
Genesis and Nature of Article 370 of the Constitution of India

Aastha Mehta¹

Abstract

Jammu and Kashmir has always been the epicenter of all political controversies and has been major reason of bitterness between India and Pakistan. It is a widely debated issue whether J&K should or should not be given such special status and often makes up for a good political agenda before elections. But what lays underneath so much disagreements and complexities which J&K as a state and India as a country faces is an Article of Indian Constitution. The Article in question is Article 370, and in order to know why the persistent problem of communism, terrorism and separatist movements have been giving Indian Government some serious trouble the genesis and nature of this Article is one thing which should be understood in detail. This is what will be the theme of this essay, to plunge into the ever-controversial Article 370 by analyzing its background, the nature of the article, the various beliefs people have about the article and what lies ahead after thoroughly searching for answers in the past. The essay conveys the features of this Article, how different it is in terms of other states and what are the after effects of having such temporary article operate for years and years after independence. It will also be essential to discuss the unique nuances of governance that have cropped up due to granting of special status to J&K under Article 370, thereby making it interesting to know what will be the response this article will get in coming years from not only the political parties but even from international community. During the course of the essay the various views whether Article 370 should be abrogated or not will be also are discussed in order to further justify the nature of this Article.

¹ BA.LLB (Hons) Gujarat National Law University

Introduction

Article 370 of Indian Constitution grants special status to Jammu and Kashmir within the India Union and therefore J&K's constitutional position and its relation with the Central Government differs from rest of the states. This Article definitely has been subjected to lot of scrutiny and has still managed to grab the limelight in almost all the discussions which questions India's sovereignty and has emerged in all international forums which focus on growing tensions between India and Pakistan.

Just before the 2014 elections, both parties have again took up the Issue of Article 370 and have called upon an analysis to know what is the article all about. On March 26, 2013 BJP made a bold statement saying that if they come to power they will definitely scrap Article 370² whereas on other hand we have statements coming from Ruling National Conference (NC) which go on as follows "I assure you that our party under the leadership of (chief minister) Omar Abdullah will never let anyone alter or abolish Article 370," NC provincial president, Kashmir, Nasir Aslam Wani said on May 2, 2013³. So in order to know why this article is one of the most contested topics before elections, and to appreciate its relevance in today's time, it will be easier for us to start from where the origin of this Article took place.

History which led to formation of Article 370

Modern history of Kashmir starts with end of British Rule in India, when two nations Pakistan and India were born through the Indian Independence Act of 1947⁴. The said Act gave the princely states an option to remain independent and not accept to be part of any of the newly formed countries. Along with Maharaja of Kashmir, Hari Singh there was several other princes who wanted to be independent state. Hari Singh was being pressurized from both sides, Pakistan not wanting Kashmir to join India to the extent that the Muslim Conference leaders exhorted the Maharaja to assume independence and pledged the support of the Muslim Conference to an independent State. The president of the Muslim Conference, Chowdhry Hamidullah assured the Maharaja of the "support and cooperation of the Muslims, forming an eighty percent majority in the State, as represented by their authoritarian organization Muslim Conference"⁵. He promised Hari Singh that the Muslim subjects of the State would acclaim him as the first constitutional king of a "democratic and independent Kashmir"⁶. Indian Congress did their best in order to convince Kashmir to accede to India, by providing different options to them. On the date of October 22, 1947, with a view of compelling Kashmir with their military tactics, Pakistan attacked Kashmir along with the help of Pakistani tribesmen, reached Srinagar capturing many territories and it is then that Maharaja of Kashmir found himself in desperate situation and asked Indian Government for help. Indian Government under the orders of the then PM Jawaharlal Nehru and Home Minister Sardar Vallabhbhai Patel, gave an ultimatum to the Maharaja that Indian army will only be sent if, Kashmir accepts Indian suzerainty and signs of the agreement of accession.

² <http://www.thehindu.com/news/national/andhra-pradesh/bjp-will-scrap-article-370/article4548368.ece> , " BJP will scrap Article 370" March 26, 2013 visited on June 2, 2013

³ <http://www.hindustantimes.com/India-news/Srinagar/Won-t-allow-anyone-to-abolish-Article-370-NC/Article1-1053799.aspx>, " Won't allow anyone to abolish Article 370: NC" May 2, 2013, visited on June 2, 2013

⁴ This Act partitioned India into two different countries, by way of dissecting them according to majority population belonging to either Muslim or Hindu religion.

⁵ Mohan Krishnen Teng, "Chapter 2: Integration of State" Kashmir Article 370, <http://ikashmir.net/article370/chapter2.html> accessed on 15th August, 2013.

⁶ Ibid.

This is the mode in which the instrument of accession came into existence between Kashmir and Indian government and was signed by Hari Singh on October 26, 1947⁷. But this instrument of Accession, was not a complete document devolving all the powers of the state of J&K on India on the other hand all that it did was a partial handing over of the state to the Government of India. In order to understand the nature of Article 370, it is important to know what exactly the document contained, since Article 370 derives many of its constitutional provisions and backing from this very instrument.

Creation of Article 370

Article 370, initially the draft Article 306-A, was formed after a result of many deliberations and compromises between the Congress leaders and leaders from All India National Conference (NC), the party which had majority support in J&K. The first and foremost bone of contention between the two parties started due to two significant factors. One was difference in the ideologies of the two parties, and second the discontentment of majority Muslims of Kashmir against Maharaja which Sheikh Abdullah had stirred into a huge uprising. Indian Union was being formed on secular outlook, whereas J&K having a majority of Muslim population, wanted to integrate into a nation which was being formed on communal basis in order to secure the religion of the state. The hatred which NC had for Maharaja was on the grounds that Maharaja had established an autocratic Hindu rule, and therefore overthrowing of the Hindu dynastical rule was also a major agenda which NC had in mind. In order to make sure that there was no further animosity between the State of J&K and Indian Union Nehru thought it was better for the Maharaja and Maharani to leave Kashmir on temporary basis, and this mammoth task of convincing a ruler, to leave his kingdom, without making an attack on his ability and power was given to Sardar Patel.

What followed was a series of making new drafts and amendments and contemplations on what will be the fate of J&K and its relation with Indian Union, and after many adjustments on the part of the Congress to accommodate the views of the NC leaders, the Working Committee laid down the proposed bill of Article 306-A, which in spite of some grievances in the minds of NC leaders was passed around in the Constituent Assembly on 16 October, 1949. One incident which is worth mentioning would be, that the situation which we face today with regard to Kashmir, and the implications which Indian and Pakistani Government face, were foreseen by Sardar Patel, who in a letter to Gopalaswamy Aiyangar, said as follows, *“I find there are some substantial changes over original draft, particularly in regard to the applicability of fundamental rights and Directive Principles of State Policy. You can yourself realize the anomaly of the State becoming a part of India and at the same time not recognizing any of the provisions”*⁸.

What followed was a Himalayan blunder on the part of Indian Government. Sheikh Abdullah, demanded that the State Assembly would give the final decision of whether J&K should or should not accept the entire accession or not. So only for this transitional phase from the ratification of J&K and till the State Assembly gave its final decision, draft Article 306-A was formulated (similar to present Article 370). But with amounting pressure from Pakistan in form of infiltration and sending the Indian Hindus back to Kashmir, Sheikh pressurized the Indian Government to give this Article a permanent place in Indian Constitution so that even if the refugee Hindus settles in J&K, the Muslims were not threatened by any way because of it. *Thus the nefarious plan to continue outnumbering Hindus in the valley was fulfilled by the dint of Article 370. If this*

⁷Justice A.S Anand, *“The Constitution of Jammu and Kashmir”* 5th Edition, 2006 pg.67

⁸ Mohan Krishnen Teng, *“Chapter 3: Article 370”* <http://ikashmir.net/article370/chapter3.html>, by visited on June 4, 2013.

Article 370 would not have been incorporated in the Indian Constitution, the present distress of present Hindu Kashmiris would have been solved long ago.

But the bad vibes between Sheikh and Constituent Assembly continued, due to Sheikh's unnaturally high expectations to give more autonomy to Kashmir Government. This can be seen from the following words of Sardar Vallabhbhai Patel, wherein he protested to the very idea of Sheikh asking so many modifications in the draft.

*“Whenever Sheikh Saheb wishes to back out, he always confronts us with the duty of the people. Of course he owes no duty to India or to Indian Government, or even on a personal basis, to you and the Prime Minister who have gone all out to accommodate him. In these circumstances question of my approval does not stand”*⁹

Thus the draft article was passed without any proposed changes of the Sheikh. But after Sardar's death, Nehru attributed the very idea of incorporating this Article to Sardar, who had since its inception opposed it. Thus this much dreaded Article got its place in the Indian Constitution.

Nature of Article 370 and an analysis of its provisions

Article 370, makes temporary provisions with respect to the state of J&K, and therefore confers upon it, special status. This provision has two characteristic features:

1. The autonomy of state is higher than the Union. By Article 370, J&K has the power to limit the applicability of Constitution of India.
2. Article 370, also gives powers to J&K, with respect to many matters that are generally not provided to any State Government. These two features outline how Article 370 works with respect to broad framework of the Constitution. In the course of this essay, I have taken the liberty to not go in step-wise manner for sub-clauses of Article for convenience and in order to bring out a clear picture which could not be possible if I had moved clause wise with regard to the Article.

- I. This Article 370 has a very distinct identity of its own. Under the Indian Constitution, the amendments done by the Parliament apply to all states, but this is not the case with J&K. An amendment in the Constitution does not automatically apply to J&K, and can only apply with the concurrence of the State Government and when the President issues an order under Article 370.¹⁰ Thus it is solely the discretion of the President, along with the acceptance of the State Government, that an amended provision be applied to State of J&K. In a way Article 370 empowers the President to define the Constitutional relationship between the State of J&K and India in terms of the provisions of the Indian Constitution, subject to the stipulation that he can do so with reference to the matters in the Instrument of Accession in consultation with, and with reference to other matters with the concurrence of the State Government.¹¹ This is the crux of what is actually laid down in Article **370(1) (d)**.
- II. The said provision 370(1) (d) uses the word “modification” which shows that President can modify and even alter radically any provision of the Constitution in any manner, and after making such necessary changes which are deemed fit, the provision will apply to the state of

⁹ “Brief History- Article 370”, Hindu Vivek Kendra, <http://www.hvk.org/2005/0405/53.html> accessed on 15th August, 2013

¹⁰ Sampat Prakash v. State of Jammu and Kashmir AIR 1970 C 1118 : (1969) 1 SCC 562

¹¹ M.P Jain, Indian Constitutional Law 5th Edition 2003, Wadhwa Nagpur Publications, pg, 920.

- J&K. Also Article 368 does not affect Presidents power with respect to Article 370. The word modification also in itself to be given widest amplitude, as laid down in *Puranlal Lakhanpal v. UOI*¹² and therefore can be said to include even any radical transformation. This shows us a very clear though unfortunate reality that J&K though being allowed all the benefits of the India's economic growth, India's policies, still has not been covered completely within the ambit of the Constitution and continues till this day to exist on a different ground. Though Article 370 cuts off the Kashmir from the mainstream India, by not letting all the necessary and well-debated amendments passed by the Legislature not apply to Kashmir. Government of India has been doing its best in order to make sure that the State grows, by implementing many new industrial and technical policies, and trying to give J&K a chance to grow just like any state of India would reap the benefits from the Central policy.¹³
- III. The next feature is more unfortunate, as this Article is contrary and defeats one of the essential planks on which Indian Constitution is based on. Article 1 of the Constitution states that India is Union of States. Though Article 370 makes Article applicable to it, making J&K an integral part of India, it does not recognize some of its very important features which gives this Article 1 its correct intent. Article 370 is a barrier if seen from what the makers of the Constitution wanted India to be. Use of the word Union is deliberate, and it has been further explained by Dr. Ambedkar that India wanted to be federation, but definitely not a federation which was resulting from an agreement between the Centre and the states to join the Centre and therefore no state can secede from this Union. The only purpose of making the states was for purely administrative purpose and not to garner feelings of hatred by separating them. But Article 370 does exactly what technically is not allowed through the tenants of the Constitutional spirit. It makes Indian governance loose and ineffective before the State Government of J&K.
- IV. Another feature of Article 370 is enshrined in clause (1) (b) which shows the legislative authority of Indian Parliament over the State of J&K. Indian Constitution provides in Union List about all the matters on which the Centre has exclusive right to frame laws. In the instrument of accession by way of which the J&K were taken within the Indian fold of governance also spells out some of this very crucial matter such as defense, communication and external affairs. This section provides for the past and the future. Clause (1) (b) (i) show that if the matter of Union List and Instrument of Accession correspond then the laws applicable to whole of India will be equally applicable to J&K again subject to the consultation which President needs to carry out with that respect. This shows that India and J&K still function only on the lines of the agreement signed many years ago, making the past events reiterate itself more strongly. Whereas the clause (1)(b)(ii) is hoping for good relations between the President of India and J&K since it provides that any other laws can also be enacted by Indian Union for the State, wherein the state of J&K and the President deem it necessary that such matters should be legislated by Indian Parliament. This makes sure that Union powers are enlarged with respect to this State, which was necessary for the interests of

¹²AIR 1961 SC1519,1512 : (1962) 1SCR 688

¹⁰“*Jammu and Kashmir Industrial Policy 2002-2015*” <http://jammu.nic.in/departments/industries/Central-Policy%20and%20Procedures.pdf> , visited on June 5, 2013.

both, Indian Union as well as J&K, since harmonious relations will always be one of prime objectives for everyone.

- V. Here comes the whole and soul of what really crystallizes Indian position with respect to J&K. The *Constitution (Application to Jammu and Kashmir) Order, 1950*¹⁴ was enacted by the provision of Clause (1) (b) (ii) of 370¹⁵. But by the Delhi agreement¹⁶ a new order was passed in 1954 which brought about some significant changes and this order was a more closely associated with Indian Constitutional framework. Also numerous amendments¹⁷ have been made therein with a view to bring the J&K constitution nearer to the position of the rest of the states of Indian Union. Now we come to one of the most important parts of the essay, wherein it will be for us to understand how Article 370 has gone to the extent of not only granting J&K a new constitution of its own, but how also Article 370 is one prime reasons why Kashmir still function differently, why it still maintains a diagonally opposite identity when compared to other states, and why still Indian growth has not reached the heartland of the beautiful valley.

Consequences of Article 370: What lies ahead?

Preceding part of the paper has focused on how Jammu and Kashmir is made different from the rest of the Indian expanse, by letting Article 370 be in the Constitution. The very same Article has been in recent news, and has been a topic for mudslinging pre-elections between political circuits. This part focuses on the consequences which the country is facing, and more importantly, the people of Jammu and Kashmir are facing, in lieu of Article 370.

First and foremost, and the most dreaded is the secessionist tendencies that have grown among the people of state. The plea of integration has always been coming from the people of Kashmir valley, and this can be seen from the recent statement made by, Ashwani Kumar Chungroo, when he said that Article 370 is the major stumbling block in the emotional integration of Kashmir with the rest of the country.¹⁸ **It is quite evident that Article 370 has not integrated Jammu and Kashmir with India but it has delinked it. There in Kashmir is no place for secularism and nationalism in the mind of the youth. The feelings of regionalism, communalism and separatism have been developed in their mind. Instead of coming closer to the national mainstream, they have distanced themselves from it and have now started raking up the question of independence.**¹⁹

Other important word, and a pertinent question is that populace of Kashmir are now considering themselves as a supra-separate entity, which has radicalized the youth to a large extent to participate in politically induced

¹⁴ This Order is repealed by President's Order of 1954 dated 14th May 1954.

¹⁵ For detailed discussion see Justice A.S.Anand, " *The Constitution of Jammu and Kashmir: Its content and developments*" 7th Edition Universal Law Publishing House, pg.96-113

¹⁶ Ibid pg. Chapter 5, section 4 on pg.105-113

¹⁷ Constitutional Order no. 51, 55,56,57,59 during the years 1956 to 1959. Then during the period of 1961 to 1994, Constitutional Order No. 62,66,69,70,71,72,74,75,76,77,79,80,83,85,86,89,90,91,92,93,94,95,97,98,100,101,103,104,105,106,108,122,124,129,151 and 154.

¹⁸ <http://www.jknewspoint.com/newsdet.aspx?q=17430> "Article 370 major stumbling block in emotional integration: Chungroo" Newspoint Bureau visited on 12th August, 2013 at 7:00 pm.

¹⁹ Narendra Sehgal, " *Memorial of Mistakes, Saga of Converted Kashmir, A bitter saga of Converted Kashmir*" <http://www.kashmir-information.com/ConvertedKashmir/Chapter26.html> accessed on 15th August, 2013.

fissiparous works.²⁰ The root cause of separatism is the unusual federal position given to the state by Article 370. India being a federal system with some unitary features, does not allow states to have their own constitution. But Kashmir being an exception, not only has its own constitution, but also its own flag. This also gave a rise to two-nation theory, wherein originally Jammu and Kashmir, was to have a separate PM along with India. Though presently, this isn't the situation, but this article has sown the seeds among people to have their separate identity, which can be seen from the rise of ethnonationalist disturbances starting from 1989 insurgency to present 2008 Amarnath dispute.²¹

Directly linked to this is the poor developmental record witnessed by Kashmir, due to the fact that businesses and investment do not go in hand in hand with a state, that frequently faces violence and "bandhs" thereby making the youth of the state more disgruntled by seeing the state of affairs in the state. Fewer opportunities and uncertain situation in the state has been major reason behind growing secessionist ideas of political leaders.

Secondly the Article 370 has again made Indian federal structure, as envisaged by the framers of this Constitution subservient to regionalism and rise in parochialism in Kashmir valley. The simple answer for the above, is that Article 370, has given double citizenship to people of Kashmir, i.e. a person staying in Kashmir is not only citizen of India but of Kashmir also, a practice not seen in any state. Also the core fundamental right of Article 19(1) (e) and (g) has been which allows Indian citizens to reside freely in any part of the country, is taken away. This is not only unfair for the people of the other states, but Kashmir has suffered unbearable economic costs since no initiative, whether economical or social, would be able to survive there without a person getting permanent residence there. In contrast people from the Kashmir valley can settle anywhere within India. Coupled with this is the reservation of any Indian Citizen to get jobs in Kashmir, since there is full reservation in jobs for citizens of Kashmir only. All this has created an atmosphere of aloofness, for people of Kashmir which has detrimental effects on the entire nation. In support of argument that Article 370 undermines the very idea of federal structure, is the fact that Parliament of India is not able to alter the boundaries of the state, as it can for other states under Article 3 of The Indian Constitution. This indicates the superior position which Jammu and Kashmir Government has over Indian Government for important issues.²²

CONCLUSION

Article 370 has been bone of contention for many years now between the central government and people of Kashmir, but it has been a big cause of concern between India and Pakistan. This article's genesis was temporary in nature, but over a period of time, it was given permanent features for political gains. It is this article that has added that extra mileage and fuel to the separatists and communal feelings between people of different communities within the State.

²⁰ For contrary view, <http://www.publishyourarticles.net/knowledge-hub/essay/an-essay-on-article-370-and-special-status-of-jammu-and-kashmir.html> "An Essay on Article 370 and Special status of Jammu and Kashmir" visited on 12th August, 2013 at 8:06 pm.

²¹ For more on this topic, see "*Kashmir's Secessionist Movement Resurfaces: Ethnic Identity, Community Competition and State*" by Reeta Chowdhuri Tremblay in Asian Survey Vol.49, No.6 (November-December, 2009) pp. 924-950 <http://research.library.mun.ca/391/1/kashmir.pdf> visited on 12th August, 2013 at 8:30 pm.

²² For more on this topic see "*Horrendous Consequences of Article 370 in Constitution of Broken Bharat (Bleeding Partitioned India)*" By Kanayalal M. Talreja, Source: Rashtriya Chethana http://www.partitionofindia.com/_archive/000007a1.htm visited on 12th August, 2013 at 8:45 pm

Looking ahead, in resolving the issue, the position can be summarized as follows in the words of Colin Powell, a statesman of U.S and retired four star general of US army.

“The Kashmir issue is essential to the relationship and can be resolved if all the parties engage with willingness to address their concerns in mutually acceptable ways...Issue must be resolved through peaceful political and diplomatic means, not through violence or reliance on force, but with determined effects for human rights.”

Though this article makes J&K stand as if it were some isolated unit, it would rather be beneficial if this Article is abrogated at the earliest, in order to bring J&K under the fold of conventional mainstream India, which is indeed on the path of success, and by doing so would also take J&K along that path. Not only will this help the state, it will help India as a nation, to welcome with open arms this wonderful “Switzerland of India”.