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Human Rights in Kashmir – Violated or Restored

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Abstract

Often, one's privilege is overlooked. One of these privileges is Human Rights. The recent abrogation of the special status of Jammu and Kashmir (J&K) has once again sparked the debate on human rights. This research paper has been written to assess what human rights actually mean, to give context to the recent activities in that state, what role does the government play, and to finally see the extent to which they are assured or violated. Every action has an after-effect and success of a decision can be judged by that after-effect. Through this paper, the after-effect of abrogation of article 370 and 35A is tracked. It is not to provide just our opinion on the subject but to make our readers able to make informed decisions and opinions on the subject.

We have adopted comparative analysis to help readers understand the extent to which the human rights practiced in Kashmir is different from the rest of India. For this purpose, various articles are reviewed thoroughly; both sides of the argument are shown to know why people are divided on this issue. It is kept in mind to present facts as they are, and not to tamper with them. This paper will, thus, discuss human rights especially with respect to the recent decisions taken by the government.

Keywords: *Kashmir, Human Rights, Article 370, Article 35A, India Kashmir, Violation, Democracy, Lockdown*

1.0 Introduction

The United Nations (UN) states human rights as “the rights that are inherent to all humans regardless of their race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.”

The constitution of India contains a section titled, “The Rights and Fundamental Rights”, which provides the people of India with fundamental rights. This vital section of the constitution was developed between 1947-1949. The fundamental rights, as provided by the constitution of India are as follows:

1. Right to Equality
2. Right to Freedom
3. Right against Exploitation
4. Right to Freedom of Religion
5. Cultural and Educational Rights
6. Right to Constitutional Remedies

While the Fundamental Rights mentioned apply to every citizen of India, denial of some of these rights in Kashmir has been a matter of controversy for a long while.

Since the scrapping of Article 370 and 35A, the situation of Kashmir has been under public scrutiny. While the government claims that its intention is to do good, other people worry about the rights enjoyed by people earlier in Kashmir. There have been constant debates regarding the “human rights’ violation” in Kashmir and it is to assess this situation, wherein lies the purpose of this paper. Whether or not people feel the way, as other people claim, we shall find out through this paper. Before further discussion on this topic, it is important to take a holistic view and get an understanding of the state’s history. Only then, can we understand why the majority of the country celebrated it, while some mourned the decision?

Even before independence, the state had a long history of being “bought” and “sold”. After Raja Ranjit Singh lost a battle, the empire was sold to the East India Company, and then was bought back by Maharaja Gulab Singh for 75 lakhs on March 16, 1846, as part of the Treaty of Amritsar, with which the ‘Princely State’ of Jammu and Kashmir came into existence.

In 1947, India was partitioned, and the territories with majorly Muslim population were to merge with Pakistan, and others, with India. The British gave the Princely states, 3 options:

1. Merge with Pakistan
2. Merge with India, or
3. Remain Independent

While many provinces voluntarily united with India's main territory, some needed convincing, and if that did not make them unite then force was used too. Kashmir was one of those states. It had both Pakistan and India, sending it offers, but it kept on delaying until it was attacked on its borders by Pakistan. Finding itself ill-equipped to send the infiltrators back, it asked India for help. India agreed to help, but on the condition that the Raja had to sign the Instrument of Accession giving in India's hands, the sectors of defence, foreign affairs and communication of Jammu and Kashmir. On the promise, that once the situation normalizes, a plebiscite (referendum) would be held, giving the people of J&K, a chance to vote on whether they would want to be a part of the Indian territory; J&K was officially declared as a part of India. However, normalcy was never restored, so holding plebiscite was out of question.

The state was entitled to special status as a part of the instrument of accession. Article 370, in 1949, was added to the Constitution, which provided the state with a separate constitution, a separate flag, and its internal administration. Later, in 1954, Article 35A was added to the Indian constitution to complement Article 370. It allowed the Jammu and Kashmir's state legislature to define 'Permanent Residents' of the state and accordingly, grant special privileges to the 'Permanent Residents' of the state.

However, it was not this simple. Nehru, in 1963, said that the provision is only "temporary". The Indian legislature managed to pass most of its bills in the J&K assembly, 260 out of 395 articles were made applicable in J&K, however there still remains a significant chunk of bills which are not applicable there, like, people of J&K still have property rights, which citizens of India do not. The property laws were strict since the time of Raja Hari Singh, as there was a threat of losing land which their residents owned through the means of marriage and this is the reason that women there were forbidden to marry outsiders. There was turmoil in the region as the population felt betrayed. There were protests, attacks by Pakistan to claim the territory. It led to three wars with Pakistan, each

leading to no concrete conclusion and consequent division of the territory marked by the Line of Control (LoC).

The decision to open Babri Masjid for Hindus to pray, in 1986, during Rajiv Gandhi's term as PM created uncertainty among people of J&K too. To make the situation worse, the elections of 1987 further made people lose their trust in the Indian Government. Insurgency in the valley increased in momentum from this point on, given the consistent failure of democracy. The Muslim United Front(MUF) candidate, Mohammad Yousuf Shah was not only falsely implicated in the allegedly rigged elections, but was also imprisoned, which led to the rise of Syed Salahuddin, the chief of the militant outfit Hizb-ul-Mujahideen, currently heading the United Jihad Council. (Rasool, 2014)

By then, the Kashmiri Pandits - a group of Kashmiri Hindus, had begun to be targeted. Hit lists of Pandits were in circulation. Waves of panic hit the community, especially after a local newspaper published an anonymous message, allegedly from the Hizb-ul Mujahideen, asking Pandits to leave. (Subramanian, 2020)

2.0 Assessing Human Rights as provided by the Constitution of India

In this part of the paper, we will discuss the various rights provided by the Constitution of India, and their overall status in the rest of India as a relative metric to compare with the situation in Kashmir.

Before starting, it is worth noting that human rights, while a huge part of the United Nations, are not something that can be considered directly in the Sustainable Development Goals (SDGs). Instead, the pieces of basic human rights are scattered throughout the SDGs. For example: Right to Access to Information, which is a huge part of today's modern life, is a part of the SDG 16 (Peace, Justice, and Strong Institutions), whereas, the Right to Health, is a part of the SDG 3 (Good Health and Well-Being).

Consequently, throughout the paper, you will find a reference to the specific right alongside its provision in the SDGs for a better understanding of how India, and more specifically, Kashmir, performs with the SDGs. The references are in accordance with the 'SDG-Related Human Rights' table issued by the Office of the High Commissioner-United Nations Human Rights Council (UNHRC) (United Nations Human Rights - Office of the High Commissioner, 2016).

As mentioned in the introduction of the paper, the Constitution of India divides basic human rights or 'fundamental rights' in certain categories. Changes to these rights can only be brought through 'Constitutional Amendment', which needs to be passed by both houses of Parliament in 'special majority'. Over the years, certain revisions have been made to the aforementioned rights for many reasons. While some rights have been added, some have been diluted.

Notable exclusions in, and/or laxly adopted, fundamental rights provided by the Constitution of India include:

1. Right to Work (Corresponding to SDGs 4, 5, 8)
2. Right to Social Security (Corresponding to SDGs 1, 10)

These rights are not considered as Fundamental Rights by the Constitution of India, and while the mentioned rights have been considered as principle directives in the drafting of state policies, they are, at their core, just directives.

2.1 Right to Freedom in India

The Constitution of India, while states Right to Freedom as one of the fundamental rights - Part 3, Section 19-22 of the Constitution - it has a number of limiting clauses. Acts such as 'Maintenance of Internal Security Act' (MISA), 'Armed Forces (Special Powers) Act' (AFSPA), and the 'National Security Act' (NSA), essentially grant the power to curtail these rights. Acts such as these, are not necessarily bad, but the use of ambiguous terms such as "security of state", "public order", "morality", "reasonable restrictions" opens the room for selective interpretation. The meaning of such phrases has not been stated in the Constitution.

2.2 Freedom of Speech and Expression

India has increasingly become a country that is intolerant of people with different views. The rise of the sentiment of Nationalism, has come with the rise of use of terms such as anti-national and boycott. India has increasingly become a country where having opposing views, culture, religion can land a person in trouble.

2.3 Freedom to Move Freely Throughout India

While the citizens of India have the freedom to move throughout India, restrictions can be imposed on the same by the means of Section 144 and Curfews. Section 144 of the

Indian Penal Code prohibits gathering of 5 or more people within a particular area. In a curfew, the power shifts to the Collector and the Police Commissioner. Only administration and police personnel are allowed on the streets. Essential Services are also shut down in the state of a Curfew. (Gill, 2020)

2.4 Freedom of Press

Freedom of Press, which is essential for formulating public opinion and boosts the legitimacy of Freedom of Expression, is notably missing. Perhaps consequentially, India ranks 142 on the World Press Freedom Index (annual report published by 'Reports without Borders'), which is a decrease from 140 the year prior. The report states that "there have been constant press freedom violations, including police violence against journalists, ambushed by political activists, and reprisals instigated by criminal groups or corrupt local officials." Section 124a of the penal code, which talks about 'sedition', is often used against the journalists who are critical of the authorities. (*India*, n.d.)

2.5 Right to Reside and Settle in any part of India

The constitution of India grants the citizens of India, the right to reside and settle in a part of India. Up until the abrogation of Article 370 and Article 35A, the rule had an exception for the state of Jammu and Kashmir owing to its special status.

2.6 Right to Information (Corresponding to SDGs 9, 16)

Right to Information was added to Article 19(1) to the constitution of India in 2005 with the status of a fundamental right. With a ruling in January 2020, the Supreme Court of India declared Access to Internet as a fundamental right under Article 19(1)(a) (Dutta, 2020). It is to be noted that even the UN has not declared Internet Access as a human right. The UN describes the Internet as a "catalyst" for the enjoyment of human rights. In other words, Access to the Internet is of extreme importance and restrictions on it should be considered as violation of all the freedoms that are enabled and assisted by the Internet. ('UN Declares Internet Access a Human Right' – Did It Really? | DiploFoundation, 2011)

To further emphasize on the importance of internet access, let us talk about the various rights and aspects of life that are assisted by access to the internet:

1. *Freedom of Expression*

It is no wonder that a tool such as the Internet has become imperative for the preservation of the Right to Freedom of Expression. With the ability to disseminate information almost immediately, the Internet has enabled people to share their opinions and expressions, unlike any media in the past. By democratizing the process of dissemination of information and allowing people to directly share their views, opinions, and thoughts with millions of people, the internet has enabled globalization and made the world a smaller place. Freedom of expression, in itself, is an important enabler of other rights.

2. *Right to Education (Corresponding to SDG 4)*

The Internet has been an important tool for education long before the advent of the Pandemic. The Internet has enabled interactive and more holistic learning, by giving students and teachers, access to vast amounts of data and learning material.

3. *Right to Health (Corresponding to SDGs 3, 6, 12, 13)*

When the world is hit by a pandemic, the issues of health infrastructure are magnified. Coronavirus has brought together thousands of scientists throughout the world. By collaborating on the research, they managed to shave off years of time from the process of developing a vaccine. The Internet has been instrumental in the dissemination of information pertaining to the Coronavirus and has potentially saved hundreds of thousands of lives. In addition to that, by enabling access to information on the environment, and climate, it has further strengthened the argument for the importance of the Internet. ('UN Declares Internet Access a Human Right' – Did It Really? | DiploFoundation, 2011b)

The importance of the internet has been emphasized such, so that the true implications of being the country with the highest number of Internet Shutdowns can be brought into perspective. In 2018, India had 134 reported incidents of Internet shutdowns, which was about 112 higher than its runner up - Pakistan. (Nazmi, 2019)

As of writing of this paper, there have been 70 such incidents in 2020 already. Looking at the data over the year, might give a clearer picture.

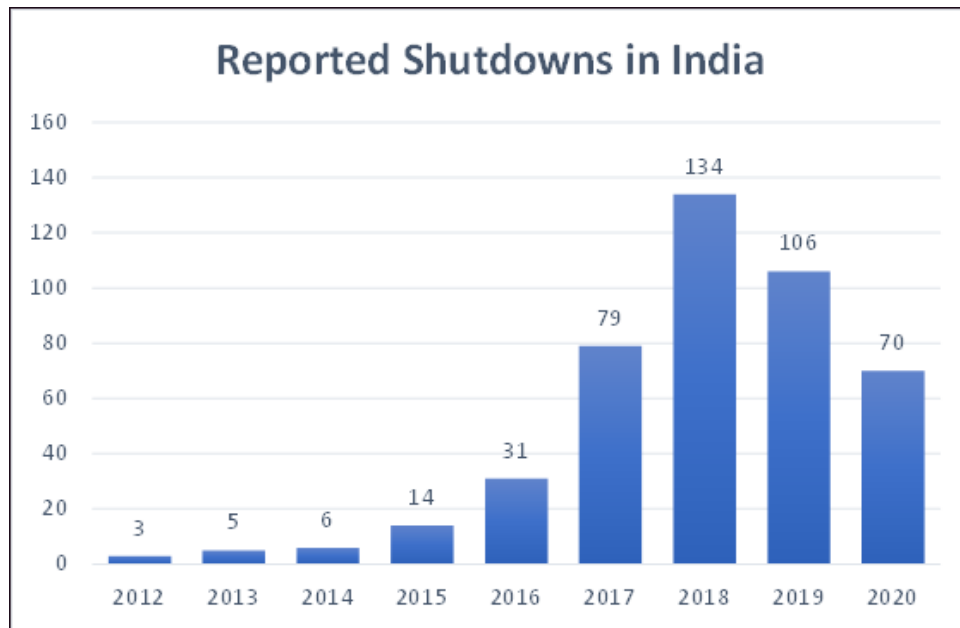


Figure 1: A clear trend of imposing shutdowns can be noted in the above graph. Manifestly, the number of shutdowns has skyrocketed with the coming of the now ruling Hindu Nationalist party - BJP. (*Internet Shutdowns in India*, n.d.)

4. Right to Freedom of Religion

The Right to Freedom of Religion is covered in Articles 25-28 of Part 3 of the Constitution of India. India as a nation, has always celebrated its position as a secular country. The Preamble of the Constitution of India begins with describing the foundations of India, i.e., Sovereignty, Socialism, Democracy, and Republicanism. It goes on to 'secure for its citizens', 'liberty of thought expression, belief, faith and worship', and 'equality of status and opportunity.' (Baruah, 2019)

Increasingly, however, the religious divisions in the country have come to light. With the advent of the Hindu Nationalist party Bharatiya Janata Party (BJP), the fundamental constitutional values have been put to test. With the introduction of National Register of Citizens (NRC) and Citizenship (Amendment) Act 2019 (CAA), the Government of India has blatantly chosen to exclude or include minorities based on their religion.

Then, it is no wonder that thousands of people took to streets to protest against these bills. The protests which on occasion turned bloody, and with hateful speeches inciting hate and anger, have caused riots. Data has shown that over 90% of religious hate crimes in over a decade have occurred since Modi came to power. (Ayyub, 2019)

3.0 Assessing Human Rights in Kashmir

The history of Kashmir has been talked about sufficiently in Introduction to understand the nuances of the policies pertaining to it. As a part of the Instrument of Accession, India gained rights over the sectors of defence, foreign affairs, and communications of Jammu and Kashmir. Article 370 and later, Article 35A were added to the Constitution of India through which, Kashmir gained a 'special status' in which it had the right to define 'Permanent residents' of the state. It also gained a separate constitution and flag, and while it could adopt the laws from India's Constitution, it did not have to. This made Kashmir operate semi-autonomously from the rest of India. It has, over the years, chosen to not adopt many laws passed in India's Constitution. This has led to many debates on the Human Rights situation in Kashmir. Here are some facets of inequality under the constitution of J&K prior to revocation of Article 370 and 35A in 2019.

3.1 Discrimination Against Women

The State Government in J&K issued "permanent resident certificates" to all its citizens. However, the certificates differed by gender. The certificates given to the women would be valid only till their marriage, and would need to be re-issued thereafter. With the added condition that, if a woman married outside Kashmir, she would be denied a certificate and thus, disqualified of 'privileges' as a 'Permanent Resident'. These privileges included the right to acquire immovable property, education, and government employment within the state. The same did not apply to its male residents. Not only is this in violation of SDGs 1, 4, 5, 8, 9; in direct violation of the fundamental rights provided to Indians under its constitution.

3.2 Violation of Fundamental Rights of Indians

Under Article 35A, the state of Jammu and Kashmir could provision that only the 'permanent residents' of the state could be eligible for purchasing and holding immovable properties in the state. This was seen as a violation of the fundamental rights provided by the Constitution of India to all its citizens.

3.3 Kashmiri Pandits

The Kashmiri Pandits are a group of Kashmiri Hindus. The Pandits resided originally, in the Kashmir Valley. With the Land Reforms in 1950, enabled by Article 370 and 35A, came a series of unfortunate events that reduced the population of Kashmiri Pandits in the valley to just 5% of the total by 1981. the 1990s saw the population of the Kashmiri Pandits in the region reduce drastically with the rise of militancy in the region. The Pandits were declared 'Kafirs' and the males were told to either leave Kashmir without their women, convert to Islam, or be killed.

3.4 The Conundrum of the Article 370

Ever since its inception, it was maintained that Article 370 was temporary. No more can this be emphasized than by Highlighting that Article 370 of the constitution of India titles - "Temporary Provisions with respect to the State of Jammu and Kashmir." A plebiscite was to be held on receiving a recommendation from the Constituent Assembly of Jammu and Kashmir for the abrogation of the Article 370. However, the constituent assembly was dissolved in 1957 without such recommendation. This, in effect, meant that the provision was now deemed permanent by many.

On 3rd April 2018, the Supreme Court of India gave a similar opinion with the declaration that Article 370 had acquired permanent status.

4.0 The Division in Kashmir

Kashmir has remained the centre of attention for an exceptionally long time, since its inception, the state and people have seen continuous bloodshed, curfews, and several other restrictions which with time, has only increased.

Partition made both sides- India and Pakistan, suffer in their own way. However, one thing they both had eyes on was Kashmir. Subsequently, they went to war soon after partition. Since then the situation there has never been normal. Kashmir has always been central to every government's policy and agenda. All successive governments have tried to somehow bring 'peace' in the valley, but the efforts have usually failed. This continuity of conflict between India and Pakistan has caused suffrage in Kashmir. The issue of Human Rights there has gained international attention over time and it is because of the unique situation of the state, that the issue remains yet to be resolved. The increased attention and telescope on the issue has meant that the government has become overly cautious in its

dealings and handlings in Kashmir. Despite numerous reports being published detailing the violations of Human Rights in Kashmir, governments have always managed to steer clear of controversies by pointing the finger on Pakistan. The stationing of armed forces there has been called an action necessary for “protection” of people.

5.0 The Scrapping of Article 370 and 35A

With the scrapping of Article 370 and 35A, which has since been both criticized and celebrated, the Modi government fulfilled one of its key promises in elections. The move has more than just stirred conversations around terrorism and Pakistan. It has stirred conversations on human rights in the country.

5.1 India’s Stance on the Move

The act of abrogation of the articles in questions, was followed by stationing more troops in the valley to “maintain law and order”, detaining the political leaders of the state, arresting journalists, and imposing lockdown with a complete communication blackout. This move has been regarded as “unconstitutional” by many, and people throughout the country have held protests against the move. The government has persistently regarded the move as necessary to bring peace, and avoid any future disruptions which might arise from this sudden move.

They argue that with these articles gone, the people of Kashmir now have human rights that were denied to them under the previous rule, and hence, they have successfully restored human rights in the region. While addressing the nation on the eve of the 73rd Independence Day, the President of India said that

"These include progressive, egalitarian laws and provisions related to the Right to Education; accessing public information through the Right to Information; reservations in education and employment and other facilities for traditionally deprived communities; and justice for our daughters by abolishing unequal practices such as instant triple talaq..."
(Press Trust of India, 2019)

Many people around the country also seem to resonate with the government, as they note that the land of Kashmir has witnessed over 30 years of terrorism and ethnic cleansing. They say that the concerns of public order and public safety remain paramount and abrogating these articles was not an easy decision, and was bound to have a violent reaction in the valley. Justifying the restrictions put in place by the government, it has been opined that trying to prevent large-scale violence by putting in severe restrictions is not necessarily immoral. It is rather the duty of the government. (Kumar, 2019)

5.2 How the World Sees It

The international media, and Governments abroad, have also made comments on the issue.

- In the last five months, the United Nations Security Council (UNSC) has twice met for closed-door meetings on the situation in Kashmir.
- The United States Congress has passed two house resolutions on Kashmir, condemning New Delhi's decision.
- The House resolution No. 745 that was introduced in the House of Representatives of the United States last year by Indian American representative Pramila Jayapal, has gained 36 co-sponsors.
- This increased focus on the situation in Kashmir (from the UNSC and the US, in particular) has forced New Delhi to invite foreign diplomats and lawmakers to the Kashmir Valley on 'fact-finding' trips. The first one was in October 2019, when the government invited a group of European Union lawmakers to the Valley. (Wani, 2020)
- In July, the Office of the UN High Commissioner for Human Rights released a 43-page report, raising serious concerns about abuses by state security forces and armed groups in both Indian and Pakistani parts of Kashmir. The UN found that Indian Security Forces (ISF) often used excessive force to respond to violent protests that began in July 2016. And it decried the lack of justice for past abuses such as killing and forced displacement of Hindu Kashmiri Pandits, enforced disappearances, and alleged sexual violence by ISF personnel. The Indian government dismissed the report as a "false and motivated narrative" that ignored "the core issue of cross-border terrorism." (*India: Ensure Rights Protections in Kashmir*, 2020)

- Soon after abrogation of article 370, Pakistan downgraded diplomatic ties with India and “In demanding international intervention, Pakistani Prime Minister Imran Khan warned against a “Srebrenica-type massacre and ethnic cleansing of Muslims,” that “will have severe repercussions and reactions in the Muslim world setting off radicalization and cycles of violence.” While India has described this as alarmist, authorities should heed Kashmiri voices that said that the recent clampdown could fuel further violence. Addressing human rights is the first step towards ending the cycle of violence”. (*India Wants to Avoid International Intervention, But Needs to Address Human Rights in Kashmir*, 2020)
- A United Nations spokesperson said that the Secretary-General was “concerned over reports of restrictions,” worried that these “could exacerbate the human rights situation in the region.” The answer is for India to adopt international human rights standards and not ape the repressive tactics of its neighbours. (*India Wants to Avoid International Intervention, But Needs to Address Human Rights in Kashmir*, 2020b)
- South Asia Director at Human Right Watch, Meenakshi Ganguly said, “India and Pakistan blame each other for human rights violations in Kashmir while ignoring their own responsibility for abuses”. (*Kashmir: UN Reports Serious Abuses*, 2020)
- The UN human rights office said that armed groups were responsible for human rights abuses including kidnappings, killings of civilians, sexual violence, recruitment of children for armed combat, and attacks on people affiliated or associated with political organizations in Jammu and Kashmir. It cited the Financial Action Task Force (FATF), an intergovernmental organization that monitors money laundering and terrorist financing, which has called on Pakistan to address its “strategic deficiencies.”²²

Serious concern was shown regarding raised tensions between India and Pakistan. It could lead to use of more force from either side, increasing the possibility of war, which would then lead to violation of more human rights in the process for the sake of “protection of people”.

This is not the only time that the international agencies and media have spoken about Kashmir. The United Nation Commission for India and Pakistan(UNCIP) passed a resolution on January 5, 1949 that provided the mechanism for holding a “free and impartial plebiscite” in Kashmir. (Bhattacharjee, 2019) The United Nations (UN) Security Council Resolution 47, stipulated that both India and Pakistan should withdraw their military forces and arrange for a plebiscite to be held in order to provide the people of Kashmir the choice of which state to join (S/RES/47). Ostensibly this resolution was an effort by the UN Security Council to put the right to self-determination into practice. (Westcott, 2020)

6.0 The Situation Now

Currently, the state of Kashmir is still under partial lockdown with only 2G services having been restored in January. The restoration of 2G services too came at the behest of a judgement from the Supreme Court of India that declared that “an indefinite shutdown of internet in Kashmir was illegal. (Phartiyal, 2020) (*End Internet Shutdowns to Manage COVID-19*, 2020) High-speed internet is yet to be restored in most of the region. Only two districts have been given access to 4G, Ganderbal and Udhampur, that too for trial purposes. By-elections for vacant posts of Panch and Sarpanch are to happen once the situation of COVID-19 improves, Chief Secretary, BVR Subrahmanyam said.

This restriction is especially more daunting in a world where most of the things have moved online. From education to work, everything has been brought to a stand-still; first by the abrogation of the articles and the subsequent lockdown and curfews, and second by the unfortunate arrival of the Coronavirus.

Blockage of access to high-speed internet has not only made it impossible for the students to take online classes, but has blocked almost all access to information in the territory. While the rest of the world deals with a novel Coronavirus, they have the advantage of having access to crucial real-time data that can save thousands of lives. Businesses have arguably been impacted harder in the region than in other areas, as they do not have the option to move to online mode as well. The internet shutdown in Jammu and Kashmir is also one of the world’s longest for any democracy. In the last week of March, the UN High Commissioner for Human Rights urged all the governments to end all internet and telecommunications shutdowns to assist in the fight against the Pandemic. (*OHCHR | Press*

In trying to “restore” human rights in the region, it would appear that the government has effectively cut the people off them.

7.0 Conclusion

The situation is not expected to normalise anytime soon. With the elections in Kashmir for Panch and Sarpanch constituencies coming up, security is expected to be tightened again. Restrictions which were previously loosened may be rolled back. The government which has supposedly done so much for the state’s growth, economic and social development has been unsuccessful to live up to its promise, as the state has seen major monetary setbacks and losses because of the lockdown which has instead set it back. It is interesting to note that the country has stationed most of its Armed Forces in Kashmir. For a population of 8 million, around 950 thousand Indian Armed Forces are deployed in the region.

There is no denying of the fact that the state has been under attack since Independence. It has become a means to spread terrorism, to harass people, overuse of military forces, and making it more of a warzone. The government’s step which was applauded by almost everyone is now subject to harsh criticism. The implementation of the much-sought action is humiliating. PM Modi in his speech said, “I assure you that it won’t take more than four months to normalise the abnormal situation that has persisted there for 40 years,”

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