

Article 370: Impact on Foreign Relations of India

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Introduction

The Centre's abrupt move to make Article 370 inoperative will ultimately go down as one of the most controversial initiatives to change an age-old provision in the constitution of India but more importantly, changing the identity and status of Jammu & Kashmir that was considered sacrosanct for a very long time. Until 05 August, Article 370 was considered to be that kind of road that kept Jammu & Kashmir tied back to India. But this was changed to a larger extent when Home Minister Amit Shah read out a Presidential notification to decide upon the future of J&K and thereby moved a proposal to make Article 370 inoperative. Amit Shah, passed on presidential notification which stated the sudden decision to scrap the always debated Article 370 and to bifurcate the state of Jammu & Kashmir into two Union territories – Jammu and Kashmir, which is going to have a legislature, and Ladakh, which will not have the legislature. It will come into force on 31st October, 2019

This article has always been debated hotly and been always in contention of Political Parties like BJP (Bhartiya Janta Party) who had put in their manifesto to get it revoked. And when it was done at last, it has garnered mixed reactions throughout India and world. However, it should be noted that whilst world and India has been Commenting, defending, criticising this move, the state of Jammu & Kashmir itself has been put under severe clampdown since August 5, with Internet and Phone lines shut. Now, after 18 October, Post-paid services were gradually restored, but there is a positive apprehension that Kashmir might, sooner or later, start boiling again as firstly, it has been robbed of its identity in broad daylight and second the procedure to make Article 370 inoperative, I believe was not a viable one.

When it comes to international realm, this move of India as of now has been praised as well as criticised by different nations but what will be its long term effects considering the US is trying to negotiate with Taliban, Pakistan being rebuked by Taliban at the behest of Kashmir, Kashmir becoming hot bed of new Militant Organisations, US trying to mediate between India and Pakistan on Kashmir, China keeping stern face on this move, Russia backing India. All of this is accumulating to a boiling volcano which may burst at any point of time and may have long term hazardous effects on Kashmir too.

History of Article 370

Before we start elaborating upon Article 370, one needs to be clear as to why even this Article was made and then incorporated within the constitution of India. Maharaja Hari Singh did not nominate any member to the Indian Constituent Assembly and made it clear in the Instrument of Accession that “Nothing in this instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with government of India under any such future constitution.”¹

Refusing to nominate members to the Constituent Assembly and having made it clear that the instrument of accession is not a license for extending Indian Constitution to Jammu and Kashmir, the Indian state was handicapped in the context constitution and law-making powers viz a viz the state. The National Conference which succeeded the Maharaja out of its craze for power and proximity to Delhi managed nomination of Sheikh Mohammad Abdullah, Maulana Masoodi, Mirza Afzal Beigh and Motiram Baigra to the Constituent Assembly of India. Once nominations to the Assembly were made from the state the position taken by the Maharaja got diluted and New Delhi perceived it to be an implied consent for application of the Indian constitution to the state. For this it needed a device and Article 370 was crafted to provide it.²

Minister, Sri N. Gopalaswami Ayyangar while introducing clause 306A of the Draft Constitution Bill, (which now corresponds ‘with Article 370 of the Constitution) in the Constituent Assembly elaborated reasons for incorporation of this Article in the constitution. He stated that conditions in Kashmir were special and required special treatment. The special circumstances, to which reference was made by him were³:-

- 1) that there had been a war going on within the limits of Jammu & Kashmir State;
- 2) That there was a cease-fire agreed to at the beginning of the year and that cease-fire was still on;
- 3) that the conditions in the State were still unusual and abnormal and had not settled down;
- 4) that part of the State was still in the hands of rebels and enemies;
- 5) that our country was entangled with the United Nations in regard to Jammu & Kashmir and it was not possible to say when we would be free from this entanglement;
- 6) that the Government of India had committed themselves to the people of Kashmir in certain respects which commitments included an undertaking that an opportunity be given to the people of the State to decide for themselves whether they would remain with the Republic or wish to go out of it; and
- 7) that the will of the people expressed through the Instrument of a Constituent Assembly would determine the Constitution of the State as well as the sphere of Union Jurisdiction over the State.” Supreme Court of India in its judgment in

¹ Clause 7 of Instrument of Accession

² Article 370: Facts and Fiction <https://www.greaterkashmir.com/news/opinion/article-370-facts-and-fiction/> accessed on 20 October, 2019

³ Article 370: Facts and Fiction, Sheikh Showkat Hussain, Srinagar, August 18, 2017, 10:32 AM

(Sampat Prakash v. State of Jammu & Kashmir & Anr⁴ on 10 October, 1968, 1970 made it clear that these conditions still persist.

The circumstances laid down by Sri N. Gopalaswami Ayyangar and fully adopted by the court have not changed until now but have got compounded through some higher end developments which include:-

- a) India has by way of Shimla Agreement and Lahore Declaration, committed itself to seek resolution on Kashmir dispute through bilateral talks with Pakistan.
- b) China has already taken control of huge part of the territory of J&K.
- c) Armed insurgency erupted in the state in early 90's and continues to grow at alarming rate till date.

Article 370

Temporary provisions with respect to the State of Jammu and Kashmir⁵

- 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.

According to the Article 370⁶, except for defence, foreign affairs, finance and communications, Parliament needs the state government's concurrence for applying all other laws. Thus, the state's residents live under a separate set of laws, including those related to citizenship, ownership of property, and fundamental rights, as compared to other Indians. As a result of this provision, Indian citizens from other states cannot purchase land or property in Jammu & Kashmir. Under Article 370, the Centre has no power to declare financial emergency under Article 360 in the state. It can declare an emergency in the state only in case of war or external aggression. The Union government can therefore not declare emergency on grounds of internal disturbance or imminent danger unless it is made at the request or with the concurrence of the state government.⁷ Article 370 under the Indian Constitution has been termed as a temporary provision and not a special provision. There are different types of provisions in the Constitution such as temporary, transitional or special. Temporary is the weakest.

However, on the other hand, I believe that by making this article inoperative, there arise many riders as well. "There are going to be now several practical problems in revoking or making Article 370 inoperative. Since There have been a number of presidential orders issued under Article 370 extending a number of statutes, enactments and other provisions applicable in other parts of the country to the state of J & K, making this article inoperative will surely create practical difficulties in coming future if no alternatives are provided.

Who could amend Article 370?

Indian Constitution can be amended through procedures provided under Article 368⁸. It had been made pretty clear that this Article couldn't be amended through the procedures which had been provided in 368. The Article could be amended or abrogated only through a presidential order with concurrence of the State which actually involves the subsequent approval of the Constituent Assembly. It is obvious that amendment of the Article 370 was not within the domain of legislative or constituent powers of the Indian parliament. It could be done by President of India through a notification but only after

⁴ AIR 1118, 1970 SCR (2) 365

⁵ Article 370, Constitution of India, 1949

⁶ Article 370, Constitution of India, 1949

⁷ Article 370: Why is Kashmir tense about it & what can India do

//economictimes.indiatimes.com/articleshow/70508922.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst accessed on 20 October, 2019

⁸ Article 368. Power of Parliament to amend the Constitution and procedure therefore, Constitution of India, 1949

concurrence of the State Constituent Assembly. Convening of the new Constituent Assembly pre-supposes dissolution of the existing Constitution of the State which includes its provisions which declare the state of Jammu and Kashmir to be part of Indian Union. Given the fact that Kosovo in recent past declared independence through a resolution of similar assembly which was recognized both by the UN Security Council and International Court of Justice, India is unlikely to take such a risk. Omar Abdullah is not wrong when he says that attempt to abrogate 370 will throw the validity of accession open. (The validity otherwise too remains disputed under International Law).⁹

Thus Article 370 was an enabling provision that facilitated extension of the provisions of Indian Constitution to the state of Jammu and Kashmir. I believe that now that this article has been abrogated it will also have implications for validity of all those constitutional orders of the President of India which have been issued on the basis of this article. Once acting as a bridge through which Indian constitutional provisions found their way to Jammu and Kashmir, now broken, so whatever has passed or passes through this bridge also becomes invalid effectively.

Impact on foreign relations of India post Article 370

Although right now it may feel too early to say what measure of impact has there been on India's foreign relations but as soon as the world got to know about the Article being made inoperative, there have been mixed reactions throughout the countries wherein many have supported the move and many have opposed and some have taken a neutral stand. The other main party to the Kashmir Dispute, Pakistan reacted strongly after the move.

The credibility of J&K's 'mainstream' political parties in the state has hit rock bottom. The drama unfolding in the 'Afghanistan-Pakistan' theatre also provides a backdrop to this development. US President Donald Trump's reported 'offer' of mediation on Kashmir during Pakistani Prime Minister Imran Khan's visit to Washington may have convinced Indian policymakers that the time to make a move on Kashmir is 'now or never'. If the US and Pakistani interests had converged on Kashmir at the expense of India, there was no reason why New Delhi could not play ball. India had its equities to preserve in Afghanistan, and at times playing the role of a spoiler is equally important to convey to your interlocutors that your voice matters. Modi's move on Kashmir, whether planned or unplanned, does precisely that. Not only will the US be struggling to figure out a response to this, but Pakistan, too, will be under immense pressure to do 'something' about it. So far, Islamabad has slammed India's move of revoking Article 370.¹⁰

Pakistan condemned and rejected the Indian government revoking Article 370 of the Constitution which gave special status to Jammu and Kashmir and vowed to exercise "all possible options" to counter India's "illegal" and "unilateral" step. Reacting sharply to the Indian government's announcement, Pakistan Foreign Office in a statement said, "Jammu and Kashmir is an internationally recognised disputed territory". "No unilateral step by the Government of India can change this disputed status, as enshrined in the United Nations Security Council (UNSC) resolutions. Nor will this ever be acceptable to the people of Jammu and Kashmir and Pakistan." Pakistan strongly condemned and rejected the announcements made by the Indian Government regarding Jammu and Kashmir.¹¹

In addition to this, the decision left Pakistan unnerved with its Prime Minister Imran Khan calling a special session of parliament and launch an all-out campaign against India at all possible levels. Imran Khan downgraded diplomatic relations with India, sent out emissaries to the UN, China and grouping of Islamic countries - Organisation of Islamic Cooperation (OIC) - in order to up ante against India, and warned of another Pulwama kind of terror incident.¹²

The world until now seems unmoved by the continuous plight of the Kashmiri people who have been confined and have remained virtually locked up in their homes since 05 August, 2019. Pakistan's efforts to raise this issue in international arena has also met with very less or negligible success so far. The international community continues to treat the Kashmir dispute as a bilateral one to be solved through dialogue between the two countries.¹³ Thus as of now, the impact may not be seen of such a concern which may make India rethink its strategy but since Kashmir is still under lockdown, once the restrictions are completely lifted and all media is allowed to make a coverage, only then the impact will be felt across the world.

Stance of International Community

The United Nations Security Council has also adopted a lukewarm attitude on the Kashmir issue. It has not called for a formal meeting or issued a statement. The U.N. has reiterated its stance that it wants India and Pakistan to resolve the Kashmir issue bilaterally. A closed-door private meeting of the 15-member Security Council was held in mid-August at the request of China, which too has territorial claims on the disputed region. It was for the first time in more than 50 years that the Security Council held a meeting, albeit informal, on Kashmir. China and Russia want India and Pakistan to settle the dispute in accordance with the U.N. Charter and Security Council resolutions on Kashmir. It is also the first time that Russia has referred to the U.N. resolutions on Kashmir. India's Ambassador to the U.N., Syed Akbar Uddin, told the media that the efforts to resolve the Kashmir issue bilaterally

⁹ Article 370: Facts and Fiction, Sheikh Showkat Hussain, Srinagar, August 18, 2017, 10:32 AM

¹⁰ Article 370: Will revoking special status be good for Kashmir, India, Updated: Aug 06, 2019, 12:09 PM IST
//economictimes.indiatimes.com/articleshow/70543207.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

¹¹ Article 370 revoked: Pakistan condemns Modi govt's Kashmir decision, calls it 'illegal' Last Updated: August 5, 2019 | 18:02 IST

¹² Kashmir: Pakistan tries to isolate India over Article 370, gets a reality check. Updated: August 12, 2019 19:43

¹³ International reaction to abrogation of Article 370: Muted response. John Cherian. <https://frontline.thehindu.com/cover-story/article29382230.ece> accessed on 22-10-2019

“had very broad acceptance globally” and that New Delhi did not need “international busybodies to try and tell us how to run our lives”.¹⁴

The only respite for Kashmir came from Organisation of Islamic Conference (OIC). It was a sigh of relief for Islamabad also. On September 1, the General Secretariat of the OIC reaffirmed its stand that the dispute on Kashmir was an international one. “The General Secretariat reaffirms the United Nations Security Council Resolutions on the internationally recognised status of the Jammu and Kashmir dispute and its final disposition through a U.N.-organised plebiscite,” the OIC statement said. The OIC also demanded the immediate lifting of the restrictions placed on the people of Kashmir.¹⁵

However, India will not be worried about the OIC. As many of its member states already good relations with India. So, it is believed that India as of now has everything covered. Morgan Ortagus, from the US State Department, also called on both sides to “maintain peace and stability along the line of control,” *Reuters* reported. She added, “We note that the Indian government has described these actions as strictly an internal matter.” The world media also reacted to the news. While *the Washington Post* called it a “disturbing turn”, *The Guardian* warned that it would have its “consequences”.¹⁶ Even China expressed serious “concern about the situation in Kashmir” in the light of India’s move to revoke Article 370.¹⁷

UAE ambassador to India Ahmed Al Banna said that the UAE had taken note of India’s decision of non operationalization of some sections of Article 370 of the Indian Constitution related to Jammu and Kashmir. He, too, termed it an internal matter as stipulated by the Indian Constitution and noted that reorganisation of states was not a unique incident in the history of independent India and that it was mainly aimed at reducing regional disparity and improving efficiency.¹⁸

Situation post A-370

In the lead-up to the move, India sent thousands of additional troops to the disputed region, imposed a crippling curfew, shut down telecommunications and internet, and arrested political leaders. Hundreds of people arrested in the Kashmir lockdown have been held without trial by the Indian authorities and moved to jails far from home. Thousands of Kashmiris have been arrested under the Public Safety Act (PSA), which allows for detentions of up to two years without trial. Most have been sent to jails across the northern state of Uttar Pradesh. Indian officials say the policy of transporting detainees, which started last year but has snowballed since August, is required to cut off the rebels from their networks. The transportations are often conducted without warning, and families say they are allowed little contact with detainees once they find them. Proving innocence is difficult even for those with resources given the communications situation in Kashmir and the number of cases. Sanjay Dhar, the registrar general of the Jammu and Kashmir High Court, said two judges in Kashmir’s main city of Srinagar were handling hundreds of appeals against PSA detentions filed since August 5.¹⁹

According to report submitted by Jammu and Kashmir Juvenile Justice Committee to Supreme Court²⁰, 144 children under 18 years of age had been picked up by police between August 5 and September 23 this year. Eighty-six of these children were picked-up under Preventive Detention provisions of the Criminal procedure Code in areas said to be affected by stone-pelting and other disturbance’.

The remaining children were arrested under allegations of rioting, stone-pelting, causing damage to public property, wrongfully restraining movement of persons and attacking police personnel. An 11-year-old was picked-up under section 107 under Cr PC provisions from Batamaloo on August 5, while a 9-year-old and an 11-year-old from Batamaloo were picked up on August 7. There is now a sense of paranoia about what might be in store. People can move within the interiors of their localities and some private transport does ply too, but only up to a small distance. In many cases, a place just 10 kilometres away seems like another country, reaching which involves crossing many security barricades and possibly stone pelting by knots of protesting youth.²¹ With media clampdown and no means for the news to venture out of state, it is highly improbable as of now to say how world community is going to react towards it. India’s foreign relations too as of now seem to be stable but for how long only time will tell. There has been news of protests in the valley and it has turned out to be war between Indian and International Media. International media such as BBC, Al Jazeera, and New York Times have shown huge protests in the valley but on the other hand the National Media has been bragging about Kashmir being normal. Who is right, only Kashmir can tell this tale once Clampdown is lifted?

¹⁴ International reaction to abrogation of Article 370: Muted response. John Cherian. <https://frontline.thehindu.com/cover-story/article29382230.ece> accessed on 22-10-2019

¹⁵ International reaction to abrogation of Article 370: Muted response. John Cherian. <https://frontline.thehindu.com/cover-story/article29382230.ece> accessed on 22-10-2019

¹⁶ How The World’s reacting To India Revoking Kashmir’s Special Status https://www.huffingtonpost.in/entry/kashmir-article-370-revoked-us-un-international-reactions_in_5d48f00ae4b0d291ed059de6

¹⁷ Scrapping of Article 370: Measured reactions from international community. <https://www.theweek.in/news/india/2019/08/06/scrapping-of-article-370-measured-reactions-from-international-community.html>

¹⁸ Scrapping of Article 370: Measured reactions from international community. <https://www.theweek.in/news/india/2019/08/06/scrapping-of-article-370-measured-reactions-from-international-community.html>

¹⁹ Kashmiri prisoners transported far from home <https://www.aljazeera.com/news/2019/08/india-revokes-kashmir-special-status-latest-updates-190806134011673.html>

²⁰ 144 minors arrested in J&K since the abrogation of the provisions of Article 370 updated on 02 October, 2019, 07:29 pm. As on <https://www.livemint.com/news/india/144-minors-arrested-in-j-k-since-the-abrogation-of-the-provisions-of-article-370-11570021960865.html>

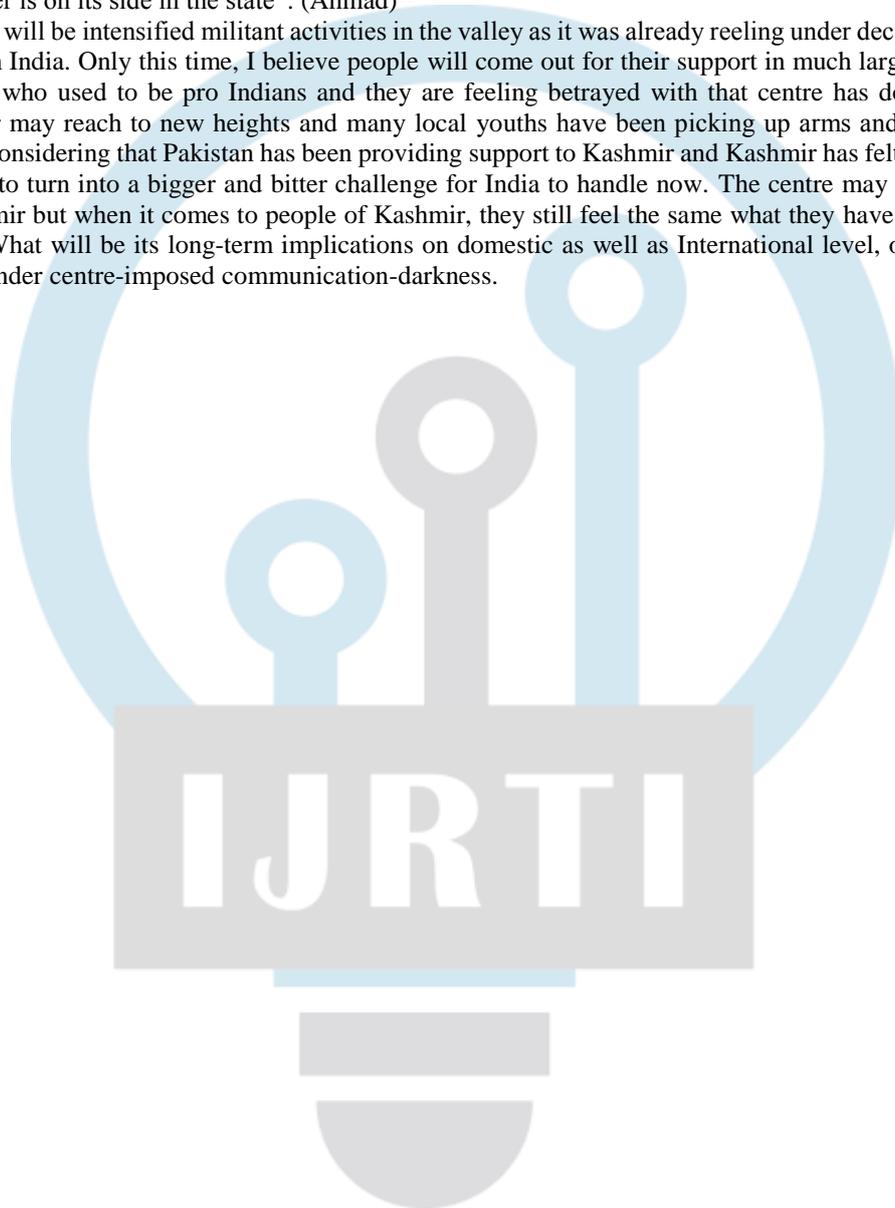
²¹ After three weeks of lockdown, this is what Kashmir looks like By Riyaz Wani in Srinagar August 23, 2019 Accessed at <https://qz.com/india/1693598/inside-kashmir-three-weeks-after-article-370-was-scrapped/>

Conclusion

The most awaited post clampdown scenario is on cards in Kashmir which is the response of main stream, pro-India politicians who are currently under detention in various detention centres. They include three former J&K Chief Ministers as well - Dr Farooq Abdullah, Omar Abdullah, and Mehbooba Mufti. They had been opposing the abrogation of Article 370 and had vowed to fight together against its abrogation. But right now, with them being under detention, it is hard to say what will be their next move. "Once released, these politicians could also decide to unite and launch a mass movement for the reversal of the Article 370 revocation. Considering the mood in the Valley, such a movement is likely to witness an overwhelming public participation,"

"Should this happen, the long running movement for freedom will gel with the struggle for the restoration of special rights under India's constitution? For once, both separatists and unionists may define their politics in adversarial terms to New Delhi, if not sharing the same platform. And this can pose New Delhi its biggest challenge in Kashmir. For the first time in seventy years, it may find no Kashmiri leader is on its side in the state". (Ahmad)²²

I can foresee that there will be intensified militant activities in the valley as it was already reeling under decade's old armed struggle for independence from India. Only this time, I believe people will come out for their support in much larger number because now it is those people too who used to be pro Indians and they are feeling betrayed with that centre has done in Kashmir. Armed movement in Kashmir may reach to new heights and many local youths have been picking up arms and it doesn't seem to stop likely in near future. Considering that Pakistan has been providing support to Kashmir and Kashmir has felt more harmony with the neighbour, it is likely to turn into a bigger and bitter challenge for India to handle now. The centre may have acquired the rights over the land in Kashmir but when it comes to people of Kashmir, they still feel the same what they have been feeling for past 70 odd years, betrayed. What will be its long-term implications on domestic as well as International level, only time will tell as the valley is still reeling under centre-imposed communication-darkness.



²² After three weeks of lockdown, this is what Kashmir looks like By Riyaz Wani in Srinagar August 23, 2019 Accessed at <https://qz.com/india/1693598/inside-kashmir-three-weeks-after-article-370-was-scrapped/>