

CONSTITUTIONAL COUP IN INDIAN OCCUPIED JAMMU AND KASHMIR



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INTRODUCTION

India had landed her forces in Kashmir on 27th October 1947 and occupied a major portion of the state against the will and wishes of the people of Kashmir and in blatant violation of the partition plan. India claimed that the ruler of Kashmir Maharaja Hari Singh had signed an instrument of accession on 26th October 1947. Article 07 of Instrument of Accession states,

“Nothing in this Instrument should be deemed to be a commitment in any way as to acceptance of any future Constitution of India, or to fetter my discretion to enter into arrangements with the government of India under any such future constitution.”

This instrument of accession was incorporated in the Indian Constitution as article 370 and 35A.

ARTICLE 370

Article 370 of the Indian constitution provides,

370. Temporary provisions with respect to the State of Jammu and Kashmir

(1) Notwithstanding anything in this Constitution,

(a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify
Explanation For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and

Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharajas Proclamation dated the fifth day of March, 1948 ;

(c) the provisions of Article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (b) shall be issued except in consultation with the Government of the State: Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub clause (b) of clause (1) or in the second proviso to sub clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify: Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification

Article 370(3) of the Constitution empowers the President to abrogate Article 370 on the recommendation of the Constituent Assembly of Jammu and Kashmir. This article allows J&K to have a separate flag and a Constitution.

ARTICLE 35-A

Article 35-A was added in the constitution through a Presidential Order “ The Constitution (Application to Jammu and Kashmir) Order, 1954”. Which provides,

“35-A. Saving of laws with respect to permanent residents and their rights.—
Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the legislature of the State,—

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—

(i) employment under the State Government;

(ii) acquisition of immovable property in the State;

(iii) settlement in the State; or

(iv) right to scholarships and such other forms of aid as the State Government may provide, shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part.”

This article allows Jammu and Kashmir to define the permanent residents which were later on defined in article 06 of the Constitution of Jammu and Kashmir, 1957.

ARTICLE 06 OF THE CONSTITUTION OF J&K, 1957

“6. Permanent residents.—(1) *Every person who is, or is deemed to be a citizen of India under the provisions of the Constitution of India shall be permanent resident of the State, if on the fourteenth day of May, 1954—*

(a) he was a State subject of Class I or Class II; or

(b) having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to that date;

(2) Any person who before the fourteenth day of May, 1954 was a State subject of Class I or of Class II and who having migrated after the first day of March, 1947 to the territory now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

(3) In this section, the expression 'State subject of Class I or of Class II' shall have the same meaning as in State Notification No. 1-L/84 dated twentieth April 1927, read with State Notification No. 13/L dated twenty seventh June 1932.

This article was the extension or reproduction of State Subject Notification No. 1-L/84 dated 20th April 1927 and notification No. 13/L dated 27th June 1932.

It will be expedient to notice that the first statutory measure to define hereditary State subject was taken by the order of Maharaja Hari Singh vide Circular No. PS-2354 dated January 31, 1927, and the definition of the expression "hereditary State subject" as contained in the second part of the aforesaid circular order dated January 31, 1927, was as under:

HEREDITARY STATE SUBJECT

“For the purpose of this order, the term ‘hereditary State subject’ will be held to mean and include all persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur and also persons who settled therein before the commencement of samvat 1942 and have since been permanently residing therein.”

The State subjects were by these orders divided into three classes. State subject of Class I being the same as the hereditary State subject defined in the earlier circular order and those of Class II being the persons who settled within the State before the close of samvat year 1968 and have since permanently resided and acquired immovable property in the State.

Notification dated 20-4-1927 was followed by Notification No. 13-L dated 27-6-1932 with a view to determine the status of J&K State subjects in foreign

State as to the position of their nationals in the State of Jammu and Kashmir. For ready reference both these notifications of Maharaja Hari Singh are reproduced here:

STATE SUBJECT DEFINITION

Notification dated 20th April, 1927 No. 1-L/84.—The following definition of the term “State subject” *has been sanctioned by His Highness the Maharaja Bahadur* (vide Private Secretary’s Letter No. 2354 dated 31st January, 1927 to the Revenue Member of the Council) and is hereby promulgated for general information.

The term “State subject” means and includes—

Class I.—All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur, and also person who settled therein before the commencement of samvat year 1942 and have since been permanently residing therein.

Class II.—All persons other than those belonging to Class I who settled within the State before the close of samvat year 1968 and have since permanently resided and acquired immovable property therein.

Class III.—All persons other than those belonging to Class I and Class II permanently residing within the State, who have acquired under “*rayatnama*” any immovable property therein or who may hereafter acquire such property under an “*ijazatnama*” and may execute “*rayatnama*” after ten years’ continuous residence therein.

Class IV.—Companies which have been registered as such within the State and which being companies in which the Government are financially interested or as to economic benefit to the State or to the financial stability of which the Government are satisfied, have by a special order of His Highness been declared to be State subjects.

Note I.—In matters of grant of State scholarship, State lands, for agricultural and house building purposes and recruitment to State service, State subject of

Class I should receive preference over other classes and those of Class II, over Class III, subject, however, to the order dated 31st January 1927 of His Highness the Maharaja Bahadur regarding employment of hereditary State subjects in government service.

Note II.—The descendants of the persons who have secured the status of any class of the State subject will be entitled to become the State subjects of the same class. For example, if A is declared a State subject of Class II, his sons and grandsons will ipso facto acquire the status of the same Class II and not of Class I.

Note III.—The wife or a widow of the State subject of any class shall acquire the status of the husband as State subject of the same class as her Husband, so long as she resides in the State and does not leave the State for permanent residence outside the State.

Note IV.—For the purpose of the interpretation of the term “State subject” either with reference to any law for the time being in force or otherwise, the definition given in this notification as amended up to date shall be read as if such amended definition existed in this notification as originally issued.

NOTIFICATION DATED 27TH JUNE, 1932

(Issued by order of His Highness the Maharaja Bahadur dated Srinagar, the 27th June 1932, 14th March 1939, published in the Government Gazette dated 24th March 1989.)

No. 13-L/1989 — Whereas it is necessary to determine the status of J&K State subjects in foreign State as to the position of their nationals in the State, it is hereby commanded and notified for the public information as follows:

1. That all emigrants from J&K State to foreign territories shall be considered State subjects and also the descendants of these emigrants born abroad for two generations:

Provided that, these nationals of Jammu and Kashmir State shall not be entitled to claim the internal rights granted to subjects of this State by laws

unless they fulfill the conditions laid down by those laws and rules for the specific purposes mentioned therein.

2. The foreign nationals residing in the State of Jammu and Kashmir shall not acquire the nationality of Jammu and Kashmir State until after the age of 18 on purchasing immovable property under permission of an ‘*ijazatnama*’ after ten years’ continuous residence in J&K State as laid down in Notification No. 1-L of 1984 dated 20th April 1927.

3. Certificates of nationality of J&K State may, on application, be granted by Minister-in-charge of the Political Department in accordance with the provisions of Section 1 of this notification.”

CONSTITUTIONAL SCRAP

On August 5, 2019, the president of India issued the Constitution (Application to Jammu and Kashmir) Order, 2019, C.O. 272, which provides

11. the provisions of the Constitution, as amended from time to time, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows: To article 367, there shall be added the following clause, namely: "(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir

(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;

(b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;

(c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers; and

(d) in proviso to clause (3) of Article 370 of this Constitution, the expression "Constituent Assembly of the State referred to in clause (2) shall read Legislative Assembly of the State".

on August 6, the president implemented the resolution and revoked Jammu and Kashmir's special status through Presidential Order C.O. 273, which stated that, as of August 6, 2019, *"all clauses of the said article 370 shall cease to be operative," and that "[a]ll provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir."*

On 6th August 2019 Indian Parliament had passed the Jammu and Kashmir Reorganization Bill, 2019. Article 370 was amended as,

370. All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise.

EFFECTS OF THIS CONSTITUTIONAL COUP

Through this act, India had divided Kashmir into two union territories Jammu and Kashmir and Ladakh. Jammu and Kashmir will have legislative assembly but Ladakh will be without legislature. The status of the state has been reduced to two municipalities. The identity of the state has been snatched and by the revocation of Article 35A the permanent residence law which was enforced from 1927 had been abrogated to change the demography of Kashmir.

VIOLATION OF INDIAN CONSTITUTION

The constitution assembly of IOJK was dissolved in 1957, in June 2018 the legislative assembly was dissolved, and Governor's rule was imposed and in December 2018 the Presidential rule was imposed in IOJK. According to Article 370, the consent and approval from the Govt. of IOJK was required but at that time there was President's rule and the nominee of the president was sitting as governor which does not represent the will of the people. This Act was violative of Article 3, which provides the procedure for a change in the areas of the state. Article 3 says *that before parliament can consider a Bill that diminishes the area of a state or changes its name, the Bill must be "referred by the president to the legislature of that state for expressing its views thereon"*. The Indian parliament is not empowered to bifurcate the state and for this purpose consultation and approval of the state legislature is necessary. This amendment was approved in haste violating the parliamentary procedure of legislation.

POST CONSTITUTIONAL SCRAP STEPS BY INDIAN GOVT.

The prime objective of this unconstitutional move is to change the demography of Kashmir. The ruling BJP is the political wing of terrorist Hindu militant organization Rashtriya Swayam Sevak Sangh (RSS) is working under Hindutva ideology. The steps were taken by Indian Govt. in the last one year proves that they are trying to convert Muslim majority state Kashmir into a Hindu majority state through demographic engineering. In May 2020 the Indian Govt. issued the Jammu and Kashmir Grant of Domicile Certificate (Procedure) Rules 2020 to give permanent Kashmiri citizenship status to non-Kashmiris. These rules state that the Indian citizens who have resided for 15 years or who have studied for 7 years in J&K, children whose parents have served the Indian government in J&K for 10 years, refugees from West Pakistan in J&K, members of the Valmiki community, and women residents who married a non-resident of J&K are eligible for domicile. To date more than 25000 domiciles

have been issued to Indians. The new rules provide a very easy and expedited process for the acquisition of domicile for non- Kashmiris and very lengthy and difficult processes for the permanent residents of Kashmir. For the non-Kashmiris a district officer issues a domicile certificate within a strict 15-day time limit. Officers that fail to comply with this timeline face a fine of 50,000 IRP. This process can also be completed online. On the other hand, existing permanent resident certificates (PRC) of indigenous Kashmiris exist only as evidentiary proof of their residence and must be submitted to their district office to obtain a new domicile certificate.

On July 17, 2020, the administrative council of IOJK had approved an amendment to the Control of Building Operations Act, 1988 and the J&K Development Act, 1970 to allow notifying any areas in the territory as “strategic areas”. This means that the land on which existing camps/ cantonments of the Indian armed forces located in various areas or where new camps/ cantonments they think is important would be acquired. This construction will be permanent and having residential blocks for families of occupational forces.

On 25th July 2020, the administrative council of IOJK has approved the creation of 37 new industrial areas and transfer of 9,654 kanals of land to the commerce department.

VIOLATION OF INTERNATIONAL LAW AND AGREEMENTS

These Indian actions are blatant violations of UNSC Res. No 91(1951) and 122(1957), which clearly states that the future status of state shall be determined through the plebiscite as it was agreed in many UNSC resolutions. Resolution No 91 states,

....that the final disposition of the State of Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations.

Affirming that the convening of a Constituent Assembly as recommended by the General Council of the "All Jammu and Kashmir National Conference" and any action that Assembly might attempt to take to determine the future shape and affiliation of the entire State or any part thereof would not constitute a disposition of the State in accordance with the above principle.....

Resolution No 122 states,

.....any action that Assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the Assembly, would not constitute a disposition of the State in accordance with the above principle; Decides to continue its consideration of the dispute.

The shifting of non-Kashmiris in IOJK is also a violation of article 49 of 4th Geneva Convention of 1949, which provides, *"The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."* This action is also a violation of Article 85(4)(a) of 1st Additional Protocol of Geneva Convention which states, *"the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies"* is a grave breach of the Protocol. According to article 8(2)(b)(viii) of ICC statute India is committing war crimes.

"[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies" constitutes a war crime in international armed conflicts.

The unilateral change of the status of Jammu and Kashmir is also a violation of the Simla agreement. According to A.G. Noorani, *After Art 370 scrapping, the Shimla pact is virtually 'dead'*. Pakistan has legal right to terminate this treaty. Article 60 of the Vienna Convention on the Law of Treaties, 1969 (VCLT) provides that the *"material breach of a bilateral treaty by either party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part"*.

GROSS HUMAN RIGHTS VIOLATIONS POST 5TH AUGUST 2019

Kashmir is an internationally recognized disputed area and conflict is an international armed conflict. The constitutional coup on 5th August 2019 is not only a piece of legislation that was introduced and implemented but it had increased the sufferings of the people of IOJK. Before introducing this bill in the Indian parliament on 4th August 2019 all telephone networks and internet services were shut down. There were almost 800,000 Indian forces stationed in IOJK, besides these forces, additional forces were deployed. Political leadership and activists were put behind the bars or under house arrest. From 5th August curfew was imposed, communication was blocked and businesses were forcefully closed by forces. From the last one year, IOJK is under strict lockdown and after COVID-19 the people are facing double lockdown. The people of IOJK are not only facing the torture, arrests, killings and humiliation in Kashmir but they are facing all these brutal acts in India by BJP, RSS and Indian forces. On 5th August 2019 estimated 8.8 million mobiles were blocked and over 6,600 people including 144 children were arrested. Pro-freedom leadership including Muhammad Yasin Malik, Shabbir Ahmad Shah, Masarrat Aalam Butt, Syeda Aasiya Andrabi, Nahida Nasreen, Fahmida Sofi, Mian Abdul Qayoom, Nayeem Ahmad Khan, Mohammad Aiyaz Akbar, Altaf Ahmad Shah, Peer Saifullah, Mehrajudin Kalwal, Farooq Ahmad Dar, Dr Abdul Hameed Fayaz, Maulana Mushtaq Veeri, Abdul Samad Inqilabi, Abdul Ahad Parra, Muhammad Yosuf Mir, Muhammad Rafiq Gania, Feroz Ahmad Khan, Dr Qasim Fakhtoo, Muhammad Ahsan Untoo, Zahoor Watali, Syed Shahid Yousuf Shah, Syed Shakeel Yousuf Shah, Maulana Sarjan Barkati, Bashir Ahmad Querishi, Hayat Ahmad and Asif Sultan were arrested. Syed Ali Gillani and Mirwaiz Umer Farooq are under house arrest. Even the pro-Indian political leadership and former chief ministers were put behind bars. The Kashmiri prisoners were shifted in different jails of India. In January 2020 internet service was restored but was limited to 2G. During the last one year, the Kashmiri

industry suffered a loss of 5.3 billion US dollars. The fruit industry suffered a lot, 1.35 lakh metric tons of fruits spoiled due to restrictions on transport. Almost 1.5 people earning through transport are jobless. Almost a half million people had lost their jobs. The educational institutions are closed and 1.5 million students are without education. According to a report published by KMS, the Indian troops had martyred 192 Kashmiris including 4 women during last 11 months, at least 1326 people were critically injured due to the use of brute force including the firing of bullets, pellets and teargas shells by the Indian military, paramilitary and police personnel on peaceful demonstrators and mourners in the territory. The report revealed that these killings rendered 9 women widowed and 22 children orphaned. The troops damaged over 935 houses and structures and molested or disgraced 77 women during the cordon and search operations across the occupied territory in the period. Indian forces are continuously targeting civilian population on the ceasefire line areas of Azad Kashmir. In the last 6 months, 13 civilians (6male and 7 female) were martyred, 125 injured and 228 houses were damaged by unprovoked shelling of Indian forces. According to reports of JKCCS during this period at least 302 Cordon and Search Operations (CASOs) and Cordon and Destroy Operations (CADO's) were conducted. The Indian forces are using COVID lockdown to suppress the people of Kashmir. FIRs against 2303 people defying the lockdown rules were registered in one month, of these, 1691 were arrested in Kashmir. Apart from arresting people, 1295 shops and vehicles were also seized for defying lockdown. 396 police officers and personnel were awarded commendation certificates and monetary rewards for their handling of COVID-19. No such rewards have been given to any doctors or paramedical staff. After the lockdown due outbreak of COVID-19 was announced, the medical staff in IOJK increasingly came under attack of the Indian army while visiting localities for conducting tests.

India is using different tactics to suppress the struggle of people of IOJK for the right to self-determination. This constitutional coup is the replication of Israel's model and it is a blatant violation of international human rights and humanitarian law. The new domicile law could permanently alter the demography of the disputed region and 17.4 lakh non- Kashmiris can certainly acquire domicile rights. The Indian government had decided to begin the delimitation (redrawing of boundaries) of electoral constituencies based on area and not population, which is likely to give Hindu-majority Jammu more seats, will reshape the local political dynamics. BJP is also proposing to fill 24 seats reserved for AJK, GB and Ladakh by fielding Hindu and Sikh refugees from AJK settled in Jammu.

Indian Govt. is using COVID-19 as an opportunity to fulfill its desires to change the demography of Kashmir, the decisions of enforcement of new domicile law, new construction policy and delimitation of constituencies were taken during COVID.

OPINIONS OF CONSTITUTIONAL EXPERTS ON THIS CONSTITUTIONAL COUP

Indian Constitution Expert AG Noorani

“Once the Constituent Assembly [of the State] met, the State government could not give its own ‘concurrence’; still less, after the Assembly met and dispersed. Moreover, the President cannot exercise his power to extend the Indian Constitution to Jammu and Kashmir indefinitely. The power has to stop at the point the State’s Constituent Assembly drafted the State’s Constitution and decided finally what additional subjects to confer on the Union, and what other provisions of the Constitution of India it should get extended to the State, rather than having their counterparts embodied in the State Constitution itself. Once the State’s Constituent Assembly had finalised the scheme and dispersed, the President’s extending powers ended completely.”

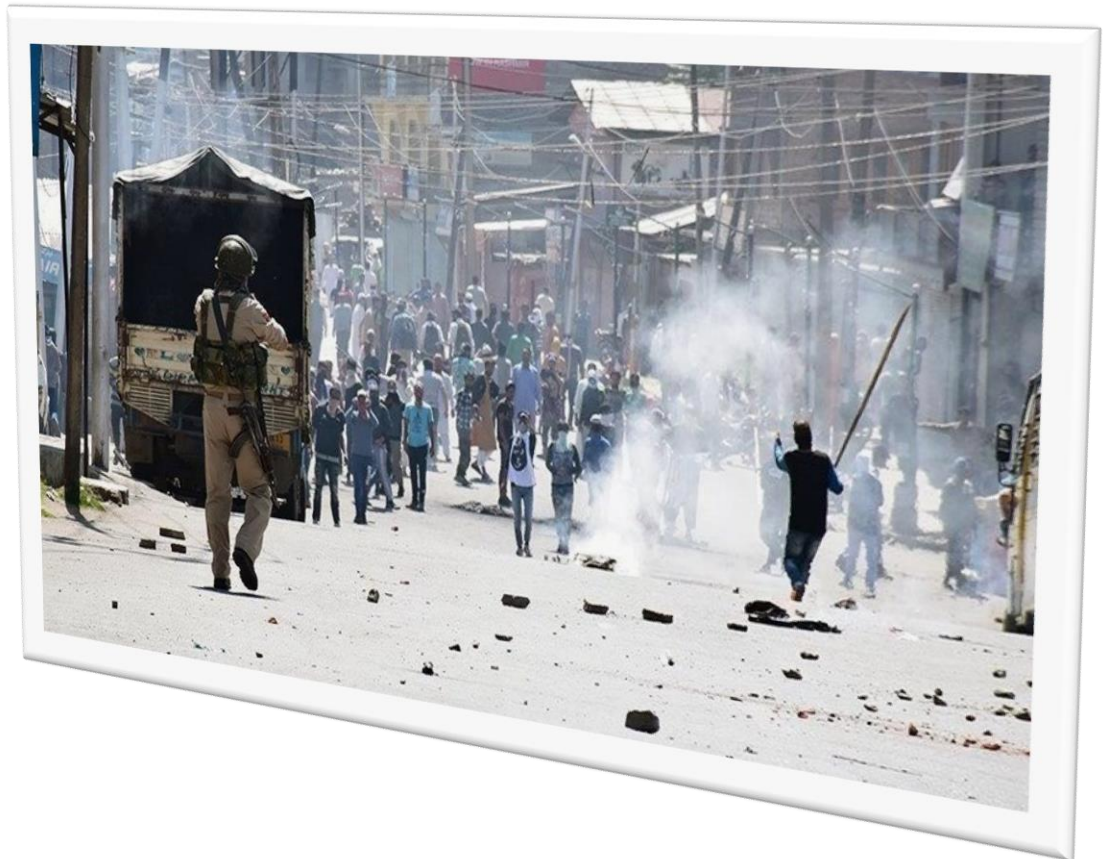
Justice Rohinton Nariman(India)

“Despite the fact that it is ... stated to be temporary in nature, sub- clause (3) of Article 370 makes it clear that this Article shall cease to be operative only from such date as the President may by public notification declare. And this cannot be done under the proviso to Article 370 (3) unless there is a recommendation of the Constituent Assembly of the State so to do.”

Human Rights activist Arundhati Roy, writing for the *New York Times* on August 15, 2019, describes the key historical stakes undergirding the current situation, “What happened in the Indian Parliament last week was tantamount to cremating the Instrument of Accession...In the 72 years since then, successive Indian governments have undermined terms of the Instrument of Accession until all that was left of it was the skeletal structure.”

CONCLUSION

The constitutional coup in IOJK is a clear violation of the Indian constitution, bilateral agreements, UN resolutions on Kashmir and international law. This article 370 was providing a linkage between India and Kashmir. After this constitutional scrap, the instrument of accession became invalid and repealed. Legally the state of Jammu and Kashmir is in the position of 25th October 1947 and India is constitutionally and militarily occupier. The Simla and other bilateral agreements were violated by India unilaterally and Pakistan has legal right to revoke all these agreements. Indian actions can change the constitutional position for India but for people of Kashmir, the erstwhile state of Jammu and Kashmir is a disputed area and its future could be determined through a fair, free and impartial plebiscite under UN auspices. India is changing the demography of IOJK and involved in crimes against humanity and war crimes.



.....Noting with satisfaction that both India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite, Considering that the continuation of the dispute is likely to endanger international peace and security, Reaffirms its resolution 38 (1948) of 17 January 1948.

(Resolution 47 (1948) on the India-Pakistan adopted by the Security Council at its 286th meeting held on 21 April, 1948, Document No. 5/726, dated the 21st April, 1948)