

POLICY BRIEF, JANUARY 2024

Indian Supreme Court Verdict on Abrogation of Article 370- Options for Pakistan

MAHAM NAWEED

About the Author

Maham Naweed is an international lawyer who completed her Bachelors of Law from the Lahore University of Management Sciences and her Masters of Law from Yale Law School. She has worked as a Consultant to the Attorney-General of Pakistan in the International Disputes Unit and has worked at the Paris Office of the international law firm, Shearman & Sterling LLP. Currently, she is the Chair, Lawfare and International Law at the Islamabad Policy Research Institute. Her areas of interest and research expertise include public international law, particularly international human rights law and laws of conflict.

About IPRI

The Islamabad Policy Research Institute (IPRI) is one of the oldest non-partisan think tanks on all facets of National Security, including international relations and international law, strategic studies, governance, public policy, and economic security in Pakistan. IPRI exemplifies two decades of rigorous and timely analysis of crucial strategic agendas and inter-governmental processes that influence national and regional policy community. Recognized for its objectivity and policy relevance, IPRI's publications offer current, up-to-date, and high-quality research in the form of authoritative journals, books, monographs, and policy briefs. The Institute's events vary from seminars on current international and national affairs to large-scale international conferences that attract renowned leaders, academics, and policymakers from all over the world. The Institute also house two specialized Chairs for International Law and Economic Security.

Table of Contents

Executive Summary.....	3
I Background to the Dispute.....	4
II Judgment by the Indian Supreme Court.....	4
III Kashmir’s History Disregarded by the Indian Supreme Court.....	5
IV Applicability of International Law to the Issue.....	6
UN Resolutions.....	6
International Human Rights and Humanitarian Law.....	7
Recommendations.....	8
Action Matrix.....	9

Executive Summary

Issue

The Indian Supreme Court's 476-page verdict upholding the abrogation of Article 370 is a saga of historical distortions, selective amnesia and logic-less interpretation. Not only does it do injustice to Jammu and Kashmir, it has set a precedent that threatens Indian democracy itself. It is an endorsement of the tendency of the Indian government to commit acts that violate India's own constitution and international law.

Recommendations

Pakistan has the following options available under international law:

1. Contentious Jurisdiction of the ICJ- (Compromissory Clause)
2. Forum Prorogatum Application to the ICJ
3. Advisory Opinion of the ICJ
4. Application to the ICC
5. Invoking Universal Jurisdiction
6. Inter-State Communication Mechanism of the Committee on the Elimination of Racial Discrimination (CERD)
7. United Nations Human Rights Council Mechanisms
8. Magnitsky-Style Human Rights Sanctions
9. Specific Instances through National Contacts Points (Organization for Economic Co-operation and Development- OECD)

I) Background of the Issue

On 5 August 2019, the Indian Government abrogated Article 370 of the Constitution of India via a presidential order. Article 370 provided special status to the State of Jammu and Kashmir, allowing it to have its own constitution and autonomy over internal administration. The abrogation ended the special status conferred on the erstwhile state of Jammu and Kashmir and the Centre later moved to reorganize Jammu and Kashmir into two Union Territories – Jammu and Kashmir and Ladakh.

This move by the Indian Government was challenged before the Indian Supreme Court and on 11 December 2023, a decision was rendered in the matter. In a unanimous ruling the court upheld the validity of the Constitutional order that revoked Article 370.

II) Judgment by the Indian Supreme Court

The Indian Supreme Court's 476-page verdict upholding the abrogation of Article 370 is an example of historical distortions, selective amnesia and logic-less interpretation. Not only does it do injustice to Jammu and Kashmir, it has set a precedent that threatens Indian democracy itself. It is an endorsement of the tendency of the Indian government to commit acts that violate India's own constitution and international law.

The petitioners had argued that Article 370 had become a permanent feature of the Indian Constitution from the moment the Constituent Assembly of Jammu and Kashmir was formally dissolved in 1957. In fact, Article 370 was the basis of the Jammu and Kashmir Constitution. It was classed as a "temporary provision" because it was meant to be ratified by the Jammu and Kashmir Constituent Assembly. By not recommending the abrogation of the provision before its dissolution, the Assembly had endorsed its continued existence in the Indian Constitution to govern this unique federal relationship.

A five-judge Constitution bench, presided by Chief Justice of India, DY Chandrachud, said that Jammu and Kashmir held no internal sovereignty after accession to India. He said there was no prima facie case that the President's 2019 orders were mala fide (in bad faith) or extraneous exercise of power. While the court said the reorganization of the erstwhile state into Union Territories in 2019 was a temporary move, it directed the Centre for the restoration of Jammu and Kashmir's statehood and for the Legislative Assembly elections to be held by next year.

III) Kashmir's History Disregarded by the Indian Supreme Court

While declaring Article 370 to be temporary, the Court noted two factors. One was the war-like conditions that persisted when the special status was accorded. The second was the transitional purpose—the Article was meant to provide for an interim arrangement until the Constituent Assembly of Jammu and Kashmir could frame its own constitution.

However, this is far from the truth. The Constitution, of which Article 370 was a part, was unanimously adopted in 1949. The war, also known as the First Kashmir War, was long over by then.

The provision was meant to be temporary only until the Jammu and Kashmir Constituent Assembly could ratify Article 370 and adopt it while framing a separate constitution for the state. The court's finding that Article 370 was a temporary provision until the Jammu and Kashmir Constituent Assembly was disbanded, after which the state would have been fully integrated, defies legal logic.

The Jammu and Kashmir Constitution declared that "*the State of Jammu and Kashmir is and shall be an integral part of the Union of India.*" The Court, however, glossed over this fact and placed more reliance on the royal heir's proclamation of 1949 which acknowledged Jammu and Kashmir's integration. It was the Jammu and Kashmir Constituent Assembly, a constitutionally mandated and democratically elected body that gave its final affirmation. This had legal sanctity and superseded any previous proclamations.

Furthermore, the Court refused to go into the question of whether the downgradation of the state to a Union Territory was valid. It also refused to deliberate the peculiar circumstances under which President's Rule was imposed in Jammu and Kashmir, the pivotal first act that served as a prologue to the legal fictions invented by the government to carry out the abrogation.

IV) Applicability of International Law to the Issue

International law applies to Kashmir in a number of ways. Despite India's reluctance to internationalize the Kashmir conflict in the name of national security, Kashmir is an international dispute. In accordance with established jurisprudence from the Permanent Court of International Justice ("PCIJ") and its successor, the International Court of Justice ("ICJ"), an international dispute involves "*a disagreement on a point of law or fact, a conflict of legal views or of interests between two [international] persons*", as well as conflicts arising from varying interpretations and executions (or lack thereof) of human rights-related obligations under international agreements and treaties.

Furthermore, international law experts have characterized the Instrument of Accession of 1947, under which the Maharaja of Kashmir decided to join India, as having an international character. This is because this Instrument of Accession took effect only and when it was accepted by either the Government of India or the Government of Pakistan and impacted the sovereign rights of two newly formed countries.

UN Resolutions

The most important resolution was passed by the UN Security Council on 21 April 1948 in an effort to provide the basic guidelines for resolving the conflict. In essence, Resolution 47 called upon Pakistan to secure the withdrawal of its troops and also for a withdrawal of Indian troops. The UN would then establish a temporary

Plebiscite Administration in Kashmir, with the mandate to conduct a fair and impartial plebiscite “on the question of the accession of the State to India or Pakistan”.

Since 1948, the UN Security Council has remained seized of the Jammu and Kashmir dispute under the Agenda item “India-Pakistan Question” and passed over a dozen resolutions on the matter, internationalizing the issue.

International Human Rights and Humanitarian Law

Violations of international human rights law and international humanitarian law are rampant in IIOJK which internationalizes the issue.

A 43-page report by the Office of the UN High Commissioner for Human Rights (OHCHR), released on 8 July 2019, raised serious concerns about abuses by state security forces and armed groups in Jammu and Kashmir. The OHCHR found that Indian security forces often used excessive force to respond to violent protests that began, including continued use of pellet-firing shotguns as a crowd-control weapon which caused a large number of civilian deaths and injuries.

Violations of core international human rights instruments such as the Universal Declaration for Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Social and Economic Rights was also rampant in Indian Illegally Occupied Jammu and Kashmir (IIOJK).

Furthermore, the applicability of international humanitarian law to IIOJK is undisputed. The international humanitarian law applicable to the conflict in Kashmir is found in Article 3 common to the four Geneva Conventions of August 12, 1949, known as “Common Article 3”. Common Article 3 provides international law standards governing the conduct of parties in an internal armed conflict, including government forces and insurgents. Common Article 3 provides that, “*Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.*”

To this end, certain acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons. These include, violence to life and person, in particular murder of all kinds and torture, taking of hostages, outrages upon personal dignity and carrying out extra judicial executions. Torture, hostage-taking, and rape have all been prominent abuses in IIOJK, and it is evident that Common Article 3 forbids each of them.

IV) Recommendations

In light of India's continued colonial agenda to forcefully integrate Jammu and Kashmir and disregard UN Resolutions, Pakistan has the following options available under international law:

1. Contentious Jurisdiction of the ICJ- (Compromissory Clause)
2. Forum Prorogatum Application to the ICJ
3. Advisory Opinion of the ICJ
4. Application to the ICC
5. Invoking Universal Jurisdiction
6. Inter-State Communication Mechanism of the Committee on the Elimination of Racial Discrimination (CERD)
7. United Nations Human Rights Council Mechanisms
8. Magnitsky-Style Human Rights Sanctions
9. Specific Instances through National Contacts Points (Organization for Economic Co-operation and Development- OECD)

Action Matrix

Legal Options for Pakistan

Option	Pathways to Solution	Implementation of Solution	Actors Responsible	Implementation Timelines
Contentious Jurisdiction of the ICJ (Compromissory Clause)	A treaty such as the Genocide Convention can be used, although India has a reservation against the Genocide Convention.	A thorough review of all the treaties that both Pakistan and India are state parties to and see if there is an international instrument that gives legal space to Pakistan.	1. AG Office 2. Ministry of Foreign Affairs 3. Ministry of Law and Justice	2-6 Months for Review of Treaties 6-12 Months for Initiation of Judicial Process
Forum Prorogatum Application to the ICJ	This is an extension of a court's jurisdiction by agreement of the parties to a case after proceedings have been instituted by a state.	Pakistan can file a case with the ICJ on this basis. This is a good way to put its case before the international community. India will most probably not accept the jurisdiction of the court.	1. AG Office 2. Ministry of Foreign Affairs 3. Ministry of Law and Justice	1-6 Months to draft the application and submit it to the court
Advisory Opinion of the ICJ	A well-researched and aptly formulated legal question can be placed before the UNGA, similar to what was done in Palestine's case.	The Ministry of Foreign Affairs will have to lobby to try and get a resolution passed in the UNGA for an Advisory Opinion by the ICJ.	1. AG Office 2. Ministry of Foreign Affairs 3. Ministry of Law and Justice	1-6 Months for lobbying to UN Member States 1-2 Years for the case to be taken up by the ICJ
Application to the ICC	Pakistan can file a declaration of temporary acceptance of jurisdiction under Article 12(3), read with Article 15 of the Rome Statute.	Refer the situation in Kashmir to the ICC Prosecutor's Office. The Prosecutor will then collect and document evidence of human rights violations in IIOJK.	1. AG Office 2. Ministry of Foreign Affairs 3. Ministry of Law and Justice	1-6 Months to draft application to the ICC 1-2 Years for ICC to conduct investigation and begin the case
Invoking Universal Jurisdiction	Domestic laws of various countries can be used to bring cases against Indian citizens and corporations involved in the	Pakistan can assist Kashmiri diaspora and NGOs in different European and American countries to bring cases against	1. AG Office 2. Ministry of Foreign Affairs 3. Ministry of Law and Justice	1-6 Months for identification of countries and fact finding 1-2 Years for the case to be

	committing atrocities in Kashmir	Indian military and paramilitary personnel for committing grave war crimes and crimes against humanity in IIOJK		initiated and litigation
Inter-State Communication Mechanism of the Committee on the Elimination of Racial Discrimination (CERD)	Neither India, nor Pakistan have a reservation to Article 8 of the Convention on the Elimination of All Forms of Racial Discrimination that establishes a committee that can give a determination on the implementation of the Convention by a state party.	Pakistan can use the mechanism provided in the Convention on the Elimination of All Forms of Racial Discrimination to file a complaint against India.	1. AG Office 2. Ministry of Foreign Affairs 3. Ministry of Law and Justice	6-12 Months for gathering evidence of racial discrimination and drafting application 1-2 Years for the matter to be brought before CERD and investigation initiated
United Nations Human Rights Council Mechanisms	Treaty Based bodies include: 1. Committee on Elimination of Racial Discrimination 2. Committee on Economic Social and Cultural Rights 3. Human Rights Committee 4. Committee on the Elimination of Racial Discrimination Against Women 5. Committee Against Torture 6. Committee on the Rights of the Child 7. Committee on Migrant Workers 8. Committee on Enforced Disappearances	Pakistan can thoroughly review all the treaties that create these committees and bring attention to the violations by India in IIOJK to these committees. The complaint mechanism is also provided in the treaties.	1. AG Office 2. Ministry of Foreign Affairs 3. Ministry of Law and Justice 4. Ministry for Human Rights	6-12 Months to conduct analysis of treaties and prepare complaint application. 1-2 Years for the treaty mandated process to take place.
	Charter Based bodies include the Human Rights Council which includes: 1. Special Procedures and Mandates 2. Universal Periodic Review	The Human Rights Council is an intergovernmental body within the United Nations system. It has a dedicated complaint procedure which	1. AG Office 2. Ministry of Foreign Affairs 3. Ministry of Law and Justice 4. Ministry for Human Rights	6-12 Months to lobby at the Human Rights Council and gather support. 1-2 Years to bring the matter before the Council and

	3. Independent Investigations	can be utilized by Pakistan to bring to light the atrocities in IIOJK and can prompt an investigation by the council mechanisms.		prompt an investigation
Magnitsky-Style Human Rights Sanctions	'Magnitsky' sanctions target those responsible for human rights violations or corruption. The UK established a global human rights sanctions regime in 2020 and a global anti-corruption sanction regime this year, using powers in the Sanctions and Anti-Money Laundering Act 2018.	Pakistan can identify Indian nationals and corporations responsible for human rights violations in IIOJK and file a case before the UK Government for those individuals and entities to be sanctioned.	1. AG Office 2. Ministry of Foreign Affairs 3. Ministry of Law and Justice	5-12 Months for identifying individuals and evidence gathering 1-2 Years for filing case before the UK Government
Specific Instances through National Contacts Points (Organization for Economic Co-operation and Development- OECD)	The OECD Guidelines for Multinational Enterprises (Guidelines) represent a global framework for responsible business conduct covering all areas of business responsibility including human rights. Countries adhering to the Guidelines are required to set up National Contact Points (NCPs).	Civil Society and NGOs can bring allegations of human rights violations by Indian Businesses who have financed the human rights violations in IIOJK.	1. NGOs 2. Civil Society 3. Kashmiri Diaspora	1-2 Years in identifying relevant stakeholders and bringing the issue before NCPs