

SUPREME COURT RESERVES VERDICT ON ARTICLE 370 CASE - WHAT TO EXPECT?

By
Mahwish Hafeez
Research Fellow
India Study Centre (ISC), ISSI

Edited by
Dr Khurram Abbas

November 27, 2023

(Views expressed in the brief are those of the author, and do not represent those of ISSI)



Source: Greater Kashmir.

After a gap of almost four years, the Supreme Court of India set up a new constitution bench that began proceedings on 23 writ petitions challenging the legality of revocation of Article 370 of the Indian Constitution that enshrined special status and limited autonomy for the Indian Illegally Occupied Jammu and Kashmir (IIOJK).¹ The Supreme Court decided to conduct day-to-day proceedings from August 2, 2023.² The five-member bench comprised Chief Justice D.Y. Chandrachud, and Justices Sanjay Kishan Kaul, Sanjiv Khanna, B.R. Gavai, and Surya Kant.

Interestingly, no genuine Kashmiri citizens of integrity, like human rights activist Shehla Rashid had filed a petition related to Article 370 before the Indian Supreme Court. It is perhaps because they have no faith in the Indian Constitution and Judiciary, especially as in recent years, the Modi regime had used the judiciary as a means to advance its *Hindutva* ideology and turned the Indian Supreme Court into a Kangaroo Court. Challenging Indian Government's act of revoking Articles 370 and 35A, Senior Advocate Kapil Sibal, Advocate Gopal Subramanian, Advocate Zaffar Shah, Advocate Rajeev

¹ "SC to Hear Pleas against Abrogation of Article 370: Here's What You Need to Know," The Indian Express, July 3, 2023, sec. Explained, <https://indianexpress.com/article/explained/explained-law/supreme-court-hear-petitions-against-abrogation-article-370-8699349/>.

² "Article 370 Case In Supreme Court: Day-To-Day Hearings To Start From August 2, Says Chief Justice Chandrachud," The Times of India, July 11, 2023, <https://nl.hideproxy.me/india/article-370-case-in-supreme-court-day-to-day-hearings-to-start-from-august-2-says-chief-justice-chandrachud/articleshow/101657570.cms>.

Dhavan, Advocate Dushyant Dave, Advocate Shekhar Naphade, Advocate Dinesh Dwivedi, Advocate Chander Uday Singh, Advocate Sanjay Parekh, Advocate P.C Sen, Advocate Nitya Ramakrishnan, Menaka Guruswamy, Advocate Manish Tewari, Advocate Warisha Farasat, Advocate Gopal Sankanarayanan represented National Conference's Muhammad Akbar Lone, *Muzaffar Iqbal Khan*, Jammu and Kashmir Bar Association, Jammu and Kashmir People's Conference, Ms. Rifat Ara Butt, former Kashmir interlocutor Radha Kumar, Manohar Lal Sharma & Prem Shanker Jha, Inderji Tikoo, Satish Jacob, and MY Tarigami, Peoples Union for Civil Liberties (PUCL), (also) representing Ms. Radha Kumar, People's Democratic Party, Javid Bhat and Awami National Conference, a politician from Arunachal Pradesh, RTI activist Venkatesh Nayak, and petitioner Soyaib Qureshi, respectively. On the other hand, Attorney General R Venkataramani, Solicitor General (SG) Tushar Mehta, Additional Solicitor General KM Nataraj and Advocate Rakesh Dwivedi argued on behalf on the Centre, whereas Advocate Kanu Agarwal appeared on behalf of the State government of IIOJK. Advocate V Giri appeared on behalf of All India Kashmiri Samaj, Advocate Mahesh Jethmalani argued for the members of the Gujjar Bakarwal community in IIOJK, and Advocate Gurukrishna Kumar appeared for people who had migrated to IIOJK from regions that came to be part of Pakistan.

While highlighting that revocation of Article 370³ was against the Constitution, it was argued by the petitioners that Article 370 had assumed permanence following the dissolution of the Constituent Assembly of IIOJK in 1957. Clause 3 of Article 370 made recommendation from the Constituent Assembly essential to remove Article 370. Hence, in the wake of the dissolution of the Constituent Assembly, the provision could not be revoked. The recommendation for abrogation has to come from an agency that is equal in mandate and stature. After 1957, there is no agency which is equal to the Constituent Assembly of IIOJK. The Constitution (Application to Jammu and Kashmir) Order, 1954⁴ was promulgated when the Constituent Assembly was still in existence. Hence, the Constituent Assembly would have abrogated Article 370 if they wanted to. The Governor had the power to dissolve the Assembly only on the aid and advice of the council of ministers. It was highlighted that when the Governor of IIOJK dissolved the State Assembly on November 21, 2018, there was no Council of Ministers.

It was further argued that the Constitution (Application to Jammu and Kashmir) Order, 1954 made a 'solemn promise' not to change 'boundaries' without concurrence. There was an understanding

³ "Article 370 in The Constitution Of India 1949," accessed September 25, 2023, <https://indiankanoon.org/doc/666119/>.

⁴ "THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954 C.O. 48" (Dr. Syama Prasad Mookerjee Research Foundation, n.d.), <https://spmrf.org/wp-content/uploads/2019/08/Constitutional-Order-1954.pdf>.

between the Constitution framers and Maharaja Hari Singh who, while in favour of independence of his state, had allegedly signed the 'Instrument of Accession' to India under which Article 370 was inserted and no process could now be followed to abrogate it. Unilateral executive decision cannot change the terms of a relationship which is constitutionally embedded in Article 370. The Section 5 of the Jammu & Kashmir Constitutions shows that Article 370 was meant to continue to remain in existence. Both the 'Constitution' of Jammu and Kashmir and the Constitution of India speak to each other through Article 370.

The Maharaja entered into an alleged 'Instrument of Accession' but did not enter into a merger agreement. IIOJK 'Constitution' required Governor to act in the best interests of the people of the State. However, the Governor committed 'serious constitutional misconduct' by recommending to the President to abrogate Article 370 which resulted in the promulgation of Presidential Order C.O. 272.⁶ As per Section 92 of the IIOJK 'Constitution', no change can be made to the IIOJK 'Constitution' even during the Governor's Rule. Article 3 of the Indian Constitution (Formation of new States and alteration of areas, boundaries or names of existing States) underscores that it is mandatory for the President to refer the Bill to the State legislature which is a condition precedent before one can invoke Article 3.

Article 370 of the Constitution cannot be revoked during President's Rule because the concurrence of the State legislature is required. It was highlighted that for the election of the President, the electorate contains the Members of Parliament of both the Rajya Sabha and the Lok Sabha as well as the legislative members of respective states. But as Jammu & Kashmir is not a State anymore, it has no say in the election of the President. States can be converted into Union Territories under Article 3 of the Constitution due to the Constitution (Eighteenth Amendment) Act, 1966.⁷ However, the Eighteenth Amendment was not applicable to Jammu & Kashmir on August 5, 2019. Asymmetrical federalism gives protection against majoritarianism and that the Indian Constitution is anti-majoritarianism. The bench was also informed that at the time of abrogation of Article 370, three former Chief Ministers as well as most of the Legislative Assembly members were under detention under the Public Safety Act.

5 "The Constitution of Jammu and Kashmir" (Directorate General Of Accounts and Treasuries, n.d.), <https://jkdat.nic.in/pdf/Rules-Costitution-of-J%26K.pdf>.

6 "THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 2019 C.O. 272," Administration of Union Territory of Ladakh, n.d., <https://ladakh.nic.in/document/the-constitution-application-to-jammu-and-kashmir-order-2019-c-o-272/>.

7 "The Constitution (Eighteenth Amendment) Act, 1966 | National Portal of India," National Portal of India, accessed September 21, 2023, <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-eighteenth-amendment-act-1966>.

Those representing the Union Government argued that on a combined reading of the so-called 'Instrument of Accession' and the Proclamation followed by the adoption of Article 370, all traces of sovereignty were surrendered. Article 370 was designed to facilitate the constitutional integration process along the same lines as it happened with other princely states. Framers of the Constitution did not want Article 370 to be a permanent feature and, therefore, the provision is contained in Part XXI of the Constitution – temporary and transitory provisions. They insisted that Article 370 was acting to the detriment of central government welfare schemes reaching the people of the valley. Following abrogation, they argued, a large number of fundamental rights and other rights are now conferred upon the residents of IIOJK and that they will be fully at par with the rest of the country.

Those arguing on behalf of the Union government also stressed that it is important that IIOJK remains as a Union Territory for some time as since August 5 2019, stone pelting and other such activities have been reduced by 97.2 percent. It was claimed that security persons casualty had reduced by 65.9 percent. The central sector scheme investment was currently at 28400 crores. The investment proposals for other than central schemes were 78000 crores. Till date, the actual investment made were 2153 crores. Several e-initiatives have taken place and as a result of that the number of projects has risen from 9229 in 2018 to 92580.

They stressed that, for the first time, the three-tier panchayat raj system is introduced. On the issue of abrogation of Article 370, the whole Parliament was taken into confidence including MPs from Kashmir. Article 370 is not in sync with the general federal features of the Constitution for the rest of the country and the Union. Article 370(3) indicates that ultimate legal sovereignty rests with the Union of India. Maharaja of Jammu & Kashmir had allegedly recognised the supremacy of the Indian constitution and accordingly Article 1 of the Constitution was enforced.

It was brought to the notice of the Bench that the petitioner and National Conference leader Mohammad Akbar Lone had shouted 'Pakistan Zindabad' in the IIOJK Assembly in 2018 and had a soft corner for secessionist forces. To this, Mohammad Akbar Lone was asked to submit an affidavit expressing his allegiance to the Constitution of India.

With these arguments the hearing of the case came to an end and the verdict was reserved by the five-member bench. It is being speculated that the decision would be announced before December 25, 2023, when one of the bench members would retire.

While those challenging the revocation of Article 370 based their arguments on sound historical facts, the defence relied mostly on arguments that are much distant from the reality. To claim that

the revocation ensured economic development, or brought gender equality or peace in IIOJK, is more fiction than fact. As a matter of fact, IIOJK's economy is ruined after India's unilateral actions of August 5, 2019 – first due to prolonged curfew and double lockdown and subsequently due to appointments of non-Kashmiri people on jobs in the state that were previously reserved only for the Kashmiri people. In fact, in the initial five months of Modi's second regime, the economy of Kashmir lost \$5.32 billion and more than 100,000 Kashmiris lost their jobs in the sectors of handicrafts, tourism and information technology. Unemployment rate in IIOJK is reportedly 25 percent, whereas in India it is 7.6 percent⁸. Demolition of people's houses and businesses early this year further deteriorated the situation for the Kashmiri people. Above all, to silence people under the shadow of the gun does not create peace.

The Indian Supreme Court is likely to announce its verdict sometime in the coming weeks. There could be three possible scenarios. First, during the course of the arguments, certain remarks made by Chief Justice like Article 35A "took away fundamental rights" or "Article 370 was never intended to be permanent" appears to reflect a tilt of the Bench towards the Union government's case and a decree favourable to them could be a clear probability. Several factors are at work. A sizeable part of Indian society at the moment is under the influence of '*Hindutva*' ideology that has always questioned IIOJK's special status. The remaining part of the society which still believes in India's secular credentials, see this move by the BJP from a nationalist point of view. Further, the opposition parties had also supported the Jammu and Kashmir Reorganization Act of 2019 in the Indian Parliament as well as Rajya Sabha. Hence, the August 5, 2019, decisions seem to be largely popular in Indian society which might make it extremely difficult for the Judiciary to give a verdict that is against public sentiment or be seen as against Indian interest.

In the second scenario, Supreme Court may decide to give verdict in favour of those challenging revocation of Articles 370 and 35A. This scenario would result in great embarrassment for Modi government. However, at the same time, it could be used by Modi in advancing his Hindutva and nationalistic narratives particularly as Lok Sabha elections are just few months away.

In the third scenario, India's Supreme Court may decide to restore statehood of IIOJK sans having it a special status, separate Constitution and flag. It may decide against restoration of Article 35A which will result in Indian government's continuous efforts to encourage non-Kashmiri Indians, particularly Hindus, to settle permanently in IIOJK and ultimately turn Muslim majority into a minority. This

⁸ Dr. Asma Shakir Khawaja, "Modi's Kashmir Policy and the Critical Voices of India," Hilal, September 5, 2022, <https://www.hilal.gov.pk/eng-article/detail/NjU0NA==.html>.

third scenario is particularly dangerous as on one hand, India would portray as having independent judiciary and on the other hand pursue its settler colonial agenda.

Pakistan needs to increase its efforts to sensitize the world, particularly the West and Muslim countries about not only human rights abuses but also the Indian designs of illegal demographic change in IIOJK. World community must be reminded that the issue of Jammu and Kashmir is an internationally recognised dispute and nothing can change the fact that India is an occupying force. Indian courts do not have any jurisdiction to decide the fate of a “disputed territory” (recognized as such by the United Nations) and therefore, proceedings in Indian courts do not mean anything. World community must also be reminded that Indian claims of Maharaja signing the ‘Instrument of Accession’ on 26 October, 1947, has no basis as has been proved by a number of eminent historians particularly Alastair Lamb. In fact, Maharaja had by that time lost legal authority to transfer the sovereign title to India as he had lost effective control of most parts of Jammu and Kashmir. When the matter was taken to the United Nations Security Council, the Kashmiris were promised that they would be given their fundamental right of self-determination to which both India and Pakistan agreed but later India backtracked. This right of self-determination is protected under the UNSC resolutions on Kashmir and the UNGA Declaration of Friendly Relations, which was adopted in 1970 and is considered an authoritative indication of customary international law. Several other UNSC and UNGA resolutions, including Resolution 2649 (XXV) of 1970 again reaffirmed the right of self-determination of the Kashmiri people.

Envoys of the foreign missions based in Islamabad should be given regular briefings on the situation of IIOJK. They must be reminded that India cannot deny Kashmiri people their fundamental right of self-determination promised to them under number of relevant UNSC resolutions. Visits should also be arranged for these envoys to meet Kashmiri refugees who had migrated to Azad Jammu and Kashmir from IIOJK so that they have first-hand knowledge of the plight of the Kashmiri people. Introduction of ‘Kashmir Chair’ in foreign Universities would help in creating awareness in the students and academia. In fact, keeping in view the fact that Kashmiri’s struggle for the right to self-determination is going to be a long fight, creating Kashmir centres in Pakistani Universities would also help in preparing future advocates of the Kashmir cause who can present the Kashmiris case more effectively to the world community.