

Note on Access to Justice and Legal Developments

Statements and Fact Finding Reports

- On 31st October 2019, the Jammu and Kashmir Reorganisation Act, 2019 which divides the disputed territory under Indian control into two directly administered Union Territories [came into effect](#). It was accompanied by a notification for the continuance of President's Rule, and a spate of new executive orders including orders [abolishing the Upper House of the State Legislature](#), dissolving [state human rights institutions](#), [reorganising critical infrastructure provision departments](#), [changing land registration procedures](#), and enacting that rules relating to conduct of business by government departments under to Jammu Kashmir Constitution, 1956 would henceforth be under the new States Reorganisation act. The UN Office of the High Commissioner Human Rights' [press briefing note](#) of 29 October 2019 on Indian - Administered Kashmir noted that "the Jammu and Kashmir State Human Rights Commission, the State Information Commission (which implements the right-to-information laws) and the State Commission for Protection of Women and Child Rights are among key institutions being wound up, with the new bodies to replace them yet to be established." In addition to the bodies mentioned, the J&K State Commission for Persons with Disabilities (constituted under the J&K Right of Persons with Disability Act 2018) has also been wound up. The delay of over three months for the hearing of time-sensitive cases pertaining to the changes in the legal and constitutional scheme and the refusal to grant an interim stay against such far reaching, adverse and possibly irreversible state actions before the new legal regime came into effect on 31st October is particularly concerning. The UN Office of the High Commissioner Human Rights' [press briefing note](#) of 29 October 2019 on Indian - Administered Kashmir took note of the constant delays and deferrals by the India Supreme Court in hearing urgent matters concerning deprivation of fundamental human rights of Kashmiris. It stated "The Supreme Court of India has been slow to deal with petitions concerning *habeas corpus*, freedom of movement and media restrictions."
- Absence of due process, unconscionable delays and systemic denial of access to legal remedies, resulting in impunity for state perpetrators of grave and continuing human rights violations and international crimes, continues to be an issue of serious international concern. Preventive arrests which afford minimal legal remedies for bail or release continue to be a pervasive pattern. Latest official figures tabled by the Ministry of Home Affairs in the Indian parliament indicated [5161 people](#) have been preventively detained in Kashmir valley in since 4 August 2019. These include individuals profiled as "stone pelters, miscreants, OGWs (overground workers), separatists and political workers."
- On 21 November 2019, [the Bar Council and Bar Human Rights Committee of England and Wales wrote](#) a strongly worded letter to Indian Prime Minister Narendra Modi, expressing serious concerns about the state of "near collapse" of the Justice system in Kashmir amidst alarming reports of rights violations including the illegal detentions of senior lawyers of the Jammu and Kashmir bar. It cited the UN Basic Principles on the Role of Lawyers (1990) which require states to ensure that lawyers are free to perform

their professional functions without intimidation, hindrance, harassment or improper interference. It stated that the prevailing circumstances of restrictions of mobility, reprisals, illegal detention and intimidation of lawyers, and blockading of communications in Jammu and Kashmir had resulted in a lack of availability of effective legal representation and hindered the right to a fair and speedy trial. And further that “In circumstances in which grave and widespread human rights violations are being alleged, disabling the justice system substantially compounds the crisis.” They also expressed concern that delays in access to justice on critical human rights’ concerns would defeat the essence of the rights in question. They called on the Indian state to allow independent investigators entry into Kashmir to ensure accountability for its actions under international law, and to take urgent steps to lift all restrictions, restore internet and communications and publish the names of all individuals, including lawyers who have been detained.

- Amnesty International issued a [Situation Update and Analysis](#) on 31 October 2019, documenting familiar patterns of mass, arbitrary and indefinite detentions of political dissenters particularly under the Public Safety Act (PSA) and Section 107 of the Criminal Procedure Code which allows for preventive arrests. Lawyers interviewed by Amnesty International India stated that most of their clients do not have copies of PSA detention orders which hinders them from filing habeas corpus petitions in courts. Many others do not have access to lawyers, especially when they are lodged in jails outside Kashmir
- A [Fact Finding Report](#) *Imprisoned Resistance* released on 4 November 2019, by an 11 member delegation of Indian human rights lawyers, trade unionists and civil society activists provides detailed observations on the prevailing lack of access to Justice in Kashmir. Their findings are based on their visits the Jammu and Kashmir High Court, several District Courts and other quasi judicial institutions in Kashmir valley. Besides widespread arbitrary, undocumented and incommunicado detentions including of children, mass preventive detentions without charge, illegal night raids, cases of torture and excessive use of force, the report focusses specifically on access to justice issues and highlights the arbitrary detention, illegal surveillance and reprisals on lawyers, delays and lack of functioning judicial institutions due to curfews and other undeclared restrictions on mobility and communication including the postal service, and forms of collective punishment using the law. The report highlights the pervasive misuse of preventive detention provisions of the Criminal Procedure Code (Sec 107, Cr Pc) to force “profiled” individuals, particularly youth and male children to sign personal bonds, or provide collective guarantees of “good behaviour” from village elders as a pre-condition to their release.

Judicial Proceedings in the Supreme Court of India

- There are [several cases](#) presently being heard by the Indian Supreme Court relating to the events of 5 August 2019 and its aftermath.

(i) Writ Petitions challenging the constitutionality of the changes to Article 370 and Article 35 A that effectively repealed Jammu and Kashmir legislative autonomy

More than twenty Writ Petitions have been filed on the question of the constitutional validity of the Indian Parliament's abrogation of Article 370 by amending the definition of Article 368 of the

Constitution. Petitions have also challenged the J&K Reorganisation Act, 2019 and various executive orders issued under it. Petitioners include politicians (including those currently under illegal detention), political parties, retired bureaucrats and defence officials, and well-known Indian [civil liberties group](#), Peoples' Union for Civil Liberties (PUCL). While most of the Petitions argue that the amendments were unconstitutional, a few Petitions have also been filed by private parties upholding the constitutionality of the state's actions. On 28 September 2019 the Supreme Court set up a special five judge Constitutional Bench to hear these petitions, after [several unproductive hearings](#). On 9 November 2019, the Centre [filed its response affidavit](#) averring that Article 370 was neither in the national interest nor in the interest of Jammu and Kashmir, reiterating highly contentious and unsubstantiated claims on under- development, gender discrimination, "secessionism" and "terrorism" apparently caused by the existence of the "special status". It further stated that the procedure adopted for the abrogation was constitutionally permissible. On 13 November 2019, Petitioners [filed a rejoinder affidavit](#), countering the state's arguments and stating that the case required a judicial interpretation of "the nature, scope and limits of President's rule in a democracy" and that the state could not "hide behind the veil of policy arguments". On the [last date of hearing 14 November 2019](#), the Court once again adjourned the case providing the State further time to file its additional response to new Petitions that have been filed, while disallowing the filing of any further pleas related to the question. The matter is now listed to be heard on 10 December 2019.

(ii) Writ Petitions challenging the constitutionality of the restrictions on civil liberties and fundamental freedoms

On November 27, a three judge bench of Supreme Court [finished hearing substantive arguments in two connected cases](#), challenging the legality of the restrictions imposed in the aftermath of August 5. The cases have now been reserved for judgment. The hearings in the Supreme Court between 6 November and 27 November covered issues of declared and undeclared emergencies, necessity and proportionality of restrictions on fundamental freedoms, and the Supreme Court's power to judicially review executive decisions made on national security grounds. Of the cases that have been heard the first petition filed by Anuradha Bhasin, Editor and Executive Director of Kashmir Times, focussed on how the restrictions on communication and movement violated the freedom of the press in Kashmir. The Foundation for Media Professionals, Indian Journalists Union, and some other individuals have intervened in Anuradha Bhasin's petition to support press freedom. The second petition was filed by politician and former Chief Minister of Jammu and Kashmir Ghulam Nabi Azad about the impact of the restrictions on the right to healthcare, education and livelihood. The cases primarily concerned the legal validity of two sets of administrative orders, (i) Under the Telecom Suspension Rules 2017 for suspension of landline, voice calls, SMS services, broadband internet and mobile internet in Kashmir. (ii) Under Section 144, Criminal Procedure Code imposing restrictions on mobility and public gatherings. [Another plea](#) filed by Dr. Sameer Kaul on the immediate restoration of internet in hospitals had earlier [not been admitted](#) by the Supreme Court on grounds that the Jammu and Kashmir High Court was a more suitable forum to decide the case. On 24 October 2019, after months of delay the state of Jammu and Kashmir filed a "limited response" to the Petition justifying the restrictions on grounds of the prevalence of "cross border terrorism" and "militancy" in the state, drawing links between such militancy and the occurrence of street protests, and stating that the internet and communications shutdown and "pre-emptive measures" under section 144 CrPC were necessary to maintain law and order, and had been by and large successful in achieving this objective. According to the government's affidavit, day time movement restrictions were eased in 35 out of 105 police stations in Kashmir on 17 August and they were completely removed in all 105 police stations only by 27 September, i.e almost

two months after their initial imposition on 5 August. However, even as on date, there continue to be night time movement restrictions in certain areas. On 20 November 2019, the state filed a further status report on the prevailing situation, stating that the situation was almost back to normal citing statistics on the restoration of phone lines, availability of internet at five star hotels and government facilities and availability of public transportation. It also referred to the extension of local governance and affirmative action provisions of the Indian Constitution as the justification for the amendments.

(iii) Writ Petitions on Illegal detentions, including Habeas Corpus Petitions; and Public Interest Litigation regarding the illegal detention of children.

Several family members and friends of individuals under illegal or preventive detention had filed habeas corpus pleas on their behalf challenging their house arrests/ detentions in the weeks following the imposition of restrictions, however only one such Habeas Corpus Petition that of businessman Mubeen Shah currently remains pending as the rest have either been dismissed by the Court or withdrawn by Petitioners. The Supreme Court has [faced criticism](#) for its approach in these cases, which has consisted primarily of “permitting” Petitioners to meet the detainee, and report back to the Court, without requiring the state to disclose the grounds of detention or produce the detained individual.

In [the case concerning the detention of Member of Indian Parliament Farooq Abdullah](#) filed by a fellow MP Vaiko, asking that he be produced before the Court and be permitted to attend a conference in Chennai, the state converted his undocumented house arrest into a Public Safety Act detention immediately after it received notice of the habeas corpus petition. On 29 September the Petition was dismissed on the basis that “nothing remained” in it, since state had detained him under the Public Safety Act. This follows a well established pattern of illegal detentions in Jammu and Kashmir, where a legal challenge to an illegal detention results its formalisation and escalation into a dreaded PSA detention order, and cycles of revolving door detentions involving multiple cases, making people afraid of seeking legal remedies for illegal detentions. This was also recently [documented by](#) the Eleven member Fact finding delegation.

In the case concerning the detention of businessman Mubeen Shah, filed by his wife Asifa Mubeen before the Supreme Court on 20 September, the Supreme Court on 24 October, [directed the Petitioner](#) to approach the Jammu and Kashmir High Court for relief, as there was already a pending petition in the High Court (filed without the Petitioner’s knowledge). Thereafter the Petition in the High Court was withdrawn and the Supreme Court on 5 November adjourned the matter for two further weeks, for the State to file its response. Mr Shah who is very unwell, has been held in preventive detention in Agra Central Jail since the night of 4 August 2019. An initial preventive detention order on “public order” grounds under the PSA , which the state claims it imposed on 7 August is valid only for three months , subject to extensions by the state. This means the initial order would have lapsed on 7 November.

In addition to the individual illegal detention cases, child rights expert, Enakshi Ganguly and Professor Shanta Sinha, Former Chairperson of the National Commission for Child Rights [filed a Public Interest Litigation \(PIL\)](#) on the illegal deprivations of the right to life and liberty of Kashmiri children, based on media reports of illegal detentions of children, some as young as ten years old. On 20 September the Court [had directed the Jammu and Kashmir High Court’s Juvenile Justice Committee](#) to inquire into the allegations of illegal detention of children. Instead of carrying out an independent inquiry the JJ Committee, relied on [a widely criticised report](#) by the Director General of Police, which refuted credible media accounts, claiming “strict

adherence is placed on the provisions of the Juvenile Justice Act". But the same report went on to admit that 144 children under 18 years of age, the youngest aged 9 years had been "picked up" by police between August 5 and September 23, but released shortly, that as many as 75 children had been preventively detained under the provisions of the Criminal Procedure Code, and 9 sent to observation homes as a "preventive measure" although preventive detention is expressly disallowed by the Juvenile Justice Act. The Petitioners then [filed a rejoinder](#) questioning the JJ Committee's findings and methodology. Dissatisfied with the Committee's Report on 5 November the [Supreme Court ordered](#) it to file a fresh, more detailed report. The matter is now listed to be heard on 3 December 2019.

Judicial Proceedings in the Jammu and Kashmir High Court and Trial Courts

According to [a credible ground report](#) filed by a local journalist, court officials stated that 1438 new cases were filed in the High Court Srinagar from August 5 until November 17, 2019, including 1069 civil cases and 369 Habeas Corpus petitions. A senior lawyer stated that most of the Habeas Corpus Petitions filed against Public Safety Act (PSA) detention Orders were based on "old cases".

In the first order in a Habeas Corpus case filed regarding the undocumented "house arrest" of a family members of a politician after 5 August, [the High Court dismissed the Petition](#) asking the Petitioners to "prove (his) arrest by evidence" before a "proper forum" and in "appropriate proceeding." The order came after a reply filed by police on October 23 that the political family were neither under house arrest nor had their liberty been curbed. The Court accepted the police version at face value, and rejected the Petitioner's plea to adduce evidence and witnesses, stating that such inquiry could not be conducted by a Writ Court, despite substantial precedents to the contrary, particularly in cases involving the fundamental rights to life and liberty.

The Jammu and Kashmir Bar Association in Srinagar, a body with 1600 members, [continues to be on strike](#) protesting the arrest of its senior office bearers, including President Miyan Qayoom and Secretary Mohammad Ashraf Bhat. The Bar Association has appointed a special panel of lawyers to appear in matters concerning the life and liberty of individuals including Habeas Corpus Petitions and bail. Lawyers continued to report unconscionable delays in the hearing of Habeas Corpus Petition, in violation of case flow management rules which say that such cases must be decided within 15 days. Regular work in the trial court including hearings in cases of under trials was severely effected with an absence of prosecutorial and court staff until 20 October causing delays and backlogs. Trial court lawyers reported on the use of the preventive detention provisions under the Criminal Procedure Code as a means of collective punishments and indefinite detentions, through coercing suspects into signing illegal bonds of "good behaviour" and illegally holding them in custody unless they, or their guarantors, who may be family members or village do so on their behalf. Lawyers also reported an increase in the number of arrests under the draconian anti-terror legislation the Unlawful Activities Prevention Act (UAPA) which allows for extra ordinary police powers and pre-trial detentions for up to 180 days.

