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**Re-visiting Article 370: the politics of autonomy in Jammu and Kashmir**

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## Re-visiting Article 370: the politics of autonomy in Jammu and Kashmir

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**Abstract:** This paper revisits one of the significant provisions of Indian Constitution *vis-a-vis* Jammu and Kashmir – Article 370. In this article, an attempt has been made to draw upon the historical trajectories of the inclusion, dilution and finally revocation of the Article 370. It also study the issue related to this provision and its criticism in the political corridors of state. The paper focuses on its political significance then and now. It scrutinises the issue related to this provision and its criticism in the political corridors of Jammu and Kashmir (J&K). The paper further explores the political ramification on Jammu and Kashmir after the abrogation.

**Keywords:** Jammu; Kashmir; Article 370; constitution; revocation; state.

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### 1 Introduction

The partition of the Indian sub-continent in 1947 resulted in two dominion states (India and Pakistan). This created catastrophic conditions wherein Jammu and Kashmir (J&K) being geo-politically important to both newly formed nations, became a major irritant

between these two powers. There is no denial of the fact that both the leaders of Indian National Congress (INC) and Muslim League (ML) had tremendous impact on the politics of J&K in the pre and post 1947 phases. Both parties tried their best to influence the decision making of political leadership of Kashmir which was mostly led by Muslim Conference (MC) and National Conference (NC). The political tussles between these two state parties led or reflected to the divided public opinion. While as the MC associated itself with ML, the Sheikh Abdullah led NC sided with INC. The roots of political turmoil in Kashmir date back to the 1930's when the working class, primarily under MC leadership emerged against the 'oppressive Dogra' rule and struggled for achieving a 'just and responsible government'. The Dogra Maharaja and Hari Singh, who was well aware about the external influences in local politics, had decided to check the outside intervention (especially Panjabis) by passing the legislation in 1927. The act under notification of 20 April 1927 and later modified in 1932 defined the state subjects as well as the property rights of the people of J&K (Chandel, 2017). The State Subject Act of 1927 was thus implemented on the insistence of powerful landed and bureaucratic elites mainly the Kashmiri Pandits who feared an influx from outside (Puri, 2004; Gupta, 2017; Chandel, 2017). However after the 'contested state's accession' to India in 1947 the property and subject rights continued to be preserved under Article 370 and 35-A (read special status) of the Indian Constitution (Noorani, 2014).

Nevertheless, the political narratives about the J&K have experienced a paradigm shift since the days of partition. After the eruption of militancy in 1989, the common narratives on the ground have been revolving around regular public unrest and uprisings on the one hand and violent counter insurgency encounters between Indian security forces joined by special operation group (SOG) of J&K police and Kashmiri militants/rebels on the other. While as off-the ground, the battle over the issues of political significance such as Articles 370 and 35-A always became a cause of regular contention. Though, the central governments time and again remained silent over such issues due to the coalition with state's regional parties like the NC and the later People's Democratic Party (PDP), however, Rashtriya Swayamsevak Sangh (RSS) backed NGOs and other individuals believed to be very close to Bharatiya Janata Party (BJP) consistently worked to stir the public discourse and create a popular opinion in support of abrogating the special status. Soon after the formation of coalition government between PDP and BJP in 2014 a writ petition was filed by couple of non-governmental organisations in Supreme Court in 2014 and 2017 respectively to reconsider and ultimately revoke this status (Nair, 2019). Finally, after more than seven decades the debate revolving once again kindled out in the political corridors of power culminating in their unilateral abrogation by the BJP led National Government on 5 August 2019.

## **2 State's 'accession' and the case of autonomy**

The relation of J&K with India was negotiated by the then political leadership which led to the inclusion of Article 370 into the Indian Constitution. The centre was given only few powers on the matters of Defence, Foreign Affairs and Communications. Thus, the state was granted a unique constitutional position under the asymmetric federal structure (Rehman, 2012). Under this asymmetric structure, various other states also enjoyed certain privileges with respect to their property rights. The states like Assam (371B),

Manipur (371C), Andhra Pradesh (371D), Sikkim (371F), Arunachal Pradesh (371H) and Goa (371I) were also granted such special powers (Wadhwa, 2001; Sofi, 2021). In case of J&K, there are certain special powers and provisions because of specific historical inclinations. Nevertheless, India is not the unique case where states have been granted certain privileges, there are many other liberal democracies where conditions necessitated a special framework of power-sharing within which different regions were brought under control to administer them smoothly (McGarry, 2007). The special status was created by the signing of the Instrument of Accession, an agreement signed between India and Hari Singh<sup>1</sup> (Anand, 2010; Bhatt, 1984).

In the later years, however, the emergence of 'communal' parties in India gave birth to the concept of Majoritarianism. These political parties and other right-wing organisations saw the devolution of powers as a serious threat to national integrity and identity of oneness. Similarly, Article 370 witnessed strong opposition right from the beginning. Time and again, New Delhi with the help of local mainstream parties (read pro-Indian parties) intervened in the local politics and eroded the very base of Article 370 by many constitutional scams and thus the state constitution was wrecked (Noorani, 2014; Naikade, 2020). These all provisions were defended by both state and central leaders at the pretext of state's geo-political strategy and the political instability. Thus, for Delhi, national interest dominated the discourse than upholding the rights of people. The de facto usage of this provision has however been done in a manner that has eroded the special status. A condition, which Hoenig (2010) describes as "a classic example of a careful calibration of power in centre-state relations existing on paper only." Article 370 was thus already turned into an empty shell before it was finally read down in 2019 (Drabu, 2020). It is rather ironical that the constitutional provision which was supposed to protect the unique identity of J&K was used against the interests of the same people (Deshmane, 2019; Nair, 2019). In another words, it was perceived as a bridge through which New Delhi used every opportunity to assimilate J&K into union through any means.

If the historical trajectories are explored carefully, we can find out how the Indian defence analysts and several policy makers time and again believed that the political instability and separatism in J&K emerged out of India's inability to merge and assimilate completely. The special status was thus perceived as a threat to the Indian unity and her national interests. Despite knowing this fact that Kashmir is a political problem since the days of partition and has historical roots also. Commenting on this, noted lawyer, Noorani (2015) observes that; "if some people single out Kashmir for hostile attention because of Articles 370 and 35-A of the Constitution of India, it is for reasons not hard to seek." Similar observations were shared by political scientist Pratap Bhanu Mehta about the special status before it was revoked, he remarks that:

"Article 370 that underscores J&K's special legal status has actually given the centre more untrammelled power over that state than it exercises over any other state. 'Special status' here seems not like a recipe for peace, but a deadly joke all sides want to play. So while there is a powerful historical, legal and political argument for not abrogating 35-A, it also behoves us to think beyond the cul-de-sacs in which we are stuck." (Mehta, 2018)

In the wake of partition in 1947, the Hindu Maharaja acceded to India on 26 November 1947.<sup>2</sup> As Indian authors believe that the accession thus signed gave the Indian government a 'legitimate right' to quell the rebellion in Kashmir and defend its territory from any possible invasion.<sup>3</sup> It should be noted here that the accession which was signed

‘legitimised’ the Indian control only over the defence, foreign affairs and communications, thus granting an autonomous status to J&K and retaining the sovereign authority of the ruler. As a result of this it was in 1952 that Article 370 was inserted into the Indian Constitution to constitutionally mandate the relationship between the two. J&K was thus exempted from the uniform constitutional arrangements, which were set in place to deal with other states, allowing the state to draw a constitution of its own and also grant citizenship rights to the state subjects. Article 370 in a way limited the legislative powers of the Indian Parliament to legislate on selected subjects listed above. The article also contained the central control by dwelling the power to the State Assembly to check upon the union’s overreach if it legislates on subjects mentioned in the union and the concurrent list. The whole constitutional design thus ensured that any decision regarding the state as to be democratically deliberated and passed from the constituent assembly of J&K.

The contextual significance which the article holds in the historical sense was deliberated in the Indian Parliament when in 17 October 1949; Gopal Swami Ayyangar initiated the proceedings for the inclusion of the Article. While discussing the difficulties involved in integrating the state with the union, he spoke of the reasons; why India should adopt such an asymmetric federal mechanism. He outlined that granting the special status is being talked because:

- 1 The war within the state – a ceasefire had held since the beginning of the year but conditions are still ‘unusual and abnormal’, ‘normal life’ not yet restored.
- 2 Part of the state is still in the hands of ‘rebels and enemies’.
- 3 ‘Entanglement’ with the United Nations over the issue of J&K and the government’s commitment to giving the people of the state the opportunity to decide for themselves whether they wish to remain with the republic or to leave it (including a plebiscite if the right conditions prevail).
- 4 Agreement that the will of the people, through a constituent assembly, will determine the constitution of the state and the sphere of union jurisdiction over the state (Tillin, 2019).

After deep deliberation over months Article 370 was introduced under Part 21 under the Temporary, Transitional and Special Provisions and embodies six special provisions for J&K. The six provisions are as under:

- First, it exempted the state from the provisions of the constitution providing for the governance of the states. J&K were allowed to have its own constitution within the Indian Union.
- Second, parliament’s legislative power over the State was restricted to three subjects’ defence, external affairs and communications.
- Third, if other ‘constitutional’ provisions or other union powers were to be extended to Kashmir, the prior ‘concurrence’ of the state government was required.
- The fourth feature is that that concurrence was provisional. It had to be ratified by the State’s Constituent Assembly. Article 370(2) says clearly: “if the concurrence of the government of the state... 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.”

- The fifth feature is that the state government’s authority to give the ‘concurrence’ lasts only till the State’s Constituent Assembly is ‘convened’. *It is an ‘interim’* power. Once the constituent assembly met, the state government could not give its own ‘concurrence’.
- The sixth special feature, the last step in the process, is that Article 370(3) empowers the President to make an order abrogating or amending it. But for this also ‘the recommendation’ of the State’s Constituent Assembly “shall be necessary *before* the President issues such a notification” (Noorani, 2014; Bhat, 2017; Pandey, 2020).

The inclusion of this article thus ensured that the temporary, transitional and special powers rest with the state constituent assembly. The inclusion of the term ‘temporary’ in the article however gave rise to confusions and controversies ever since it was framed. Tillin specifically points out that the term meant that “Article 370 was a temporary expediency designed to govern the state’s relations with India before the military conflict over its status could be resolved.” Article 370, thus, recognised the peculiar and distinct conditions which were looming over the state at the moment of this constitutional design; however, it was intended as an interim measure before the convening of a constituent assembly in J&K and/or the holding of a plebiscite (Tillin, 2019).

### **3 Opposition and favour: two schools of thought on Article 370**

Once the final draft of Article 370 was made after debates in constituent assembly, there were voices who opposed the unique governance structure terming it discriminatory and against the interests of the nation. According to Aqbar it was Moulana Hasrat Mohani who questions, “why this discrimination, please?” (Akbar, 1991). However, Sardar Patel justified the provision as willing as Aiyangar, telling the constituent assembly on 12 October 1949 that “in view of the special problems with which the government of J&K is faced, we have made a special provision for the constitutional relationship of the state with the union on the existing basis...” (Akbar, 1991). Even Shyama Prasad Mookerjee (member in Nehru’s cabinet) accepted it as well, but later opposed it in tooth and nail and launched country wide agitation for revocation of Article 370. Nevertheless, it is widely believed that Article 370 was then viewed as a victory for Indian unity, not as a problem as it was made out to be in the future political discourse in India and Kashmir (Akbar, 1991; Jamwal, 2019).

However, since its inception the discussion over the autonomy has been debated by many schools. One school of thought, known as the Integrationists (represented by the Vishwa Hindu Parishad, BJP and other like-minded parties), strongly opposed granting any special position and they demanded full integration. Its slogan from the beginning was ‘*Ek Pradhan, Ek Vidhan, and Ek Nishaan*’ (One Head, One Constitution, One Flag). Scholars and parties who supported this school argued that the militancy and a secessionist movement in J&K was the result of the undue privilege meted out under Article 370. To these forces, abrogation of Article 370 at one stroke was the only patriotic and practical reply to Pakistan’s threats towards India and end of separatist politics. They believed, even if it becomes an empty shell, it will continue to be the

source of inspiration for the separatist and communal elements of Kashmir (Chowdhary, 2015).

For political parties like BJP, Article 370 was projected as a ‘historical blunder’ created by Pandit Nehru. They believe that it had created a ‘separatist psyche’ and have constitutionalised divisive thinking. The political and social assimilation of the Kashmir with India is thought to have been seriously damaged by its existence. Hindutva parties also claim that Article 370 has inhibited the process of economic development of J&K and made the state dependent on central grants and subsidy. And which leads to corruption and nepotism. The BJP was thus convinced that the precondition of the solution of the Kashmir problem is the repeal of Article 370. It thus considered it a ‘bounden duty’ to remind countrymen that the nation faces a very grave peril in J&K. In opposition to this thought, there is a very strong demand, essentially enunciated by the J&K NC and other regional parties but supported by many leftists groups and scholars both within and outside J&K, for maintaining the special status. This school of thought favours the restoration of the autonomy that it maintains has been severely eroded since 1953 (Hoskote, 2017).

#### **4 Erosion of autonomy over the decades**

Academicians and scholars all over the world have classified the governments into unitary and federal structures based on the distribution of power between national and regional governments. In a federal setup (like USA) there is a two tier of government with well-assigned powers and functions. In this system, the central government and the governments of the region act within a well-defined sphere, coordinate and at the same time act independently. The federal polity, in other words, provides a constitutional device for bringing unity in diversity and for the achievement of common national goals. Similarly, India adopted ‘quasi-federal’ system of government, where centre was made more powerful but at the same time states enjoy considerable powers. As discussed above Article 370 made an exceptional power sharing model between J&K and Indian Union where state enjoyed an autonomous status within the border framework of union. However, over the last seven decade’s Article 370 was reduced to, what Noorani (2014) calls, “a husk through political fraud and ‘constitutional abuse.” After the dismissal and arrest of Sheikh Abdullah in 1953, the state autonomy was eroded with full concurrence of pro-Delhi political party NC under Bakshi Ghulam Mohammad and later Ghulam Mohammad Sadiq.

On 14 May 1954 the Constitution (Application to Jammu and Kashmir) Order 1954 was issued by the President of India with the concurrence of the Government of J&K. This order implements the Delhi Agreement as ratified by the constituent assembly and also supersedes the Order of 1950 (Anand, 2010; Noorani, 2014). The State’s Constitution was overridden by the centre’s orders. Its basic structure was altered. The head of state elected by the state legislature was replaced by a Governor nominated by the centre. Article 356 (imposition of President’s Rule) was applied despite a provision in the State’s Constitution for Governor’s Rule (Section 92). This was done on 21 November 1964. On 24 November 1966, the Governor replaced the *Sadar-i-Riyasat* and State’s Prime Minister was replaced by Chief Minister after the State’s Constitution had been amended on 10 April 1965, by the 6th Amendment. So, the question to be analysed

is whether Article 370 held any significant position at the time it was read down in August 2019. It would suffice to argue that around forty seven orders were made applicable to J&K from 1956 to 1994. 94 of the 97 entries in the Union List and 26 of the 47 in the Concurrent List were extended to J&K as were 260 of the 395 Articles of the Constitution (Rehman, 2012). This shows that Article 370 was eroded from time and made a hollow provision. Thus, the autonomy as envisaged by Article 370 was eroded substantially over the decades.

The Article 370 has been in news ever since its revocation in 5 August 2019 but it would not be fair to say that it has only been talked and discussed post that. This particular article was revoked leading to indefinite lockdown and huge deployment of forces in the state. Through this revocation, the significant autonomy that Kashmir had for decades was stripped. The Act<sup>4</sup> passed unilaterally by the Parliament of India divided into two union territories directly ruled by the centre hence, stripping the state of its status under Article 370. To understand this complex dynamic lucidly, it is important to note that this article has always been in the forefront of contestation and conflict. To get an insight into the complexities of it, we need to delve deeper into history as discussed above to know how the journey of this article in turmoil has been.

The wreckage of this article began since its inception only and making it a bone of contention between two ‘diametrically opposing groups, within the state and at the centre’. The debate was widely based on the gradual erosion of Article 370 and integrating the state into the Indian Dominion fully (Noorani, 2014). The events of ‘erosion’ of Article 370 kept happening from 1956 till the fall 20th century, under the aegis of the Law Ministry, yet it always remained in loop for further negotiations (Nair, 2019).

## **5 Abrogation of 370 and the Constitution (Application to Jammu and Kashmir), 2019**

The Constitution (Application to J&K), August 2019, superseding its predecessor, Constitution (Application to J&K) 1954, and abrogated Article 370. By virtue of new constitution application, it took away the ‘special privileges’ retained by the J&K. Consequent to the said order, The Jammu and Kashmir (Reorganisation) Bill, 2019 was passed in the parliament which bifurcated the J&K into two union territories. In this way, autonomy under 370 was taken away by virtue of this order (Gazette of India, 2019). The long decades old dream and agenda of Hindu Nationalists forces was realised under the BJP Government. Perhaps it would not be wrong to say that BJP contested the 2019 Lok Sabha elections on the promise to Abrogate 370 and what they believe was vital for the ‘total integration of J&K’ and end of ‘separatism politics’ in Kashmir (Nair, 2019; Naikade, 2020).

Two schools of thought have emerged in post-August constitutional changes of J&K – whereas one side (mostly right-wing people and academicians) lauds the BJP’s move as constitutional and valid. But at the same time, the critics opine (mostly represented by Kashmiri regional parties and some academicians also) that the decision to remove Article 370 marks the demise of the Indian Constitution, and pointing to the unconstitutionality and invalidity of the process. However, there is a general consensus that whether the said decision is ‘constitutional’ or ‘unconstitutional’ that must be left to the better sense of judgement of the Apex Court India. However, one cannot deny the fact

that the change in constitutional relation had once again put J&K at the crossroad. It is steering in a political direction that is unknown and uncertain. The pro-Indian parties are in a state of utter bewilderment as their narrative of separate identity and 'special status' lost its political relevance. The models like self-rule, autonomy, achievable nationhood and talks with Hurriyat and Pakistan all got demolished (Chowdhary, 2019, 2020; Ahanger, 2020; Jacob, 2020b). Similarly, the countless counter insurgency operation like 'catch and kill', 'operation all out' and 'calm down' has virtually locked down Kashmir.

## 6 Conclusions

The ultimate revocation of the article has thus bought us to the normative question of hate and neglect that Kashmir has suffered over time. The consistent failure to address the political challenges at hand and the lack of political will to engage the stakeholders at different levels into a positive conversation to resolve the deadlock which has chocked millions of lives since decades. The failure to enter into a dialogue and refusal to recognise the political disputes finally reached to an ill-informed conclusion with the revocation of the Article 370. It must however be noted here that neither the revocation of the article nor the bifurcation of the state would settle any scores.

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## Notes

- 1 J&K's Constitution was framed in 1956. It retained Maharaja's definition of permanent residents: all persons born or settled within the state before 1911 or after having lawfully acquired immovable property resident in the state for not less than ten years prior to that date. All emigrants from J&K, including those who migrated to Pakistan, are considered state subjects. The descendants of emigrants are considered state subjects for two generations.
- 2 Although state's accession with India was contested from the day one by Pakistan and so was challenged in J&K by different separatist political parties from MC, Political Conference, Plebiscite Front, Awami Action Committee, People's League, J&K Liberation Front and All Parties Hurriyat Conference over the seven decades. Similarly there is ongoing armed struggle against the Indian state for the right to self-determination of people of J&K.
- 3 However, this view is contested by different scholars who had worked on Kashmir's relation with Indian and Instrument of accession. Back to political leadership of separatism groups in J&K they too challenge this notion. Thus the debate over the state's accession with union of India is still debated in the political discourse of J&K, both academically as well as politically.
- 4 The Jammu and Kashmir Reorganisation Act, 2019 was duly passed by the Parliament of India, without forming and thus consulting any leadership from the state.