

Kashmir in Turmoil

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The beautiful landscapes of Kashmir have made it into several romantic Bollywood movies. In the films, lovers dance and sing in front of snow-covered mountains, turquoise lakes, and green valleys. These images clash sharply with pictures we see in the news: masked militants throwing stones at Indian security forces, armed military patrolling the streets and women holding up photographs of their disappeared husbands. The latter set of pictures reminds us that the beautiful region is a conflict zone and one of the most militarised areas in the world.

Kashmir is not only the object of disputes over territory between India and Pakistan as well as India and China. It also witnesses violent conflicts between the Indian security forces (which include the army and paramilitary forces) and an armed Kashmiri insurgency that seeks autonomy from the Indian nation-state. The latter conflict has escalated anew since 5 August 2019 when the BJP-led Indian government abrogated the special status that the Muslim-majority state Jammu and Kashmir (J&K) had previously enjoyed and significantly curtailed the civil liberties of people living in the region.

This blog post contextualises the events of August 2019 and thereafter. At the same time, it provides an introduction and some background information to the posts assembled in this symposium titled *Casting Light on Kashmir*. The symposium engages critically with the legal and socio-political developments in Indian-administered Kashmir—focusing not only but primarily on the events around and since August 2019 and their implications for the people in the region.

History and Territorial Struggles

In August 1947, the colonial rule of British India formally ended, and India and Pakistan emerged as independent nation-states. At this point, India gave several former princely states a choice to either join the newly created Indian state or remain independent. Jammu and Kashmir's Hindu ruler, Maharaja Hari Singh, first opted for the state to stay independent. It was only when tribal warriors from Pakistan and with the help of Pakistani officers invaded the state, that the Maharaja asked the Indian government for military assistance and, in return, agreed to accede to India.

What followed was the first of three Indo-Pakistani wars. When the Indian Prime Minister Jawaharlal Nehru brought the conflict before the United Nations, the Security Council held that the people of Kashmir should decide in a referendum whether the region should belong to India or Pakistan and that an interim administration should prepare such a referendum. The war ended in 1949 with an armistice, and the former princely state was divided into an Indian and a Pakistani part. The referendum for which the UN Security Council had asked never took place. The second and third Indo-Pakistani wars occurred in 1965 and 1971. In the Simla

agreement of 1972, the two nations agreed to deal bilaterally with the conflict (and not through the UN's intervention) and established a Line of Control in Kashmir.

Kashmir's belonging, however, remained an issue of debate. India argues that the whole territory of the former princely state joined the Union in 1947 and is, therefore, part of the Indian territory. Pakistan claims that the territory is disputed and that its final status would only be decided in a referendum as per the UN Security Council resolution. India's and Pakistan's different positions are also reflected in the [official maps of the two states](#): Indian maps show the whole territory as part of the Indian Union, while Pakistani maps first marked the territory as "disputed" and later as "illegally occupied" by India.

Article 370

When Maharaja Hari Singh acceded to the Indian state in 1947, he was ensured that the state of J&K would retain a certain degree of autonomy. The [Instrument of Accession \(IoA\)](#) that Singh signed regulated that the power to legislate on all matters except defence, external affairs and communication would remain with Jammu and Kashmir. In 1950 special rights were also granted to the state in the new Indian Constitution. Under the title "Temporary provisions with respect to the State of Jammu and Kashmir", [Article 370](#) limited the power of the Indian parliament to make laws applicable to J&K and gave significant powers to the Constituent Assembly of Jammu and Kashmir (a body that ceded to exist in 1957) in deciding about the relation between the state and the Indian nation (including about a potential abrogation of Article 370 itself).

The state thus enjoyed a unique position within the Indian constitutional and legal framework compared to other states of the Indian Union. It was the only Indian state that had its own Constitution. Citizens from other Indian states were restricted in purchasing land in Jammu & Kashmir and in holding government jobs. Scholars have therefore stated that J&K belonged to a [sui generis legal category](#).

Over time, the special status conferred to the state in Article 370 was hollowed out greatly through passing presidential orders under Article 370(3). Practically, the state had thus lost much of its autonomy long before the abrogation of its unique status in 2019. Still, Article 370 was regarded as having an important symbolic function for the Kashmiri identity. As one commentator [states](#): While the "Kashmiri autonomy promised under Article 370 had become a myth", it was still "a symbol of Kashmir's uniqueness to the Indian scheme of things".

Insurgency and Counter-Insurgency

The Indian infringement on Kashmir's autonomy paralleled a growing Kashmiri movement to strive for *azadi*—freedom—from the Indian nation. In the late 1980s, a militant separatist insurgency against the Indian administration of J&K emerged in Kashmir, continuing its activities till today. It contains groups supporting the state's independence and groups seeking the region's accession to Pakistan.

India reacted to this movement with a counterinsurgency, militarising the Kashmir valley. Since 1989 violent confrontations between the militants and the Indian security forces have erupted regularly. We see a spiral of violence here, in which actions by the militancy and the Indian state reinforce each other: In its attempt to quash the insurgency, the Indian state infringes the rights of the Kashmiris, which leads to a growing resistance against the Indian state, which leads to further repression. In protests against Indian politics, Kashmiris regularly express their anger by throwing stones at Indian security forces, who react by using violence, frequently leading to the blinding or killing of individuals. The funeral processions then organised for the deceased “martyrs” often become the sites for new violent protests.

On the pretext of law and order and the prevention of terrorism the Indian state has regularly curbed fundamental rights of the Kashmiri people: their right to privacy, their freedom of movement, their right to assembly, their freedom of religion, their freedom of speech, and their right to life and personal dignity. The Indian state used surveillance, policing, raids, mass arrests, and widespread preventive detention against street protesters and people it deemed suspects. It introduced 24-hour curfews and prohibited groups from meeting in public. It closed mosques, prohibited Friday prayers, and detained priests. It shut down the internet and harassed journalists and human rights defenders. Long before the abrogation of its sovereignty, Kashmir was thus in a state of [permanent emergency](#).

Enforced disappearances are another phenomenon we witness in J&K. Civilians (most of whom are men), whom the Indian state has a problem with, “are disappeared” by Indian security forces and are never seen again. Since 1989 there are reportedly over [8,000 cases of enforced disappearances](#). Although chances are low that many of the disappeared are still alive—and in fact, several [mass graves](#) with unmarked bodies have been found in Kashmir—the disappeared are technically not considered dead. Women whose husbands have “been disappeared” are thus left in a stage of [half-widowhood](#). As per Indian law, they are not recognised as widows until seven years after the husband’s disappearance (and therefore neither allowed to remarry nor qualified for any government welfare schemes). In 1994, a female-dominated movement called the [Association of Parents of the Disappeared Persons](#) began searching for the disappeared men, hoping that some of them might still be alive.

The conflict has gendered dimensions in many other ways, too. While few women act as combatants, Kashmiri [women support the insurgency through other means](#), such as chanting slogans and resistance songs at protests, mobilising local support for the militancy or providing food and shelter to militants. Women are, however, also particularly vulnerable to sexual assault, including [rape](#), committed by both Indian security forces and militants.

Human rights violations committed by Indian security forces mostly remain unpunished. This is partly because of the [Jammu & Kashmir Armed Forces Special Powers Act](#) (AFSPA), enacted in 1990. Section 4 of the AFSPA states that where armed forces deem it “necessary [...] for the maintenance of public order”, they may use violence against and even kill “any person who is acting in contravention of any

law”, may arrest suspects, and enter, and search houses without a warrant. Section 7 of the AFSPA stipulates that

“No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.”

The Abrogation of Kashmir’s Special Status and its Aftermath

On 5 August 2019, the Indian President issued [The Constitution \(Application to Jammu and Kashmir\) Order, 2019](#), which made the whole Indian Constitution applicable to J&K. On 6 August, the President issued another [order](#) making all clauses except for clause 1 of Article 370 inoperative. The legal manoeuvre through which the Indian government circumvented Article 370’s requirement for the involvement of J&K’s Constituent Assembly in amending Article 370 was the following: In December 2018, the central government had imposed President’s Rule (Article 356 of the Constitution) in Jammu and Kashmir. The Constitution (Application to Jammu and Kashmir) Order from August 2019 then introduced a constitutional amendment of Article 367 of the Constitution—an article on interpretation. A newly introduced clause 4 of that article would state that the expression “Constituent Assembly” in Article 370(3) of the Constitution shall read “Legislative Assembly of the State” (see Appendix II of the Constitution). Since President’s Rule in J&K meant that a Governor assumed the powers of the state’s legislative body, the consent of the Governor to abrogate Article 370 was considered enough to fulfil the requirement of the state’s participation. Commentators called this procedure [a smack in the face of constitutionalism](#).

In addition to these orders, the Indian parliament passed [the Jammu and Kashmir Reorganisation Act, 2019](#), which divided the state of J&K into two union territories. Unlike states, union territories do not have their own governments but are governed by the Union government of India. Executive power thus no longer lay with the former state’s chief minister but with one lieutenant governor in each of the union territories, both of whom are appointed by the President of India on the advice of the Indian Prime Minister.

The abrogation of the state’s special status was accompanied by severe restrictions on fundamental rights. Several thousand people were [arrested and held in preventive detention](#). This included politicians, former chief ministers, activists, lawyers, and journalists. The tool that allowed this was the [Public Safety Act](#) (PSA)—a law passed under Colonial Rule in 1915 to stifle political dissent. It permits the state government to take a person into preventive detention without trial for up to two years under broad provisions that leave ample scope for abuse. Furthermore, curfews were issued under section 144 of the Indian Criminal Procedure Code, travel restrictions were introduced, and essential [Mosques were closed](#).

The day before the Presidential Order, the Indian government had [shut down the internet](#) in J&K—a shutdown that would last for five months (access was only gradually restored after that, 4G internet was only available 18 months after the initial shutdown) and became the longest ever in a democracy. No access to the internet not only meant that people could not communicate with family and friends or inform a wider public about the situation in Kashmir. But for many people it also meant no access to education, business, medical care or the courts—even more so since the internet shutdown fell in the time of the lockdowns established as a reaction to the COVID pandemic.

In 2020, the Indian government also notified a new domicile reservation policy and new land rules, thereby broadening the group of people who could apply for government jobs in the newly created union territories and allowing any Indian citizen to purchase non-agricultural land in the region.

These various actions fall into a time of [anti-Muslim](#) (and pro-Hindu) policies, including the passing of laws that prohibit cow slaughter, place limits on conversion from Hinduism to Islam or provide pathways for Hindus and other non-Muslims who immigrated to India from other states to acquire Indian citizenship.

The Indian Supreme Court has so far largely refrained from taking a clear position on the government's actions. Since August 2019, several petitions have been filed to challenge the abrogation of Kashmir's special status, but the [Supreme Court is yet to hear the pleas](#). And while the Court issued two judgements on the internet ban in Kashmir (in January and May 2020), their outcome was largely unsatisfactory to many commentators (see [here](#) and [here](#)). The Court circumvented a decision about whether the internet ban was unconstitutional and, instead, referred the matter to a three-member special committee headed by the Union Home Secretary. Thus, ironically, [as commentators have pointed out](#), the executive that restricted internet access in the first place was now supposed to judge its own actions.

This Symposium

Casting Light on Kashmir puts together blog posts by scholars and activists situated both in and outside of Kashmir. Some authors decided to use a pseudonym to prevent attacks against them by people who might not share their views.

Sidra Yousaf and Paul Dießelberg sketch the contours of a postcolonial theory of constitutional patriotism. Burhan Majid shows how the constitutional erosion in Kashmir began long before 2019. Numan Zargar and Zaid Mehraj investigate the relationship between the abrogation of Article 370 and the basic structure doctrine. Nikhil Mulani looks at the internet shutdowns before and after 2019. Nusaybah and Asfur engage with the infringement of people's rights to privacy and a dignified life through India's surveillance policy. Anam Shah delves into the mechanisms of The Jammu and Kashmir Public Safety Act and shows how the State is using it as a tool to contain dissent. Aman argues that the Indian institutions have used the Constitution as a "tool for the erasure of aspirations" of Kashmiris. And, finally, the

India Justice Project engages with the situation for human rights defenders and journalists working in and reporting critically about Kashmir.

The blog posts assembled in this symposium certainly do not cover all the relevant legal, political and societal issues in Kashmir but cast a light on some of them. In assembling these texts for the symposium, we hope to inform an audience beyond the Indian one about the developments in the region, to somewhat disentangle a complex socio-legal situation and to initiate a—hopefully respectful and productive—academic discussion.

