

The Abrogation of Article 370 - Our Nationhood Redefined

“Mr. Abdullah, you want that India should defend Kashmir. You wish India should protect your borders, she should build roads in your area, she should supply your food grains, and Kashmir should get equal status as India, but you don’t want India and any citizen of India to have any rights in Kashmir and the Government of India should have only limited powers. To give consent to this proposal would be a treacherous thing against the interests of India, and I, as the Law Minister of India, will never do. I cannot betray the interests of my country”.¹ The above mentioned are the words of Dr. B. R Ambedkar about Kashmir and the insertion of Article 370. What Ambedkar asked Sheikh Abdulla is still a reverberating question in India. What necessitated the government to make such a move in Kashmir? Nehru's Starry-eyed Idealism has crippled the nation's quest for prosperity. Has the incursion of Article 370 turned to be a treacherous act as stated by Ambedkar? In this essay, we would be discussing all these aspects and the effect of Article 370.

The inclusion of Article 370 itself is a deception and a mockery of common prudence. To understand this, we must have a better understanding of Kashmir and its history. The land space including (Jammu-Kashmir Valley (including Gilgit Baltistan, Azad Kashmir) and Ladakh) is a private property of the Dogra Dynasty. Yes, Jammu & Kashmir can be considered as a private property of the Royal family of Kashmir. The state of Jammu and Kashmir was part of the Sikh Empire, but soon after the demise of Ranjith Singh the kingdom fell into complete disarray. The British cashed in on this opportunity and waged war against the Sikh Empire and it was during this war that the Dogra's extended their support to the British to win over the Sikh Empire. In 1846 after the war, the British sold the region to the Dogra's under the Treaty of Amritsar for an amount of Rs.75 Lakh. So, it won't be a preposterous proposition to say that Raja Singh was in a rightful position to sell the region to anyone he liked. So, if Raja Hari Singh wanted to accede the state of Jammu and Kashmir there cannot be any hindrance to that. So, the ludicrous argument of the naysayers that Kashmir was never a part of India is unjustified.

¹ Dr. S. N. BUSI, B. R. AMBEDKAR FRAMING OF INDIAN CONSTITUTION

Analysis of Article 370 & 35A

Article 370 is incorporated under Part XXI of the Indian Constitution with the heading 'Temporary, Transitional and Special Provision', but the sympathizers of Article 370 have wrongly interpreted it as a Special Provision. The provision starts with the subtitle 'Temporary provisions concerning the state of Jammu and Kashmir'², whereas the provisions under Article 371 and Article 371A to 371I are designated as Special Provision by the Framers. So, it must be made clear that Article 371, 371A are the Special Provisions here and Article 370 is not a Special provision but a temporary provision. Pandit Jawaharlal Nehru in 1961 when asked about Article 370 said that,

"Article 370 of the Constitution would disappear by being eroded progressively."³ So, it is clear that induction of Article 370 was made only as a transitory clause but unfortunately has turned to be a temporary permanent provision.

The crux of clauses (1)(b)(I) and (1)(b)(ii) of Article 370 say that the Parliament, which is the highest law-making body in the country must take the 'consultation' or 'concurrence' of the State government for making any law under union list or concurrent list to make it applicable to the state of Jammu and Kashmir. The entire set of laws governing citizenship, ownership of property and most essentially fundamental rights are different in J&K as compared to the rest of India. No Indian citizen from any other state can purchase land or any immovable property in Jammu and Kashmir. The pretext of Article 370 itself vindicates the statement of Dr. B.R Ambedkar that the citizens of Kashmir can make use of all the rights and liberties of the people of India but neither the citizens of India nor the Parliament (which have the right to make law in every inch of Indian Territory) is forbidden to make any law in Kashmir.

How has Article 370 affected the growth of Jammu and Kashmir?

² INDIA CONST. art. 370.

³ ARVIND LAVAKARE, THE TRUTH ABOUT ARTICLE 370, 24 (2005).

The state of Kashmir under the rule of Raja Hari Singh was one of the most progressive states in India. The State of Jammu and Kashmir was one of the first states to take action against the menace of untouchability in the state. Maharaja Hari Singh opened all public schools, colleges, and wells to the untouchables in 1931. The next year, all the state temples were also opened for them, and lastly, in 1940, he proclaimed untouchability as a crime.⁴ Primary education was made compulsory for boys in all the municipal towns in 1930⁵. To prevent female infanticide, the Maharaja constituted two committees in 1926 and 1929, which recommended educating the people and severe action against the guilty of the crime. The Maharaja accepted both the recommendations⁶. The removal of legal disabilities on the marriages of Hindu widows was regarded as a doctrine in the Sub-continent. To promote their welfare, two Women Welfare Associations were set up in 1927 and 1928, respectively, one each at Srinagar and Jammu.⁷

This was the state of J&K before Independence, or to be precise before the insertion of Article 370 into our constitution. Seven decades down the line the state has failed to show any proportional growth in any of the above aspects. The state of Jammu and Kashmir is the only state in India without the State Minority Commission. Article 370 also deprived the SC/ST community of Reservation in Educational Institutions. The Reservation was extended to the SC/ST community after the Presidential Order, 2019.⁸ The Jammu and Kashmir government invited 200 families belonging to the Valmiki community in 1957, for different sanitation works, and those families and their descendants have resided in Kashmir for the past seven decades and they are yet to receive permanent resident status. These families are also not allowed to vote for legislative assembly elections.⁹ This situation of the state is very well enough to say that Article 370 has turned to Counter-Productive.

Perversions of Article 370 and 35A:

⁴ Dr. Ganesh Malhotra, *Maharaja Hari Singh: Father of Renaissance in Jammu and Kashmir*, THE EPILOGUE (Sep. 24, 2017), <https://epilogue.in/2017/09/24/maharaja-hari-singh-father-of-renaissance-in-jk/>.

⁵ *Id.* at 4.

⁶ J&K Government Records, General Department, Order No. 1539-C of May 18, 1929, F. No. 1100 of 1929.

⁷ J&K Government, General Department, F. No. 66/M-46 of 1931, p. 12 (India); Note on the Department of the Administration under the Political Minister.

⁸ Constitution (Application to Jammu and Kashmir) Amendment Order, 2019

⁹ Pankaj Gupta, *Article 35 A- Caste politics or politics of caste: Valmiki's victims of politics in J&K*, JK Now (Mar. 9, 2019), <https://www.jammukashmirnow.com/Encyc/2019/3/19/Article-35-A-Caste-politics-or-politics-of-caste-Valmikis-victims-of-politics-in-Jammu-Kashmir.html>

It is an undeniable fact that Article 370 and Article 35A runs against the spirit and ethos of the constitution of India and more precisely it an anomaly to the concept of India as Nation or Nationhood.

The first thing which proves this proposition is the preamble of the Indian constitution. The preamble of the constitution says that 'We the people of India, having solemnly resolved to constitute India into a Sovereign, socialist, secular, democratic republic¹⁰. The word 'secular' and 'Socialist' was inducted into the constitution through a constitutional amendment¹¹ and the Supreme Court has also held that Secularism is a part of the basic structure of our constitution. ¹² But the exasperating fact is that the whole of the Preamble extends to the State of Jammu and Kashmir except the word 'Secular'¹³ in the first paragraph and the word 'Integrity' in the penultimate paragraph of the constitution. It means that the state of Jammu and Kashmir is not bound to uphold the principle of Secularism and Integrity of India, unlike other states. This is not just a provision of Article 370, but it is a clear case of treachery as mentioned by B.R Ambedkar.

The legality of revocation of Article 370-

It is quite ironic that something which was included in the constitution as a sojourn has lived it through perpetuity till the abrogation of it by the president on August 5. First of all, it is legally improper to say that Article 370 has been abrogated or repealed. Instead, it has been made to be redundant. However, the president's order has effectively replaced the Constitutional Order of 1954 through which the Article 35A was inducted into the constitution with the Constitutional Order of 2019¹⁴. The constitutional order of 2019 makes all the provisions of the Indian constitution applicable to the state of Jammu and Kashmir with exception of Article 367 by invoking the powers under Article 370(1) and thus in turn takes the importance of Article 370 by leaving it to deter. In sum and substance, the new Presidential order states that the whole of the

¹⁰ INDIA CONST. Preamble.

¹¹ INDIA CONST. *amended by* The Constitution (Forty-Second Amendment) Act, 1976.

¹² Keshav Ananda Bharati v. The State of Kerala, A.I.R. 1973 S.C. 1461 (India), *See also* S. R. Bommai v. Union of India, (1994) 3 S.C.C. 1 (India) as cited in P. M. BAKSHI, THE CONSTITUTION OF INDIA (2002).

¹³ INDIA CONST. Appendix II (Application to Jammu and Kashmiri) Order 1954, Restatement concerning the present text of the constitution, of the exceptions and modifications subject to which the constitution applies to the state of Jammu and Kashmir.

¹⁴ INDIA CONST. (Application to Jammu and Kashmir) Order, 2019 C.O. 272.

Indian Constitution as amended from time to time will apply to the State of Jammu Kashmir instead of being applied in bits and pieces.

The next question that would arise is, whether the government has complied with the provision of Article 368 before altering Article 370 and abrogating Article 35A. First of all, it is important to note that Article 35A was not inducted into the constitution through a constitutional amendment. Instead, it was incorporated through the Presidential Order of 1954¹⁵. The Supreme Court in *Paranal Lakhanpal vs The President Of India*¹⁶(1961) observed that the word ‘modification’ under Article 370 1(d) would also include the President's power to amend a constitutional provision in its application to Jammu & Kashmir through the endorsement of the supreme court is questionable but it is the law of the land. So, this Judgement allows the President to make such orders and is protected by law. The order of the President would also pass the test of Judicial review even without relying on the Paranal Judgement because Article 370(1)(d) says that the President can extend the provision of the Constitution to the state of Jammu and Kashmir by an order. Besides, Article 363 makes it clear that no courts in India including the Supreme Court will be having jurisdiction to issues that relate to covenants, treaties, or instruments of accession entered into by the Princely States with the Indian Union.¹⁷ Which inter-alia confirms the supremacy over the issue and the Supreme Court at best must confirm as to whether it has jurisdiction to hear the subject before going into the merits. The Supreme Court may take an entirely different opinion, but it cannot just flout all the above-mentioned legal principles.

Conclusion

In analyzing the above facts, it becomes clear that Article 370 was the biggest obstacle in the path of growth not only for Jammu and Kashmir but also for India. It is also clear that framers of the constitution never intended to make Article 370 a permanent provision and it was never meant to stay for '*ad-Infinitum*'. Also, public perception cannot be an instrument for legal interpretation. Even if we accept this argument, the monolithic opinion of the people in Kashmir valley alone

¹⁵ INDIA CONST. APPENDIX I 569 (Application to Jammu And Kashmir) Order, 1954.

¹⁶ Puranal Lakhanpal v. The President of India, 1962 S.C.R. (1) 688 (India).

¹⁷ PTI New Delhi, *President Declares Abrogation of Provisions of Article 370*, THE BUSINESS LINE (Aug. 07, 2009)

<https://www.thehindubusinessline.com/news/president-declares-abrogation-of-provisions-of-article-370/article28843149.ece>

cannot be construed as the popular opinion. So, in short, Article 370 has outlived its term and now it is time for it to step aside. The decision of Article 370 can only be seen as the first step in reintegrating the Nation and thus 'Redefining our Nationhood.