



## **Article 370**

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### **INTRODUCTION**

Article 370 deals exclusively with Jammu & Kashmir State that came under the administrative control of the Government of India after the country's 15-month war that Pakistan started in 1947 to seize sovereignty and is arguably the most controversial provision of the Constitution of India. x The origin of Article 370 can be traced back to British Raj in India. Prior to the partition of 1947, India was divided in two different sets of geographical regions: provinces which constituted 60% of the land area of the sub-continent known as British India and princely states which constituted the rest 40% of British India. x The 562 such princely states were ruled by the Princes, Maharajas, Nawabs, Rajas and so on and ranged in size and population. They contributed 100 million of the subcontinent's total population of 400 million inhabitants at the time of independence. British looked after the defence, foreign policy and communications of these states. But the states were not directly ruled by the British and were allowed governance in internal matters such as law and order, civil liberties, health, education and economic development in return for which they each acknowledged British 'paramountcy' through individual treaties, The British gave an Indian State and its ruler protection against neighbors and usurpers by stationing company troops in its capital under the control of a British Resident. x Their citizens were not British subjects, like the other Indians, but 'British protected persons'. The troops were, of course, very much a two-wedged weapon: while they were protecting the prince, they were also keeping him in check, a privilege for which he was expected to pay. The case of Jammu & Kashmir was very telling in this context. 3 x The British transferred the State forever to Maharaja Gulab Singh under Treaty of Amritsar, for 75 lakhs in 1846, and fixed a nominal annual

payment to protect his territories from external enemies. X In February, 1947, Government announced that independence would be given to British India, the plan was to create two independent dominions of India and Pakistan based on the Hindu and Muslim majority areas of the various provinces that constituted British India. The policy was announced by the British Government's with regard to Indian states. Political arrangements between the States on the one side and the British Crown and British India on the other were to be brought to an end under that policy. The rights surrendered by the States would revert to the States when the partition of India and Pakistan were created. The communal basis of division of British India would not affect the States at all thus, with the withdrawal of power, the princely States would become 'independent'. Neither the British Government nor the cabinet mission made any suggestion regarding the future of the princely States except that they would become legally independent. The prospect of all 562 Indian States exercising their independence came under chaos over the dominions of India and Pakistan since both competed to absorb these states. V. P. Menon proposed that the princely rulers should be persuaded to hand over just three functions of their States to the central government of India: defence, external relations and communications, the same functions which had been always exercised by the British government. x There was an agreement between J&K with Pakistan and India that both will not attack J&K. While India kept its word and refrained from attacking, J&K chose to remain independent when India and Pakistan gained their independence on 15th and 14th August 1947, respectively. In spring, internal revolt begins in the Poonch region against oppressive taxation under the recently imposed direct rule by the Maharaja; In

August, Maharaja's forces fire upon demonstrations in favour of Kashmir joining Pakistan, burn whole villages and massacre innocent people; The people of Poonch evacuate their families and at least 60,000 refugees fleeing to Jammu by 13 September. The rebellion spreads to adjacent Mirpur and Muzaffarabad. The Poonch rebels declare an independent government of "Azad" Kashmir on 24 October Pakistan attacked Kashmir on 6th October 1947 by "Azad Kashmir Forces" supported by Pakistan. To save J&K, the then ruler of J&K Maharaja Hari Singh chose to accede J&K to India. 1947: The Maharaja of the State of Jammu and Kashmir signs the Instrument of Accession (IOA) on 26 October, acceding the 75% majority Muslim region to the Indian Union, following invasion by the tribesmen from Pakistan, according to the 1948 Indian White Paper; India accepts the accession, regarding it provisional until such time as the will of the people can be ascertained by a plebiscite, since Kashmir was recognized as a disputed territory. The instrument of accession was signed by the ruler of Jammu and Kashmir whereby only Defence, Communications and External Affairs were surrendered by the State to the Dominion of India. In October 1947, the then prime minister of India Pt. Jawahar Lal Nehru made certain commitments and in consideration of those the accession was made by the ruler in favours of India. Article 370 was then incorporated in the Constitution in the pursuance of those commitments. Article 370 gave J&K a greater measure of autonomy as compared to other states and the power of the Union of India is restricted in the state. The Indian Parliament would need the state government's concurrence for applying all other laws. 1947-1952: Sheikh Abdullah drifts from a position of endorsing accession to India in 1947 to insisting on the self-determination of Kashmiris in 1952. In July 1952, he signs Delhi Agreement with the Central government on Centre-State relationships, providing for autonomy of the State within India and of regions within the State; Article 370 is confirmed and the State is allowed to have its own flag. The domination of Kashmir Valley (which has a 95% Muslim majority and accounts for more than 50% of the total population of Indian J&K) and Abdullah's land reforms create discontent in Jammu and Ladakh; An agitation is launched in the Hindu-majority Jammu region against the Delhi Agreement and in favour of full accession with the Indian Union; the movement is withdrawn later, due to pressure from the Center;

Secessionist sentiments in the Valley and communalism in Jammu feed each other.

## HISTORY

Article 370 is arguably the most contentious provision of the constitution of India. It deals exclusively with the Jammu and Kashmir State that came under the administrative control of the Government of India after the country's 15-month war that Pakistan started in 1947 to seize sovereignty over the state. Besieged by the controversy right from its draft stage, Article 370 has been the subject of heated debate ever since the Constitution came into full effect from 26th January 1950. While one section of the Indian polity has strongly demanded its abrogation, some others have vehemently opposed this demand; in 1999, Farooq Abdullah, the State's then Chief Minister, even threatened a revolt if the Article were revoked. x On 26th January 1950, the constitution of India came into force with a unique provision- Article 370. The special status accorded to the state of Jammu and Kashmir in the article meant that its people lived under a different set of laws while being part of the Indian Union. Maharaja Hari Singh signed the accession papers on October 26, 1947 under which the state acceded to India. x The accession of Jammu and Kashmir was carried out on the same pattern other states acceded to it. But as a result of the misfortune of the country, Jawahar Lal Nehru pressurized the Maharaja for handing over power to Sheikh Abdullah. On request of Sheikh Abdulla it was decided that the State Assembly will take the final decision on the accession and it was done to appease the Muslim society in Kashmir. From here the state was given the special status. x The question arose as to what should be till the assembly took the final decision? For this period Article 370 was incorporated in the Constitution as a temporary measure. But even when the State Assemble ratified the State's accession to India, the Article was not scrapped. With the blindfold of political interest we lent permanency to the temporary character of the article making our position not only ridiculous before the world but also provided a golden opportunity and solid base for separatist-oriented terrorism to grow in Kashmir. x This special status delinks the state from rest of the country. It is because of this Article that the Government of India cannot enforce any law connected with Jammu and Kashmir without the approval or concurrence of the State Government. Only defense, external affairs and communications fall in the central list.2 Against this the Parliament has

the powers to frame laws for rest of the states in the country. But Article 370 of the Constitution restricts the hands of the Union Government and the Parliament in doing this in case of Jammu and Kashmir. x Its dangerous consequences have been witnessed in recent years when the law prohibiting misuse of religious places could not be extended to Jammu and Kashmir with the result the state does not come within the ambit of secularism. It won't be an exaggeration if it is called constitutionally recognized separatism. On the basis of this "special status" people of Kashmir, Pakistani rulers and diplomats and intellectuals in the world raise of volley of questions in front of the Government of India. Is accession of Jammu and Kashmir complete like other states? If the accession is complete, why then the special appeasement.

### Special Relationship of J&K with the Indian Union

- (i) J&K have its own Constitution framed by a special Constituent Assembly set up by the State.
- (ii) Parliament cannot make any law without the consent of the State Legislature relating to:
  - (a) Alteration of name and territories of the State.
  - (b) International treaty/agreement affecting the disposition of any part of the territory of the State.
- (iii) The residuary power in respect of J&K rests with the State Government and not with the Union Government.
- (iv) The Fifth Schedule pertaining to the administration and control of Scheduled Areas and Scheduled Tribes and the Sixth Schedule pertaining to the administration of Tribal Areas are not applicable to the State of J&K.
- (v) The provisions of the Indian Constitution regarding denial of citizenship to person who migrated to Pakistan do not apply to Permanent residents of J&K who after having migrated to the territory, now included in Pakistan, return to the territory of that State or permanent return issue by or under the authority of any law made by the Legislature of that State and even such person shall be deemed to be a citizen of India.
- (vi) Certain special rights have been granted to the permanent residents of the State of J&K with regard to employment under the State; acquisition of

immovable property in the State; settlement of the State etc.

- (vii) No proclamation of emergency made by the President under Article 352 on the ground of armed rebellion shall have effect on the State of J&K without the State Government's concurrence.
- (viii) The Union has no power to suspend the Constitution of the State on the ground of failure to comply with the direction given by the Union. In the event of the breakdown of the Constitutional machinery in the State, Governor's Rule is to be imposed. However, in 1964, Articles 356 and 357 was extended to that State in the event of a breakdown of Constitutional machinery to take over the administration of that State.
- (ix) The Parliament was also provided the power to legislate for the State during emergency under Article 356. The first occasion when President's Rule under Article 356 was imposed in J&K was in 1986 to follow Governor's Rule. The Union has no power to make a proclamation of financial emergency in the State.
- (x) The provisions of Part IV relating to the Directive Principle of State Policy do not apply to J&K.
- (xi) No amendment of the Constitution of India can extend to J&K unless it is so extended by the order of the President under Article 370 (1).
- (xii) The High Court of J&K enjoys very limited powers. It cannot declare any law unconstitutional or issue writs, except for the enforcement of the Fundamental Right. J&K would continue to be governed by Article 370 of the Constitution of India.
- (xiii) The residuary powers of legislation shall remain with the State. However, Parliament will continue to have power to make laws relating to the prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India (xiv) Parliament can take action in the event of insult to the Indian National Flag, the Indian National Anthem and the Constitution.
- (xv) President can suggest any amendments to the Article in concurrence with the State Assembly
- (xvi) J&K have its own legislation on matters like welfare measures, cultural matters, social security, personal law and procedural laws.

(xvii) J&K Government can review the laws made by Parliament and may decide which of them, in its opinion, needs amendment or repeal. Thereafter, appropriate steps may be taken under Article 254 of the Constitution of India.

(xviii) J&K to not make separate laws for the appointment, powers, functions, duties, privileges and immunities of the Governor, and matters relating to Elections namely, the superintendence, direction and control of Elections by the Election Commission of India, eligibility for inclusion in the electoral rolls without discrimination, adult suffrage and composition of the Legislative Council, being matters specified in sections 138,139, 140 and 50 of the Constitution of the State of Jammu and Kashmir.

(xix) No agreement was possible on the question of nomenclature of the Governor and the Chief Minister

## ISSUES AND CHALLENGES

1. Temporary and Transition Provision Article 370 was introduced under temporary and transition provision, it is but still in existence. So who will decide what was actually meant by the term temporary and transition provision.

2. Does not fulfill the criteria of Section 5 of the instrument of accession which says- "The terms of this my instrument of accession shall not be varied by any amendment of the Act or the Indian Independence Act, unless such amendments are accepted by me by instrument supplement to this instrument".

3. Encourages Separationist tendency- As per the article published in Indian republic, Kashmiri locals do not think of them as part of India and often asks people coming from different states to Kashmir, if they have you come from India. This shows that even the concept of unity in integrity, which is one of the best attribute of India's most cherished culture, is losing its meaning.

4. It affects the economic development- As per the provisions of article 370 people from outside Kashmir cannot invest in Kashmir, they cannot buy any property or carry on any business. Where rest of the India enjoys right to move freely and carry on trade in any part of India thereby developing India as a whole, Kashmir due to restriction put by Article 370 is closing doors of development for itself.

5. Permitting corruption As we have CAG, Lokpal, CBI to investigate corruption issues in other States of India, Kashmir due to article 370 does not come under these anti corruption bodies. When corruption is on its toll in India it becomes a very important issue of debate that since the top most investigation bodies of India does not have its operation in Kashmir, is Kashmir totally a corruption free State and does not need such authorities.

6. Threat to Indian security It is well known to all that Pakistan is a great threat to India due to its deep involvements in terrorism. The Article also gives Pakistan's citizens entitlement to Indian citizenship, if he marries a Kashmiri girl. This is very sensitive issue and needs to be looked upon with great care and precautions. This way we are welcoming terrorists thereby making them our son in laws. How can this be justified when terrorism is not only a national issue of concern but global as well and more importantly when Kashmir is the eye of Pakistan right from the time of Independence.

7. RTI is not applicable to State of J & k- people are not only deprived of right to information but also the procedure to file the complaint. Which means a very important aspect of Democracy to have a transparent government is missing from the State. RTI has proved to be a very important tool to fight corruption, in the absence of RTI it can be assumed that politicians of J & K wants to escape from accountability thereby refusing to abrogate Article 370.

8. People in the State are not enjoying various beneficial laws such as marriages between Kashmiris and people from rest of India. Thereby affecting their human rights as well as marriage is a very personal issue and if on marrying a non Kashmiri a Kashmiri women ceases to be the State subject where she was born and loses her identity of the State is quite discriminatory as it does not happen with women from rest of the State in India as they have only one citizenship that is Indian Citizenship.

9. The emergency provisions Article 352 and 356 do not apply to State of Jammu and Kashmir. Under Article 356 where President can declare his rule in any state of India for Jammu and Kashmir he has to first consult with the Governor of State who himself is appointed by the President.

10. Even the very important terminologies like secularism and socialism are absent from the Preamble of the Constitution of Jammu and Kashmir.

## LANDMARK CASES

1. *Sampat Prakash v. State of J&K* : The main issue which was raised by the petitioner was based on the fact that Article 35 (c) of Jammu and Kashmir Constitution as initially introduced by the Constitution (Application to Jammu and Kashmir) Order, 1954, had given protection any law relating to preventive detention in Jammu and Kashmir against invalidity on the ground of infringement of any one of the fundamental rights guaranteed by Part III of the Constitution for a period of five years only. Subsequently this period was extended to ten years and later to fifteen years by the Presidential Orders dated 1959 and 1964. The petitioner challenged these extensions on the ground that the orders making such modifications could not be validly passed by the President under Article 370 (1). Article 370 could only have been intended to remain effective until the Constitution of the State was framed and thereafter it must be held to become ineffective that any modification made by the President subsequent to the enforcement of the Constitution would be without the authority of law. The above argument was rejected by the Supreme Court and held Article 370 should be held to be continuing in force because the situation had existed when this article was incorporated in the Constitution had materially altered, and the purpose of introducing this article was to empower the President to exercise his discretion in applying Indian Constitution and a reference was also made that Article 368 of the Constitution in its application to State of J&K under which an amendment to the Constitution under Article 368 is of no consequence in the State of J&K unless applied by the President under Article 370 (1).

2. *Mohd. Damnoo v. State of J&K* The petitioner challenged the validity of his detention under the J&K Preventive Detention (Amendment) Act, 1967, on the ground that the Act is invalid as it has not been assented to by the Sadar-i-Riyasat of the State. On November 16, 1952, the President had made an order substituting another Explanation for the existing one in clause (1) of Article 370, as "For the purpose of this article, the Government of the State means the person for this time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of J&K, acting on

the advice of Council of Ministers of the State for the time being in office." According to the counsel on behalf of the petitioner, neither the State Assembly nor the President were competent to impair the functioning of the Sadar-i-Riyasat of the State unless the Constitution of India was amended under Article 368 and 370 (3) or a fresh Constituent Assembly was convened to amend the Explanation. The above argument was not accepted by the Supreme Court and the Court explained the following feature of Article 370 (1) (b) and (d) is the necessity of the concurrence of the State Government. Article 370 (1) merely recognised a constitutional position in the State. It was contended Article 370 (1) (b) and (d) places no limitation on the framing or amendment of the Constitution of J&K. basically, it was pointed out that the change in the designation and the mode of the appointment of the Head of the State, the constitutional position in the State remains basically the same and the Governor is the successor to the Sadra-i-Riyasat and can validly exercise his powers as Head of the State.

3. *Prem Nath Kaul vs State of J&K*, 1959 AIR 749 This was One of the earliest and leading case regarding the impact of Art 370 to be decided by the Hon'ble Supreme Court. In this judgment the Supreme Court traced the passing of power from the hands of Maharaja Hari Singh to the successor. The Court held that Article 370 in no way reduced the plenary powers of the Maharaja, nor did it try to impose the President's will on the state of Jammu & Kashmir. What it did in fact, was that it vested authority in the Constituent Assembly to decide the relationship that the State wanted to establish with India. It also observed that the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provision of Article 370 (1) is made conditional on the final approval by the said Constituent Assembly in the said matters.

## CONCLUSIONS

**STUDENTS FINDINGS** The matter of special status to J&K through Article 370 has flared constant debates. But there are special provisions given to some other states like Nagaland, Maharashtra and Assam through Article 371. Internationally, Hong Kong is an integral part' of China but has been given a special dispensation. There are in fact numerous examples around the world in which, due to special circumstances, certain areas or regions have been

given a special dispensation. Article 370 has brought in welcome changes as well. For instance, due to the ability to form their own laws, land reforms were introduced in J&K. Land was given to farmers and landless labors from the landlords. Some experts say that there's no feeling of Indians among the people in the state. People of Kashmir valley have been made to believe by some Kashmiri politicians and separatists that they are not integral part of India and that they have a distinct identity which is completely different from that of Indians and that the provision of Article 370 in the Indian constitution vindicates it. This is a fallacy as Article 3 of the J&K constitution clearly states that J&K is and shall be an integral part of India. Kashmir is rich in beauty and can prove to be major source of tourist attraction and thus revenue but no investors want to come because they denied privileges in Jammu and Kashmir which is a result of Article 370. The state has been deprived of industrial development, as the legislation does not allow outside investment and prevents outsiders from buying land. Consequently, unemployment, especially among the youth, is on the rise. This is indirectly aiding militancy. Article 370 cripples the personal liberties of non-permanent residents of Jammu Kashmir. Any Constitutional provisions such as the RTI that empowers a common man is either not applicable in Jammu Kashmir or is applied in its truncated state. The journey of a Separate Status/State was always going to veer towards the course of separatism, never towards further integration and consolidation. This in a way is an effort to break the political and constitutional relationship between Jammu and Kashmir and the rest of the country. Article 370 only displays temporary and interim measure for Jammu and Kashmir provision which is incorporated in Part XXI of the Constitution under Temporary within the ambit of the Constitution of India and Transitional Provision to say that Article 370 is a bridge between India and Jammu Kashmir. The question of abrogation of article 370 is extremely sensitive and must be handled coolly and in a mature fashion. The sort of statements issued from both sides will only create further turmoil and tension in the Jammu & Kashmir state.

