

# ANTIQUITY AND ANTERIOR OF THE STATE OF JAMMU & KASHMIR AND THE LEGIT, DELIBERATIVE CONTINGENCY CONSANGUINEOUS TO ARTICLE 370 & 35A

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## INTRODUCTION

“Gar firdaus bar-rue zamin ast, hami asto, hamin asto, hamin ast.” “If there is a heaven on earth, it's here, it's here, it's here.” Mughal Emperor Jehangir said this when he visited Kashmir in the 17th century.

Sir Walter Lawrence, the author of *The Valley of Kashmir* and *first Settlement Kashmir* of Kashmir said, “*The valley is an emerald set in pearls; a land of lakes, clear streams, green turf, magnificent trees and mighty mountains where the air is cool, and the water sweet, where men are strong, and women vie with the soil in fruitfulness.*”

“*Kashmir issue was created out of fear, mistrust and animosity and it should be solved through courage, trust, and friendliness. It should be solved from the ground of development of brotherhood, education and prosperity and not from the ground of religion, terrorism or military actions. It just needs more character, more courage and more compassion.*”

— Amit Ray, Nuclear Weapons Free World Peace on the Earth

Before August, 1947 Indian Territories were governed by Britishers. Those territories which were governed by Britishers directly called British India. In British India there was no role of Indian kings or Nawabs. Indian territories governed by Britishers indirectly were governed by kings or Maharaja or Nawabs directly. Such territories were called Princely States. Out of such Princely States the state of Jammu & Kashmir is having a history of its own. The soul of Kashmir can be felt through the following lines:

Our men have lost their spirit  
Our women have lost their smile,  
Our children have lost their laughter,  
The valley has lost its shine,  
Weep softly O mother  
For, we still have our pride.

— Srividya Srinivasan

These were 565 Princely States. British India converted into Dominion of Pakistan and Dominion of India on 14th and 15th August, 1947 respectively. Dominion of India converted into Union of India on January 26, 1950.

*“Kashmir was ignorant and, therefore, unaffected of the happenings taking place behind its lofty mountains. No social or political upheaval was permitted to cross the sky-high and colossal walls of Kashmir. It was mainly because Dogra regime was loyal to the British Government and proved its loyalty in the difficult and testing time of revolt 1857.”*

— Tarif Naaz, Sheikh Mohammad Abdullah: A victim of betrayal

According to Mountbatten Plan it was declared that British India would be divided into two parts, namely-

- I. *Dominion of India &*
- II. *Dominion of Pakistan.*

Instrument of Accession becomes a document which contents conditions to join a country. This Instrument was prepared by Mr. V. P. Menon.

Following the Mountbatten Plan, Independence of India Act, 1947<sup>i</sup> was passed by British Parliament. Principle of Lapse of Paramountcy was enshrined in section 7 of Indian Independence Act, 1947. According to this section, after 15th August all treaty, agreement, accord with any Indian States shall be lapsed, and it shall be treated that there was no agreement with any princely states. Three options were given for Indian States.

## PRE-CONSTITUTIONAL POLITICAL AND LEGAL HISTORY

Hari Singh was born on 23.sep.1895 at the palace of Amar Mahal Jammu, the only surviving son of Raja Amar Singh Jamal, the brother of Maharaja Pratap Singh, the then Maharaja of Jammu and Kashmir. In 1903, Hari Singh served as page of honor to Lord Curzon at the grand Delhi Durbar. At the age of 13 he was sent to Mayo College of Ajmer. Mr. Maharaja Hari Singh (1895 -1961) was king of Jammu and Kashmir during 1925-1961. Lord Louis Mountbatten tried to make Hari Singh understand to join either India or Pakistan in June 1947.<sup>ii</sup>

But Mr. Ram Chandra who was the then Prime Minister and advisor of king was not interest to accept such suggestions and Maharaja Hari Singh decided to keep Kashmir as an independent nation. Up to August 15, 1947 he neither joined Dominion of Pakistan nor Dominion of India. In this way Kashmir became a sovereign nation. Although, Maharaja Hari Singh had signed Instrument of Accession on October 26, 1947 but Instrument of Accession was accepted on October 27, 1947. It lost its sovereignty on October 27, 1947 on which date Instrument of Accession of Kashmir was accepted by Mountbatten, Governor General of India.<sup>iii</sup>

Sheikh Mohammed Abdullah Mr. Sheikh Mohammed Abdullah completed M.Sc. from Aligarh Muslim University in 1930. He started to agitate against king and formed a Party which was known as All Muslim Conference on October 16, 1932. Sheikh was president of this Party. He changed his mind and thought to include person of all religions. He realized that the actual fight was not against Hindu king. Actual fight was against dictator king. So, All Muslim Conference converted into National Conference on June 11, 1939.

He started a movement for abolition of kingship in 1946. He was arrested. He was released on September 19, 1947. He and his supporters played vital role in support of Indian Army at the time of attack over Kashmir by Pakistan. He was very popular leader. He accepted concept of secularism and socialism. So, Mr. Jinnah and Muslim League were unable to play any role in Kashmir. He played vital role as a leader in politics of Jammu and Kashmir.

## **WAR BETWEEN PAKISTAN AND KASHMIR (OCTOBER 22, 1947 - OCTOBER 26, 1947)**

On October 16, 1947, Pakistan broke Standstill Agreement with Kashmir and stopped supply of grains, oil etc. and train services. Mr. Md. Jinnah wanted to use force for acquiring land of Kashmir. Pakistan with help of tribal militias attacked over Kashmir on October 22, 1947.

*“There were people dying everywhere getting massacred in every town and village, there were people being picked up and thrown into dark jails in unknown parts, there were dungeons in the city where hundreds of young men were kept in heavy chains and from where many never emerged alive, there were thousands who had disappeared leaving behind women with photographs and perennial waiting, there were multitudes of dead bodies on the roads, in hospital beds, in fresh martyrs' graveyards and scattered casually on the snow of mindless borders.”*

— Mirza Waheed, The Collaborator

At this time Kashmir was sovereign. Kashmiri Muslim Army who was serving king joined hands of Pakistani invaders. Brigadier Rajendra Singh stopped them from entering into Uri by blasting bridge and stopped them for two days. He sacrificed his life but played a vital role to save Kashmir. After two days (October 24, 1947) Pakistani invaders entered into Uri and captured Hydro -Power Station.<sup>iv</sup>

They cut electricity of Kashmir. They had reached in Baramulla which was 54 kilometres from Srinagar. But invaders started to murder, rape, loot etc. of all persons irrespective of religion, race, caste sex etc. in two days. King Hari Singh got time to rethink his decision. Hari Singh requested from Dominion of India to save Kashmir on October 24, 1947. On 25 October, Memon met new Prime Minister Mehar Chand Mahajan and King. He suggested king to go Jammu after leaving Kashmir.<sup>v</sup>

Following the suggestions Hari Singh ran to Jammu. Memon, Prime Minister Mehar Chand Mahajan and some army officers leaved Kashmir in night. On October 26, 1947, Pakistani invaders attacked over Kashmir. Lord Louis Mountbatten was not ready to save Kashmir unless King decides to join Dominion of India because at that time Kashmir was an Independent country. In this meeting Mr. Memon explained ground report of Kashmir. After Meeting of Defence Committee, Memon, Prime Minister Mehar Chand Mahajan went to Jammu and met

Hari Singh. Hari Singh signed on—Instrument of Accession on the same date i. e. on October 26, 1947.

*“Kashmir is India’s greatest moral and political failure. It is here that even the most civilized amongst us begin to make excuses for repression, brutality and violence. It is here that we subsume all that we otherwise celebrate under the demands of freedom, progress, liberalism, liberty and secular ideals. Since 1947, the Indian state has responded to the political aspirations and the social and the legal demands in Kashmir through militarization, repression, and indiscriminate violence, including, at various times, the denial of democratic rights, the manipulation of elections, and the murder and imprisonment of its political leaders.”*

— Suchitra Vijayan

## **INSTRUMENT OF ACCESSION BY MAHARAJA HARI SINGH SIGNED ON OCTOBER 26, 1947**

October 26 is historical date in the history of Kashmir. On this date Maharaja Hari Singh signed Instrument of Accession and decided to join Dominion of India. Mountbatten, Governor General of India accepted this—Instrument of Accession on October 27, 1947. After sign on Instrument of Accession by Mountbatten, Jammu & Kashmir became part of Dominion of India and lost its sovereignty. Now it was obligation of India to save the Kashmir.

Again, meeting of Defence Committee was held and it was decided to send the army in early morning to save the Kashmir. In this meeting Mountbatten proposed for plebiscite in Kashmir after re initiation of peace and security. Mr. Patel and Mr. Nehru gave implied consent. This Instrument of Accession was in no way different from executed by some 500 other states. It was unconditional voluntarily and absolute. It bound the Jammu & Kashmir legally and constitutionally.

## **FIRST WAR BETWEEN INDIA AND PAKISTAN (27 OCTOBER, 1947- JANUARY 1, 1949)**

October 27, 1947—Instrument of Accession was signed by Mountbatten and Kashmir became part of India. Attack over Kashmir after signing of Instrument of Accession was attack over India. Early morning of 27 October, 1947 Lt. Col. Deewan Ranjit Roy reached Kashmir with Air Force. After this Indian forces heavily attacked over Pakistani invaders. They started to run away. Bharat Mata Ki Jai (Victory of Mother India) slogan were chanted by everyone and everywhere. War was continuing. Mr. Jinnah invited India for discussion in Lahore. Mr. Mountbatten and Mr. Nehru were ready but Mr. Patel was opposing. Only Mountbatten reached Lahore. Mr. Nehru did not go due to his health reasons. On November 1, 1947, Mountbatten met with Jinnah in Lahore. Jinnah was saying that accession was a cheating. Mountbatten supported India. It is the first official meeting with India and Pakistan. Everything was going in favour of India. But unfortunate things happened on November 2, 1947.

## **ANNOUNCEMENT OF PLEBISCITE IN KASHMIR BY MR. NEHRU ON NOVEMBER 2, 1947**

Mr. Nehru did not know ground reality of Kashmir after Pakistani attack. He had misconception about United Nations Organization because he did not know practical behaviors of permanent members of Security Council. Mr. Nehru had no bargaining power with permanent members of Security Council. On November 2, 1947, without waiting result of Meeting of Mountbatten and Jinnah, Nehru announced on All India Radio in Delhi for plebiscite in Kashmir and role of United Nations on Kashmir issues under supervision of International Bodies like United Nations Organization. First time plebiscite was suggested by Mountbatten in Meeting of Defence Committee on 26 Oct. 1947.

But in the meeting condition was that plebiscite would be conducted after restoration of peace and security. Nehru openly declared for plebiscite on November 2. Jinnah was not ready for plebiscite at that time. He feared that Kashmir may join India under leadership of Sheikh. Even USA and UK knew that in case of plebiscite Kashmir would join India. So, USA and UK supported Pakistan for their interests. Mr. Nehru committed wrong by sending plebiscite issues in UNO. At that time plebiscite should have been conducted without interference of UNO.

Nehru realized this later on. After this Kashmir issues became international issues. Later on, by interference of Security Council cease fire occurred and Pakistan have half part of Kashmir till now.

*“In the era of Khrushchev, the Soviet Union had publicly declared itself a supporter of the Indian stand on Kashmir. In 1962 a Russian veto had defeated a Security Council resolution on the plebiscite issue. By 1965, and after the fall of the Khrushchev regime, Russian attitudes were significantly modified”.*

-Nyla Ali Khan

Plebiscite was completed in Jammu & Kashmir in 1957. Members of Constituent Assembly were representing the Public of Jammu & Kashmir. They were elected by public by casting votes. They expressed their views through Constitution of J&K which came into force on January 26, 1957. Article 3 of the Constitution of J&K clearly says that—The State of Jammu and Kashmir is and shall be an integral part of the Union of India. Article 147 says no change can be done in Article 3 of the Constitution.<sup>vi</sup>

### **CREATION OF POK/LOC ON JANUARY 1, 1949**

After announcement of Mr. Nehru on November 2, 1947 Kashmir's issue was referred to UNO. India raised this issue in Security Council by using Article 35 of the Charter of the United Nations Organization and complained against Pakistan. United Nations offered for cease fire on August 13, 1948. Indian Army was continuously acquiring land of Kashmir from Pakistan. Jinnah lost his mental control. It was the first defeat of Pakistan.<sup>vii</sup>

Due to intervention of UNO, on 1st January 1949, cease fire between India and Pakistan was declared. At the time of cease fire Indian Army had thrown Pakistani Army from Kargil and Dras but remaining part was in the hand of Pakistan Army. Land held by Pakistan is called Pakistan occupied Kashmir (POK). Cease fire line on January 1, 1949 is called Line of Control.

## POST-CONSTITUTIONAL POLITICAL & LEGAL HISTORY

On 25 January, 1950, Yuvraj Karan Singh authorized by Maharaja announced that Constitution of India must be adopted by Constituent Assembly of the States only those provisions which were related to Jammu and Kashmir. Remaining part of Constitution of India came into force on January 26, 1950. Constitution (Application to Jammu and Kashmir) Order 1950 was issued by President by using power conferred by Article 370(1) on January 26, 1950.<sup>viii</sup>

*“Let Jammu and Kashmir lead the way in the building of a new future for India. Let it set an example to the rest of India and the world by showing how the entire region can be transformed into a zone of peace, stability and prosperity.”*

-Pranab Mukherjee

## CONSTITUTION OF JAMMU AND KASHMIR

The terms of the proclamation of the Maharaja on March 5, 1948 in regard to the convening of a National Assembly did not meet the requirements of the situations prevailing at that time. Yuvraj Karan Singh issued proclamation for new Constituent Assembly.

On April 20, 1951 Yuvraj Karan Singh s/o Maharaja Hari Singh issued a Proclamation for constituting a Constituent Assembly for purposes of framing a Constitution for the State. The Constituent Assembly consisted of seventy-five members. National Conference won all the 75 seats in direct election on the basis of adult franchise under leadership of Sheikh Abdullah.

The first meeting of the J&K Constituent Assembly was held at Srinagar on October 31, 1951. According to preamble of Constitution of J&K<sup>ix</sup>, Constitution of the State was adopted and enacted on November 17, 1956.

The last session of the Constituent Assembly was held on January 25, 1957. Constitution of Jammu & Kashmir came into force of January 26, 1957. January 26 is also celebrated as republic day of India. January 26 was chosen for enforcement of Constitution of J&K to show unity with India.

Total sections are 158 and seven schedules and Appendix.

First Schedule has been omitted. Shri N. Gopalaswami Ayyangar presented clause 306A (Now it is known as Article 370) in Constituent Assembly on October 17, 1949.<sup>16</sup> It was introduced due to absence of peace and security in J&K. It was accepted in form of interim system. Shri



N. Gopaldaswami Ayyangar elaborated each provision in detail. Clause 306A became Article 370 after the Commencement of the Constitution of India. Article 370 came into force on January 26, 1950. (please refer article 370).

## MEANING OF GOVERNMENT OF THE STATE

Meaning of Government of the State is very important. Parliament can make laws only with consultation or concurrence of the Government of the State. In the Constituent Assembly from the very beginning Explanation was added to define Government of the State Explanation added in clause 306A (now article 370).<sup>x</sup> For the purposes of this article, the Government of the State means the person for the time being recognized by the Union as the Maharaja of Jammu and Kashmir, acting on the advice of the council of Ministers, for the time being in office, under the Maharaja's Proclamation, dated the fifth day of March, 1948. This explanation was accepted in article 370 of the Constitution of India with minor modification recognized by Union was replaced by recognized by President in Article 370.

President has power to make Order under article 370 (1).<sup>xi</sup> Amendment by Parliament is not necessary. In 1952, the Constituent Assembly of J&K, on the recommendations of the Basic Principles Committee, abolished the hereditary rulership and substituted in its place an elected head, designed Sadar-i-Riyasat. It became necessary to change the definition of the Government of State and Explanation was modified. In 1952 modification was done in Explanation by order of President of India on the recommendation of Constituent Assembly (First meeting on October 31, 1951- Last meeting on January 25, 1957) of J&K. Order was effective from November 17, 1952.

*“At the same time, old confrontations have taken on frightening urgency, especially the India-Pakistan conflict over Kashmir and the violent stalemate in the Middle East. Progress on these and other global challenges requires us to develop a larger strategy for American foreign policy, rooted in a fundamental commitment to move the world from interdependence to an integrated global community committed to peace and prosperity, freedom and security”.*

- William J. Clinton

## **SUBSTITUTED EXPLANATION IS FOLLOWING**

For the purposes 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 of the State for the time being in Office.

In 1965 post of Sadar-i-Riyasat and Prime Minister was substituted by Governor and Chief Minister respectively. This was done by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965. Post of Sadar-i-Riyasat was substituted by Governor from Constitution of Jammu and Kashmir but consequential amendment was not done in Article 370. Jammu and Kashmir Preventive Detention (Amendment) Act, 1967 was assented by Governor. It was challenged that Governor had not been mentioned in Article 370. So, this Amendment was unconstitutional. Constitutional Bench of Supreme Court in the case of Mohd. Maqbool Damnoo v. State of Jammu and Kashmir held that no difficulty in holding that article 370 (1)

and article 370 (1) (d) place no limitation on the framing or amendment of the Constitution of Jammu and Kashmir. If there is a limitation it must be found in the Constitution of the State Section 147 of the Constitution of Jammu and Kashmir itself provides that under that section the Indian Constitution cannot be amended. In this case the Court held that the Amending Act was validly assented to by the Governor.<sup>xii</sup>

According to section 35 of the Constitution of Jammu and Kashmir all functions of the Governor except those functions mentioned in sections 36, 38 and 92 shall be exercised by him only on the advice of the Council of Ministers with Chief Minister at the head.<sup>xiii xiv</sup>

Final conclusion is that in present time Government of the State means Governor who acts only on the advice of the Council of Ministers with Chief Minister at the head. Jammu and Kashmir have adopted Parliamentary form of Government. So final powers are in the hand of Legislative Assembly of Jammu and Kashmir.

(Application of other provision of the Constitution subject to exceptions or modifications with consultation or concurrence as the case may be-Article 370(1) (d) Meaning of Modification-modification has been interpreted in widest amplitude. Article 367 lays down that, unless the context otherwise requires, the General Clauses Act, 1897, shall apply for the interpretation of the Constitution. Therefore section 21 of the General Clauses Act, under which a power to

issue a notification or order includes a power to add, amend, vary or rescind it, is applicable to the power of the President under Art. 370.

Puran Lakhanpal v. President of India and Others (1961) - Power of President to make an Order to modify the Constitution was challenged in Puran Lakhanpal v. President of India and Others (1961). By the Constitution (Application to Jammu and Kashmir) Order, 1954 method of election for six seats in Lok Sabha from J&K was changed from direct election to indirect election. This Order had been issued by President with the concurrence of the Government of J&K under Article 370 (1). Constitutional Bench of Supreme Court held that President has such power because essence of election still persists.

Supreme Court held, -The word modification used in article 370(1) (d) must be given the widest meaning in the context of the Constitution and in that sense, it includes an amendment and it cannot be limited to such modifications as do not make any radical transformation.

(1) Word modification as used in article 370 was interpreted with the help of article 367 read with section 21 of General Clauses Act, 1897.<sup>xv</sup> Wider interpretation was done.

(2) By Constitution (Application to Jammu and Kashmir) Order, 1954 a proviso was added after clause (2) of Article 368. This proviso is - Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of article 370.

(3) Any amendment made under article 368 cannot be applied to J&K without Order of President made after concurrence of Government of J&K under article 370. Article 368 does not automatically applicable to J&K.

(4) Article 370 authorizes the President to modify a Constitutional provision not only when it is applied to the State for the first time, but even subsequently after it has been applied.

(5) Meaning of modification was accepted as was laid down in Puran Lakhanpal Case, 1961<sup>xvi</sup>

(6) In this case Supreme Court clearly said, It is thus clear that the State of Jammu & Kashmir has no vestige of sovereignty outside the Constitution of India and its own Constitution, which is subordinate to the Constitution of India. It is therefore wholly incorrect to describe it as being sovereign in the sense of its residents constituting a separate and distinct class in themselves. The residents of Jammu & Kashmir, we need to remind the High Court, are first and foremost

citizens of India. Indeed, this is recognized by Section 6 of the Jammu & Kashmir Constitution.<sup>xvii</sup>

Constitution (Application to Jammu and Kashmir) Order 1950- President, by using the power conferred by clause (1) of article 370, in consultation with Government of J&K has made the Constitution (Application to Jammu and Kashmir) Order 1950. This Order was made on January 26, 1950 and it came on the same date. In this Order some items mentioned in Union List were declared as corresponding matters of Instrument of Accession. Some other provisions were also declared on which Parliament can make laws.

### **DELHI AGREEMENT, 1952<sup>xviii</sup>**

An agreement between Pt. Jawahar Lal Nehru and Sheikh Abdullah was concluded in July 24, 1952 which is known as Delhi Agreement. By this Agreement some consciousness were made between both leaders. These are (1) Internal autonomy was accepted (2) State Legislature was authorized to make laws on state subjects who had gone to Pakistan due to communal violence of 1947 if they return Kashmir (3) Pardoning powers were given to President (4) State flag along national flag was allowed. (5) Sadar-i-Riyasat must be elected by the State Legislature.

### ***Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1952<sup>xix</sup>***

The President by using the powers conferred by clause (1) of Article 370 of the Constitution of India, in consultation with the Government of the State of Jammu and Kashmir made the Order Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1952. It came into force on November 17, 1952. By this Order Rajpramukh was replaced by Sadar-i-Riyasat of Jammu and Kashmir. Sadar-i-Riyasat was elected person.

### ***Removal of Sheikh Abdullah as Prime Minister and Bakshi Ghulam Mohammad new PM***

Due to pressure of Mr. Nehru, Mr. Karan Singh was elected as first Sadar-i-Riyasat. Delhi Agreement, 1952 was very dangerous for whole country. Agitation started against this. Dr. Syama Prasad Mukharji, N.N. Khare and Sucheta Kriplani vehemently criticized the Delhi Agreement.

Sheikh Abdullah, instead of implementing the Agreement started advocating secession, which would make a Kashmir an independent state. It was inflammatory rumours that USA was backing for independence of Kashmir. Rift occurred in cabinet.

Sheikh Abdullah who was holding the post of Prime Minister since March 5, 1948 was dismissed by Sadar-i-Riyasat Mr. Karan Singh on August 8, 1953 on the ground that he had lost his majority in the House. He was not given chance to prove majority. On August 9, 1953, Sheikh was sent to jail in Kashmir Conspiracy case. Bakshi Ghulam Mohammad who was very popular leader in Kashmir and he was opposing policy of Sheikh was appointed as Prime Minister of Jammu and Kashmir on August 9, 1953.<sup>xx</sup>

## **CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER 1954**

New Delhi negotiated with Jammu and Kashmir in January, 1954. At that time President of India and Prime Minister of India were Mr. Rajendra Prasad and Mr. Jawaharlal Nehru respectively and Sadar-i-Riyasat and Prime Minister of Jammu and Kashmir were Mr. Karan Singh and Mr. Bakshi Ghulam Mohammed respectively. After long discussion negotiation was concluded. Constituent Assembly of J&K ratified the State Accession to India in February 1954. In exercise of the powers conferred by clause (1) of article 370 of the Constitution, the President, Mr. Rajendra Prasad with the concurrence of the Government of the State of Jammu and Kashmir, on the advice of the Government of Pt. Jawaharlal Nehru made an Order which came into force on May 14, 1954. This Order is known as Constitution (Application to Jammu and Kashmir) Order 1954.

By this Order several new provisions were accepted in the Constitution of India and consequently several provisions of Indian Constitution were extended to Jammu and Kashmir. After October 26, 1947 acceptance of Order was most beneficial. Benefit of this Order must be evaluated according to circumstances prevailing during 1947 to 1954. It was applauded by everyone. By this Order law making powers of Parliament were extended on several other subject matters. If you compare this Order in comparison to other State you may feel nervous. But main problem aroused due to delay of acceptance of Instrument of Acceptance and by sending this issue in UNO. One of the Controversial Article i.e. Article 35A came from this Order.<sup>xxi</sup>

Article 35A- Saving of laws with respect to permanent residents and their rights

Article 35A contains Non-obstante Clause. It declared that neither previous nor subsequent laws enacted by Legislature of J&K shall be void on the ground of violation of any provisions of the Constitution of India if it is related to following matters-

- (1) Definition of permanent residents,
- (2) conferring on special rights and privileges or imposing upon other persons any restrictions as respects-
  - (i) employment under the State Government;
  - (ii) acquisition of immovable property in the State;
  - (iii) settlement in the State; or
  - (iv) Right to scholarships and such other forms of aid as the State Government may provide.

Such legislation shall be valid notwithstanding that it is inconsistent with the fundamental rights conferred by the Constitution upon the other citizens of India, such as discrimination on the ground of place of birth (article 15(1), equality of opportunity for employment (article 16(1), and right to reside and settle in any part of the territory of India (article 19(1) (e), etc.<sup>40xxii</sup>

#### Section 6, Permanent residents

Section 6 of the Constitution of Jammu and Kashmir defines Permanent residents. There are three clauses of this section. First clause related to Citizen of India, second clause is related to any person who migrated to Pakistan after March 1, 1947 and returns to J&K. and in third clause "State Subject of Class I or of Class II shall have been defined.

According to section 10 of the State Constitution the permanent residents of the State shall have all the rights guaranteed to them under the Constitution of India.

Parkash v. Mst Shahni and others in 1965 Jammu and Kashmir High Court<sup>xxiii</sup> decided a case which involved issue of permanent residence. According to decision of this case in case of marriage of girl who is permanent resident with a boy who is non-permanent resident, such girl will lose the status of permanent resident of J&K. because her domicile and nationality changed

according to her husband. This decision was supporting patriarchal society. This decision was overruled in 2002.

## **STATUS OF ARTICLE 35A NOW**

Article 35A stem from art.370, and was introduced through a presidential order in 1945. Art.35A does not appear in the main body of the constitution Art.35 is followed by Art36 but appears in appendix I. Art.35A empowers the Jammu and Kashmir legislature to define the permanent residents of the state, and their special rights and privileges. Monday's (05. Aug.2019) Presidential order has extended all provisions of the constitution to Jammu and Kashmir, including the chapter on Fundamental Rights. Therefore, the discriminatory provisions under 35A are now unconstitutional. The President may also withdrawal 35A. This provision is currently under challenge in the Supreme Court of India on the ground that it could have been introduced in the Indian constitutionally through a constitutional amendment under Art368, and not through a presidential order under 370. However, Monday <sup>TM</sup>s presidential order, too has amended article 367 without following the amending process.

Note III - The wife or a widow of the State Subject of any Class shall acquire the status of her husband as State Subject of the same Class as her Husband, so long as she resides in the State and does not leave the State for permanent residence outside the State.

Note III is applicable to only those wife or widow who is non- permanent resident of J&K and marries a permanent resident of the state. But after getting marriage they have acquired status of her husband and became the permanent resident of Jammu and Kashmir. If they leave J&K for permanent residence outside the State, they will lose their status. This note is not applicable those women who have become permanent resident by birth. So, if such women get marriage with non-permanent resident of J&K will not lose status of permanent resident.

Decision: J&K High Court held that a daughter of a permanent resident marrying a non - permanent resident will not lose the status of permanent resident of the state of Jammu and Kashmir.

Decision of this case was challenged in Supreme Court by State Government. But it was withdrawn due to fear of approval of decision of Supreme Court. It was decided to change this decision through enactment of laws by State Legislation. Permanent Residents (Disqualification) Bill, 2004 <sup>xxiv</sup> was introduced in the Assembly to change the decision of J&K

High Court in 2002. These issues have been challenged in Supreme Court by Public Interest Litigations.

### **ABOLITION OF ARTICLE 370<sup>xxv</sup>**

Article 370 was introduced for a time being. It is temporary provisions in the Indian Constitution.

Article 370 (3)<sup>xxvi</sup> .Notwithstanding anything in the foregoing provisions of this article, 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: Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

According to Article 370 (3), President has been authorized to cease the operation of Article 370 in whole or with modification by public notification. But this power of President is conditional rather than absolute. This power is subject to the recommendation of the Constituent Assembly. Constituent Assembly was in existence during 1951 -1957 (First meeting on October 31, 1951-Last meeting on January 25, 1957). At present time this Constituent Assembly does not exist. So, Article 370(3) is not operative.

In these circumstances' recourse have to be taken of Article 368. But it must be remembered that Article 368 does not apply automatically unless President make an order after consultation with or concurrence of the State Government. Article 368 does not curtail the power of the President under Article 370.6 So final power is in the hand of Government the Government of State of Jammu and Kashmir.

### **RELATION BETWEEN CONSTITUTION OF INDIA AND CONSTITUTION OF JAMMU & KASHMIR<sup>xxvii</sup>**

Article 370 deals temporary provisions with respect to Jammu and Kashmir. According to section 3 of the Constitution of Jammu & Kashmir, 1957 the State of Jammu and Kashmir is and shall be an integral part of the Union of India. Section 3 is the basic feature of Constitution of Jammu & Kashmir. According to section 147 of the Constitution of Jammu & Kashmir any Bill or Amendment shall not be moved in either House to change section 3 or the provisions of the Constitution of India as applicable, in relation to the State.



The Constitution (Application to Jammu And Kashmir) Order, 2019<sup>xxviii</sup> Union Minister for Home Affairs, Shri Shah, introduced two bills and two resolutions regarding Jammu & Kashmir (J&K).<sup>xxix</sup>

These are as follows:

1. Constitution (Application to Jammu & Kashmir) Order, 2019 {Ref. Article 370(1) of Constitution of India } issued by President of India to supersede the 1954 order related to Article 370.
2. Resolution for Repeal of Article 370 of the Constitution of India {Ref. Article 370 (3)}<sup>xxx</sup>
3. Jammu & Kashmir (Reorganization) Bill, 2019 {Ref. Article 3 of Constitution of India}<sup>xxxi</sup>
4. Jammu & Kashmir Reservation (2nd Amendment) Bill, 2019<sup>xxxii</sup>

Government is moving a resolution which would repeal the provisions under Article 370 of the Constitution of India, which granted a special status to the state of J&K. The provisions of Article 370 would cease to exist from the date President of India issues a notification in this regard, after the recommendation of the Parliament. Consequently, the Constitution of India would get applicable to J&K, on par with other states/UTs of the country, the Minister added.

Article 370 has prevented J&K to merge with India rather than being a basis of its merger. The politics of vote bank has looted the youth of the state for over 70 years. I would call on the opposition members to debate and discuss on why the benefits of development were not allowed to reach the common people of J&K till now. Politics of religion must be avoided at all costs. Article 370 is equally harmful for people of all religions, the Minister said.

Further, the Minister termed the provisions of Article 370 as discriminatory on the basis of gender, class, caste and place of origin. The youth is being taken for a ride by the political elite. This provision was temporary in the first place and it has to go in the larger interest of the people of J&K, he added.

Under article 370(3), there is a provision that President, on recommendation of the Parliament, has the power to amend or cease the implementation of article 370, through a public notification. This has already happened on a number of occasions in the past. The Home Minister pointed out to the opposition that everyone knows how the article 370 is hampering the development of the people of the state.

the repeal of the Article 370, doors to private investment in J&K would be opened, which would in turn increase the potential for development there. Increased investments would lead

to increased job creation and further betterment of socio-economic infrastructure in the state. Opening of buying of lands would bring in investments from private individuals and multinational companies and give a boost to the local economy, as opposed to the apprehensions raised by those opposing this historic step, he added.

Home Minister remembered the martyrdom of civilians and soldiers who have lost their lives during 1989-2018. He said that had article 370 would not been there, these people wouldn't have lost their lives. Refugees who came from Pakistan after partition did not get citizenship till now. They cannot become councillors in the state. This has been a historical injustice to these people. As opposed to this, in rest of India two Prime Ministers were elected from those refugees.

Because of article 370, democracy never took root in J&K, corruption flourished, widespread poverty took root and no socio-economic infrastructure could come up. It is the root cause of terrorism. Further, 73rd and 74th Amendments to the Constitution could not be applied to J&K due to article 370. Panchayat and Nagar Palika elections could not be held. Who is responsible for taking away democratic rights of the people of J&K which were available to other citizens of India? It was Article 370. Panchayat elections recently held were conducted successfully and peacefully. The people want democracy and not bloodshed., the Minister said.

Talking about economic backwardness in J&K, article 370 impedes people from outside the state to do business there. Absence of economic competition has prevented development and corruption flourished and prices are at a rock bottom because no one can buy land there. No industry, including tourism, is allowed to flourish there. People remain poor in perpetuity despite presence of abundant economic opportunities for the local populace. Rampant corruption is present, thus preventing external investment in the state.

Rebutting the apprehension that removing article 370 would destroy Kashmiri culture, Shri Shah said that all states have preserved their culture and language after becoming a part of the Union of India. How does article 370 protect JK on this aspect, he asked. It is only and only a political propaganda that has blinded the youth of Kashmir into believing it for 70 years. I assure the youth of JK that give this government 5 year and it will become the most progressive region in the country, the Minister said.

Daughters of the state marrying outside the state lose their rights to property. It is so discriminatory to the women and their children. SC and ST people have been discriminated

against and have been deprived of reservation to political offices. Despite knowing this a few people have been perpetuating this article only for their political gains, the Minister said.

Shri Shah assured the House that if the Union Territory model works well, our government would also consider giving J&K the status of state again. No constitutional amendment would be required.

J&K would become a true part of India in letter and spirit once article 370 is removed. The path to solution to all the problems of Kashmir goes through the repealing of article 370. This step would stand strong and would pass the test of legal scrutiny.

Article 370 was a temporary and transient provision, it had to go. It only required political will, which only the present government had. I give a heartfelt appeal to all political parties to rise above political considerations to join hand with the government to remove article 370. The country wants this united as one, the Minister concluded, after which all the resolutions and bills relating to J&K were passed.

Shri Amit Shah also introduced the Jammu and Kashmir (Reorganization) Bill, 2019<sup>xxxiii</sup> making Jammu & Kashmir a Union territory with a Legislative Assembly along with Union Territory status to Ladakh without a Legislative Assembly.

Further, the Jammu & Kashmir Reservation (2nd Amendment) Bill, 2019<sup>xxxiv</sup> to amend the Jammu & Kashmir Reservation Act 2004 was also introduced. This bill seeks to extend the 10% quota to economically weaker sections of society in J&K in jobs and educational institutions. Both the bills were passed by Rajya Sabha unanimously.

To conclude, before reading out the judgment, Justice Ramana, who authored the verdict, quoted the famous opening lines from Charles Dickens' novel A Tale of Two Cities.

*'It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way – in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only'.*

“Although cherished in our heart as a ‘Paradise on Earth’, the history of this beautiful land is etched with violence and militancy. While the mountains of Himalayas spell tranquility, yet blood is shed every day,” he said.

As was said by Salman Rushdie, in an ideal world, you could reunite the Pakistan-occupied part of Kashmir with the Indian-occupied part and restore the old borders. You could have both India and Pakistan agreeing to guarantee those borders, demilitarize the area, and to invest in it economically. In a sane world that would happen, but we don't live in a sane world.

## ENDNOTES

<sup>i</sup> Independence of India Act, 1947

<sup>ii</sup> Puri, Balraj (June 2009), "5000 Years of Kashmir", Epilogue, 3 (6)

<sup>iii</sup> Ibid

<sup>iv</sup> Akbar, M. J. (1991), Kashmir, behind the vale, Viking, p. 9, ISBN 9780670839940

<sup>v</sup> Ibid

<sup>vi</sup> Constitution of J&K

<sup>vii</sup> Zain, Ali (13 September 2015). "Pakistani flag hoisted, pro-freedom slogans chanted in Indian Occupied Kashmir – Daily Pakistan Global". En.dailypakistan.com.pk. Archived from the original on 18 November 2015. Retrieved 17 November 2015.

<sup>viii</sup> Article 370(1) on January 26, 1950

<sup>ix</sup> preamble of Constitution of J&K

<sup>x</sup> 306A (now article 370).

<sup>xi</sup> Order under article 370 (1).

<sup>xii</sup> Sneddon, Christopher (2015). Understanding Kashmir and Kashmiris. Oxford University Press. p. 29. ISBN 9781849043427.

<sup>xiii</sup> section 35 of the Constitution of Jammu.

<sup>xiv</sup> sections 36, 38 and 92 of the Constitution of Jammu and Kashmir.

<sup>xv</sup> article 367 read with section 21 of General Clauses Act, 1897.

<sup>xvi</sup> Puran Lakhanpal Case, 1961

<sup>xvii</sup> Section 6 of the Jammu & Kashmir Constitution

<sup>xviii</sup> Delhi Agreement, 1952

<sup>xix</sup> Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1952

<sup>xx</sup> Application to Jammu and Kashmir) Order 1954

<sup>xxi</sup> Article 35A came from this Order

<sup>xxii</sup> (article 15(1), (article 16(1),

<sup>xxiii</sup> Parkash v. Mst Shahni and others in 1965 Jammu and Kashmir High Court

<sup>xxiv</sup> Permanent Residents (Disqualification) Bill, 2004

<sup>xxv</sup> Abolition of Article 370

<sup>xxvi</sup> Article 370 (3)

<sup>xxvii</sup> Relation between Constitution of India and Constitution of Jammu & Kashmir

<sup>xxviii</sup> The Constitution (Application to Jammu And Kashmir) Order, 2019

<sup>xxix</sup> two bills and two resolutions regarding Jammu & Kashmir (J&K) introduced by Union Minister for Home Affairs, Shri Shah,

<sup>xxx</sup> Resolution for Repeal of Article 370 of the Constitution of India {Ref. Article 370 (3)}

<sup>xxxi</sup> Jammu & Kashmir (Reorganization) Bill, 2019 {Ref. Article 3 of Constitution of India}

<sup>xxxii</sup> Jammu & Kashmir Reservation (2nd Amendment) Bill, 2019

<sup>xxxiii</sup> Jammu and Kashmir (Reorganization) Bill, 2019

<sup>xxxiv</sup> the Jammu & Kashmir Reservation (2nd Amendment) Bill, 2019