

ABROGATION OF ARTICLE 370 IN JAMMU & KASHMIR

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INTRODUCTION

This provision is a result of historical controversy which has been going for years, which provided autonomous status to the State of Jammu and Kashmir due to which it enjoys a position giving autonomous status empowering it to have its own Constitution, flag and other legal provisions unlike other States of the Indian Union. The insertion of Article 370 came out as a big controversy which started at the time of independence when Raja Hari Singh signed Instrument of Accession with the Government of India. Article 370 was only link between India and Jammu and Kashmir and this is why it was termed as the “umbilical cord” of the Indian Constitution and turned out to be the most sensitive provision of the Constitution.

Article 370 has remained an enigma which was originally intended to of temporary and transitional nature. The Constitutional validity of Article 370 has been challenged in Apex Court on several occasions, but its Constitutionality has been upheld by the Supreme Court of India. But finally in a turmoil situation where thousands of soldiers and army troops were deployed to the state of Jammu & Kashmir, all communications were cut off and suddenly parliament scrapped off article 370 and 35A of the Constitution via Presidential order invoking article 370 (3) of the Constitution, also establishing Jammu and Kashmir and Ladakh as two separate Union Territories by passing resolution with majority in parliament, former with a legislature and latter without one. Article 370ⁱ granted an autonomous status to J&K, while Article 35Aⁱⁱ, incorporated into the Constitution in 1954, provided special rights and privileges to the citizens of the state.

Art. 370, from its inception it is considered a major impediment for the overall development of Jammu and Kashmir. It is branded as an obstacle between integration of Jammu and Kashmir with other India, which in fact already an integral part of India. An article also promoted as it is major reason behind the terrorist activities in the region. An article is also blamed for denying

equal property rights to women. However, It is interesting to study that, are the people of Jammu and Kashmir are not in favour of the overall development of region, or are they don't want to improve their quality of education by removing article 370, or are they don't want a terrorism free State. India need to rethink on bringing a sustainable solution on the situation of Jammu and Kashmir. Putting state under surveillance cannot be long term option. As we Indians are very perfect in finding a middle path. Here also we need to look at that middle path to tackle the above problems. To control terrorism, to providing education to Jammu & Kashmir, to giving property rights, to increase growth of economy.

INSERTION OF ARTICLE 370

In 1947, when we got independence India consisted two categories of political units, firstly Provinces which are directly rule by British government and others were princely states. British rulers while leaving India gave three options to various princely states of India. They are free to choose either to remain in India or Pakistan or to remain as Independent Stateⁱⁱⁱ. It's a million thanks to Sardar Patel and his diplomacy, all but three princely state choose to become an integral part of India. These three were Junagarh, Hyderabad and Jammu and Kashmir who choose to be Free State. Today's all these three parts are integral parts of India. The principal question arises here is that what makes them an integral part of India. In case of Junagarh, the answer is the referendum which took place in Junagarh through which people will give legacy to India. In case of Hyderabad, is not just police action but an instrument of accession signed by Nizam which authorize India's legacy over it.^{iv}

Now to our point in case Kashmir also it is an instrument of accession by Maharajadhiraj Hari Singh which gives Dominion of India authority to rule over Jammu and Kashmir^v. The concept of instrument of accession was as already originated by Government of India Act, 1935.^{vi} Pakistani-backed invasion of tribal raider compel Maharajadhiraj Hari Singh to sign the instrument of accession. The accession of Jammu and Kashmir is not same as of other princely states. It authorized India to make laws on only those subject that is enumerated in schedule given below of the instrument of accession itself. The schedule given below instrument of accession provides that dominion of India has authority to make laws regarding external affairs, communication, defence, and some ancillary aspects like election.^{vii}

The reason behind the article 370 can be traced in that instrument of accession. We have given place to Instrument of accession in our constitution by introducing the article 370 to our constitution. The article was drafted by the Sheikh Abdullah then prime minister of Jammu and Kashmir appointed by the Maharaja Hari Singh Ji. The article 370 is bond which binds Jammu and Kashmir with India after the instrument of accession.

SCRAPPING ARTICLE 370: EFFECTS AND EXEMPTIONS

Earlier, Article 370 conferred a ‘temporary provision’ that granted special autonomous status to Jammu and Kashmir, but after the executive abrogated this provision the state no longer enjoys the power to have its own constitution, now it will have to adhere to the constitution of India like the rest of the country. The government also informed that Jammu and Kashmir will be spilt into two entire Union Territories, Jammu and Kashmir being one and Ladakh being the other, which will be under the direct control of the Centre’s rule.

For Central laws to be enacted or drafted, the Central government first had to seek the State Government’s approval on the same, but now Central laws will automatically have to be followed by the state like the rest of the country.

The machinery will have to be reconstituted, it will either be structured on the lines of Delhi or Puducherry. In Delhi, Law and Order is under the control of the Union government whereas in Puducherry, the Law and Order is a state subject.

Before, special powers were being exercised by Jammu and Kashmir, but after Article 370 is revoked, Jammu and Kashmir will not have the power to exercise such powers. Furthermore, there was a concept of dual citizenship in Jammu and Kashmir, but now only single citizenship status will be conferred on the residents of the state. Article 370 also conferred the right on the state of J&K to have its own flag, but after the revocation, India will have only one Tri-colour Flag for the entire country. Article 360, which talks about the declaration of financial emergency by the president was also not applicable on the state, but now it will be fully applicable in the state. Furthermore, there were no reservation granted to the minorities residing there, but subsequent to this historic move, reservation will also be granted to the minorities. Also, if the women from J&K married out of the state, she lost all her rights and her citizenship

of the state, but now, no such implication exists, and she will have a right to retain all her rights and her Indian citizenship. The government also imposed section 144 of the Criminal procedural Code in the Kashmir valley and political leaders such as Omar Abdullah and Mehbooba Mufti have been placed under house arrest, and also mobile and data services have been suspended in the state of J&K.

All the provisions and statutes which were applicable throughout the territory but not in Jammu and Kashmir, will not be applicable in both the Union Territories. No separate Constitution or statute will prevail, and all such provision become inoperative with scrapping off Article 370. Article 35A made distinction between the permanent residents of Jammu and Kashmir and the outsiders and it will also cease to have any effect. The national reservation laws will apply in jobs and education in Jammu and Kashmir like rest of the Indian states. It will be now easier for Outsiders to take admission in colleges funded by the Jammu and Kashmir government and will be eligible for jobs in state government offices. Kashmiri women, who marry a non-Kashmiri, and their children would no longer lose their right of inheritance.

Therefore, scrapping article 370 means scrapping all such exemptions and immunities granted via autonomous status and now the newly formed Union territories shall be subjected to the same constitution and all the above laws, provisions and acts which are applicable throughout the territory of India.

VIOLATION OF HUMAN RIGHTS ON THE NAME OF INTEGRATION

The insinuation of this move might or might not stain the history of Indian politics but it has certainly ensued violation of human and constitutional rights of the Kashmiri residents. With a ban on internet and an unacceptable lockdown on-going in the valley, it has become a herculean task for the people to make their voice heard to the rest of the country or earn a livelihood for that matter. A report in the Indian Express has conveyed that *“the imposition of curbs, spontaneous shutdowns and internet blockades in the Valley since August 5 has dealt a major blow to Kashmir’s economy as it suffered losses between INR 14, 295 and INR 17, 878 crores, the Valley’s leading trading body Kashmir Chamber of Commerce and Industries (KCCI) said”*.

The valuation concerning this was done centered on the GDP of the economic year 2017-18 and it revealed that the tourism sector incurred a loss of INR 1, 056 crore and the Kashmiri carpet industry lost about INR 72 crore while the industries and the utilities sector suffered a staggering loss of INR 4, 095 crores. The utilities sector encompassed amenities like trade, hotel, restaurant, transport and communication, financial services, public administration, real estate, ownership of dwelling and professional services, defence and the overall loss has added to an amount of INR 19, 191 crores.^{viii} The figures concerning loss of jobs also stand at 4, 96, 000 in the last four months preceding December, 2019. The sectors those are heavily dependent on internet services like, information technology and e-commerce have come to a stand-still in the Valley. With the lock-down in full swing it had become problematic for the residents to offer prayer at the Jama Masjid, Srinagar as it was entirely shut down for 135 days following the annulment. The day it was re-opened for the public, police personnel and paramilitary forces were on-guard outside the mosque. The mosque management had clarified that they wouldn't be reopening the mosque till the complete withdrawal of the security forces.^{ix} The critics took to Twitter to call the suspension of mobile internet services in the valley as 'authoritarian'.^x

The lockdown had resulted in enforcement of Section 144^{xi} of the Criminal Procedure Code since August 4, 2019 and vehicles with special authorization were only permitted to ply and in certain parts of the city there were restraints as regards to pedestrian movements. With the telephone lines down, it had become a nightmare for the people to call for medical aid from the hospital.^{xii} Local reporters evaluating the status quo in the Valley had ascertained two reasons behind public dissent and anger. The first one concerned the curtailing of decades-old privilege which has been labeled as undemocratic and unceremonious by the residents and the other reason was the weeks-long communication blackout.

This age boasts of the Internet as the most powerful and influential gizmo that has been made accessible to the human and the accessibility of the same has become more of a right rather than a privilege. The shutting down of all manners of communication apprehending a relentless remonstrance from the residents against the nullification of 370 entirely detached Kashmir from the rest of India. Many citizens justified their angst in relation to this "Information Blackhole"^{xiii} as a dictating behavior of the government that has only augmented with time. The portrayal of information in the media to the rest of the world ensues to be in contradiction

with the ground situation. The people are tired of the constant denial that they live-in when it comes to Kashmir. The state of J&K happens to have a peculiar sentiment in the heart of every Indian. The fight for Kashmir has shifted from ‘freedom from militancy’ to ‘restoration of the special rights’ in the Constitution.^{xiv}

A STEP TOWARDS UNIFIED NATION- BANE OR BOON TO KASHMIR?

Indian authorities adopted measures in anticipation of unrest in J&K state that raised serious Human rights concerns^{xv}. Subsequent to making the announcement, prominent political leaders such as Mehbooba Mufti and Omar Abdullah were detained by the government. Following that, Broad restrictions on freedom of movement were placed, Internet services, mobile services and educational institutions were shut down and section 144 of the Criminal Procedural Code, 1860 was also imposed in the state of Jammu and Kashmir. The government has a responsibility to ensure security in Kashmir, but that means respecting the human rights of everyone, including protestors. The government got off to a bad start by banning public meetings and shutting down the internet^{xvi}.

Thousands of additional troops were stationed in the region by the National government citing security reasons. Tourists and Hindu Pilgrims have also been directed to evacuate the state of Jammu and Kashmir due to Anticipated “terror threat”. The revocation of the special status and scrapping off Article 370 from the Indian Constitution prompted condemnation from political leaders and is generating tension in the region.

In the recent times, Kashmir has witnessed an increase in the number of violent protests and militant attacks. It has been noted that often Indian Security forces have used uncurbed or unrestrained force to retort to protests, including using Pellet- firing shotguns to control the crowd, resultant to which many protestors have been injured or died. It has also been alleged that several children and pregnant women had also become victim to brutal act of army personnel. It has been suggested that the Indian Government should revisit its techniques and rules of controlling the crowd and should order the Security forces to act in accordance with

the United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials.

India has been alleged by the United Nations for violating the Human Rights in Kashmir. It is estimated that approx. 586 people, including 160 civilians, 267 rebels and 159 Indian security personnel were killed last year- the highest since 2008^{xvii}.

Before the annulment of Article 370, Office of the United Nations High Commissioner for Human Rights (OHCHR) “has recommended for a Commission of inquiry to be constituted for conducting a comprehensive, independent, international investigation to inquire into the allegations which included the use of excessive force to respond to protests and the detention of protesters, political dissidents, and other activists on vague grounds for long periods, ignoring regular criminal justice safeguards”.^{xviii} International community has also raised concerns and condemned the restrictions on the internet and social media services in Jammu and Kashmir, stating that they had a “disproportionate impact on the fundamental rights of everyone in Kashmir,” and had the “character of collective punishment.”^{xix}

Although, India has vehemently denied the allegations put by the UN report, and has also accused the OHCHR of ‘legitimizing terrorism’ while stating that ‘The assertions in the report are in violation of India’s sovereignty and territorial integrity and ignore the core issue of cross border terrorism’^{xx}.

After the revocation of Article 370 from the Indian Constitution, Shree Narendra Modi, the Hon’ble Prime Minister of India answering the world community & citizens of India, ensured that the removal of Article 370 would ensure stability, market access and predictable laws in the state, which would further help in gaining investment, especially in key sectors like tourism, agriculture, IT, healthcare among others. This will assist to develop an ecosystem, which will give better rewards to the skills, hard work and products of people in the region. In today’s world, economic growth cannot happen in a closed environment. Open minds and open markets will ensure that the youth of the region will put it on the path of greater progress. The integration gives a boost to investment, innovation and incomes. He further stated that this was a well-considered decision to make Jammu and Kashmir, and Ladakh two distinct entities and that this decision would be to the entire advantage of the people therein. Also, he mentioned that with the setting up of top educational institutions in the state, Jammu and Kashmir will not

only get better opportunities for education but a good workforce environment too. The Prime Minister also commented on the upcoming airport and rail line projects that would help in overall connectivity and development in the state that will ultimately enhance the smooth functioning of businesses and quoted ‘Better connectivity, better linkages and better investments will help products of the region reach across the country and the world, leading to a virtuous cycle of growth and prosperity to the common man’.^{xxi}

When it comes down to gender inequalities, this has turned out to be a blessing for the women in the valley as they can retain their property rights even if they choose to get married outside the state, which was not the case before the annulment of this article. According to Permanent Residents Law, any women who got married outside the state was to lose all rights on the property and this also extended to the children of such women.^{xxii} The children even lost their right to gain entrance into government colleges or government jobs and along with it even their right to vote.^{xxiii} In spite of India being a signatory to the United Nations General Assembly Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), this desecration throughout the state had gone unnoticed. Post-abrogation of this law the women of the Valley are allowed to exercise their choice to marry anyone outside the state and not lose their inherited right as a consequence of it.

DETERMINING CONSTITUTIONALITY OF SUCH ACTION

The scrapping of special status of Jammu and Kashmir came like a shock to entire world, celebrated in most of the parts of country yet criticized by many. On 5th August 2019, Amit Shah introduced the two statutory resolutions in the Rajya Sabha. The first resolution advocates that Parliament pass the public notification issued by the President with regard to Article 370.

It said, “In exercise of the powers conferred by Clause (3) of Article 370 of the Constitution of India, the President, on the recommendation of Parliament, is pleased to declare that as on 5th of August, 2019, all clauses of the said Article 370 shall cease to be operative except Clause (1) thereof...”^{xxiv}

The second resolution moved by the Home Minister concerned reorganisation of the border State into two Union Territories.

The Ladakh division of the State of Jammu and Kashmir has a large area but is sparsely populated with a very difficult terrain. There has been a long pending demand of the people of Ladakh to give it the status of Union Territories to enable them to realise their aspirations. The Union Territory of Ladakh will be without Legislature. Further, keeping in view the prevailing internal security situation, fuelled by cross-border terrorism in the existing State of Jammu and Kashmir, a separate Union Territory for Jammu and Kashmir is being created. The Union Territory of Jammu and Kashmir will be with legislature.^{xxv}

Opposition parties alleged that scrapping of article 370 through presidential order without obtaining assent of parliament. It is argued that the present presidential notification derives its legality and authority from the earlier provisions of Article 370 (3) which stated that the President may by public notification say that the Article 370 is inoperative and ceases to exist. But the same provision also says that the consent of the state assembly would be necessary to pass such an order. However, the state of Jammu and Kashmir is under Governor's rule without any state assembly.

Tabling of resolution for adoption of the Presidential Order led to huge pandemonium in the Rajya Sabha. Opposition leaders including Ghulam Nabi Azad and many other members of congress opposed the move alleging that the government has "murdered" the Constitution.

The ruling party i.e. Bhartiya Janta Party, gave defence that instead of scrapping Article 370, the government used the power given by the same Article to the President to make the provision ineffective. As scrapping of Article 370 would, otherwise, require a constitutional amendment under Article 368, but by invoking Article 370(3), the government has cleverly bypassed the amendment route.

Defending the move, Amit Shah said the Narendra Modi government has followed what was done by Pandit Jawaharlal Nehru in 1952 and 1962. Pandit Nehru and then Jammu and Kashmir Prime Minister Sheikh Abdullah had agreed on the Delhi Agreement in 1952 providing special privileges to the people of Kashmir on the matters of property ownership on the principles of hereditary. A Presidential Order was also implemented in 1965.^{xxvi}

ROAD AHEAD

Present situation of Kashmir cannot be called a sustainable situation. It was said by Justice Chandrachud “Dissent is safety valve of the democracy, if not allowed Pressure cooker will be burst”^{xxvii} People anger has to be allowed by legal way. Unfortunately, government is justifying people consent for revocation by saying not a single bullet is fired. The justification indirectly inducing peoples that we will not hear your voice unless you raise it in different way.

Reiterating the note on which we started, we Indians are perfect in finding middle path. As in case of whether judiciary is supreme as like USA or parliament is supreme like UK. We adopted our own system of checks and balance. Similarly, in present situation, a middle path would be appropriate, for example- a lighter protection must be given by introducing one more article or statute. As we know not just Jammu and Kashmir, Constitution of India provide special status in some and different aspects to other 11 states also^{xxviii}. The Jammu and Kashmir also need a special status in some cases while maintaining the unity and integrity. As we know, Jammu & Kashmir is the only State in northwest India with a considerable share of the Scheduled Tribes in its population. They form 11.9 percent of the total population in 2011^{xxix}. The required protection as like Nagaland has to be given. The opening of jobs in Jammu and Kashmir may lead to dissent from the youth of Jammu and Kashmir. This requires protection for some time till we improve their educational quality, make them more capable to fight with other northern Hindi states. The already situation is as such if they will see peoples from other states are securing jobs from government. It will further increase their dissent when they see they are not represented in their own state.

The whole world community is looking at the reaction of world’s largest democracy and many nations have commented on this action but India resorts to any such comments by a simple answer that “It is an internal matter of India”. At last, we can hope that now when the action has been very well implemented, proper steps shall be taken for economic growth and social upliftment of the people in Jammu & Kashmir so that this step results to be boon for the state, its people and results in integration and unity of India.

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