

“ARTICLE 370: HISTORIC DECISION AND TURNING POINT OF THE INDIAN CONSTITUTION”

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“No problem can be solved from the same level of consciousness that created it”

— Albert Einstein

INTRODUCTION

Article 370 and Article 35A of the Indian Constitution are one of the most debatable and controversial topics of the Indian Constitution. Having had a negative impact on the lives of the people of Jammu & Kashmir since its inception in 1950, the articles have finally been abrogated by the Government of India in August, 2019. Its controversial nature is further explained as this matter was also taken to The United Nations by the then Indian Government, but till today no peaceful solution has been reached. This issue is so complex that it gives no clarity to the minds of the people of J&K, which frequently leads to fights, riots, baseless allegations, violent attacks and so on. Everyone has a different way of looking at this issue which has created multiple conjectures on the relationship between the Indian Government and the erstwhile State of Jammu & Kashmir. Due to all this, the development of J&K has suffered the most. The State’s tourism sector has been seeing a consistent decline for the last several decades, as tourists refrain from visiting the State for fear of their safety. The common people, who hugely depended on the influx of tourists for their livelihoods, have had to look for alternative means of income, of which are very few as the State has almost a negligible Industrial complex. To understand the current scenario of the nation one should have a complete knowledge on A.370 and A.35A, as the basis of understanding any issue lies in its history.

HISTORICAL BACKGROUND

Jammu & Kashmir is located in the northern most region of India. At the time of the British Raj there were 600 princely states and Jammu & Kashmir was one of them. The population of this princely state consisted of a combination of Hindus, Muslims, Buddhists and Sikhs. When the British flag came down on 15th August 1947, Maharaja Hari Singh, the then king of the princely state asked for the advice of Lord Mountbatten on the issue, the then Governor-General of India. Thereafter, they tried to conduct plebiscite which was a failed attempt as Pakistan kept on interfering and started questioning its legality. Maharaja Hari Singh wanted to make J&K an independent nation and develop it on the lines of Switzerland but he later agreed to become a part of the Republic of India when the Pakistani army

attacked it in 1947 with the intention of annexing it and forcibly making it a part of Pakistan. On October 26th, the Maharaja signed the “Instrument of Accession” which was approved by Governor-General Lord Mountbatten. It was agreed and accepted by all the people and was considered to be valid by all the leaders at that time. Since the past so many years this instrument is considered a proof which shows that Jammu & Kashmir is an integral part of the Republic of India. Pakistan, since partition, has always had mala fide intentions to acquire Jammu & Kashmir which has led to three wars, various isolated attacks and frequent riots resulting in the death of innocent people. The move of abrogating the article was so grave and sudden that it made the lives of people miserable.

ORIGIN OF A.370 AND A.35A

Part XXI of the Indian Constitution talks about A.370 as “Temporary, Transitional and Special Provision¹” which provided autonomous status to the state of Jammu & Kashmir. The article was an outcome of the “Instrument of Accession” signed by the Maharaja. The insertion of this article was not an easy task, due to so many complexities involved at the time of independence. The first Prime Minister of India, Pandit Jawaharlal Nehru had clear intentions to incorporate this article under the Constitution. When he discussed the matter with other leaders like Maulana Hasrat Mohini, Dr. B. R. Ambedhkar, they were of the opinion that insertion of this article will have negative impact on relationship between India and the state of Jammu & Kashmir in the future. Dr. B. R. Ambedhkar even refused to draft this article as a part of the Indian Constitution. Prominent leader, the “Ironman”, Sardar Patel also had his misgiving on the same and never wanted this article to be incorporated. Even after all this, Pandit Nehru’s decision did not change and he thereafter asked Gopalaswami Ayyangar to draft this article. There are various contentions that, Sheikh Abdullah who was the second Prime Minister of Jammu & Kashmir and a political leader who played a crucial role in Kashmiri politics was behind the insertion of A.370 as he wanted autonomous power in Jammu & Kashmir. He even removed the Monarchy system and re-designated himself as Sadar-e-Riyasat, who was to be elected by the members of the Assembly. Article 35A was added by a Presidential Order through The Constitution (Application of Jammu & Kashmir) Order, 1954, as per the powers under A.370 (1)² and with the approval of the State

¹ Subs. by the Constitution (13th Amendment) Act, 1962, S.2 for “Temporary and Transitional Provisions” (w.e.f.1.12.1963)

² (1) Notwithstanding anything in this Constitution, (a) the provisions 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 the 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 that 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 purposes of this article, the Government of the State means the person for the time

Government of Jammu & Kashmir. This article could be altered only with two-third majority by the state legislation and the powers of the Central Government were very restrictive under this article. It specifically defines “Permanent Resident” and grants various rights and privileges to the people of the State. This article was not added as per the procedure for the amendment of the Constitution as given under Article 368.

IMPLICATION OF A.370 AND A. 35A

Insertion of the article imposed a lot of restrictions on the powers of Union Government. It could only take decisions on matters related to:

1. Defense
2. Foreign Affairs
3. Communication
4. Finance

Centre had no power to impose financial emergency unless a request is made to the State Government and approved by it thereafter. This power of the Union could only be used if there was any internal disturbance or imminent danger from an enemy country. Property/ land could only be purchased by the permanent residents of the state which created problems in setting up industries and establishing other commercial sectors. Multi National Companies could not set up base in the state due this and the socio-political landscape of the state. There were lots of problems being faced by non-resident student admission which violated A.14 (Right to Equality under Part III of the Constitution), which is one of the fundamental rights, and is classified as the basic structure of the Constitution. No beneficial rights were given to labours/ workers belonging from Schedule Caste/ Schedule Tribe. A lot of discrimination was seen towards women if they married someone who was not a permanent resident of the state as, in such a situation the women was forced to give up all her hereditary rights and become a non-permanent resident. Any provisions of the Constitution or any amendment made thereto were not directly applicable to Jammu & Kashmir unless it was approved by the State Legislative assembly. It is to be observed that over the period of time there have been many modification and amendment in this article and ninety four out of ninety seven entries of the Union list were applicable in the state, two

being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharajas Proclamation dated the fifth day of March, 1948 ;

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

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions 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 matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government

hundred and six articles out of three hundred and ninety five articles became part of Jammu & Kashmir's Constitution and seven out of twelve schedules were incorporated in the state.

CURRENT SCENARIO

On 5th August 2019, Home Minister Amit Shah abrogated A.370 which automatically leads to the abolishment of A.35A from the Constitution of India. This historic decision is still shaking the entire nation. Amit Shah even proposed to make Jammu & Kashmir and Ladakh a "Union territory" which will be under the direct control of the Central Government. They will be governed by the rules and regulation same as Delhi and Pondicherry. It is being contended that it will have a positive impact on the lives of the local residents of the State. Two days prior to this historic announcement, section 144³ of The Code of Criminal Procedure, 1973 was imposed on Jammu & Kashmir as a precautionary measure by the Centre to avoid any sort of riots or un-necessary situation created by the people against this abrogation. It was issued by the District Magistrate of the state which prohibits public gathering. Leading from this, telephone lines, internet and mobile facilities were stopped and political leaders like the former Chief Ministers Omar Abdullah, Mehbooba Mufti and Farooq Abdullah were kept under house arrest. Further the Re-Organisation Bill was proposed in the Rajya Sabha, which was accepted and will come into force from 31st October 2019. The decision has caused a lot of difficulty and tension in the lives of people residing in the State

VIEWS OF PEOPLE IN FAVOUR OF THIS ABROGATION

Bharatiya Janata Party (popularly known as the BJP) is in full support of this decision; they once said that A.370 is a road block between making Jammu & Kashmir an integral part of India. Supporters of the party are of the view that this decision will bridge the gap between India and Jammu & Kashmir. The Hindu majority residing in the state are also in favour of this decision. Many socialist/constitutional experts are of the view that this provision was inserted in the constitution only on a temporary basis and that the decision to remove it does not violate any principal of law.

VIEWS OF PEOPLE AGAINST THIS ABROGATION

There have been multiple negative views on this abrogation. Kashmir based parties like the Peoples Democratic Party, Jammu & Kashmir Peoples Movement are some that are against this decision. Permanent residents of the state are also not in complete favour of this decision as they fear losing their independent status, and the uncertainty about the stability of its future. Former Chief Minister Mehbooba Mufti recently tweeted that "Today marks the darkest day in Indian Democracy", she also pointed out that it was a unilateral decision of the Central Government and no consultations were held

³ Chapter X part C (Urgent Cases of nuisance or apprehend danger)

with the residents of the State or with any regional political party, which blatantly violates the principles laid down by the country's founding fathers for the State.

IMPACT OF THIS ABROGATION

This decision by the centre will have various significant changes, the same are as follows:

1. Earlier Jammu & Kashmir was the only state to have a Constitution of its own which gave the state independent and special powers which were only applicable to the permanent members of the state and had no implication on other states. On Abrogation of A.370 the separate constitution will no longer exist and the state will be governed by The Indian Constitution only;
2. Jammu & Kashmir had a separate flag, but on abrogation of A.370 the state will no longer have one and only the Indian Tricolor will be raised in the state;
3. Non-residents of Jammu & Kashmir will have a right to buy property/ land in the state without any legal restrictions. In the same manner, property/ land can be sold to any Indian citizen of the country;
4. Earlier the permanent residents of the state were governed by separate laws relating to education, citizenship, ownership etc. On abrogation, the state will no longer have a separate set of laws and will be governed by The Code of Criminal Procedure, 1973 and The Code of Civil Procedure, 1908;
5. The special status given to the state under A.370 will cease to operate and for the time being the state will be converted to a "Union Territory" which will be in direct control of the centre;
6. The state will no longer have a Governor, but a Lieutenant Governor just like Delhi and Pondicherry;
7. Instead of 29, India will now have 28 states and the number of union territories will now be increased to 9 after including J&K and Ladakh;
8. The concept of dual citizenship for permanent residents will cease to operate and now there will only be Indian Citizenship;
9. Article 356 and Article 360 (Emergency provisions under Part XVIII of the Constitution of India) which were earlier not valid in Jammu & Kashmir will become constitutionally valid on scrapping of A.370 from the Constitution;
10. RTI (Right to Information Act, 2005), which was established by the Government of India to promote transparency and for creating accountability in the working of the public sector, which was earlier not applicable in the state will be legally valid in Jammu & Kashmir and Ladakh;

The tenure of the members of the legislative assembly is six years in the state of Jammu & Kashmir but now on abrogation of A.370 from the Constitution of India, the tenure of the members of legislative assembly of the Union Territory of J&K will be five years. Further the UT of Ladakh would not have a legislative assembly at all and all decisions would be directly taken by the Central Government;

CAN A.370 AND A.35A BE REPEALED FROM THE CONSTITUTION

Article 1 of the Indian Constitution says that the provisions of the Constitution are applicable in Jammu & Kashmir through Article 370(c). It is clear that the article can be repealed only by the President through public notification after recommendation for the same has been made in the constituent assembly of the state. Even if this article is repealed it will not have a negative impact on the relationship between India and Jammu & Kashmir as the Instrument of Accession will always act as a proof to show that the state has always been an integral part of India since Independence. The Instrument of Accession can be understood through the concept of a “treaty” as defined under International Law. Treaty is a pact/ contract/ formal written agreement between two nations who decide to work together and try to maintain harmony between the nations. It is to be noted that Article 3 of the Jammu & Kashmir Constitution and Article of the Indian Constitution clearly states that the state is an integral part of India⁴.

WHETHER PRESIDENTIAL ORDER CAN BE CHALLENGED IN SUPREME COURT

In the past, multiple petitions have been filed in the Supreme Court of India regarding A.370 and 35A. After the announcement of the abrogation of A.370 also a few petitions were filed in the Supreme Court on which they issued a notice to the Central Government, the petitions will be heard by a five judge Constitution Bench in the first week of October and the court has asked the Central Government to respond on providing relaxation to telephone communication and internet services in the. There are various complications attached with this article. The order may be challenged on the ground that whether it is categorized as a basic structure of the Constitution or not? As it is a known fact that as per the provisions of the Constitution of India, basic structure cannot be modified or amended. For example: fundamental rights are considered to be basic structure of the Constitution and hence cannot be altered as per the provisions of the Constitution. Over the years there have been lots of debates/ arguments on this point but there is no clear cut answer is available till date. What is the validity of the Instrument of Accession after the abrogation as some people contend that it is the sole proof to show the relation between India and Jammu & Kashmir? Whether conversion of the state into a Union Territory is legally justified under Article 3 of the Jammu & Kashmir constitution? As it is a known fact that A.35A was inserted by a Presidential Order and not by the procedure established by the Constitution, it is a big question on what will be the state of this article on abrogation. Will it have a positive or a negative impact on the powers of the Supreme Court of India and The Election Commission of India? There has been a lot of conjecture that on abrogation the concept of Sadar-e-Riyasat (President) and Wazir-e-Azam (Prime Minister) will cease to operate. All these issues require in-

⁴ SBI v. Santosh Gupta 2017 SC

depth analysis and research and the Supreme Court of India might take a few years to decide on this issue.

CONCLUSION

There is no doubt that this decision is indeed a historic one. This decision was much needed for the complete integration of Jammu & Kashmir into the Indian Constitutional system, and to finish terrorism in the state. The main purpose of this decision is the welfare of the state which will lead to an increase in levels of employment, development, and provide a safe and secure environment for the people of the state. But it will take a lot of time for these things to come into action and for us to see the results of the same. At present the situation in Jammu & Kashmir is not pleasant, local residents are facing a lot of problems, all shops are closed, children are not being able to attend school, leaving the house at present is really risky and in many places it is not allowed also. This abrogation is a huge step but it will take a lot of time for the situation to get normalize and for us to see whether it has positive or negative impact on the nation and also on its impact on India's relationship with Pakistan. Bharatiya Janata Party said that Jammu & Kashmir will be a Union Territory only for a limited period of time and only for the purpose of maintaining peace and harmony as enemy nations are against this abrogation. It is to be observed that A.370 has not been completely scrapped from the Constitution of India; declaration under A.370(c) still persists and is legally valid in the Constitution⁵.

⁵ Relevant Extracts From J&K Reorganisation Act, 2019 (Notification GSR526(E) dt.6.8.2019
