E-ISSN: 2682-7964 (Online)

CODEN: SVSOC5

Social Values and Society (SVS)

DOI : <http://doi.org/10.26480/svs.02.2019.15.19>

Social Values & Society

REVIEW ARTICLE

LAW AND DETENTION: A CRITICAL ANALYSIS OF LAW IN THE KASHMIR VALLEY

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ARTICLE DETAILS

ABSTRACT

Article History:

Received 01 April 2019

Accepted 06 May 2019

Available online 09 May 2019

The conflict of Kashmir is mapped out as a multi-dimensional dispute between various states. It is an inter-state dispute between India and Pakistan, armed conflict between India and Kashmiri's over the right of self-determination (freedom) and between India and religious militants. Meanwhile, India took repressive measures that created the situation of 'new war' in the state of Jammu and Kashmir. The 'new wars' were basically post-cold war conflicts which differ from the accepted definition of warfare. The main features of these conflicts include human rights abuses, identity issues and the presence of para-military forces, which lead to displacement of population. It is noteworthy that democratic states practice the art of law fare and justifies the violence and brutality against their own inhabitants. The law employed by the government also carries an insurgent potential in order to make claims for resources, recognition, voice, integrity and sovereignty. Similarly, in Kashmir valley where security forces use force to preserve law by enforcing new regulations or by reconsidering established sanctions. The paper would examine why violence like arbitrary detention, torture, and disappearances are existing in the contemporary period and what is the role of law in the valley towards detention.

KEYWORDS

Kashmir, Conflict, Emergence of Law, Arbitrary Detention, Its Impacts.

1. INTRODUCTION

The state of Jammu and Kashmir is located in the heart of Asia. It is situated between 32.17- and 35.58-degree north latitude and 32.26- and 80.30-degree east longitude. The state of Jammu and Kashmir was formed on 26 October 1947. The state covers an area of 2, 22,236 sq. kms and is the sixth largest state in terms of area. The state of Jammu and Kashmir is surrounded by Himachal Pradesh in its south as well as neighbouring countries like Pakistan, Afghanistan and China from west, north and east respectively [1].

Region	Areas (Sq. Miles)	Population (2011 census) (Provisional)
Kashmir valley	8,639	5,35,0811
Jammu region	12,378	69,07,623
Ladakh region	33,554	2,90,492
Total	54,571	1,25,48,926

Source: National Disaster Risk Reduction Portal [2]

Kashmir is a land of remarkable beauty, blessed by nature with breath taking. Scenery and a glorious climate, the Kashmir valley, a fertile well-watered spot, surrounded by high mountains has been described with

justification a heaven on earth, a produce rich oasis an area not noted for its abundance [3]. In the nineteenth century the state of Jammu and Kashmir has acquired a unique geo-political status in the Indian sub-continent. The state has contiguous boundaries with Russia, Afghanistan, Pakistan, China and Tibet that deserve constant vigil and as such it has made the state very important through geographically, politically, economically and from the military point of view [4].

Description	As per census, 2011
No. of districts	22
No. of tehsils	84
No. of blocks	143
No. of panchayats	4128
No. of towns	86
No. of cities with million plus population	02 (Jammu and Srinagar)
Total	2,22,236 sq. Kms

Source: National Disaster Risk Reduction Portal [5]

2. KASHMIR CONFLICT

Conflicts in South Asia can be ascribed to four reasons: Firstly, some have their roots in British colonial policies such as divide and rule. Secondly,

some conflicts have arisen due to the modernization process in the sub-continent which benefits some and marginalize and exclude others. Thirdly, conflicts are due to the intervention of external countries like Soviet intervention in Afghanistan in early 1980's and the last being is that some conflicts arise because of limited resources and the struggle for these resources. Kashmir conflict is a complicated and multidimensional one and can fit into the first category. The political mobilization of the Kashmiri Muslims, deinstitutionalization of Indian politics and the intervention of Pakistan sowed the seeds of discontent in Kashmir [6]. India took repressive measures to deal with the insurgency that created the situation of 'new war' in the state of Jammu and Kashmir. Mary Kaldor argues that the 'new wars' were basically post-cold war conflicts which differ from the accepted definition of warfare. The main features of these conflicts include human rights abuses, identity issues and the presence of para-military forces, which lead to displacement of population. Moreover, these conflicts take place in the context of criminality, corruption and administrative failures [7].

Kashmir has a Muslim majority population and was ruled by Mughal-Afghan dynasties. In the nineteenth century, the Britishers gained it from Sikhs after the latter is defeated in the first Anglo-Sikh war (1845-46) and imposed an indemnity on the Sikh government. The Sikhs were not in a position to pay and hence gave Kashmir, Jammu, Ladakh and Baltistan to British [8]. The Hindu Maharaja Gulab Singh (Dogra) stepped in and agreed to pay the indemnity of seventy-five lakh rupees the Britishers and the Treaty of Amritsar was signed [9]. Thus, the valley of Kashmir witnessed Dogra rule from 1846s-1947s and was marked by the alienation of Muslims in Kashmir. The imposition of heavy taxes, capital punishment and the constant terror was created by the Dogra's against Kashmiri Muslims [10].

On the eve of independence in 1947s, there were five hundred and sixty-five princely states in colonial India and were given the choice to merge either with Pakistan or India [11]. Kashmir was one of the largest princely states and its Dogra ruler Maharaja Hari Singh wanted to remain independent and refused to accede to either states. In 1947, the Maharaja faced an armed revolt by Muslims from Poonch and the revolt then began to spread to other parts of Jammu and Kashmir. To maintain the status quo, the Maharaja signed a Standstill Agreement with Pakistan. In 1947, the Kashmiri Muslims revolted openly against the oppressions of Maharaja and was the revolt was supported by the tribesmen of Pakistan's North West Frontier Province (NWFP). In October 1947s, the tribesmen captured the several towns and massacred a large number of civilians and advanced to capture Srinagar (summer capital of valley) [12]. To crush the rebellion, the maharaja sought assistance from the state of India and the Prime Minister Jawahar Lal Nehru, agreed to send troops in Kashmir on the condition that the state should be acceded to India. On 26 October 1947 Maharaja Hari Singh signed the Instrument of Accession with India on the condition that Kashmir should be permitted to have its own constitution [13].

In the same year, India and Pakistan fought the first war on the Kashmir dispute and the matter was taken to the United Nations (UN). With the intervention of UN, a cease-fire line was signed between India and Pakistan on 01 January 1949. In 1965s, the countries fought another war over Kashmir and divided the old Line of Control (LOC) of the state into four political units.

- The three regions Jammu, Kashmir and Ladakh which is known as Indian occupied Kashmir.
- Azad Kashmir came to known as Pakistan occupied Kashmir (POK).
- The northern area which is administered by Pakistan.
- Aksai- Chin taken from and is under China's control [14]

In January 1966s, Tashkent Agreement was signed between India and its neighbouring country Pakistan and both countries decided to solve the Kashmir dispute through peaceful negotiations. However, in 1971s, India supported East Pakistan for its independence and another war came into existence between India and Pakistan. In 1972s, an agreement was signed, and both countries decided to end their conflicts through bilaterally and this agreement came to be known as Shimla Agreement [15]. The main

features of Shimla agreement are that both the countries should respect each other's territorial integrity, sovereignty, political independence and non- interference in each other's internal affairs. Besides it lay emphasis on cooperative relationship with special focus on people to people contact and upheld the inviolability of the line of control (LOC) in Jammu and Kashmir [16].

3. EMERGENCE OF LAW

The emergence of law in the Kashmir valley made its appearance in the earlier 1990s, marked by multiple large-scale strikes, curfews, insurgency attacks, and indiscriminate counter-attacks by security forces. After being assured to self-determination and popular sovereignty by Indian first Prime Minister (Jawaharlal Nehru) before seven decades was never fulfilled. Instead of that, the Indian government continuously denied the true representation in the Kashmir Valley and forced people of Valley to seek their democratic rights through violence.

In the year 1989s, insurgency or armed revolt started in Kashmir Valley with the support of common masses. The outbreak of violence was not a political failure, but it was historically related to the conflict of Jammu and Kashmir between India and Pakistan [17]. There are some external and internal dimensions that are interlinked with the Kashmir conflict. The external dimensions include the continued hostility between the two nuclear rival states India and Pakistan while as internal dimensions include the nature of alienation between people of Kashmir Valley and India. However, the immediate context of the insurgency was guided by the internal context as well as the political events that took place before the outbreak of insurgency [18]. However, there are different views among the scholars regarding the outbreak of insurgency in the Kashmir valley. Ashutosh Varshney, argues that in the Kashmir Valley, there was a clash of three competing visions of nationalism: Kashmiri, Secular, and Islamic [19]. Among them, the Islamic nationalism and the demand of applying Sharia got stronger rather than democratic structure in the Kashmir Valley. On the other hand Prem Shankar Jha, an Indian journalist argues that the basic reason for the outbreak of insurgency in the valley can be traced to middle-class frustration. The educated youth faced the problem of unemployment on a large scale [20]. In contrary, Sumit Ganguly points out that the main reason for the outbreak of insurgency was the result of political mobilization which increased dramatically after 1970's. The growth of educational institutions and madrassas boosted it and sowed the seeds of Islamic fundamentalism, in the Kashmir valley. The increase in education made an awareness among the people about the politics at local, national and international levels [21].

Although most of the scholars are of the view that the rigged elections of 1987s were the main reason that sparked the violence in the Kashmir valley. The remarkable feature about the election was that a new political party of Jamaat-i-Islami namely Muslim United Front (MUF) contested the election for state assembly. The MUF, with the support of pro-independence activists, Islamic fundamentalists and Kashmiri youth contested on forty- four seats and won only four seats [22].

The leaders of the MUF wanted a change in the political system by democratic and peaceful means and also by the process of elections. However, there was a widespread belief that the elections were rigged with the support of National Conference and Congress combination. This ultimately became the trigger for the deep-rooted resentment of the Kashmiris to raise their voice against Indian administration. The exact impact of electoral malpractice on the eventual outcome remained uncertain, yet 1987s proved to be a turning point for politics in Kashmir [23].

In the eyes of people and opposition parties of Kashmir Valley, the election was perceived as falsified and illegitimate. Many opposition candidates drew the conclusion that 'democratic' politics offered no passage for the redressal of Kashmiri grievance. Abdul Ghani Lone, a Kashmiri opposition leader summarized the roots of popular anger against 'democracy' in Kashmir states "It was this [subversion of democracy] that motivated the young generation to say 'to hell with the democratic process and all that this is about' and they said, 'let's go for the armed struggle'" [24]. The

electoral manipulation, frustration, alienation as well as the state repression created a spiral of violence in the region and initiating youth to join the militant groups. In such uncertain and disordered environment, most of the educated youths joined the Jammu and Kashmir Liberation Front (JKLF) [25]. With the passage of time, it was JKLF that emerged a major militant organization in the valley.

During 1989-1990s, three distinct developments marked the beginning of the new phase of the insurgency. Firstly, the armed militancy that started in the valley after the rigid elections started making its impact through selective targeting of security forces, government officials and political activists. Second, there was popular uprising reflected through massive demonstrations on the streets of Valley resounding with slogans of Azaadi (freedom). Third, the collapse of political order in the Valley insisted people to openly defying the state [26].

The Indian state responded insurgency very strongly because all strategies of India were therefore singled out for tackling militancy, which was considered to be waged by the support of Pakistan. The demonstrations and peaceful rallies were seen as a surprise and was considered as law and order problem. However, the movement was going stronger and people openly defied curfews [27]. The state administration failed in dealing with the situation and was replaced by Paramilitary forces for maintaining law and order as well as countering the insurgency. These paramilitary forces were given absolute authority in their counterinsurgency operations.

The Indian government also declared Kashmir a 'disturbed area' and promulgated laws that empowered the security forces to control violence and terrorism. This led to the violation of human rights and the practice of detention, arrests, and torture comes into existence. The laws like Public Safety Act, The Terrorist and Disruptive Activities (prevention) Act 1987, Jammu and Kashmir Disturbed Area Act, and Armed Force Special Power Act and Prevention of Terrorist Act, 2002 were used indiscriminately which suppressed the basic liberty of the people in Kashmir [28].

4. ARBITRARY DETENTION IN THE KASHMIR VALLEY: A THEORETICAL FRAMEWORK

Arbitrary detention is the imprisonment of a person without proper evidence that he/she committed a crime or a case in which there has been no proper due process [29]. In other words, it means the holding of a person without trial when the evidence available is not sufficient for him or her to be charged or for a conviction to be secured by legal proof. The United Nations Human Rights Committee explains arbitrary detentions as imprisonment or arrest that are carried out by the state and includes the elements of inappropriateness, injustice, lack of predictability and due process of law. The United Nations working group on arbitrary detention has broadly defined arbitrary detention as: (a). Have no valid legal basis. (b). are intended to deny the detainee the exercise of the fundamental rights guaranteed by either domestic or international law [30].

The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948, provides in Article 3 that "everyone has the right to life, liberty and security of person," and in Article 9 that "no one shall be subjected to arbitrary arrest, detention or exile". Similarly, Article 9(1) of the International Covenant on Civil and Political Rights states: "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention". Both of these establishes a standard of freedom from arbitrary arrest or detention, which includes and extends beyond the protection from 'unlawful' detention. The functional meaning of the concept of arrest and detention provided by United Nations Committee states that "the act of confining a person to a certain place, whether or not in continuation of arrest and under restraint which prevent him from living with his family or carrying out his normal occupational or social activities" [31].

Modern nation-states have a monopoly on the legitimate use of violence as a means of protecting law and order, stifling dissent and controlling political disorder. In the twentieth century, violence became a tool and technique of social control among the modern nation states [32]. Violence

is the creative action in the anti-colonial and anti-state movements and makes it clear that violence is a peculiar instrument because it usually appears with power. The appearance of violence in the form of action can disrupt the movement of status quo and leads to more destruction [33]. Violence is a short-term goal, because it does not promote causes either in history nor revolution, neither progress nor reaction, but it serves as a tool of grievances and brings them to public attention [34].

Walter Benjamin in 'Critiques of violence' seeks to relate violence with law and justice. Violence is always bound up with social relations, ethics as well as justice and law. He further states that law itself is a kind of violence that constitutes and maintains social relations by creating a monopoly on force and coercion. He believes that legal violence is always contradictory because in legal system violence can be sought only in the realm of means, not of ends [35].

Drawing on Kantian conception, that state may never use violence for security and equal freedom. Every action should be based on morality and humans can never be used as means to an end. He states that all individuals should be given more freedom than the freedom of anyone else. The purpose of law is to honor the dignity of all persons by enshrining legal rights within a regime of secure and equal freedom of all [36].

The modern states use the practice of violence not for the interest of the public, but rather to states interest, as violence operating outside law threatens not the state, but the existence of law itself [37]. In contemporary conflicts, there remains the constant threat of instantaneous destruction in the form of state violence [38]. The state violence can be destructive because it manifests itself on the bodies of individuals and causes physical pain and mental distress. The law is one of the tools that help the state to regulate violence for the maintenance of social order and seeks to change human behavior. However, instead of that it asserts authority on the lives of individuals and even asserts authority over authority itself. In this process, somebody loses liberty, property, family and even life [39]. The principle of modern states violence which operate through the principle of law and state powers are known as 'Exceptions' in which inhabitants are stripped of their basic rights like the right to liberty, expression, and freedom and submitted to the sovereign power of the state.

Giorgio Agamben holds 'state of exception' as the voluntary creation of a permanent state of emergency and has become one of the essential practices of politics. State of exception is not a law, but it is a suspension of a judicial order and had become the dominant paradigm of government in contemporary politics. He states that one of the elements that make the state of exception so difficult to define is certainly its close relationship to civil war, insurgencies, and resistance. According to Agamben, by means of the state of exception, a state can use legal war that allows for the physical elimination not only of political opponents but of entire categories of citizens who for some reason cannot be integrated into the political system [40].

A 'state of exception' is a lawless void, in which state authorities act in extreme situations with the force of law. The force of law makes law and life indistinguishable. Giorgio Agamben is of the view that every action should be dealt with a legal action, but unfortunately, that is not possible in the 'state of exception' because the functions of law depend on violence. The state uses its extra-legal violence against its own people in order to combat an emergency threat and there is no role of the judiciary in the state of Emergency/Exception. Scholars and practitioners regard the state of exception as a political problem, as a result, political crisis are understood on the political level and not on juridical grounds. There is a division between state power and judicial rights which make, possible to act as an external force to exercise political power, which interrupts the individual's basic fundamental rights [41]. The example of USA Patriot Act, which gives power to USA government to take anyone into custody on suspected activities that endangered the national security. Similarly, Indian government enacted a series of emergency provisions in the state of Jammu and Kashmir, most notable is the (AFSPA) 1990, which grants armed forces extraordinary powers, including the power to arrest and to destroy property without warrant and can use force against any person.

5. CONSEQUENCES OF ARBITRARY DETENTION IN THE KASHMIR VALLEY

The oppressive response used by Indian state to suppress the movement is torture, rape, enforced disappearance, custodial deaths and burning of houses in the valley, violence laid its impacts deeply in the social life [42]. A survey conducted by Action Aid international in Kashmir in 2000- 2001s says that people in the valley face depression at individual and collective level and most of them resort to drugs. It has been estimated that 59.30% males and 39.50% females were suffering from depression and hypertension. Anxiety emerged as a social- psychological problem in Kashmir after counter-insurgency by the Indian security forces. In the valley usually no one is sure to return home safely in the evening. This environment of insecurity, killing and disappearances of Kashmiri youths led to psychological problems. Thousands of such cases have been reported in the past twenty-five years because of militancy and militarization [43].

5.1 Psychological Torture

The people of Kashmir has been both witness and victim of both physical as well as Psychological torture from the last few decades. According to the survey of Medecins Sans Frontieres Netherland, violence and the threat of torture seems to have a significant effect on the physical and mental health in Kashmir region. Torture appears to be widespread among the detained (legally or illegally). The survey concludes that 76.7% respondents were tortured in custody [44].

In Kashmir valley, people face mental and psychological consequences in terms of sleeplessness, fear, nervousness, anger, aggressiveness, depression, drugs and suicides. Before the onset of militancy and militarization, mental disorders were unknown to the Kashmir valley. After 1990s, the use of detention and later on torture increased disorders like post-traumatic stress disorder (PTSD). In such disorder the victim relieves the trauma again and again. The presence of armed forces and torture created the psychological fear and insecurity among the people of Kashmir. The propagation of third-degree torture and indiscriminate killings by the Indian security forces has made everyone vulnerable.

Human rights abuses from governmental forces and militants are reported in the form of arrest, extra-judicial killing, house to house searches, abductions and torture. The disappearance of thousands of Kashmiri youth has made a measurable economic and mental impact. The earning members of the family who goes missing from insurgency leaving behind half-widows. There is no accurate number of half-widows as per Pervez Imroz, a Human rights Activist and Lawyer of High Court argues that their number ranges from 1000-1500. The members picked on suspicion by security forces leading to mental torture for the whole family. The half-widows do not know about their husbands whether they are dead or alive and lived on the hope that one day they may return home. Many women whose husbands have disappeared prefer to wait for them and do not remarry for the fear of social isolation [45].

5.2 Psycho-Sexual Malfunction

The horrors of torture by Indian security forces in detention centers cause Psycho-sexual malfunctions among youth. The propagation of third-degree methods in the valley lead sexual problems like impotency which increases the domestic conflicts and suicides among the people of Kashmir. The interrogation by security forces with electric shocks passed to the genitals, suppressed with heavy rollers, removing of finger nails, waterboarding, pouring petrol into anus like techniques were inflicted on detained persons in the custody.

In Kashmir, law and order is not only problem but there are social, emotional, political and psychological problems that are created by comprising torture, disappearances, displacement, killings has changed the scenario valley, where grieving, insecurity, oppression and sexual problems changes the ability and capacity of youths and resorted them to drugs. According to reports, younger generation comes with the problems

of libido or erectile dysfunction due to infliction of inhuman torture by state agencies [46]. The women in the Kashmir valley also face psycho-sexual problems because of depression which lead to infertility, miscarriages, polycystic ovarian syndrome, serum insulin, insulin resistance and irregular menstrual cycle levels are significantly higher in women suffering from the disorder [47-49].

6. CONCLUSION

Soon after independence in 1947s, Kashmir remained a princely state. However, Pakistan sent tribal in Kashmir who looted people in every manner. After the accession of Kashmir, Indian Government imposed laws like AFSPA, PSA, DAA, and TADA which led to violations of human rights including gang rapes, mass shooting of demonstrators, and large-scale arrests, torture of detainees and extra-judicial killing of prisoners. The people of Kashmir started the protest movement for the right to self-determination. To suppress the movement government of India brought seven lakh military and Para- military troops, which resulted in frequent curfews, arrests, torture, custodial killings, and disappearances. With such practices in Kashmir potential of youth was not cultivated, however instead psychological fear was set permanently in their minds which resulted overall backwardness of those families who became victims of these practices.

The Kashmir Valley since the 1990's has experienced militarization, repression, economic deprivation and indiscriminate violence. The valley is in a state of siege, where authority is vested in the military power and suspends fundamental rights for the maintenance of law and order. It is considered as the need of the state to take radical measures like the suspension of law and the formal rules of justice to ensure its survival. The modern states are claiming that they are fighting the war against terror and justifies the suspension of constitutional provisions for the protection of lives and well-being of their citizens. However, the modern democratic states have built burgeoning detention facilities like immigration centers, prisons and police cells that engage in torture and other cruel, inhuman treatments. The establishment of the detention centres by the state in order to maintain national security, law and order had legitimately transformed the individuals into 'living dead'.

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