There were no casualties from the BSF side and which conclusively establishes the fact that there was no firing from the side of the processionists and there was no military or armed person in the crowd.
5. The security forces/personnel have committed offence out of vengeance and their barbarous act is deliberate and well planned. When the very custodians of life and property of innocent and unarmed citizens turn renegade and set out to destroy the same, it does not augur well for the future of any democratic country. The happiness and the very inhuman callousness exhibited by security personnel places a big question mark on the procedure involved in the recruitment and training of such force. The role of Deputy Commandant Shri J.K. Rodala in the whole incident is equally culpable because of tacit approval given by him to the indiscriminate and unprovoked firing. This has shattered beyond repair the confidence and trust that the people of a democratic



country repose in the protectors of their lives. Thus it is imperative upon every right thinking individual to condemn this gruesome incident as a blatant violation of human rights and values.

The Magistrate of Enquiry recommended the immediate dismissal of these accessed persons who committed this dastardly act and initiation of criminal proceedings against them and every effort should be made to ensure that justice is done and maximum possible punishment under the law of the land is awarded to such malignant and sick minded individuals.

The next-of-kin of those killed approached the High Court for compensation. In its decision, the High Court<sup>244</sup> held that:

*“...These facts sufficiently show that the BSF personnel on duty opened fire on the mob without any provocation or cause. The procession was entirely peaceful and unarmed and there is no evidence of the presence of any armed militants in the mob. Thus there was no justification to kill these persons who were closely related to the present petitioners...”*The Court directed as follows: *“On the findings recorded above and keeping in view the age and other facts regarding the deceased persons I direct the State to pay a compensation of Rs. 4 lacs to each petitioner for the loss of life of their close relatives/dependants who have been killed in the incident and whose particulars are given in the petition. This amount shall be in addition to the ex-gratia relief paid to them...”*

The Appeal filed against this order was dismissed by the Division Bench holding that<sup>245</sup>:

*“The State Government is not disputing the incident resulting into killing of 31 persons. The State Government ordered magisterial inquiry and in the inquiry report adverse inference has been drawn against the BSF personnel and based on it, the State Government has also sought for sanction to prosecute the BSF personnel...”*

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244 <https://indiankanoon.org/doc/570305/> passed on 10.09.2007

245 <https://indiankanoon.org/doc/167270312/> passed on 01.09.2015

## Annexure 8: Brief summary of cases in the SHRC

### Enforced disappearances

1. SHRC/2012/66 dated 06.12.2016: Suitable compensation was ordered to be paid to the mother whose son was forcibly taken away in the year 1997 and thereafter was never found. The SHRC found that given that the boy had not left voluntarily but was forcibly taken from his house, and that it is likely that it was those who were involved in terrorist activities.
2. SHRC/2012/58 dated 09.12.2016: SHRC disposed off the case observing that the State Government could consider granting of some relief to the family of a person in Pulwama district who had disappeared in 1991.
3. SHRC/2011/323 dated 15.02.2017: The complaint pertains to the disappearance of the petitioner's son since 1998 from Handwara, Kupwara,, in which the SHRC directed that it should be treated as a case of presumed death and relief should be granted to the petitioner.
4. SHRC/55/2011 dated 04.05.2017: SHRC ordered that the complainant be granted old age pension in view of the disappearance This was a case in Baramulla district, of killing of the petitioner's son during the intervening night of 24/25.03.1992, by unknown persons suspected to be militants.
5. SHRC/39/2015 dated 03.05.2017: Direction was issued to the DC, Kulgam to grant ex-gratia of Rs. 1 lakh to the wife of a man who was missing for the past ten years. The said person was initially with the militant outfit, HM, before joining the Government's Ikwan outfit and then was engaged as a SPO before he went missing.
6. SHRC/172/2012 dated 25.05.2017: Rs. 1 lac compensation was recommended as relied to the mother whose son disappeared from their house in 1992 and after 8 days of which his bullet ridden dead body was recovered from the forest of Trumar-Batpora. The investigations revealed that he was not involved in any subversive activity.
7. SHRC/62-J/2012 dated 25.07.2017: The complainant from Village Ramban stated that on 21.01.2001, a police party entered the house of the complainant, ransacked, misbehaved with family members and arrested his younger brother. Two other persons were also arrested that night before the arrest of his brother. But they were released. Till date, the whereabouts of his brother are unknown and he fears that it might have been cold blooded murder after arresting unlawfully. DGP, J & K filed a report stating that unknown armed masked persons kidnapped the complainant brother and despite investigation none could identify any person responsible for the kidnapping and hence investigation of the case was closed as untraced. SHRC disposed of the complaint stating no further action was required in the matter. Complainant did not reply to notices.
8. SHRC/93/2013 dated 21.08.2017: Complainant filed complaint before the commission to intervene in the matter of missing case of her husband who is missing since 1990. SHRC dropped the complaint as the complainant did not remain present.
9. SHRC/38-J/2014 dated 07.09.2017: Complainant husband was kidnapped by some militants in December 2003 from their house in Gursai Muri, Poonch district, and till date his whereabouts remain unknown. The complainant has claimed benefit under SR&O-43. SHRC gave direction to chief secretary to pay sum of Rs. 5 lacs to the complainant within 30 days.
10. SHRC/20/2017 dated 21.02.2018: The petitioner approached the SHRC in regard to the enforced disappearance of his brother, but the respondent police claimed that he was a militant hence the SHRC ordered for an enquiry which too was inconsequential, hence the matter was closed.

11. SHRC/IA/502/2012 (258/2011) dated 26.10.2017: This case pertains to enforced disappearances and unmarked graves in Poonch and Rajouri districts. SHRC noted that it has passed directions in other matters pertaining to nameless and unidentified graves in North Kashmir on 19.10.2011 and passed the following order:

*"01) The dead bodies in unmarked graves referred to and listed in the enquiry report of the Investigating Team appointed by the Commissioner in cluster of villages at various places in district Baramulla, Bandipora and Kupwara and also as pointed out by a public spirited person or body well versed with the facts and circumstances in particular across the North region of the Kashmir shall be identified by all available means and techniques like DNA (Deoxy Nucleic Acid) profile, physical description, dental examination, distinctive medical characteristic, finger prints, carbon dating, forensic pathology, etc. (as may be applicable), so that even the identity of dead bodies in these unmarked graves is possible with the claimed disappeared persons.*

*02) The DNA (Deoxy Nucleic Acid) profile sampling techniques shall be supplemented by the present day modern scientific techniques and methods facilitating and ensuring matching of the unidentified dead bodies in unmarked graves on maintenance of the identification profiles, with the identity of a particular dead body or a disappeared or any other person who's identification with the bodies discovered in unmarked graves is sought/claimed;*

*03) In those cases where the police may be through respective Police Stations or any other named Wing or Agency of the Police, has maintained an identification profile of the buried dead bodies in the unmarked graves, be of militants or civilians then the process of identification over-again as referred above need not be gone through. However, such identification profiles shall be made available for identification of the disappeared or other persons to meet the claim or desire of the concerned to get identification of their dead or missing persons in the circumstances and facts as in this case;*

*04) Prosecution to bring to justice perpetrators of crim including commission of culpability homicide shall be under-taken on due process and in due course of law;*

*05) Compensatory justice in case of identified disappeared persons in case of unnatural death to reach the families/NOKs preferable by following evolved policy and on earmarked procedure informed of justice and to serve the larger interests of public interest concentric to National Interests. And*

*06) An independent duly representative structured body having due credibility/weight fully empowered to go in all questions/aspects regarding unmarked graves, disappeared person, identification of buried/dead bodies etc. and queries raised thereto and to pronounce authoritatively in all matters inter-alia the recommendation made hereto, to be constituted and put in place in time. Copies of the recommendations be supplied to parties across the board.*

*In this case Action Taken Report has been filed before the Commission. After the case was decided a petition was filed before the Commission that there are unmarked graves in Poonch and Rajouri. The response was sought from the Government and the Commissioner Secretary Home Department has filed a*

*report dated: 30-06-2012. After reading this report, I do not think this Commission needs to hold any further enquiry into the matter as the Home Department has accepted that there are 1486 graves in Poonch which are unidentified and unmarked, in Rajouri it is admitted there are 594 graves which are unmarked and unidentified, so in all in these two districts there are 2080 graves which are unmarked. There are other 1351 graves which are marked and identified. Since the Government has accepted that there are 2080 unidentified graves in Poonch and Rajouri, therefore, the Commission has no hesitation to issue same directions which were already issued in the earlier case(s) SHRC No. SHRC/13/2008; SHRC/231/2011; SHRC251/2011 and SHRC/247/2011. The direction referred above shall be complied within six months."*

12. SHRC/118/2017 dated 03.11.2017: Petitioner's grievance was that his father was taken away from his home in 2007, in Pulwama by some unknown persons and killed. SHRC closed the complaint holding that nothing could be done since the body of the Petitioner's father had not been recovered.
13. SHRC/96-J/2017 dated 07.11.2017: The petitioner approached the SHRC stating that her husband was kidnapped by unknown persons in 2003 and has been untraceable since then. The police took the stand that he had joined the militants and was involved in several cases. Even so the Commission held that it: *"... will not be able to come to any conclusion as to whether the petitioner's husband was innocent and kidnapped by the militants as claimed by the petitioner nor can conclude that he was a terrorist..."*, hence it directed that she be granted relief under the appropriate scheme.
14. SHRC/259/2017 dated 26.03.2018: The case brought before the SHRC was one of the petitioner's brother gone missing in the year 2002. The matter was taken up on 05.05.2008 when the SHRC held that the petitioner was entitled to compensation and observed as follows: *"... This commission also takes judicial notice of the fact that this State in year 2000 was passing through worst type of turmoil and number of disappearances had taken place and many militant related crack downs, combing operations and cross firings had created panic among the masses..."* Thereafter the matter was disposed off directing as follows: *"... There are number of cases of this nature coming the commission. It is true that dependents of such disappeared persons have no proof as to what happened to such persons. Equally the government has no proof that such persons have either crossed to other side of the border or were consumed by ongoing situation in the state for many decades. However, under law a person whose whereabouts are not known for seven years to those who should normally know their whereabouts can be presumed dead. Since the number of such persons is quite large, and it is also fact that the families suffer. Therefore, government must take care of such families. It is directed that government may frame a scheme which would give some welfare to dependents of such persons, as the state is a welfare state. If persons disappears and his family suffers and government is not in position to answer about the fate of such missing persons. Government must come to the rescue..."*
15. SHRC/163-J/2012 dated 14.08.2017: SHRC directed payment of compensation to the next-of-kin of a 16-year old girl who was abducted from her house by two SPOs, not to be found ever again.
16. SHRC/61-J/2012 dated 08.11.2017: The details of the complaint in this matter is that the petitioner's father was lifted by the armed forces and did not return after that. Despite having considered this matter previously and passed orders on payment of 1 lakh compensation, no compliance was made hence a complaint was filed again. The SHRC reiterated payment of monetary compensation and granting of relief as per the existing Scheme.

### Deaths and injuries to innocent people:

1. SHRC/2012/257 dated 09.02.2017: SHRC directed the DC, Bandipora to consider the grant of compensation, on humanitarian grounds, to the father of a man whose son was killed in an encounter.
2. SHRC/2017/25 dated 09.05.2017: SHRC ordered for grant of relief to an ailing father from Kulgam, whose son, an innocent 20-year old man, was killed in the crossfire during and encounter between forces and militants on 21.06.2015.
3. SHRC/148/2013 dated 18.05.2017: The complainant in this case is the father of of a 14-year school boy who alleged that his son was killed when the Indian Army opened fire without provocation. The police took the stand that the kid was killed in crossfire between Indian army and the militants. The petitioner wanted action to be taken against the persons involved in the firing.
4. SHRC/279/2012 dated 25.05.2017: The SHRC directed payment of compensation of Rs. 75000/- to a woman in Kupwara District who received a bullet injury causing permanent disability of her leg. At the time she was working in an orchid, she received bullet injury.
5. SHRC/134/2016 dated 25.05.2017: Petitioner in Kupwara District was injured in firing on 21.06.1996 and suffered permanent disability of his leg. In view of which SHRC directed payment of Rs.1 lac as compensation.
6. SHRC/197/2014 dated 25.05.2017: SHRC directed payment of Rs. 25000/- compensation to the petitioner in Kupwara District who got injured due to cross border shelling on 17.11.2000.
7. SHRC/107/2012 dated 20.07.2017: SHRC denied the relief to petitioner who approached the commission in 2012 for an incident that occurred in 1999, where in her son was killed in Amira Kadal Srinagar as she failed to deny the fact that her son was a militant and weapons were recovered from his possession.
8. SHRC/130/2015 dated 10.08.2017: SHRC held that that Rs. 1 Lac granted to the petitioner as ex-gratia relief is not sufficient and awarded Rs. 3 lacs as compensation for death of petitioner's 12 year old son who died in an explosion in Baramulla District caused due to negligence of the police. An encounter took place at village Ladoora Rafiabab on 02.09.2015 in which a militant was killed, and the son of the Petitioner found an unexploded shell at the encounter site which he took home and tried to open which exploded killing him and injuring his mother. The SHRC held that *"In view of the report of the DGP J&K there is no doubt that the boy died due to negligence of the police. Unexploded explosive shells cannot be left in such a way that an innocent boy will pick it up as a toy and get killed."* In addition to monetary compensation, the SHRC directed the DGP J&K to initiate action against the officers/officials who were responsible for negligence of their duties.
9. SHRC/46/2014 dated 21.08.2017: SHRC took suo moto cognizance of the killing of Naidkhai youth namely Farhat Ahmad Dar in Police firing based on news report published in Daily G.K dated March 15/2014 and directed the government to pay a compensation of Rs. 5 lacs within a period of eight weeks holding that *"... one cannot escape the conclusion that indiscriminate and excessive force used by the police resulted in the death of a young boy who was a student of 11<sup>th</sup> class..."*. Farhat was shot in the chest during a stone pelting incident in regard to which the Magistrate in his report concluded that the action taken by the police *"... is not coterminous with their status and ultimate loss could have been avoided by resorting to non-lethal methods of firing on non-vital parts or in such manner that no human life would have lost."*
10. SHRC/2011/16 dated 31.08.2017: Complainant is seeking compensation under SRO-43 for killing of his son Tanvir Ahmad Sheikh by security forces in Baramulla District when they started firing at stone pelting. By this order SHRC directed the Dy. Commissioner

Baramulla to award Rs. 5 lacs as compensation within 30days. It held that in view of GAD Order no. 893 of 2008 dated 04.07.2008 is entitled of all benefits under SRO 43.

11. SHRC/99/2015 dated 10.11.2017: SHRC enhanced compensation to the petitioner who suffered a bullet injury in a firing incident.
12. SHRC/2012/1 dated 15.11.2017: SHRC directed the DC, Anantnag to sanction ex-gratia relief to the Petitioner who had received a bullet injury in 2001.
13. SHRC/229/2012 dated 16.11.2017: SHRC enhanced compensation in to the family of a man who was killed in police firing by the CRPF near Dalgate, Srinagar and to his son who was also seriously injured.
14. SHRC/114/2016 dated 22.11.2017: SHRC granted relief of compensation to ten persons who were injured in an explosion in Shopian.
15. SHRC/262/2017 dated 22.11.2017: SHRC enhanced compensation to the petitioner who was injured in a mine blast in 1996 in Kupwara
16. SHRC/353/2012 dated 06.12.2017: Taking suo motu cognizance of 15 persons who suffered bullet injuries in Pulwama on 29.12.2012, the SHRC thereafter passed an order directing for monetary compensation to the injured as admittedly they were innocent bystanders who got caught in an encounter between militants and the armed forces.
17. SHRC/57/2015 dated 14.12.2017: SHRC ordered for monetary compensation to the petition who admittedly suffered bullet injury in 2008 when he was 15 years old resulting in the amputation of his right leg.
18. SHRC/145/2017 dated 15.02.2018: Compensation was directed to be paid to the next-of-kin of deceased who was killed in cross-firing between militants and army at Bemina Hamdaniya Colony in the year 2000.
19. SHRC/411/2017 dated 06.02.2018: Petitioner was granted relief of monetary compensation for having lost her right arm in shelling in the year 1998 in Kupwara district.
20. SHRC/390/2017 dated 06.02.2018: Petitioner was granted relief of monetary compensation for having got seriously injured in a mine blast while cutting grass in a field, resulting in the amputation of his right leg (Kupwara district).
21. SHRC/142/2017 dated 06.02.2018: Petitioner was granted relief of monetary compensation for having got seriously injured in a mine blast in 2003 (Kupwara district).
22. SHRC/232/2017 dated 06.02.2018: Petitioner was granted relief of monetary compensation for having got seriously injured in a mine blast while cutting grass in a field, resulting in the amputation of his right leg (Kupwara district).
23. SHRC/358/2017 dated 06.02.2018: Petitioner was granted relief of monetary compensation for having got seriously injured in a mine blast while cutting grass in a field, resulting in the amputation of his leg (Kupwara district).
24. SHRC/359/2017 dated 06.02.2018: Petitioner was granted relief of monetary compensation for having got seriously injured in a mine blast while cutting grass in a field, resulting in the amputation of his leg (Kupwara district).
25. SHRC/392/2017 dated 06.02.2018: SHRC directed for payment of compensation and other relief to the petitioner whose husband was killed in a firing incident in 2017.
26. SHRC/403/2017 dated 06.02.2018: SHRC directed that, in addition to compensation already paid, other relief should be extended to the petitioner whose son was fired upon and killed by ambush party of army camp, Thandipora in 2017.
27. SHRC/233/2017 dated 06.02.2018: Petitioner suffered serious injuries during shelling and firing in 1993 and lost both hands and vision in one of his eyes. SHRC lamented that he was not given any compensation for decades and directed the payment of immediate relief and directed the DC, Kupwara to take up the matter of payment of compensation to the petitioner with the army.
28. SHRC/264/2017 dated 06.02.2018: Petitioner was granted relief of monetary compensation for having got seriously injured in a mine blast while cutting grass in a field,

- resulting in the amputation of his leg (Kupwara district).
29. SHRC/276/2017 dated 06.02.2018: Petitioner was granted relief of monetary compensation for having got seriously injured in a mine blast while grazing cattle in a field, resulting in the amputation of her leg (Kupwara district).
  30. SHRC/243/2017 dated 06.02.2018: Petitioner suffered injury to his hand when he found an object he found in his field exploded when he picked it up in his hand. This happened in 1985. SHRC directed that he should be given one time relief from the Red Cross Fund and increased the monthly relief from the Social Welfare department.
  31. SHRC/09/2018 dated 06.02.2018: Compensation to the petitioner was increased substantially for the loss of his only son in a blast in 2016 in Handwara, Kupwara.
  32. SHRC/340/2017 dated 06.02.2018: SHRC directed that the petitioner be granted all other reliefs available under law in regard to the death of his son in shelling.
  33. SHRC/398/2017 dated 06.02.2018: The petitioner's wife was seriously injured in a mine blast and lost his right leg. DC, Kupwara was directed to take up the matter with the concerned army and ensure the petitioner is paid due compensation.
  34. SHRC/130/2017 dated 07.03.2018: Monetary compensation was directed to be paid to the Shaheena who was shot in her thigh inside her house in Warihama Beerwa, Budgam.
  35. SHRC/393/2017 dated 16.03.2018: The petitioner's father suffered bullet injury while he was collecting fire wood in the forest and in view of this admitted fact, the SHRC directed for DC, Kupwara to ensure payment of compensation.
  36. SHRC/02-J/ of 2017 (SHRC/341-s of 2012) dated 16.08.2017: The petitioner sought relief and compensation for the death of his son who had gone for some labour work and unfortunately he was caught in the cross fire between army and militants in 2005. The authorities declared his son to be a Pakistani militant and buried his body along with two militants who were killed in the encounter. It is only after the efforts of the family members that an enquiry was conducted and the body exhumed and identified as the body of his dead son. Thereafter his son was re-buried at Kishtwar graveyard. Despite this woeful incident no relief or compensation was given as per the Scheme, hence the complaint to the SHRC was made, which directed payment of compensation of Rs. 5 lakhs.
  37. SHRC/112-J/2012 dated 12.09.2017: SHRC directed payment of compensation to the petitioner who had suffered as serious bullet injury by the jawans of BSF 90 Bn. who were on firing practice at the range at Jhulass Poonch on 13.07.1993.
  38. SHRC/40/2012 dated 08.11.2018: Ex-gratia relief was directed to be granted to the petitioner who suffered injuries when he received splinters during cross-firing between armed forces and militants.

#### **Death and injury at the hands of unknown persons**

6. SHRC/2012/116 dated 08.11.2016: The petitioner herein was dragged out of his house in Bandipora in 2014 by unidentified armed people, and shot due to which he suffered multiple injuries and amputation of one of his legs. He approached the SHRC for compensation. SHRC passed an Order whereby it held that: *".. The gunshot suffered by him can be attributed to an overall situation in which the state finds itself for many years resulting in failing to protect a young man..."*, and ordered for 2 lakhs compensation to be paid to him.
7. SHRC/2011/221 dated 17.02.2017: This was a case of killing of the petitioner's son during the intervening night of 24/25.03.1992, by unknown persons suspected to be militants on account of the petitioner's son despite having received arms training across the border, on return refusing to take part in their activities. SHRC ordered One Lakh compensation in favour of the parents. Matter pertained to Kupwara district.
8. SHRC/205/2014 dated 08.11.2016: The petitioner's husband was killed by unknown militants in the year 1992 and were seeking employment under the relied scheme for her



child. The police admitted that her husband was a surrendered militant who was engaged in the forest department as a daily wager. Granted relief as sought for.

9. SHRC/27-J/2010 dated 11.09.2017: SHRC issued directions for payment of hefty compensation to the petitioner who had sought compensation on account of the killing of 7 members of his family by militants at their house in Ari, Poonch district in 21.07.1999
10. SHRC/88/2017 dated 15.09.2017: SHRC directed for compensation to be paid to the petitioner whose son was kidnapped by the Iqwan UI Muslimoon from their home in Kumullah, Ganderbal, who were then taking him in a vehicle which got attacked by the militants causing three deaths including that of the petitioner's son in 1997.
11. SHRC/152-J/2016 dated 24.10.2017: SHRC directed for compensation to be paid to the petitioner whose mother and sister were killed by militants in their house in village Dheda, Ramban district in the intervening night of 27<sup>th</sup> and 28<sup>th</sup> July 2005.

### **Protection of property of Kashmiri Pandits**

1. SHRC/01-J/2017 dated 15.11.2017: The petitioners were erstwhile residents of village Tral payeen, Pulwama district but were forced to leave their homes and hearths along with others from their Pandit community and that the Government of J&K had promulgated the Jammu and Kashmir Migrant's Immovable Property (Preservation, Protection and Restraint of Distress Sales) Act, 1997 to protect the immovable properties of the Kashmir migrants, yet their properties were being encroached upon. The SHRC, after enquiry, directed that property be protected and handed over to the petitioners.

### **Death and injury of agents of the army**

1. SHRC/158/2016 dated 25.05.2017: SHRC directed the deputed commissioner and other authorities to extend all benefits to a person in view of the fact that his son who was working as an SPO disappeared in the year 2006 and admittedly the disappearance is related to militancy.
2. SHRC/70/2012 dated 25.05.2017: The complainant in this case sought for compensation on account of having received bullet injuries during anti-militancy operation in a group known as Javaid Ahmad Mir @ Javaid group Wawooria Lolab Kupwara. The commission accepted the police's stand that he was working with the said group. But in regard to the other it stated that "*.. submissions cannot be accepted. Police appeared to have engaged this person to fight militants and after fulfilling the purpose they disowned them*". Rs. 25000/- compensation was ordered to be paid.
3. SHRC/62/2015 dated 25.05.2017: Four persons were residents of Katwada Machil, Kupwara, were engaged by BSF as porters for lifting ammunitions to the border and unfortunately they died in a snow storm. This was undisputed. The commission order payment of Rs. 50,000/- as compensation to the next of kin of the deceased and also directed the Deputy commissioner, Kupwara to take up the matter with BSF authorities and impress upon them to create Rs. 3 lacs compensation to the next of kind of the deceased.
4. SHRC/263/2017 dated 06.02.2018: Petitioner lost his one foot in a mine blast while working as porter with army 16 Kamove at Gunda post Karnah. SHRC directed the Assistant Commissioner, Kupwara to pay ex-gratia relief and the DC, Kupwara was directed to take up the matter with the army for seeking compensation to the petitioner.
5. SHRC/272/2017 dated 06.02.2018: The petitioner's son was working as a porter with the army and died from injuries sustained when he slipped off and fell down a deep naala and had not been given any relief or compensation. SHRC held that: "*...It is unfortunate that a person who was working with the army like a soldier has not been helped by anybody. Neither he has been paid any compensation by the army nor has he been paid relief by the district administration...*". In stating so, the SHRC also directed that Home Secretary to

frame a scheme for people such as the petitioner's son who are not covered by existing schemes.

6. SHRC/242/2017 dated 06.02.2018: Petitioner was working as a porter with the BSF when he lost his leg due to a mine blast in 1982 and yet neither the government nor the army had given any relief. SHRC directed the DC, Kupwara to take up the issue with the concerned agency to ensure compensation to the petitioner.
7. SHRC/375/2017 dated 06.02.2018: Petitioner was working as a porter with Army Unit 19 Maratha, when he lost his leg due to a mine blast in 1982, while carrying luggage from Darshan post to another post. SHRC directed that the petitioner be given a one-time relief from the Red Cross fund.
8. SHRC/274/2017 dated 06.02.2018: Petitioner was working as a porter with the army when he suffered injuries in a mine blast and yet neither the government nor the army had given any relief. SHRC directed the DC, Kupwara to take up the issue with the concerned agency to ensure compensation to the petitioner.
9. SHRC/283/2017 dated 06.02.2018: Petitioner was working as a labour for the army when he lost his leg in a mine blast, AC, Kupwara was directed to ensure decision was made in 2 months.
10. SHRC/22/2009 dated 08.11.2017: The petitioner's claim that her husband was working for the Intelligence Agency who used his services by way of sending him to Pakistan to get information about militants and that he was killed when militants were also crossing the border on 25.09.1991 and that the SSP and SDPO had paid her Rs. 1.00 lakh and promised her more compensation and job, but hadn't done so to date. SHRC rejected the stand of the police that her husband was a militant who was killed crossing the border by holding that: "...By paying Rs. 1.00 lac at the time of death of petitioner's husband the Government admits that the husband of the petitioner was working for the Government and die while performing his duties...". SHRC thus directed that all relief under the appropriate schemes ought to be granted to the petitioner.

#### **Land occupied by the army**

1. SHRC/116/2014 dated 25.05.2017: The resident of Panzgam, Kupwara, filed a complaint that 6 ½ canals of her land was taken over by the army camp and insufficient money was paid to her, which the SHRC directed the deputy commissioner to look into.
2. SHRC/67-J/2014 dated 22.02.2018: This is a case filed by the Kashmiri Pandits presently residing in Jammu, wherein they migrated from their village due to the turmoil in 1990 and after thereafter the BSF 103BN has occupied their land in Kherman Nandram, Handwara and not paid rent since 1990. During enquiry it is admitted that the BSF has been in occupation since 1990 and it is only since January 2015 that rent is being paid continuously. SHRC, taking these undisputed facts into account, has directed that the arrears of rent since 1990 ought to be paid immediately.

#### **Harassment by the armed forces:**

4. SHRC/115/2017 dated 10.07.2017: 'The Human Shield Case' – *"The report of the police accepts that Farooq Ahmad Dar S/O Ab. Rahim R/O Chill was tied to a bonnet of vehicle and used as human shield, but the police maintains that this is done by Army. There cannot be any debate as to whether the treatment given to said Farooq Ahmad was violation of human rights or not. there are laws which in this country and international laws which prohibit such a treatment even to a convict. Such a treatment to human being cannot be accepted by a civilized society. This Commission however is handicapped to go into the conduct of the Army who are allegedly responsible for the incident according to Farooq Ahmad as well as State police. Because of the limited applicability of the Protection of Human Rights Act, 1993, State of Jammu and Kashmir, although the State has its own*

*Protection of Human Rights Act, under which the Commission acts.... In view of the report of the police Farooq Ahmad has been subjected to human rights violation and therefore, the State Government cannot escape from the responsibility of having failed to protect the human rights of a citizen. It was also stated by the petitioner that the said Farooq Ahmad has suffered mental and physical injuries and scars therefore he was referred to Government Medical College Srinagar for being examined. The Medical Superintendent SMHS Hospital Srinagar was also directed to provide necessary treatment to said Farooq Ahmad. Superintendent of SMHS Hospital Srinagar has filed the report before the Commission on 06-05-2017. Besides, noting certain injuries, the doctors opined that Psychiatric consultation was done for features of anxiety/stress who diagnosed him as "ACUTE STRESS DISORDER" with Trauma screening questionnaire score of 8/10.... Coming back to the matter in hand, I have no doubt in my mind that Farooq Ahmad was subjected to torture and humiliation besides was wrongly confined. It is medically also established that said Farooq Ahmad did not suffer only humiliation publically but also suffered trauma which resulted in Psychiatric stress which may remain with him for rest of his life. For the humiliation, physical, psychological torture, stress wrongful restraint and confinement the Commission thinks it appropriate to direct the State Government to pay compensation of RS. 10.00 lacs (Rupees Ten Lacs) to the victim. Since the Commission is not able to go into question as to whether Indian Army was responsible for this act of gross human rights violation or not. Therefore, the Commission clarifies that any observation made in this order should not be taken as an expression of any opinion regarding alleged involvement of Officers of Indian Army."*

5. SHRC/144-J//2016 dated 26.07.2017: The complainant from Poonch District has raised the unnecessary harassment by Army (3/8GR) led by CO, Col. V.K. Sharma and one captain N.K Shukla. He complained that his family was also being harassed and visited during odd hours and threatened of dire consequences. The DGP, JNK submitted a report where he stated that the complainant during verification has stated that he is not being harassed. The order records that the complainant was contacted on the mobile and that he stated that he had no grievance against the army and hence the complaint was closed.
6. SHRC/102-J/2012 dated 25.07.2017: Complainant filed a complaint against the detention and torture of their son by the Satwari Police, Jammu. The enquiry officer stated that none of the person had beaten the accused. Complainant has not remained present. SHRC has dropped complaint.

#### **Damage to property**

1. SHRC/2007/64 dated 30.12.2016: SHRC referred the case of the petitioner to the DC, Baramulla for consideration of grant of compensation on humanitarian grounds for the damage caused to his house during an exchange of fire between the militants and army personnel on 17.04.2004.
2. SHRC/244/2017 dated 06.02.2018: The petitioner lost his house due to shelling in the year 1996 and also suffered serious injuries. SHRC directed for payment of ex-gratia compensation and also directed the DC, Kupwara to re-consider the payment of relief for the damaged house.

#### **Others**

1. SHRC/2012/315 dated 11.05.2017: SHRC directed the State Government to pass orders, granting permission or rejecting, permission to the petitioner, who was from Baramulla district, to visit POK.
2. SHRC/66/2017 dated 06.07.2017: SHRC directed the DC, Shrinagar to reassess compensation payable to the petitioner whose house at Shanpura, Habak, Shrinagar got

completely destroyed during the floods of 2014. The commission directed the Dy. Commissioner, Shrinagar to re- assess the compensation.

3. SHRC/28/2016 dated 10.07.2017: SHRC directed the revenue authorities to consider the request of petitioner to declare her father who is missing from Baramullah District in 1991.

## Annexure 9: Note on the development of jurisprudence around Article 370

Today when the Supreme Court is seized of the challenges to the abrogation of Article 370 and the decision to split the State of Jammu and Kashmir, as also the challenge to the constitutionality of Articles 370 and 35A, it is necessary to review the decisions of the Supreme Court on Article 370 thus far. This is especially since, as already set out elsewhere in this report, Article 370 was to be invoked by the President of India with the consultation of the State Government in respect of entries set out in the Accession Treaty and with the concurrence of the Constituent Assembly in respect of any other provision of the Constitution of India. The Constituent Assembly was dissolved in 1956 and no further invocation of Article 370 could have been done after that. But in reality there has been a virtual hollowing out of this Article over the years, at times with the concurrence of the State Government and at times with the concurrence of the Governor appointed by the Centre.

The first major case was *Prem Nath Kaul v. State of Jammu and Kashmir* (AIR 1959 SC 749) where the land reforms law of Jammu and Kashmir was challenged. While dealing with the power of the Maharaja to promulgate the law in the context of Article 370, the Constitutional Bench of the Supreme Court held that it was clear that the Constitution makers were clear that the final resolution of relation between Kashmir and India be left to the Constituent Assembly of Jammu and Kashmir. There was also a challenge in this matter to the constitution of the Constituent Assembly of Jammu and Kashmir. It was argued that Constituent Assembly had not been properly constituted and properly elected. This argument was rejected by the Supreme Court holding that the Constituent Assembly was properly constituted. In view of this decision there should have been no doubt that the relationship between India and Kashmir was to be determined by the Constituent Assembly of Jammu and Kashmir and once so determined, it could not be changed even by the President without the concurrence of the Constituent Assembly. The Constituent Assembly was dissolved and therefore all subsequent Presidential Orders whittling down Article 370 should have been held to be per se illegal.

However shockingly the subsequent judgments of the Supreme Court totally ignore Prem Nath's judgment and proceed to validate Presidential powers exercised subsequent to the dissolution of the Constituent Assembly. In *Sampat Prakash* (AIR 1970 SC 1118), a 5 judge bench of the Supreme Court held that despite that fact the Constituent Assembly of Jammu & Kashmir had ceased to be in existence, the President of India could extend any Central law or any Constitutional amendment via Article 370. The petitioner had challenged his detention on the ground that the modifications made in the law through Presidential Orders of 1959 and 1964 could not have been validly passed by the President. What was shocking was that though one of the judges to both Prem Nath and Sampat Prakash was common, the Court did not even refer to Prem Nath's Judgment.

In *Mohammad Maqbool Damnoo vs. State of Jammu and Kashmir* (AIR 1972 SC 963) the constitutional validity of the Preventive Detention Amendment Act 1967 was questioned on the basis that it had received the assent of the governor rather than the Sadr-i-Riyasat, the constitutional head of the state – an elected position and established by the J&K Constituent Assembly to replace the maharaja in accordance with the Delhi Agreement in 1952. The J&K constitution had been amended through the Constitution of Jammu and Kashmir (6th Amendment) Act 1965, to provide for the appointment of a governor, nominated by the central

government, in place of the Sadr-i-Riyasat. The Supreme Court found no difference between the constitutional position of a governor and a Sadr-i-Riyasat, the former a nominated person by the Centre and the latter an elected office. The Supreme Court also refused to accept the contention that Article 147 of the Constitution of Jammu and Kashmir contemplates perpetual existence of Sadr-i-Riyasat because this section expressly bars the Assembly from amending any provision of Article 147. Thus this Judgment undermined even the Constitution of Jammu and Kashmir.

J&K Grant of Permit for Resettlement Act, 1982 was introduced in the state to provide for the regulation for the grant of permit for the purpose of resettlement or permanent return to the State of J&K of the permanent residents of the State and their descendants who had migrated to Pakistan between March 1 1947 and May 14, 1954. The specific object of this enactment was to bring about return of such evacuees who had left the state in wake of mass killings of Muslims that took place in Jammu in 1947. In February 2002, the Supreme Court stayed the implementation of the J&K Grant of Permit of Resettlement Act of 1982, after two petitions challenging the constitutional validity of the said Act were presented before the Supreme Court. The petitioners had alleged that the Act would pose a threat to national security. The matter has now been referred to a Constitution Bench and the final judgment is awaited. Meanwhile, the future of the evacuees, who had left Jammu and Kashmir since 1947 and were permanent residents of the state is uncertain.

In December 2016, a 2 judge bench of the Supreme Court of India in *State Bank of India v. Santosh Gupta*<sup>246</sup> held that in Jammu and Kashmir there was no vestige of sovereignty outside the Constitution of India and its Constitution is subordinate to the Constitution of India.

By various Presidential Orders passed from time to time the autonomy of Jammu and Kashmir had been systematically whittled down and Article 370 has been eroded to a shell. The Supreme Court, instead of rescuing this Article has over the decades supported these moves by the Centre.

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246 2017 2 SCC 538

## Annexure 10: Note on Federalism in the context of J&K

Article 1 of the Constitution states India is a Union of States. Article 245 onwards deal with distribution of legislative powers and List 2 of Schedule VII provides for items on which only the State Government can legislate. The nature of federalism has been highly debated. Some judgments call it quasi federal while some call it federal.

In the case of *State of W.B. v. Union of India* [(1964) 1 SCR 371 : AIR 1963 SC 1241], Sinha, C.J. in the majority judgment, has held that India is quasi-federal with a strong tilt to the Centre. In so holding, the learned Judge referred to four indicia of a real federation, as follows:

*“(a) A truly federal form of Government envisages a compact or agreement between independent and sovereign units to surrender partially their authority in their common interest and vesting it in a Union and retaining the residue of the authority in the constituent units. Ordinarily each constituent unit has its separate Constitution by which it is governed in all matters except those surrendered to the Union, and the Constitution of the Union primarily operates upon the administration of the units. Our Constitution was not the result of any such compact or agreement: Units constituting a unitary State which were non-sovereign were transformed by abdication of power into a Union.*

*(b) Supremacy of the Constitution which cannot be altered except by the component units. Our Constitution is undoubtedly supreme but it is liable to be altered by the Union Parliament alone and the units have no power to alter it.*

*(c) Distribution of powers between the Union and the regional units each in its sphere coordinate and independent of the other. The basis of such distribution of power is that in matters of national importance in which a uniform policy is desirable in the interest of the units, authority is entrusted to the Union, and matters of local concern remain with the State.*

*(d) Supreme authority of the courts to interpret the Constitution and to invalidate action violative of the Constitution. A federal Constitution, by its very nature, consists of checks and balances and must contain provisions for resolving conflicts between the executive and legislative authority of the Union and the regional units.”*

The federal context of state of Jammu and Kashmir was dealt with by the Supreme Court in *State Bank of India Vs. Santosh Gupta* [(2017) 2 SCC 538]. Dealing with federalism in the context of the State of Bengal Judgment, the Supreme Court observed:

*“11. It was found that so far as States other than the State of Jammu Kashmir are concerned, indicia (a) and (b) were absent whereas indicia (c) and (d) were present, and this coupled with a reading of various other articles of the Constitution led a Constitution Bench of this Court to decide that the federal structure of the Constitution tilts strongly towards the Central Legislature and the Central Government.*

*12. In so far as the State of Jammu & Kashmir is concerned, it is clear that indicia (b) is absent. Insofar as the other indicia are concerned, the State does have its own separate Constitution by which it is governed in all matters, except those surrendered to the Union of India. Amendments that are made in the Constitution of India are made to apply to the State of Jammu & Kashmir only if the President, with the concurrence of the State Government, applies such amendments to the State of Jammu & Kashmir. The*

*distribution of powers between the Union and the State of Jammu & Kashmir reflects that matters of national importance, in which a uniform policy is desirable, is retained with the Union of India, and matters of local concern remain with the State of Jammu & Kashmir. And, even though the Jammu & Kashmir Constitution sets up the District Courts and the High Court in the State, yet, the supreme authority of courts to interpret the Constitution of India and to invalidate action violative of the Constitution is found to be fully present. Appeals from the High Court of Jammu & Kashmir lie to the Supreme Court of India, and shorn of a few minor modifications, Articles 124 to 147 all apply to the State of Jammu & Kashmir, with Articles 135 and 139 being omitted. ....We may also add that permanent residents of the State of Jammu & Kashmir are citizens of India, and that there is no dual citizenship as is contemplated by some other federal Constitutions in other parts of the world. All this leads us to conclude that even qua the State of Jammu & Kashmir, the quasi-federal structure of the Constitution of India continues, but with the aforesaid differences. It is therefore difficult to accept the argument of Shri Hansaria that the Constitution of India and that of Jammu & Kashmir have equal status. Article 1 of the Constitution of India and Section 3 of the Jammu & Kashmir Constitution make it clear that India shall be a Union of States, and that the State of Jammu & Kashmir is and shall be an integral part of the Union of India.”*

*S.R. Bommai V. Union of India [(1994) 3 SCC 1], Jindal Stainless Ltd. [(2017) 12 SCC 1]* (both larger Benches of Supreme Court) throw a different light on federalism.

In *S.R. Bommai* case speaking for himself and Kuldeep Singh, J. Sawant, J. while referring to H.M. Seervai's commentary on Constitutional Law of India held that the principle of federalism has not been watered down so as to make the Constitution unitary in character. The presence in the Constitution of exclusive legislative powers conferred on the State and the provision that such powers may be exercised by Parliament during an emergency may not affect and dilute the federal character of the Constitution. So also, the provisions of Article 355 imposing the duty on the Union to protect a State against internal disorder are not inconsistent with the federal principles nor are the powers vested in the Central Government under Article 356 inconsistent with the federal character of the Constitution.

What is important is that B.P. Jeevan Reddy, J. in *S.R. Bommai* case speaking for himself and Aggarwal, J. while holding the Constitution to be federal in character, cautioned that the Centre cannot tamper with the powers conferred upon the States. States are not mere appendages of the Centre within the sphere allotted to them. The States are supreme and the Centre cannot tamper with their powers. K. Ramaswamy, J. speaking for himself also accepted federalism of the Indian Constitution as a basic feature.

One other decision that has dealt with the federal character of the Constitution of India is *Kuldip Nayar v. Union of India [(2006) 7 SCC 1]* wherein this Court held that nature of federalism in the Indian Constitution is no longer *res integra*. Relying upon the Constituent Assembly Debates to which we have referred earlier, the Court declared: (SCC p. 49, paras 50-51)

*“50. A lot of energy has been devoted on behalf of the petitioners to build up a case that the Constitution of India is federal. The nature of federalism in the Indian Constitution is no longer res integra.*

*51. There can be no quarrel with the proposition that the Indian model is broadly based on federal form of governance.”*

In *ITC Ltd. v. Agricultural Produce Market Committee [(2002) 9 SCC 232]* the Supreme Court ruled that the Constitution of India must be interpreted in a manner that does not whittle down



the powers of the State Legislature. An interpretation that supports and promotes federalism while upholding the Central supremacy as contemplated by some of the Articles must be preferred. To the same effect is the nine-Judge Bench decision of this Court in S.R. Bommai case where the Supreme Court cautioned against adoption of an interpretation that has the effect of whittling down the powers reserved to the States. The Court said:

*“276. The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-à-vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. It is a matter of common knowledge that over the last several decades, the trend the world over is towards strengthening of Central Governments — be it the result of advances in technological/scientific fields or otherwise, and that even in USA the Centre has become far more powerful notwithstanding the obvious bias in that Constitution in favour of the States. All this must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle — the outcome of our own historical process and a recognition of the ground realities. This aspect has been dealt with elaborately by Shri M.C. Setalvad in his Tagore Law Lectures “Union and State Relations under the Indian Constitution” (Eastern Law House, Calcutta, 1974). The nature of the Indian federation with reference to its historical background, the distribution of legislative powers, financial and administrative relations, powers of taxation, provisions relating to trade, commerce and industry, have all been dealt with analytically. It is not possible — nor is it necessary — for the present purposes to refer to them. It is enough to note that our Constitution has certainly a bias towards Centre vis-à-vis the States [Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan [Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan, AIR 1962 SC 1406 : (1963) 1 SCR 491] ]. It is equally necessary to emphasise that courts should be careful not to upset the delicately-crafted constitutional scheme by a process of interpretation.”*

While on the one hand the Supreme Court holds that federalism is part of the basic structure of the Indian Constitution and the nature of federalism is distinct from that of say the United States, the Court also holds that this federalism needs to be guarded and interpretation which promotes this federalism needs to be given.

Be that as it may, the Constitution and its various amendments clearly indicate that devolution of power to the local level is a Constitutional mandate. 73rd Amendment to the Constitution (made in 1992) brought in the concept of Panchayats and Gram Sabhas for rural areas and 74th Amendment (made in 1993) brought in the concept of Municipalities for urban areas as institutions of self governance at the local level.

It is in this context that both the abrogation of Article 370 and the Reorganisation Act have to be seen.

Text for Back Cover:

Between August 5 and 6, 2019, two presidential orders, C.O. 272 and C.O. 273, were issued that had the effect of abrogating Article 370 and Article 35A, and effectively dismantled the limited protection afforded to state of Jammu and Kashmir in self-governance, territorial integrity and the collective rights to land and livelihood. As lawyers, activists and a medical doctor, we felt it important out of a sense of solidarity for the peoples of Jammu and Kashmir, but also out of a sense of responsibility to understand the situation first hand on the ground, in order to advance the true spirit of a democratic society and hold our elected government and the institutions of democracy accountable for their actions. An eleven-member team comprising advocates, trade union and human activists and a psychiatrist visited the Kashmir Division from September 28 – October 4, 2019. The broad objective of the team was to understand the situation persisting in the two months since the abrogation of Article 370, and, second to assess the quality of access to justice in these compelling circumstances.