

The Abrogation of Article 370 in Jammu and Kashmir

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Abstract:

After India got Independence in 1947, the princely states were given choice to join either India or Pakistan. However, after the Azad Kashmir Forces attack the frontiers of Jammu and Kashmir, maharaja Hari Singh decided to accede the state to India thereby signed the instrument of accession with Jawaharlal Nehru. Sheikh Abdullah and Jawaharlal Nehru drafted a provision (Article 370) which gives special to the states of Jammu and Kashmir. Article 370 embodied six special provisions for Jammu and Kashmir. Article 370 of Part XXI of the Indian constitution declares all of its provisions to be "temporary, transitional, and special". Recently in 2019, The Government of India abrogate the article 370 and the state of J and K was divided into two UTs. This paper aims to examine the impact of the abrogation of article 370.

(Keyword: Article 370, Instrument of Accession, Indian constitution, Article 370, Jammu and Kashmir, abrogation, UTs, terrorism)

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I. Introduction

Following World War II and a change in the British government, it was announced on 20th February, 1947 that India will be awarded independence, not later than August 1948. Lord Mountbatten proposed the '3rd June Plan' of Partitioning India into India and Pakistan, which was ultimately accepted by both Indian National Congress and Muslim League (Gupta, 2021). After the partition of the British Raj into two Dominions in 1947, the erstwhile princely states were offered the choice of joining Pakistan or India. It's worth noting that these states had the attributes of sovereign entities that had only been under the British Empire's protection. In fact, Jammu and Kashmir already had its own Constitution, which contained the Maharaja's executive, legislative, and judicial powers, as well as a High Court and a "Board of Judicial Advisors" modelled after the British system. J&K had de jure complete legislative and judicial powers when midnight struck on August 15, and hence might have proclaimed its own independence (Dequen, 2019). Maharaja Hari Singh's indecision over which Dominion to join, combined with the geopolitical context of the moment, determined otherwise. However, because of its strategic location between the newly created Pakistan and India, J&K was able to exert more influence over its future status. Lord Mountbatten (then Governor-General of the of India) quickly accepted the Instrument of Accession of Jammu and Kashmir (Bhatt, and Kaul 2006), which had to be taken into consideration in the drafting of the future Indian Constitution.

With the end of British rule, the State of Jammu and Kashmir became independent on 15 August 1947. Initially, Maharaja Hari Singh decided not to join India or Pakistan and thereby remained Independent. However, on 20th October 1947, the Azad Kashmir Forces supported by the Pakistan army attacked the frontiers of the state. Under these political circumstances, the ruler of the state decided to accede the state to India. Accordingly, the Instrument of Accession of Jammu and Kashmir to India was signed by Pandit Jawaharlal Nehru and Maharaja Hari Singh on 26 October 1947 (p.226). The Instrument of Accession states:

1. Maharaja Hari Singh accepts the matters specified in the schedules hereto as the matters to which the Dominion Legislature [of India] may make law for this State.
2. Nothing in this Instrument shall empower the Dominion Legislature to make any law for this State authorizing the compulsory acquisition of land for any purpose.
3. Nothing in this Instrument shall be deemed to be a commitment in any way as to acceptance of any future Constitution of India or to fetter my discretion to enter arrangement with the Governments of India under any such future Constitution.
4. Nothing in this Instrument affects the continuance of my sovereignty in and over this State, ... or the validity of any law at present in force in this State (Bhatt, and Kaul 2006, p.227).

The schedule solely provides the Dominion authority over defence, foreign affairs, and communications. Furthermore, it states that, while India would be granted jurisdiction over the aforementioned matters, it could

only do so within the existing State court system, implying that no jurisdiction would be granted to a higher Dominion court (i.e., the Federal Court of India and the Privy Council).

Despite being part of India, J&K kept most of its sovereignty, delegating just a few things to the national government. Jammu & Kashmir maintained control over its citizens' status as well as a jurisdictional monopoly over civil and criminal affairs at this time. Furthermore, by refusing to automatically recognise India's future Constitution, it cemented the concept that the state would continue to be controlled by its own legal system. The Indian Constitution was responsible for upholding and regulating this dual system. As a result, only Articles 1 and 370 of the Indian Constitution apply to J&K directly.

In his All-India Radio address to the nation on November 2, 1947, Pandit Jawaharlal Nehru articulated the reasons for supporting J&K's accession to India, as well as announcing that the people of J&K would choose the state's fate. (Roy, 2010). Nehru reaffirmed his commitment to hold a plebiscite in J&K in Srinagar on November 13, 1947, when he visited the state on Sheikh Abdullah's request. (2018, Soz) While assuring the people of J&K that the future of the state would be decided by the people of J&K. Nehru stated that India would accept the conclusion of the plebiscite, even if it was against India. Such a vow by Pandit Nehru reflects his faith in J&K's accession to India, as he knew that the Hindu-majority region of Jammu and Ladakh was ready to join India. Due to Sheikh Abdullah's undeniable power in Kashmir and Sheikh's pro-India predisposition, the Muslim majority region of Kashmir will vote in favour of India. On the 23rd of December 1949, Pandit Nehru reiterated his vow of a vote on J&K on All India Radio. (Nayyar, 2014) In addition to the foregoing, other UNSC Resolutions, notably UNSC Resolution 47 and UNCIP Resolutions of the 13th of August 1948 and the 5th of January 1949, mandated that the final determination of J&K's status been made through a democratic, free, and impartial plebiscite.

An Overview of Article 370

The issue of J&K's accession to India, its geographical position sandwiched between India and Pakistan, administrative problems in J&K, the internationalisation of J&K at the UNSC, statements by various personalities, and the continuation of the war between India and Pakistan until December 31, 1948, forced the Constituent Assembly to consider a Special Position for J&K in the Indian Constitution, which was unanimously approved. However, by placing Article 370 under Part-XXI of the Constitution of India, i.e., 'Transitory, Transient, and Special' Provisions (the phrase 'Special' was adopted in 1962 by the 13th Constituent Amendment Act, 1962), it was also insured that it was a temporary and transient provision. Initially, When Article 370 was incorporated in the Indian Constitution it clearly states that the provisions with respect to the state of Jammu and Kashmir are only temporary and not permanent (Gupta, 2021). When Sheikh Abdullah, the then-prime minister of J&K appointed by Maharaja Hari Singh and Jawaharlal Nehru, drafted the provision in 1947. Abdullah had claimed that Article 370 should not be subject to temporary provisions, and that the state should have "iron-clad autonomy." The centre, on the other hand, declined to give his demand. Article 370 embodied six special provisions for Jammu and Kashmir. Article 370 of Part XXI of the Indian constitution declares all of its provisions to be "temporary, transitional, and special".

1. The initial words are 'notwithstanding anything in the constitution anything in this constitution. These words appear in only a few other places in the Indian Constitution. These lines indicate that it has no bearing on any other provision of the Indian Constitution because it exclusively applies to Jammu and Kashmir.

2. The requirements of Article 238 are not applicable to the state of Jammu and Kashmir, according to subclause 'a' of clause 1 of Article 370.

3. Article 370 (1) b states that the parliament's powers over the state are limited. The document of accession established India's dominion. The Governor of Jammu and Kashmir has sole discretion over matters relating to the union list and concurrent list. The Parliament can only decide on issues relating to the State List. All the lists, such as the Union list, Concurrent list, or State list, that apply to all Indian states save Jammu and Kashmir are contained in Article 246 of Schedule VII. Governor of State refers to the Maharaja of Jammu and Kashmir, who acts on the advice of the Council of Ministers for the time being, based on the Maharaja's declaration on 5th March 1948.

4. Article 1 of the Indian Constitution applies to the state of Jammu and Kashmir, as stated in Clause 1(c) of Article 370.

5. Clause 1(d) of Article 370 specifies that by passing a Presidential order, various alterations and modifications to the Article can be made. However, before passing such an order, the President must seek the advice or consent of the Governor of the State of Jammu and Kashmir. Another caveat is that such an order must be relevant to the matters specified in the instrument of accession and must have the approval of the state's governor.

6. Paragraph (ii) of sub-clause (b) of clause (1) or in the second provision to sub-clause (d) of that clause says that with the consent of the Governor of the Jammu and Kashmir it must be placed in front of the Constituent Assembly.

7. Clause 3 of the Article 370 of the Indian Constitution explains that President has the power to abrogate or delete this Article by giving official notification in the Official Gazette. Provided that he shall take the consent of the State Governor before making such move (Neha, Arora, Ajnat, Sampla, Gautam,2020).

The state of Jammu and Kashmir is granted autonomy under Article 370 of the Indian constitution. This article tries to provide the people of Jammu and Kashmir a voice in questions of governance, as they have long felt insecure about their identity and uncertain about the future. The article declares that the implications of Article 238, which was removed from the Constitution in 1956 when India's states were reorganised, do not apply to Jammu and Kashmir.

Recent changes

President of India proclaimed the abolition of Article 370, overturning Presidential Orders from 1956. The Home Minister introduced and enacted a new bill known as the "Reorganisation Bill." Jammu and Kashmir and Ladakh were divided into two UTs under this bill. The unilateral governments will govern both of the UTs. The upper house of parliament approved the judgement, which was later overturned by the lower house (Neha, Arora, Ajnat, Sampla, Gautam,2020, p.5570). Shah had added at the time, "I would want to assure you that the repeal of (Articles) 370 has prepared the road for the development of Kashmir." Terrorists in Kashmir have now begun counting down the days before they die." "Congress leaders indicated there will be carnage in Parliament," Shah remarked in an interview. I'd like to tell them that nothing has happened. There hasn't been a single shot fired, and no one has died. Kashmir is progressing in a peaceful manner (Anand,2020).

This sparked an enormous international response, especially in light of the regional restrictions imposed as a result of the judgement. To be sure, most countries believed that the developments in Jammu and Kashmir were an "internal concern" for India, and that differences between India and Pakistan should be handled by negotiation. Some of India's strategic allies and long-time friends, on the other hand, have expressed worry and decried the government's communication restrictions, as well as the arrest of political leaders and restrictions on civil freedoms (Shah and Shah, 2020)

The abrogation has changed India's political map, with Parliament, Government of India and Indian Constitution getting full jurisdiction over the region.

1. State laws were scrapped and both UTs got lieutenant-governors since the division came into effect on 31st October,2019.
2. Jammu & Kashmir was turned into a UT with A legislative (along the lines of Puducherry and Delhi NCR).
3. Ladakh remained a UT under central rule.
4. After the removal of Article 35A, a new domicile law was introduced last year in these regions (Anand,2020).

Impacts

1. The State Legislature's power vanishes with the repeal of the 1954 Order, and parliamentary rules, including reservation laws, would apply to Jammu and Kashmir as they do to the rest of the country. The administration has called for this to end "positive discrimination" and to bridge the "gap" between residents of J&K and citizens from other parts of the country.

2. Furthermore, by removing the 1954 Order, a clause added to Article 352 is nullified. The Order stipulated that no declaration of emergency in the state based on "just internal disturbance or immediate threat" may be made without the permission of the state's government.

3. The move would be legally challenged on constitutional grounds and, more importantly, would undermine a key component of the 1947 Delhi-Srinagar agreement. The duty of maintaining law and order. According to Article 370, the President's power was utilised to both create and exercise an enabling provision that allowed the Order to be amended instantly, eliminating the need for the State Assembly.

4. The Rajya Sabha has been a sudden and covert weapon for the administration to rail against its historic political stance on Jammu and Kashmir. This shift will put India's social fabric to the test, not just in terms of its impact on Jammu and Kashmir, but also in terms of the implications for federalism, parliamentary democracy, and pluralism. The passage of far-reaching legislation such as dismembering a state without prior deliberation has set a new low. Executive arrogance typified the entire process of effectively repealing Article 370 of the Constitution. The purported process of changing the constitutional status of a fragile border state was carried out without any parliamentary consultation or political engagement from its population.

5. The possibility of economic gains connected with the removal of J&K's special status is one of the central government's arguments against it. The independence of J&K's judicial system, as well as its strict restrictions on foreign ownership of real estate in the region, created a barrier to private investment and the establishment of new businesses. However, in the Kashmir Valley, the repeal's economic impact is difficult to discern.

Jammu and Kashmir reorganisation bill 2019

After Article 370 was repealed, the Union government passed the Reorganization Bill, which paved the way for changes to the Jammu and Kashmir and Ladakh borders. As per this Act Jammu and Kashmir will have legislative Assembly. Ladakh will not have any Legislative assembly and will be governed by lieutenant Governor only. The features of the bill are:

1. Leh and Kargil will not be the part of Jammu and Kashmir anymore and will be merged with Ladakh territory.
2. All the other districts, villages or states will remain the inculcated in Jammu and Kashmir.
3. Allocation of Lok Sabha seats is also decided in this Act which specifies that five seats out six will be allotted to Jammu and Kashmir and one to Ladakh for the representation of Lok Sabha in the house of Parliament.
4. Election process will be same as prescribed in the delimitation Act.
5. Legislative Assembly of Jammu and Kashmir will last for 5 years
6. Article 239a will be enforceable on Jammu and Kashmir as Puducherry.
7. Legislative Assembly seats are also escalated from 107 to 111, 37 of Jammu and 46 of Kashmir and 4 of Ladakh.
8. SC/ST will get reservation.
9. High Court of both UTs will be same (Neha, Arora, Ajnat, Sampla, Gautam,2020, p.5570-71).

II. CONCLUSION

The expected changes in development, infrastructure, corruption, employment prospects, quality of life, and so on have yet to materialise. Other issues in the state include Pakistan-sponsored terrorism, extremism, proxy wars, and an internet prohibition. The curfew imposed there has had an impact on normal living since the abolition of the state's special regulations. The Corona virus added to the difficulties of everyday existence. Economic challenges exist as well, with tourism halting and apple growing in horticulture, which contributes 8% to the state's gross domestic product, being seriously harmed. Being a border state, dealing with external issues is also a challenge. The removal of Article 370 has undoubtedly provided the state with fresh opportunities. The government must make concerted efforts in order to reap the benefits. Investors should be attracted, the state's infrastructure should be reinforced to encourage investment and tourism, the administration should be reformed and refurbished, the education system should be renovated and improved, and measures should be made to promote women's education and employment. The Indian government has a unique chance to promote peace and prosperity in regions where terrorism and extremism are prevalent. Residents of the state must be emancipated from a fearful environment and assured that the change will benefit their future.

J&K's special position was expected to come to an end, but only with the rivalry of its people. The Centre's unexpected move disenfranchised them on a topic that directly affected their lives and sentiments. Nonetheless, that was accomplished following a massive military build-up and the house arrest of prominent government officials, and the communication blockade demonstrates a flagrant disregard for democratic principles. With the goal of fully integrating Jammu and Kashmir into India, this decision to modify the state's status could have unintended and severe consequences. The Modi government should be most concerned about the public backlash in Kashmir. They do not want to see a recurrence of the 2016 protests in the wake of Burhan Wani's death. However, because the curfew is gradually lifting and communication links in the Kashmir Valley have just recently begun to reopen, it will take some time to determine the full impact of the decision. It could elicit a defensive reaction in Pakistan, leading to a more aggressive response. However, while Pakistan has agreed on viewing the move as unrelated to Kashmir's disputed status for the time being, the issue will become more complex as time goes on, finally shifting the situation quickly and comprehensively.

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