

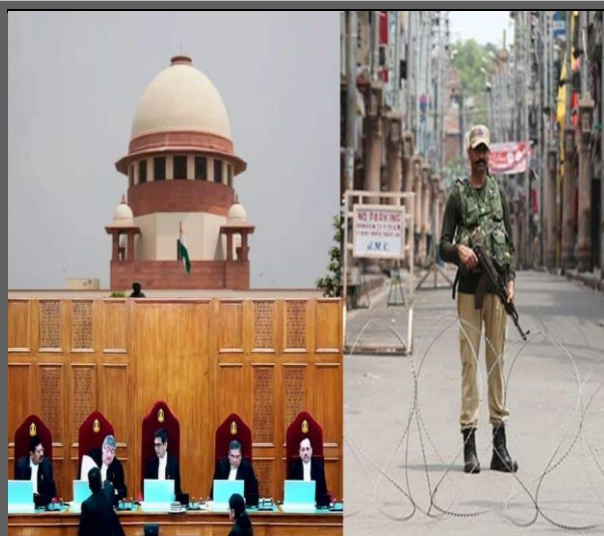
INDIAN SUPREME COURT UPHOLDS REVOCATION OF ARTICLES 370 AND 35A

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



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Introduction

On December 11, 2023, the Indian Supreme Court announced its verdict on petitions challenging Indian government's measures of August 5, 2019, wherein it had revoked Articles 370 and 35A of the Indian Constitution that guaranteed special status for Indian Illegally Occupied Jammu and Kashmir (IIOJK) and defined "permanent residents" of the state and their special privileges. The Court, headed by Chief Justice DY Chandrachud, announced that IIOJK had no internal sovereignty after its so-called 'accession' to India. The verdict further read that the President's orders of 5 August, 2019, were not a mala-fide exercise of power. It ordered the Union government to restore statehood of IIOJK and hold Legislative Assembly elections by September 2024. While acknowledging human rights violations taking place in IIOJK, Justice Kaul recommended formation of Truth and Reconciliation Commission.¹

¹ 'Explained: Key Aspects of Supreme Court's Article 370 Verdict', The Indian Express (blog), 12 December 2023, <https://indianexpress.com/article/explained/key-aspects-of-article-370-verdict-unpacked-9064079/>.

Response by the Political Forces of IIOJK

Being fully aware of how unpopular the verdict would be, the Indian government placed the entire Kashmiri political leadership under house arrest, whereas houses of Hurriyat leaders and activists were raided.² Soon after the verdict was announced, former Chief Minister and leader of National Conference (NC) Omar Abdullah took to X (Twitter) and quoted Faiz Ahmad Faiz couplet “*Dil na umeed tou nahi, Na kaam hi tou hai, Lambi hai gham ki shaam, Magar shaam hi tou hai*” (my heart is helpless, but doesn’t mean it is hopeless, the evening of sorrow is long, but it is just an evening), to express how despite being disappointed he is not disheartened and is ready for a long struggle.³

The People’s Democratic Party (PDP) President, Mehbooba Mufti, equated the verdict with the death sentence not only for the people of IIOJK but also for the ‘idea of India’ to which according to her, the State of Jammu and Kashmir had (allegedly) acceded. She went on to advise the Kashmiri people not to lose hope.⁴ She further added that the verdict had proved the argument that (alleged) accession of IIOJK to India was temporary. The Party also decided to suspend its political activities for one week “in order to stand in solidarity with the people of Jammu & Kashmir in the wake on the Supreme Court of India’s judgment of the issue of Article 370.”⁵

In its latest monthly *Newsletter* titled “From Citizens to Slaves,” the PDP while raising the question “What is the difference between an occupation and a government?”, asks the incumbent government, particularly Union Home Minister Amit Shah that instead of eyeing Azad Jammu and Kashmir (AJK), he should ask himself what he has done for IIOJK. The Newsletter goes on to discuss Indian designs of extracting lithium mines which is feared to damage ecology and economy of IIOJK. It will not only contaminate fresh water sources but will also damage fertile lands. And after all this, the monetary benefits would go to outsiders. Hence, while a government empowers the citizens, the occupation on the other hand disempowers, dispossesses and exploits its citizens.⁶

² ‘Mehbooba Mufti, Omar Abdullah Placed under House Arrest Hours before Article 370 Verdict’, Kashmir Media Service, 11 December 2023, <https://www.kmsnews.org/kms/2023/12/11/mehbooba-mufti-omar-abdullah-placed-under-house-arrest-hours-before-article-370-verdict.html>.

³ “‘Lambi Hai Gham Ki Shaam...’: How Kashmir Leaders Reacted to Article 370 Verdict’, Mint, 11 December 2023, sec. Politics, <https://www.livemint.com/politics/news/jammu-and-kashmir-article-370-abrogation-supreme-court-omar-abdullah-ghulam-nabi-azad-mehbooba-mufti-narendra-modi-11702285528993.html>.

⁴ Sanhati Banerjee, ‘Article 370: A Death Sentence, Defeat of the Idea of India - Mehbooba Mufti on Verdict’, The Economic Times, 11 December 2023, <https://economictimes.indiatimes.com/news/politics-and-nation/article-370-a-death-sentence-defeat-of-the-idea-of-india-mehbooba-mufti-on-verdict/articleshow/105901204.cms>.

⁵ ‘PDP Suspends Political Activities for One Week in Srinagar’, The Indian Express, 11 December 2023, <https://indianexpress.com/article/india/pdp-political-activities-srinagar-9063615/>.

⁶ Mehbooba Mufti, “‘What Is the Difference between an Occupation and a Government?’, Tweet, Twitter, 14 December 2023, <https://twitter.com/MehboobaMufti/status/1735180387955929357>.

Interestingly, in his article published in *'The Hindu'*, a Srinagar-based journalist observed that the Supreme Court verdict has inflicted a serious blow to the political parties that were traditionally loyal to India. Both the PDP and NC are facing existential threat for the first time since their inception in 1998 and 1931, respectively. Both these parties have lost ground to the Hurriyat and both parties have been avoiding social media or addressing public rallies. The dent this decision has inflicted can also be gauged from the fact that even Gupkar Alliance, which had previously spoken in one voice, is silent this time around.⁷

Dr. Radha Kumar, one of the three interlocutors for IIOJK appointed in October 2010, by the Cabinet Committee on Security, too came forward and expressed her shock over the verdict. She said that the silence of the Kashmiri people should not be mistaken. People are silent only because of fear of reprisals by Indian security forces and "My greatest fear is what will happen when that fear goes away and people are not fearful anymore." She highlighted the fact that more than 5,000 people that included children as well as entire Kashmiri leadership were arrested by Indian security forces prior to August 5, 2019, which showed 'mala-fide' intent of the Indian government. This fact was completely overlooked by the Indian Supreme Court. She also termed the current state of affairs as the ugliest situation in IIOJK in the last seven decades. For Dr. Radha Kumar, the solution to the Kashmir issue lay in a renewed peace process where India restores statehood and allows Kashmiri people to express their long suppressed anger. India must deal with this anger with compassion and understanding without resorting to firing bullets or arresting and putting people behind bars. She further suggested negotiations with those who have taken up arms, demilitarising the region, and making the Line of Control (LoC) a 'soft border' with greater autonomy for both IIOJK as well as AJK that may allow common economic development for the both sides of Jammu & Kashmir.⁸

Response by the Opposition Political Parties of India

Apart from political parties in IIOJK, Jamaat-e-Islami Hind (JIH) president Syed Sadatullah Hussaini said that the party does not agree with the verdict of the Supreme Court which did not take into

⁷ Peerzada Ashiq, 'Article 370 Verdict - A Changed Political Landscape in J&K', *The Hindu*, 19 December 2023, sec. Comment, <https://www.thehindu.com/opinion/op-ed/a-changed-political-landscape-in-jk/article67655552.ece>.

⁸ Radha Kumar, 'The Deep Import of the Article 370 Verdict', *The Hindu*, 19 December 2023, sec. Lead, <https://www.thehindu.com/opinion/lead/the-deep-import-of-the-article-370-verdict/article67655254.ece>.

consideration the way this decision was originally taken in August of 2019. It was abrogated without consulting the people of the state, state assembly or even the Parliament.⁹

The Indian National Congress too came forward to express its dismay over the verdict saying that the law accorded to IIOJK “deserved to be honoured” until its revocation could be done strictly in accordance with the Indian Constitution. Senior party leader P. Chidambaram expressed his disappointment that the Indian Supreme Court did not “decide the question of dismembering the state and reducing its status to two union territories; that question is being reserved for adjudication in a suitable case in the future.”¹⁰ Indian National Congress President Mallikarjun Kharge after meeting with the party leaders from IIOJK criticised Prime Minister Modi. He expressed his views on X and said that the “Modi Government has left no stone unturned in betraying the people of Jammu and Kashmir.”¹¹

Pakistan’s Stance

For Pakistan, neither the Indian illegal and unilateral actions of August 5, 2019, were acceptable nor the verdict by the Indian Supreme Court have come as a surprise. Pakistan categorically rejected the judgement and highlighted the fact that Jammu and Kashmir is an internationally recognized dispute which is still pending with the United Nations Security Council (UNSC) for its final resolution as per the aspirations of the people of Jammu and Kashmir. Restoration of statehood, conduct of State Assembly elections or similar steps cannot serve as a substitute to the grant of the right to self-determination to the Kashmiri people. India cannot avoid its international obligations on the pretext of domestic legislations and judicial verdicts.¹²

Pakistan pointed to the fact that the Court’s judgement cannot distract the international community’s attention from the gross and systematic human rights violations being perpetrated in IIOJK. Pakistan also showed serious concern that India’s unilateral actions were particularly aimed at bringing demographic change in IIOJK, which is in clear violation of International Law and also

⁹ Ziya Us Salam, ‘Jamaat Disappointed with Article 370 Verdict’, The Hindu, 12 December 2023, sec. India, <https://www.thehindu.com/news/national/jamaat-disappointed-with-article-370-verdict/article67631840.ece>.

¹⁰ “Disagree”: Congress Differs with SC, Says Article 370 “Deserved to Be Honoured”, Hindustan Times, 11 December 2023, <https://www.hindustantimes.com/india-news/disagree-congress-differs-with-sc-says-article-370-deserved-to-be-honoured-101702299566601.html>.

¹¹ ‘Central Govt Has Left No Stone Unturned in “Betraying” People of J-K: Congress President’, ANI News, 26 December 2023, sec. National, <https://www.aninews.in/news/national/politics/central-govt-has-left-no-stone-untuned-in-betraying-people-of-j-k-congress-president20231226190323/>.

¹² ‘Pakistan Rejects the Indian Supreme Court’s Verdict on Indian Illegally Occupied Jammu and Kashmir’ (Ministry of Foreign Affairs, Pakistan, 11 December 2023), <https://mofa.gov.pk/pakistan-rejects-the-indian-supreme-courts-verdict-on-indian-illegally-occupied-jammu-and-kashmir/>.

bilateral agreements. Pakistan also reiterated its unflinching support to the people of Jammu and Kashmir in their quest for their right to self-determination.¹³

Similar views were expressed by the caretaker Prime Minister of Pakistan Anwar-ul-Haq Kakar. Addressing the media during his visit to the Azad Jammu and Kashmir (AJK) to address special session of Azad Jammu and Kashmir Legislative Assembly, the Prime Minister said “Kashmir was never a part of India and will never be” and therefore, Indian courts cannot decide the future of Kashmir. He added that for Pakistan, the residents of IIOJK are potential citizens of Pakistan and therefore, Pakistan will not allow the trampling of their rights.¹⁴ The President of Pakistan, Dr. Arif Alvi too in his statement said that Indian judiciary had succumbed to the fascist Hindutva ideology by giving decisions that are suited to the Indian government. Such decisions cannot legitimize the occupation of Jammu and Kashmir by India as it is an internationally recognized dispute. He said that the judgement would further strengthen the resolve of the people of the IIOJK in their struggle against Indian illegal occupation and urged the international community to play its due role and make India fulfil the pledges made by her to the Kashmiri people in the past. ¹⁵

The gravity of situation compelled Pakistan to draw the attention of international community to the unfolding crisis in IIOJK. Addressing letters to the leaders of United Nations, Organization of Islamic Cooperation (OIC) and European Union (EU), Pakistan’s Foreign Minister Jalil Abbas Jilani while highlighting the illegality of the verdict by the Supreme Court of India on the status of IIOJK wrote that under international law, domestic legislation and judicial verdicts cannot be invoked to determine the status of internationally recognised disputed territory. While emphasising the actual Indian design of demographic change, the Foreign Minister termed the Indian Supreme Court verdict as a breach of international law and relevant United Nations Security Council (UNSC) resolutions. He also called UNSC to implement its resolutions and prevent India from human rights violations of Kashmiri people. He also urged these organisations to play their due role in ensuring that India reverse all its illegal and unilateral actions undertaken since August 5, 2019.¹⁶ He emphasized that having no faith in Indian government, its democracy, secularism and even judiciary, the people of IIOJK look towards the world community for redressal of their grievances. It is now up to the

¹³ ‘Pakistan Rejects the Indian Supreme Court’s Verdict on Indian Illegally Occupied Jammu and Kashmir’.

¹⁴ ‘Pakistan Doesn’t Care Two Hoots about Indian SC Kashmir Verdict, Says PM’, Geo.Tv, 15 December 2023, <https://www.geo.tv/latest/523118-pakistan-doesnt-care-two-hoots-about-indian-sc-kashmir-verdict-says-pm>.

¹⁵ ‘President Strongly Rejects Indian SC Verdict’, Kashmir Media Service, 11 December 2023, <https://www.kmsnews.org/kms/2023/12/11/president-strongly-rejects-indian-sc-verdict.html>.

¹⁶ ‘Foreign Minister Writes to Leaders of International Organizations Inviting Their Attention to the Illegality of Indian Supreme Court’s Judgement on the Status of IIOJK’ (Ministry of Foreign Affairs, Pakistan, 16 December 2023), <https://mofa.gov.pk/foreign-minister-writes-to-leaders-of-international-organizations-inviting-their-attention-to-the-illegality-of-indian-supreme-courts-judgement-on-the-status-of-iiojk/>.

international community to uphold the values of humanity, justice and rule-based system to ensure peace and security for everyone in the world.

In its initial reaction to the verdict, China reiterated its position of the dispute to solve peacefully according the relevant UN resolutions.¹⁷ Later, Chinese Foreign Ministry spokesperson also clarified that “China has never recognised the so-called Union Territory of Ladakh set up unilaterally and illegally by India. India’s domestic judicial verdict does not change the fact that the western section of the China-India border has always belonged to China.”¹⁸

In its statement, the Organisation of Islamic Cooperation (OIC) General Secretariat called for reversal of all illegal and unilateral measures that have been taken since August 5, 2019 by India. The Organisation also expressed its solidarity with the people of IIOJK in their struggle for their right of self-determination.¹⁹

Implications

This verdict by the Indian Supreme Court, on the one hand, clearly indicates that for the government of India, the people of IIOJK, their aspirations or even their opinion do not matter at all. In fact, as per the Indian legal and Constitutional experts the verdict has weakened Indian federalism which is a basic feature of Indian constitution. They lamented that the verdict clearly indicates that the Union government can remove statehood status of any state and turn it into a Union territory at will. As such, the verdict is seen by many in India as an attack on India’s Constitution, federalism and secularism. Indeed, the many flaws in the verdict that have been highlighted by the legal and Constitutional experts has encouraged the petitioners to mull over filing a review petition in the Supreme Court. Communist Party of India (M) leader and Gupkar Alliance spokesperson MY Tarigami stated “Many others are serious on this question because as citizens we think justice has not been delivered to us. We have to explore all options and review petition is one of them.”²⁰ Similarly, The Awami National Conference (ANC) Vice President Muzaffar Shah was quoted as

¹⁷ ‘In China’s First Reaction to SC Verdict on Article 370, Focus on Dialogue’, Hindustan Times, 12 December 2023, <https://www.hindustantimes.com/india-news/in-china-s-first-reaction-to-sc-verdict-on-article-370-focus-on-dialogue-101702386599162.html>.

¹⁸ ‘Article 370 | Supreme Court’s Order Won’t Affect Our Position on Ladakh, Says China’, The Hindu, 13 December 2023, sec. India, <https://www.thehindu.com/news/national/article-370-supreme-courts-order-wont-affect-our-position-on-ladakh-says-china/article67635491.ece>.

¹⁹ ‘OIC General Secretariat Expresses Concern over the Indian Supreme Court’s Judgment Upholding the Unilateral Actions Taken by the Indian Government That Stripped the Special Status of the Territory of Jammu and Kashmir’ (Organisation of Islamic Cooperation, 12 December 2023), https://www.oic-oci.org/topic/ampg.asp?t_id=40069&ref=26810&lan=en.

²⁰ ‘Oppn Parties in J&K to File Review Plea against SC Verdict on Art 370: Tarigami’, Hindustan Times, 28 December 2023, <https://www.hindustantimes.com/cities/chandigarh-news/oppn-parties-in-j-k-to-file-review-plea-against-sc-verdict-on-art-370-tarigami-101703756902950.html>.

saying "Legal and constitutional experts say the Supreme Court judgment was full of flaws. It remained silent on many basic issues. A review petition is being prepared and once it is ready, we will put it before our legal teams and the 23 petitioners. Most likely, we will file the petition in the apex court."²¹

The verdict will have long term implication for the people of IIOJK, including especially in terms of changing the demographic structure of the occupied territory. This verdict means that India will continue to implement on its strategy of turning the Muslim majority into a minority without any legal or political hindrance. It will continue to encourage non-Kashmiri Indians to permanently settle in IIOJK. This verdict also means that mining and trade rights will continue to be awarded to Indian companies instead of local companies. The verdict has also means that massive human rights violations will continue unabated and any form of freedom of expression would be stifled with the help of draconian laws introduced by the Indian government in the past such as Jammu & Kashmir Public Safety Act 1978, The Armed Forces (Jammu & Kashmir) Special Powers Act 1990, Prevention Of Terrorism Act (Pota) 2002, Unlawful Activities (Prevention) Amendment Ordinance 2004, etc.

As far as the India-Pakistan relations are concerned, this verdict will cast a negative effect on any effort of normalization of relations between the two countries. This will result in the Kashmir remaining as a constant flashpoint in a nuclearized South Asia and thus keep the region unstable. Apart from security, Indian measures of August 5, 2019, and subsequent Supreme Court verdict have also held bilateral trade as hostage. In fact, the Line of Control (LoC) trade was suspended by India months before it formally announced to revoke Articles 370 and 35A. It was because of acrimonious nature of relations between India and Pakistan that SAARC was rendered dysfunctional and any hopes of revival of SAARC continue to be undermined by their strained relations owing to India's relentless onslaught on religious and cultural identity of the Kashmiri people.

Conclusion

It is unfortunate that instead of moving towards the resolution of Jammu & Kashmir dispute according to the wishes of the Kashmiri people, the Indian measures of August 5, 2019, and with subsequent Indian Supreme Court's verdict in its favour, India has further complicated the situation. India feels that by taking such measures, it will break the resolve of the Kashmiri people. Whereas, in reality, Indian measures of August 5, 2019, were self-inflicting as it has snatched whatever little credibility pro-Indian political parties like PDP and NC had in the eyes of ordinary Kashmiri people. It

²¹ 'Article 370 - Awami National Conference Mulling Filing Review Petition before Supreme Court', The Hindu, 28 December 2023, sec. India, <https://www.thehindu.com/news/national/article-370-awami-national-conference-mulling-filing-review-petition-before-supreme-court/article67683260.ece>.

has also further strengthened the saner voices in India who have been, and are still, highlighting Prime Minister Modi's faulty policies.

Pakistan, on its part, has repeatedly made it clear that it will continue to extend all possible support to its Kashmiri brethren for the realization of their legitimate right to self-determination. The people of IIOJK have waged their valiant struggle for the past more than 75 years and they will continue to do so till the time they liberate their land from illegal Indian occupation. In this struggle for freedom, tens of thousands of Kashmiris have lost their lives, thousands have been wounded, tortured, widowed and orphaned. It is time that this human tragedy comes to an end and people of occupied Jammu & Kashmir are granted their inalienable right to self-determination, as enshrined UN charter and relevant UN Security Council resolutions. Otherwise, the idea of a prosperous and peaceful South Asia will only remain a distant dream.