

SCRAPPING OF ARTICLE 370: A CONSTITUTIONAL TRANSMUTATION OF THE FEDERAL BALANCE

Written by Kartik pant, Tarun Pant** & Pooja Pant****

** BA LLB Student, Chankaya Law College, Rudrapur, U.S.Nagar, Uttarakhand*

*** Research Scholar, Department of Physics, M.B. Government P.G. College, Haldwani,
Nainital, Uttarakhand*

**** Research Scholar, Department of Physics, M.B. Government P.G. College, Haldwani,
Nainital, Uttarakhand*

ABSTRACT

The Constitution of India is a unique constitution. It is the largest written liberal democratic constitution of the world. It provides a quaint composition of federalism and Unitarianism, and flexibility and with rigidity. Article 370 of the constitution of India postulates autonomy for the state of Jammu and Kashmir-a region located in the northern part of Indian subcontinent which was administered by India as a state from 1954 to 31 October 2019. A part of the larger region of Kashmir, which has been the subject of dispute between India, Pakistan, and China since 1947, granting it with the power to have a separate constitution, a state flag and autonomy over the internal administration of the state. The article was drafted in Part XXI of the Constitution: Temporary, Transitional and Special Provisions. The Constituent Assembly of Jammu and Kashmir, after its establishment, was authorized to recommend the articles of the Indian constitution that should be applied to the state or to abrogate the Article 370 altogether. After consultation with the state's Constituent Assembly, the 1954 Presidential Order was issued, specifying the articles of the Indian constitution that applied to the state. Since the Constituent Assembly dissolved itself without recommending the abrogation of Article 370, the article was deemed to have become a permanent feature of the Indian Constitution. This article, along with Article 35A, defined that the Jammu and Kashmir state's residents live under a separate group of laws, including those related to citizenship, ownership of property, and fundamental rights, as compared to residents of other Indian states. On 5 August 2019, the Government of India issued a constitutional order superseding the 1954 order, and making all the provisions of the Indian constitution applicable to Jammu and

Kashmir based on the resolution passed in both houses of India's parliament with 2/3 majority. In addition, the Jammu and Kashmir Reorganization Act was passed by the parliament, enacting the bifurcation the state of Jammu and Kashmir into two union territories to be called Union Territory of Jammu and Kashmir and Union Territory of Ladakh. Given the sacrosanct political arrangement it encapsulates as well as its role as an exemplar of Indian federal asymmetry, it is now upon the Supreme Court to formally acknowledge the constitutional basis of India's delicate distribution of powers. This paper will seek to provide a comprehensive understanding of the constitutional history of Article 370, exploring the constitutionality of the abrogation of Article 370 by the central government, nature of Indian federal system along with the discussion of its changing dimensions in light of Article 370. Further, this paper will also highlight the challenges to Indian federalism.

Keywords: Federalism, Unitarianism, Article 370, Article 35A, Bifurcation, Abrogation

INTRODUCTION

The northernmost region of our country was a princely state and the last ruling king was Raja Hari Singh. The British trader-rulers "sold" the dominion of Jammu and Kashmir to Dogra king Gulab Singh for Rs 75 lakh. The Dogra king ruled over the regions of Jammu, Kashmir Valley, Gilgit-Baltistan and Ladakh. The arrangement continued till 1947, when the British divided the Indian subcontinent into two countries - India and Pakistan.[1-3] The population of the state was an amalgamation of Hindus, Sikhs and Muslims. As the flag of the British Raj came down, princely states united to form the Republic of India, and Pakistan got two masses of land to form a new country. The Hindus, Sikhs and Buddhists of Jammu and Kashmir favored an accession to India, while the views of the Muslim population stood divided. Again, not happy with what they got, Pakistan always had their eyes on Kashmir and repeated invasions and attacks had debilitated the kingdom. Maharaja sought help from Lord Mountbatten. On the advice of Lord Mountbatten, the Indian government attempted a plebiscite, but it couldn't be carried out, due to objections from the Pakistani government questioning its legality. Thereafter, on October 26th Maharaja Hari Singh signed the Instrument of Accession to India, and it was accepted by Lord Mountbatten, the then Governor-General on October 27, thus making J&K a part of India. Jammu and Kashmir ruler Hari Singh appeared to chart out his

own way without acceding to India or Pakistan. It signed a standstill treaty with Pakistan, which breached the agreement by invading Jammu and Kashmir in October 1947. India did not intervene till Hari Singh signed the Instrument of Accession with India and sought help from New Delhi. Hari Singh sought special privileges for his people on the lines of a 1927 law that denied outsiders the right to own property in the state. This law restricted the right to own property in Jammu and Kashmir in line of inheritance only. This had been brought apparently to keep the Britishers away from the salubrious Valley of Kashmir. The Jawaharlal Nehru government agreed to Hari Singh's condition subject to future final settlement. The matter was placed before the Constituent Assembly of India, which was dealing with the task of framing the Constitution of India. After a lot of deliberation, Article 370 was inserted in the Constitution's twenty-first part that proclaimed it to be "Temporary, Transitional and Special Provision". The state of Jammu and Kashmir had acceded to India in unique circumstances after independence, thus since from the inception of India as an independent country, it remains an area of discord. Article 370 of the constitution of India was a unique provision which reflects the process of integration of the state into the Union of India. The power of the Indian parliament was limited in respect to the formulation of law to the state of Jammu and Kashmir.

NATURE OF ARTICLE 370 & 35A: PERMANENTLY TEMPORARY

This Article was providing Jammu and Kashmir a separate Constitution and a separate flag with unique identity and autonomy. The state has three parts: Jammu, Kashmir valley, and Ladakh with a population of 1.25 crore [4]. On May 27, 1949 representative of Jammu and Kashmir joined the Constituent Assembly of India. Article 370 [5] was discussed for five months by the Prime minister of India, Jawaharlal Nehru, and his colleagues with the Prime minister of Jammu and Kashmir Sheikh Mohammad Abdullah and his colleagues from May to October 1949 [6]. The representatives of the state had negotiated with the Union of India in terms of its membership with the Union. Article 370 records a solemn compact [7]. There is no liberty of any party to unilaterally amend or abrogate it, except in accordance with the terms of provision. N. Gopaldaswamy Ayyangar became the chief drafter of the Article 370. he tried to reconcile the differences between Abdullah and Patel and after a great negotiations Art. 370 came into the picture. Article 370 embodies six special provisions for Jammu and Kashmir.

These temporary provisions with respect to the State of Jammu and Kashmir[8-9] are stated below:-

(a) It exempted the State from the complete applicability of the Constitution of India. The State was conferred with the power to have its own Constitution.

(b) Central legislative powers over the State were limited, at the time of framing, to the three subjects of defence, foreign affairs and communications.

(c) Other constitutional powers of the Central Government could be extended to the State only with the concurrence of the State Government.

(d) The 'concurrence' was only provisional. It had to be ratified by the State's Constituent Assembly.

(e) The State Government's authority to give 'concurrence' lasted only until the State Constituent Assembly was convened. Once the State Constituent Assembly finalised the scheme of powers and dispersed, no further extension of powers was possible.

(f) Article 370 could be abrogated or amended only upon the recommendation of the State's Constituent Assembly.

Article 35A was incorporated into the Constitution in 1954 by an order of the then President Dr. Rajendra Prasad on the advice of the Jawaharlal Nehru Cabinet. The controversial Constitution (Application to Jammu and Kashmir) Order of 1954 followed the 1952 Delhi Agreement entered into between Nehru and the then Prime Minister of Jammu and Kashmir Sheikh Abdullah, which extended Indian citizenship to the 'State subjects' of Jammu and Kashmir. The Presidential Order was issued under Article 370 (1) (d) of the Constitution. This provision allows the President to make certain "exceptions and modifications" to the Constitution for the benefit of 'State subjects' of Jammu and Kashmir. So Article 35A was added to the Constitution as a testimony of the special consideration the Indian government accorded to the 'permanent residents' of Jammu and Kashmir.

REVOCATION OF THE SPECIAL STATUS OF JAMMU & KASHMIR

The key to determining the basic structure question in relation to Article 370 is to understand its exact nature.[10] While the marginal note of the provision characterizes it as a ‘Temporary Provision’, a number of Supreme Court (‘Court’) decisions have characterized it as having a continued existence and being permanent. Critics of the provision have argued that it was meant only as an interim arrangement and automatically lapsed once the constituent assembly for J&K was dissolved in 1957. In so far as the first argument is concerned, the Court has on various occasions, including in *Sampath Prakash* and *Santhosh Gupta*, relied on Article 370 (3) to suggest that the provision continues to be in existence. Thus, the Court has observed that the provision will cease to have effect only when the President makes a public notification to the contrary, *subject* to the condition laid down in clause 3 – i.e. recommendation of the Constituent Assembly for J&K – being fulfilled. The J&K High Court in *Ashok Kumar* has in fact gone one step further and has observed that the provision cannot be abrogated even using the amending powers of the Parliament under Article 368.

In 2014, as part of Bharatiya Janata Party manifesto for the 2014 general election, the party pledged to integrate the state of Jammu and Kashmir into the Union of India.[11] After winning the elections, attempts were made by the party along with its parent organisation, the Rashtriya Swayamsevak Sangh (RSS), for the abrogation of Article 370.[12] Former prince regent and Congress leader Karan Singh opined that an integral review of Article 370 was overdue and, it need to be worked on jointly with the State of Jammu and Kashmir.[13]

The President of India issued an order under the power of Article 370, overriding the prevailing 1954 Presidential Order and nullifying all the provisions of autonomy granted to the state. The Home Minister introduced a Reorganization Bill in the Indian Parliament, seeking to divide the state into two union territories to be governed by a lieutenant governor and a unicameral legislature. The resolution seeking the revocation of the special status under Article 370 and the bill for the state's reorganization was debated and passed by the Rajya Sabha – India's upper house of parliament – on 5 August 2019.[14] On 6 August, the Lok Sabha – India's lower house of parliament – debated and passed the reorganization bill along with the resolution recommending the revocation.[15-16] The constitutional expert opinion is divided on whether the revocation is legally sound.

Petition against abrogation of Article 370 was filed On 28 August 2019, the Supreme Court of India agreed to hear multiple petitions challenging the abrogation of Article 370 and the

subsequent bifurcation of Jammu and Kashmir into two union territories. It constituted a five-judge bench for the same.[16-17]

The court issued notices to the government, seeking a reply to the petitions, despite pleas by the government arguing that the notices could be cited in international forums such as the United Nations against India.[18] Additionally, the court ordered the government to reply within seven days to a petition seeking an end to the restrictions on communications as well as other restrictions in the region.[19]

The Supreme Court heard the petitions on 30 September 2019. It allowed the central government to submit its replies to the petitions in 30 days and fixed 14 November 2019 as the next date of hearing. The petitioners wanted the court to issue an injunction against reorganization of the state into two union territories but the court declined to issue any injunction. This means that the two union territories came into existence on 31 October 2019 as planned.[20]

NATURE OF INDIAN FEDERAL SYSTEM

Every federal system requires division of powers between the Union and State Governments and both are independent in their own sphere and not subordinate to one another. To avoid the chaos and conflict between the two competing jurisdictions, the power has been divided between the centre and the States and division of power is one of the most important feature of the federal constitutions [21]. The English word ‘Federation’ derived from the Latin word “Foedus” which means ‘treaties or agreement’ (or referring to an alliance of individuals or groups to promote specific and common interests). Federal states are those states which developed by a treaty or an agreement. It is a system where sovereignty is divided between the core-centre and peripheral-states. On the point of division of powers, federalism can be classified as ‘Centripetal’ [22] or ‘Centrifugal’. But Indian federalism is not the result of any agreement or treaty.

Indian Constitution is basically federal in form and is marked by the traditional characteristics of a federal system, namely, supremacy of the constitution [23], division of power between the Union and the state governments, existence of an independent judiciary and a rigid procedure for amendment of the constitution. It establishes a dual polity, with clearly defined sphere of authority between the Union and the states, to be exercised in fields assigned to them. There is

an independent judiciary to determine the issues between the Union and the States, or between one state and another.[24] Andrew Heywood said: “The federal systems give regional and local interests a constitutionally guaranteed political voice. The states exercise a range of autonomous powers and enjoy some measure of representation in central government through Council of States.” [25] Every federal system requires division of powers between the Union and state governments. It is prescribed in our Constitution by part XI along with VII schedule.[26] While articles 245 to 255 deal with distribution of legislative powers, the distribution of administrative powers is dealt with in articles 256 to 261 of the Constitution.

There is criticism that “the Indian constitution does not satisfy certain essential tests of federalism, namely, the right of the units to make their own constitution and provision of double citizenship⁷⁶ as American constitution has. Even the essential characteristics of federalism like duality of governments, distribution of powers between the Union and the state governments, supremacy of the constitution, existence of a written constitution and most importantly, authority of the courts as final interpreters of the Constitution are all present in our constitutional scheme.” But at the same time, the constitution has certain features which can very well be perceived as deviations from the federal character,[27] due to this deviation many constitutional experts doubted on the federal nature of the constitution. They described it as more unitary and less federal because the Central government is more powerful than the State governments. Distribution of power between Centre and state is done by three lists in schedule VII, but all-important subjects either are placed in Union List or Concurrent List and this distribution make the Centre stronger.[28]

KASHMIR: THE CHANGING TREND OF INDIAN FEDERALISM

Amending the Constitution by a Presidential Ordinance to render Article 370 ineffective, and demoting Jammu and Kashmir as well as Ladakh to the status of Union Territories, are the latest in a series of measures taken by the PM which indicate a trend towards less federalism and a stronger central government [29]. The manner in which the changes in the status of Kashmir have been brought about raises questions about Indian federalism. What should the relationship be between states and the Union? In establishing that relationship, the Constituent Assembly had to balance between creating a Union with the power to hold the country together in uncertain times, and providing diverse states with sufficient autonomy to preserve their individual identity.

The concept of a federal balance is visible in Sawyer's works: "The power of the centre is limited, in theory at least, to those matters which concern the nation as a whole. The regions are intended to be as free as possible to pursue their own local interest." In the present instance, the central government amended Article 370 through subversion of the above requirement and, subsequently, of the Indian understanding of federalism. This transpired in a three-fold manner. First, the centre invoked Article 370(1) during president's rule in the state. Article 370(1) provides for the modification and amendment of other constitutional provisions in relation to Jammu and Kashmir. To initiate this procedure under Article 370(1), the concurrence of the government of the state of Jammu and Kashmir had to be taken. However, owing to the president's rule which led to the dissolution of the legislative assembly and vesting of its powers with the Governor (a representative of the centre in the state), only the Governor's assent was taken. Second, through Article 370(1), Article 367 was amended to add a new interpretation sub-clause stating that the words 'Constituent Assembly' in Article 370(3) are to be read as 'Legislative Assembly of the State'. Third, through the combined effect of the new interpretation of Article 370(3) and the absence of a legislative assembly in the state, the central government passed a statutory resolution recommending the president to amend Article 370.[30]

By omitting to consult the elected state representatives in the matter, the central government has gone against the grain of co-operative Federalism. Such untoward violation of the constitutional scheme may even be tantamount to affecting a constitutional fraud: in fact, by extending the reach of the central government in this unprecedented manner, it could be said that the altered federalism is 'coercive' in nature.

CONCLUSION

The amendment of article 370 is not exclusive affair of the union government because an initiative to this effect only can be from the state government as per expression constituent assembly of the state incorporated in clause(2) of the said article for which mandatory resolution must be passed by the state government before issuance of an constitution order by

the president of India and finally power to amend the constitution lies with the union parliament to incorporate relevant provisions to regulate the federal relations between union and state of J&K. The article 370 can be amended provided procedure prescribed be followed and parliament has secondary role in this context. Further the analysis of federal relations with union government show that doctrine of federal supremacy as per article 246 is also not applicable in the state especially in case of conflict between union and state law however parliament law has such primacy in state with regard to concurrent power only. The union legislation applicable in the state directly, under article 370, which do not apply and those framed under article 252 & 253, etc. are also shown in the annexure No. X as testimony to the wide legislative power of the state assembly. History tells us that disruptive change is not without disruptive consequences. There is bound to be resistance to what the Prime Minister and his Home Minister have dared to do in the face of conventional wisdom that the political status quo called Jammu & Kashmir is best left undisturbed. Lethargy and loath, coupled with aversion to risk, prevented previous Prime Ministers from acting decisively even if they were convinced that Article 370 was an abomination, a wart that needed to be excised – for the betterment of the people of that state and unity of the nation.

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