

ARTICLE 370: A PERMANENTLY TEMPORARY PROVISION

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ABSTRACT: Article 370 of the Constitution of India confers a special status to the state of Jammu and Kashmir. It came into existence on 26 January 1950. Article 370 is enacted, in Part XXI, under Temporary and Transitional Provisions of the Constitution. Since the date of its inception to the Indian Constitution it has been in controversy among the political thinkers. Dr. B.R. Ambedkar had refused to sketch the article due to its bias and exceptions within the Constitution of a free India. In recent year there is a great demand from particular strata of society for amending the Indian Constitution with regard to abrogation of Article 370. This paper highlights the practical difficulties in wiping out Article 370 from Indian Constitution and also through some light about the true status of Article 370 under judicial guidance in this regard.

Key Words: : Article 370, Article 35A, Jammu and Kashmir, Constitution, Special Status

Introduction:

The Kashmir (Jammu and Kashmir) State was part of the British Indian Empire before 1947.

It was under the regime of Maharaja Hari Singh who belonged to Hindu religion. The large of the population of the Kashmir valley comprised of Muslims and the meagre Hindu population there comprised mostly of the Kashmir Brahmins and some others who were closed to the Hari Singh government.¹ British rule in India came to an end on and from 15th August 1947 by Indian Independence Act 1947 which divided India into two parts i.e. India and Pakistan. Whereas British India was simply included into India or Pakistan, the kings of the 565 princely states, who were under the autonomy of British suzerainty, were given with three options: accession to India or Pakistan, or independence. The last option existed only in theory, as probably none of the princely states were in a position to survive politically autonomy in the World and economically in the face of the two big neighbouring countries.²

In spite of this, Maharaja Hari Singh, refused to join either India or Pakistan after partition and chooses third option i.e. the idea of being an independent State. But in October 1947, Pakistan through their kabayali rebels attacked on Jammu and Kashmir. Maharaja being not in a situation to resist the attack make conditional negotiated the accession of the State of Jammu and Kashmir with the Dominion of India. This unbalanced situation of the State of Jammu and Kashmir leads to the inclusion of Article 370 in the Indian Constitution.³ The Indian government made him sign the Instrument of Accession, on 27 October 1947. The Instrument of Accession was the legal document intended for the accession of princely states and either of the two newly-formed nations, India and Pakistan. It was executed by the Indian government on one side and by the rulers of each of the princely states on other side.⁴ However, the Instrument of Accession executed with the state of Jammu and Kashmir has been limited the power of making law by the Dominion of India with respect to State of Jammu and Kashmir only to four areas namely, a) Defence b) External affairs c) Communication and d) Ancillary matters.⁵ However, due to the controversy covering Government of India's legal position with the state of Jammu and Kashmir, the Instrument of Accession signed with the state of Jammu and Kashmir has been broadly debated about the nature of either the signing of the

¹ Daya Sagar, *Jammu & Kashmir: A Victim*, Ocean book Pvt. Ltd., New Delhi, 2015, pp. 20, 21.

² Sergiu Constantin and Karl Kössler, "Jammu and Kashmir", *Online Compendium Autonomy Arrangements in the World*, January 2016, at www.world-autonomies.info.

³ Pradeep Kulshrestha, "Article 370: Constitutional Obligation and Compulsion", *International Journal of English Language, Literature and Humanities*, Vol. 4, Issue 1, January 2016, p. 95. (94-112)

⁴ Suryakant Nath, "The myth of the instrument of accession: A Reappraisal", *International Journal of Applied Research*, Vol. 2, No. 3, pp. 17-18 2016 (17-21)

⁵ http://jklaw.nic.in/instrument_of_accession_of_jammu_and_kashmir_state.pdf

document by Maharaja or of the state's relationship with the Indian Union as per the Instrument of Accession.⁶

Framing of Article 370

Article 370 of the Constitution of India confers a special autonomous status to the state of Jammu and Kashmir. It came into commencement on 26 January 1950. Article 370 is enacted in Part XXI, under Temporary and Transitional Provisions of the Constitution.⁷ The old Article 238, related to Part B states or former princely states was repealed by the 7th Constitutional Amendment Act in 1956 after the reorganisation of Indian states. However Article 370 overruled Article 238 as special provision for the state of Jammu and Kashmir. Article 370 has been controversial since from its inception, as it confers special status on the State of Jammu & Kashmir. Dr BR Ambedkar had refused to outline the article as it made an exceptions within the framework of a free India. In the end the drafting was done by Gopaldaswami Ayyangar, who was a confidante of Prime Minister Jawaharlal Nehru and former diwan of the Maharaja Hari Singh. The fact, that it was initially intended to be temporary in nature; hence it was included in the Temporary and Transitional Provisions in Part XXI.⁸

Provisions of Article 370

Thus it is clear from the provision of Article 370⁹ that, it makes “temporary provisions” of Article 370 and clearly recognises the special position of state of Jammu and Kashmir. Article 370 says that Article 1 of the

⁶ Suryakant Nath, “The myth of the instrument of accession: A Reappraisal”, *International Journal of Applied Research*, Vol. 2, No. 3, p.18, 2016. (17-21)

⁷ Khurshid Ahmad Mir, “Debating Article 370 of Indian Constitution”, *International Journal of Research*, Vol. 2. Issues 3, 2017, p. 692

⁸ Amitabh Hoskote, Vishakha A Hoskote, “Jammu & Kashmir & The Politics of Article 370: Sealing Legality for the Illegitimate”, *PEOPLE: International Journal of Social Science*, Vol. 3, Issue 1, p. 814. (813-835)

⁹ *Article 370 was introduced under Part XXI under the Temporary, Transitional and Special Provisions.*

1. Notwithstanding anything in this Constitution:

a. The provisions of article 238 shall not apply in relation to The State of Jammu and Kashmir.

b. The power of Parliament to make laws for the said State shall be limited to;

I. Those matters in the Union List and the Concurrent list which, in consultation with the government of the State, are declared by the President to correspond to matters specified in the instrument of Accession governing the Accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

II. Those matters such other matters in the said lists, as, with the concurrence of the Government of the State, The President may by order specify.

Explanation- For the purpose of this article, the Government of the State means the person for the time being recognized 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;

c) The provisions of article 1 and of this article shall apply in relation to this State;

d) Such of the other provisions of this Constitution shall apply in relation to that State to such exceptions and modifications as the President may by order specify:

a. Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

b. Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of the Government.

2. If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

3. Notwithstanding anything in the foregoing provisions of the article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may notify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

4. In exercise of the powers conferred by this article the President, on the recommendation of the Constituent Assembly of State of Jammu and Kashmir, declared that, as from the 17th day of November, 1952, the said

constitution which outlines the territory of the union of India, and Article 370 itself, applicable to the state immediately at the time of commencement of Article 370 . Article 370 (1) (b) restricted the power of Union legislature to make laws for the states to the following¹⁰ :-

- (i) Those matters in the Union list and the Concurrent list as correspond th the subjects specified in the Instrument of Accession.¹¹ It is pertinent to mention here that in Instrument of Accession three major heads have been mentioned i.e, defence, foreign affairs and communication. Besides the three major heads, a number of ancillary matters have also been mentioned in the Instrument of Accession. It was necessary to identify those items in the union and concurrent list and this task was left to the president to be performed by him in consultation with the State Government.
- (ii) Such other subjects in the Union or the Concurrent list as the President may by order with the concurrence of the State Government. This Clause means that subjects other than those mentioned in the Instrument of Accession can be brought within the purview of parliament. But while in (i) above, only consultation with the State Government is required, in (ii) the concurrence of the State government has been mentioned.

Article 370(1) (d) provides that other provisions of the Constitution can be applied to the state with or without modifications by order of the president. Such an order is not to be issued by the president:

- (1) without consulting the State Government if matters to be specified in the order relate to those mentioned in the Instrument of Accession;
- (2) without the concurrence of the State Government if the matters to be specified in the order relate to matters other than those mentioned in the Instrument.

Article 370 (2) further provides that if the State Government gave its concurrence, as mentioned above, before the convening of the State Constituent Assembly, “it shall be placed before such Assembly for such decision as it may take on”. As the constituent Assembly exists no more, Article 370 (2) has exhausted itself. Article 370 is a special provision for amending the Constitution in its application to the State of Jammu and Kashmir. Article 368 does not limit the power of the president under Article 370. Even a major alteration can be made in a constitutional provision in its application to the State. Further, Article 370 empowers the president to alter a constitutional provision not to apply when it is applied to the State for the first time, but even subsequently after it has been applied. An amendment made to the Constitution does not automatically apply to the State of Jammu and Kashmir. It can apply only with the concurrence of the State Government, and when the President issues an order under Article 370.¹²

The Constitution (Application to Jammu and Kashmir) Order, 1954

In exercise of the powers conferred by Article 370 (i) (ii), the President of India has issued a number of Constitution (Application to Jammu and Kashmir) orders from 1950 onwards applying various other provisions of the Constitution of India and the laws enacted by Parliament to the State of Jammu and Kashmir. The first such order was made in 1950 which lays down that any amendment to the constitution does not apply to the state unless it is extended there-to by presidential order under Article 370 (1). This order was superseded by the 1954 order. There have been almost 45 amendment orders to the 1954 order till date applying various other provisions of the Constitution of India to the State.¹³ Article 35A was inserted to the **Indian Constitution** through the Presidential Order -**The Constitution (Application to Jammu and Kashmir) Order, 1954**. The order was issued by the then President Rajendra Prasad on 14 May 1954. This Article gives power to the legislature of the state of Jammu and Kashmir to define “permanent residents” of

article 370 shall be operative with the modification that for explanation in cl. (1) thereof the following Explanation is substituted namely.

Explanation—For the purpose of this Article, the Government of the State means the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-I-Riyasat of Jammu and Kashmir, acting on the advice of Council of Ministers of the State for the time being in office.

¹⁰ M.P. Jain, Indian Constitutional Law, Lexis Nexis Butterworths Wadhwa Nagpur, Haryana, 2010, pp. 854-855.

¹¹ http://jklaw.nic.in/instrument_of_accession_of_jammu_and_kashmir_state.pdf

¹² M.P. Jain, Indian Constitutional Law, Lexis Nexis Butterworths Wadhwa Nagpur, Haryana, 2010, pp. 855-856.

¹³ Compedium on Article 370 of The Indian Constitution, Samvaad 2017, p. 9

the state and provide special rights and privileges to these permanent residents in terms of public employment, acquisition of property, free education and scholarships.¹⁴ Article 35A is questionable as it was added by presidential order not following the procedure prescribed by Article 368.

The Constituent Assembly of the State ultimately adopted and enacted the Constitution of Jammu and Kashmir on 27th November, 1956 that was inaugurated on 26 January 1957 duly approved the accession in terms of Instrument of Accession in unambiguous Preamble constitutional language the integration of the State of Jammu and Kashmir to the Indian Union, viz., “as a result of the accession of Jammu and Kashmir to India which took place on the twenty-sixth day of October, 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof”. Section 3 of the Constitution of Jammu and Kashmir states: “The State of Jammu and Kashmir is and shall be an integral part of the Union of India”.¹⁵

Conclusion and Present Status of Article 370

Article 370 has been added in the Constitution as a temporary provision. According to Article 370(3), The President may declare by public notification that Article 370 shall cease to be operative, or shall be operative only with such exception and modification and from such date as he may specify. But before the issuance of notification by the President, the recommendation of the Constituent Assembly of the State shall be necessary. As the Constituent Assembly of the State no more exists now, hence, Article 370 (3) is no longer operative. Accordingly if any modification is to be made to Article 370, it will have to be made under Article 368 regarding Amendment of the Constitution. However, a question here arises that whether any amendment to Article 370 under Article 368, without concurrence of, or consultation with, the State Government will be effective? The Constitution (Application to Jammu and Kashmir) Order 1950, lays down that any amendment to the constitution does not apply to the State unless it is extended by a Order of the President under Article 370(1) which yet again involves “concurrence of”, or “consultation with”, the State Government. It means that any modification in Article 370 can only be made in concurrence or with consultation of the State of Jammu and Kashmir which seems to be non feasible if we look into the present scenario of the State. In a petition filed by *Kumari Vijayalakshmi Jha*, the Supreme Court on April 4, 2018 declared that in view of the judgement of the Supreme Court in ‘*State Bank of India vs. Santosh Gupta*’ case the controversy over Article 370 was finally settled by the court ruling and the provision had acquired permanent space in the Constitution and it could no longer be abrogated by the central government. The Supreme Court had said, since the Constituent Assembly of the State ceased to exist, the President would not be able to fulfil the mandatory provision of getting its recommendation for its abrogation. The petitioner sought a declaration in her petition that Article 370 was a temporary provision that lapsed with the dissolution of the Jammu and Kashmir Constituent Assembly on January 26, 1957 and accordingly Constitution of Jammu and Kashmir was void, inoperative and in breach of the Constitution.¹⁶ With this ruling of the Supreme Court, it is clear that though Article 370 was drafted in part XXI of the Constitution under “Temporary and Transitional Provisions”, yet over the time it acquired permanent status.

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