
HOLISTIC ANALYSIS OF ARTICLE 370 WITH REGARD TO THE RECENT VERDICT

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Introduction

Article 370 has been the most controversial provision of the Indian Constitution since its inception. This Article of the Constitution again came in the limelight during 16 days of intense deliberations in the Supreme Court with regard to the petition challenging the abrogation of Article 370 and diluting the special status of Jammu and Kashmir. The 16 days of hearing ended on 5th September and the verdict on abrogation of Article 370 came on 11th December. To understand the current scenario there is a need to understand the introduction as well as revocation of the Article 370 which has been discussed in this paper to provide a holistic outlook of the topic and understand the intricate balance between executive action and constitutional principles.

The Origin of Jammu and Kashmir's Unique Status

After Indian Independence Act, 1947, most of the princely states joined India except 3 namely Hyderabad, Junagadh, Jammu and Kashmir. Later Hyderabad was merged with Union of India by way of Police action, Junagadh was merged by way of referendum and Jammu and Kashmir signed Instrument of Accession due to external aggression from Pakistan. Instrument of Accession was signed by Maharaja Hari Singh on 26th October, 1947. By this Instrument of Accession three powers were transferred to the government of India namely defence, external affairs, communications. Meanwhile Pandit Nehru approached UN regarding aggression by Pakistan where UN called for ceasefire where a big piece of land was illegally acquired by Pakistan which is now called as Pakistan Occupied Kashmir (POK). Also United Nations Security Council called for Plebiscite to which India and Pakistan did not agree and promised Constituent Assembly as an alternative. Thus, it was decided that till Constitution of Jammu and Kashmir is framed Article 370 was adopted as a temporary provision between India and Jammu and Kashmir.

Article 370

It was a temporary provision with respect to the State of Jammu and Kashmir which was the result of the Instrument of Accession which was signed by Maharaja Hari Singh. As per this Article Parliament can make laws on three items in case of Jammu and Kashmir which were mentioned in the Instrument of Accession, in consultation with the State government. Also, the Parliament was empowered to make laws on other subjects apart from those mentioned in the Instrument of Accession only with the concurrence of the government of the State of Jammu and Kashmir. It was also mentioned that only two articles of the Indian Constitution were applicable to Jammu and Kashmir i.e Article 1 and Article 370 and other Articles of the Indian Constitution could be made applicable by the Presidential order passed by the President of India. And for deleting this particular article concurrence of Constituent Assembly of the State of Jammu and Kashmir was necessary.

Constituent Assembly of Jammu and Kashmir gave Constitution to Jammu and Kashmir in 1956. The first Article of Jammu and Kashmir stated that Jammu and Kashmir as it existed on 15th August, 1947 is an integral part of union of India. Thus, this Article indirectly signifies that Pakistan Occupied Kashmir (POK) is also part of Union of India.

Nehru-Sheikh talks

When the Constituent Assembly of Jammu and Kashmir reached at its main decisions representatives of the Indian Government and the State of Jammu and Kashmir met to discuss its implications. This arrangement between Sheikh Mohammad Abdullah (Prime Minister of Jammu and Kashmir) and Jawaharlal Nehru agreed upon in July 1952 came to be known as the Delhi Agreement of 1952. While negotiations were going on Sheikh Abdullah was arrested in the Kashmir Conspiracy case. Renegotiations began with Bakshi G Muhammad. Thereafter Presidential Order of 1954 was issued by the President of India in concurrence with government of the State of Jammu and Kashmir headed by Bakshi G Muhammad which came to be known as 'Constitution (Application to Jammu and Kashmir) Order, 1954'. By this Presidential Order other provisions of the Indian Constitution such as Supreme Court, Election Commission etc. apart from Article 1 and 370 were made applicable to the State of Jammu and Kashmir. Amidst all other provisions Article 35A was also made applicable to the State of Jammu and Kashmir.

Article 35A

The Article 35A was same as the State subject Law that were passed during Dogra rule in Jammu and Kashmir to protect the land and jobs being acquired by an outsider. These State subject laws were passed under the influence of Kashmiri Pandits. Thus, this Article 35A gave power to State Legislature to identify residents and entitle them to special benefits related to employment, scholarship and other privileges. But the biggest advantage for the permanent residents was that only they have the right to own and buy property in the State of Jammu and Kashmir. Adding of Article 35A in the Constitution means amending the Constitution but this amendment was not done under Article 368 by the Parliament but by Presidential Order of 1954 under Article 370. Two questions that were raised in this regard are as follows:-

- i.) How Article 35A can violate fundamental rights?
- ii.) How can Constitution be amended by Presidential Order and not by Article 368?

The answers to above questions lie in Article 370(d) which states that -such of the other provisions (apart from Article 1 and 370) of this Constitution shall apply in relation to that State (Jammu and Kashmir) subject to such exception and modifications as the President may by order specify. Thus, fundamental rights had been made applicable to Jammu and Kashmir but with an exception and that exception was Article 35A.

Thus, it can be said that the fundamental purpose of the Presidential Order of 1954 was exact opposite: instead of giving the State a 'special status', it was designated to take autonomy away from it. At the time of its introduction this order, the Order was celebrated in India as a great step towards bringing Jammu and Kashmir closer into the Union of India. Even the right-wing leaders had hailed it as a "commendable step". No eyebrows were raised over the minor issue of Article 35A, which made up a very small component of the Order.

DELETION/AMENDMENT OF ARTICLE 370

In the 2015 Assembly Election neither BJP nor People's Democratic Party was able to secure a clear majority, therefore BJP-PDP formed a coalition government but this coalition government collapsed in June,2018. As per Article 92 of the J&K Constitution, Governor's rule was imposed in Jammu and Kashmir but it was only for 6 months. Thereafter President's

Rule was imposed in December, 2018. In 2019 Lok Sabha Election BJP won the election and on 5th August, 2019 Presidential Order of 2019 (C.O.-272) was issued which superseded Presidential Order of 1954. According to Presidential Order of 2019, entire Indian Constitution was made applicable to J&K. Also, Article 35A disappears as it was inserted by Presidential Order of 1954.

Article 367 was amended (interpretation clause) in the following ways: -

- i.) Sadar-i-Riyayat (President) acting on the advice of the COMs shall be construed as reference to the governor of J &K.
- ii.) In proviso to clause (3) of Article 370 of this Constitution the expression Constituent Assembly of the State referred to in clause (2) shall be read as “Legislative Assembly of the State”.

Thus, through these amendments it became possible to abrogate/modify Article 370 as it was mentioned in Article 370 that for any modification or abrogation of Article 370 concurrence of Constituent Assembly of J&K is required but the Constituent Assembly of Jammu and Kashmir was dissolved after framing of the Constitution for the State of Jammu and Kashmir. Thus, for the sake of abrogation of Article 370, Article 367 was amended which mentioned that Constituent Assembly means Legislative Assembly of the State. But there was no legislative assembly as the State was under President’s rule and thus, the Parliament became the legislative assembly of the State of Jammu and Kashmir and passed a statutory resolution urging President to amend Article 370 by passing the Presidential Order and second statutory resolution talked about the reorganization of the State of Jammu and Kashmir into union territory of Jammu and Kashmir and Ladakh. There were several petitions challenging the abrogation of Article 370 and bifurcation of erstwhile State into two union territories – Union territory of Jammu and Kashmir and Ladakh. The Supreme Court gave its verdict on these petitions on 11th December, 2023.

SC VERDICTS ON ARTICLE 370

PREM NATH KAUL V. UNION OF INDIA ¹

¹ AIR 1959 SC 749

In this case, the validity of the Big Landed Estates Abolition Act ,1950 was challenged. This Act was enacted by Maharaja Yuvaraj Karan Singh to boost agricultural production by transferring land from estate owners to tillers.

The Supreme Court upheld the Act affirming that the maharaja possessed the legislative power to enact it. Also, in this case the Supreme Court made observations regarding the role of the Constituent Assembly of Jammu and Kashmir.

PURANLAL LAKHANPAL V. THE PRESIDENT OF INDIA²

In this case Article 81 of the Indian Constitution was amended by the Presidential order which allowed representation of J&K in Lok Sabha only through indirect elections and only the President was empowered to select these members after consulting the legislature of J&K.

The court upheld the amendment and held that the word ‘modification’ used in Article 370(1) must be given the widest meaning in context of the Constitution.

SAMPAT PRAKASH V. STATE OF JAMMU AND KASHMIR³

In this case an order was issued by the President of India extending the application of Article 35(c) in J&K which provided immunity to preventive detention laws from fundamental rights claims in the state. This was challenged in the SC but it was upheld by the court.

MAQBOOL DAMNOO V. STATE OF JAMMU AND KASHMIR⁴

In this case Presidential order was challenged which stated that “Sadar-i-Riyasat” in Article 370 was to be construed as governor of J&K. The petitioner in this case was detained under the Preventive detention Act that was passed by the assent of the governor of J&K.

The court upheld the validity of the presidential order and held that the governor is the successor to Sadar-i-Riyasat.

² 1962 SCR (1) 688

³ 1969 SCR (3) 574

⁴ 1972 SCR (2) 1014

RE: ARTICLE 370 OF THE CONSTITUTION OF INDIA⁵

After the abrogation of Article 370 on August 5, 2019 several petitions were filed before the Supreme Court challenging the constitutional validity of the abrogation. On 28 August, 2019 this case was referred from 3-judge bench to 5-judge bench of the SC. Due to Covid 19 Pandemic this case remained in dormant state for few years and on 11th July 2023 the 5-judge bench of the SC decided to hear the case from August 2, 2023. The arguments in the case went on for 16 days emphasizing the historical, constitutional and political aspect of such abrogation. The arguments concluded and the SC reserved its verdict in this case. On 11th December 2023 the SC passed the historic verdict and upheld the constitutional validity of abrogation of Article 370. The bench in this case comprised of Justice S K Kaul, Sanjeev Khanna, B R Gavai, and Surya Kant headed CJI DY Chandrachud. CJI Chandrachud said that Jammu and Kashmir had no internal sovereignty after accession to India. The court also directed the center to restore statehood of Jammu and Kashmir and upheld Ladakh being as a union territory. Justice Kaul also recommended for setting up of a Truth and Reconciliation Commission in J&K.⁶

Conclusion

Thus, the recent verdict, which exchange and underlines the essence of constitutional democracy in India, wherein public opinion expression occurs through established democratic mechanisms. The Chief Justice of India, Justice Chandrachud's observations in present case shed light on the delicate balance between parliamentary representation, executive actions, and the preservation of constitutional principles. The recent case on Article 370 decided by the Supreme Court will have a significant impact on the democratic setup of the Country. It will resolve the debate regarding constitutionality of abrogation of Article 370 which will have a harmonizing effect in the Country as well as in the State of Jammu and Kashmir. After abrogation of Article 370, since 2019 many developmental projects have been launched in the State of J&K for the holistic development of the State. Over the last 2-3 years there have been decreased stone pelting as well as terrorist activities in the region which will lead the State on a progressive path.

⁵ 2023 INSC 1058

⁶ Supreme Court Observer, 'Challenge to the Abrogation of Article 370', < <https://www.scobserver.in/journal/challenge-to-the-abrogation-of-article-370-judgement-explainer/> > accessed 17 December, 2023