

Article 370 & 35(a)

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Introduction

India is a union of different states. Every region has its own cultural, strategic and functional importance. Therefore, every state equally contributes to what India is today. Every state has its unique recognition. It's very common to hear that the Himalayas are the crown of India. In the lap of the Himalaya lies 'the paradise on Earth' i.e. Kashmir. Jammu and Kashmir is an integral part of Independent India. But at the same time, it has become a valley of insurgencies, terrorist activities and military operations due to its location. Therefore it becomes very important to look at the history of Jammu & Kashmir to decode the present tensions and the ongoing debates around Article 370, a hot potato in Indian politics.

Looking at the History

India was called 'the golden bird' in the glorious past. But due to the invasions by corrupt people like Muhammad Ghori, it lost its wealth. The mention of the English East India Company becomes equally important because of the irreparable damage that they caused to India. After an oppressive rule of about 200 years, the British decided to set free India on 15 Aug 1947. But this freedom did not come easily. It was accompanied by a dreadful partition. The British were clever enough to declare that princely states are free to either join India or Pakistan or remain free. But due to the efforts of our then home minister & deputy Prime Minister Sardar Vallabhai Patel, most of the princely states decided to join India but four states: Hyderabad, Manipur, Junagadh & Jammu-Kashmir did not sign the instrument of accession (a document through which they agree to join India legally). Later on, Junagadh, by way of a plebiscite, Manipur by way of constitutional monarchy and Hyderabad by way of the army, succeeded in India. Only Jammu & Kashmir was left. ¹

Geography of Jammu & Kashmir:

Jammu and Kashmir comprised three political regions: Jammu (a mix of Hindus, Muslims, Sikhs and speakers of different languages), Kashmir valley (mostly Muslim and Kashmiri

¹ NCERT, Politics in India since Independence, chapter 1, (2007)

speaking with a small minority of Hindus) and Ladakh (sparse population of Muslim & Buddhists).²

The beginning of the special privilege called Article 370:

Jammu & Kashmir was ruled by king Hari Singh before independence who was a Hindu ruler but the population of the state was majorly Muslim. That's why the king did not join any country after independence. In October 1947, believing that Kashmir belongs to Pakistan due to the majority Muslim population, Pakistan tried to capture Kashmir by sending tribal infiltrators. The king asked for India's help. The government of India assured military help and the ruler signed the instrument of accession on 26th October, 1947.³ The Maharaja signed the instrument of accession but did not accept the constitution of India for Jammu & Kashmir. He demanded a separate constitution for his princely state. Therefore, the constituent assembly devised a special provision, called Article 370 for Jammu & Kashmir's autonomy.⁴ After the signing of the instrument of accession on a decided condition, defence, external affairs & communications of Jammu & Kashmir came into the hands of the Union.

Provisions of Article 370

Article 370 was drafted by Gopalswami Ayyangar. Part XXI of the Indian Constitution deals with Temporary, Transitional and Special Provisions concerning the state of Jammu and Kashmir.

- It gives special privileges to Jammu & Kashmir citizens like dual citizenship (citizens of J&K and India). Only the permanent citizens of Jammu & Kashmir could buy land in Jammu & Kashmir.
- The article restricted the applicability of certain provisions of the Indian constitution to J&K. In J&K, RPC (Ranbir Penal code) was applicable. Except laws related to foreign affairs, defense, communication and finance, all other Indian laws will be applicable in J&K only after passing through the state legislative assembly. The term of the J&K legislative assembly was 6 years instead of 5 years for other states.

² Ncert, supra 151

³ Avantika, Article 370 & 35a: history, origin and Provisions, Yahoo news, (22 Feb 2019) <https://in.news.yahoo.com/article-370-35a-history-origin-provisions-132348359.html>

⁴ Michae Elkan, This is why article 370 was created, inINDIAaa (June 9, 2016) <https://www.inindiaaa.com/2016/06/this-is-why-article-370-was-created.html>

Important rights like the Right to Education (RTE) and Right to Information (RTI) were not applicable in Jammu & Kashmir.

- A financial emergency could not be declared and state permissions were required for proclaiming an emergency on grounds of internal disturbance.
- Orders of the Supreme Court were not valid in Jammu & Kashmir.
- Besides this, the other bone of contention was a separate flag for J&K.
- A Kashmiri woman who marries someone from another Indian state will lose her Kashmiri citizenship but not if she marries a Pakistani. This was against the unitary character.⁵

Provisions of Article 35(a)

This article empowers the state legislature of Jammu & Kashmir to define permanent residents of the state and confer certain special rights & privileges, which can't even be challenged for violating any provision of the constitution. This article came into being by a Presidential order on the advice of the Jawaharlal Nehru government in 1954. The article was widely condemned for creating 'a class within the class of Indian citizens.'⁶

Cases filed for challenging the special status to J&K:

- *Sampat Prakash v. State of Jammu & Kashmir, 1970*⁷: In this case, Supreme Court had held that Article 370 will be repealed only if the constituent assembly recommends President to repeal
- *Prem Nath Kaul v. State of Jammu & Kashmir, 1959*⁸: The temporary provisions of Article 370 were based on the ultimate relation between the Union & state of Jammu and Kashmir, decided by the constituent assembly.⁹

Abrogation of article 370 & 35(a)

The main promise made by the ruling party was to abrogate article 370 & 35(a) of the Indian constitution and fully merge Jammu & Kashmir in India. To uphold its promise,

⁵ What is Article 370 of the Indian constitution –special privileges to J&K, Tentaran.com, Dec. 28, 2020, <https://www.tentaran.com/what-is-article-370-of-the-indian-constitution/>

⁶ Krishandas Rajagopal, What is Article 35 A, The Hindu National, 3 November 2017 21:10 <https://www.thehindu.com/news/national/what-is-article-35a/article19567213.ece>

⁷ Sampat Prakash v. State of Jammu & Kashmir, 1970 AIR 1118 (India).

⁸ Prem Nath Kaul v. State of Jammu & Kashmir, 1959 AIR 1959 SC 749 (India).

⁹ Murali Krishnan, Article 370 matter stays with 5 judge bench, SC accepts govt's stand, India news, March 2, 2020, 11:52 am <https://www.hindustantimes.com/india-news/no-need-for-larger-bench-rules-supreme-court-on-plea-on-scrapping-article-370/story->

the government abrogated the special status on 5th August 2019 bypassing Jammu & Kashmir reorganisation Act, 2019. It led to a lot of controversies and there were protests as well as support for the move. From the very beginning of the enactment of Article 370, there were two classes of people:

- I. Who supported the article and the subsequent rights given to Jammu & Kashmir citizens.
 - II. Who was against this provision and the special status given to the state?
- Let's look at the arguments of both groups.

Arguments in favour of Article 370:

- When Mr. Gopalswami Ayyangar (drafter of this article) was asked about the reason for the distinction, he replied that Kashmir is not ready for full integration in India like other states, due to multiple reasons, the prime one being the war with Pakistan over this region and under these abnormal and unusual circumstances, the state was controlled by rebels, which necessitates a separate provision for the state.
- The contention that laws for J&K can be made only by state legislative assembly is wrong in the sense that under Article 370(i)(ii), the President has been given the power to proclaim constitutional orders and this power has been widely used till date.
- The abrogation can be made only on the recommendation of the state constituent assembly to the President under clause (3) of the article.¹⁰

Arguments against the retention of this article:

- The critics say that this article promoted separatism and communalism in the minds of people.
- The article, by limiting the applicability of the Indian constitution in the valley, has disabled the guarantee of fundamental rights and hindered the unity and integrity of India enshrined in the preamble.
- Article 370 was only temporary and therefore its abrogation is justified.

¹⁰ Compendium of Article 370 of the Indian constitution, Samvaad 2017
https://www.alexis.in/uploads/1/3/5/9/13599455/article_370_compendium.pdf

- The right to have a separate constitution and separate flag will only promote disunity.
- The conferring of special rights over the state of Jammu & Kashmir goes against the federal structure of the country. Further, it creates an apprehension of inferiority in the minds of other states who are not given so-called 'special rights'.
- It creates two classes of citizens living in Jammu & Kashmir: one who is permanent residents and enjoys certain rights like the right to property and second are those refugees like Dalits from West Pakistan, who have been living there for a long time but don't enjoy Kashmiri citizenship and the subsequent rights.
- The article is also violative of Article 14 (Right to equality) of the Indian constitution in the sense that it snatches the special rights of the daughters of Jammu & Kashmir if they marry someone from other states in India. The worst irony with this provision was that the Kashmiri citizenship rights remained intact if she married a Pakistani.
- Rights available to minorities all over India are not available to minorities in Jammu & Kashmir.
- The article is also a hindrance in bringing new progressive laws in the valley since every new law requires it to be passed through the state legislative assembly. Additionally, many of the laws in Jammu & Kashmir are older than independence.
- It hampered the development of Ladakh, which was neglected due to excessive focus on Jammu & Kashmir.¹¹

Afterwards of the abrogation:

The 2019 Act divided the erstwhile state of Jammu & Kashmir into two Union Territories: Jammu & Kashmir (with a legislative assembly) and Ladakh, including Kargil & Leh, without legislative assembly. LG (Lieutenant Governor) was appointed for both the states: Mr. G.C. Murmu (presently Manoj Sinha) for the Union Territory of Jammu & Kashmir and Mr. Radha Krishan Mathur for UT of Ladakh.

There have been a plethora of petitions filed in the apex court against this abrogation and the consequent communication blackout.¹² To hear the pleas resisting abrogation

¹¹ Hari om, 21 questions for supporters of Article 370, The complete opinion forum, 16 Dec 2013
<http://www.vijayvaani.com/ArticleDisplay.aspx?aid=3044>

and challenging Jammu and Kashmir reorganisation Act, a five-judge constitution bench was set up, headed by Justice NV Raman, comprising Justice Sanjay Kishan Kaul, R Subhash Reddy, BR Gavai and Surya Kant. There were three kinds of issues that needed answers:

1. Whether the repeal of article 370 and 35(a) is justified?
2. The issue of restrictions imposed like internet blackouts.
3. Is the detention of various people justified? ¹³

For the first issue, the Supreme Court is yet to take a stand but scholar Gautam Bhatia says that by refusing to decide, SC has decided.

The second issue led to the pronouncement of a landmark judgement in the field of internet shutdowns: *Anuradha Bhasin v. Union of India*¹⁴ In this judgement the court pronounced that internet shutdowns could be suspended in case of urgency only. In this way, the court gave direction to a proportionality and reasonable test for internet shutdowns, which is in itself a great initiative towards the protection of citizens in digital India.¹⁵

The repeal of the articles and the internet & communication disruptions, backed with the detention of several political leaders of opposition parties, led to the formation of the Gupkar alliance. It is an alliance of seven political parties of Jammu & Kashmir with Farooq Abdullah as chairman and Mehbooba Mufti as Vice-chairperson, condemning the abrogation of Article 370, converting it into Union Territory and withdrawal of the privileges given to the state of Jammu & Kashmir. It is named so because it was formed after a meeting at Farooq Abdullah's home on Gupkar Road. ¹⁶

¹² TNM staff, 100 days since article 370 was abrogated: 11 developments in Jammu and Kashmir, Nov. 12, 2019, <https://www.thenewsminute.com/article/100-days-article-370-was-abrogated-11-developments-jammu-and-kashmir>

¹³ Vaksha Sachdev, Deciding by not deciding: Takeaway's from SC's Kashmir hearing, The Quint, 1 Oct 2019, 11:23 pm <https://www.thequint.com/news/law/deciding-by-not-deciding-supreme-court-kashmir-hearings-takeaways-fait-accompli>

¹⁴ *Anuradha Bhasin v. UOI*, 2019 SCC OnLine SC 1725 (India).

¹⁵ Anushree Somnath Tadge, *Anuradha Bhasin v. UOI*, Indian law portal, July 4, 2020, [Anuradha Bhasin v. UOI - Indian Law Portal](#)

¹⁶ News, What is Gupkar Alliance? All about People's alliance for Gupkar declaration

Conclusion

The abrogation of the special status given to Jammu & Kashmir has got mixed reactions, but the dominance of people supporting the move due to a variety of reasons is evident. The government has proclaimed that this decision will bring development and prosperity to the newly formed union territories of J&K and Ladakh. The various initiatives announced in the budget this year like the setting up of Central University in Leh and the gas pipeline project in J&K are initiatives in the same direction. But there are a few concerns associated with the abrogation.

The major concern is the misuse of the Union powers in the administrative decisions of the newly formed UTs. The recent bill by the Parliament to amend the act of 1991 related to powers and functions of LG of Delhi has caused apprehensions about the overarching control of the Union in Union Territories. The bill was introduced in the backdrop of conflict between the Delhi government headed by Mr. Kejriwal from the AAP party and the LG over the jurisdiction of powers and it is rumoured that the power of LG will get an upper hand over the Delhi government.¹⁷ Therefore, this amendment creates concern about the future independence of the administration of newly formed UTs.

The internet shutdowns are finally being restored and the railway services that were stopped have finally started. But the major issue that will always remain awakened in the minds is: whether the actions like internet shutdown, detention of opposition leaders etc., after the repeal of Article 370 & 35(a) justified? Also, the abrogation has created fears in the minds of certain North Eastern states like Nagaland about future autonomy, although the government has cleared the ambiguity.

Thus, it is observed that any decision by the government brings with it certain concerns. It is upon the government to prove people wrong and fulfil the purposes for which the government has taken that step.

“The constitution & its provisions like article 370 are the givings of history. But the future stance of the abrogation of the article will remain a mystery.”

¹⁷ Vijaita Singh, Bill coming on Delhi government, Lieutenant Governor's functions, The Hindu, 4 Feb 2021
<https://www.thehindu.com/news/national/bill-coming-on-delhi-government-lieutenant-governors-functions/article33750731.ece>