

## TRIUMPHING TRANQUILLITY OF KASHMIR

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### **An Inception from the pages of history**

The abrogation of Article 370 was etched in golden letters in the pages of history. Asymmetric agreements have been negotiated in settlement of a number of regional conflicts in India. Kashmir's autonomous status was the oldest and, in original conception, the most far reaching of these provisions. Article 370 has governed the accession relationship of the princely state of Jammu and Kashmir with India under the Indian Constitution and as envisaged originally it formed the basis of Kashmir's special and autonomous status. It is imperative to note that Kashmir freedom movement was a movement to rid Kashmir of despotism, working in tandem with the national movement but not a part of it. It was only when Jammu and Kashmir forces faced an uprising by the Poonch troops of the British Indian Army's decommissioned Sixth Punjab Regiment and then a military rout by invading frontier tribesmen in the State's border town of Domel on October 22, 1947 that the Maharaja turned in desperation to India.

Article 370 read with Article 369 of Indian Constitution provided temporary powers to Parliament to make laws for Jammu and Kashmir. The astonishing fact is that the principal draftsman of the Constitution of India, Dr BR Ambedkar refused to draft Article 370 which sheds ample light on the fact that Article 370 was a much disputed and controversial law right from its inception. Therefore in its very genesis, Article 370 sought to create unequal terms for people who were citizens of the same country, living in different regions. This was also a precursor to the unequal development of people in J&K itself and in comparison to the rest of the country. The multiple cause and effect of the Maharaja's bid to safeguard his own sovereignty, Nehru's bid to invalidate Jinnah's Two Nation Theory and Sheikh Abdullah's bid to ascend to power; all of these have only resulted in effecting an unequal playing field and creating roots for future disharmony<sup>2</sup>.

### **Peculiar powers of Article 370**

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Article 370 confers special status to the state of J&K, which is one of the vexing conundrums of contemporary Indian politics; in fact the inherent inequality gave rise to the entire debate about a special status given unlike other princely states which acceded to India in 1947. Article 370 is drafted in Part XXI of the Constitution which relates to Temporary, Transitional and Special Provisions. An important nugget of history is that Article 370 was not incorporated at the time of accession but included at the instance of Sheik Abdullah, who was a member of the Constituent Assembly that drafted the constitution. All the provisions of the Constitution which are applicable to other states are not applicable to Jammu and Kashmir<sup>3</sup>. Under Article 370, the Centre has no power to declare financial emergency under Article 360 in the State. It can declare emergency in the state only in case of war or external aggression. The Union government can therefore not declare emergency on grounds of internal disturbance or imminent danger unless it is made at the request or with the concurrence of the state government. Also the Indian Parliament cannot increase or reduce the borders of the state. Jammu and Kashmir has two flags; a separate state flag along with the national flag. Insulting of national symbols is not cognizable offence in Jammu and Kashmir. The citizens of J&K are governed by state specific laws which come under the Constitution of Jammu and Kashmir, instead of those for the rest of India. The article came with a tag that said it was temporary, giving hope that the state would also be integrated with time and the main clause for repealing this article was when there would be real peace and also when the people of the state approved of this arrangement. Under sub-section 3 of this Article, the President of India can revoke Article 370 only on advice from the Constituent Assembly of Jammu and Kashmir. The Constituent Assembly was dissolved in 1957 and replaced by a Legislative Assembly, which was dismissed last year after the political dilemma of the coalition government. The current Presidential order modifies Article 367 of the Constitution with Constituent Assembly to be read as Legislative Assembly of the State and the State Government construed as the Governor. This has enabled the President to abrogate Article 370 with the consent of the Governor as the consent of the State. In the celebrated case of *PremNath Kaushal v. State of Jammu and Kashmir*<sup>4</sup> the Supreme Court has clarified that the framers of

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<sup>3</sup>According to the Article 370, except for defence, foreign affairs, finance and communications, the Parliament needs the State government's concurrence for applying all other laws. Thus the state's residents live under a separate set of laws, including those related to citizenship, ownership of property and fundamental rights, as compared to other Indian citizens. As a result of this provision, Indian citizens from other states cannot purchase land or property in Jammu and Kashmir.

<sup>4</sup> AIR 1959 SCR 749

constitution wanted the Constituent Assembly to finally determine the relationship between India and the State. The Constitution of Jammu and Kashmir came into force in 1957, with Article 147(c) stating that no amendment can be made to the Constitution in relation to the provisions of the Constitution of India as applicable to the state; this would, for all purposes, include the relationship enshrined under Article 370.

The Constitution of Jammu and Kashmir was framed in 1956 which retained the definition of permanent residents, as provided in the notifications issued by the Dogra ruler Hari Singh. The definitionsaid that all persons born or settled within the state before 1911 or after having lawfully acquired immovable property resident in the state for not less than ten years prior to that date, all emigrants from J&K, including those who migrated to Pakistan, are considered state subjects. The descendants of emigrants are considered state subjects for two generations. It is to be noted that the law regulating the permanent residents prohibits non-permanent residents from permanent settlement in the state, acquiring immovable property, government jobs, scholarships and aid. It was also interpreted as discriminatory against J&K women. It disqualified them from their state subject rights if they married non-permanent residents. But in a landmark judgment by J&K High Court in *State of J&K v. Dr SushilaSwahney*<sup>5</sup> held that women married to non-permanent residents will not lose their rights but their children will not have succession rights.

### **The Disputed Amendment**

In Clause 5 of the Instrument of Accession, Hari Singh said that the terms of “my Instrument of Accession cannot be varied by any amendment of the Act or of The Indian Independence Act unless such amendment is accepted by me by an Instrument supplementary to this Instrument”. In Clause 7, he said: “Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future Constitution.”<sup>6</sup> These statements made in the IOA stand as arguments against this, though it must be noted that the scenario has hence changed a lot. In *State Bank of India v ZaffarUllah Nehru*<sup>7</sup> the Supreme Court noted that the Federal Structure of the Constitution is reflected in Part XXI of the

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<sup>5</sup> AIR 2003 (1) J&K 35

<sup>6</sup> **Indian Independence Act** (1947 c. 30 (10 & 11. Geo. 6.))

<sup>7</sup> Civil Appeal nos 12237-12238 of 2016

Constitution<sup>8</sup>. The ruling party went for the alternate route by moving forward with a Presidential Order, which is quite possibly the only way to bypass any legal obstructions. To the Government's defence, moving for a motion of concurrence with the Jammu and Kashmir Constituent Assembly would have been illogical as the body had already been dissolved back in 1951, and the State Legislative Bodies are anything but regular with positions often going vacant<sup>9</sup>.

Article 370 itself is gender neutral, but the definition of Permanent Residents in the 1927 notification included an explanatory note which said: "The wife or a widow of the State Subject...shall acquire the status of her husband as State Subject of the same Class as her Husband, so long as she resides in the State and does not leave the State for permanent Residence outside the State." This was widely interpreted as suggesting also that woman from the State who marries outside the State would lose her status as a State subject<sup>10</sup>. Article 370 is synonymous with decentralisation and devolution of power and phrases that have been on the charter of virtually every political party in India. There is no contradiction between the wanting J&K to be part of the national mainstream and the State's desire for self-governance as envisioned in the Article.

### **Need for repeal**

Article 370 was created with a novel cause of making the citizens of the state of J&K feel secure and empowered as they had to live through abnormal and disturbing conditions. One of the most authentic logic put forward in opposing Article 370 is that it bars the non-subjects from outside the state to buy immovable as well as movable property here, set any industry or manufacturing

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<sup>8</sup>The court also said that J&K has a special status, and that Article 370 was not temporary. The court referred to Article 369 of Part XXI that specifically mentions the period of five years; no time limit is mentioned in Article 370. The court observed that Article 370 cannot be repealed without the concurrence of the Constituent Assembly of Jammu and Kashmir ("*in exercise of powers conferred by clause (1) of Article 370 of the Constitution, the President with concurrence of the Government of State of Jammu and Kashmir*").

<sup>9</sup>A major problem with the current Presidential Order (C.O. 272) is that it sought to amend Art 370 by using the amended Art 367, which is the interpretation clause of Art 370. There is a chance of it not withstanding legally in the Supreme Court (previous judgments deem it not legal). To add to the plethora of problems, the President consulted the Governor to proceed with the amendment. Interesting, Jammu and Kashmir had not had a Government for some time now. So, in effect, the Union Government holds a monopoly here.

<sup>10</sup>However, in a landmark judgment, in October 2002, the full bench of J&K High Court, with one judge dissenting held that the daughter of a permanent resident of the State will not lose her permanent resident status on marrying a person who is not a permanent resident, and will enjoy all rights, including property rights.

unit, while no other state bars any state subject of J&K to invest there, acquire land or set business establishment. The private sector today has achieved new heights in many states. But how the same private sector can grow in J&K when there is obstacle of Article 370 in attracting the flow of investment from big business houses which are running mega projects and giving employment to thousands of educated youth according to their academic, professional, skilled and non-skilled capabilities. Lack of job avenues to the educated unemployed youth of state is forcing them to move out to other states for finding suitable source of bread earning. It is said that if this silent migration of youth continues, it will convert the state into a land of old and aged people in next 15-20 years, which is indeed a very serious matter and need to be taken note of by the government. It is also said that the unemployment in J&K has promoted militancy. A poor youth after completing education with limited resources, after sitting idle for long, gets easily lured by the people who push them into anti-national activities by giving them few thousands of rupees.

### **Implications**

With the formation of Union Territory, the Legislative Assembly may make laws for the whole or any part of the Union Territory of Jammu and Kashmir with respect to any of the matters enumerated in the state list except on subjects public order and police which will remain in the domain of the Centre vis-a-vis the Lieutenant Governor<sup>11</sup>. In case of inconsistencies between laws made by Parliament and laws made by the Legislative Assembly, earlier law shall prevail and law made by the Legislative Assembly shall be void. The role of the Chief Minister will be to communicate to the Lieutenant Governor all decisions of the Council of Ministers relating to the administration of affairs of the Union Territory and proposals for legislation and to furnish such information relating to the administration of affairs as the Lieutenant Governor may call for. The Bill specifies that the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh will have a common Lieutenant Governor.

With the abrogation of Article 370, the region of J&K will witness a tectonic shift in laws governing the area. Permanent citizens of Jammu and Kashmir recognised as state subjects will

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<sup>11</sup><http://www.prsindia.org/billtrack/jammu-and-kashmir-reorganisation-bill-2019>

cease to have special privileges<sup>12</sup>. One of the most important amendments proposed will be related to Transfer of Property Act. The Jammu and Kashmir Reorganisation Bill, 2019 passed in Parliament, makes provision to omit Sections 139 and 140 of the Act which would allow the transfer of immovable property in favour of non-permanent residents of the State. Similarly, the Bill provides to amend the Jammu and Kashmir Land Grants Act- allowing non-resident promoters who can get the land on lease<sup>13</sup>. The other change will be regarding the criminal law. The Bill provides to apply at least half a dozen laws related to the criminal justice system<sup>14</sup>.

The right to information Act, 2005 and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 are also proposed to be applied. The High Court of Jammu and Kashmir shall continue to be the common constitutional court for both the proposed Union Territories. The Bill also states that the power to make laws relating to All India Services and Anti-Corruption Bureau will lie solely with the lieutenant governor. Under Section 73, the President can suspend any or all provisions of the law if a situation arises where it is necessary or expedient to do so in the light of failure of constitutional machinery<sup>15</sup>.

For now, J&K is still a work in progress in terms of restoring normalcy. Transport and communication is being re-established with many political leaders still in jail. The Bill being passed is almost a certainty. The Supreme Court will definitely have a say in it, regarding its provisions and surrounding legality. The implementation and execution will be key factor in determining the overall success of the motion and more importantly, in making it hassle-free.

### **A Note of Peroration**

Article 370 was envisaged as an instrument for a vulnerable populace, unsure of protection of their identity and culture. In the same instance it was meant to assure autonomy to create space in governance and empower people to decide their future. This delegation of power has remained mired in the clutches of only a few. The very basis of the autonomy granted is challenged due to

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<sup>12</sup>The key provision of Article 35A that bars anyone except permanent residents of the state from buying land, holding government jobs would be hit as it could be held to be discriminatory against other citizens of the nation.

<sup>13</sup>The Wakf Act that deals with regulation of movable or immovable property for religious and charitable purposes as recognised by Muslim Law is also proposed to be applicable to the region.

<sup>14</sup>The Indian Penal Code, the Criminal Procedure Code, The Indian Evidence Act- the most important laws governing criminal trial will now apply.

<sup>15</sup>This move is possible only on action on a report from the lieutenant governor or otherwise. Unlike a state which is governed by its elected government, a UT is an administrative unit governed by the Central Government. In UTs with a legislature, the lieutenant governor governs in consultation with the elected government.

the lack of accountability in public life. In the larger context of India, whether it is the refugees from Poonch, Mirpur and Muzaffarabad, or the case of Kashmiri Pandits in exile, the state has failed to provide a mechanism for redress. The extreme case of discrimination cannot be justified in terms of any reasoning offered by Article 370 or those who advocate it. Instead of empowering the people to decide their own future and fate, the article risks this very underlying reason for its incorporation in the first place, and has been abused without any qualms. Therefore, the argument of naysayers that it is the erosion of Article 370 and not its creation that is helping separatism bloom stands without merit.

The bill seems to be a good prospect for the future of India as a whole, though it walking on thin ice at the moment. With the right guidance and prudent diplomacy, there is no reason why it cannot be a success. It even has international implications, with Pakistan running afoul in the UNSC, and other countries observantly holding their ground. On the bright side, India does have support from major bodies as long as the complete process is constitutionally justified. Moreover, it appears to be the peoples' will as well because this was adhered to in the ruling party's election manifesto. There is a common misunderstanding that this amendment has implications on the overall integration of the nation. Though there is some truth to that statement, one deeper analysis, it is more of a matter of autonomy. Article 3 of the Jammu and Kashmir constitution itself declares the state to be an integral part of India. So, the bill is in direct conflict with it. If the bill indeed is accepted, the ramification on J&K will not be so nice. The once-sacrosanct Art 35(a) will most certainly be disregarded as unconstitutional. It is going to be getting a status lower than other states, alongwith lower representation and influence. Amit Shah stated that J&K will be changed back to a state "in due time". Time will tell. Till then, hope is pinned on carrying this out in a judicial and sagacious manner, for the overall betterment of the nation as one unit.