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TALES OF KASHMIR

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A STUDY DEALING WITH
ARTICLE 370 AND THE EFFECT
OF ITS ABROGATION

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PREFACE

5th August 2020 marked the first anniversary of the much-controversial abrogation of Article 370 of the Constitution. What followed was a series of protests and human rights violations inviting condemnation from activists and human rights organisations all over the world. The Centre's decision to do away with Article 370, which conferred a special status upon the state of Jammu and Kashmir, deepened the regional and communal differences that have persisted since before independence. Though Article 370 was always intended to be a temporary provision, part of the reason that caused resentment among people was the utter disregard for the considerations that led the constitution makers to adopt and enact this one-of-a-kind provision in the first place. The history behind Article 370 finds its roots in pre-independence tensions, political turmoil, and communal conflicts as well as the constant tussle between India and Pakistan to gain control of this erstwhile princely state. The future however, is shrouded in the uncertainties of political actions and societal reactions to them. Through this newsletter, we attempt to drive you through the ups and downs that the valley has witnessed in the past decades.

WHAT'S IN THE ISSUE

A STUDY DEALING WITH ARTICLE 370 AND THE EFFECT OF ITS ABROGATION

History Of Article 370

Stance of various countries on abolition of article 370

Army and paramilitary ;violating human rights or
maintaining Peace

The Way Forward

INTERNET ACCESS AS A HUMAN RIGHT: ANALYSIS THROUGH ONE- YEAR ANNIVERSARY OF KASHMIR'S DIGITAL LOCKDOWN

Overview of the Ban Imposed

Direct Contravention of exercise of Basic Human Rights

Recognition of Access to the Internet as a Basic Human

Right Testing times in case of a Global Pandemic

Conclusion

The background image is a composite. It features a serene landscape with a calm lake reflecting the sky and surrounding green hills. In the foreground, a wooden boat is partially visible. Overlaid on this is a large, glowing yellow map of India. The text 'ARTICLE 370' is prominently displayed in bold black letters across the center of the map.

ARTICLE 370

HISTORY OF ARTICLE 370

The history behind Article 370 finds its roots in pre-independence tensions, political turmoil, and communal conflicts as well as the constant tussle between India and Pakistan to gain control of the erstwhile princely state of Jammu and Kashmir (J&K).

As of 15th August 1947, all of the princely states except Kashmir and a few others had acceded to the Union of India.¹ Soon after independence, Kashmir faced a threat of invasion from Pakistan. There were speculations that Sheikh Mohammad and his associates had decided to accede to India, however, nothing had been formally declared.² On 22nd October 1947, tribesmen from Pakistan invaded Kashmir and killed a large number of non-Muslims using weapons and modern warfare.³ Kashmir was quick in turning to India for help.⁴ However, Lord Mountbatten suggested that J&K accede to India as

otherwise, India would be entering a foreign territory.⁵ Accordingly, on 26th October 1947, J&K acceded to India on the condition that India's parliamentary body would have powers to legislate only on matters of defence, external affairs, and communications.⁶ It was also agreed upon that as soon as normalcy was restored in the state, a plebiscite would be held where people of J&K would be able to decide whether they wished to join India or Pakistan and till then, the accession of J&K to India was merely provisional.⁷

On 27th October, the Indian troops entered Kashmir. Pakistan maintained its view that the attack on Kashmir was India's ploy to coerce the state into accession.⁸ On 1st January 1948, India approached the United Nations Security Council (UNSC) asking it to call upon Pakistan to withdraw its support to the tribesmen.⁹ Subsequently,

¹ V.P. Menon, *Integration of the Indian States*, 109, (Hyderabad: Orient Blackswan Pvt. Ltd., 2014).

² Nehru to Patel, October 5, 1947. Vol. 1, *Sardar Patel's Correspondence: 1945-50*, 53, (Ahmedabad: Navjivan Publishing House, 2015 reprint).

³ Nehru to C.R. Attlee, October 25, 1947. Vol. 4, *Selected Works of Jawaharlal Nehru: Second Series*, 274.

⁴ Supra at 4, 57.

⁵ Abhinav Chandrachud, *The Abrogation of Article 370*, *Festschrift in Honour of Nani Palkhivala*, 5, (August 24, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448331.

⁶ Instrument of Accession of Jammu and Kashmir, (October 26, 1947).

⁷ Supra at 8, 7.

⁸ Supra at 8, 6.

⁹ Memorandum to the Security Council, (January 1, 1948). Vol. 8, Valmiki Choudhary (ed.), *DR. RAJENDRA PRASAD: CORRESPONDENCE AND SELECT DOCUMENTS*, 390, (New Delhi: Allied Publishers, 1994).



the UNSC issued several resolutions calling upon both India and Pakistan to end the hostilities, however, this ended in an impasse. In April 1948, Resolution No. 47 was passed requiring the Government of Pakistan to withdraw its tribesmen from the state.¹⁰ Once the tribesmen withdrew, the Government of India would withdraw its troops and hold a plebiscite. In August 1948, under the United Nations Commission for India and Pakistan, both the nations agreed upon a cease-fire,¹¹ but Pakistan did not withdraw from its occupation of Kashmir.

As a result, Kashmir's fate remained undetermined throughout the process of drafting of the Indian Constitution. Since the drafting could no longer be stalled, it was decided that a temporary provision regarding the status of J&K would be inserted in the constitution with the backdrop of India's promise that its ultimate fate will be decided through a state-wide plebiscite. B.N Rau, the constitutional advisor, pitched the idea for a 'transitional provision' to acknowledge the provisional Instrument of Accession until the final status of the state could be determined.¹²

It was finally agreed upon that J&K stood acceded to the Union of India on matters of defence, communications, and external affairs and accession concerning any other matters will be determined by the Constituent Assembly of J&K. Ultimately, Kashmir was given representation in the Constituent Assembly and Sheikh Abdullah and three others joined the Constituent Assembly as its representatives.¹³ In July 1949, Vallabhbhai Patel stated that Kashmir's accession to India should be "continued on the existing basis till the State could be brought to the level of other States"¹⁴ and for this purpose, a special constitutional provision had to be inserted.¹⁵ Eventually, the draft of Article 306A was presented and discussed upon in the Constituent Assembly which was finally enacted as Article 370 of the Constitution of India with hardly any opposition.

The essence of Article 370 was to restrict the intrusion of India into the affairs of J&K as much as possible. As earlier stated, the aim behind the inclusion of Article 370 was to restrict Indian Parliament to the matters of defence, communications, and external affairs. On these matters, the parliament was required to consult the Government of

¹⁰ Supra at 8, 9.

¹¹ United Nations Commission for India and Pakistan, S.C. Res. ¶ 75, U.N Doc. No. 1100, (August 13, 1948).

¹² Supra at 4, 85-86, 88.

¹³ Vol. 20, Choudhary (ed.), supra at 12, 144.

¹⁴ Supra at 8, 11.

¹⁵ Statement of Vallabhbhai Patel, CONSTITUTION ASSEMBLY DEBATES, (October 12, 1949).

J&K whereas, for all other matters, it required the 'concurrence' of the State Government.¹⁶ Secondly, none of the Articles of the Indian Constitution applied to the state (then) except Article 1 and Article 370. This completely restricted the Indian Parliament from

interfering in the affairs of the state or its Constitution. The President was given the power to determine if certain provisions should apply to the state with the required modifications.¹⁷ Finally, it was also agreed that the Article should be repealed or amended only by the President with the consent of the Constituent Assembly of J&K.¹⁸



STANCE OF VARIOUS COUNTRIES ON ABOLITION OF ARTICLE 370

The international community continues to treat the Kashmir issue as a bilateral one to be solved through dialogue between its so-called liberator *Pakistan* and the righteous protector *India*¹⁹. The United Nations Security Council has also adopted a lukewarm attitude on the Kashmir issue, expressing talks of peaceful resolution of the said dispute²⁰. This move has been backed by

leaders, ministers and envoys of countries such as Jordan, Kazakhstan, Nepal, Sweden, Malaysia, Japan, The United States of America²¹. France and the United Kingdom²² have declared the abrogation of Article 370 of the Constitution of India, 1950 and the bifurcation of Jammu & Kashmir into 2 Union Territories as a matter of worry and great concern²³. This neutral

¹⁶ Article 370(1)(b), THE CONSTITUTION OF INDIA, 1950.

¹⁷ Article 370(1)(d), THE CONSTITUTION OF INDIA, 1950.

¹⁸ Article 370(3), THE CONSTITUTION OF INDIA, 1950.

¹⁹ John Cherian, *International reaction to abrogation of Article 370: Muted response*, FRONTLINE, <https://frontline.thehindu.com/cover-story/article29382230.ece> (Last accessed: 8th August 2020).

²⁰ *ibid*

²¹ *Article 370: US urges all stakeholders to maintain peace, stability along LoC*, Aug 06, 2019, THE ECONOMIC TIMES <https://economictimes.indiatimes.com/news/politics-and->

nation/article-370-us-urges-all-stakeholders-to-maintain-peace-stability-along-loc/articleshow/70547299.cms (Last accessed: 4th August 2020).

²² *Kashmir Article 370: UK expresses concern, reiterates calm*, INDIA TODAY <https://www.indiatoday.in/india/story/kashmir-article-370-uk-expresses-concern-reiterates-calm-1578460-2019-08-08> (Last accessed: 11th August 2020).

²³ *Different Countries And Organisations Respond To Article 370 Abrogation*, SWARAJYA LIVE <https://swarajyamag.com/news-brief/live-different->

attitude is in contradiction with the diplomatic stance of Bhutan, U.A.E., Germany and even Syria, who have vocally supported India's move of disposing of the autonomy of the Kashmir region which had left it under-developed, crippled and infested with terrorists for decades. Interestingly, the eminent Leaders of countries like Bangladesh, Australia and Sri Lanka termed the whole Kashmir fiasco as one of India's "internal issues"²⁴.

Nearly 75 years ago, Nikita Khrushchev, the Secretary of the Communist Party of the Soviet Union, declared Kashmir to be an integral part of India in his visit to Srinagar (Kashmir) on December 10, 1955²⁵. Even after the dissolution of the U.S.S.R., the President of Russia, Vladimir Putin and his Government has extended support towards India's move on the abrogation of Article 370 as an "internal and domestic" issue- it understands the significance of India in its geostrategic calculations and the threat of radical Islamists worldwide.



However, Iran and Turkey have frowned upon India's unilateral move to be invalid, indirectly assuring support to the opposition of this move, i.e., Pakistan and China, who have strong ties in nearly every sector and have openly condemned this geopolitical tactic. The Contact Group on Jammu & Kashmir, a body affiliated to the Organization of Islamic Cooperation did not hesitate in

terming India's stance as illegal²⁶, though a majority of the Arab countries individually have refused to express any comments to that effect²⁷. India's arch-rival China, a permanent member of the UNSC has demanded both India and Pakistan to settle the dispute as per the U.N. Charter and Security Council resolutions on Kashmir and has offered to even mediate between the two –

[countries-and-organisations-respond-to-article-370-abrogation](#), (Last accessed: 9th August 2020).

²⁴ *Live: Different Countries And Organisations Respond To Article 370 Abrogation*, SWARAJYSTAFF, <https://swarajyamag.com/news-brief/live-different-countries-and-organisations-respond-to-article-370-abrogation>, (Last accessed: 14th August 2020).

²⁵ Rajan Kumar, *History repeats itself: Why Russia continues to support India on Kashmir issue at the UNSC*, FINANCIAL EXPRESS, <https://www.financialexpress.com/defence/history-repeats-itself-why-russia-continues-to-support-india-on-kashmir-issue-at-the-uns/1680824/>

²⁶ *OIC body rejects Art 370 move*, HINDUSTAN TIMES, <https://www.hindustantimes.com/india-news/oic-body-rejects-art-370-move/story-le4PpVB1RQPCNN4aUdZoTP.html>, (Last accessed: 8th August 2020)

²⁷ Giorgio Cafiero, *World India's actions in Kashmir and the muted response from Arab Gulf states*, TRT, <https://www.trtworld.com/opinion/india-s-actions-in-kashmir-and-the-muted-response-from-arab-gulf-states-29233>, (Last accessed: 8th August 2020).

Russia and United States have expressed their willingness to intervene and resolve this issue permanently²⁸.

Despite the inclination of developed and prosperous nations towards India, Pakistan has vowed to exercise “all possible options” to counter India’s “illegal” and “unilateral” step²⁹. Terming it unacceptable, Pakistan Muslim League-Nawaz (PML-N) president and opposition leader Shehbaz Sharif has called it an “act of treason” against the United Nations³⁰. Prime Minister Imran Khan has pressed on India’s “disregard” towards the international obligations opining that “*arrogance will only result in heightening the conflict dynamics in the region*”³¹, hinting towards a possible nuclear war due to the aforesaid dispute. Due to domestic pressure, it has cancelled trade ties, including the Samjhauta Express with India besides downgrading diplomatic relationship by sending Indian high commissioner home³². Such reckless statements of the global leader showcase the underlying fear of India seizing control over the illegally occupied Kashmir region by Pakistan, considering rising support for a re-merger with India in Gilgit –Balistan³³. Pakistan itself is known for massive human rights

violation in both Baluchistan and Sindh regions, precisely the reasons why they are demanding independence and self-autonomy in the first place - it would be expected from the Prime Minister of Pakistan to focus on internal stability rather than asserting claim on regions which legally fall within the domain of India. Where the President of United States of America terms Kashmir as an explosive and complicated situation³⁴, the envoys from the Philippines³⁵ and Vietnam³⁶ have appreciated the Indian Government for ensuring peace therein, even after the abrogation of Article 370. A similar conclusion has been obtained from the delegates of various countries³⁷ which visited Kashmir for assessing the situation therein³⁸.

As the world seems divided on this controversial issue, it is pertinent to divert attention towards the basic human rights of the people of Kashmir. The need of the hour is to secure the future of the people, and not engage in political and diplomatic concerns.

The abrogation of Article 370 which repealed the special status of Jammu and Kashmir has also raised innumerable questions on the future of human rights of the civilians living there

²⁸ N Manoharan, *Could Norway Broker Peace Between India and Pakistan?*, THE QUINT, <https://www.thequint.com/voices/opinion/india-pakistan-peace-norway>, (Last accessed: 8th August 2020).

²⁹ *Pakistan rejects India's move to scrap Article 370*, PTI Islamabad, THE HINDU BUSINESSLINE, <https://www.thehindubusinessline.com/news/pakistan-rejects-indias-move-to-scrap-article-370/article28824457.ece>, (Last accessed: 8th August 2020).

³⁰ *Id.*

³¹ *India's arrogance will blow up Kashmir conflict to regional level, claims Pak PM Imran Khan*, INDIA TODAY, <https://www.indiatoday.in/world/story/pakistan-pm-imran-khan-loc-conflict-india-nsc-meet-1577186-2019-08-04>, (Last accessed: 8th August 2020).

³² Om Parida, *Geopolitical concerns behind India's decision of bifurcation of J&K and scrapping of Article -370*, TIMES OF INDIA, <https://timesofindia.indiatimes.com/blogs/the-rock-bottom/geopolitical-concerns-behind-indias-decision-of-bifurcation-of-jk-and-scrapping-of-article-370/>, (Last accessed: 8th August 2020).

³³ *Article 370 Abrogation Is Brightest Light Of Hope For PoK, Gilgit Baltistan: Activist*, BUSINESS STANDARD, <http://www.businessworld.in/article/Article-370-abrogation-is-brightest-light-of-hope-for-PoK-Gilgit-Baltistan-Activist-/05-08-2020-305099/>, (Last accessed: 8th August 2020).

³⁴ Chidanand Rajghatta, *Kashmir situation explosive and complicated, Trump says, off erring to Mediate again*, THE TIMES OF INDIA,

<https://timesofindia.indiatimes.com/india/kashmir-situation-explosive-and-complicated-trump-says-offering-to-mediate-again/articleshow/70762845.cms>, (Last accessed: 8th August 2020).

³⁵ *News No difference between pre & post abrogation situation in Kashmir, all normal: Philippines Ambassador to India*, TIMES NOW, <https://www.timesnownews.com/india/article/no-difference-between-pre-post-abrogation-situation-in-kashmir-all-normal-philippine-ambassador-to-india/538845>, (Last accessed: 8th August 2020).

³⁶ Siddhi Gaharwar, *News Sign of happiness on people's face: Vietnamese envoy who is on J&K visit witnesses normalcy in daily lives*, TIMES NOW, <https://www.timesnownews.com/india/article/signs-of-happiness-on-people-s-face-vietnamese-envoy-who-is-on-jk-visit-witnesses-normalcy-in-daily-lives/538401>, (Last accessed: 8th August 2020).

³⁷ *Envoys from 16 nations to visit Kashmir today to assess ground situation, EU to skip trip*, INDIA TODAY, <https://www.indiatoday.in/india/story/envoys-will-visit-kashmir-today-1635154-2020-01-09>, (Last accessed: 8th August 2020).

³⁸ *2nd Batch of Foreign Envoys visit Jammu & Kashmir*, DD NEWS, <http://ddnews.gov.in/national/2nd-batch-foreign-envoys-visit-jammu-kashmir#:~:text=Second%20batch%20of%20foreign%20envoys,the%20ground%20situation%20in%20the>, (Last accessed: 8th August 2020).

ARMY AND PARAMILITARY ;VIOLATING HUMAN RIGHTS OR MAINTAINING PEACE

“Caged in conduit wires and faced with blood-stained bayonets from all sides, turned into the most militarized zone in the world, Kashmir remains: The snow that accumulates and melts and accumulates again keeps burying its history with thousands of mass graves.”



The above excerpt (distributed in JNU) came under heavy criticism when the then Union Minister Venkaiah Naidu termed such statements to be an act by the Congress and the Left to “unleash a campaign of calumny to defame the NDA government”.³⁹ However, after all these years, the question that remains is whether the said description of Kashmir can be dismissed merely as a political hyperbole or not.

HISTORICAL BACKGROUND OF DEPLOYMENT OF FORCES IN J&K- BIRTH OF INSURGENCY

Political unrest in the Valley traces back to 1982 when Farooq Abdulla came to power as a political successor

after the death of his father Sheikh Abdulla.⁴⁰ Having failed to garner any support or trust from the public he decided to ally with the Congress party in the election of 1987. It was alleged that to subvert the democratic norms, he had rigged the elections back then. The Kashmiri population saw this as an act of betrayal to the previous leaderships for petty political gains.⁴¹ This led to disillusionment and mistrust amongst the youth in the Valley which was then capitalized by the extreme nationalists to give the Kashmir sub-nationalism a religious colour.⁴²

³⁹ Opinion M Venkaiah Naidu, *Truth about JNU, Rohith Vemula: NDA govt will not permit anti-national programmes in universities*, <https://timesofindia.indiatimes.com/blogs/toi-edit-page/truth-about-jnu-rohith-vemulanda-government-will-not-permit-anti-national-programmes-in-universities/>. (Last accessed: 8th August 2020).

⁴⁰ *Mohammad Abdullah Dies; Led India's State Of Kashmir*, NY TIMES, <https://www.nytimes.com/1982/09/09/obituaries/mohammad->

[abdullah-dies-led-india-s-state-of-kashmir.html](https://www.nytimes.com/1982/09/09/obituaries/mohammad-abdullah-dies-led-india-s-state-of-kashmir.html). (Last accessed: 8th August 2020)

⁴¹ Bamzai, ‘*Culture and Political History of Kashmir*’ (Volume 3: Modern Kashmir, P.N.K. Bamzai, M D Publications Ltd, New Delhi, 1994).

⁴² Jugdep S. Chima, *Ethnic subnationalist insurgencies in contemporary South Asia- An introduction*, (Routledge Contemporary South Asia Series, 2015).

As a result of this, the Insurgency movement was born when the candidates who had unfairly lost the allegedly rigged elections took up arms against the same state machinery that had betrayed them. In July 1988, agitating youths and the people of Kashmir took to streets to protest against the Indian Government, whom they now saw as the major villain behind the rigging of such elections and *raison d'être* for the failure of democracy in the state.⁴³ This sentiment further radicalized the local ethnic elements and rapidly expanded the insurgent base, especially amongst the Kashmiri youth in the Valley.

The violence in the state went from being spasmodic to orchestrated and deliberate as the Farooq Abdullah government, which has already lost legitimacy in the eyes of many Kashmiri Muslims, employed oppressive means to suppress the insurgency. Under the leadership

of JKLF (Jammu & Kashmir Liberation Front), many protests and strikes were organized in the state. In 1990, from January 21-23, JKLF organized large scale Anti-Government assemblies and protests.⁴⁴ To curb these movements, the Indian state deployed CRPF (Central Reserve Protection Force) and BSF (Border Security Force) which were instrumental in countering the Maoist Movements.⁴⁵ This time the forces had to not only deal with armed rebels but also with the stone pelting by the common citizens of Kashmir. Thus, the deployment of CRPF and BSF was seen in the light of a very severe step taken by the State against its very own citizens. The animosity of the situation fuelled when The Armed Forces (Jammu and Kashmir) Special Powers Act was introduced in 1990 to suppress the flourishing insurgency movement in the Valley.⁴⁶



⁴³ Altaf Hussain, *Kashmir's Flawed Elections*, BBC, http://news.bbc.co.uk/2/hi/south_asia/2223364.stm.

⁴⁴ Behra, Navnita Chadha (2006). *Demystifying Kashmir*, Washington D.C: Brookings Institution Press, p. 150.

⁴⁵ *Id.*

⁴⁶ Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, No. 21, Acts of Parliament, 1990.



THE ARMED FORCES (JAMMU & KASHMIR) SPECIAL POWER ACT (AFSPA): AN ACT TO PROTECT OR SUPPRESS?

With the advent of AFSPA in 1990, Armed forces have enjoyed special powers in the valley. The Indian Armed Forces had been deployed in J&K for internal security which broadly includes Anti-terror and Counter-insurgency operations. Most of these Anti-terror operations in the Valley are led by the Army facilitated by the CRPF and Special Operations Group (of the J&K Police). AFSPA has given unrestrained power to the security forces to arrest any person without a warrant.⁴⁷ Complemented with the Public Safety Act, 1978 (“PSA”), it enables the government to detain a person up to two years without a trial.⁴⁸ According to the UN Report of UHCHR, “*AFSPA and PSA have created structures that obstruct the normal course of law, impede accountability and jeopardize the right to remedy for victims of human rights violations.*”⁴⁹

The prerogative to declare any area as disturbed and thus invite the application of AFSPA is solely left to the Central Government.⁵⁰ Additionally, according to Section 4 of the Act, any officer can arrest persons without a warrant, enter and search without warrant any premises and even stop, search and seize any vehicle subject to ‘reasonable suspicion’.⁵¹ As if these powers were not enough, the Act in Section 7 further provides that no prosecution, suit or legal proceedings shall be instituted against any person acting under the Act, without the prior sanction by the Central Government.⁵²

Therefore, the AFSPA provides overarching protection to such ‘discretionary’ acts of the members of Armed forces which provides unstipulated freedom, often misused to stifle dissent in the Valley leading to human rights violations.

⁴⁷ *What is AFSPA, and where is it in force?*, <https://www.thehindu.com/news/national/what-is-afspa-and-where-is-it-in-force/article23648102.ece>. (Last accessed: 8th August 2020).

⁴⁸ Sruthi Radhakrishnan, *Explained: The Jammu and Kashmir Public Safety Act*, <https://www.thehindu.com/news/national/explained-the-jammu-kashmir-public-safety-act/article29438694.ece> (Last accessed Aug.9 2020).

⁴⁹ *First-ever UN human rights report on Kashmir calls for international inquiry into multiple violations,*

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23198> (Last accessed Aug.9 2020)

⁵⁰ §3, Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, No. 21, Acts of Parliament, 1990.

⁵¹ §4, Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, No. 21, Acts of Parliament, 1990.

⁵² §7, Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, No. 21, Acts of Parliament, 1990.

HUMAN RIGHTS VIOLATION IN THE VALLEY

International human rights bodies restrict the jurisdiction of military tribunals to purely internal disciplinary matters of armed forces and do not stretch it to criminal matters. The Declaration on the Protection of Disappeared Persons, Working Group on Enforced or Involuntary Disappearances, and the Convention against Torture are some of the examples where it is established that any persons accused of crimes like enforced disappearances must be tried by competent ordinary courts and not by special courts, particularly military tribunals.⁵³



The Army Act, 1950 provides that ‘civil offences’ like murder or rape are to be tried by security forces if the act was committed while on active service.⁵⁴ Categorization of an area as ‘disturbed’ allows armed forces to claim that serious human rights violations (like killing, disappearance, rape) can be only tried by military courts as in these areas, forces are considered to be on ‘active service’ at all times.⁵⁵ Hence the absence of any mechanism to affix accountability and responsibility on

the members of armed forces deployed has resulted in suffocating the citizens’ right to justice. Therefore, provisions such as these run against the spirit and purpose of human rights law.

To create a climate of political repression, Indian security forces in Kashmir continue to use force as a tool to either force civilians to confess to the militant activity or reveal information about the suspected militants.⁵⁶ Tear Gas and Pellet guns are another means by which innocent civilians including minors are targeted under the garb of national security. Though it is argued that these are used as a large resort and in a way that is less-lethal, it is seen in practice that such weapons are used indiscriminately often against unsuspecting civilians. According to various reports since 2010 pellet guns have killed 24 and blinded 139 Kashmiris.⁵⁷

Besides violations of fundamental rights of the Indian constitution, the atrocities committed in Kashmir violate specific provisions of International Covenant on Civil and Political Rights (ICCPR). Article 6 of the ICCPR which expressly prohibits derogation of the right to life, even in times of emergency⁵⁸ and Articles 4 and 7 of the Covenant that bans torture of persons are grossly violated.⁵⁹ The above-stated rights are even available in cases of an emergency including the alleged threat to the security of a state.

⁵³ Declaration on the Protection of all Persons from Enforced Disappearance, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/EnforcedDisappearance.aspx>; Working Group on Enforced or Involuntary Disappearances, https://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

⁵⁴ The Army Act, 1950, <https://cvc.gov.in/sites/default/files/vm17ch7/vm17ch7/6.%20ARMY%20ACT,%201950%20.pdf>.

⁵⁵ “DENIED” Failures in accountability in Jammu and Kashmir, <https://www.amnesty.org/download/Documents/ASA2018742015ENGLISH.PDF>.

⁵⁶ *India’s Secret army in Kashmir, New Patterns of Abuse Emerge in the Conflict*, 8 Human Rights Watch, (1996). (Last accessed: 8th August 2020).

⁵⁷ Adnan Bhat, *Kashmir: Civilians severely wounded in pellet gun attacks*, Aljazeera, August 9, 2019.

⁵⁸ Art.6, International Covenant on Civil and Political Rights.

⁵⁹ Art. 4, 7, International Covenant on Civil and Political Rights.

Even though the State denies the existence of any armed conflict, many human rights groups believe that the fighting between the Indian state and militant groups in Kashmir qualifies as non-international armed conflict and thus attracts application of Article 3 of the Geneva Conventions.⁶⁰ In addition to this, Additional Protocol

II to the Conventions (applicable in case of non-international armed conflict) is also applicable which lays down minimum protections available to civilians and other groups.⁶¹ Therefore, India as a signatory to all these conventions is bound to observe the same on its land.



SITUATION POST-AUGUST, 2019

The report by the Forum for Human Rights in Jammu and Kashmir titled as ‘The Impact of the Lockdown on Human Rights in Jammu and Kashmir, August 2019-July 2020’ highlighted the trauma faced by the people in the Valley since August 4, 2019, after the abrogation of Article 370.⁶² The Forum, co-chaired by the former Supreme Court judge Justice Madan Lokur stated that around 38,000 additional troops were sent into J&K to enforce a lockdown. Under Section 144 of the Code of Criminal Procedure, any public assembly was prohibited and popular politicians were put under preventive detention.⁶³ The future of the human rights of the people in the region seems extremely grim and murky given the fact that the government is still using unfair and arbitrary measures to subdue the populace. There have been new allegations against the Central

Government for resorting to harsh counterterrorism and seditions laws to clamp down on peaceful critics.⁶⁴ The harsh Public Safety Act is still being misused to detain journalist, politicians and civilians who can’t even lawfully criticize the government.⁶⁵

Business and trade suffered a major blow because of the frequent curfews and cut off of the economy from the rest of the country (due to absence of big corporate players). Education and employment opportunities are also very limited as the majority of the times the state is prone to conflicts. Moreover, the insurgents resist the entry of education or any form of outside development. And to this day, Kashmir stays in both physical and digital lockdown.

⁶⁰ Art. 3, Geneva Convention Relative to the Treatment of Prisoners of War of 12 August, 1949.

⁶¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

⁶² *Lockdown in J&K for over 11 months led to ‘across-the-board human rights violations’, says report*, <https://scroll.in/latest/968430/lockdown-in-j-k-for-over-11-months-led-to-across-the-board-human-rights-violations-says-report>. (Last accessed: 8th August 2020).

⁶³ *Report Flags Human Rights Violations During J&K Lockdown, Seeks End to Curbs*, <https://thewire.in/rights/jammu-and-kashmir-lockdown-human-rights-violations>. (Last accessed: 8th August 2020).

⁶⁴ *Id.*

⁶⁵ *Security with Human Rights*, Amnesty International, <https://www.refworld.org/pd/4d86f6292.pdf>.



THE WAY FORWARD

The people of Kashmir have always been the victims of suffering due to the endless tussle between the Indian Government and the armed militants who have been involved in numerous acts of human rights violations. Although, a year has passed since the abrogation of Article 370, the region of Jammu & Kashmir is still virtually clamped down.⁶⁶ The security forces continue to patrol the streets of Kashmir in large numbers, the economy is in tatters and the political mainstream has been thrust aside.

There is also no doubt that the abrogation of Article 370 has had many intended as well as unintended ramifications. By abrogating Article 370, many Kashmiri's feel that they have all been categorised separatists or supporters of the separatists' movement which has led them to lose faith in the pro-establishment political class of Kashmir.⁶⁷

No clear picture can be painted as to what exactly lies in the immediate future of the region. The COVID 19 pandemic has further worsened the situation and served as a double whammy to an already fraught and volatile region. Hence outreach from the government, a measure of empathy and reopening of the channels of dialogue is crucial at this point of time. Moving forward, rebuilding trust and getting over the trust deficit between the people of Kashmir and the Government is the need of the hour. The state should embark upon bridging the years-long of conflict and the resultant rift. Repealing draconian laws such as the Public Safety Act would be a good measure and starting point for the government. Release of detainees booked under the Public Safety Act, who are still languishing in prison despite the removal of Article 370 and application of the Constitution of India over the state of Jammu and

⁶⁶Kaisar Andrabi, *A Year After 370's End, A Dangerous Silence in Kashmir*, The Diplomat, 4th August 2020, <https://thediplomat.com/2020/08/a-year-after-article-370s-end-a-dangerous-silence-in-kashmir/>, (Last accessed 8th August 2020).

⁶⁷ Ayjaz Wani, *'Life in Kashmir After Article 370'*, ORF Special Report No. 99, Observer Research Foundation, (https://www.orfonline.org/wp-content/uploads/2020/01/ORF_SpecialReport_99_Kashmir.pdf) (Last accessed: 7th August 2020).

Kashmir would be a significant measure that the central government could consider.⁶⁸

UNDOING OF THE RAMIFICATIONS AND THE IMPACT



IMPACT ON EDUCATION:

The internet shutdown in Kashmir has been the longest such shutdown in any democracy around the world.⁶⁹ For a democratic nation that touts itself as one of the most vibrant in the world, such an act exposes the hypocrisy of the State. Denying access to high-speed internet services damages the futures and careers of young students and their prospects of continuing with their education. It only serves in further alienating the youth of the region who already feel disconnected with the rest of the country.⁷⁰



For Kashmiri students and research scholars studying in various institutes, communication and internet blackout has caused great distress and worry regarding their

future.⁷¹ Thus, restoring internet services completely in Kashmir will go a long way in making life easier for the common people of Kashmir and bringing a semblance of normalcy back to the region. This is a crucial step that the government needs to take on an urgent basis would help the Kashmir valley to limp back to normalcy and will also act as a significant gesture towards the people of Kashmir.

ECONOMIC IMPACT:

Another major impact of the abrogation of Article 370 was the massive hit to the economy of Kashmir. As per data provided by the President of the Kashmir Chamber of Commerce and Industry (KCCI), the economy of Kashmir had suffered massive losses worth Rs. 17,878 crores in four months of the abrogation of Article 370.⁷² Taking cognizance of such statistics, an economic bailout package by the central government would also go a long way towards helping the economy as various business communities in Kashmir have also requested for such reliefs in the past.⁷³

⁶⁸ *Id.*

⁶⁹ Niha Masih, Shams Irfan, Joanne Slater, *India's Internet Shutdown in Kashmir is the longest ever in a democracy*, The Washington Post, https://www.washingtonpost.com/world/asia_pacific/indias-internet-shutdown-in-kashmir-is-now-the-longest-ever-in-a-democracy/2019/12/15/bb0693ea-1dfc-11ea-977a-15a6710ed6da_story.html (Last accessed: 8th August 2020).

⁷⁰ *Supra* note 1, at 9.

⁷¹ Ishfaq Majid, Shazia Kouser, Tawseef Ahmad Sheikh, *The Human Toll of Kashmir's Internet and Mobile Shutdown*, The Diplomat, <https://thediplomat.com/2019/12/the-human-toll-of-kashmirs-internet-and-mobile-shutdown/>, (Last accessed: 9th August 2020).

⁷² *Kashmir Economy suffered loss of Rs. 17,878 cr in 4 months after Article 370 Abrogation*, The Indian Express, <https://indianexpress.com/article/india/kashmir-economy-suffered-loss-four-months-after-article-370-abrogation-jk-6172096/> (Last accessed: 8th August 2020).

⁷³ *Kashmiri traders, industries seek economic package to revive businesses*, The Times of India, <https://timesofindia.indiatimes.com/india/kashmiri-traders-industries-see-economic-package-to-revive-businesses/articleshow/76180033.cms> (Last accessed: 8th August 2020).



The clampdown by the government and the threats by militants has greatly damaged the rural economy of the region. Appropriate compensation that reaches the farmers and a team on the ground to assess the damage caused should be some of the steps to be seriously considered by the central government in the roadmap of reviving the economy of Kashmir.

POLITICAL IMPACT:

Many feel that the move to abrogate Article 370 effectively eroded mainstream politics and the political discourse in Kashmir will now essentially bifurcate into either separatist wanting complete autonomy from India or politicians becoming stooges of the central government.⁷⁴ Traditionally, unionists have advocated for the political autonomy of Jammu & Kashmir within the pre-existing constitutional framework of India whereas separatists have wanted complete freedom from India.⁷⁵ The rationale behind the stance of the unionists was the special status afforded to Kashmir by Article 370 and Article 35A. With that gone, the foundation of the position taken by the unionists becomes hollow and for the first time, may see them aligning with the separatist ideology.⁷⁶ The removal of the special status of Kashmir may thus force unionist

leaders who have tended to support New Delhi to recalibrate their stance and to stand in opposition of the revocation of the special status stand alongside with separatist agenda, which will be a significant challenge to the central government as it is likely to find no mainstream credible political support, for the first time in over 70 years.⁷⁷



The removal of the special status of Jammu & Kashmir has also cleared the way for Indian citizens in other parts of India to purchase property in Kashmir, which may gradually lead to a change in the demography of the region.⁷⁸ Leaders of the RSS which is the ideological parent of the BJP have supported the dilution of the Muslim majority state.⁷⁹ It is hard to say whether a change in the demographics of the region is realistically possible at this point, but with the removal of the special status remains a possibility.

⁷⁴ *Supra* note 1

⁷⁵ Riyaz Wani, *Post Article 370 Withdrawal, What Lies Ahead for Kashmir?*, *South Asian Voices*, 19th October 2019, (<https://southasianvoices.org/the-aftermath-of-article-370-withdrawal-what-lies-ahead-for-kashmir/>), (Last accessed: 8th August 2020).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Article 35A: Why a Special Law on Kashmir is controversial*, BBC News, 5th August 2019, <https://www.bbc.com/news/world-asia-india-40897522>, Last accessed: 9th August 2020).

⁷⁹ Shamsa Nawaz, *Indian Efforts to Change the Demography of IOK.*, *Strategic Studies*, vol. 37, no. 2, 2017, pp. 40–57.

INTERLOCUTION:

While considering all possible fronts for revamping, the government must restart dialogue with the civil society and political leadership of Kashmir. The crippling silence from New Delhi only serves to heighten fears and anxiety within the common people who have already suffered immensely and had their lives

disrupted. A team of interlocutors⁸⁰ to engage in dialogue with citizens, students, farmers and understand the problems at the grass-root level would be a good step in rebuilding trust and showcase empathy from the government.



IMAGE SOURCES

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⁸⁰ *Supra* note 2 at 11.

INTERNET ACCESS AS A HUMAN RIGHT: ANALYSIS THROUGH ONE- YEAR ANNIVERSARY OF KASHMIR'S DIGITAL LOCKDOWN



INTRODUCTION

With the Internet being termed as a “fundamental utility, essential for free expression and healthy democracy”⁸¹, it has started to gain possible recognition as a basic human right in various countries across the world. In times of global pandemic such as COVID-19, the world has seen the internet to be emerging as a lifeline for people to function and sustain a livelihood. Being one of the most powerful sources of enlightenment for people across the globe, the Internet is now starting to get recognized as part of the basic infrastructure of a country.⁸² The dependency on Internet has increased manifolds in the current times, hence making it all the more essential to be recognised as

a basic human right, enabling individuals to access other rights such as the right to livelihood, right to the occupation, and right to freedom of speech and expression, etc. In this context, it becomes extremely pertinent to analyse the government imposed digital and communication lockdown in Jammu and Kashmir as we witness the first anniversary of the controversial Constitution (Application to Jammu and Kashmir) Order, 2019 which stripped Jammu and Kashmir of its special status that it had enjoyed since 1954 under Article 370 of the Indian Constitution.⁸³

⁸¹ Karl Bode, *The Case for Internet Access as Human Right*, https://www.vice.com/en_uk/article/3kxmm5/the-case-for-internet-access-as-a-human-right. (Last accessed: 8th August 2020).

⁸² *Internet access is 'a fundamental right'*, <http://news.bbc.co.uk/2/hi/technology/8548190.stm>. (Last accessed: 8th August 2020).

⁸³ Constitution (Application to Jammu and Kashmir) Order, 2019, <http://egazette.nic.in/WriteReadData/2019/210049.pdf>. (Last accessed: 8th August 2020).

OVERVIEW OF THE BAN IMPOSED

Following the imposition of Constitution (Application to Jammu and Kashmir) Order, 2019 after the revocation of Article 370 of the Constitution, the Government of India has imposed Internet blockage in the valley since August 2019. Various petitions were filed before the Supreme Court which stated that the internet shutdown was an arbitrary and unreasonable restriction towards the Fundamental rights to information, education, and free speech: protected by the Constitution.⁸⁴ Multiple rounds of litigation before the Apex Court of the country saw various arguments being advanced which emphasised that the “*Right to access the Internet is a fundamental human right under the right to education and the right to privacy under Article 21 of the Constitution. Suspension and shutdown of the Internet and communication services is an infringement of the freedom and rights guaranteed and safeguarded under Articles 19 and 21.*”⁸⁵ Hence it is argued that restricting facilities like the Internet which acts as a powerful enabler of other human rights and freedoms recognized in the Universal

Declaration of Human Rights (UDHR), such as Access to education (Art. 26 UDHR),⁸⁶ Expressing ideas (Freedom of expression, Art. 19 UDHR)⁸⁷ and Connecting and associating with others (Freedom of association and peaceful assembly, Art. 20 UDHR)⁸⁸ tend to be directly violated by such State actions.

DIRECT CONTRAVENTION OF EXERCISE OF BASIC HUMAN RIGHTS

The petitions brought against the State condemned the Internet shutdown, claiming that it had brought the functioning of the State and its people to a grinding halt. A plethora of arguments was advanced by reporters, media personnel, students, MLAs, Doctors, Healthcare staff, etc. alleging that providing a *carte blanche* to the State, allows for the imposition of broad and unreasonable restrictions on fundamental Human Rights of its citizens. As the Internet has become a platform to access other Fundamental rights conferred by the Constitution of India, deprivation of the same stands in direct violation of the Basic Human Rights.



⁸⁴ Synopsis of Petition filed in the case of Ehtesham Hashmi & Ors. v. Union of India, https://www.livelaw.in/pdf_upload/pdf_upload-367956.pdf. (Last accessed: 8th August 2020).

⁸⁵ Krishnadas Rajgopal, *Arbitrary Internet shutdowns violate fundamental rights, says plea in SC*, [https://www.thehindu.com/news/national/arbitrary-internet-](https://www.thehindu.com/news/national/arbitrary-internet-shutdowns-violate-fundamental-rights-says-plea-in-sc/article30588825.ece)

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⁸⁶ The Universal Declaration of Human Rights, <https://www.un.org/en/universal-declaration-human-rights/>

⁸⁷ *Id.*

⁸⁸ *Id.*

Multiple petitions have been brought to court, arguing that the unreasonable act of internet shutdown has brought various professions to a grinding halt. Eminent journalists too have argued that Internet being an essential feature for the modern-day press, its shutdown had made the profession of journalism come to halt as they are unable to publish newspapers since the imposition of the ban.⁸⁹

Similar petitions were brought by people with internet-based professions highlighting how in recent years, growing technology and the user-friendliness of the Internet has increased dependency upon it magnanimously. With the advent of the ‘Digital India’ initiative by the government, each sector saw a shift

towards internet dependency and the same has now smoothly ventured into the everyday lives of businesses. In the backdrop of such a changed scenario, it is pertinent to note that any restriction upon the internet can be a direct infringement of the Right to Trade and Profession of an individual.

The Digital India campaign has come crashing down in Kashmir, as several internet service providers were raided and even rounded up in Srinagar to enforce the strict clampdown. Even the mobile services and related internet facilities had been suspended. Being encapsulated in cyberspace, these restrictions on the use of the Internet had potentially brought life to a standstill by hindering basic activities.



TESTING TIMES IN CASE OF A GLOBAL PANDEMIC

The administrative authorities in Jammu and Kashmir decided to lift the ban and provide access to 2G internet services in the valley towards the end of January 2020 on the direction of the Supreme Court.⁹⁰ This move was still a Hobson’s choice and highly problematic, especially when the country was moving towards a

pandemic situation due to the COVID-19, wherein healthcare workers relied on internet services for the latest guidelines regarding the situation. Various health workers, medical practitioners, and doctors emphasized the need for 4G service to be restored in the valley as the 2G speed connectivity wasted precious time trying to download the latest advisories, manuals, protocols, and studies issued on the disease.⁹¹ In some cases,

⁸⁹ Case Analysis of *Basin v. Union of India*, <https://globalfreedomofexpression.columbia.edu/cases/bhasin-v-union-of-india/>. (Last accessed: 8th August 2020).

⁹⁰ *Social Media Ban Lifted in Kashmir After Seven Months*, <https://thewire.in/government/kashmir-internet-block-order-whitelist-social-media> (Last accessed: 8th August 2020).

⁹¹ *Foundation for Media Professionals v. Union Territory of Jammu and Kashmir*, Writ Petition (Civil) No. 10817 of 2020.

doctors even failed to access any online resources at all due to poor connectivity and speed.⁹² These factors make the situation in the State of Jammu and Kashmir further grim as the availability of such resources is of prime importance especially when the country is battling with a pandemic outbreak. On similar lines of difficulty, as the education system has also shifted to an online platform due to the pandemic, children in the

state are being denied facility to attend online classes due to the unavailability of proper Internet services.⁹³ This directly contravenes the basic human right to education as a multitude of kids are unable to continue with their education with a lack of resources in such troubled times.⁹⁴



RECOGNITION OF ACCESS TO THE INTERNET AS A BASIC HUMAN RIGHT

Methods of controlling the actions of its citizens have been highly frowned upon by the United Nations Human Rights Council. It has time and again stated the significance of recognising and observing Article 19 of UDHR by the nation which protects freedom of expression through any media. Various international human rights institutes along with the UN also discourage restrictive laws such as Internet ban and other abusive laws that target the basic human rights of its citizens.

The United Nations Human Rights Council in 2016, gave a global recognition to the Internet as being a Human right. While Article 19 of the Universal Declaration of Human Rights (UDHR) does protect freedom of expression through online mediums, bypassing a specific resolution for “promotion, protection, and enjoyment of human rights on the internet”⁹⁵ the UN aimed to condemn the action of countries that intentionally disrupt the internet access of its citizens.⁹⁶ Through the resolution, the right of those whose work relies on Internet access was also realised.⁹⁷

⁹² Naseer Ganai, *Forget 4G Internet, Not Even 2G Services In J-K; Medical Services Hit*, <https://www.outlookindia.com/website/story/india-news-forget-4g-internet-even-no-2g-mobile-services-in-j-k-medical-services-hit/352551>. (Last accessed: 8th August 2020).

⁹³ Ishfaq Majid and Shazia Kouser *As life moves online amid the pandemic, Kashmiri Education is being left behind*, June 16, 2020, <https://thediplomat.com/2020/06/as-life-moves-online-amid-the-pandemic-kashmiri-education-is-being-left-behind/>. (Last accessed: 8th August 2020).

⁹⁴ Right to Education, UNESCO <https://en.unesco.org/themes/right-to-education>

⁹⁵ Universal Declaration of Human Rights, https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

⁹⁶ Emma Boyle, *UN Declares Online Freedom to be a Human Right That Must be Protected*, <https://www.independent.co.uk/life-style/gadgets-and-tech/un-declares-online-freedom-to-be-a-human-right-that-must-be-protected-a7120186.html>. (Last accessed: 8th August 2020).

⁹⁷ UNHRC: *Significant resolution reaffirming human rights online adopted*, <https://www.article19.org/resources/unhrc-significant-resolution-reaffirming-human-rights-online-adopted/>. (Last accessed: 8th August 2020).

While the Apex Court in India maintained silence on whether the right to access the internet is a fundamental right, it upheld that the rights under Art. 19(1)(a) and Art. 19(1)(g) using the medium of the internet are constitutionally protected. , However, it is pertinent to highlight that the UNHRC Resolution has been previously observed by various Courts in India. For instance, in September 2019, the Kerala High court while deciding in the case of *Faheema Shirin R.K. v. State of Kerala*⁹⁸ held the Right to Access the Internet to be a facet of Fundamental Human Right by relying on the same resolution of Human Rights Council. With the lower courts taking a step forward in recognising the right to access the internet as a fundamental right, there is a need for the Supreme Court to concretise the same.

CONCLUSION

While it can be argued that UN resolution stands as a 'soft law' hence lacking enforcement mechanism in countries all over the world, it is important to note that international conventions and norms are to be read into the fundamental rights guaranteed in the Constitution of India in the absence of enacted domestic law occupying the fields when there is no inconsistency between them.⁹⁹, Article 19 of UDHR too, clearly makes a case for an interpretation that recognises Internet as a Human Right by a borrowed interpretation of the UN resolution in this regard. It is time that India recognises the increased importance of the Internet and its access as an important aspect of sustenance especially in changing times as such and refrains from depriving its citizens of such basic human entitlements.

⁹⁸ AIR 2020 Ker 35.

⁹⁹ Vishakha v. State of Rajasthan, AIR 1997 SC 3011.

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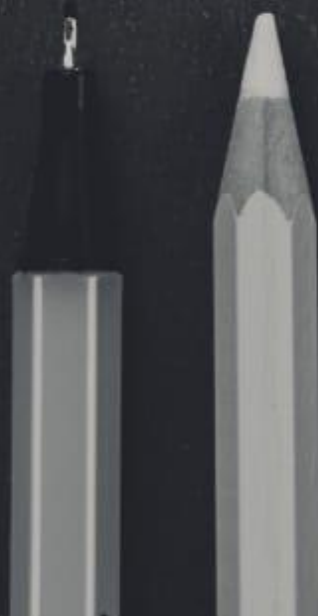
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