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ABROGATION OF THE ARTICLES 370 AND 35[A]: A STUDY IN THE CONTEXT OF RECENT DEVELOPMENT AND FUTURE OF THE STATE

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Abstract

In the present research paper, talks about the provisions related to the abrogation of Article 370 and Article 35–A of the Indian Constitution by the Parliament of India and the circumstances present after that. Article 370 and Article 35–A describe about the special position given to the populaces of Jammu and Kashmir and who are stable populaces of that state and deliver them with special rights which are not available to the rest of the Indians. Section 144 of the Criminal Penal Code is allotted at the time of safety risk during riots. The Jammu and Kashmir Reorganization Act was passed by Parliament, with legislation to bifurcate the state of Jammu and Kashmir into two union territories called the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh without legislation. The objective behind the repeal and reorganization of these Articles of the Indian Constitution by the Central Government was to integrate Kashmir into India so that the State of Jammu and Kashmir can also take advantage of opportunities which are not available to them, as they had a separate Constitution earlier. Also, its aim was to end terrorism in the nation and accomplish the demand of the persons of Ladakh as they wanted it to become a union territory. Also, this research paper discussions about the past of the State of Jammu and Kashmir, the effects of abrogation of Article 370 of the Indian Constitution, the effects of the amendment, the world’s reaction to this amendment and finally the future and recent progress of the state.

Keywords: Abrogation, Article 370 and Article 35[a] of the Indian Constitution, Jammu and Kashmir, Autonomy.

Introduction

In 1952, the Indian President Dr. Rajendra Prasad wrote at one place in the entry of his diary: “the Indian Constitution has assumed the President of India a number of powers, including the power to impose President’s rule in a State in case of emergency”, and "Kashmir is a portion of India and the Constituent Assembly of Kashmir cannot yield any verdict arbitrarily".¹ In 19th December 2018, the President of India delivered a declaration under Article 356 of the Indian Constitution. Article 356 was applicable to the State of Jammu and Kashmir on the basis of the Presidential Order of 1954. Under the declaration, the President himself assumed “all functions of government”. Under the declaration, the President himself accepted “all the roles of the government”² of the State and announced that the powers of the Legislature of Jammu and Kashmir would be exercised “by or under the power of Parliament”.³ The declaration illuminate that any position to the “Governor” or “Legislature” of Jammu and Kashmir in the Constitution

¹. Prasad’s diary, 8 July 1952; Choudhary Valmiki [1994], Dr. Rajendra Prasad: Correspondence and Select Documents, Allied Publishers, New Delhi, Vol. 16, at p. 253.

². Clause [a].

³. Clause [b].

shall be construed as a position to the President and Parliament respectively.⁴ Three effects then occurred in rapid sequence that basically reformed the constitutional position of Jammu and Kashmir:

Firstly, on 5th August 2019, the President of India delivered an instruction,⁵ C.O. 272, which removed order of 1954,⁶ which included special provisions i.e., Article 35[c] and Article 35–A that were applicable to Jammu and Kashmir. However, it also required to modify Article 367 of the Constitution by changing the orientation to the words “Constituent Assembly” in Article 370[3] with “Legislative Assembly”. It was ingenious—because President’s precept was forced in Jammu and Kashmir, India’s BJP–conquered Parliament was acting as the “Legislative Assembly” of Jammu and Kashmir. Therefore, Parliament can request the President to modify or revoke Article 370.

Secondly, in cooperation the Houses of Parliament dispensed an endorsement to the President to eliminate Article 370. Consequently, the next day, on 6th August, the President made a proclamation, C.O. 273, creation Article 370 redundant.⁷

Thirdly, on 9th August 2019, Parliament passed the **Jammu and Kashmir Reorganization Act, 2019**, which completely stripped Jammu and Kashmir of its statehood and bifurcated the state into two union territories: Jammu and Kashmir and Ladakh.⁸

Both the Union Territories came into existence on 31st October, 2019, on the occasion of Sardar Patel’s birth anniversary. The Government of India gave two main motives for dividing Jammu and Kashmir into two Union Territories: [1] To give it the status of Union Territory to meet the demands of the people of Ladakh. [2] To keep internal security in the State and prevent cross–border terrorism.

History of the Jammu and Kashmir State

The State of Jammu and Kashmir has been an unsettled subject ever since it was handed over to India in 1947. The State of Jammu and Kashmir got its proper shape after it was acquired by Ranjit Singh. He formed the Sikh Union and liberated Kashmir from the Mughal Empire in the early 19th century. Its administration was given to the head of the ‘Dogra’ community. At this time the base of the British East India Company was getting sturdy. The Anglo–Amritsar Treaty fixed the trust of Jammu and Kashmir which was shape in the year 1846, and came to be known as the royal state, which he sold to Dogra Raja Gulab Singh for 75 lakh rupees.⁹

In 1947, the British divided the Indian subcontinent into two parts, namely India and Pakistan. Raja Hari Singh was the King of Jammu and Kashmir at that time and Jammu and Kashmir being a royal State, such princely states were assumed the choice of either ceding to India or Pakistan or remaining an independent State. Raja Hari Singh decided to become a self–governing state in its place of linking the two newly independent nations. However, this diplomatic rule was transitory as the state was condemned by raiders from the adjoining North West Frontier Province, backed by Pakistan. Maharaja Hari Singh asked the Prime Minister of India for help. Former Prime Minister of India Pt. Jawaharlal Nehru refused Hari Singh for help saying that he could not help him by sending his army as the state of Jammu and Kashmir is not a

⁴ The proclamation, in Clause [c][ii], suspended a provision of Article 3 of the Constitution, which required the President to refer a Bill for the reorganization of the State to the Legislature of a State if it did not cover the area, boundaries or the name affects the State.

⁵ The Constitution [Application to Jammu and Kashmir] Order, 2019.

⁶ Section 1[2] of the Constitution [Application to Jammu and Kashmir] Order, 2019.

⁷ Declaration under Article 370[3] of the Constitution, 6th August, 2019, C.O. 273.

⁸ Under the 2018 proclamation, the President had suspended the requirement to send a bill to the legislature under a provision of Article 3 of the Constitution.

⁹ Rathore T. [2008], Kashmir: Then and Now, The Greater Kashmir, April 8, at pp. 17–28.

part of India. In the midst of these circumstances, in October 1947, Maharaja Hari Singh made an agreement with India declaring that Jammu and Kashmir was a part of India, but it would enjoy certain freedoms that other states would not. Not only this, India will get complete autonomy in matters related to the state such as foreign affairs, communication, finance and defence.¹⁰ Article 370 was added to the Indian Constitution to ensure that the state enjoys special privileges in the state of Jammu and Kashmir.¹¹

Article 370 of the Indian Constitution

Article 370 of the Indian Constitution was enlisted by Sheikh Abdullah, the Prime Minister of Jammu and Kashmir, who was selected by Maharaja Hari Singh and Jawaharlal Nehru in 1947 with the purpose of keeping friendly relations between India and Jammu and Kashmir. Sheikh Abdullah desired that the provisions of Article 370 should not be provisionally placed in the Indian Constitution and iron-clad sovereignty for the State where the Center did not comply.¹² The final draft of the Article was made by Gopalaswami Iyengar who was a Minister without portfolio in India's first cabinet; he was also the earlier Diwan of former Maharaja Hari Singh. Article 370 came into force in 1949.¹³

Article 370 of the Indian Constitution is a provisional provision that gives special position to Jammu and Kashmir under Part XXI of the Indian Constitution which deals with the provisional, intermediate and special provisions that have been granted to the State.¹⁴ Under this Article the Indian Parliament cannot upsurge or reduction the boundaries of the State... all provisions applicable to other states do not apply to Jammu and Kashmir. For instance, till 1965, Jammu and Kashmir had the Governor in place of the *sadr-e-riyasat* and Prime Minister in place of Chief Minister.¹⁵

That is to say, except for defence, finance, communications and foreign affairs, the Parliament shall require the authorization of the State Government to enact any other law according to this Article. The State populaces of Jammu and Kashmir live under a different set of laws relating to ownership of property, citizenship and fundamental rights than other citizens of India. As a result, Indian citizens from other states cannot buy land in Jammu and Kashmir. Also, the central government has no authority to declare a financial emergency under Article 360 of the Indian Constitution, emergency can be declared only on war and external aggression. Dual citizenship is permitted to peoples of Jammu and Kashmir, only single citizenship is applicable to all other Indians. A separate flag is approved for the state of Jammu and Kashmir. Additionally, there is no provision for reservation for minorities, and they cannot demand the right to information, with a woman marrying a non-Kashmiri having to give up her property.¹⁶

The Indian laws which are fully applicable to the State of Jammu and Kashmir are as follows:

- a) The All-India Services Act, 1951.
- b) The Border Security Force Act, 1968.
- c) The Central Goods and Services Tax Act, 2017.
- d) The Central Laws [Extension to Jammu and Kashmir] Act, 1968.
- e) The Essential Commodities Act, 1955.

¹⁰. Anand A.S. [2004], *The Constitution of Jammu and Kashmir*, Universal Publication, New Delhi, at p. 97.

¹¹. Basu D.D. [1970], *Commentary on the Constitution of India*, Lexis Nexis, New Delhi, at p. 512.

¹². Rathore T. [2008], *Kashmir: Then and Now*, The Greater Kashmir, April 8, at pp. 17–28.

¹³. Basu D.D. [1970], *Commentary on the Constitution of India*, Lexis Nexis, New Delhi, at p. 530.

¹⁴. Gazala P. and Javedur R. [2012], *An Unpleasant Autonomy: Revisiting the Special Status for Jammu and Kashmir*, *Economic and Political Weekly*, 47[23], at p. 73.

¹⁵. Chowdhary R. [2000], *Autonomy Demand: Kashmir at Crossroads*, *Economic and Political Weekly*, 35[30], at p. 2599.

¹⁶. Anand A.S. [2004], *The Constitution of Jammu and Kashmir*, Universal Publication, New Delhi, at p. 103.

- f) The Income Tax Act, 1961.
- g) The Integrated Goods and Services Tax Act, 2017.
- h) The Negotiable Instruments Act, 1881, etc.

In 2018, *Kumari Vijayalakshmi Jha v. Union of India and Anr.*¹⁷ the Apex Court has ruled that Article 370 has acquired an everlasting feature in the Constitution of Indian. Similarly, in the case of *State Bank of India v. Santosh Gupta*,¹⁸ the Apex Court reiterated the above decision with reference to Article 370. India needs the permission of the Jammu and Kashmir government to enforce laws in the State except in the matter of defence, foreign affairs, finance and communications. The laws of the state of Jammu and Kashmir are completely different from those of the rest of India in terms of fundamental rights, property and citizenship. The consent was only temporary as the Constituent Assembly required ratification. This Article can be abolished only after the approval of the State Constituent Assembly. The state has absolute genuine power to make laws with respect to welfare measures, cultural measures, personal law and procedural law.

Article 35[a] of the Indian Constitution

It authorizes the State's legislature to define "permanent residents" of Jammu and Kashmir and grant them only those specifically notable benefits for them. The State of Jammu and Kashmir reflects as "permanent residents" those individuals who were born earlier the year of 1911 or those who have lawfully steady property and residence for 10 years before the date of appealing citizenship or as permanent residents....¹⁹ It provides special rights to the residents of Jammu and Kashmir and forbids people from external the State from buying any steady property in the State. It also permits the State legislature to execute any limitations on peoples other than enduring residents in respect of the above.

It was compiled to the Indian Constitution in 1954 by an order of the then President Rajendra Prasad on the assistance of the Jawaharlal Nehru Cabinet. In order to assurance these special rights and freedoms, the Article states that no act of the State Legislature falling under it can be challenged for violating the Constitution or any other law.

Manuscript to Article 35[a] in the Indian Constitution: "Parliament shall have the power to make laws, and the State Legislature shall have no power; in respect of any matter which may be provided for by law made by Parliament under Clause [3] of Article 16, Clause [3] of Article 32, Article 33 and Article 34; and for prescribing punishment for acts which have been declared to be an offense under this Part; and Parliament shall, as soon as may be after the coming into force of this Constitution, make laws to determine the punishment for the acts referred to in Sub-section [ii]."²⁰

Section 144 of the Criminal Procedure Code

Repealing of Article 370 and 35-A in state of Jammu and Kashmir Section 144 of the Code of Criminal Procedure implemented in many areas. On the night of 4th August 2019, orders were approved by the District Magistrate to implement Section 144 from 6 am on 5th August, 2019. Mobile phone and internet services are down and three former CMs of the state of Jammu and Kashmir were under house detention as they were request all political parties to come together as a unit against this move of the central

¹⁷. [2017] WP [Civil] No. 9300/2015.

¹⁸. [2017] 2 SCC 538.

¹⁹. Anand A.S. [2004], *The Constitution of Jammu and Kashmir*, Universal Publication, New Delhi, at p. 104.

²⁰. Sharma S. [2019], *The Political Impact of India's Removal of Jammu and Kashmir's Special Status*, South Asian Voices, August 19, at p. 97.

government.²¹

Section 144 of the Criminal Procedure Code is allotted in crucial cases of security risk or riot and prohibits the assembly of five or more people in the area where it has been imposed.²² The notice is delivered by the District Magistrate of the zone. This section also authorizes the authorities to block net-access. According to the order delivered by the government, there will be “no movement of civic”. When there is a risk of breach of public peace or internal trouble, Section 144 of the Code of Criminal Procedure is invoked. Under this section, all citizens except police or paramilitary or security forces are prohibited from carrying sharp-edged weapons or firearms in public places. This section cannot be forced for more than two months. In addition, if the State Government reflects it essential to prevent hazard to human life or to prevent riot, this special clause may be extended by six months from the date of commencement of the order. The penalty for illegal assembly is up to three years.²³

Impact of Abrogation of Article 370

After the abrogation of Article 370, some of its impacts which can be clearly seen are as follows:

- a) After the abrogation of Article 370, no special rights will be given to the citizens of Jammu and Kashmir.
- b) After the reorganization, any Indian citizen can buy immovable property like land there and migrate to Kashmir and Ladakh.
- c) After the reorganization, financial emergency Article 360 of the Indian Constitution will apply to these states.
- d) All the provisions of Article 370 of the Indian Constitution except Clause [1] of Article 370 are void.
- e) Article 356 of the Indian Constitution will be applicable in the state of Jammu and Kashmir, that is, now the Governor’s rule in the state has been replaced by the President’s rule.
- f) Central laws will be applicable in the areas of Jammu and Kashmir and Ladakh.
- g) For the residents of Jammu and Kashmir, the tricolor flag of India will apply, there will be no separate flag and the general election will be held once every five years.
- h) Minorities living there will be given 16 percent reservation.
- i) The Central Government will now also have the right to directly deploy and control the police forces.
- j) The individuals of Jammu and Kashmir will have to give-up their dual citizenship as India follows the notion of single citizenship.
- k) The Right to Information Act will be applicable to all of them as well.
- l) Women of Jammu and Kashmir will not have to lose their immovable property after marrying a non-Kashmiri and can retain their property.
- m) After the abrogation of Article 370, the over-all assembly seats will become 83 as 4 seats in Ladakh region will be cut.

Effects of Amendment

- a) Article 370 of the Indian Constitution has not been repealed but has only been amended. Article 370 still retains its place in the Indian Constitution without any power.

²¹. The Economic Times, 11th August, 2019, at p. 7.

²². The Hindustan Times, 12th August, 2019, at p. 11.

²³. Prakash A. [2017], **Code of Criminal Procedure**, Universal Law Publishing, at p. 254.

- b) Article 35–A in Appendix I of the Constitution, which was inserted with the broad powers given in Article 370(1), has become inactive after this amendment.
- c) Clauses [2] and [3] of Article 370 of the Indian Constitution are held to be void except in Clause [1].

Global Reactions

The BJP government bifurcated the state of Jammu and Kashmir into two Union Territories, drawing different reactions from across the world. This decision of the central government was welcomed by most of the people happily, while some people opposed it saying that they are hurting the sentiments of the people living there. Neighboring countries Pakistan and China strongly opposed this, saying that the Center should not have taken this decision. Responding to this remark, Ministry of External Affairs spokesperson Rajesh Kumar said that the Recognition Bill 2019, passed by the government in Parliament on 5th August, 2019, relating to Jammu and Kashmir is an internal matter of the country. They have no right to interfere in the private affairs of the country. This issue is a legacy of history between India and Pakistan, which is also agreed upon by the international community.

Development and Future of the State

On 5th August, 2019, Parliament passed the bill to abandon Articles 370 and 35–A to separate Jammu and Kashmir from Ladakh. The focal object was to endow reservation to those financially backward and changing of the Ranbir Penal Code by the Indian Penal Code, 1860. These changes made in the State have criticized versatile from student bodies and pressure groups across the country, which believe that it will end to pursue Kashmiris, but when we check carefully, it ensures equity for them. There is a calculated step and for every Indian, because they have some special powers. Populaces of Jammu and Kashmir will advantage from numerous social welfare schemes, which were organized like the right to education, the laws such as the right to information will be accessible to them. Even after marrying non–Kashmiri, women can keep their property with them. Many job opportunities will be providing by the State which will empower them to live a safe and prestigious life and eventually being a federal area will mean that their security will rest in the hands of the center. This step has sent a solid message across the border that India is accomplished of all fronts to deal with their internal issues deprived of the help of external powers. This practice of internal power shows that India is sovereign.

Conclusion

The abrogation of Article 370 is a big win for the whole country. Now after all these changes, we can proudly say that “from Kashmir to Kanyakumari, India is one”. This decision taken by the government in the Indian Parliament will actually remove terrorism from India and Kashmiris will rise to nationalism. In this context, we can also say that the best and bold decisions taken in governments so far in India. The state of Jammu and Kashmir is our ultimate duty to feel safe and future towards the future. There was no investment or industrial development due to terrorism in the valley that identified as the earth’s heaven, because there was always an atmosphere of terrorism between investors. Therefore, it can be said that peace system has been established in Jammu and Kashmir state by removing Article 370 and the spirit of nationalism has been communicated between Kashmiri people. With this hope that the government will keep the idea of the development of “Jannat”.
