
ABROGATION OF ARTICLE 370: IMPACT ON ASYMMETRICAL FEDERALISM IN INDIA

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ABSTRACT

Asymmetrical federalism refers to non-symmetrical division of political, fiscal and administrative powers and relations among states even though they share same constitutional status. After enjoying 69 years of said special status, the Central Government has scrapped Article 370 from constitution of India which has been followed by imposition of Section 144 of Code of Criminal Procedure ('1973 Code') and exercise of preventive detention laws in various parts of the said territory. The said action of scrapping of Article 370 has been widely challenged on account of procedural limitations embedded in the Indian Constitution. However, the same has impacted the asymmetric element in federal fabric of Indian state.

The author envisages to analyse the said impact along with the detailed study on nature of Indian Federalism in the light of Article 370. The author, moreover, aims to do a comparative analysis of federal arrangement prior and post to the abrogation. The said research article scrutinizes the historical background of Article 370 along with dealing with constitutionality of such abrogation and connects the abrogation of Article 370 with the facets of basic structure of the constitution. The author attempts to make critical and systematic examination of the impact of said abrogation on asymmetrical federalism in India. The scope of study is limited and confined to analyse and impact and comparative analysis of nature of Indian federalism prior and post such abrogation. The study is doctrinal, analytical, explanatory and comparative in nature.

Key words: Abrogation, Article 370, Asymmetrical Federalism, Basic Structure, Comparative Analysis.

1. INTRODUCTION

One of the most recent developments in relation to state of J&K also called as the 'Crown of India' is removal of special status owing to abrogation of Article 370 of the constitution. Being a sensitive border state, the valley had witnessed all kinds of situations pertaining to war and terrorism and, therefore, followed a unique style of federalism, i.e., asymmetrical federalism. Owing to the same, the state has enjoyed special powers and autonomy even though having same constitutional status.

With the abrogation of Article 370, the territory of the state has been bifurcated into two Union Territories, i.e., Union Territory of Jammu and Kashmir (with legislative assembly) and Union Territory of Ladakh (without legislative assembly) for better control and administration by the Centre directly. Due to such transformation of state of J&K into Union Territories, the federal structure and autonomy of the state prior to such abrogation has gravely impacted, thereby, the said issue has an intriguing relation with the changing nature of federalism in India.

Originally, India had been considered as 'quasi federal' as the legislative and executive powers of states are separately recognised in the constitution. States have their own area of operation. Powers of states are not dependent on the centre but they are derived from the supreme authority, i.e., constitution. The apex court in *S.R. Bommai v. Union of India*¹ had highlighted that 'federation' constitutes union of states having distribution of powers which are duly recognised by the constitution. The states are sovereign and independent within their territory. However, in India, states cannot secede from union as it is "Indestructible Union of Destructible States".

However, the Centre plays a significant role and is stronger than states. Centre can create new states, alter their boundaries, divide the states or unite them without their consent. Likewise, the Central Government in India had divided and converted the state into Union Territory. Moreover, the Centre can also override the states' power in accordance with the constitutional provisions and the residuary power vests with the Centre. States are also dependent on the Centre with respect to fiscal resources. Therefore, it can be concluded that India is a federal country with a strong centre.

Herein, the importance is given to asymmetric element of federalism and its status in India after abrogation of Article 370. Asymmetric federalism means a federalism based on unequal

¹ S.R. Bommai v. Union of India, AIR 1994 SC 1918.

arrangements, unequal powers and special treatment for some units within a federation. It is quintessential in the constitution in order to secure rights of states in federal polity, ensure unity in diversity, social justice, satisfy special needs of status with unequal status, reduce radicalisation and for better representation in democracy. The essence of asymmetric federalism can be inferred through various instances involving different kinds of administrative units, i.e., centre, states, union territories (with and without legislature). Puducherry and Delhi can be the examples of union territories having legislature, however, Union Territory of Jammu and Kashmir has been added to the list after abrogation of Article 370.

Apart from the aforesaid two, special status has been granted to the State of Jammu and Kashmir (J&K) (then) along with north-eastern regions through Article 370 and 371 respectively. However, the special status has also been granted to other states under the constitution, namely, Assam (Article 371B), Manipur (Article 371C), Andhra Pradesh (Article 371 D&E), Sikkim (Article 371F), Mizoram (Article 371G), Arunachal Pradesh (Article 371H) and Goa (Article 371I). This difference in power and autonomy among similar administrative units has created asymmetry in the nature and functioning of Indian federalism. However, the same is being impacted a lot owing to abrogation of Article 370.

The research article in its Part II delves into constitutional history and inception of Article 370 along with its relation to the basic structure of the constitution. Part III explores the said impact and the Part IV pertains to the comparative analysis of federal arrangement prior and post to the said abrogation of the Article 370.

2. ARTICLE 370: BASIC STRUCTURE AND CONSTITUTIONAL HISTORY

Until August 06, 2019, the State of J&K enjoyed special status owing to the existence of Article 370. The said special status under Article 370 is inclusive of state legislature having autonomy to extend Indian laws within territory of J&K (then) and its own definition of 'permanent residents' (people from other states are devoid of owning any kind of property within its territory) along with having its own constitution, penal and criminal codes. The President was empowered to extend the constitutional provisions to the state of J&K, with or without modifications, through timely notifications. It can also be regarded as a means for applicability of Indian Constitutional provisions in the state of J&K.

Apart from state of J&K, the essence of asymmetrical federalism in the form of special status can also be found with north-eastern states. Besides several differences, the commonality is

with respect to the fact that discretionary power of Governor in relation to certain special responsibilities overrides the decision after the consultation process with respective Council of Ministers. However, the said essence has been incorporated in the constitution through Article 370 for regulation of arrangement between centre and state. Thus, Article 370 has been constantly and strongly argued as a basic and essential feature of Indian Constitution since its inception.

However, its abrogation has proved that Article 370 has a temporary status as it merely indicates constitutional recognition of privileges along with contractual rights and obligations of parties mentioned in Accession Instrument signed in 1948 between Indian Government and Kashmir's ruler. The said instrument act as a treaty which regulates the relationship and distribution of powers between Central Government and concerned state. Abrogation of privileges and conditions of said instrument unilaterally could be regarded as a breach of contract under the instrument of accession, and therefore, according to the general rule the parties to the instrument would be restored to the position prior to the agreement.

Apart from the same, the constitutionality of said abrogation along with bifurcation of states has also been challenged on the grounds that owing to federal structure and procedural limitations embedded in the Article 370, the centre could not scrap it unilaterally and opposition must have sufficient political support in state assembly in order to scrap it. The state legislature of J&K was given the authority to retain, modify or delete the said article as per the contract (proves its temporary status), although, it had wisely decided to retain the same.

The High Court of Delhi in *Kumari Vijayalaxmi Jha v. Union of India*² rejected the argument that Article 370 was temporary and its existence and continuation is a fraud on the Constitution. The court distinguished Article 370 from Article 369 and remarked that element of temporariness in the latter arises from the time limit of five years mentioned in the article in itself. The apex court in *State Bank of India vs. Santosh Gupta*³ also accepted that due to historical reasons, Jammu & Kashmir had a special status. Though the Article 370 was intended to transitional or temporary, but it has become a permanent feature of the constitution for the reasons mentioned in Article 370 (3) of the constitution which states that without the recommendation of the constituent assembly Art.370 cannot be abrogated.

² Kumari Vijayalaxmi Jha v. Union of India, 2017 SCC OnLine Del 7884.

³ State Bank of India vs. Santosh Gupta, (2017) 2 SCC 538.

In *Prem Nath Kaul v. State of J&K*⁴, a five-judge bench of the Supreme Court observed that Article 370 (2) implies that the constitution-makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provisions of Article 370 (1) is made conditional on the final approval of the Constituent Assembly of Kashmir. The apex court, herein, held that that Jammu and Kashmir's relationship with India was to be finally determined by the Jammu and Kashmir Constituent Assembly.

But the same court took a contrary stand in *Sampat Prakash v. State of J&K*⁵ and stated that Article 370 could still be invoked even after the dissolution of Jammu and Kashmir's Constituent Assembly. The five-judge bench of the apex court refused to accept that Article 370 is temporary in nature and stated that it has never ceased to be operate, therefore, is a permanent provision. If it is a permanent feature of our Constitution then it cannot be amended and thus can be said to be the part of the basic structure. Under Article 368, Parliament can amend any provision of the Constitution but as per the *Keshvananda Bharti v. State of Kerala*⁶, no constitutional amendment can either destroy the Constitution or alter its basic features.

The Supreme Court held that the word 'temporary' in the heading of Chapter XXI of the constitution does not mean temporary. Any temporary provision may indeed be termed as 'special'. Thus, the word 'special' in the heading of this chapter was inserted by the 13th constitutional amendment in 1962. Sardar Patel himself had said in the Constituent Assembly that a 'special provision' had been made for the Kashmir in view of the existing relationship of the centre with the state.⁷

3. ABROGATION OF ARTICLE 370 AND ASYMMETRICAL FEDERALISM

The abrogation of Article 370 has been strongly opposed owing to the certain reasons:

- The presidential order dated August 06, 2019 under Article 370 (1) was considered as colourable exercise of power. It was an unjustified action done under the guise of powers granted under the constitutional provisions.

⁴ Prem Nath Kaul v. State of J&K, AIR 1959 SC 749.

⁵ Sampat Prakash v. State of J&K, AIR 1970 SC 1118.

⁶ Keshvananda Bharti v. State of Kerala, AIR 1973 SC 1461.

⁷ Faizan Mustafa, Article 370, Federalism and Basic Structure of the Constitution, The India Forum, September 27, 2019.

- The mandate provided under the proviso to Section 370 (3) was not complied with. The said presidential order was passed unilaterally by the centre without due recommendations of the constituent assembly of J&K.

However, the other side favouring the abrogation argued that presidential order dated August 06, 2019 was not a colourable piece of legislation and was lawful exercise of power. Moreover, it is argued that mandate under Section 370 (3) was complied by the centre in the view that, in absence of state legislature due to presidential rule in the state in accordance with Article 356, the recommendations were taken from the Governor of the state.

Initially, merely Article 1 was extended to the state of J&K but through later orders like the *Constitution (Application to Jammu and Kashmir) Order, 1954* (hereinafter referred to as ‘1954 Order’) other major constitutional provisions were also extended to the territory of J&K. The Constituent Assembly of the state of Jammu and Kashmir, referred to in Article 370 (3), ceased to exist in 1957 that made the abrogation of the article impossible. The *Constitution (Application to Jammu and Kashmir) Order, 2019* (hereinafter referred to as ‘2019 Order’), issued on August 6, superseded the 1954 Order and made all the provisions of the Indian Constitution applicable to the state. The order also substituted the word ‘constituent assembly’ in 370 (3) with ‘Legislative Assembly of the state’, thus paving the way for the abrogation of Article 370.

Article 3 empowers the Parliament to create new states through Reorganisation Bill only after the president has obtained the consensus from the concerned state legislature. Due to dissolution of state assembly of J&K through imposition of Article 356, there was no constitutional body to make the recommendations either under Article 370 (3) or under Article 3. Therefore, the said mandate paved the way through Article 356 (1) (b) which allows president to entrust to the Parliament the powers of the state legislature while president’s rule is in operation in a state.

In lieu of the same, a Resolution was presented in the Rajya Sabha that recommended the abrogation of Article 370 and the bifurcation of the state into two Union Territories. The Jammu and Kashmir Reorganisation Bill, 2019 presented on the same day made provisions for the bifurcation. The Resolution and the Bill were passed by the Rajya Sabha on the same day and by the Lok Sabha on 6 August 2019. Acting on the recommendation, the president issued the order abrogating Article 370 with effect from 6 August 2019.

This has vitiated the nature of federalism in the country which is being regarded as the basic and essential feature of the constitution. The bifurcation of a state without satisfying the requirements of Article 3 and abrogation of Article 370 without consultations clearly goes against the principles of Indian federalism. Bifurcating a state that enjoyed special status in the Constitution and reducing it into a Union Territory, at first might win elections, but is a serious blow to the constitutional fabric of the country.

The said action also suffers with grave procedural illegalities inherent within the process of the said outcome. The constitutional and judiciary history had witnessed several such instances and laid down the factum that 'means to achieve an outcome are equally important to be just and fair as outcome.' The same is evident through the cases of *Indira Gandhi v. Raj Narain*⁸, *Kihotto Holohan v. Zachillu*⁹, *Rajendra N Shah v. Union of India*¹⁰ and many others.

Apart from procedural illegalities, the said action is not founded on principles of constitution and was benefitted from unconstitutional abolition of state legislative council. Moreover, the other two union territories having their own elected assembly and a council of ministers derive their power from specific constitutional provisions, i.e., Article 239AA and 239AB deals with Delhi and Article 239A and 239B along with provisos to Article 240 deals with Puducherry. But in the case of J&K, a legislative assembly is created only on the backing of a legislation.

It is to be noted that section 13 of the bill does not amend Article 239 A, but merely extends that provision to the Union Territory of Jammu and Kashmir. It can have far reaching constitutional implications as one of the organs of the state is at the complete mercy of the centre and can be abolished at any time even by an ordinance. The state of J&K was one of the few states that had a bicameral legislature. Article 169 prescribes detailed procedure for the abolition of legislative council in a state. It is through a Parliamentary law that the Council can be abolished. However, for the Parliament to consider this issue, a resolution passed by the State Legislative Assembly by two thirds majority is necessary. Section 57 of the bill dissolves the Legislative Council without recourse to the procedure prescribed under the said article.¹¹

⁸ *Indira Gandhi v. Raj Narain*, AIR 1975 SC 1590.

⁹ *Kihotto Holohan v. Zachillu*, AIR 1993 SC 412.

¹⁰ *Rajendra N Shah v. Union of India*, 2013 (2) GLR 1698.

¹¹ Shiju Mazhuvanchery, Constitution as a puzzle: Abrogation of Article 370 and Kashmir conundrum, The Week, August 09, 2019.

4. NOW AND THEN: COMPARATIVE ANALYSIS

The special status of Article 370, prior to its abrogation, provided for extension of laws by the centre pertaining to the subject matter mentioned in the instrument of accession mere consultation (discussion) with the state government is required. However, for any subjects other than the aforesaid, concurrence (consent) of the J&K government is required. However, after abrogation, contingent nature of asymmetric constitutional provisions has come in the limelight.

The abrogation of Article 370 has exposed ambiguities that have long been evident in federal system of India. Asymmetric agreements have been negotiated in settlement of a number of regional conflicts in India. Kashmir's autonomous status was the oldest and most far-reaching of these provisions. But in practice, there has been a contingency to autonomy provisions, leaving them open to revision by popular majorities at the all-India level.¹²

Post abrogation, the centre got the direct control over administration of the state. There would be no special status, dual citizenship, two flags or any kind of separate law for state of J&K. In absence of special status, people from other states can claim ownership of property in the State of J&K. Moreover, the federal asymmetry of the country has disfigured and is being under constant threat with respect to special status granted to other such states in accordance with the constitutional provisions. Elections will be conducted after every 5 years and Centre, on satisfactory conditions, can declare financial emergency under Article 360 in the state of J&K.

Article 6 of the constitution of J&K which mentions about permanent residents of the J&K would also be automatically repealed. Moreover, Article 35A which provides for privilege and authority with state legislature of J&K to define permanent residents of J&K along with the special right exercised by them, is followed from the roots of Article 370 would be de facto unconstitutional owing to the fact that it was introduced through 1954 Order. The said order has now been set aside by the 2019 Order and extended all constitutional provisions of India inclusive of fundamental rights to the territory of J&K. Hence, discriminatory provisions violating the fundamental principle of equality would also be discarded as invalid and unconstitutional.

¹² Louise Tillin, The fragility of India's Federalism, *The Hindu*, August 08, 2019.

5. CONCLUSION AND PATH AHEAD

Article 370 was the symbol of de jure asymmetrical federalism in the constitution of India. The recent abrogation of the said article would probably result in further free fall in the federal asymmetry embedded in the constitutional provisions and has been regarded as the basic feature of the constitution. The furtherance with the slogan of 'one nation, one constitution' would possibly lead to decline in general asymmetry inherent in the federal fabric of the constitution of India. The most feasible way to combat the prospects of the same is the formal and judicial recognition of federal symmetry inherent in the constitutional provisions as the integral and essential part of 'basic federal structure' of the constitution.

By abrogating Article 370, bifurcating Jammu and Kashmir and downgrading the status of the successor units to Union Territories, the government has used the flexibility of the federal provisions of the Constitution to other ends. This is not the first time that a Central government has used its powers to bifurcate a State in the absence of local consensus. This was also seen with the creation of Telangana in 2014. As in the case of Telangana, the creation of the Union Territory of Ladakh does respond to a long-run demand in this region with a substantial Buddhist population. However, the decision to transform the remainder of J&K State into a Union Territory, at the same time as annulling Article 370, is a departure with profound and as yet unknown consequences in Kashmir, and wider implications for Indian federalism.¹³

¹³ Id.