

“EFFECTS OF REVOCATION OF ARTICLE 370 OF CONSTITUTION OF INDIA”

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INTRODUCTION

The special status to Jammu and Kashmir, which is one of the states of Indian subcontinent has been given through Article 370 and Article 35A of the Constitution of India. This state is located in the northern most part of India and share its border with other countries like Afghanistan, China, Pakistan and Tibet. Indian Independence Act, 1947 parted British India into two countries, India and Pakistan. After Indian Independence Act of 1947, Princely states of British India were given three choices, to be part of either Pakistan or India or to be independent state. Three Indian states such as Jungad, Kashmir and Hyderabad didn't choose either dominion and decided to frame their own Constitution¹. Then it was realised by the members of constituent assemblies that separate internal constitution of each state can create differences amongst the states. It was decided that constituent assembly should frame and draft the constitution for whole India and then shall after the completion be ratified by all the States and Unions². In the case of State of Jammu and Kashmir several problems arose for the Government of India. The Sikh ruler of Jammu and Kashmir, Maharaja Hari Singh, agreed for the accession of state of Jammu and Kashmir in three aspects: Communications, Defence and Foreign Affairs only.

INSTRUMENT OF ACCESSION

On 26 October 1947, Maharaja Hari Singh (ruler of Jammu and Kashmir) executed Instrument of Accession and it was accepted by Lord Mountbatten. It is a legal document by which state of Jammu and Kashmir acceded to India. This document provided powers to India's Parliament to legislate only in respect of matters related to communication, defence and external affairs of Jammu and Kashmir. It was clearly mentioned in the Clause 5 of Instrument of Accession that the terms IoA cannot be subject to change by any amendment of Indian Independence Act, 1947 or Government of India Act, 1935. If there is a need of any kind of amendment then it shall be ratified by the King by an instrument that should be supplementary to the present instrument. Clause 7 of the IoA states that in this particular instrument there is not anything that commits him to acceptance of Constitution of India. Initially the Maharaja Hari Singh decided to be independent but later on October 22, 1947, state of Jammu and Kashmir was attacked by Pakistan army which forced King to seek the help from India. India agreed to

¹ Prof. K.L. Bhatia, Article 370 of Indian Constitution, Jammu and Kashmir, pg. 18

² Framing of India's Constitution: Selected Documents, Indian Institution of Public Administration, New Delhi, Volume 4, Pg. 547 and 548

help on the condition that he has to sign an Instrument of Accession and that should be in favour of India. In this manner, Jammu and Kashmir got its accession into Indian subcontinent through instrument of accession. This led to the incorporation of Article 370 in the Indian Constitution.

ARTICLE 370 AND ARTICLE 35 A OF CONSTITUTION OF INDIA

Article 370 of the Constitution of India came into effect on October 17, 1949. It exempts the state of Jammu and Kashmir from the rest of the constitution except for the Article 1, Article 35A and Article 370. This article of the constitution gives the state of Jammu and Kashmir special power to draft its separate constitution and design its separate flag. Instrument of Accession permits the parliament to legislate only on the matters related to communication, defence and external affairs. They were allowed to frame their own laws for the state. Property rights in the region of J&K was denied for the outsiders. This means that residents of the state were governed by different laws in the matter of property and ownership from the rest of the country. Article 35A of the Indian Constitution came into effect through a presidential order in 1954. This article stems from the Article 370 of the constitution. This article gives the power to define the permanent resident of the state. It prohibits the non- residents of the state from buying the lands, winning any kind of educational scholarships, permanently settling and from holding any kind of government local government services. This article further deals with Permanent Resident Laws. According to these laws, female residents of state of Jammu and Kashmir will be barred from the property rights of the state in case they get married to a non- resident. Article 35A in comparison to Article 370 has remained unchanged whereas Article 370 have been diminishing slowly over the decades.

CALL FOR ABROGATION

On 5th August 2019, it was announced in the Rajya Sabha that the President of India had promulgated for the abrogation of Article 370 of the Indian Constitution. According to Presidential Order of 2019, all the provisions of Indian constitution will be applicable on the state of Jammu and Kashmir. On 5th August 2019, The Jammu and Kashmir Reorganisation Bill, 2019 was also introduced in the Rajya Sabha by Home Minister of India, Amit Shah for the purpose of converting the state of Jammu and Kashmir into separate union territories. In that bill, it was proposed about the creation of two union territories, one Jammu and Kashmir and other one Ladakh. It was proposed under the bill that the union territory of Jammu and Kashmir will have their own legislature whereas Ladakh will not have one. Rajya Sabha passed the bill by 125 votes in favour and 61 votes in against of the bill whereas Lok Sabha passed the bill by 370 votes in favour and 70 in against of the bill. After the assent of President of India bill became the act. These union territories will come into effect on October 31, 2019 on the birthday of Sardar Vallabh Bhai Patel.

HISTORICAL BACKGROUND OF JAMMU AND KASHMIR

The state of Jammu and Kashmir is the part of Indian Subcontinent located in the northern most part of the country. The state has mountainous region known for its valley, scenic beauty and snowy mountains. The most important part is its strategic position which has made the state of Jammu and Kashmir, the centre for International rivalries³. It is one such state whose borders are not well settled. The area of the state is approximately 2,22,236 Sq.km. Since 1984, Pakistan has control over the area of 78,114 Sq.km. in 1962, China has illegal occupation over the area of Baltistan and Gilgit, these areas were handed over by the Pakistan illegally. The state of Jammu and Kashmir was geographically a part of India and enjoyed its autonomy in the country. Kashmir has a Muslim majority population; Jammu is considered to have predominantly of Hindu population and Ladakh has a population of Buddhist people. The residents of these provinces are called Koshurs. The ancient history of Jammu and Kashmir can be derived from the Kalhana's book "Rajatarangini". It mentions particularly about the kings of Kashmir. King Jalauka of Kashmir divided his government into eighteen sub departments. The system adopted by the king was similar to Yudhishtira's (Mahabharata) constitutional system. Kashmir was also part of the powerful kingdom of king Ashoka. After several conquests and expansion of the kingdom, Ashoka adopted Buddhism. This led to the introduction of Buddhism in the state of Jammu and Kashmir. In 712 AD. Muhammed Ibu Kasim conquers the several states in India and this led to the spread of Islamism in India. He converted Punjab into a Muslim state but was failed to conquer Kashmir. 1342 onwards, Kashmir was ruled by first ever Muslim ruler Shah Mir. Islamisation of the state of Kashmir happened during the rule of Sikander (1389-1413). The reason for the Islamisation of the state was because of the invasion of immigrants of Afghans, Arabs, Persians, Turks and Pathans. The reign was Afghan rulers were known as reign of terror. People of Kashmir requested Maharaja Ranjit Singh of Punjab for the help to get relived from the afghan rulers. Ranjit Singh, on the request of people sent a Dogra Rajput King, Gulab Singh to defeat the Afghan ruler. He was successful in defeating the ruler of afghan and further established the supreme power of the Sikh in the state. Kashmir was under the sovereignty of the Sikhs from 1819 till 1846. In 1846, Raja Gulab Singh was defeated by the Britishers at Sabraon. Raja Gulab Singh did not defeat the Britishers in the battle and also didn't use any weapons in the battle. In this way he gained the favour of the Britishers and after that he was made the Prime Minister of the Punjab. The two treaties were signed by the Britishers after gaining the victory over the Sikhs, Treaty of Lahore, on 9th March 1846 and Treaty of Amritsar, on 16th March 1846. The treaty states that the British Government is transferring the possession of state of Jammu and Kashmir to Maharaja Gulab Singh and his heirs. Further it was provided in the Article 3 of the treaty that Maharaja Gulab Singh has to pay the sum of Seventy-Five Lakhs Rs. for the transfer of the state. The term of the treaty was also that Fifty lakhs should be paid at the time of ratification of the

³ Dr. K.K. Wadhwa, A Case Study of Jammu and Kashmir, Constitutional Autonomy, pg-13

treaty and remaining Twenty-Five lakhs has to be paid before the first October of 1846. This is the reason that Treaty of Amritsar is also known as “Sale Deed of Kashmir”. Maharaja Ranbir Singh, third son of Maharaja Gulab Singh took over Kashmir after his father’s death for the purpose of improving the administrative system. Maharaja Ranbir Singh divided the province of Jammu and Kashmir into Wazarats. Jammu was under the direct control of the king whereas Kashmir was under the control of governor and indirectly in control of Maharaja. In the province of Jammu there was abolishment of the revenue system but it continued in the Kashmir. The state continued to be ruled by the Sikh rulers until 1930. In 1930, during the rule of Maharaja Hari Singh, people of Kashmir were disappointed by his rule and policies. During this period National Conference, the first major political party of Jammu and Kashmir was formed. The founder of this party was Sheikh Muhammad Abdullah. The movement against the maharaja was further launched and the same was known as Quit Kashmir Movement. In August 1947, India got its independence from the rule of Britishers. The princely states were given choices, after the independence to choose between Pakistan, India or to stay independent. Jammu and Kashmir was one such state whose decision was not decided then Hari Singh, the Sikh ruler signed a standstill agreement opting for a status quo with Pakistan. After that Pakistani tribesmen invaded in J&K, Hari Singh asked for help from Jawahar Lal Nehru and Vallabh Bhai Patel. They agreed to help on the condition that he has to sign an Instrument of Accession and that should be in favour of India.

RIGHTS OF THE PERMANENT RESIDENTS OF JAMMU AND KASHMIR

The residents of Jammu and Kashmir are called Koshurs or Mulkis. The people of the state has been given special status as compared to rest of the Indians. This special status to a particular state and its people contradict the observation made in the judgement of Supreme Court in case of *Indra Sanbhay v Union of India*⁴ it was observed, in this case that India has a common citizenship for all and every citizen has a right to feel that he/she is Indian first, regardless of any bias. Similar perspective has been drawn by Supreme Court in the case of *Raghunath Rao Ganapatrao v. Union of India*⁵.

RIGHTS OF PERMANENT RESIDENTS PRIOR TO ACCESSION

The Dogra rule is considered to be a reign of discrimination against the Muslims. At the time of Dogra rule, army consisted only of Punjabi, Dards and Dogras. Kashmiris were not included in the armed forces; they were disqualified for such services. Also, during the reign of Maharaja Pratap Singh, the residents of Kashmir were not given high posts in the military or civil services. This discrimination against Muslim majority people continued during the rule of Maharaja Hari Singh. There was a State’s Arms Act, which allowed Dogras and Rajput’s to use and own firearms. Maharaja Hari Singh under his

⁴ AIR 1993 SC 477

⁵ (1994) Supp (1) SCC 191

rule passed the order prohibiting the outsiders to purchase any immovable property in the state of Jammu and Kashmir. This order was passed with the objective of protecting the rights of people from outsiders. Discrimination was also seen in the State's election and its laws. The residents of the state's voting rights were limited to only three percent of the population. There were criteria for the voting, only literate people whose annual income is Rs.400 or more than that were allowed to cast vote. Illiterates and women were totally barred from casting any votes.

RIGHTS OF PERMANENT RESIDENTS AFTER ACCESSION

Many rights and privileges were provided to the residents of Jammu and Kashmir after the accession. The Presidential Order of 1950 also known as Constitution Order 1950, mainly dealt with the conditions and provided in Instrument of Accession. According to this IoA, Fundamental Rights of the constitution were not applicable to the residents of the state of J&K. But after signing of Delhi agreement in 1952, some of the Fundamental rights were applicable to residents of the state. The presidential Order of 1954, made both Part III and Part II of Indian Constitution applicable on the state of J&K. On 26th January 1957, the Constitution of Jammu and Kashmir came into effect. Section 6 of the Constitution of Jammu and Kashmir deals with the status of Permanent Residents separately and Section 10 of the same constitution deals with the rights of the Permanent Residents. The permanent residents of Jammu and Kashmir had special rights and privileges over the citizens of India such as- The state was allowed to have its separate Constitution and a separate flag of its own state. Only in the matters of Communication, Defence and foreign affairs the centre had right to interfere. According to the Instrument of Accession, all the other laws need the assent of both parliament and state government. Property rights in the region of J&K was denied for the outsiders. This means that residents of the state were governed by different laws in the matter of property ownership from the rest of the country. There was a system of Dual citizenship in the state of J&K., Article 356 and 360 (Financial Emergency) of the Constitution of India was not applicable on the residents of J&K. there was not kind of reservation for minorities in the state. The duration of legislative assembly was for 6 years.

PRESIDENTIAL ORDERS

According to Article 370 (1) of the Indian constitution some powers are conferred on President of India. The President of India and Government of Jammu and Kashmir in concurrence with each other has made number of orders.

THE PRESIDENTIAL ORDER OF 1950

This presidential order is also known as The Constitution Order, 1950. This order came into effect on January 26,1950 with the Indian Constitution. It mentioned the various articles and subjects of the

Constitution of India such as Clause b(i) of the Article 370, this article was in correspondence with the Instrument of Accession. According to the Presidential Order of 1950, 235 articles of Constitution of India were not applicable to the Jammu and Kashmir, 9 articles were applicable but partially and other 29 were altered and made applicable on them.

THE PRESIDENTIAL ORDER OF 1952

On 15 November 1952, the Presidential Order of 1952 was issued on the request of state government. The amendment was made in the Article 370 of Indian Constitution, it represented the abolishment of monarchy that existed in Jammu and Kashmir. the monarchy was replaced by an elected Head of the State.

THE PRESIDENTIAL ORDER OF 1954

The Constitutional order of 1954 was issued on 14 May 1954, at the request of state constituent assembly. This order deals with the implementation of the Delhi Agreement of 1952. There are certain provisions in the Delhi Agreement, which were implemented like citizenship of India was given to the Permanent residents of the state of Jammu and Kashmir, Article 35A was included in the Indian Constitution providing the certain rights and privileges to State legislature in respect of immovable property, Fundamental rights of Constitution of India were also provided to the state, jurisdiction of the apex court was given to the state and the power was given to central government to declare national emergency at the time of external aggression.

THE PRESIDENTIAL ORDER 1955-2018

After these orders, forty-seven other orders were also issued in 1956-1994. All these orders had made the provisions of Indian Constitution applicable on the state of Jammu and Kashmir. These Presidential orders dealt with the various subject matters relating to the union and state list. These orders are originated from the Presidential Order of 1954.

FRAMING OF CONSTITUTION OF INDIA AND CONSTITUTION OF JAMMU AND KASHMIR

On 15th August 1947, India became independent from the rule of Britishers. This led to the effect of Independence Act, 1947, whose objective was to setup two separate dominions known as Pakistan and India. The act provided for the establishment of constituent assembly for the framing of Constitution of India. Draft Constitution was prepared by the Drafting Committee of constituent assembly consisting of 315 Articles and 8 Schedules. It took around three years for constituent assembly for framing of the Constitution of India. The Indian constitution is considered to be the World's Longest

and lengthiest Constitution. Princely states were given three choices, to be part of either Pakistan or India or to be independent state. Three Indian states such as Jungad, Kashmir and Hyderabad didn't choose either dominion and decided to frame their own Constitution⁶. Then it was realised by the members of constituent assemblies that separate internal constitution of each state can create difference amongst the states. It was decided that constituent assembly should frame and draft the constitution for whole India and then shall after the completion be ratified by all the States and Unions⁷. In the case of State of Jammu and Kashmir several problems arose for the Government of India. The Sikh ruler of Jammu and Kashmir, Maharaja Hari Singh, agreed for the accession of state of Jammu and Kashmir in three aspects: Communications, Defence and Foreign Affairs. According to drafting committee, it was necessary for all the states to follow all the provisions given in the Constitution except for Jammu and Kashmir. The members of Constituent assembly decided that only certain provisions of Constitution of India that is in correspondence with Instrument of Accession only those provisions should be applied on the state. Article 370 of the Constitution of India was incorporated, giving certain special rights to the state of Jammu and Kashmir. This article in the constitution was a temporary and transitional provision and applicability of same was decided to last till the adoption and formulation of the State's constitution. Later, the constituent assembly of the state was dissolved without suggesting amendment or revocation of the Article 370. After this dissolution of the state assembly Article 370 became one of the features of constitution of India. The state of Jammu and Kashmir proposed for the framing and drafting of separate constitution under Article 370 of Constitution. They got the permission under this temporary provision to frame their own constitution. It is the only state to have a separate constitution of itself. The constitution of Jammu and Kashmir is a written constitution consisting of 158 sections and 6 schedules. The constitution of this particular state is partly rigid and partly flexible⁸. The rigid features of the Constitution of Jammu and Kashmir, 1957 includes the proviso under Section 147 stating that no bill shall be passed or moved to state legislative assembly for the purpose of amendment or change of article 3 and 5 of the Constitution of J&K. It is believed that the Constitution of J&K is not repugnant to Indian constitution but it is complementary to it⁹.

IMPLICATIONS OF REVOCATION OF ARTICLE 370 OF INDIAN CONSTITUTION

On 5th August 2019, it was announced in the Rajya Sabha that the President of India had promulgated for the abrogation of Article 370 of the Indian Constitution, which has provided political autonomy to the state of Jammu and Kashmir. This article was added in constitution of India with an objective of providing special status to Jammu and Kashmir by allowing them to have their own constitution,

⁶ Prof. K.L. Bhatia, Article 370 of Indian Constitution, Jammu and Kashmir, pg. 18

⁷ Framing of India's Constitution: Selected Documents, Indian Institution of Public Administration, New Delhi, Volume 4, Pg. 547 and 548

⁸ A.S. Anand, The Constitution of Jammu and Kashmir- Its Development and Comments, Third Edition, Pg.197

⁹ Ibid

separate flag and independence in all the subject matters except for communications, defence and foreign affairs. This revocation or abrogation took place by the Presidential order passed on 5th August 2019. A bill has been passed in Rajya Sabha and Lok Sabha for the splitting of state of Jammu and Kashmir into two union territories. These separate union territories will have separate name and state legislatures of their own. Also, one more union territory will be formed, Ladakh. The Ladakh will be controlled directly from the New Delhi. The revocation of Article 370 has led to the abrogation of Article 35A of the Constitution of India. Article 35A of the Indian Constitution came into effect through a presidential order in 1954. This article gives the power to define the permanent resident of the state. It prohibits the non-residents of the state from buying the lands, winning any kind of educational scholarships, permanently settling and from holding any kind of government local government services. This article further deals with Permanent Resident Laws. According to these laws' female residents of state of Jammu and Kashmir will be barred from the property rights of the state in case they get married to a non-resident. Article 35A in comparison to Article 370 has remained unchanged. Before the announcement of the revocation of Article 370 and Article 35A thousands of soldiers were sent to the state of Jammu and Kashmir. Omar Abdullah, former chief minister of Jammu and Kashmir, Mehbooba Mufti and two other senior politicians have been detained. There are several opinions of people that have been acknowledged, few of them are of the view that political autonomy of the state of Jammu and Kashmir has been eroded after the addition of Article 370 in the Constitution of India, others are of the view that the order passed by the president requires the assent from the constituent assembly of the Jammu and Kashmir but the assembly was abolished in the year of 1957. People are also of the view that the approval by the lawmakers of Jammu and Kashmir is required for the revocation of the article. Critics are also of the opinion that by abrogating Article 370 from the constitution of India is a breach of Contract entered by Maharaja of Kashmir by way of Instrument of Accession. This order of president is likely to face the challenges legally and politically. All these challenges will be dealt by the Supreme Court of India in the future. Kashmir is known to be a state of Muslim majority people, there is a fear in the mind of residents of the state that there will be transformation of the state demographically after this revocation. There is a possibility of getting the state replaced by Hindu majority people. There is also a formation of separate union territories for the internal security reasons. Jammu and Kashmir will have their own legislature whereas Ladakh will be without a legislature. According to Presidential Order of 2019, all the provisions of Indian constitution will be applicable on the state of Jammu and Kashmir. This means that proper assembly elections will take place in Jammu and Kashmir. Residents of Jammu and Kashmir like other citizens of the country can select their own representatives. The important implications of revocation of the Article 370 of the Indian Constitution are that the state of Jammu and Kashmir no longer will have their separate constitution and separate flag of the state. They have lost the special autonomous status given to them by the Article 370 of the Constitution of India. The state of Jammu and Kashmir be converted into

separate union territories. The union territory of Jammu and Kashmir will have their own assembly or legislature whereas Ladakh will not have one. The Constitution of India will come into force for the state of Jammu and Kashmir. This major step is taken by the government with the objective of national integration following the concept of one nation theory. The duration of assembly in Jammu and Kashmir was 6 years but now after the decision it is revoked. Now, the outsiders are given right to buy or own the land and property in the state. Restriction on Right to Information for the residents of J&K are revoked. The centre also has right to impose financial emergency on state. There is possibility of Hindu MLA's in the state. All the central laws will now be directly applicable to the whole of the country without any exceptions. The election will be held after every 5 years in the state. The law has prevented the outsiders of Jammu and Kashmir from owning any property in the state. It is expected that after the revocation, there is a possibility that real estate sector will see a drastic change. The real estate prices are likely to rise now. The minorities will also have a reservation of 16 percent. Article 356 of Constitution of India will also be applicable on the people of the state of J&K. There will be only system of single citizenship all over the country.

OPINION OF POLITICAL LEADERS

The revocation of Article 370 has gained different opinion and reactions from across the world. Two Member of Parliament, Nazir Ahmed Laway and Fayaz Ahmad Mir made an effort to tear the constitution of India in the parliament. These leaders were removed from the parliament by Chairman Venkaiah Naidu. Mehbooba Mufti presented her view by stating that the day of revocation of article 370 was one of the darkest days in Indian democracy. According to her, the two-nation theory has been abolished and India has backfired on Kashmir by making such a decision. This decision of President is illegal and unconstitutional for her. She has tweeted saying that "India has to face its catastrophic consequences and India has failed in keeping the promises". According to the former chief minister of Kashmir, Omar Abdullah Scrapping or abrogation of article 370 of Indian Constitution is breach of trust of people of Jammu and Kashmir. He stated further that India will have to face dangerous and far reaching consequences. According to Arun Jaitley, BJP leader this decision of revocation of Article 370 is move towards the national integration. He complemented the statements of Amit Shah (Home Minister) and Narendra Modi (Prime Minister) by saying that "A historical wrong has been undone today. Article 35A came through the back door without following the procedure under Article 368 of the Constitution of India." According to Sushma Swaraj supported the decision of government by calling it a historic event. Arvind Kejriwal, Delhi Chief Minister and convenor of Aam Aadmi party has welcomed the decision passed by the centre and was in support of it. The political parties who supported the decision of revocation of Article 370 are Shiromani Akali Dal, AGP, Aam Aadmi Party, Shiv Sena, Telugu Desam Party, BPF, Bahujan Samaj Party, Biju Janata Dal and AIADMK. According

to these parties the move of scrapping Article 370 from Indian Constitution was bold and courageous. Satish Chandra Mishra (BSP member) and the first one in the council of states to support the decision. Mayawati supported the decision of bifurcation of the state. AIADMK member Jayalithaa, Shiv Sena members and BJD members were glad that Jammu and Kashmir became integral part of India. There were several other parties who were against the centre's decision to abrogate Article 370 from the constitution are Rastriya Janta Dal, Trinamool Congress, National Conference, Nationalist Congress Party, People's Democratic Party, Congress and DMK. According to the critics, it was the catastrophic step taken by the government.

CONCLUSION

The decision to revoke Article 370 and Article 35A from the Constitution of India stirred controversy all over the Political spectrum. Supporters are of the opinion that this decision has made the state of Jammu and Kashmir integral part of India. While critics are of the opinion that it is a shift to a majoritarianism and it is a catastrophic step taken by the government to fetch more votes. This decision aims at the idea of one nation theory. The residents of Jammu and Kashmir fear that this decision can be a threat to their livelihood or may hamper their property rights and business. The implications of this decision according to this study is beneficial for the residents of the country. Revocation of Article 370 removes arbitrariness and promotes equality in the nation. It provides equal rights for each and every citizen of the country.
