

ARTICLE 370: A CRITICAL ANALYSIS

By Aditya Jain¹

Article 370 is arguably the most contentious provision of the constitution of India. It deals exclusively with the Jammu and Kashmir State that came under the administrative control of the Government of India after the country's 15-month war that Pakistan started in 1947 to seize sovereignty over the state. Besieged by the controversy right from its draft stage, Article 370 has been the subject of heated debate ever since the Constitution came into full effect from 26th January 1950. While one section of the Indian polity has strongly demanded its abrogation, some others have vehemently opposed this demand; in 1999, Farooq Abdullah, the State's then Chief Minister, even threatened a revolt if the Article were revoked.

- On 26th January 1950, the constitution of India came into force with a unique provision- Article 370. The special status accorded to the state of Jammu and Kashmir in the article meant that its people lived under a different set of laws while being part of the Indian Union. Maharaja Hari Singh signed the accession papers on October 26, 1947 under which the state acceded to India.
- The accession of Jammu and Kashmir was carried out on the same pattern other states acceded to it. But as a result of the misfortune of the country, Jawahar Lal Nehru pressurized the Maharaja for handing over power to Sheikh Abdullah. On request of Sheikh Abdulla it was decided that the State Assembly will take the final decision on the accession and it was done to appease the Muslim society in Kashmir. From here the state was given the special status.
- The question arose as to what should be till the assembly took the final decision? For this period Article 370 was incorporated in the Constitution as a temporary measure. But even when the State Assembly ratified the State's accession to India, the Article was not scrapped. With the blindfold of political interest we lent permanency to the temporary character of the article making our position not only ridiculous before the world but also provided a golden opportunity and solid base for separatist-oriented terrorism to grow in Kashmir.
- This special status delinks the state from rest of the country. It is because of this Article that the Government of India cannot enforce any law connected with Jammu and Kashmir without the approval or concurrence of the State Government. Only defense, external affairs and communications fall in the central list.² Against this the Parliament has the powers to frame laws for rest of the states in the country. But Article 370 of the Constitution restricts the hands of the Union Government and the Parliament in

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² Tavleen Singh, *Kashmir: A Tragedy of Errors*, New Delhi 1995, p.240

doing this in case of Jammu and Kashmir.

- Its dangerous consequences have been witnessed in recent years when the law prohibiting misuse of religious places could not be extended to Jammu and Kashmir with the result the state does not come within the ambit of secularism. It won't be an exaggeration if it is called constitutionally recognized separatism. On the basis of this "special status" people of Kashmir, Pakistani rulers and diplomats and intellectuals in the world raise a volley of questions in front of the Government of India. Is accession of Jammu and Kashmir complete like other states? If the accession is complete, why then the special appeasement.

INTRODUCTION

EVOLUTION/ HISTORICAL BACKGROUND

Article 370 deals exclusively with Jammu & Kashmir State that came under the administrative control of the Government of India after the country's 15-month war that Pakistan started in 1947 to seize sovereignty and is arguably the most controversial provision of the Constitution of India.

- The origin of Article 370 can be traced back to British Raj in India. Prior to the partition of 1947, India was divided in two different sets of geographical regions: provinces which constituted 60% of the land area of the sub-continent known as British India and princely states which constituted the rest 40% of British India.
- The 562 such princely states were ruled by the Princes, Maharajas, Nawabs, Rajas and so on and ranged in size and population. They contributed 100 million of the subcontinent's total population of 400 million inhabitants at the time of independence. British looked after the defence, foreign policy and communications of these states.
- But the states were not directly ruled by the British and were allowed governance in internal matters such as law and order, civil liberties, health, education and economic development in return for which they each acknowledged British 'paramountcy' through individual treaties. The British gave an Indian State and its ruler protection against neighbors and usurpers by stationing company troops in its capital under the control of a British Resident.
- Their citizens were not British subjects, like the other Indians, but 'British protected persons'. The troops were, of course, very much a two-wedged weapon: while they were protecting the prince, they were also keeping him in check, a privilege for which he was expected to pay. The case of Jammu & Kashmir was

very telling in this context.³

- The British transferred the State forever to Maharaja Gulab Singh under Treaty of Amritsar, for 75 lakhs in 1846, and fixed a nominal annual payment to protect his territories from external enemies.
- In February, 1947, Government announced that independence would be given to British India, the plan was to create two independent dominions of India and Pakistan based on the Hindu and Muslim majority areas of the various provinces that constituted British India. The policy was announced by the British Government's with regard to Indian states.
- Political arrangements between the States on the one side and the British Crown and British India on the other were to be brought to an end under that policy. The rights surrendered by the States would revert to the States when the partition of India and Pakistan were created. The communal basis of division of British India would not affect the States at all thus, with the withdrawal of power, the princely States would become 'independent'.
- Neither the British Government nor the cabinet mission made any suggestion regarding the future of the princely States except that they would become legally independent. The prospect of all 562 Indian States exercising their independence came under chaos over the dominions of India and Pakistan since both competed to absorb these states. V. P. Menon proposed that the princely rulers should be persuaded to hand over just three functions of their States to the central government of India: defence, external relations and communications, the same functions which had been always exercised by the British government.
- There was an agreement between J&K with Pakistan and India that both will not attack J&K. While India kept its word and refrained from attacking, J&K chose to remain independent when India and Pakistan gained their independence on 15th and 14th August 1947, respectively. In spring, internal revolt begins in the Poonch region against oppressive taxation under the recently imposed direct rule by the Maharaja; In August, Maharaja's forces fire upon demonstrations in favour of Kashmir joining Pakistan, burn whole villages and massacre innocent people; The people of Poonch evacuate their families and at least 60,000 refugees fleeing to Jammu by 13 September. The rebellion spreads to adjacent Mirpur and Muzaffarabad. The Poonch rebels declare an independent government of "Azad" Kashmir on 24 October.
- Pakistan attacked Kashmir on 6th October 1947 by "Azad Kashmir Forces" supported by Pakistan. To save J&K, the then ruler of J&K Maharaja Hari Singh chose to accede J&K to India.
- 1947: The Maharaja of the State of Jammu and Kashmir signs the Instrument of Accession (IOA) on 26 October, acceding the 75% majority Muslim region to the Indian Union, following invasion by the tribesmen from Pakistan, according to the 1948 Indian White Paper; India accepts the accession, regarding

³ Prem Nath Bazaz, *Struggle for Freedom in Kashmir*, New Delhi 1954, pp.140-160

it provisional until such time as the will of the people can be ascertained by a plebiscite, since Kashmir was recognized as a disputed territory. The instrument of accession was signed by the ruler of Jammu and Kashmir whereby only Defence, Communications and External Affairs were surrendered by the State to the Dominion of India.

- In October 1947, the then prime minister of India Pt. Jawahar Lal Nehru made certain commitments and in consideration of those the accession was made by the ruler in favors of India. Article 370 was then incorporated in the Constitution in the pursuance of those commitments. Article 370 gave J&K a greater measure of autonomy as compared to other states and the power of the Union of India is restricted in the state. The Indian Parliament would need the state government's concurrence for applying all other laws.
- 1947-1952: Sheikh Abdullah drifts from a position of endorsing accession to India in 1947 to insisting on the self-determination of Kashmiris in 1952. In July 1952, he signs Delhi Agreement with the Central government on Centre-State relationships, providing for autonomy of the State within India and of regions within the State; Article 370 is confirmed and the State is allowed to have its own flag. The domination of Kashmir Valley (which has a 95% Muslim majority and accounts for more than 50% of the total population of Indian J&K) and Abdullah's land reforms create discontent in Jammu and Ladakh; An agitation is launched in the Hindu-majority Jammu region against the Delhi Agreement and in favour of full accession with the Indian Union; the movement is withdrawn later, due to pressure from the Center; Secessionist sentiments in the Valley and communalism in Jammu feed each other.

How was it Introduced?

In 1949, the then Prime Minister Jawaharlal Nehru had directed Kashmiri leader Sheikh Abdullah to consult Dr. B. R. Ambedkar, then law minister, to prepare the draft of a suitable article to be included in the Constitution for inclusion of J&K. Dr BR Ambedkar, the principal drafter of the Indian Constitution, had refused to draft Article 370 as he felt it propels discrimination. Nehru thus directed Sheikh Abdullah to Ayyangar, a minister without portfolio, who drove the inclusion of Article 370 to completion. It is believed that Dr. B. R. Ambedkar and Sardar Vallabh Bhai Patel were not kept in loop during the formation of this Article.

LEGAL ANALYSIS

ARTICLE 370 OF THE CONSTITUTION

Article 370 consists of three clauses out of which clause (1) of Article 370 consists of four sub-clauses from (a) to (d) words 'Notwithstanding anything in this Constitution' indicate that Article 370 has been given overriding effect. It applies without having to depend on any other provision of the Constitution of India for its enforceability. This prelude has been rarely used in the rest of the Constitution of India.

Article 370 (1) (a)

Article 370 (1) (a) says that the provisions of **Article 238** shall not apply in relation to the State of Jammu and Kashmir. Article 238 which applied with certain minor exceptions, the Constitution of the provinces to the States in part B of the First Schedule was not made applicable to the State of Jammu and Kashmir though the State of Jammu and Kashmir was also labeled as part B State under the Constitution of India as promulgated in 1950. Part VII was included in the Constitution of India, which contained only one article, i.e., Article 238 which provided internal Constitution of all Part B States. The provisions of Part VII of the Constitution provided that Part VI of the Constitution, which contained provisions for Part A States, corresponding to Governor's provinces, would also apply to the Part B States, subject to certain modification and exceptions. But the State of Jammu and Kashmir was exempted from the application of Part VII of the Constitution as unlike other Indian States, the State of Jammu and Kashmir refused to accept the application of the Indian Constitution in its entirety. Moreover, having regard to the circumstances in which State acceded to India, Government of India declared that it was the people of the State of Jammu and Kashmir acting through their Constituent Assembly who could determine the Constitution of the State as well as the sphere of the Union jurisdiction over the State.

Article 370 Clause (1) (b)

The essence of clauses (1) (b) (i) and (1) (b) (ii) combined is that laws of Parliament on matters in the Union List and the Concurrent List can be made for Jammu and Kashmir State only after 'consultation' with the State Government or after 'concurrence' of the State government depending on the subject matter of the law.

Clause (1) (b) of Article 370 refers to the legislative authority of Parliament over the State of Jammu and Kashmir. According to clause (1) (b) (i), Parliament has power to make laws on those matters in the Union list and the Concurrent list which correspond to matters already surrendered by Instrument of Accession. The elaboration of these subjects in terms of the entries in the two Lists is to be done by the President by Order in consultation with the State Government. The Instrument of accession (which was signed by Maharaja Hari Singh) on under para 3 laid down that the Dominion Legislature may make laws for the State only in those matters which are specified in the Schedule appended to the Instrument.⁷⁰ In the Schedule, three major heads have been mentioned, viz., defence, foreign affairs and communications. Each of these broad heads has a number of items which were also

listed in the Schedule.

Besides the three major heads, a number of ancillary matters have also been mentioned in the schedule appended to the Instrument of Accession. It was necessary to identify those items in the Union and Concurrent List which correspond to matters mentioned in Schedule appended to the Instrument of Accession and this task was left to the President to be performed by him in consultation with the State Government.

Clause (1) (b) (ii) of Article 370 provides that subjects, which are mentioned in Union list and concurrent list of the seventh schedule to the Constitution of Indian but which are not mentioned in the Schedule appended to Instrument of Accession, can be brought within the purview of Parliament only with the concurrence of the Government of Jammu and Kashmir which the President may by order specify. This provided for subsequent enlargement of the Union power if this were deemed necessary in the interest of the union or state.

Explanation: For the purpose of this article the government of the state means the person for the time being recognized by the president on the recommendation of the legislative assembly of the state as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the council of ministers for the state for the time being

Article 370 Clause (1) (c)

Clause (1) (C) of Article 370 merely says that only articles of the Constitution of India, which apply of their own force to the State of, are Articles 1 and 370. This means to make the provisions of these two articles applicable to the State neither presidential Order is necessary nor any consultation with the State Government necessary. Article 1 defines the territory of India. Sub-clause (2) of Article 1 adds that the States shall be as pacified in the First Schedule. The first schedule mentions the State of Jammu and Kashmir. Thus the State of Jammu and Kashmir is part of territory of India. But it is Article 370 which makes Articles 1 applicable to Jammu and Kashmir State. This is not without legal significance and consequence.

Article 370 Clause (1) (d)

Clause (1) (d) of Article 370 and the two proviso appended thereto refer to other provisions of the Constitution. Whereas clause (1) (b) of Article 370 refers to the extent of legislative powers of the Union parliament over the State of Jammu and Kashmir, clause (1) (d) of Article 370 refers to such other provisions of the Constitution other than the legislative powers. Article 370 (1) (d) lays down that such of the other provisions of the Constitution of India can be applied to the State, subject to such exceptions and modifications, as the President may by order specify. Such an order may be issued by the president of India subject to the following conditions:

(1) Where the order related to matters specified in the Instrument of Accession, consultation with the Government of Jammu and Kashmir is necessary;

(2) Where the order relates to matters not specified in the Instrument of Accession, concurrence of the State Government is necessary.

Thus, the President under Article 370 (1) (d) is empowered to apply such other provisions of the Constitution, with the consultation or concurrence of the State Government as the case may be, to the State of Jammu and Kashmir and subject to such 'exceptions' and 'modifications' as he may by Order specify. The meaning of the expression 'exception' implies that than President could provide that a particular provision of the Constitution would not apply in relation to the State of Jammu and Kashmir.⁸⁰ Thus, the President had been given power not to apply a particular provision of the Constitution altogether in that State.

Article 370 Clause (2)

Clause (2) of Article 370 provides that if the Government of Jammu and Kashmir gives its concurrence for the enlargement of the powers of the Union Parliament on matters which are not covered by schedule attached to Instrument of Accession or for an application of those provisions of the Constitution of India which do not correspond to the matters specified in Schedule attached to Instrument of Accession before the convening of the State Constituent Assembly, it should be placed before such Assembly for such decision as it may take thereon.

While the Jammu and Kashmir Constituent Assembly was on the anvil, there was only an Interim Government functioning in the State. Hence, it was a justified stipulation of this clause that concurrence given by the interim government was required to be placed before that Assembly for decision after that Assembly had been convened. Thus, in effect the power to extend the scope of the Union power or otherwise change the basis of relationship of Kashmir with India was vested in the Constituent Assembly of the State. The arrangement made under Article 370 was to continue until the Constituent Assembly of the State made a decision to the contrary. The framers of the Constitution presumed that the temporary provisions envisaged by Article 370 would last only for a relatively short duration and their operation would hardly extend beyond the time the Constituent Assembly of the State would take to draft the Constitution of the State.⁹⁴ In 1957, Constitution Assembly of the State was dissolved. Thus, Article 370(2) has exhausted itself.⁴

Article 370 Clause (3)

⁴ Balraj Puri, *Kashmir: Towards Insurgency*, New Delhi 1993, p.19

Clause (3) provides that with the prior recommendations of the Constituent Assembly of Jammu and Kashmir, the President may, by public notification declare that this Article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify. Since the Constituent Assembly of the State exists no more, Article 370(3) is no longer operative. Therefore, if any modification is to be made to Article 370 resource will have to be had to Article 368 regarding amendment of the Constitution.

The first Para of clause (3) of Article 370 permits a mere executive notification to cease the operation of an Article of the Constitution or to restrict its operation in the country. Clause (3) of Article 370 is thus a revolutionary provision in a parliamentary democracy.⁵

The courts have held that Article 370 can still be used to make orders there under despite the fact that the State's Constituent Assembly has ceased to exist. It was found that since the Assembly had made no recommendation that Article 370 be abrogated, it should be held to be continuing in force because the situation that existed when this article was incorporated in the Constitution had not materially altered, and the purpose of introducing this Article was to empower the President to exercise his discretion in apply the Indian Constitution while that situation remained unchanged.⁶

The important provisions of the Constitution of Jammu and Kashmir can be summarized as follows:

Current Legal Framework of Article 370

Since the Constituent Assembly on July 14, 1954 decided that the Article 370, which was temporary in nature, shall remain in force and therefore it became permanent feature of the Indian Constitution. It became un-amendable after the Constituent Assembly ceased to exist after 1957. Presidential orders and parliamentary amendments have been made to the Article from time to time in concurrence with the J&K State Assembly.

Special Relationship of J&K with the Indian Union:

- (i) J&K have its own Constitution framed by a special Constituent Assembly set up by the State.
- (ii) Parliament cannot make any law without the consent of the State Legislature relating to:
 - (a) Alteration of name and territories of the State.
 - (b) International treaty/agreement affecting the disposition of any part of the territory of the State.
- (iii) The residuary power in respect of J&K rests with the State Government and not with the Union

⁵ Prem Nath Bazaz, *Democracy through Intimidation and Terror*, New Delhi: Heritage Publishers, 1978, p.15

⁶ Alastair Lamb, *Kashmir A Disputed Legacy 1846-1990*, Roxford 1991, pp.227-231

Government.

- (iv) The Fifth Schedule pertaining to the administration and control of Scheduled Areas and Scheduled Tribes and the Sixth Schedule pertaining to the administration of Tribal Areas are not applicable to the State of J&K.
- (v) The provisions of the Indian Constitution regarding denial of citizenship to person who migrated to Pakistan do not apply to Permanent residents of J&K who after having migrated to the territory, now included in Pakistan, return to the territory of that State or permanent return issue by or under the authority of any law made by the Legislature of that State and even such person shall be deemed to be a citizen of India.
- (vi) Certain special rights have been granted to the permanent residents of the State of J&K with regard to employment under the State; acquisition of immovable property in the State; settlement of the State etc.
- (vii) No proclamation of emergency made by the President under Article 352 on the ground of armed rebellion shall have effect on the State of J&K without the State Government's concurrence.
- (viii) The Union has no power to suspend the Constitution of the State on the ground of failure to comply with the direction given by the Union. In the event of the breakdown of the Constitutional machinery in the State, Governor's Rule is to be imposed. However, in 1964, Articles 356 and 357 was extended to that State in the event of a breakdown of Constitutional machinery to take over the administration of that State.
- (ix) The Parliament was also provided the power to legislate for the State during emergency under Article 356. The first occasion when President's Rule under Article 356 was imposed in J&K was in 1986 to follow Governor's Rule. The Union has no power to make a proclamation of financial emergency in the State.
- (x) The provisions of Part IV relating to the Directive Principle of State Policy do not apply to J&K.
- (xi) No amendment of the Constitution of India can extend to J&K unless it is so extended by the order of the President under Article 370 (1).
- (xii) The High Court of J&K enjoys very limited powers. It cannot declare any law unconstitutional or issue writs, except for the enforcement of the Fundamental Right. J&K would continue to be governed by Article 370 of the Constitution of India.
- (xiii) The residuary powers of legislation shall remain with the State. However, Parliament will continue to have power to make laws relating to the prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India
- (xiv) Parliament can take action in the event of insult to the Indian National Flag, the Indian National Anthem and the Constitution.
- (xv) President can suggest any amendments to the Article in concurrence with the State Assembly
- (xvi) J&K to have its own legislation on matters like welfare measures, cultural matters, social security, personal

law and procedural laws.

- (xvii) J&K Government can review the laws made by Parliament and may decide which of them, in its opinion, needs amendment or repeal. Thereafter, appropriate steps may be taken under Article 254 of the Constitution of India.
- (xviii) J&K to not make separate laws for the appointment, powers, functions, duties, privileges and immunities of the Governor, and matters relating to Elections namely, the superintendence, direction and control of Elections by the Election Commission of India, eligibility for inclusion in the electoral rolls without discrimination, adult suffrage and composition of the Legislative Council, being matters specified in sections 138,139, 140 and 50 of the Constitution of the State of Jammu and Kashmir.
- (xix) No agreement was possible on the question of nomenclature of the Governor and the Chief Minister

RELEVANT CONSTITUTIONAL BODIES

PRESIDENT

POWER OF THE PRESIDENT UNDER ARTICLE 370

Article 370 clearly states that due to the special position given to State of Jammu and Kashmir, the President is given the power to apply the provisions of the Constitution to that State subject to such exceptions and modifications as the President may by order specify. The President has power to say by order that certain provisions of the Constitution will be expected from application to the State of Jammu and Kashmir and on such order being made those provisions would not apply to that State. Besides this power of making exceptions, the President is also given power to apply the provisions of the Constitution with such modifications as he thinks fit. The meaning of the word 'modification' used in Article 370 (1) must be given the widest effect, including making racial modifications.

The Constituent Assembly of Jammu and Kashmir

The Constituent Assembly of Jammu and Kashmir performed two main functions:

- (i) It abolished the hereditary rule of Maharaja and replaced it with the elected head, Sadar-i-Riyasat, this post later was changed into the governor's post.⁷ As per the conditions of the Instrument of Accession, the Maharaja introduced a popular interim government, after inviting Sheikh Abdullah, President of the All India Jammu and

⁷ "The Constitution of India (1949)" (PDF). *Lok Sabha Secretariat*. pp. 1122–1123.

Kashmir Conference to form the interim government.

(ii) It framed the Constitution of the state. The Draft Constitution of the Constituent Assembly for state was adopted on November, 17, 1957 and given effect from January 26, 1957.

ISSUES AND CHALLENGES

1. Temporary and Transition Provision Article 370 was introduced under temporary and transition provision, it is but still in existence. So who will decide what was actually meant by the term temporary and transition provision.

2. Does not fulfill the criteria of Section 5 of the instrument of accession which says- “The terms of this my instrument of accession shall not be varied by any amendment of the Act or the Indian Independence Act, unless such amendments are accepted by me by instrument supplement to this instrument”.

3. Encourages Separationist tendency- As per the article published in Indian republic, Kashmiri locals do not think of them as part of India and often asks people coming from different states to Kashmir, if they have you come from India. This shows that even the concept of unity in integrity, which is one of the best attribute of India's most cherished culture, is losing its meaning.

4. It affects the economic development - As per the provisions of article 370 people from outside Kashmir cannot invest in Kashmir, they cannot buy any property or carry on any business. Where rest of the India enjoys right to move freely and carry on trade in any part of India thereby developing India as a whole, Kashmir due to restriction put by Article 370 is closing doors of development for itself.

5. Permitting corruption As we have CAG, Lokpal, CBI to investigate corruption issues in other States of India, Kashmir due to article 370 does not come under these anti corruption bodies. When corruption is on its toll in India it becomes a very important issue of debate that since the top most investigation bodies of India does not have its operation in Kashmir, is Kashmir totally a corruption free State and does not need such authorities.

6. Threat to Indian security It is well known to all that Pakistan is a great threat to India due to its deep involvements in terrorism. The Article also gives Pakistan's citizens entitlement to Indian citizenship, if he marries a Kashmiri girl. This is very sensitive issue and needs to be looked upon with great care and precautions. This way we are welcoming terrorists thereby making them our son in laws. How can this be justified when terrorism is not only a national issue of concern but global as well and more importantly when Kashmir is the eye of Pakistan

right from the time of Independence.

7. **RTI is not applicable to State of J & k-** people are not only deprived of right to information but also the procedure to file the complaint. Which means a very important aspect of Democracy to have a transparent government is missing from the State. RTI has proved to be a very important tool to fight corruption, in the absence of RTI it can be assumed that politicians of J & K wants to escape from accountability thereby refusing to abrogate Article 370.

8. People in the State are not enjoying various beneficial laws such as marriages between Kashmiris and people from rest of India. Thereby affecting their human rights as well as marriage is a very personal issue and if on marrying a non Kashmiri a Kashmiri women ceases to be the State subject where she was born and loses her identity of the State is quite discriminatory as it does not happen with women from rest of the State in India as they have only one citizenship that is Indian Citizenship.

9. **The emergency provisions** Article 352 and 356 do not apply to State of Jammu and Kashmir. Under Article 356 where President can declare his rule in any state of India for Jammu and Kashmir he has to first consult with the Governor of State who himself is appointed by the President.

10. Even the very important terminologies like **secularism and socialism** are absent from the Preamble of the Constitution of Jammu and Kashmir.

ROLE OF JUDICIARY

LANDMARK CASES

1. **Sampat Prakash v. State of J&K :**

The main issue which was raised by the petitioner was based on the fact that Article 35 (c) of Jammu and Kashmir Constitution as initially introduced by the Constitution (Application to Jammu and Kashmir) Order, 1954, had given protection any law relating to preventive detention in Jammu and Kashmir against invalidity on the ground of infringement of any one of the fundamental rights guaranteed by Part III of the Constitution for a period of five years only.

Subsequently this period was extended to ten years and later to fifteen years by the Presidential Orders dated 1959 and 1964. The petitioner challenged these extensions on the ground that the orders making such modifications could not be validly passed by the President under Article 370 (1). Article 370 could only have been intended to remain effective until the Constitution of the State was framed and thereafter

it must be held to become ineffective that any modification made by the President subsequent to the enforcement of the Constitution would be without the authority of law.

The above argument was rejected by the Supreme Court and held Article 370 should be held to be continuing in force because the situation had existed when this article was incorporated in the Constitution had materially altered, and the purpose of introducing this article was to empower the President to exercise his discretion in applying Indian Constitution and a reference was also made that Article 368 of the Constitution in its application to State of J&K under which an amendment to the Constitution under Article 368 is of no consequence in the State of J&K unless applied by the President under Article 370 (1).

2. **Mohd. Damnoo v. State of J&K**

The petitioner challenged the validity of his detention under the J&K Preventive Detention (Amendment) Act, 1967, on the ground that the Act is invalid as it has not been assented to by the Sadar-i-Riyasat of the State. On November 16, 1952, the President had made an order substituting another Explanation for the existing one in clause (1) of Article 370, as “For the purpose of this article, the Government of the State means the person for this time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of J&K, acting on the advice of Council of Ministers of the State for the time being in office.”

According to the counsel on behalf of the petitioner, neither the State Assembly nor the President were competent to impair the functioning of the Sadar-i-Riyasat of the State unless the Constitution of India was amended under Article 368 and 370 (3) or a fresh Constituent Assembly was convened to amend the Explanation.

The above argument was not accepted by the Supreme Court and the Court explained the following feature of Article 370 (1) (b) and (d) is the necessity of the concurrence of the State Government. Article 370 (1) merely recognised a constitutional position in the State. It was contended Article 370 (1) (b) and (d) places no limitation on the framing or amendment of the Constitution of J&K. basically, it was pointed out that the change in the designation and the mode of the appointment of the Head of the State, the constitutional position in the State remains basically the same and the Governor is the successor to the Sadra-i-Riyasat and can validly exercise his powers as Head of the State.

3. **Prem Nath Kaul vs State of J&K, 1959 AIR 749**

This was One of the earliest and leading case regarding the impact of Art 370 to be decided by the Hon’ble Supreme Court. In this judgment the Supreme Court traced the passing of power from the hands of Maharaja Hari Singh to the successor. The Court held that Article 370 in no way reduced the plenary

powers of the Maharaja, nor did it try to impose the President's will on the state of Jammu & Kashmir. What it did in fact, was that it vested authority in the Constituent Assembly to decide the relationship that the State wanted to establish with India. It also observed that the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provision of Article 370 (1) is made conditional on the final approval by the said Constituent Assembly in the said matters.

PRINCIPLES SET OUT BY JUDICIARY

The Supreme Court has refused to interpret the word 'modification' as used in Article 370 (1) (d) in any "narrow or pedantic sense". In *Puranlal Lakhanpal V. President of India and Others*, Supreme Court observed:

We are therefore of opinion that in the context of the Constitution, we must give the widest effect to the meaning of the word "modification" used in Article 370(1) and in that sense, it includes an amendment. There is no reason to limit the word "modifications" as used in Article 370(1) only to such modifications as do not make any "radical transformation".

The J&K court gave its verdict on a petition regarding the applicability of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) in the state. The SARFAESI Act, 2002, enacted and enforced by the Indian Parliament in 2002, empowers banks and financial institutions to recover their non-performing assets without the court's intervention. The High Court said this Act cannot be applied to J&K, but suggested that the state can have its own law on the lines of the SARFAESI Act.

In a judgment that would safeguard the special status of Jammu and Kashmir under Article 370, the J&K High Court in July 2015 said that the constitution of the state is "sovereign in character" and the Assembly exercises sovereign power to legislate laws. The court also said that the "sovereign character" of the state cannot be challenged or abridged.

The division bench comprising Justices Muzaffar Hussain Attar and Ali Mohammad Magrey also ruled that Article 35 (A) of the Constitution of India — which RSS and its affiliates view as unconstitutional and want repealed — clarifies the already existing constitutional and legal position and does not extend something new to the state.

Comparative study



The LAW BRIGADE

Point of Comparison	Jammu and Kashmir	Other States
Separate Constitution	Jammu and Kashmir is the only state in India, which has a Constitution of its own. The Constitution of J&K was enacted by a separate Constituent Assembly set up by the State and it came into force on 26th January 1957.	All other States in India have to follow a Single constitution, which was adopted on 26 th November 1948 and came into effect on 26 th January 1950. Thus the relationship between the Union and these states is based on a Quasi Federal Structure.
Division of States by The Union	Any action of the Union Legislature or Union Executive, which results in alteration of the name or disposition of any part of the territory of the state, requires the consent of the State Legislature or the State Executive (as the case may be) to be effective. The Union has no power to suspend the Constitution of J&K.	The Union of India can alter or rename any other state in India according to the procedure established by law. The State Reorganization Act of 1956 was enacted in order to give the Union these powers under the provisions of Article 3 and Article 4 of The Indian Constitution.
Fundamental Duties, Directive Principles & Fundamental Rights	Part IV (Directive Principles of the State Policy) and Part IVA (Fundamental Duties) of the Constitution are not applicable to J&K. In addition to other fundamental rights, Articles 19(1)(f) and 31(2) of the Constitution are still applicable to J&K; hence the Fundamental Right to property is still guaranteed in this state.	Part IV (Directive Principles of the State Policy) and Part IVA (Fundamental Duties) of the Constitution are applicable to other States of India. Article 19(1) (f) and Article 31(2) were removed from the Constitution of India and hence these Acts do not apply to other states in India.
Position of High Court	The High Court of J&K has limited powers as compared to other High Courts within India. It can't declare any law unconstitutional. Unlike High	The High Courts of the other states in India can declare any law unconstitutional (such a decision is subject to being overruled by the

	Courts in other states, under Article 226 of the Constitution, it can't issue writs except for enforcement of Fundamental Rights.	Supreme Court) Moreover the High Courts of other states can issue writs on some matters other than Fundamental Rights.
Emergency Provisions	The Union of India has no power to declare Financial Emergency under Article 360 in the state. The Union can declare emergency in the state only in case of War or External Aggression. No proclamation of emergency made on the grounds of internal disturbance or imminent danger thereof shall have effect in relation to the state unless (a) it is made at the request or with the concurrence of the government of the state; or (b) where it has not been so made, it is applied subsequently by the President to that state at the request or with the concurrence of the government of that state. In December 1964, Articles 356 and 357 were extended to the state.	The Union has the power to declare a Financial Emergency under Article 360 in all States of India except Jammu and Kashmir. It can also declare a National Emergency in states of India.

COMPARISON BETWEEN VARIOUS STATES HAVING SPECIAL STATUS

Article 371 - Special Provisions for Maharashtra & Gujarat

President is authorized to provide that Governor of Maharashtra & Gujarat would have special responsibilities for:

- Establishment of separate development boards for Vidarbha, Marathwada & rest of Maharashtra + Kutchh & rest of Gujarat, with the provision that a report on working of these boards will be placed each year before state Legislative assembly.

- Equitable allocation of funds for developmental expenditure over the mentioned areas.
- Equitable arrangements providing adequate facilities for technical education, vocational training & adequate opportunities for employment in state services

Article 371 – B Special Provisions for Assam

- President may provide for the constitution & functions, a committee of Legislative assembly of the state, consisting of members of that assembly elected from the tribal area of Assam.
- President can also direct that the governor shall have special responsibility to secure proper functioning of that committee

Article 371 – C Special Provisions for Manipur

- President may provide for the constitution & functions, a committee of Legislative assembly of the state, consisting of members of that assembly elected from the hill areas of Manipur.
- President can also direct that the governor shall have special responsibility to secure proper functioning of that committee.
- Governor should submit an annual report to the President regarding the administration of Hill areas

Article 371 – E Special Provisions for Sikkim

- Legislative assembly shall not less than 30 members + 1 seat from the state in Lok sabha & 1 in parliamentary constituency.
- For the purpose of protecting the rights & interest of different sections of Sikkim population, Parliament is empowered to provide number of seats in Sikkim administrative assembly for the people belonging to such sections.
- Governor in his discretion (On direction of President) have special responsibility for peace & equitable arrangement for socio- economic development of different sections of Sikkim

Article 370- special provisions for J&K

Article 1 states J & K is a constituent state of Indian union, however Article 370 grants a special status to J & K on the basis of agreement concluded at time of J & K accession to Indian union:

- J & K has its own constitution apart from Indian constitution (Framed on 17th nov. 1956 & came in force on 26 jan 1957).
- Parliament can not make laws with regards to J & K on subjects stated in state list.
- Residuary powers lies with legislature of J & K.
- Follows dual citizenship, only citizens of J & K can take part in elections to state assembly Only citizens of J & K can acquire, own & dispose of immovable property in J & K.
- Parliament can not change the name, boundary or territory of J & K without the concurrence of state legislature.
- No preventive detention law made by the government can have automatic extension to J & K.
- Union has no power to proclaim a financial emergency to J & K.

The above special provisions clearly shows that because of some untoward situations there was felt a need to give some special provisions to various states. While mostly the special provisions deal with protecting the cultural, linguistic and economic benefits to the states, which had various issues, related to these matters but the case was totally different with the state of Kashmir. Though it is a known fact that the condition and situation in Kashmir is much different from other states, which have special provisions so it truly deserves some special authorities and powers. But giving arbitrary power is not justified and from the above comparison it can be clearly seen that the state of Kashmir has been given some arbitrary political powers.

CONCLUSIONS

STUDENTS FINDINGS

The matter of special status to J&K through Article 370 has flared constant debates. But there are special provisions given to some other states like Nagaland, Maharashtra and Assam through Article 371. Internationally, Hong Kong is an integral part' of China but has been given a special dispensation. There are in fact numerous examples around the world in which, due to special circumstances, certain areas or regions have been given a special dispensation.

Article 370 has brought in welcome changes as well. For instance, due to the ability to form their own laws, land reforms were introduced in J&K. Land was given to farmers and landless labors from the landlords.

Some experts say that there's no feeling of Indians among the people in the state. People of Kashmir valley have been made to believe by some Kashmiri politicians and separatists that they are not integral part of India and that

they have a distinct identity which is completely different from that of Indians and that the provision of Article 370 in the Indian constitution vindicates it. This is a fallacy as Article 3 of the J&K constitution clearly states that J&K is and shall be an integral part of India.

Kashmir is rich in beauty and can prove to be major source of tourist attraction and thus revenue but no investors want to come because they denied privileges in Jammu and Kashmir which is a result of Article 370. The state has been deprived of industrial development, as the legislation does not allow outside investment and prevents outsiders from buying land. Consequently, unemployment, especially among the youth, is on the rise. This is indirectly aiding militancy.

Article 370 cripples the personal liberties of non-permanent residents of Jammu Kashmir. Any Constitutional provisions such as the RTI that empowers a common man is either not applicable in Jammu Kashmir or is applied in its truncated state.

The journey of a Separate Status/State was always going to veer towards the course of separatism, never towards further integration and consolidation. This in a way is an effort to break the political and constitutional relationship between Jammu and Kashmir and the rest of the country.

Article 370 only displays temporary and interim measure for Jammu and Kashmir provision which is incorporated in Part XXI of the Constitution under Temporary within the ambit of the Constitution of India and Transitional Provision to say that Article 370 is a bridge between India and Jammu Kashmir.

The question of abrogation of article 370 is extremely sensitive and must be handled coolly and in a mature fashion. The sort of statements issued from both sides will only create further turmoil and tension in the Jammu & Kashmir state.

Protests and Recent Controversies

For the last few days, the issue of Article 370 of the Indian Constitution has been attracting the attention of the people who keep track of news through print and electronic media. It is not for the first time that Article 370 has come to limelight after political parties and leaders raked it up. It comes into focus after intervals of few months or few years. While country's one of the largest political party, the Bharatiya Janata Party, has been demanding its abrogation on the ground that the state has got no benefit from it and on the contrary has fostered anti-national

sentiment in the valley and sooner it goes better it would be for the state, its people and the country. On the other hand a regional political party, the National Conference, has been advocating its continuation on the ground that it is the bridge between this state and the Indian Union. Similarly, another regional political party, the People's Democratic Party, too sticks its nose for the sake of crass political compulsions and opposes the demand of its abrogation and thus taking the line of National Conference.

While political ball on this issue continues to enter different courts and debate through media goes on among the intelligentsia afresh under the present political climate in the state and in the backdrop of certain developments in the past in terms of state –centre relations, the million dollar question which makes rounds in minds of a common citizen of the state is as to what he or she has gained from it? Has anyone from his or her family been benefitted from it? If, yes, what kind of benefit and in what shape it has been? Similarly, other question which comes into one's mind is that if it has harmed a common citizen, why it should continue? Why it should not be abrogated?

IDENTIFYING LACUNAS IN LAW

The original form of Article 370 and J&K constituent assembly by extension laid down a set of rules with following major implications:

- i) Article 370(3) provides that the President may by notification declare that this article shall cease to be operative, but the proviso clearly lays down a limitation that the recommendation of the Constituent Assembly of the state shall be necessary before the President issues such a notification. It is not disputed that the Constituent Assembly of J&K has never given any such recommendation. In that view Article 370 cannot be withdrawn by Parliament purporting to exercise the power of amendment given by Article 368.
- ii) Even Article 368 limits the power of Parliament to make any amendment to the Constitution which would result in a change in any of the lists in the Seventh Schedule; such amendment shall also require to be ratified by the legislatures of not less than half of the states.
- iii) State of the Indian Union having a special status conveys a wrong signal not only to Kashmiris but also to the separatists, Pakistan and indeed the international community that J&K is still to become integral part of India. It also questions the Article 1 of the constitution which grants freedom of equality in all matters to all citizens.
- iv) Permanent J&K residents enjoy dual citizenship which is against the single citizenship nature of the

Citizenship Act of Indian Constitution.

- v) A Pakistani resident gains J&K citizenship if he marries a J&K citizen.
- vi) RTE, RTI, CAG and majority of Indian laws are not applicable in the state.
- vii) Because of Article 370, no outsider (anyone who is not a native Kashmiri) can purchase land in J&K. This proves to be a hindrance in the economic development of J&K as outside investments are blatantly rejected.
- viii) Reservation of seats for Kashmiri migrants in every government-aided institution
- ix) J&K to constitute its own constitution
- x) The article, along with Article 5 that defines the contours of jurisdiction of Indian Parliament regarding lawmaking for the state, cannot be amended.
- xi) The provisions of Article 238, which were omitted from the Constitution in 1956 when Indian states were reorganized, shall not apply to the state of Jammu and Kashmir.
- xii) Indian Parliament needs the state government's concurrence for applying all other laws.
- xiii) The agreement opposed imposition of Article 352, empowering the President to proclaim general emergency in the state. The Centre has no power to declare financial emergency under Article 360 in the state. It can declare emergency in the state only in case of war or external aggression. The Union government can therefore not declare emergency on grounds of internal disturbance or imminent danger unless it is made at the request or with the concurrence of the state government.
- xiv) The residents of J&K live under a separate set of laws, including those related to citizenship, ownership of property, and fundamental rights, as compared to other Indians. Indian citizens from other states do not enjoy equal rights in the state.
- xv) Under section 3 of Article 370, it was provided that the article can be removed or changed only on the recommendations of Constituent Assembly of J&K and that is why it was called a temporary provision.
- xvi) Name and boundary of the state cannot be altered

SUGGESTIONS AND STUDENT'S OPINION

In personal opinion, with power and freedom comes the responsibility. There is no harm in giving special powers to a state. This would lead to decentralization of power and also better governance. But we should be cognizant of the basic rights of every citizen and should not violate that. Any special status given to an individual or a state forever is not the need of the hour. We will have to change with the changing times and include everyone as

equals. The government of India is trying to develop the areas of Jammu and Kashmir but this goal cannot be achieved without including the citizens across the territory of India. The government should make provision for inclusive growth of the state of Kashmir.

Kashmir, being a part of India should have liberal policies and should have policies identical to other states of India. This will not only help in overall development of Kashmir but it will also solve the disputes. India being a democratic country should have equal laws, restrictions and privileges for all its citizens. Last but not the least consent of residents of Jammu And Kashmir regarding abrogation of section 370 is also must in order to arrive on necessary conclusion.

Hence, the action must begin with a political and judicial merge. The judiciary could look upon to secure equal rights to all the Indian citizens in the State. Legal eagles should go to court asserting that Article 35A violates the principle of equality that is part of the basic structure of our Constitution and that the J&K State Constitution creating a privileged class of citizens designated as Permanent Residents violate the noble principles enunciated in the Preamble of that very Constitution. A mechanism for transparent and mutual working of the Lok Sabha and the Rajya Sabha should be evolved.

1) Can Article 370 be removed without it affecting J&K's accession with India as things stand?

Needless to say, there are different opinions on this legal and technical matter. From what I understand, the Instrument of Accession signed by Hari Singh mentions that the accession is *subject to certain terms*. And those terms are codified under Article 370 which provides a separate a constitution to J&K and gives the special status. The J&K constitution is based on 370, which states that J&K is an integral part of India. So, pro 370-ists say that repealing Art. 370 would cut off it's link to India. This might lead to a situation where the terms of accession needs to be redrawn and made unconditional.

2) Should Art 370 be removed?

The polarization is very sharp on this question. The general Indian narrative is that, J&K has always been part of India, so the accession and special status doesn't make any sense. When thousands of other princely states acceded and integrated without special treatment why do Kashmiris need one? But there are also genuine concerns about the whether 370 has alienated people of J&K and has it really benefitted the state economically and socially.

From a Kashmiri narrative, they were forced into a marriage that they didn't desire. The separatists want to annul or divorce from this marriage. The others point out that it was a marriage of convenience and to remain married they need to stick to the pre-nuptial terms and conditions.

There is a lack trust between the two parties to sit down and have a genuine discussion, not to mention the politics of it which seems to drown down rational discussion. IMO, India has been indifferent to people of J&K. They have failed to both take measures for social and political integration, as well as, to crack the whip with clever politics and, in extreme cases, force.

Things like AFSPA and not taking proper action against excesses of the armed forces have set a deep rooted sense of subjugation and alienation in the minds of the Kashmiri people. They need to realize and it is our duty to engage with them to make it clear that India means no ill will towards J&K and the people of Kashmir are as much a part of India as Kashmir is. I think we would be better off trying to address these concerns proactively, such that Art 370 becomes totally irrelevant.

The need is to develop the confidence to fight for '*Ek Vidhan, Ek Nishan, Ek Pradhan*' and the ultimate goal is to bring J&K within the mainstream of the Indian Constitution without Article 370.



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