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# **Abrogation of Article 370:**

## **Implications & Policy Choices for Pakistan**

ASMA KHALID & MOBEEN JAFAR MIR

5<sup>th</sup> Floor Ali Plaza, Jinnah Avenue,  
Blue Area, Islamabad.  
Email: [info@ipik.org](mailto:info@ipik.org)  
Tel No: 051-8444830  
P.O.Box 3393  
GPO Islamabad



# **Abrogation of Article 370: Implications & Policy Choices for Pakistan**

**Asma Khalid & Mobeen Jafar Mir**

**Islamabad Policy Institute, Pakistan**

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### **Introduction:**

After days of speculation, Indian government on Monday scrapped the autonomous status for Occupied Kashmir enshrined in Article 370 of (India's) Constitution and bifurcated the occupied region into two separate Union territories – Muslim majority Jammu and Kashmir and Buddhist-dominated Ladakh.

The special autonomous status enjoyed by Occupied Kashmir under Article 370 was revoked in entirety through a presidential order called The Constitution (Application to Jammu and Kashmir) Order 2019. A Presidential order does not require parliamentary approval and therefore it became effective immediately.

Meanwhile, a bill for 'reorganizing' Occupied Jammu and Kashmir was adopted by Rajya Sabha to form Union Territories of Jammu and Kashmir, which will have a legislature, and Ladakh that will be without a legislature.

The implications of Indian government's moves related to Occupied Kashmir in the words of India's Union Home Minister Amit Shah are that: "The entire (Indian) constitution will be applicable" to the region that so far enjoyed an autonomous status and that the erstwhile State of Jammu and Kashmir has ceased to exist.

The latest moves followed deployment of tens of thousands of additional Indian troops in Occupied Kashmir, evacuation of tourists, cancellation of Amarnath Yatra, and orders for other emergency measures including suspension of internet, ban on gatherings, and stockpiling of essential commodities in anticipation of unrest in coming months. Several pro-India Kashmiri politicians were put under house arrest.

Britain and Germany, meanwhile, had issued travel advisories for the citizens visiting the area.

Opposition parties in India protested BJP government's move. Pro-India politicians from Occupied Kashmir were at the forefront of the protests. Leader of Opposition in Rajya Sabha and former chief minister of Occupied Jammu and Kashmir Ghulam Nabi Azad accused the BJP government of "murdering constitution and democracy" by annulling Article 370. Besides Congress, the repeal of Article 370 was also protested by Trinamool Congress, Dravidian Progressive Conference, Jammu and Kashmir Peoples Democratic Party (JKPDP), Janata Dal-United, and Communist Party of India (Marxist).

Former chief minister of Occupied Jammu and Kashmir Mehbooba Mufti tweeted: “Today marks the darkest day in Indian democracy,” and added that Indian government’s “unilateral decision” was “illegal and unconstitutional”.

### **Background:**

BJP, ever since its inception, has promoted Hindutva agenda and taken a hardline on Muslims. The core element of BJP politics has, therefore, been its three-point agenda — enforcement of uniform civil code, Ayodhya and Abrogation of Article 370. BJP election manifestoes have always been informed by this direction of its politics. A look at BJP’s manifesto for 2019 elections shows that the party was motivated to annul Article 35A and Article 370 of the Constitution of India - the two Kashmir specific legislations. The party further wanted to push forward with its plans for a demographic change in the Valley through the resettlement of refugees from West Pakistan, Azad Kashmir, and Chhamb.

The solid win in 2019 polls, it needs to be remembered, put Prime Minister Narendra Modi and the BJP in a position to go ahead with domestic policies that the Hindu nationalist party had always backed, including a change in the special status of Occupied Jammu and Kashmir and those that put Hindus first. BJP had not been able to implement its core agenda during its previous stints in power because on those occasions it was leading a coalition government. However, this time around it found itself politically well placed on a stronger foundation, after opposition parties were decimated in the polls, to implement that agenda.

Therefore, in the annulment of Article 370 one can see BJP fulfilling its electoral promise.

### **What are Articles 35A and 370?**

The now repealed Article 370 guaranteed the Muslim-majority state of IOK a great deal of autonomy. It allowed IOK to have its own constitution, its own distinctive and separate flag and independence over all matters except foreign affairs, defense and communications.

In 1927, the residents of Kashmir got exclusive rights through an executive order. Later, when India got independence in August 1947 and division of the subcontinent took place, Maharaja Hari Singh, the then ruler of the State of Jammu and Kashmir, supposedly signed a Treaty of Accession to join the rest of the Union of India. That was formalized in Article 370 of the Indian constitution. Subsequently, under 1952 Delhi Agreement, a presidential order extended Indian citizenship to the residents of Jammu and Kashmir but continued the exclusive rights of the Kashmiris.

Similarly, Article 35A empowered the local legislature in IOK to define permanent residents of the region. This Article had come into being in 1954 through a presidential order under the Indian Constitution’s Article 370.

Article 35A had its own significance as it forbade Indians from outside the state from permanently settling, buying land, holding local government jobs or winning education scholarships in the region.

Article 35A, also known as the Permanent Resident Law, also barred female residents of IoK from property rights in the event they marry someone not hailing from Kashmir. Similarly, children of those women were also not entitled to such rights.

The spirit behind this legislation was to protect identity and culture of Kashmiri people and to preserve Kashmir's demographic character.

### **Judicial Verdicts on Articles 35A & 370:**

BJP had previously tried the judicial route to fulfill its dream of ending Occupied Jammu and Kashmir's special status.

The High Court of Jammu and Kashmir had in October 2015 ruled that the authority to annul Article 370, under clause (3) of the article, was with the Constituent Assembly that was dissolved in 1956. The legislation, in court's view had acquired a permanent status, because the Constituent Assembly did not revoke it before being dissolved. It was of the view that "the territory of (Occupied) Kashmir retains an element of sovereignty and cannot be integrated into India".

Similar view was held in two different verdicts delivered by the High Court in 2015 – Ashok Kumar vs State of Jammu and Kashmir and Bhupinder Singh Sodhi vs Union of India. In both cases Article 370 had been challenged.

Legal experts believe that clause (3) of Article 370 prescribed the route for the repeal of the legislation. The repeal of the law could be done through a Presidential Order under Article 370 based on the recommendation of the Constituent Assembly of the State. The recommendation of the Constituent Assembly was "necessary" before the issuance of Presidential Order notifying "that this Article (370) shall cease to exist". With Constituent Assembly ceasing to exist in 1956, President of India has lost his power to annul the law. This route cannot be circumvented by any other device, whether an ordinance or even an Act of Parliament.

Indian Supreme Court too in 2018 ruled that after the dissolution of the Constituent Assembly, President of India would not be able to implement or execute the obligatory provisions required for its withdrawal.

Bifurcation of J&K similarly requires consent of the elected assembly of the State.

Since the set procedure was bypassed while annulling Article 370 and bifurcating IOK, many believe that BJP government's moves may face legal challenges.

### **Implications:**

- The first and the foremost implication of the Indian move to end Occupied Jammu and Kashmir's autonomy is for the stability of the region. It could increase the chances of war or military conflict – a scenario that looks particularly scary because it involves two nuclear armed neighbours. Deployment of additional troops by India in the already world's most heavily militarized zone per square mile, the intensification of ceasefire violations by India on Line of Control, and its use of cluster bombs on civilian population of Azad Kashmir (AJK) point towards the dispute turning for the worse.
- Indian government intends to further complicate the long running dispute so as it dim the chances of its resolution.
- The move is unlikely to affect the disputed status of the Kashmir Conflict, but it could potentially have implications for Kashmir related bilateral agreements between India and Pakistan especially Indus Water Treaty. Water dispute is a significant dimension of Kashmir conflict; therefore, PM Modi's threats of unilateral withdrawal from the Indus Basin Treaty should not be taken lightly as BJP government's manifesto regarding revocation of article 370 was ignored by Pakistan's government.
- There are apprehensions that India may in future negotiations with Pakistan or at the international stage project IOK as part of its territory while demanding that the future of AJK needs to be settled and may seek third party mediation on it, thereby turning the entire focus of Kashmir dispute on Pakistan/AJK.
- Abrogation of Article 370 will intensify the indigenous struggle against Indian occupation of Kashmir and the key resistance to BJP move is expected to come from here. Article 370 was a symbol of autonomy for the Kashmiris as they lived under the yoke of Indian Occupation. The repeal of the legislation would, therefore, amplify the Kashmiris' fears of repression forcing even those sitting on the sidelines to resist. Reactions by pro-India Kashmiri leaders like Mehbooba Mufti and Omar Abdullah, both of whom have spoken against the annulment, is an early indication of things to come. India would, meanwhile, respond with an intensified crackdown.
- The real intent behind the BJP action is to bring about a demographic change in the Muslim dominated region by opening the doors for non-Kashmiri Indians to buy property and permanently settle in IOK. The idea is that a demographic change may end the

religious and ethnic basis of the conflict and integrate Kashmir in India. Abrogation of the Article may, however, not help in achieving that goal. It may instead add to social turmoil there and could set off communal violence even though Indian government is trying to convince the people that the move is aimed at economic development and prosperity of the region by bringing in investment.

- Another important objective of the demographic change besides increasing the representation of Hindus in the Valley, is to reduce the influence of Kashmiri political parties for achieving the desired outcome in case a plebiscite is held in the Valley under the United Nations.
- All attempts at demographic change by settling people from other areas in IOK are illegal under the international law. Article 49 of the Fourth Geneva Convention categorically states: "The occupying power shall not deport or transfer parts of its own population into the territories it occupies."
- Modi won 2019 polls on the basis of anti-Muslim and anti-Pakistan rhetoric despite poor governance and lackluster performance on the economic front. He is continuing with the same strategy with the hope of solidifying his domestic support and keeping people distracted from his government's failure to implement economic reforms agenda and address growing job crisis.

### **Policy choices for Pakistan:**

Dealing with the aftermath of annulment of Article 370 by India would be a big test for Pakistan's diplomacy especially after it failed to anticipate the move, despite some very clear signals, and mount a diplomatic challenge to Indian government's plan. Media reports reveal that India had shared its plans for scrapping the legislation on Kashmir with US and other Western powers in advance. The government must now try to make up for the lost time and launch a diplomatic blitzkrieg for sensitizing other countries about the implications of the Indian move, while underscoring the dispute status of Kashmir and highlighting the human rights excesses being committed by the Indian occupation forces there, which have now been well documented by the Office of UN High Commissioner for Human Rights for the second consecutive year and other human rights organizations.

Moreover, threats to regional stability from the development need to be underscored. The objective of the diplomatic drive must be clearly defined – getting international focus on the issue and making world condemn India for its illegal and dangerous move.



Pakistan should work for convening an urgent meeting of the UN Security Council for a discussion on the developing situation. Similarly, the matter may be taken up at International Court of Justice although the prospects of such a petition may not be very bright in view of several exceptions to acceptance of the world court's jurisdiction listed by India. However, as Foreign Office vowed to "exercise all possible options to counter the illegal steps" no avenue can be left unexplored.

Special effort needs to be made to bring the spotlight on human rights excesses committed by the Indian troops in IOK. It is the best option to get the international community, particularly the human rights activists, involved on Kashmir. At the same time, the international focus on Kashmir, could to a certain extent, earn a relief for Kashmiris from human rights abuses, because such an attention would act as a restraining factor on India.

Pakistan has been extending political, diplomatic and moral support to the indigenous struggle of Kashmiris. The government has rightfully renewed its pledge to continue that support. However, a discussion must be initiated within the country on the extent of the support that could be extended to Kashmiris in light of the international law that clearly accepts the right of people living in occupied territories to struggle against foreign occupation. UNGA Resolution 3314 is very clear on this issue as it notes: "Nothing in this definition of aggression could in any way prejudice the right to self-determination, freedom and independence of peoples forcibly deprived of that right, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support."

Similarly United Nations Resolution 37/43 (December 1982) "reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation by all available means, including armed struggle."

**About Authors:** *Asma Khalid is a Senior Research Officer at Islamabad Policy Institute (IPI).  
Mobeen Jafar Mir is a Research Officer at Islamabad Policy Institute (IPI).*