

Article 370– Declared Constitutional WHY?

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Abstract—This research paper deals with the reasons as to why the Supreme Court gave the decision in favor of government of India in the case of abrogation of Article 370. It consists of an introduction defining Article 370 of the Indian constitution. Article 370 has been interpreted for providing a clarity in the judgement. Various problems were faced by the citizens of India as well as the citizens of Jammu and Kashmir due to article 370. History behind the origin of article 370 deals with the “instrument of accession” signed between Raja Hari Singh and Prime Minister of India in the year 1947. This research work analyses the special provisions which were granted to the permanent residents of Jammu and Kashmir and how it was finally abrogated by the government of India with the help of tactical step taken up by the government of India. Sub clause (d) of Article 370 clause (1) was deleted from the documents in order to prevent abrogation but with the strategic mindset and efforts, the provision was brought back which served as a milestone in removing Article 370 from the state of Jammu and Kashmir.

The validity of this abrogation was challenged in the Supreme Court. This research work consists of various reasons and facts according to which the abrogation of article 370 was declared constitutional. With the help of various web series, data, legal research and case laws, this research work has been completed.

Index Terms—Instrument of accession, article 370, president’s rule, constituent assembly, legislative assembly.

I. INTRODUCTION

According to Article 370 which is incorporated in part XXI of the Indian Constitution, special status was granted to the state of Jammu and Kashmir in India, which means:-

- Laws made by the Parliament were not automatically applied in the state of Jammu and Kashmir. Only after the approval of the state legislature in Jammu and Kashmir, the laws could be applied. Jammu and

Kashmir had its own constitution and a separate flag. However, the constituent assembly while making this article specified clearly that it is a temporary provision and is subject to change.

The power to abrogate Article 370 was given to the constituent assembly of Jammu and Kashmir. The constituent assembly also recommended the provisions of the Indian constitution which should be applied to the state of Jammu and Kashmir including Article 356 which gave the power to the president of the country to issue presidential orders or ordinances in a situation when both the houses or either of the house of the parliament is not in session or in any emergency circumstances where the president deems it fit to issue presidential ordinances. However, in the year 1957, the constituent assembly of Jammu and Kashmir was dissolved without abrogating Article 370.

The functioning of the state was under the control of the Jammu and Kashmir state legislature.

It gave Jammu and Kashmir some unique parts and allowed it to have its own laws in many matters, except for defense, foreign affairs, finance, and communication.

Article 370 was abrogated few years back in 2019 by the Government of India according to the procedure established by law.

This abrogation was challenged by 23 petitioners in the Supreme Court of India regarding the validity of this abrogation.

The judgement was delivered by bench of 5 sitting judges namely, D Y Chandrachud CJI, S K Kaul J, Sanjeev Khanna J, B.R. Gavai J and Surya Kant J in favor of Government of India.

Thus the special status of Jammu and Kashmir finally came to an end. According to Jammu and Kashmir Reorganization Act, the state of Jammu and Kashmir was bifurcated into two union territories namely Jammu and Kashmir and Ladakh.

II. INTERPRETATION OF ARTICLE 370

Article 370(1)(a). sub clause (a) of clause (1) states that the provisions of Article 238 shall not apply in relation to the state of Jammu and Kashmir.

Article 238 placed in part VII of the Indian constitution dealt with the states in part B of the first schedule. Jammu and Kashmir is placed in part B of the first schedule.

Article 370 (1)(b). Sub clause (b) of clause(1) of this article, limited the power of the Parliament to make laws for the state of Jammu and Kashmir.

The sub clauses deals with the scope of the power of Parliament to make laws for Jammu and Kashmir with respect to matters in the union and the concurrent list.

Article 370 (1)(c). Sub clause (c) of clause (1) made it clear that Jammu and Kashmir was governed by article 1, which made Jammu and Kashmir an integral part of “ India, that is Bharat” which, as article 1(1) states “ shall be a union of states”.

Article 370 (1)(d). Sub clause (d) of clause (1) was followed by two Provisos: The first proviso stipulated that a presidential order related to matters specified in the instrument of accession shall be issued only with the consultation with the government of India and the second proviso stipulated that a presidential order relating to matters other than those specified in the first proviso would be issued only with the concurrence of the state government.

Article 370 (2). clause (2) states that if the concurrence of the government of the state of Jammu and Kashmir 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.

Article 370 (3). Notwithstanding anything in the foregoing provisions of this article, the President may by public notification declare that this article shall cease to be operative or shall be operative only with such exceptions and modification, and from such date as he may specify.

Provided that of the recommendation of the constituent assembly of the state referred to in clause (2) shall be

necessary before the President to issue such a notification.

III. PROBLEMS FACED IN INDIA DUE TO ARTICLE 370

Since Jammu and Kashmir enjoyed a special status, it created some differences and separation between the state of Jammu and Kashmir and other states in India. It caused problems in the economic development as it restricted investment opportunities introduced by the central government.

It also caused problem to the people living in Jammu and Kashmir as the rights granted to them in that state was completely different from the rights granted to the other citizens of India.

The citizens of India residing in other states of India could not buy property or land situated in Jammu and Kashmir.

They had separate constitution which caused hindrance in the application of laws uniformly. For example Article 21(A) of the Indian constitution which provided compulsory education to the children of age between 6-14 years was not applicable in Jammu and Kashmir.

Panchayats did not enjoy any rights.

Dual citizenship was granted to the permanent citizens of Jammu and Kashmir.

Any Kashmiri women who married outside the state of Jammu and Kashmir would lose the citizenship of Jammu and Kashmir as well as the property.

They had separate flag of their own.

No reservation was given to minorities in Jammu and Kashmir namely Hindus and Sikhs. Although large amount of fund was allocated for the development of Jammu and Kashmir by the central government, the state government would misuse those funds for their own greasy needs.

IV. HISTORY BEHIND THE ORIGIN OF ARTICLE 370

The British parliament enacted the Indian independence Act of 1947. According to section 1(1) of the Act two independent dominions - India and Pakistan were to be established from 15th August 1947. The princely states were given the option to either join India or Pakistan or remain independent. Out of the 565 princely states, almost everyone had

decided to either join India or the new country of Pakistan . But Jammu and Kashmir's future was still uncertain where the population consisted mostly of Muslims, but the ruler was Hindu .The then ruler of Jammu and Kashmir known as Raja Hari Singh wished to join India but the

Prime Minister of India Pandit Jawaharlal was not ready to accept his access until Raja Hari Singh agreed to handover the reins of Kashmir to Sheikh Abdullah. This political strain between Jawaharlal Nehru and Raja Hari Singh, led the state of Jammu and Kashmir to remain independent as he felt he would lose his monarchical power if he joined India. Moreover Hari Singh also signed a standstill agreement with Pakistan. This agreement allowed Pakistan to trade , communicate and travel without any hindrance to the state of Jammu and Kashmir.

However, after sometime Pakistan started invading Jammu and Kashmir. There was tremendous law and order problems in the state of Jammu and Kashmir as the invaders of Pakistan started occupying parts of Kashmir. Almost 1/3rd of the lands of Kashmir was lost in the hands of Pakistan. In such a situation Maharaja Hari Singh had no other option left except to seek help from India. Thus On 26 October 1947, Maharaja Hari Singh fled from Srinagar and reached Jammu for seeking help from India. Hari Singh requested India for armed forces in order to stop invasion in Jammu and Kashmir

India agreed to help Jammu and Kashmir, but given the condition that they must access to India. Jawaharlal Nehru told that he cannot send the Armed Forces unless it was an Indian territory . this led to the signing of "instrument of accession" of Jammu and Kashmir . On 5 March 1948, maharaja Hari Singh issued a proclamation for the establishment of a constitution for the state of Jammu and Kashmir for the governance of the state. Moreover , Maharaja Hari Singh also announced the formation of an interim popular government with

Sheikh Mohammed Abdullah as the Prime Minister .After the negotiation between Shaikh Abdullah, a Kashmiri leader and that then Prime Minister of India , Jawaharlal Nehru a temporary provision Article 370 was created to give special status to Jammu and Kashmir and establishment of a separate set of rules which was different from the rest of India. Maharaja Hari Singh accepted the proposal made by India and agreed to join India in return of help from India,

although this was a temporary provision, it continued to remain in effect till year 2019, making Jammu and Kashmir different from other states of India.

V. ANALYSIS OF THE SPECIAL PROVISIONS GRANTED TO JAMMU AND KASHMIR UNDER ARTICLE 370

Jammu and Kashmir enjoys autonomy in governance since it had its own constitution and separate law.

They had their own separate constitution. The laws made by the Parliament was not applied automatically in the state of Jammu and Kashmir, unless the state legislature agrees to them.

The people of Jammu and Kashmir enjoyed dual citizenship, they were citizens of India as well as of the state of Jammu and Kashmir.

The privilege of owing and buying property or land in Jammu and Kashmir was limited to the permanent residents of Kashmir.

WHO ARE THE PERMANENT RESIDENTS OF KASHMIR ?

- a person who was a state subject on May 14, 1954.
- who had been a resident of the state for 10 years. • has lawfully acquired immovable property in the state.

Jammu and Kashmir was the only state in India permitted to have its own separate flag next to the national flag of India.

Terrorists were easily able to enter and attack various parts of Kashmir.

Article 370 could be abrogated or amended only upon the recommendation of the State's Constituent Assembly.

VI. ABROGATION

Article 370 was removed from the Constitution by the government of India in the year 2019 with the majority support from both the houses of the parliament.

In the year 2019, the prevailing government Bhartiya janta party declared on 5th August 2019 that no special status would be granted to the state of Jammu and Kashmir and now along with the other states of India,

Jammu and Kashmir will also be subject to the same laws and rights as the rest of the country. The state of Jammu and Kashmir was bifurcated into two union territories namely Jammu and Kashmir and Ladakh according to the Jammu and Kashmir Reorganization Act of 2019¹.

The decision to revoke article 370 was based on several reasons such as:-

- Integrating the state of Jammu and Kashmir more closely with the rest of India since it was a temporary provision and it caused a lot of hinderance in the uniform application of Indian laws in the whole territory.
- The government also aimed for the economic development of Jammu and Kashmir.
- The revocation of article 370 would help in taking a step towards national unity.

However, 23 petitions came before the Supreme Court, challenging the decision of the government of India as unconstitutional.

According to the opinion of few citizens of India, the government of India abrogated Article 370 in an unconstitutional manner and it was a constitutional fraud.

On 11th December, the Supreme Court under five judge constitutional bench chaired by the chief justice of India D Y Chandrachud gave the decision in favor of government of India. Supreme Court upholds article 370 abrogation.

VII. FACTS OF THE CASE

The main concern of the petitioner was that Article 370 could only be abrogated by the Jammu and Kashmir's constitutional assembly according to the provision of Article 370, but since the Jammu and Kashmir's Constitutional assembly was dissolved in the year 1957, the government of India has no power to abrogate Article 370.

However, in the year 2015, the state government in Jammu and Kashmir was formed by an alliance of the People's Democratic party with the Bhartiya Janta party.

The chief minister of the state resigned on 19 June 2018, after the Bhartiya Janta party withdrew support. The following day, governor issued a proclamation under section 92 of the Constitution of Jammu and Kashmir, which gave power t to the governor to take over all the power and functions under his control in an event of a failure of the constitutional machinery in the state.

Section 92 requires the concurrence of the President of India given under clause (5). However, the proclamation ceases to exist after six months. Therefore, the concurrence of the President, governors rule was implemented in the state. On 21st November 2018, the

legislative assembly was dissolved by the governor under section 53(2) of the Constitution of Jammu and Kashmir. The governor submitted a report to the President recommending the application of president's rule under Article 356 of the Constitution in the state. Therefore, president's rule came into effect from 19th December 2018 in the state. President's rule was extended on 3rd July 2019.

On 5th August 2019, the President issued CO 272(the constitution order 2019).

The President exercise of power under article 370(1) applied:-

- (a) All the provisions of the Constitution of India by suspending all constitutional orders which were made applicable to Jammu and Kashmir either with or without modifications and
- (b) Article 367(4)-changing the term "constituent assembly" in the proviso of Article 370(3) to "legislative assembly".

According to article 356 of the Indian constitution during presidential rule, all the powers of the state legislature are vested in the hands of the Parliament. Since article 356 was subsisting in the state of Jammu and Kashmir, the Parliament undertook the exercise to cease article 370 and declare it in operative in its capacity as the legislature of the state.

Simultaneously, The Jammu and Kashmiri reorganization Bill 2019 was also passed in both the houses of the Parliament.

¹ "Reorganisation Act"

According to the Jammu and Kashmir re organization Bill of 2019, state of Jammu and Kashmir was bifurcated into:-

- a) The union territory of Jammu and Kashmir with the legislative assembly and
- b) The union territory of Ladakh without the legislative assembly.

VIII. JUDGEMENT

On 11th December 2023, five senior most judges of the Supreme Court upheld the decision of union government to abrogate article 370.

The judgement consisted of 476 pages out of which justice SK Kaul wrote 121 pages, Justice Sanjeev Khanna wrote judgement of three pages and chief Justice DY Chandrachud, Justice BR Gavai and Surya Kant altogether wrote 352 pages.

IX. REASONS BEHIND THE JUDGEMENT

- a) CJI Chandrachud strongly believed that Jammu and Kashmir did not retain internal sovereignty. Jammu and Kashmir was a part of Indian territory according to Article 1 of the Indian Constitution.
 - b) Article 370 is a temporary provision contained in PART XXI of the Indian constitution.
 - c) Governor can assume “all or any” roles of the state legislature referring to the landmark, 1994, ruling in S.R. Bommai vs Union of India², which dealt with the limitations and of the governor under president’s rule.
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- d) There was no requirement for the President to secure the concurrence of the state government according to the provisions of article 370(1)(d).
 - e) The chief justice also held that Parliament in a state under the President rule was not just restricted to lawmaking it further extended to executive action.

X. CONCLUSION

The recent judgement upheld the principle of “_Ek Bharat Shrestha Bharat”.

The long struggle finally came to an end in the year 2019 leading to a better future for the diverse and democratic country of India.

This abrogation was necessary for the preservation of national integrity and sovereignty of the country(principles of preamble). It united all the states of India according to the provision given in Article 1 of the Indian constitution which states “India that is Bharat is a union of states”.

Abrogation was also necessary for boosting the economic development. Various schemes have been launched to support development such as the Industrial Development Scheme (IDS) and the Prime Minister Development Package (PMDP).

According to an official survey, the number of terrorist incidents have decreased by over

50%. The factors behind the decline of violence include increased security, public support, etc.

After the abolition of Article 370, the government is working towards construction of new infrastructure in the state of Jammu and Kashmir, such as construction of new roads, bridges, power lines.

INOX cinema, the first multiplex cinema is launched in Srinagar therefore after the long period of 3 decades Kashmir gets back the theatre.

Equal rights of women in property is also given after the removal of special status. Fundamental rights is now equally applicable in the state of Jammu and Kashmir as enjoyed by the Indians in other states.

Lastly, it has resulted in an increased number of tourism, highest percentage of tourism was recorded in the year 2022 in India, since 75 years of independence.

² Union of India ([1994] 2 SCR 644