

SYMPOSIUM

Kashmir, Minority Rights and Indian Constitutionalism: Introduction to the Special Issue

By *Tanja Herklotz**

A. Introduction

“Jammu & Kashmir: You (still) can’t have enough of it” is a slogan in one of the tourist advertisements in India’s “Incredible India” campaign.¹ The video shows the beautiful landscapes of the mountainous region in the Himalayas and some of the rich cultural traditions of the Kashmiris. To many Kashmiris, however, it seems like it is the Indian government that still can’t have enough of Kashmir. The unique special status that the erstwhile state of Jammu and Kashmir (J&K) once enjoyed had been consistently eroded by the Indian government over the past decades. The final nail in the coffin of J&K’s autonomy was the decision by the BJP-led Indian government to abrogate the state’s special status completely via a constitutional amendment in August 2019. A move that the Supreme Court of India sanctioned in December 2023.

Kashmir has been in turmoil for decades. Not only has the region been at the epicentre of territorial struggles between India and Pakistan as well as India and China. J&K—until 2019, the only state with a majority Muslim population, while Muslims otherwise constitute a minority in the country²—also has long witnessed violent conflicts between the Indian security forces (which include the army and paramilitary forces) and an armed Kashmiri insurgency that seeks independence from the Indian nation-state. This violent struggle produces images that could not differ more from the beautiful pictures in the tourist advertisements. News and documentaries about the region show masked militants throwing stones at Indian security forces, armed soldiers patrolling the streets, and women holding up photographs of their disappeared husbands.

Yet, to most scholars of comparative constitutional law not located in Kashmir/India, these images are probably unknown. Kashmir is far away for many of us. So why, then, is it still worth looking at this region in the Himalayan mountains? The authors of this special issue tell us why. They engage with struggles for self-determination, authoritarian

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1 Jammu & Kashmir Tourism, Jammu, Kashmir & Ladakh - Incredible India Ad Campaign, <https://www.youtube.com/watch?v=1vjGd5hWdUE> (last accessed on 9 January 2024).

2 Population Census 2011, Hindu Muslim Population in India, <https://www.census2011.co.in/reli-gion.php> (last accessed on 10 January 2024).

constitutionalism, the suppression of religious minorities, the legacies of colonial rule, neo-colonial structures and (the lack of) constitutional faith—topics that are also highly relevant in many other places around the globe.

Since the political and legal relationship between the Indian state and the Kashmir region is complex, this introduction seeks to provide some background information and contextualisation to the articles assembled in this special issue. It focuses on the events of August 2019 and their aftermath.

B. 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 the 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, 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 (UN), 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.

C. 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)³ signed by Singh regulated that the power to legislate on all matters except defence, external affairs and communication would remain with Jammu and Kashmir. In 1950,

3 Instrument of Accession Jammu and Kashmir, https://cjp.org.in/wp-content/uploads/2019/08/instrument_of_accession_of_jammu_and_kashmir_state.pdf (last accessed on 4 January 2024).

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 making decisions concerning the relation between the state and the Indian nation, including about a potential abrogation of Article 370 itself.

J&K enjoyed a unique position within the Indian constitutional and legal framework compared to other states of the Indian Union. It was the only state that had its own constitution. Citizens from other states were restricted in purchasing land in Jammu and Kashmir and in holding government jobs. Scholars have, therefore, stated that J&K belonged to a *sui generis* legal category.⁴

Yet, over time, the special status conferred to the state in Article 370 had been hollowed out by passing various presidential orders under Article 370(3). Thus, J&K had practically lost much of its autonomy long before the abrogation of its unique status in 2019. In the words of Burhan Majid, one of the contributors to this special issue, Article 370 was effectively stripped into an “empty shell”.⁵ Still, Article 370 was regarded as having an important *symbolic* value to the Kashmiri identity. It was “a symbol of Kashmir’s uniqueness to the Indian scheme of things”.⁶

D. Insurgency, Counter-Insurgency, and Human Rights Violations

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 region’s independence and groups seeking its accession to Pakistan.

India reacted to this movement with a counterinsurgency, militarising the Kashmir region. 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

4 Jean-Philippe Dequen, A Journey to the Brink of India’s Legal Landscape: Jammu and Kashmir’s Relationship with the Indian Union, *South Asia Multidisciplinary Academic Journal* 17 (2018), p. 99.

5 Burhan Majid, From a Sovereign State to a Union Territory: A History of the Constitutional Erosion in Kashmir, *World Comparative Law* 56 (2023), in this issue.

6 Manoj Joshi, Kashmir and 370: Constitutional Coup Whose Aftereffects Will Linger a Long Time, *The Wire* (2019), <https://thewire.in/government/kashmir-article-370-constitutional-coup-aftereffects> (last accessed on 9 January 2024).

react by using violence that frequently leads to the blinding or killing of individuals. The funeral processions organised for the deceased “martyrs” often become sites for new violent protests.

On the pretext of law and order and the prevention of terrorism, the Indian state has regularly curbed the 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.⁷

Indian security forces are further engaged in the abduction and potential killing of Kashmiri citizens, so-called enforced disappearances. The Association of Parents of Disappeared Persons, Kashmir, counts over 8,000 cases of enforced disappearances.⁸ 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 Kashmir⁹—the disappeared are technically not considered dead. Women whose husbands have “been disappeared” are thus left in a stage of half-widowhood with challenging consequences.¹⁰

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.”

7 *Haley Duschinski / Shrimoyee Nandini Ghosh*, Constituting the occupation: preventive detention and permanent emergency in Kashmir, *The Journal of Legal Pluralism and Unofficial Law* 49 (2017), p. 314.

8 The Association of Parents of Disappeared Persons, Kashmir, A Provisional Biography of a Journey Towards Justice for the Enforced Disappeared, <https://apdpkashmir.com/a-provisional-biography-of-the-association-of-parents-of-disappeared-persons-kashmir/> (last accessed on 9 January 2024).

9 See, for instance, *Shujaat Bukhari*, Mass Graves Found in North Kashmir Containing 2,900 Unmarked Bodies, *The Hindu* (2021), <https://www.thehindu.com/news/national/Mass-graves-found-in-North-Kashmir-containing-2900-unmarked-bodies/article16851202.ece> (last accessed on 4 January 2024).

10 *Ather Zia*, The Spectacle of a Good Half-Widow: Women in Search of their Disappeared Men in the Kashmir Valley, *Political and Legal Anthropology Review* 39 (2016), pp. 164-175.

E. The Abrogation of Kashmir's Special Status and its Aftermath

On 5 August 2019, the Indian President issued an order (Constitutional Order 272), which made the entirety of the Indian Constitution applicable to J&K. On 6 August, the President issued another order (Constitutional Order 273), 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. Constitutional Order 272 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 the 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”.¹¹

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.

Severe restrictions on fundamental rights accompanied the abrogation of J&K's special status. 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 important 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 and was only gradually lifted thereafter. 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 coincided with the lockdowns established to react to the COVID-19 pandemic.

11 Kanad Bagchi, Of Constitutional Subterfuge and the “Integration” of Kashmir, *Verfassungsblog* (2019), <https://verfassungsblog.de/of-constitutional-subterfuge-and-the-integration-of-kashmir/> (last accessed on 9 January 2024).

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 fell into a time of aggressively 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 human rights situation in the former state of J&K has not improved in the years after abrogating the state's autonomy. Instead, in the years since August 2019, "the Indian government has drastically intensified the repression of the people of Jammu & Kashmir, including journalists and human rights defenders by subjecting them to multiple human rights violations."¹²

F. The Supreme Court's December 2023 Judgement

On 11 December 2023, in the case *In Re: Article 370*, a five-judge constitutional bench of the Indian Supreme Court gave a unanimous judgement that upheld the abrogation of Article 370 and the revocation of the special status of Jammu and Kashmir.¹³ The Court upheld the validity of Constitutional Order 273 issued by the President to abrogate Article 370. With regard to Constitutional Order 272, the court held that the substitution of "Legislative Assembly of the State" for "Constituent Assembly of the State" in Article 370(3) was invalid. Yet, according to the Court, this finding did not affect the validity of the abrogation order because Article 370(3) did not bind the President to the assembly's recommendation.

To most commentators, the judgement did not come as a surprise, yet some expressed their disappointment with it:

*"In Re: Article 370 was the Court's opportunity to ensure the incredible power that the Constitution vests in the Union Executive and Parliament is not abusively exercised and to read the Constitution in a manner that diffuses some of that power. Regrettably, those will be the tasks of a future Court."*¹⁴

12 Amnesty International, *We Are Being Punished by the Law: Three Years of Abrogation of Article 370 in Jammu and Kashmir*, <https://www.amnesty.org/en/documents/asa20/5959/2022/en/> (last accessed on 10 January 2024).

13 Supreme Court of India, *In Re: Article 370*, 2023 INSC 1058. For a more detailed engagement with the judgement, see *Ashwani Singh*, Guest Post: The Supreme Court's Article 370 Judgement—II: On the Constituent Power of Jammu and Kashmir, <https://indconlawphil.wordpress.com/2023/12/16/guest-post-the-supreme-courts-article-370-judgment-ii-on-the-constituent-power-of-jammu-and-kashmir/> (last accessed on 9 January 2024).

14 *Ashwani Singh*, note 13.

In the judgement, the Court further held that the J&K territory should regain its state designation with local elections to be held in 2024. It remains to be seen how the story continues.

G. About the Use and Misuse of the Constitution – and Whose Constitution Is It, Anyway?

This special issue examines the India-J&K relationship and the abrogation of Kashmir's special status in its broader historical, political, and constitutional context. Three of the articles are building on blog posts that have been assembled for a symposium entitled "Casting Light on Kashmir", published on *Verfassungsblog* in late 2022 and early 2023.¹⁵

Rouf Ahmad Dar and *Javid Ahmad Dar* discuss why Jammu and Kashmir's autonomous status hasn't stood the test of time. Was the unmaking of J&K's autonomy "ingrained in the very making of Article 370 or an outcome of its antithetical use by the successive Indian governments?"¹⁶ Providing an extensive historical overview and elaborating on the events during and after the making of the Indian Constitution, the authors state that the revocation of Kashmir's authority resulted from both an institutional misuse of Article 370 and an inevitable outcome of the article's original design.

Burhan Majid traces the process of the erosion of J&K's autonomy that began long before August 2019. He shows that different Constitution Application Orders, amendments to the J&K Constitution, and judgements by the Indian Supreme Court gradually dismantled J&K's unique constitutional position within the Indian framework. The abrogation of Article 370 in 2019 marked the final step in this process of diluting J&K's constitutional identity.

Paul Dießelberg and *Sidra Yousaf* argue that the concept of "constitutional patriotism", initially developed in the German context, holds promising insights for understanding constitutional activism in Kashmir and India more broadly. By looking at the Kashmiri and others' resistances against the Hindu nationalist and majoritarian politics that draw on the Indian Constitution, the authors argue that constitutional patriotism equips marginalised minorities "with a language of rights that can be used to challenge majority decisions, by appealing to a patriotic idea of remaining loyal to the continuously fought for values of the constitution".¹⁷

Aman is sceptical towards such a reliance on constitutional patriotism and the use of the Indian Constitution to fight for the rights of the Kashmiris. Instead, he holds that Kashmiris

15 Thanks are due to Maxim Bönnemann, for the organisation of the *Verfassungsblog*-Symposium, and, apart from Maxim, to Gabriel Noll and Jasmin Wachau for the planning and organisation of this issue and to Dillon Davis and Danae Zolotas for their help in editing the articles.

16 *Rouf Ahmad Dar / Javid Ahmad Dar*, Constitutional Autonomy and its (Un)Making, *World Comparative Law* 56 (2023), in this issue.

17 *Paul Dießelberg / Sidra Yousaf*, Towards a Postcolonial Theory of Constitutional Patriotism for the Marginalized: The Case of the Indian Constitution and Kashmir, *World Comparative Law* 56 (2023), in this issue.

felt that the articles of the Indian Constitution “were never theirs to begin with” but always only “belonged to the Indian State”.¹⁸ Aman invites us to be more “suspicious about the promises of the constitution”, which, he argues, the Indian state has used as a tool for “striking at the heart of the [Kashmiri’s] collective struggles and [...] hopes”.¹⁹



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18 *Aman*, “Tuhindi Article” (“The Articles Were Yours”), *World Comparative Law* 56 (2023), in this issue.

19 *Ibid.*