

THE KASHMIRI CONUNDRUM

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Abstract

In the last decade the State of Jammu and Kashmir has finally begun to show signs of what is presumed to be an inkling of stability. Due to both constitutional and statutory regulations, the abundantly empowered State Government should have grabbed this opportunity with ample hands. Alas, due to its own laxity the lacerating decadence continues and grievances remain unanswered.

Therefore the primary objective of this essay through the medium of rigorous doctrinal research will therefore be to examine the root cause of this underlying problem namely Article 370 along with its adverse effects. Through a compiled research from a host of multi disciplinary sources we shall further dissect various sub topics regarding this issue like the constitutional order of 1954, the heatedly contested section 3 in the Jammu and Kashmir's constitution and finally the elephant in the room (the procedure for abrogating Article 370). Hopefully the authors can conclude by motivating the readers to aspire for a perfect system and resolve any problem found relating to the topic at hand

Keywords – Jammu and Kashmir, Article 370, Abrogation, Constitution

(1) Introduction

The tale of Kashmir is a sordid saga. Proxy wars, unfulfilled promises and perverted politics have continued to deteriorate the relationship between the Union and the State and have also played a pivotal role in denying the people their aspirations. At its core lies Article 370, a temporary measure which unfortunately prevents the full integration of the State into the Union. This not only empowered the Government of the Valley with increased autonomy but due to political distortions allowed Jammu & Kashmir to adopt its own Constitution. Since this statute was incorporated to deal with the exceptional circumstances

prevalent during the 50's, it's continued failure calls for a thorough review of its purpose, and thereby answer two quintessential questions :-

- a) Whether the time's conducive for arrogating Article 370?
- b) What is the legal procedure for abrogation now that the Constituent Assembly is abolished?

The authors being a biased party favor its abolition shall therefore strive to answer both these questions keeping in mind the legalism woven into Article 370, its present implications and effects whilst providing a holistic view of the current scenario prevalent in the valley.

(2) History

Before the adoption of Instrument of Accession in 25/10/1947 the territory of Jammu and Kashmir was a kingdom. It was ruled by Maharaja Hari Singh who had succeeded the State form Maharaja Pratap Singh in 1925 to become the new emperor of Jammu and Kashmir territory. During the 1930's, amidst several populist agitations demanding a responsible government, Maharaja Hari Singh proclaimed new regulations to delineate legislative, executive and judicial functioning. In so doing he made efforts to establish a proper governing system¹ but retained all the principle powers of governance himself, hence all the functions of governance were continued to be done by and in the name of the King.² Thus, the King continued to hold absolute discretion in deciding to consent on any governmental measure or not.

In 1940s the political scenario in British India changed promptly and the British legislature passed the Indian Independence Act, 1947. This Act proclaimed the Sub Continent's Independence and further established two independent dominions that are India and Pakistan. With the enactment, the suzerainty of The King over the Indian States lapsed under Section 7(1)(b) and with it lapsed all his obligations, powers, rights, authority or jurisdiction exercisable in relation to the Indian States by treaty, grant, usage, sufferance or

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¹ Regulation 1 of 1991 (1934)

² Jammu and Kashmir Constitution Act 14 of 1996 (1939)

otherwise in force at the date of the passing of the Act between His Majesty and the Rulers of the Indian States.³

This British enactment of 1947 threatened the Maharaja's Sovereignty and left him inadequately prepared to defend the State without military intervention. The threat of losing his empire to tribal raiders led the King to sign the "Instrument of Accession" on 25-10-1947 with India which by then had become an Independent Dominion.

Now the Government of India had the power, subject to the terms of the Instrument of Accession, to exercise in relation to the State of Jammu and Kashmir such functions as may be vested in them under the Government of India Act, 1935. By clause 3 of the Instrument the Maharaja agreed that matters specified in the Schedule attached to the Instrument of Accession were matters with respect to which the Indian Dominion Legislature can make laws for the State of Jammu and Kashmir. The Schedule attached to the Instrument refers to four topics, that is, defense, external affairs, communications and ancillary, and further enumerates under these topics another additional twenty matters serially. Thus, by the Instrument of Accession the Maharaja took the initial step in recognizing the State of Jammu and Kashmir as a part of the Dominion of India.⁴

Following the Instrument, the Indian army entered the state to repel the invaders. But Sheikh Abdullah Mohammad, a popular leader of the people who was appointed by The Maharaja as the head of the emergency administration endorsed the accession as ad-hoc which would be ultimately decided by a plebiscite. On the other side, Pakistan disputed the accession as illegal and this triggered the first war between India and Pakistan in 1947.

On 1st January, 1948 India took the Kashmir issue to the United Nations Security Council. The United Nations Security Council after hearing arguments from both sides passed a resolution dated April 21, 1948 instructing the UNCIP (United Nations Commission for India and Pakistan) to help restore peace and order to the region and prepare for a general plebiscite to decide the fate of Kashmir.⁵ This resolution was passed by United Nations Security Council under chapter VI of UN Charter therefore it was nonbinding and had no mandatory enforceability. Pakistan thus ignored the mandate and refused to implement the plebiscite.

³ The Indian Independence Act, 1947

⁴ Prem Nath v. State of Jammu and Kashmir, AIR 1959 SC 749.

⁵ UN Security Council Resolution 47, 1948 adopted by United Nations Security Council.

The Maharaja in his endeavour to introduce a responsible government and pacify the popular demands issued another proclamation on 5/3/1948. By this proclamation an interim government was set up theoretically functioning under the Constitution of 1939.⁶

While the state was now governed by the interim Government, the political events and public demand for framing of a democratic Constitution continued to gather momentum. The Maharaja, due to health issues left the State for a temporary hiatus. In his absence he entrusted all his powers and functions including his rights and prerogatives of making laws, issuing proclamations, orders and ordinances, or remitting, commuting or reducing sentences and of pardoning offenders, to Yuvraj Karan Singh Bahadur by a proclamation dated 20/6/1949.⁷ This was the last official act by the Maharaja before he left the State.

Exercising his powers under the last proclamation, Yuvaraj Karan Singh on November 25th, 1949 declared and directed that the Constitution of India shortly adopted by the Constituent Assembly of India shall, in so far as it is applicable to the State of Jammu and Kashmir, govern the constitutional relationship between the State and the Union of India and shall be enforced by him, his heirs and successors in accordance with the tenor of its provisions. He also declared that the provisions of the said Constitution shall, from the date of its commencement, supersede and abrogate all constitutional provisions inconsistent therewith which were then in force. This declaration was made in reference to the fact that the best interests of the State of Jammu and Kashmir required the constitutional relationship between the State and the contemplated Union of India to continue as between the State and the Dominion of India.⁸

In the mean time the Constituent Assembly in India was engaged in framing a Democratic Constitution. The Constituent Assembly also included the duly appointed representatives of the State of Jammu and Kashmir. Since there were UN resolutions calling for plebiscite in J&K, the constituent assembly decided that till a decision was taken, a temporary provision be introduced to give shape to the future relationship between the state and Union of India. Therefore in October 1949 the Indian Constituent Assembly adopted a temporary provision conferring special status and internal autonomy to the State. This

⁶ Prem Nath v. State of Jammu and Kashmir, AIR 1959 SC 749.

⁷ *Kashmir: Timeline*, Available at http://www.kashmirlibrary.org/kashmir_timeline/kashmir_chapters/1948-1954.shtml, Last Visited on 16.06.2014

⁸ Prem Nath v. State of Jammu and Kashmir, AIR 1959 SC 749.

provision came to be known as Article 370⁹. On January 26, 1950, the Constitution of India came into force and it provided a suitable basis to continue the constitutional relationship between the State and the Union of India through Article 370.

The Yuvraj again issued a proclamation on 20/4/51., directing that a Constituent Assembly consisting of elected representatives on the basis of adult franchise to be constituted forthwith for the purpose of framing a Constitution for the State of Jammu & Kashmir. This proclamation was intended to meet expeditiously the populist demand for framing of a democratic constitution for the State. In accordance with this proclamation a Constituent Assembly was elected and it framed the State Constitution. By this Constitution the dynastic rule of Maharaja Hari Singh came to an end. The Jammu and Kashmir State Assembly ratified the Instrument of Accession in 1954 and on 30 October 1956, the state Constituent Assembly adopted a Constitution declaring the State an integral part of the Indian Union.¹⁰

(3) Reasons supporting the abrogating of Article 370

The objective of Article 370 was to nullify tensions between the Union and the State and gradually to assimilate Jammu and Kashmir, in an orderly fashion¹¹. However 64 years in, this objective continues to remain unfulfilled and has further created a perplexing Status Quo now championed by the State Government who is its most advantageous beneficiaries. Therefore, quoting Sanya Friedman since "the first step in solving any problem is recognising there is one", by deeming Article 370 a problem the authors would like to highlight both its legal and factual irregularities which have ultimately deprived the people of the valley their inalienable rights as equal citizens of our democratic nation.

A. Legal Issues

In order to understand the true legislative depth of the problem this topic is discussed in its entirety including Article 35A of the Constitution Order, 1954 promulgated by the President.

- i. **Abuse of Article 370(1)(b)(i) and (ii)** - Under the following clauses the Union has power to legislate in matters both in the Union or Concurrent list. However due to

⁹ Constitution of India, 1950

¹⁰ Prem Nath Bazaz, *Democracy through Intimidation and Terror*, Heritage Publishers, New Delhi (1978), p.15, 87.

¹¹ Prashanth Vaidyaraj, *Article 370 – An objective Appraisal*, http://centreright.in/2013/08/article-370-an-objective-appraisal/#.U7IGM2O2U_o, Last Visited on 15.06.2014

clause (ii) it can only be done, upon the concurrence of the State Government. Therefore any law the Union wants to extend upon Jammu and Kashmir becomes redundant unless approved by the State Government. The legislation is further diluted by the fact that of the 99 entries in the Union List 6 are excluded from the State while of the 52 entries 21 are excluded in the Concurrent List. This prevents the Union from exercising any "real" legislative control over the State and further empowers the State Government who uses ignorance as a tool to cover their own incompetence. (E.g. the Jammu and Kashmir State Accountability Fiasco).¹²

- ii. **Issue of Citizenship and Fundamental Rights** - Permanent Citizens are defined under Section 6 of the Constitution of Jammu and Kashmir. The classification is based on a notification by the Maharaja dated 20/4/1927. Those in "State Subject Class I" are born and residing within the State's territorial boundaries since March, 1885 and "State Subject Class II" comprises of settlers after March 1911 who have acquired immovable property within the State. These elite form the Permanent Resident of the Valley leading to the concentration of state resources into their hands. This discrimination is further exasperated by the fact that ordinary domiciled citizens are deliberately denied even the bare semblances of Fundamental Rights which only extend to Permanent Residents under Article 35A (The Constitution of Jammu and Kashmir on Universal Fundamental Rights). The inequality doesn't end there as again within Article 35A rights of a non permanent can be abrogated hence he can't purchase property, vote in the Legislative Assembly nor pursue a governmental job. Even in marriage if a permanent citizen marries a non permanent he or she loses all her rights under Order, 1954 therefore this one notification not only lambasts all concepts of International Laws related Citizenship, it further violates Article 14 and, has a negative impact on Personal Laws as well.
- iii. **Jurisdiction of Courts** - Article 368 deals exclusively with Parliaments powers to amend the Constitution, as it doesn't apply to J&K the Centre can only recommend amendments to the Constitution of J&K. This creates an extremely grave situation as even the High Court of J&K can only enforce those fundamental rights that are guaranteed by the 1954 order. Since the SC has appellate authority if an ordinary citizen of Kashmir having only domicile appeals a J&K High Court Judgement in

¹² Gk News Network, *Govt on job to dis(empower) State Accountability Commission*, <http://www.greaterkashmir.com/news/2012/Aug/24/govt-on-job-to-dis-empower-state-accountability-commission-77.asp>, Last Visited on 20.06.2014

case the Supreme Court denies his petition citing his non entitlement under the Order of 1954 shadows are cast about the validity of the Keshavananda Bharti Judgement¹³ while if Supreme Court does accept the petition then doubts are raised about the need for judgements rendered by the J&K High Court. This creates a perfect lose - lose scenario for all the parties involved.

Furthermore under I.R.Coelho vs. State of Tamil Nadu¹⁴ Judicial Review became an integral part of the Basic Structure and therefore cannot be taken away. Due to this ruling a serious question arises that whether there can be Citizens of India who are not permanent citizens and therefore not subject to ordinary civil right under the order of 1954 while there are Permanent Subjects enjoying both full citizenship guaranteed both by the State and the Union?

- iv. **Miscellaneous Issues** - Many acts which can legitimately address the grievances of the people of Jammu & Kashmir are exempt due to non concurrence by the State Government. These include the Prevention of Corruption Act, Urban Land Ceiling Act, Domestic Violence Act etc. Further even when the people demand revolutionary changes like RTI the Government conveniently introduces diluted legislature to further protect its interests. E.g. the J&K RTI Act deliberately keeps the benefits enjoyed by State Minister outside its purview¹⁵. Since ultimate approval is vested with the State Government, the Centre can't interfere hence we can only hope for the best.

B. Factual Discrepancies

Before highlighting the factual discrepancies the authors would like to provide some factual statistics about the State of Jammu and Kashmir. The state is divided into 3 regions namely Jammu consisting of 26,293 sq. kms. with 24,61,906 voters, Kashmir 15,853 sq. kms. with 24,10,220 voters and finally Ladakh 59,241 sq. kms. consisting of 63,597 voter¹⁶.

- i. **Electoral and Administrative Discrepancies** - Despite both the region of Jammu and Kashmir having an almost equal shares in terms of voter turnout both the electoral seat division and the administrative setup highlight an outward bias towards the region of Kashmir. While Jammu elects 2 MP's and Kashmir 3 in State Legislative Assembly Kashmir occupies 46 seats while Jammu a mere 37, a

¹³ Keshavananda Bharti v. State of Kerela, AIR 1973 SC 1461

¹⁴ I.R.Coelho v. State of Tamil Nadu, AIR 2007 SC 861

¹⁵ The Jammu and Kashmir Right to Information Act, 2009

¹⁶ Census of India, *Jammu and Kashmir Population Census data 2011*, Available at <http://www.census2011.co.in/census/state/jammu+and+kashmir.html>, Last Visited on 22.06.2014

difference of almost 9. In case of administrative framework the percentage of employees employed in the Civil Secretariat are nearly 90% while in case of Central Government employees a 100% Kashmiris. Apart from this the State Headquarters, Offices and all 13 State Corp are all located in Kashmir.

- ii. **Revenue Discrepancies** - In terms of revenue generation Jammu produces nearly 70% of the entire State annual earnings while 30% is produced by Kashmir. However the figures are reversed in terms of fund allocation with Kashmir getting the lion share. Budgetary Reports further highlight this disparity as even the overall funds allocated by the Centre for the development show Kashmir retaining 90% of the funding.¹⁷
- iii. **Educational Discrepancies** - Education has also suffered it's brunt under this regime as 65% educational institutes are located in Jammu receiving only 30% of the State's Educational Expenditure. In terms of educational development all the recent colleges albeit The Dental College, The Veterinary College or the Physical Training College (which was initially proposed for Jammu) have been established in Kashmir. This shows not only the benign neglect the State Government practices when it comes to Jammu but on a long term basis since 65 % educational colleges only attain the minority share of the funds it raises serious accusations about the quality of these underpaid institutes.

The list is never ending. Despite the Gajendragadkar, Sikri and Wazir Commission recommendations the State continues to favour discriminatory policies that now bear fruit like there never being a CM from the Jammu region, a drastic increase in unemployment from 68,784 in 1989 to 1,55,000 in 2006 and till recently a new insistence from Ladakh in demanding Union Territory status¹⁸ all to escape the Iron grip of Article 370.

(4) Procedural Debate on the Abrogation of Article 370

The question whether Article 370 can or should be abrogated has long been debated. Conflicts in political interests, political reluctance and most importantly the balance of arguments, both in favour and against the abrogation have been the major factors in its non

¹⁷ V.K.S. Choudhary, *The Law and Burning Problems*, Universal law publishing Co., New Delhi, (2013), Pg 54

¹⁸ Muzaffar Hussain, *Union Territory For Ladakh: Just Another Election Promise?*, Available at <http://www.tehelka.com/union-territory-for-ladakh-just-another-election-promise/>, Last visited on 22.06.2014

settlement. The main issue related to abrogation is whether the Article can be abrogated from the Constitution, if yes, then how or by what means necessary.

Those in favour argue that the Article was adopted as a “Temporary Provision” in the Indian Constitution. The Article was indeed adopted at a time when there was a United Nations resolution calling for plebiscite in Jammu and Kashmir, and its objective was to merely give shape to the future relationship between the State of Jammu and Kashmir and the Union of India until a final decision was reached regarding the Status of J&K. The provision was therefore made to be subsequently repealed within a few years of its adoption.

Clause (3) of Article 370 provides the provision for removal or modification of the Article, it authorises the President to make a public notification by which this Article shall cease to be operative or shall be operative only with specified exceptions or modifications but this power can be exercised by the President only if the Constituent Assembly of the State makes recommendation on this behalf. Since the Constituent Assembly of Kashmir no longer exists, this Article cannot be removed or modified under this provision.

Another method by which the Article can be abrogated is through Article 368 which gives power to Parliament to amend the Constitution. Sub-clause (d) of Clause (1) of Article 370 provides that the other provisions of the Constitution shall apply in relation to the State subject to exceptions and modifications specified by the President, provided that no such order shall be issued except with the concurrence of the State Government. The said proviso refers to the definition provided by the government in its Explanation attached to Clause (1) which states that “For the purposes of this article, the Government of the State means the person for the time 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 Maharaja's Proclamation dated the fifth day of March, 1948”

The President exercising powers conferred on him by Clause (3) of this article, on recommendation of the Constituent Assembly of the State of Jammu and Kashmir, declared that, as from the 17th day of November, 1952, the said Article 370 shall be operative with the modification that for the Explanation in clause (1) thereof, the following Explanation is substituted namely:

“Explanation - For the purposes of this article, the Government of the State means the person for the time being recognised by the President on the recommendation of the

Legislative Assembly of the State as the Sadar-i-Rayasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.”

Therefore, by amendment, the text “Maharaja of Jammu and Kashmir” was replaced by “on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir”. Later, in 1965 the aforementioned explanation was again amended by the Legislature of the State which substituted the term “Governor” for “Sadar-i-Riyasat” by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965.

Also, Section 26 of the Constitution of Jammu and Kashmir provides that the Head of the State shall be designated as the “Governor” and Section 27 and 28(1) provides that the “Governor shall be appointed by the President by warrant under his hand and seal” and that “the Governor shall hold his office during the pleasure of the President” respectively. Therefore, an inference may be drawn with reference to Article 368 and Sub-clauses (d) of Clause (1) of Article 370 that, the removal of Article 370 can be brought by a constitutional amendment which at the minimum requires:

(1) The President to exercise his powers under Article 370 to make specification regarding the application of Article 368 on the State.

(2) The concurrence of the Governor of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, regarding the specification made by the President.

(3) A vote of two-third majority in the Parliament for the Constitutional Amendment and;

(4) A vote of over fifty percent majority in the Jammu and Kashmir Assembly.

Therefore, Article 368 may be used as a medium for elimination of Article 370 from the Constitution, but being sentient about the different stands of members of Parliament and that of the Jammu and Kashmir assembly, the kind of consensus required for such an accomplishment can be hardly expected today.

Those against the removal of Article 370 vociferously argue that Article 370 provides the foundation upon which the Constitution of the State of Jammu and Kashmir was enacted and if Article 370 goes, the Constitution will also be rendered void and therefore Section 3 under which Jammu and Kashmir became an integral part of India will

automatically cease to apply. This argument can simply be countered by stating that nowhere in Article 370 is there an express or implied mention that the Constitution of Jammu and Kashmir was enacted on the basis of Article 370. Therefore neither the Article 370 nor the Jammu and Kashmir Constitution are dependent upon each other; hence even if Article 370 is repealed it will have no effect on the State's Constitution. Since the Constitution will remain intact so will Section 3 and therefore Jammu and Kashmir will continue to remain an integral part of India. The only question which remains unanswered after this is regarding the validity of the Constitution of Jammu and Kashmir and its applicability over the state for the reason of its existence independent of Article 370.

(5) Conclusion

Article 370 is far too serious a matter to be debated lightly or casually. This Article is a constitutional guarantee given by our founding fathers and it can only be changed through multilateral consensus. On 27th November 1963 Pandit Jawahar Lal Nehru, because of whom this provision found a place in the Indian Constitution, stated in the Lok Sabha that “Article 370 has been eroded, many things has been done in last few years which has made the relationship of Jammu and Kashmir with the Union of India very close and we feel that the process of gradual erosion is going on, we should allow it to go on.” He clearly meant that the erosion of Article 370 will bring the State of Jammu and Kashmir closer to Indian Union and therefore the Article must be eroded overtime.

Jammu and Kashmir is a State which has witnessed a number of atrocities consuming the lives of thousands. The state being a part of Indian Union deserves peace and development in all fields whether it's social, economic or political. This has been deprived on account of Article 370. In fact in 2005, a survey of the most corrupt States done by Transparency International placed Jammu and Kashmir at second spot after Bihar. On the issues of agriculture production, sex ratio, poverty eradication, employment, getting investments, good governance the State of Jammu and Kashmir is behind the rest of the country over the years. Even today, an Indian citizen who does not belong to the state of Jammu and Kashmir cannot buy a land or own a property in the state; this deprives major private investments influx which would have gone a long way in solving the majority of the State's problems.

The fundamental purpose for adopting Article 370 in the Constitution was to subserve the interest of the people of Jammu and Kashmir, but subsequently it's being abused to serve vested interest i.e. the ruling elite.

Jammu and Kashmir is and has always been an integral part of India. The argument that the State of Jammu and Kashmir being a part of India is conditional on the existence of Article 370 in the Indian Constitution is completely erroneous as the State had already become an integral part of India upon the adoption of the Instrument of Accession in 1947 and the Article came in to existence only in 1949. Therefore it would be incorrect to state that "Either Article 370 will exist or J&K won't be a part of India" as recently tweeted by Mr. Omar Abdullah, the Chief Minister of Jammu and Kashmir.

A provision which has expressly been mentioned in the Constitution as a temporary provision was adopted only on the assurance of its gradual removal. The interpretation of the Constitution must firstly be done via Literal Interpretation that is by following the Statute expressly word to word and secondly, by bearing in mind the history and purpose for the adoption of said Article, thereby following the Grund norm in letter and spirit.

Article 370 has so far proved to be inadequate in addressing the aspirations of the people. The present government must therefore, instead of using the issue as a shield for divisive politics must try to understand the multilateral attitude of Parliament and its own citizens and therefore, strive for its immediate removal. Thus, Article 370 must be abrogated to make India into a true United Union of States where every State and Individual enjoys equal rights and opportunities in the absence of any special or discriminatory status.