



Managing the risks of inclusion and participation: Kashmir, India as a case study

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‘Kashmir’ refers to all the regions of the erstwhile princely state of Jammu and Kashmir (pre-partition of the subcontinent). This is also the definition of Kashmir under international law and in United Nations resolution. All the regions in the erstwhile princely state remain the subject of dispute. A Line of Control – a de facto ceasefire line – divides these territories into India-administered Kashmir and Pakistan-administered Kashmir. India-administered Kashmir comprises three regions: Jammu, the Kashmir Valley and Ladakh. Pakistan-administered Kashmir consists of two regions: Azad Jammu and Kashmir, and Gilgit-Baltistan. These distinct regions are administered by India and Pakistan respectively through specifically devised sub-state constitutions.

Key moments for peace and constitution building in Kashmir

Kashmir is a complex and layered conflict with inter-connected geopolitical (territorial claims by India, Pakistan and China) as well as internal dimensions (competing positions among Kashmiris favouring self-determination, autonomy/devolved sovereignty, or greater integration with India/Pakistan). These complexities are also reflected in the relationship of peace to constitution building in Kashmir. In Kashmir’s history, constitutions have been both the site of strident (even violent) contestation as well as tools for negotiation and compromise among seemingly irreconcilable positions.

I will illustrate this with three key moments spanning the 72-year conflict: the promulgation of the Jammu and Kashmir Constitution in 1956 in India-administered Kashmir; the abolition of state subject rule in Gilgit-Baltistan in Pakistan-administered Kashmir in 1974; and the abrogation of Article 370 of the Indian Constitution in 2019. These examples will also serve to contextualise my responses to later questions regarding inclusion and public participation.

1. Jammu and Kashmir Constitution of 1956: In 1956, following the conditional accession of Jammu and Kashmir to India, a constituent assembly promulgated a special sub-state Constitution for Jammu and Kashmir. The overarching relationship between the Jammu and Kashmir state and India had been incorporated into Article 370 of the new Indian Constitution in 1950, which granted a special status and autonomy to Jammu and Kashmir including the right to its own flag, Parliament and constitution. Kashmir had the right to legislate on all matters except defence, foreign affairs and communications, which were the preserve of India. The sub-state constitution was created under the wider rubric of Article 370.

Right from its inception, this sub-state constitution has played contradictory roles in conflict resolution. On the one hand, it came to represent a particular position in the conflict which favoured integration with India. Indeed its preamble states, ‘*We, the people of the state of Jammu and*

Kashmir, having solemnly resolved, in pursuance of the accession of this State to India which took place on the twenty sixth day of October, 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof. Over seven decades of conflict, India carried out a series of constitutional changes that eroded the autonomy initially guaranteed to Kashmir as a condition of its accession. Kashmiri parties who support total independence or union with Pakistan have contested the legitimacy of this Constitution, arguing that the accession to India was illegal or done under duress and against the aspirations of the Kashmiri people and that without implementing a plebiscite mandated by United Nations Security Council resolutions, these constitutional changes are a violation of international law.

On the other hand, as the ultimate resolution of Kashmir as a territorial issue between India and Pakistan remained elusive, sub-state constitutions on both sides of Kashmir also became practical ways of providing some measure of autonomy within the existing constitutional settings in both countries. Pakistan has allowed similar constitutional arrangements for the territories under its administration, eg the Azad Jammu Kashmir Interim Constitutional Act 1974. In this way, sub-state constitutions have been described as mechanisms to address Kashmiri aspirations, albeit in limited ways, pending the final resolution of the conflict or the achievement of full independence or statehood.

2. ***Abolition of state subject rule in Gilgit-Baltistan:*** In 1974, the Pakistani government unilaterally revoked the State Subject Rule in Gilgit-Baltistan. State Subject Rule, which protected indigenous residence, land and property rights in the pre-independence princely state of Kashmir, had been subsequently enshrined in sub-state constitutions on both sides. Gilgit-Baltistan, however, was treated as a frontier region directly administered by Pakistan through ad hoc arrangements and did not have its own constitution. The federal authority in Pakistan abolished the special status of the people of Gilgit-Baltistan, which has to some degree altered the demographic composition in the region through the settlement and acquisition of property by outsiders from Pakistan. This was done without consulting or securing the consent of the local population. This was an early indicator of a central aspect of Pakistani policy on Kashmir: to separate Gilgit-Baltistan from the other region of Azad Jammu and Kashmir and to ultimately effect the de facto integration of Gilgit-Baltistan into the federal structure of Pakistan. The move to integrate Gilgit-Baltistan has evolved partly in response to local demands for greater constitutional protections and rights as a full-fledged province of Pakistan (even while they want to protect indigenous land rights) and a desire to avoid being held hostage to the Kashmir conflict (Kashmiri leaders opposed any constitutional changes fearing this would compromise the overall disputed nature of Kashmir and dampen prospects for resolution).

The policy also relates to geopolitical factors, especially Pakistan's alliance with China. While Chinese investments in infrastructure and other projects in Gilgit-Baltistan were considerable in 1974, this has come into even sharper focus in recent years with the construction of the China Pakistan Economic Corridor (part of the One Belt One Road initiative) through Gilgit-Baltistan. India has similarly sought to insulate Ladakh (the region bordering China) from politics in the rest of Jammu and Kashmir through empowering local institutions in Ladakh and more recently through a formal constitutional split of Ladakh as a separate union territory, directly ruled by the central government. Like in Gilgit-Baltistan, significant local constituencies in Ladakh favoured union territory status and a separation from the rest of Kashmir, while wanting to retain indigenous rights and protections in relation to land, property and the preservation of fragile ecosystems.

3. ***Abrogation of Article 370 of the Indian Constitution:*** On 5 August 2019, the Indian government undertook one of the most significant amendments to the Indian Constitution and abrogated Article 370, which enshrined the special status of Kashmir and its relationship with the Indian union. It simultaneously converted the Jammu and Kashmir state into two separate union territories of Jammu and Kashmir and Ladakh respectively. Union territories enjoy significantly less autonomy than states in the Indian federal set up. This move will enable a greater degree of central control over governance and resources in these regions. The Indian government has relied on legal loopholes to avoid the constitutionally mandated consultation with the Jammu and Kashmir legislative assembly and government. They pre-emptively detained all top and second rung leaders in Kashmir, including pro-India politicians who had hitherto relied on special status provisions to make an argument for achieving Kashmiri aspirations within the framework of the Indian constitution. The Indian government also flew in around 150,000 additional para-military troops and imposed a communications blockade in anticipation of opposition to the move.

While the move was made through an overwhelming parliamentary majority and enjoyed widespread public support across India, the substance of the changes and the manner in which they were brought about have been deeply opposed by Kashmiris, particularly in the Valley and Pakistan-administered Kashmir (although some parts of the local populations in Jammu and Ladakh have supported it). In some ways, this move was a culmination of an integrationist Indian agenda from independence onwards. However, the magnitude of the change, suddenly brought about, without taking any Kashmiri leader into confidence, has brought the entrenched positions of all the parties to the conflict into sharp focus. It has also hardened internal regional and communal divisions across various populations within Kashmir.

There are several legal challenges to the move pending in the Indian Supreme Court. The political and security impacts (including on the militancy landscape within Kashmir) are likely to be significant but their precise nature will become clear in the coming months.

Inclusion in peace and constitution building

The inclusion of the nearly 22 million Kashmiris (across the different regions of Kashmir and among the diaspora populations) remains a key challenge to conflict resolution processes. Kashmiri voices tend to be overwhelmed by the territorial contestations of three powerful nuclear states: India, Pakistan and China. Following the India-Pakistan war of 1971, both leaders signed the Simla Agreement, promising to treat Kashmir as a purely bilateral issue between the two countries. India has on that basis argued against any international intervention or mediation on Kashmir. As a result, the architecture of negotiations on Kashmir has no formal mechanisms to include Kashmiri leaders or international actors. Diversity of identities and political aspirations across the various regions of Kashmir has posed a further challenge to the question of which Kashmiris to include and how.

The constitutional arrangements on both sides of Kashmir have provided some space for Kashmiris to participate in decisions about governance, their future status and relationship with the central authorities in India and Pakistan. However, these have been taken up primarily by Kashmiri parties who have reconciled with remaining within the ambit of the Indian and Pakistani federal systems respectively. The inception of the Jammu and Kashmir Constitution in 1956 (see above) is an example of how sub-state constitutions became embedded in a wider integration agenda, restricting its potential for inclusion of groups opposed to integration. Therefore the participation of pro-independence Kashmiri groups in these constitutional arrangements and governance systems has remained limited, that is, constitutions have not facilitated an effective dialogue or negotiation

between diametrically opposed positions in the conflict (independence versus integration). Rather, ad hoc and largely secret talks with Kashmiri separatists (and on one occasion, militant groups) have been the norm during periods of productive India-Pakistan negotiations.

The abrogation of Article 370 of the Indian constitution (see above), however, illustrates the danger of totally bypassing constitutional mechanisms (however limited they may be) which provide for consulting and securing the consent of Kashmiris themselves in respect of questions that relate to their autonomy and governance. The total absence of inclusion, in its starkest form, has exacerbated the risks of enhanced violence in Kashmir and war between India and Pakistan.

Public participation: opportunities and outcomes

Opportunities for public participation in a peace process on Kashmir have been limited and mostly occurred during productive spells in India-Pakistan negotiations. For example, from 2004-2008, India-Pakistan talks were picking up speed and a special back channel was appointed by the two Prime Ministers to hash out an agreement on Kashmir. This was accompanied by mechanisms to elicit the participation of Kashmiris such as the Prime Minister's Working Groups endorsed by a series of Roundtable Conferences convened by Indian Prime Minister Manmohan Singh. Participants in these roundtables extended to bureaucrats, political leaders from all sides, and civil society drawn from all the regions of Kashmir under India's administration. The working groups were tasked with developing concrete proposals for a 'new Jammu and Kashmir' on a range of topics, including confidence building measures such as trade and travel across the Line of Control, good governance, balanced economic development and human rights and minority protections in the state. Simultaneously, President Musharraf undertook extensive interactions with civil society and political groups in both Pakistan and India to secure their support for his peace initiative and create a conducive environment for confidence building.

In 2010, the Indian government appointed a panel of three interlocutors (all prominent figures in civil society) to undertake wide ranging consultations with stakeholders across the three regions of Kashmir. They produced a report *A New Compact with the People of Jammu and Kashmir*. The report was based on interactions with more than 700 delegations, three round-table conferences representing political parties at the State and local levels, civil society groups, student bodies, academics, associations of lawyers, journalists and businessmen, trade unions, religious establishments, community organisations of specific ethnic groups and people uprooted from their homes due to war or endemic violence, local council members, the heads of the police, the paramilitary forces and the Army. Several thousand ordinary citizens also turned up at three mass meetings they attended to express their views on a wide range of issues. They also met militants and stone-pelters in jails, and the families of the victims of alleged human rights abuses. Unfortunately, the report of the interlocutors was not taken up by the Indian government owing to domestic political factors, but it did temporarily generate hope of forward movement among Kashmiris.

These instances of public participation in parallel to (or outside of) constitutional arrangements are hugely important given the limits of constitutional arrangements in securing broad based participation. Greater public participation has coincided with lower levels of violence on the ground since it creates a sense of optimism about resolving the conflict.

A referendum or plebiscite to allow Kashmiris the right to determine their status (independence or integration with India/Pakistan) has been a consistent demand of pro-independence and pro-Pakistan groups from the early days of the conflict. This would allow a degree of public participation on a core political issue at the heart of the conflict. However, critics of a referendum have argued

that it is (a) not feasible since India opposes it in principle and Pakistan would likely oppose a referendum with a third option for complete independence; (b) internal divisions within Kashmir would be further sharpened by a referendum and potentially lead to violent conflict in implementing its outcomes; and (c) a referendum in the absence of a geopolitical compact involving at the minimum, India, Pakistan and China, would only open up the region to greater risks of war. These remain hypothetical scenarios since the parties have never come close to agreeing to hold an independent referendum across the regions of Kashmir but raise useful questions in relation to the risks of certain forms of public participation in a complex conflict in a contentious geopolitical environment.

Lessons from Kashmir's experience relevant to other countries and regions engaged in constitution building in a (geo)politically sensitive context

While recognising the difficulty in comparing vastly different conflicts, I offer three lessons from the Kashmir case that might be useful in other contexts grappling with similar issues.

1. For post-colonial states anxious to establish their sovereignty and territorial integrity, it would be useful to give careful thought to how constitutional mechanisms can be used creatively to manage sub-state identity-based conflict. The Kashmir case illustrates that it is possible to do this without compromising on fundamental territorial interests. It is also important to build a strong political narrative with the majority populations (and not just the minority populations that are part of the sub-state arrangements) in such countries that recognises the value of sub-state constitutions or other forms of devolved sovereignty.
2. For radical groups in marginalised populations who bear the brunt of violent conflict, it is often useful for leaders to think strategically about how they can engage with constitutional mechanisms even while critiquing them for legitimising the status quo. In the Kashmir context, leaders with opposing political positions on the ultimate status of Kashmir might have benefited from a deeper dialogue on constitutional issues since this might have created avenues for unifying or strengthening their collective bargaining position vis-à-vis the big powers they were up against.

For peacebuilding and constitutional practitioners, it is crucial to recognise the limits of constitutional mechanisms which are often contested spaces in themselves and therefore exclude important stakeholders in the conflict. They should pay greater attention to the design of alternative processes to secure the inclusion of key stakeholders in the conflict and mechanisms to broaden public participation, being mindful of the domestic political and geopolitical constraints on some of these options. These mechanisms could range from official initiatives, to semi-official committees or groups, to purely civil-society led programs that can feed into official policy and the public discourse on contentious issues.

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