

Abrogation of Article 370 and its Constitutional Implications

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Abstract

At the time of Indian independence, the State of Jammu and Kashmir was not a province of the erstwhile British India, and, therefore, was given an option, after independence, either or not to join any of the two newly created countries of India and Pakistan. When the ruler of the State, Maharaja Hari Singh, decided to join India by executing 'Instrument of Accession' (I A) on October 26, 1947; the State was accorded special status under Article 370 of Indian Constitution. Under the provisions of this Article, limitations were imposed on legislative and executive powers of the Government of India as per the terms of the I A. Presidential order, supported by the Government of the State, was a condition precedent under Article 370 to implement any of the provisions of Indian Constitution in the State. Enjoying the special status, the State had framed its own Constitution in 1956 for its people. Government of India has abrogated, on August 5, 2019, the special status of the State by utilizing the provisions of Article 370 itself, and has, in addition, bifurcated it into two Union Territories of 'Jammu and Kashmir' and 'Ladakh'. The Constitutionality of this legal action, however, is pending before our Supreme Court and a future verdict in the case will decide the status of the former State of Jammu and Kashmir.

Keywords: *State of Jammu and Kashmir, Instrument of Accession, Constitution, Article 370, Presidential Order, Union Territory.*

Introduction

Abrogation of Article 370 and its Constitutional Implications

The state of Jammu & Kashmir (J&K) has a unique place in the political history of India. The Indo-J&K relationship, and more specifically the Union Government's handling of J&K, has always been widely reported, discussed, and scrutinized from within and outside of the Indian Subcontinent. The state had been granted limited autonomy under Article 370 of the Indian Constitution, which provided for a separate Constitution for J&K, and restricted the Union Government's legislative authority over matters concerning J&K. In August 2019, the Union Government, through two Presidential Orders, unilaterally announced that it was formally revoking this special constitutional status of J&K. Article 370 was de-operationalized, and the state was reorganized into two separate Union Territories, thus drastically redefining the constitutional relationship between the state and the Union Government.

History of the State of Jammu and Kashmir

In the third decade of 19th century the whole province of Jammu came under a single ruler named Gulab Singh. He was a Dogra chief of Rajput descent. After conquering Ladakh in 1834 AD, he became Raja thereof. In 1842 he conquered Lhasa and annexed Skardu and Baltistan at the same time. By the treaty of Amritsar, concluded between Raja Gulab Singh and The British Government on March 16, 1846, he became the ruler of Kashmir also. The treaty is notoriously referred to in the State of J&K as the 'Sale deed of Kashmir'. Under such circumstances, thus, was the State of J&K created. Ranbir Singh succeeded the throne in 1856 AD about two years before his father's death. He divided the provinces of Jammu and Kashmir in several districts for better administration and established courts. In 1877 a High Court (Adalat-i-Alia) was established, which was the highest court of appeal or revision. He, however, continued the policy of exclusion of every community other than his own from the army and the high offices in the State. Maharaja Pratap Singh ascended to the throne in 1885 AD after the death of his father Ranbir Singh. His reign lasted for about 40 years despite a short interruption due to his deposition by the British Government in 1889. He promulgated a scheme in the shape of Sri Pratap Reforms Regulation in January 1922. It made

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provision for a state council to aid and assist the Maharaja in the conduct of the government of the state. It also provided for the reconstitution of the High Court of Judicature in the state. Pratap Singh was succeeded by his nephew Hari Singh after his intestate death in 1925. Hari Singh ascended the throne in 1925 and remained as the ruler of the State of J&K till the accession of the State in India in 1947. In April 20, 1927 he issued a definition of the term 'State Subject' which thereafter became the basis of definition of 'Permanent Resident' in the State. On April 22, 1934 the Maharaja enacted a Constitutional Act providing for the establishment of the legislative assembly, called the 'Praja Sabha' and laying down his own Legislative, Executive and Judicial powers. Promulgation of the Jammu and Kashmir Constitution Act on September 7, 1939 by the Maharaja was an event of outstanding importance. However, the Constitution Act emphatically brought out the fact that the Maharaja was an absolute Monarch in whom were vested all the powers of the state. Sheikh Abdullah of National Conference threw a challenge in 1946 to the very basis of the Dogra sovereignty in Kashmir. In his speeches delivered before crowds, Abdullah demanded that Maharaja Hari Singh should quit the valley and free the Kashmiris citizens to decide their future by themselves. In the line of 'Quit India' movement in British India he initiated the 'Quit Kashmir' movement in the State of J&K.

Incorporation of Article 370

To save Jammu and Kashmir from the tribal aggression, backed by Pakistan regular army, the king of Jammu and Kashmir State, Maharaja Hari Singh signed the Instrument of Accession on October 26, 1947 as required by Indian Independence Act 1947, while acceding to merge the State with Indian Union, thereby surrendering the jurisdiction of three subjects, Defence, Foreign Affairs and Communication to the Union of India. It was Maharaja Hari Singh alone to decide about the accession of the Jammu and Kashmir State with either of the Dominions, India or Pakistan. Further, the Indian Independence Act did not envisage conditional accession; neither the king of the state nor the Governor General of India can put any condition while signing or by accepting the accession. Therefore, appending a letter by Lord Mountbatten while accepting the accession of the state that stated, "..... It is my Government's wish that, as soon as law and order have been restored in Kashmir and her soil cleared of the invaders, the question should be settled by a reference to the people", was uncalled for. This statement does not and cannot affect the legality of the accession. Mr. Mehar Chand Mahajan, the first Chief Justice of India has observed: "The Indian Independence Act did not envisage conditional accession.It conferred on the rulers of the Indian States absolute power in their discretion to accede to either of the Dominions. The Dominion's Governor-General had the power to accept the accession or reject the offer but he had no power to keep the question open or attach conditions to it..." He further said:

"Finality which is statutory cannot be made contingent on conditions imposed outside the powers of the statute. Any rider which militates against the finality is clearly ultra vires and has to be rejected".

This contention of the Government of India made the Indian case weak in the Security Council of UNO and formed the basis of its resolution on Jammu and Kashmir and made the issue rolling till date. It may further be added that Sheikh Mohammad Abdullah had no local standee in the matter to decide about the accession of Jammu and Kashmir State with India. As such undue pampering of Sheikh and yielding to his demand of creating a State within a State under his supremacy was not required that made Jammu and Kashmir a boiling issue, the consequences of which the country is still confronting with. After the accession of the State to India Maharaja Hari Singh was compelled by the Government of India, in particular by the then Indian Prime-Minister, to hand over the complete administration of the State to Sheikh Abdullah. Sheikh Abdullah was first appointed as Emergency Administrator and then Prime Minister on March 4, 1948. On June 9, 1949, the Maharaja issued a proclamation vesting all his powers in Yuvraj Karan Singh. After the accession of the princely states, the acceding states were to constitute their own Constituent Assemblies for framing their separate constitutions and define their relationships with the Union. However, the process of setting up the constituent assemblies was extremely slow as only three states, Saurashtra Union, Travancore & Cochin constituted their respective Constituent Assemblies. After Sardar Vallabhbhai Patel made the premiers of the states agree to accept the Indian Constitution that was in the process of being framed. The Constituent Assembly on 12 th October, 1949 decided that the India

Constitution would be operative in the states on the basis of its acceptance by the Rulers or the Rajpramukhs. In accordance with this statement, Rulers or Rajpramukhs declared the acceptance of the Constitution.

However, Sheikh Mohammad Abdullah, Mirza Mammad Afzal Beg, Mulana Mohammed Saeed Masoodi and Moti Ram Baigra who joined the constituent Assembly of India on June 1949 (all being the members of National Conference), on behalf of State Government did not accept the draft of the constitutional provisions agreed upon by other states. They wanted separate political identity for Jammu and Kashmir on the basis of its Muslim majority. Pt. Jawaharlal Nehru was willing to accommodate the separate identity of Jammu and Kashmir and at the same time he wanted to stick to the wish of the Government of India reflected by Lord Mountbatten letter and his own declaration that the question of State accession should be settled by a reference to the people, as soon as the law and order is restored in Kashmir and her soil cleared of the invaders.

The National Conference leaders refused to accept the inclusion of the State in the territorial jurisdiction and the constitutional organization of India and refused to commit themselves to the acceptance of any application of the Constitution of India to the State in respect of the matters which did not correspond to the terms of the Instrument of Accession.

After that there were long parleys between the Government of India and Sheikh Abdullah and his colleagues to arrive at the final draft of Article 306A. In between Pt. Nehru proceeded on foreign tour entrusting the task of piloting the draft through the Constituent Assembly to N. Gopaldaswami Ayyangar. It was a very hard task for Ayyangar to arrive at the consensus on the final structure of Article 306. After holding number of meetings with National Conference leaders, Ayyangar drew up a fresh draft in consultation with Afzal Beg, who was deputed by Sheikh Mohammad Abdullah to negotiate a settlement.

The revised draft of Article 306-A was circulated in the Constituent Assembly on 16 October, 1949. It came up for the consideration of the Assembly the next day. The draft was adopted by the Assembly without any dissent. At the revision stage, Article 306-A was remembered Article 370 of Constitution of India

On 25 November 1949, the Regent of the State, Karan Singh, by a proclamation ordered that the relations between the State and the Union of India be governed by the Constitution of India. According to the proclamation “the provisions of the Constitution of India shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State”. On 26 January 1950, the Constitution of India came into force.

Article 370: Temporary Provisions with Respect to the State of Jammu and Kashmir

- (1) Notwithstanding anything in this Constitution:-
- (a) The provision of article 238 shall not apply in relation to the State of Jammu and Kashmir.
- (b) The power of Parliament to make laws for the said State shall be limited to-
- (i) Those matters in the Union List and the Concurrent List which in consultation with the Government of State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for the State; and
- (ii) Such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation: For the purpose of this article, the Government of the State means that the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of

Council of Ministers for the time being in office under Maharaja's Proclamation dated fifth day of March 1948;

(c) The provision of Article (1) and this article shall apply in relation to that State;

(d) Such of other provisions of this Constitution shall apply in relation to

that State subject to such exception and modifications as the

President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State.

Provided further that no such order which relates to the matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub clause (b) of clause (1) or in the second proviso to

sub-clause (d) of that clause be given before the Constituent Assembly for

the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) 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.

President of India by his order (called Order, 1950), in exercise of his powers conferred by clause (1) or Article 370 of Constituent of India, in consultation with the Government of the State of Jammu and Kashmir, applied the Constitution to Jammu and Kashmir on 26 January,1950.

Salient Features Article 370

1. Jammu and Kashmir is allowed to have its own Constitution.

2. The Jammu and Kashmir of the Indian Constitution and Parliament's legislative power over the State is restricted to three subjects, namely Defence, Foreign Affairs and Communications, as specified in the Instrument of Accession. However, the President has the power to extend such other provisions of Indian Constitution and laws related to the matters specified in the Instrument of Accession in consultations with the State Government.

3. The President of India can extend the other constitutional provisions or other Union powers which do not fall within the ambit of the Instrument of Accession to the State with the concurrence of the State Government. The concurrence given by the State Government has to be ratified by the State Constituent Assembly, if such concurrence is given before the formation of the Constituent Assembly of the State.

4. Clause (3) of Article empowers the President to make an order abrogating or amending Article 370, but it requires the recommendation of the State Constituent Assembly.

5. Under Clause (3) of Article 368, there is a proviso that states that no constitutional amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by the order of the President under clause (1) of article 370 which requires the concurrence of the State Government and ratification by the Constituent Assembly.

Disoperationalization of Article 370

In order to scrap the special status of the State of J&K the Government of India invented an indirect procedure in the Constitution. It first issued the Constitution (Application to Jammu and Kashmir) Order, 2019, C.O. 272, under Art. 370 (1) with the concurrence of the State's Governor on August 5, 2019. It superseded the earlier Presidential Order of 1954, C.O.48, with immediate effect and applied whole of the Constitution in the State of J&K. C.O.4820 was the first exhaustive modification of Indian Constitution in its application to the State. C.O.272 has also added a new Clause in Art. 367 as Clause (4) consisting of four sub-clauses. Sub-Clause (4) says that in proviso to Clause (3) of Art. 370 the expression 'Constituent Assembly of the State' referred to in Clause (2) shall read 'Legislative Assembly of the State.' This was the cornerstone for all subsequent legal measures—a tool to circumvent the obligation placed on the Union Government to take the prior recommendation of the J&K Constituent Assembly before de-operationalizing the Article. Sub-clause (d) of clause (1) of Article 370 states that "other provisions" of the Indian Constitution can be modified and then made applicable to the state by Presidential order. Therefore, textually speaking, the phraseology of Article 370 suggests that the power meted out under it-to modify provisions of the Constitution before applying them to J&K-does not extend with respect to a modification of Article 370 itself. Here, however, the power under Article 370(1)(d) was used to modify Article 370(3) by modifying Article 367 "in relation to the State of Jammu and Kashmir According to Article 370(1)(d), other provisions of the Constitution may be extended to J&K-with possible "exceptions and modifications"-only by way of a Presidential order issued in concurrence of the "Government of the State." The explanation to clause (1) provides that any reference to the "Government of the State" is to be construed as "including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers." The first Presidential order stated that the concurrence of the Government of J&K had been obtained. However, in reality, the concurrence obtained was the concurrence of the Governor acting on behalf of the President of India, since J&K was under President's Rule at the time. Further, the second Presidential order, relying on Article 370(3), declared that Article 370 had ceased to be operative. Merely based on the substitution of terms achieved in Article 370(3) through the first order (assuming that the first order is not found procedurally lacking), the Union Government would still have required the recommendation of J&K's Legislative Assembly before declaring the provision inoperative. However, during President's Rule, the Indian Parliament exercises all powers of the Legislative Assembly of that state. In reality, Article 370 was de-operationalized on the recommendation of the Indian Parliament, not of J&K's Legislative Assembly. Therefore, a question arises regarding the scope of the powers that may be exercised by the Union Government and the Indian Parliament during President's Rule, and whether there are any limits to this power. Article 356 of the Indian Constitution forms the basis of this analysis, as it governs the situation of President's Rule. As per sub-clause (a) of clause (1) of Article 356, the President may by proclamation "assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor." Further, sub-clause (b) states that the President may "declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament."

After indirectly changing Art. 370 (3) by amending Art. 367, the Union Home Minister introduced two Statutory Resolutions, one, to recommend that the President issue a notification rendering Art. 370 inoperative, and two, to accept the 'Jammu and Kashmir Reorganization Bill' on August 5, 2019. Both the Houses of the Parliament passed these resolutions acting as the Legislative Assembly of the State of J&K, for the State was under President's Rule at that time. This Bill became an Act after getting President's assent on August 9, 2019. Under the Act, the State of J&K was to be divided into two union territories (UTs) to be respectively known as the 'Union Territory of J&K' and the 'Union Territory of Ladakh'. Both these UTs came into existence on October 31, 2019.

Constitutional Implications of Abrogation of Article 370

- After a revocation, no uncommon forces will be given to the inhabitants of Jammu and Kashmir.
- After the abrogation of Art 370, anyone can buy immovable property like land and can move in Jammu and Kashmir.
- People of Jammu and Kashmir need to part with their double citizenship as India follows the idea of single citizenship.
- Women needn't to part with their immovable property in the wake of the wedding to non-Kashmiri. They can hold their property.
- Article 360 of the budgetary crisis will be pertinent to them.
- 16% reservation will be given to minorities of the occupants living there.
- There will be no different banner for the occupants of Jammu and Kashmir.
- They will have a banner of tri-shade of India and general decisions will happen once in like clockwork. Now the laws like Right to information will be accessible to them.
- The Central government will likewise have the ability to convey and control the police powers straight forwardly.
- There will be the utilization of focal laws in the regions of J&K and Ladakh.
- The article 356 of the Indian constitution would be material in the J&K. It implies the representative standard is supplanted by the president rule in the state.
- All the arrangements of article 370 of the Indian constitution are invalid and void aside from proviso 1 of the article 370 of Indian constitution.
- After the annulment of article 370, the complete get together seats would diminish to 83 in light of the fact that 4 seats of Ladakh district would be sliced.
- Jammu and Kashmir will be managed directly by the central government, allowing for more centralized control over administration.
- The new union territory of Jammu and Kashmir will be similar in structure to Pondicherry and Delhi, while Ladakh will align more closely with territories like Andaman and Nicobar.
- This change is expected to facilitate more focused development initiatives by the central government in the region.
- The 73rd and 74th amendments, which pertain to the elections of local bodies, will now apply, leading to increased local participation in governance.
- With the implementation of these amendments, local governance structures will be strengthened, promoting greater accountability and representation.

Conclusion

The abrogation of Article 370 in August 2019 has far reaching constitutional implications, particularly in the context of Indian federalism and the division of powers. India's federalism is often described as "quasi-federal" because the Constitution vests residuary powers in the Union and permits strong central intervention in state matters. Article 370, however, created an asymmetrical model of federalism by granting Jammu and Kashmir its own Constitution, flag, and legislative autonomy in all subjects except defence, foreign affairs, and communications. Its removal has redefined the boundaries of federalism by eliminating this exceptional autonomy and placing Jammu and Kashmir under the same constitutional regime as other states and union territories. While proponents argue that this strengthens the unity and integrity of India by ensuring uniform application of laws, critics contend that it undermines the principle of cooperative federalism, as the decision was made without the consent of an elected state government or legislature. The reorganization of the state into two union territories also altered the federal balance by reducing the level of political autonomy available to the region, raising questions about the extent to which the Union can restructure state boundaries and constitutional status unilaterally. Thus, the abrogation is not just a regional event but a precedent with implications for the future of federalism in India.

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