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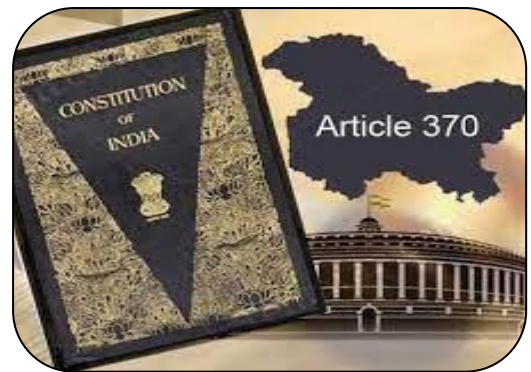


ARTICLE 370 OF THE INDIAN CONSTITUTION: GENESIS, EROSION AND ABROGATION

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ABSTRACT

In recent times the Article 370 of the Indian Constitution has acquired special significance due to two reasons. First, abrogation of the soul of this particular Article by the Modi led BJP government at center in August 2019. Second, Kashmiri political parties' continuous demand to restore Jammu and Kashmir's statehood which was made a Union Territory in 2019. This paper deals with origin, weakening and abrogation of this Article of the Indian Constitution. However before discussing the main theme, the researcher discusses in brief the peculiar circumstances in which Jammu and Kashmir acceded and temporary special provisions under Article 370 were added in the Part XXI of the Constitution of India.



KEYWORDS: Kashmiri political parties , temporary special , Indian Constitution .

INTRODUCTION

The Indian Independence Act , 1947 provided independence to both India and Pakistan. However due to this act paramountcy lapsed and the Indian states regained the position of absolute sovereignty which they had enjoyed prior to the assumption of the British Crown.¹ When Pakistan attacked Jammu and Kashmir, its ruler Raja Hari Singh requested Government of India to provide military help. New Delhi agreed to provide military help but persuaded Hari Singh to sign Instrument of Accession first to make Jammu and Kashmir accede to India to avoid any embarrassment to New Delhi on the ground that it had no locas standi in the state. Finally Hari Singh signed instrument of Accession on 26th October 1947 and hence Jammu and Kashmir became legally and irrevocably a part of India and Government of India was fully entitled to exercise jurisdiction with respect to those matters to which the Instrument of Accession extended.² When India made her Constitution in 1949, the act of Jammu and Kashmir's Accession was given legal effect by declaring this Union Territory a part of the territory of India by Article 1. But the application of of the other provisions of the of the Constitution of India to Jammu and Kashmir was placed on a tentative basis, subject to the approval of the Constituent Assembly of the state. Finally the Indian Constitution provided that only Article 1 and 370 would apply of their own force to Jammu and Kashmir.³

The Article 370 (which was numbered as Article 306A in the original draft of the constitution) was a very peculiar article till August 2019 in the sense that it provided that the power of Indian Parliament to make laws for the state of Jammu and Kashmir shall be limited matters specified in the

Instrument of state's accession and may extend to any other only with the concurrence with the state.⁴ This article provided special status to Jammu and Kashmir by ceding to the Indian Union only in defence, foreign affairs and communications, retaining autonomy in all other matters. The state was permitted to have a Constituent Assembly, and a constitution of its own, to elect its own head of state called Sadr-e-Riyasat, and its own flag.⁵ Different from other states it also designated its chief minister as prime minister. Due to this article, Indian constitution's part III (Fundamental Rights) did not cover the state. The jurisdiction of other institutions such as Supreme Court, the Election Commission and the CAG did not extend to this state. However, Article 370 dealt with the relations of the state with centre and not with its accession to the union, which was complete.⁶

As per provisions of Article 1 and 370, the President in consultation with the state government made the Constitution (Application to Jammu and Kashmir), Order, 1950 which specified that Union Parliament would be competent to make law regarding three subjects (Defence, Foreign Affairs and Communications) with respect which Jammu and Kashmir had acceded to India.⁷ Again the President made the Constitution (Application to Jammu and Kashmir) Order, 1954 which came into force on the 14 May 1954. This order implemented the Delhi Agreement (June 1952) and also superceded its own order of 1950. This order extended the jurisdiction of the Union to all subjects under the Constitution of India.⁸

In 1956, the Constituent Assembly of Jammu and Kashmir ratified the Jammu and Kashmir's accession to India. However over the years the President made orders as amended in 1963, 1964, 1965, 1966, 1972, 1974 and 1986 vis-à-vis entire constitutional position of the of the state within the framework of the constitution of India, except the internal constitution of the state government.⁹ These amendments brought the Presidential order considerably modified the the state's special status and the jurisdiction of union institutions such as Supreme Court, the CAG, the Election Commission and the Constitutional provisions regarding fundamental rights were extended to the state. The Parliaments's authority to make laws for the state and the President's authority to impose President's rule was also extended to the state. Moreover, state's services were integrated with the central and all india services like other states of India. Even symbolic changes in nomenclature Sadr-e-Riyasat to Governor and the state prime minister to chief minister were also made.¹⁰

Now question arises why Jammu and Kashmir State's autonomy was weakened despite stringent constitutional provisions under Article 370? Late Indian Prime Minister Gulzarilal Nanda stated that Article 370 included a very simple process to amend, by an Executive Order of the President of India, whereas the powers of all other states could only be amended by the normal process of the constitutional amendment subject to stringent conditions. He further said that Article 370 was the only way of taking the Constitution of India into Jammu and Kashmir. He compared this article with a tunnel through which Indian constitution could reach to this¹¹ state. Later governments sitting in Delhi thought on similar lines.

After coming to power in 2019 at center, the Modi led BJP government used the powers conferred by clause 3 of article 370 to scrap Jammu and Kashmir's autonomy or special privileges. On 5th August 2019, the President issued CO 272, the Constitution (Application to Jammu and Kashmir) Order 2019. By this order, the President in exercise of powers under 370 (1), applied all the provisions of the Constitution of India by superceding all previous Constitution Orders by which select provisions of the Constitution were made applicable to Jammu and Kashmir either with or without modification.¹² The same CO also modified Article 367 (4) by replaced the term "Constituent Assembly" by Legislative Assembly in the proviso to Article 370 (3). The same day Rajya Sabha recommended to the President under Article 370 (3) that all clauses of Article 370 shall cease to be operative, except clause 1 of 370 which says that all provisions of the Constitution of India, as amended from time to time, without modification or exceptions, shall apply to the state of Jammu and Kashmir notwithstanding anything contrary contained in Article 152 or article 308 or any other article of this constitution or any provision of the constitution of Jammu and Kashmir or any law.¹³

Again on 6th August 2019, Parliament discharged its functions as the legislature of the state of Jammu and Kashmir. The Lok Sabha recommended to the President under Article 370 (3) that special

provision in Article 370 shall cease to be operative. Again it stated that the President, on the recommendation of Parliament, was pleased to declare that as from the date on which President of India sign the declaration and that would be published in the official Gazette, all clauses of the article 370 would cease to operate except clause (1).¹⁴ Both Houses of Parliament passed the Reorganization Bill to bifurcate the the state of Jammu and Kashmir into the Union Territory of Jammu and Kashmir with Legislative Assembly and the Union Territory of Ladakh without the Legislative Assembly.¹⁵

On 6th August 2019, pursuant to the recommendation by Lok Sabha, the President of India issued CO 273 under Article 370 (3) of the Constitution as amended by CO 272 by which Article 370 ceased to apply with effect from 6 August 2019. On August 9, 2019, the Union Ministry of Home Affairs issued notification, to bring the provisions of the Reorganization Act into force with effect from 31 October 2019 following Presidential Assent.¹⁶

The abrogation of Article 370 and stripping Jammu and Kashmir was later challenged in Supreme Court by various Political Parties and civil society groups of Kashmir. In December 2023, a Constitution Bench of the Supreme Court unanimously upheld the power of the President to abrogate this temporary provision of the Constitution. It reasoned that Article 370 was only a 'temporary provision' to ease the accession of the then princely state to the Union at a time of internal strife and war.¹⁷ In its judgment apex court also acknowledged that Article 35 A, which empowered Jammu and Kashmir Assembly to define permanent residents of the state, denied fundamental rights to citizens of other states.

To conclude, it can be said that Article 370 was included in the constitution to provide special status to Jammu and Kashmir in lieu of Jammu and Kashmir's accession to India. However from 1954 onwards Article 370 was weakened and over the years many provisions the Indian Constitution were extended to bring Jammu and Kashmir within its ambit. Finally this article was amended to such an extent in August 2019 that it lost its ultimate goal of securing autonomy of the state. Today when Jammu and Kashmir has been bifurcated into two Union Territories: Jammu and Kashmir and Ladakh, and its citizens are struggling to get statehood again, Article 370's existence in the Indian Constitution has no meaning. To me, though the Jammu and Kashmir (UT) has lost statehood and autonomy, its citizens are enjoying more rights and privileges granted by the constitution of India and that pushes them on the path of development and prosperity. The abrogation of the Article would also integrate the citizens of Jammu and Kashmir with the whole of India in a speedy way by providing various economic opportunities.

END NOTES

¹ Basu, D.D., *Introduction to the Constitution of India*, Wadhwa, Nagpur 2002, p. 256.

² Ibid.

³ Ibid.

⁴ Kashyap, Subhash C., *Our Constitution*, NBT, 1999, p. 276.

⁵ Chandra, Bipan, Mukherjee, M., Mukherjee A., *India after Independence: 1947-2000*, Penguin India, 2000, p. 320.

⁶ Ibid.

⁷ Basu, D.D., *Introduction to the Constitution of India*, 'op.cit', p.257.

⁸ Ibid.

⁹ Ibid.

¹⁰ Chandra, Bipan, Mukherjee, M., Mukherjee A., *India after Independence: 1947-2000*, 'op.cit',

¹¹ "Article 370 Of the Constitution of India", *Wikipedia* (Wikipedia.org/wiki/Article -370-of-the-constitution-of-India), Accessed on 11.02.2024.

¹² "In Re: Article 370 of the Constitution" (SC Reportable order in Writ Petition civil no. 1099 and others of 2019), The Supreme Court of India Judgement (Reportable), date 11.12.2023 (available at : main.sci.gov.in/pdf/LU/article_370.pdf) Accessed on 11.02.2024.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Bhaumik, Aaratrika (2023), "Supreme Court's verdict upholding the abrogation of Article 370", *The Hindu (Delhi)*, 12 December 2023.



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