



## The Past and Present of Article 370

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### **Abstract-**

At the time of Indian independence, the State of Jammu and Kashmir was not a province of the erstwhile British India, and, therefore, was given an option, after independence, either or not to join any of the two newly created countries of India and Pakistan. When the ruler of the State, Maharaja Hari Singh, decided to join India by executing 'Instrument of Accession' (I A) on October 26, 1947; the State was accorded special status under Article 370 of Indian Constitution. Under the provisions of this Article, limitations were imposed on legislative and executive powers of the Government of India as per the terms of the I A. Presidential order, supported by the Government of the State, was a condition precedent under Article 370 to implement any of the provisions of Indian Constitution in the State. Enjoying the special status, the State had framed its own Constitution in 1956 for its people. Government of India has abrogated, on August 5, 2019, the special status of the State by utilizing the provisions of Article 370 itself, and has, in addition, bifurcated it into two Union Territories of 'Jammu and Kashmir' and 'Ladakh'. The Constitutionality of this legal action, however, is pending before our Supreme Court and a future verdict in the case will decide the status of the former State of Jammu and Kashmir.

**Key Words-** State of Jammu and Kashmir, Instrument of Accession, Constitution, Article 370, Presidential Order, Union Territory.

### **1. Introduction**

One of the well-known and exhaustively discussed provisions of the Indian Constitution is Article 370. It granted, before its substitution in 2019, special status to the State of Jammu and Kashmir (hereinafter referred to as the State of J&K) in 'Indian Union'.<sup>1</sup> Due to this, the relationship of the State of J&K with the Union was somewhat different from that of the other States. Enjoying this special relationship, the State of J&K had framed

its own Constitution through duly elected Constituent Assembly in 1956. The Constitution came into force on January 26, 1957.

Art. 370 and a separate Constitution for the State of J&K proved that the State had not fully integrated with Indian Union unlike other States of India. It was the result of 'Instrument of Accession' signed by the ruler of Jammu and Kashmir on October 26, 1947 and accepted by the then Governor-General of India. Under this Instrument only three subjects, namely, External Affairs, Defence and Communications, were surrendered to the erstwhile Dominion of India (now, Union of India). Art. 370 recognized the terms and conditions of the Instrument and provided a mechanism to apply the provisions of the Indian Constitution to the State of J&K. Probably the State of J&K was the only State which negotiated the terms of its accession to India.

Art. 370 had been characterized as being of a temporary nature. The reason behind it was the title of Art. 370 itself which read as 'temporary provisions with respect to the State of J&K'. In addition, this Article was included in 'Part XXI' of the Constitution, the heading of which reads as 'temporary, transitional and special provisions'. Clause 3 of Art. 370 provided internal evidence to support the view relating to its nature being temporary. However, it must be noted that the Supreme Court had in several cases emphatically held that Art. 370 was not temporary, and had, thereafter, acquired permanence.

Art. 370 was made a bone of contention just after its incorporation in the Constitution by saying that it was against the unity and integrity of India. This view was furthered by a mainstream political party, the BJP (it is the successor of the earlier Bhartiya Jana Sangh), which later on demanded the abrogation of this Article. When voted to power second consecutive time in 2019 by a thumping majority, it fulfilled its promise and scrapped the special status of the State of J&K.

## **2. History of the State of Jammu and Kashmir**

The State of Jammu and Kashmir is situated between 32°17' and 36°58' north latitude and 73°26' and 83°30' east longitude.<sup>2</sup> Its boundaries touch Afghanistan in north-west, Tibet in north-east and east, Punjab and Himachal Pradesh in south and Pakistan in west. At present, almost half of its territory is under actual occupation of Pakistan and China. Pakistan occupied Kashmir is called the 'POK' in India and 'Azad Kashmir' in Pakistan. Aksai Chin is controlled by China since 1962 war. India claims that occupation of Kashmir's territories by both the countries is illegal. It is notable that Art. 370 applied only to Indian side of Kashmir.

Lalitaditya<sup>3</sup> (697-738 AD) was the most famous Hindu ruler of Kashmir. He was famous for constructing buildings. Islam<sup>4</sup> came to Kashmir during 13<sup>th</sup>-14<sup>th</sup> century AD. Jain-ul-Abedin (1420-1470) was the most famous Muslim ruler who came to Kashmir. Later, Mughal emperor Akbar conquered Kashmir in 1585. Mughals lost the control of Kashmir to Ahmed Shah Abdali of Afghanistan in 1752. In 1819 Maharaja Ranjit Singh of Punjab invaded and controlled Kashmir.

In the third decade of 19<sup>th</sup> century the whole province of Jammu came under a single ruler named Gulab Singh.<sup>5</sup> He was a Dogra chief of Rajput descent. After conquering Ladakh in 1834 AD, he became Raja thereof.

In 1842 he conquered Lhasa and annexed Skardu and Baltistan at the same time. By the treaty of Amritsar, concluded between Raja Gulab Singh and The British Government on March 16, 1846, he became the ruler of Kashmir also. The treaty is notoriously referred to in the State of J&K as the 'Sale deed of Kashmir'. Under such circumstances, thus, was the State of J&K created.

Ranbir Singh<sup>6</sup> succeeded the throne in 1856 AD about two years before his father's death. He divided the provinces of Jammu and Kashmir in several districts for better administration and established courts. In 1877 a High Court (Adalat-i-Alia) was established, which was the highest court of appeal or revision. He, however, continued the policy of exclusion of every community other than his own from the army and the high offices in the State.

Maharaja Pratap Singh<sup>7</sup> ascended to the throne in 1885 AD after the death of his father Ranbir Singh. His reign lasted for about 40 years despite a short interruption due to his deposition by the British Government in 1889. He promulgated a scheme in the shape of Sri Pratap Reforms Regulation in January 1922. It made provision for a state council to aid and assist the Maharaja in the conduct of the government of the state. It also provided for the reconstitution of the High Court of Judicature in the state.

Pratap Singh was succeeded by his nephew Hari Singh<sup>8</sup> after his intestate death in 1925. Hari Singh ascended the throne in 1925 and remained as the ruler of the State of J&K till the accession of the State in India in 1947. In April 20, 1927 he issued a definition of the term 'State Subject' which thereafter became the basis of definition of 'Permanent Resident' in the State. On April 22, 1934 the Maharaja enacted a Constitutional Act providing for the establishment of the legislative assembly, called the 'Praja Sabha' and laying down his own Legislative, Executive and Judicial powers. Promulgation of the Jammu and Kashmir Constitution Act on September 7, 1939 by the Maharaja was an event of outstanding importance. However, the Constitution Act emphatically brought out the fact that the Maharaja was an absolute Monarch in whom were vested all the powers of the state.

Sheikh Abdullah<sup>9</sup> of National Conference threw a challenge in 1946 to the very basis of the Dogra sovereignty in Kashmir. In his speeches delivered before crowds, Abdullah demanded that Maharaja Hari Singh should quit the valley and free the Kashmiri citizens to decide their future by themselves. In the line of 'Quit India' movement in British India he initiated the 'Quit Kashmir' movement in the State of J&K.

### 3. Accession of the State of J&K to India

Labor Ministry in England which assumed power after the end of Second World War brought about a change in the British policy towards India. It decided on February 19, 1946 to send a delegation of three cabinet ministers to India to find a solution for the problem of India. "The cabinet mission consisted of Lord Pethick-Lawrence, Sir Stafford Cripps and Mr. A.V. Alexander. It arrived in India on 23<sup>rd</sup> March, 1946. Besides trying to find a solution for the Indian problem, the mission had also to review the relationship of the Indian Native Princes with the paramount power."<sup>10</sup>

The Cabinet Mission proposed a detailed plan for devolution of power from Britishers to Indians, but rejected the 'Muslim League's demand for Pakistan.'<sup>11</sup> On the question of relationship between Indian States and British Crown, the Mission clarified that the paramountcy shall be reverted to the rulers of these States. After the passing of the 'Indian Independence Act, 1947' by the British Parliament for partition of British India into India and Pakistan; 'the Indian States regained the position of absolute sovereignty, which they had enjoyed prior to the assumption of suzerainty by the British Crown.'<sup>12</sup> Under the Act, these States were given the choice of either being independent or to join any of the newly created countries.

Before 1947, the State of J&K was an Indian (Native) State. After the partition the ruler of the State, Maharaja Hari Singh, initially decided not to join either India or Pakistan; but, when the Kabalies attacked and occupied the areas of the State with the help of Pakistan forces in October, 1947, the Maharaja requested the Government of India for help. On October 27, 1947 he signed the Instrument of Accession with the Governor General of India, and, thus, the State of J&K became part of India in Law.

#### **4. Incorporation of Article 370 in Indian Constitution**

Maharaja Hari Singh acceded his State to India on the advice of 'Sheikh Abdullah', leader of the All Jammu and Kashmir National Conference (AJ&KNC), the political party commanding the widest popular support in the State.<sup>13</sup> Sheikh Abdullah was firstly appointed as the head of the Emergency Administration in October 1947 by the Maharaja. Later, on March 5, 1948, he replaced this Emergency Administration by a 'Popular Interim Government'<sup>14</sup> and appointed Mr. Abdullah as the Prime Minister of the State.

At the time of the State's accession, a Constituent Assembly was working for a future Constitution of India. After the accession four representatives including Sheikh Abdullah were made part of this Constituent Assembly. Mr. Abdullah was of the view that the relationship of his State with India should be based only on terms of the Instrument of Accession, and this view was accepted by Indian Government. Under the Instrument of Accession only three subjects<sup>15</sup>-Defence, External Affairs and Communications- were surrendered by the Maharaja to the Dominion of India. Except these subjects, the State was free to make or unmake any law on any subject. The accession of the State was treated as provisional and Indian leaders assured their Kashmiri counterparts to have 'a proper, fair, and impartial plebiscite'<sup>16</sup> taken when the conditions were created for that.

It is also notable that the State of J&K was facing a war-like situation in areas bordering Pakistan, and this situation was designed and created by Pakistan Army to forcibly annex the State. After the accession of the State in India, Pakistan's design was frustrated, but it continued to aid and support invaders. Moreover, Pakistan readily refused to recognize the accession and termed it a fraud. Later, the disputes over the State between both the countries went to the United Nations' Security Council (UNSC), which has another aspect of the history of the State's accession in India

Thus, these were the tough and dynamic circumstances wherein Indian Constituent Assembly was discussing the future relationship of the State of J&K with India. The agreed result of this discussion was the incorporation of Art. 370 in Indian Constitution. It was drafted as Article 306-A, and after the enforcement of the Constitution

it became the Art. 370. The draft of Art. 370 was prepared and presented by N. Gopalaswami Ayyanger. Art. 370 provided ‘temporary provisions’ with respect to the State and was included in Part XXI of the Constitution titled ‘Temporary and Transitional Provisions.’<sup>17</sup>

## 5. Provisions of Article 370

Before its abrogation on August 5, 2019, Art. 370 consisted of three clauses, and Clause (1) thereof consisted of four sub-clauses. Sub-clause (a) of Clause (1) provided that the provisions of Art. 238 was not to apply in relation to the State of J&K. Art. 238 was related to application of Part VII of the Constitution to a few States and was repealed in 1956. Sub-clause (c) was the only provision through which provisions of Articles 1 and 370 were made applicable to the state of J&K. That is to say that Art. 370 was not enforced in the State under Art. 394 which provides about enforcement of the Constitution in rest of India.

Sub-clauses (b) and (d) of Clause (1) of Art. 370 consisted of the most important provisions relating to the sphere of Parliamentary jurisdiction over the State of J&K. Sub-clause (b) provided that 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; and
- (ii) Such other matters in the said Lists as, with the ‘concurrence’ of the Government of the State, the President may by order specify.

Sub-clause (d) authorized the President to apply such of the other provisions of the Constitution to the State as he might by order specify. But no such order could be made by the President without consulting the State’s Government if the same was related to the matters of Instrument of Accession. In case such an order not being related to Instrument of Accession ‘concurrence’ of the State Government was needed for its issuance.

Clause (2) of Art. 370 further provided that if the ‘concurrence’ of the Government of the State referred to in Clause (1) be given before the “Constituent Assembly” for the purpose of framing the Constitution of the State was convened, it had to be placed before such Assembly for such decision as it might take thereon. It can, now, be said that Clauses (1) and (2) of Art. 370 provided a procedure to apply the provisions of Indian Constitution by Presidential order to the State of J&K.

In exercise of the powers under Art. 370(1)(b)(ii), the President of India issued the *Constitution (Application to Jammu and Kashmir) Order, 1950*<sup>18</sup> in consultation with the Government of J&K. It specified the matters with respect to which the Parliament was authorized to make laws for the State. Later, this order was replaced by another one made by the President under the same authority with the concurrence of the State. This was called the *Constitution (Application to Jammu and Kashmir) Order, 1954 (C.O.48)*<sup>19</sup> and came into force on May 14, 1954. This was the most important order which had extended the jurisdiction of Parliament to almost all subjects on the Union List. Under it, elaborate arrangements were made to apply various Parts of the Constitution. Several



amendments were subsequently made therein from time to time to apply more and more provisions of the Constitution.

Clause 3 of Article 370 empowered the President to declare by public notification that this article would cease to be operative or would be operative with such exceptions and modifications as the President might specify. But, the President could not have issued any such notification unless recommended by the Constituent Assembly of the State. The Constituent Assembly of the State was dissolved in 1957 after providing a Constitution for the State and without making any recommendation under Art. 370 (3). After this dissolution it was assumed, as a prudent view, that the President can never repeal or amend Art. 370.

## 6. Abrogation of Art. 370 and its Effects

In order to scrap the special status of the State of J&K the Government of India invented an indirect procedure in the Constitution. It first issued the *Constitution (Application to Jammu and Kashmir) Order, 2019*, C.O. 272, under Art. 370 (1) with the concurrence of the State's Governor on August 5, 2019. It superseded the earlier Presidential Order of 1954, C.O.48, with immediate effect and applied whole of the Constitution in the State of J&K. C.O.48<sup>20</sup> was the first exhaustive modification of Indian Constitution in its application to the State. C.O.272 has also added a new Clause in Art. 367 as Clause (4) consisting of four sub-clauses. Sub-Clause (4) says that in proviso to Clause (3) of Art. 370 the expression 'Constituent Assembly of the State' referred to in Clause (2) shall read 'Legislative Assembly of the State.'

After indirectly changing Art. 370 (3) by amending Art. 367, the Union Home Minister introduced two Statutory Resolutions,<sup>21</sup> one, to recommend that the President issue a notification rendering Art. 370 inoperative, and two, to accept the 'Jammu and Kashmir Reorganization Bill' on August 5, 2019. Both the Houses of the Parliament passed these resolutions acting as the Legislative Assembly of the State of J&K, for the State was under President's Rule at that time. This Bill became an Act after getting President's assent on August 9, 2019. Under the Act, the State of J&K was to be divided into two union territories (UTs) to be respectively known as the 'Union Territory of J&K' and the 'Union Territory of Ladakh'. Both these UTs came into existence on October 31, 2019.

On August 6, 2019, the President issued a notification in the exercise of the powers conferred by Clause (3) of Art. 370 read with Clause (1) thereof, on the recommendation of Parliament, for making the declaration that as from the August 6, 2019, all clauses of the said Art. 370 shall cease to be operative except a New Article 370. This new Article was part of this notification. This declaration under old Article 370 is known as C.O. 273. The New Art. 370 envisages that all the provisions of this Constitution, as amended from time to time, without any modification or exceptions, shall apply to the State of J&K notwithstanding anything contrary in this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement etc. having the force of law in the territory of India, or any other instrument, treaty or agreement under Art. 363 or otherwise.

## 7. Conclusion and Suggestions

It is notable that two days high voltage drama that was played in the floor of our Parliament on August 5-6, 2019, was very secretly planned and performed by the Government of India. At that time the State of J&K was under President's Rule since December, 2018 and the State Assembly had already been in dissolution mode. All the political leaders of the State were detained by the police and the security of the State was tightened by heavily deploying armed forces to quell the probable protests and voices of dissent. Here critics say that the Indian Government has done an illegal act by unilaterally abrogating the special status of the State.

As far as the legality of scrapping of the special status of the State of J&K is concerned, it is submitted that any policy decision regarding a State's reorganization should not be taken by the Governor while his State is placed under President's Rule. A Governor under our Constitution is supposed to perform its duties with the aid and advice of the Council of Ministers. He or She is a formal head of the State Government in the same manner as is the President for Union Government. Every consent and concurrence, therefore, given by the Governor of the State of J&K for altering State's Constitutional status is problematic in Law.

The way in which the Parliament has abrogated the special status of J&K and bifurcated it into two UTs has serious objections. Using the President's Rule as a gain for altering the relationship of a State with the Union is against all established norms and practices of Federalism. The Parliament has, in unilaterally scrapping Art. 370, also violated the judicial doctrine of Colorable Legislation. This doctrine is applied for the interpretation of the 7<sup>th</sup> Schedule of the Constitution. According to this doctrine, nothing can be done indirectly which can't be done directly.

Now, since, the constitutionality of all the legal developments relating to Art. 370 is in question before a Constitution Bench of Supreme Court, the future decision alone in this case will decide the fate of C.O. 272, C.O. 273 and *The J&K Reorganization Act, 2019*. Before this decision we can't say anything with certainty regarding Art. 370. However, the Supreme Court seems in no hurry to adjudge this question, for no interim stay is granted against the moves of Government of India. After the outbreak of COVID-19 in the month of March, 2020, higher courts including the Supreme Court, are hearing only urgent cases through video-conferencing, and the question regarding Art. 370 is not held as urgent. It is also notable that normalcy in the State of J&K, after scrapping of its special status in August last year, has paralysed due to heavy armed forces deployment, continuous curfew for uncertain long period and shut down of high speed Internet and economic activities. Many political leaders, social activists and journalist of the State are still languishing in jails or home arrests.

## References:

- <sup>1</sup> . Article 1 of Indian Constitution provides that India, that is Bharat, shall be the Union of States.
- <sup>2</sup> . Verinder Grover, Ranjana Arora (Ed.), Vol. 4, *Encyclopedia of India and Her States* 98 (Deep & Deep Publication, New Delhi, 2<sup>nd</sup> edn., 1998).
- <sup>3</sup> . Id, p. 97.
- <sup>4</sup> . Id, p. 98.

- <sup>5</sup>. Justice A.S. Anand, *The Constitution of Jammu & Kashmir: Its Development & Comments* 5-7 (Lexis Nexis, Gurgaon, 8<sup>th</sup> edn., 2016).
- <sup>6</sup>. Id, pp. 10-12.
- <sup>7</sup>. Id, pp. 13-20.
- <sup>8</sup>. Id, pp. 21, 26, 30-31.
- <sup>9</sup>. Id, p. 46.
- <sup>10</sup>. Id, p. 48.
- <sup>11</sup>. <https://www.britannica.com/topic/Cabinet-Mission-Plan> (Last visited on July 10, 2020).
- <sup>12</sup>. Prof. S.R. Bhansali, *The Constitution of India* 1861, (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2<sup>nd</sup> edn., Vol.2, 2014 ).
- <sup>13</sup>. A.G. Noorani, *ARTICLE 370: A Constitutional History of Jammu and Kashmir* 45 (Oxford University Press, New Delhi, 1<sup>st</sup> edn., 2014).
- <sup>14</sup>. Id, p. 47.
- <sup>15</sup>. Id, pp. 39-40.
- <sup>16</sup>. Id, p. 55.
- <sup>17</sup>. After the substitution by the Constitution (13<sup>th</sup> Amendment) Act, 1962 it reads now as 'Temporary Transitional and Special Provisions.'
- <sup>18</sup>. Justice A.S. Anand, *The Constitution of Jammu & Kashmir: Its Development & Comments* 102 (Lexis Nexis, Gurgaon, 8<sup>th</sup> edn., 2016).
- <sup>19</sup>. Id, p. 120.
- <sup>20</sup>. A.G. Noorani, *ARTICLE 370: A Constitutional History of Jammu and Kashmir* 264 (Oxford University Press, New Delhi, 1<sup>st</sup> edn., 2014).
- <sup>21</sup>. <https://www.thehindu.com/news/national> (Last visited on September 5, 2019).