



POLICY FEATURE

SITUATION KASHMIR

India's Annexation &
Policy Options for Pakistan

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SITUATING THE KASHMIR CRISIS

On August 5, 2019, the second BJP led government of Narendra Modi annexed Jammu and Kashmir by abrogating Article 370 and bifurcating the state into two separate Union Territories. This illegal annexation was preceded by one of the largest crackdowns in the history of Jammu and Kashmir. For over a week before Article 370 was revoked, India's Home Minister Amit Shah, worked surreptitiously to ferry nearly 180,000 fresh troops into Kashmir. Hundreds of Kashmiri politicians from the Hurriyat and other political parties, including former Chief Ministers were arbitrarily placed under house arrest and later shifted to jails. Internet services, mobile networks, land lines, cable television were closed down and a curfew imposed across Jammu and Kashmir.

Now in its second week, the crackdown and curfew continue in Kashmir amid gross violations of human rights. Young women and men have been fired at for holding protests, pellet guns have blinded several hundred people, soldiers remain posted outside homes and along all major streets, mosques have been closed and Eid celebrations marred by a ban on large congregations.

Pakistan has taken a grim view of developments in Kashmir. Prime Minister Imran Khan, opposition parties and the military have unanimously rejected India's unilateral actions. As the lockdown in Indian Occupied Kashmir continues, Pakistan's government has taken a number of actions to highlight the disputed nature of the region and the threat to peace and security posed by India's illegal annexation and continued human rights violations.

This Policy Feature by the Jinnah Institute examines recent developments in Kashmir and provides a list of political and diplomatic policy options for Pakistan in the coming weeks.

What Has India Done?

After days of troop surges, arrests, speculation and denials, Indian Home Minister Amit Shah introduced a presidential order and a bill in Parliament on August 5, 2019. Through the order, India has amended Article 370 of the Indian Constitution thereby ending the special autonomous status of Jammu and Kashmir and the state subject rule under Article 35A. The bill further bifurcates the Indian occupied state of Jammu and Kashmir into two Union Territories namely; the Union Territory of J&K and the Union Territory of Ladakh. While the Union Territory of J&K will have a legislature, the Union Territory of Ladakh will be without a legislature.

Article 370

Article 370 has governed the accession and relationship of the princely state of Jammu and Kashmir with India under the Indian Constitution. As originally envisaged, Article 370 formed the basis of Kashmir's special and autonomous status. According to pro-India political leaders Farooq Abdullah, Mehbooba Mufti and others, revoking Article 370 will mean a break in the relationship between the State and India.

Under Article 370, the President of India can revoke 370 only on advice from the Constituent Assembly of Jammu and Kashmir. The Constituent Assembly was dissolved in 1957, and replaced by the Legislative Assembly of Jammu and Kashmir, which was dismissed last year after the BJP-PDP alliance fell through.

Importantly, the current Presidential order replaces the Legislative Assembly in Article 370 with Governor of Jammu and Kashmir thereby using the Governor's consent as consent of the State. This may be challenged in an Indian Court of Law in the coming days.

It is important to note that Pakistan has never recognised the Instrument of Accession, and therefore Article 370, as a legal basis for India's claims on the State of Jammu and Kashmir, arguing that the Maharajah Hari Singh has earlier signed a Stand-by Agreement with Pakistan and that India's forcible occupation was against the wishes of the Muslim majority populace of the State.

Bifurcation

In addition, India has removed the State status of Jammu and Kashmir and bifurcated the state into two union territories – Jammu and Kashmir, and Ladakh. Jammu and Kashmir will be a union territory with a legislature and Ladakh will be a union territory without a legislature. This means that there will be elections in Jammu and Kashmir but the legislature will be under the President of India who will be represented by a Lieutenant Governor. It is also likely that the legislature remains dissolved for an extended period, continuing direct rule by the Lieutenant Governor.

Why Now?

The BJP has long advocated repeal of Article 370 and 35A of the constitution as part of its election manifesto. According to the BJP this will pave the way for 1) full integration of Jammu and Kashmir in India and 2) removal of the state subject rule, allowing non-Kashmiris to move to Kashmir and gain residence and voting rights. This will dilute the Muslim majority of the only Indian state with a Muslim majority. The second electoral victory of Narendra Modi has provided the necessary votes to the BJP to go ahead with such a move without taking into account the views and opinion of the State Legislature of Jammu and Kashmir which has been abrogated for over a year now. Many analysts suggest that Modi's decision to revoke Article 370 has been precipitated by President Donald Trump's offer to mediate in the Kashmir dispute. The resulting internationalisation of Kashmir has been viewed with skepticism in New Delhi which may have acted in haste to preempt any possibility of dialogue on Kashmir in the coming months.

What are the Constitutional Challenges?

Pro-India Kashmiri and opposition leadership will likely challenge the latest moves in the Supreme Court as being against the spirit of the constitution. These challenges will likely revolve around the method of abrogating Article 370 with the consent of the governor and without the consent of a legislative assembly. In 2018, the Supreme Court of India had said that Article 370 had acquired 'permanent status' through years of existence making its abrogation impossible. In July this year, the Supreme Court of India had once again said that it would hear public interest litigation against Article 370. The matter remains seized before the court.

Reaction in Kashmir?

Kashmir is in lockdown. For the past two weeks, India's Home Minister has overseen the largest ever crackdown, exodus and information blackout in Kashmir. From the end of July nearly 35,000 extra paramilitary forces have been flown into Kashmir on an emergency basis via special flights by the Indian Air Force. By some accounts in Indian newspapers, the actual figure of new troops in Kashmir exceeds the official figure of 35,000 and reaches 180,000 paramilitary troops including CRPF, ITBF, BSF, NSG,

and SSB. These deployments are in addition to the 700,000 forces including the Indian Army and the Rashtriya Rifles already deployed by India in Jammu and Kashmir.

Starting on the evening of 4th August, Internet, cellphones, landlines and cable TV were all closed down and a curfew imposed across Jammu and Kashmir. By Monday, state authorities across India were given advisories to stay on high alert against communal rioting.

For its part, Kashmir's Hurriyat leadership has consistently rejected India's occupation of Kashmir, calling for their right to self-determination under UN resolutions. But several pro-Indian politicians in the valley have taken part in elections and governed the state. However, the vast majority of these politicians have publicly said that repeal of Article 370 will mean that the contract between India and Kashmir will be broken. Kashmiris are also concerned that the repeal of Article 35A by extension of Article 370 is an attempt by the BJP government to change the demographic reality of Kashmir, which is the only Muslim majority state in India today. Now Indians will be able to buy property in Kashmir and gain residence status and voting rights, changing the electoral reality of the Muslim majority region.

In her initial response to the decision, Mehbooba Mufti has said that India now constitutes as an occupation force in Kashmir and that the decision will be resisted by Kashmiris across the political spectrum. Pro-Indian political leaders, including Mehbooba Mufti, Omar Abdullah and Sajjad Lone are now among hundreds of political leaders who are under arrest by Indian Authorities.

Human Rights Violations in IOK

Denying Political Rights

Since the early hours of Monday, August 5, almost all Kashmiri leaders have been arrested and lodged in jails. Hurriyat leadership, including Syed Ali Gilani, Mirwaiz Omar Farooq and other have already been under house arrest. JKLF leader Yasin Malik has been kept in solitary confinement amid reports of deteriorating health. Pro-India Kashmiri leaders including Mehbooba Mufti, Omar Abdullah, Sajad Lone and Shah Faesal are also under arbitrary arrest by Indian authorities. These are in addition to hundreds of other political activists that have been picked up by security forces and moved to jails in the past two weeks. Over seventy politicians from Kashmir have been moved to jails in UP and have been shifted out of Jammu and Kashmir, including National Conference leader Ali Mohammad Sagar. Political parties such as the Jammata-e-Islami have also been banned by India in Kashmir. According to several Indian and international news outlets that have been able to report from Kashmir despite the heavy clampdown, paramilitary troops are stationed outside homes and localities all over the valley, denying Kashmiris the right to assembly and peaceful protest.

Killing, Maiming and Blinding

The first signs of a relaxation in curfew were announced on Friday, August 9. According to international media reports, over 10,000 Kashmiris took to the streets of Srinagar in protest against India's illegal occupation of Jammu and Kashmir. The protests, which have been well documented by independent media outlets such as BBC, AFP, Al Jazeera and the New York Times, Indian forces responded to the protests with live fire, pellet guns, and tear gas shelling. Several Kashmiri youth have been blinded and injured in India's response. Many are undergoing treatment at the SMHS hospital. Even in non-valley Muslim majority areas such as Kargil and Poonch, reports of sporadic protests and violence are emerging. According to a report filed by a group of independent rights activists who have recently returned from Kashmir, Indian forces have been undertaking gross violations of human rights by arbitrarily abducting and detaining young Kashmiri children as young as seven years of age. In addition,

use of pellet guns has resulted in the mass blinding of young women and men in Kashmir during sporadic protests across the valley.

Denying Religious Freedoms

With the curfew in Kashmir now entering the second consecutive week, Kashmiri Muslims have been denied the right to religious freedom and practice. After protests on Friday, August 9, the Indian authorities refused Kashmiri Muslims to celebrate Eid, an annual Muslim religious festival. Mosques across the Kashmir valley remained closed on August 12. Every main highway and street in Srinagar and other cities remained closed off with barbed wire and large deployment of troops. Muslims were not allowed to congregate at Mosques as Indian authorities had passed orders that Eid prayers would not be allowed. In major Mosques throughout the city such as Jamia Masjid Srinagar, which remained shut, soldiers patrolled the streets to stop locals from offering prayers. The streets of Srinagar and other cities remained deserted as lockdown on movement and communications continued across Jammu and Kashmir on Eid day.

Media and Communications Blackout

The Indian government has instituted new heights of media and communications clampdown in Jammu and Kashmir. Internet services, cable television, landlines and mobile phones remained close for a second week as families remained without contact with each other. Several Kashmiris who live outside Jammu and Kashmir reported that they were unaware of the health and wellbeing of their family members as they have not been able to get in touch with loved ones. International and Indian correspondents operating out of the Kashmir valley reported that their movements were restricted by local administration officials. All media personnel were shifted to one hotel in Srinagar to monitor their movements. Meanwhile, the Indian government denied large protests and firing by alleging that international news outlets were misreporting facts on the ground and that calm remained in the city. Propaganda footage of an orchestrated interview with India's NSA and images of selected streets in upper Srinagar were released by the Indian government to give the impression that all was well. This was diametrically opposed to reporting coming out of Kashmir from international outlets such as BBC, NYT, Al Jazeera and AFP who refuted Indian governments claims that no protests took place or that protestors had been fired upon. Indian news channels too have faced backlash from the Indian government. The owners of one of India's leading news channels, NDTV were arrested in Mumbai and were denied travel rights. NDTV had been reporting on the crisis in Kashmir. NDTV has reported continued harassment by Indian officials to toe the line on Kashmir reporting by the channel.

Slowly and gradually, as the voices of Kashmiris are come out despite the blanket ban in the valley, the vast majority of Kashmiris are rejecting India's announcement calling it a forcible annexation against which the Kashmiri people will continue to fight till the end. It is expected that whenever curfew is relaxed protests will break out across Kashmir.

PAKISTAN'S REACTION SO FAR

Pakistan has strongly rejected India's unilateral move to materially change the status of a disputed territory. The first reaction from Pakistan came through the National Security Council meeting, a day before India's abrogation of Article 370. In its statement, the NSC called out India's use of cluster munitions along the LoC and warned of destabilizing actions by India in Indian Occupied Kashmir. After the Modi government's plans were put into motion on August 5, the President of Pakistan called an emergency joint session of Parliament on the request of opposition parties.

A strong resolution by a special joint session of Parliament has highlighted India's human rights abuses and the disputed nature of the dispute, recognizing that there are three parties to the dispute; Pakistan, India and the Kashmiris. It has reiterated the right to self-determination of the Kashmiri people and called on the international community, especially the United Nations to ensure that India is held to UNSC resolutions on Kashmir.

Meanwhile, after another NSC meeting Pakistan announced to take the following diplomatic actions in light of India's annexation and bifurcation of Kashmir.

- Pakistan downgraded diplomatic relations with India, asking the Indian High Commissioner to leave and announcing that Pakistan's High Commissioner designate would not be leaving for New Delhi,
- Pakistan also announced that it was suspending all bilateral trade,
- Existing bilateral agreements were now under review, and,
- Pakistan announced that it would be approaching the UNSC to uphold UN resolutions on Kashmir. On August 10, it was announced that Pakistan had decided to approach the UNSC with support from China,
- The Foreign Minister of Pakistan has written to the President of the UN Security Council seeking an emergency session of the UNSC on the "India-Pakistan Question" given the threat to international peace and security.

The Prime Minister also announced the formation of a seven member committee to examine Pakistan's diplomatic and political options after India's unilateral decision. Decisions of the committee are awaited.

POLICY OPTIONS GOING FORWARD

India's annexation of Kashmir is being celebrated in India as a major constitutional and political decision that has shifted the dynamics of the bilateral relationship with respect to Kashmir. Many analysts in India are selling the abrogation of Article 370 as a *fait accompli*. But India's undemocratic and illegal action will have serious repercussions for regional stability and directly impact Pakistan which has *locus standi* on Kashmir as an internationally recognized dispute. Even more significantly, the gross violation of human rights underway in Kashmir, and the BJP government's plans to change the demographic Muslim majority character of Kashmir are being seen as akin to ethnic cleansing in India's only Muslim majority state.

Pakistan has already downgraded its diplomatic and economic relationship with India, by suspending trade and halting connectivity. To send a message of unstinting support to the people of Kashmir, and resoluteness to the international community in the wake of India's unilateral revocation of Article 370, it is further suggested that:

Diplomatic Options

- Pakistan should appoint a Special Envoy for Kashmir, someone with international stature and repute, who commands the confidence of all political parties and institutions in the country. The Special Envoy should be given the status of a Cabinet Member to demonstrate Pakistan's seriousness and resolve. The Special Envoy should be tasked with highlighting India's illegal and unconstitutional annexation of Kashmir and gross violation of human rights in Kashmir by Indian

forces in world capitals. The Special Envoy should work in close coordination with Pakistan's Foreign Office and Ambassadors in major world capitals and the United Nations.

- Kashmir evokes sentiment in Pakistan and is a national issue. All political parties stand against India's forcible annexation of Kashmir against the wishes and will of the people of Kashmir. The resolution passed by the joint session of Parliament reflects this consensus. The government should form a small but effective multi-party committee with members who have foreign policy experience and international recognition. It should be tasked with meeting legislators in P-5 countries, and other stakeholders, including international human rights organizations, to highlight the plight of Kashmiris and their right to self-determination under UNSC resolutions.
- Pakistan should approach the United Nations Security Council under Chapter VII Article 39 that deals with 'Threats to International Peace and Security'. Pakistan should work diligently in coordination with China to support Pakistan's bid to approach UNSC in this regard. The three conditions under which the UNSC Article 39 can be triggered are; the existence of any threat to peace, breach of peace, or act of aggression. Pakistan can make a case in the first two instances. In recent times, UNSC Article 39 has been triggered in wider contexts such as terrorism and humanitarian crisis. Pakistan has a strong case to make since Indian actions are a contravention of (i) UNSC Resolution 38 that calls on each Government to inform the Council of any material change and consult the Council in this regard, (ii) UNSC Resolution 47 that states in its preamble that India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be settled by a free and fair plebiscite, that the continuation of the dispute endangers international peace and security, (iii) The Simla Agreement which states that India and Pakistan relations will be governed by the Charter of the United Nations.
- Pakistan should call an emergency meeting of the Organization of Islamic Countries Foreign Ministers to seek support on Kashmir and condemn India's unilateral annexation.
- Pakistan, as a member of the United Nations Human Rights Council, should raise the issue of gross violations of human rights, including the right to self-determination, enshrined in the UN Charter.
- Pakistan should also highlight the latest reports by the UN High Commissioner on Human Rights that document abuses and arbitrary arrests of Kashmiris by Indian forces.
- Pakistan missions abroad should share fact files with international human rights organizations such as Amnesty International, Human Rights Watch and others to create public awareness of India's gross violation of human rights.

Lawfare Options

- The annexation of Kashmir is illegal under international law. India has 'occupied' J&K as defined by Article 42 of the Hague Regulations 1907, which state that 'territory is considered occupied when it is actually placed under the authority of the hostile army'. The definition applies to contested territory, like Kashmir.

(The International Court of Justice in its *Wall* Opinion recognized that Israel was bound by Geneva Convention IV and held that the Palestinian territories became occupied by Israel during the 1967 conflict. The analogy between Israel's occupation of the West Bank and Gaza in 1967 is almost similar to India's occupation of Kashmir after 1947).

- India has imposed authority on the occupied territory with the presence of half a million troops, puppet governments and draconian laws like AFPSPA that allow security forces powers to arrest, kill on suspicion, search and destroy property suspected of belonging to insurgents. They also allow security forces to preventively detain individuals without trial and charge (approximately 20,000 individuals have been so detained). This has frustrated the Kashmiris right to self-determination through the occupation; an *erga omnes* obligation and a right guaranteed to all people under the UN Charter.
- Furthermore, Security Council Resolution 47 passed in 1948 called for a free and fair plebiscite in the region. This referendum has never been executed and, without it, India has no valid legal claim – the territory remains contested and under illegal Indian occupation. The existence of an occupation means the situation is an international armed conflict, even if the occupation meets no resistance. India is bound by a whole spate of rules and regulations applicable in international humanitarian law to an international armed conflict (this includes all four Geneva Conventions as well as customary international humanitarian law). It is also bound by the laws of occupation as prescribed under the Hague Regulations 1907.
- India has routinely breached these laws, in some cases so gravely they potentially constitute war crimes. Civilians have been intentionally targeted by security forces, murdered in reprisal attacks, and summarily executed in custody. Reports of torture by international observers have identified thousands of cases revealing systematic coercion of detainees to confess or reveal information. Cordon and search operations have involved sexual violence as retribution, or to collectively punish and humiliate communities. Indiscriminate weapons like pellet guns and cluster munitions have been used resulting in deaths, blinding and impairment. Failing to prosecute those accused of war crimes itself is a breach of the Geneva Conventions.
- Article 35A of the Indian Constitution is not relevant to Pakistan. But its provisions bar non-Kashmiris from settling or buying property in Indian Occupied Kashmir, complying with Article 49 of Geneva Convention IV (which prohibits the transfer or deportation of persons in Occupied Territory). Its revocation now means that Indian citizens can permanently settle, buy land, and hold local government jobs in the area. It is a breach of GCIV and there are well-grounded fears that India may be attempting to change the demographics of the country's only Muslim-majority state. Splitting the state into two suggests a West-Bank settler arrangement.

Geopolitical Options

- Pakistan should work closely with the United States and political factions in Afghanistan to find a peaceful solution to the war in Afghanistan. Pakistan should continue its support for the reconciliation process and highlight the timing of the India's move as a means to disrupt and shift focus from the reconciliation process.
- Pakistan should work closely with China to find common ground on Chinese concerns vis-à-vis Ladakh and Pakistan's concerns in Indian Occupied Kashmir. Pakistan must leverage Chinese diplomatic weight at multilateral forums to highlight the plight of Kashmiri people.
- With violence in Indian Occupied Kashmir likely to rise as curfew restrictions ease, India is also likely to divert world attention from the indigenous freedom struggle by; (i) Increasing ceasefire violations along LoC, (ii) undertaking a false flag operation in Kashmir, (iii) resorting to allegations of cross-border terrorism against Pakistan. To preempt Indian actions, Pakistan must (i) increase intelligence gathering in Indian Occupied Kashmir, especially along the LoC, (ii) inform diplomatic missions, including the P-5 of Indian intentions to divert attention from human rights abuses in Indian Occupied Kashmir, (iii) highlight the indigenous nature of the

freedom movement in Kashmir, (iv) focus on how Indian aggression against the Kashmiri people is the cause of violence in Kashmir.

- Pakistan should address and amplify the vast differences in the condition of people in GB/AJK and that of people living under Indian occupation. Pakistan should take all possible measures to ensure that a new international narrative on Indian oppression in Kashmir is brought to international newspapers and magazines.