

## **Elimination of Article 370 from Indian Constitution: Its implication on Kashmir**

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### **Abstract**

This paper deals with how Jammu & Kashmir has been the main driver of disputes between India and Pakistan since 1947. The two nations are now equipped with atomic forces. India and Pakistan had wars in 1948, 1965, and 1971 and had fought in 1999 over the Kargil conflict on the Kashmir issue also. India contravened the Shimla Agreement and the UN Security Council's resolution and on fifth August 2019, India took over its occupied region of Jammu and Kashmir by repealing article 370 and 35A of the Indian Constitution. Without remembering sensitivities appended to this basic issue, Indian striking activity has irritated an all-around tense climate in South Asia. In the event that the Kashmir issue isn't tended to convenient, it will cause huge harm to the locale of South Asia and particularly to the individuals of Jammu and Kashmir.

**Key Words:** Jamu & Kashmir, India, Article 370, Constitution, UN Security Council.

### **Introduction**

Not many people know the reason behind the formulation of Article 370 in the Constitution of India, and it has played a vital role for Jammu and Kashmir to become an important part of the Indian Constitution. It was despite the political apprehension of the Sardar Patel, Political Parties and Constituent Assembly. When the B.R Ambedkar refused to frame this Article, Jawaharlal Nehru appointed his most trusted Cabinet Member N. Gopalswami Ayyangar to draft Article 370 of the Constitution of India. Earlier Sheikh Abdullah was directed to accompany B. R Ambedkar for framing Article 370, but he was strictly against the formation of this Article. In 1950, the Indian Constitution came into force, Article 1 of the Constitution defined Jammu and Kashmir has a particular position. Inequality in India begun from here. Jawaharlal Nehru and Sheikh Abdullah signed an agreement known as the Delhi Agreement<sup>1</sup> to improve relations between the state and the union. Jawaharlal Nehru promised the citizen of India that Article 370 is just a short-term solution and it will be deleted with time. Framers of Article did not mention the period replicate the word temporary in the provision. Does it mean one week, one month, one year, or a decade? Because it took almost half a century to justify and abrogate these words like „temporary, translational and special provision“ which is contained in part XXI of the Constitution. As per the

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<sup>1</sup>Noorani, Abdul G. Article 370: A constitutional history of Jammu and Kashmir. Oxford University Press, 2014.

Instrument of Accession signed by the State, Maharaja provided specifically that dominion of India on the State of Jammu and Kashmir will be limited to the matters related to external affairs, defence, and communication and other matters will be decided by the Maharaja or government itself. Moreover, Clause 7 of the Instrument of Accession also defines that no further laws provided in the Constitution of India are applicable to the State of Jammu and Kashmir.<sup>2</sup>

### **For a clarity we will discuss a timeline**

#### **1947 (instrument of accession)**

First and very important date is 26 October, 1947.

On this day the instrument of accession was signed between Government of India and Raja Hari sing. From that day onwards Jammu and Kashmir become the part of India.

#### **1949 (constitution of India Article 370)**

In 1949 constitution of India was not yet completed. it was still in the process of writing. On 17 October 1949. Article 370 was incorporated in the constitution of Indian.

#### **1950**

After that January 1950 Indian Republic Day. From this day only Indian constitution was started applicable. Now we will look the two important articles of 1950 constitution of the topic related to Jammu and Kashmir. First article "1" which declares Jammu and Kashmir as a state of India and second "Article 370" which states about the temporary status of Jammu and Kashmir.

#### **1954 (First presidential order- Art. 35A)**

W at ever changes made in 35A and 370 is done through specific presidential orders. Similarly on 14 May 1954 a specific order was passes by Dr. Rajendra Prasad. Which name was the constitution to Jammu and Kashmir order 1954? From this Presidential order in 1954 Article 35A was included in our constitution. This is that article which prohibits other Indian citizens and tells that who can be a permanent resident in Jammu and Kashmir.

Generally when you see the constitution of India you will not get 35A there but when will you see constitution of Jammu and Kashmir you will definitely get 35A thee.

#### **1956 (J&K Constitution come into force)**

17 NOVEMBER 1956 on this day constitution of Jammu and Kashmir was started to be applicable. We see that the constitution of Jammu and Kashmir also declares that it is the integral part of India. From 1947 to 1990 many changes took place in Jammu and Kashmir. Looking at the situation of that time Armed Forces Special Power Act was imposed in Jammu and Kashmir in 1990.

#### **2015 (Bharatiya Janata Party)**

Bhartiya Janta Party along with People's Democratic Party Formulated a government together. After that 2016 Mehbuba mufti was made chief minister of Jammu and Kashmir.

#### **2018 (President's rule declared in Jammu and Kashmir)**

After that we come to 2018 where Bhartiya Janta Party breaks their alliance with

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<sup>2</sup>Anand, Adarsh Sein. "07\_Kashmir's Accession to India." (2016).

people's Democratic Party. Now according to the constitution of Jammu and Kashmir Article 92 says that " If states constitution machinery is not running properly then governor rules takes over from there" so from June 2018 governor rules starts in Jammu and Kashmir and from December 2018 President rule imposed in Jammu and Kashmir.

**May 2019 (BJP won the parliamentary Elections their Elections Manifesto talked about Scrapping of Article 35A & 370)**

After that May 2019 BJP wins in parliamentary elections and the election manifesto of BJP clearly states about the renovation of 35A and Article 370 from Jammu and Kashmir.

So this is the time line between 1947 to May 2019. Now we will actually look that what is 35A and Article 370

**Article 370**

Why was Article 370 brought because in 1947 we have signed Instrument of Accession and said that we will make a special provision for Jammu and Kashmir for fulfilling that statement we include Article 370 so from the date there constitution was made since then Article 370 is part of their constitution. So what article 370 does? It provides a special status to Jammu and Kashmir. It says that the other laws of India are not applicable in Jammu and Kashmir. But article 370 also says that it is a temporary provision. Yes, the text of Article 370 says that the special status of Jammu and Kashmir is only a temporary provision after that in Article 370 the removal of this article is also stated. In removal procedure it is stated that whenever if a president wants he can issue a public order and can say that from today onwards article 370 is not applicable but before issuing this order he has to take permission from the constituent assembly of Jammu and Kashmir. Now if the procedure of removal of Article 370 was giving in that article then why he has not removed that article yet? Because the constituent assembly which was discussed for the permission that assembly was already got dissolved since 1957. Legislative assembly and constitutional assembly are two different things in article 370 the matter was to be discussed with constituent assembly. This was not in existence so because of this dead lock the whole problem was coming in removal of 370.

**Article 35A**

In Article 370 for the special status for Jammu and Kashmir for fulfilling that statement in 1954 Dr.Rajendra parsad issued a presidential order and from there onwards Article 35A came in to existence. So by which the other status were separated from Jammu and Kashmir by Article 370. Like that only 35A created discrimination among the people living in Jammu and Kashmir. 35A says that all that laws which other status of our country follow will not be applicable in Jammu and Kashmir. President along with state assembly will decide that which are the laws that will be applicable in J&K. secondly 35A that provision by which it is decided that who is the permanent resident of that state and who are not. So now what are terms of permanent resident? The people who are considered as permanent resident of Jammu and Kashmir. They have special rights and given many privileges and those who are not permanent resident of there has to face many limitations there. Who are permanent residents? It is decided through 35A

and the constitution of Jammu and Kashmir. It tells that the people who are state subject of that state from 14 May 1954 or the people who are living there since 10 years or more or the people who had lawfully acquired an immovable property there. Only this people will be considered as permanent resident and others will not. The importance of permanent and non-permanent residents. the importance of this I give you an example. Right to vote has not been available for the non-permanent residents over there. The second this provision is very discriminating for women. this provision and constitution of Jammu and Kashmir states that if any Kashmir women marries an outsiders or a non-Kashmiri then she will not be able to use property rights of her any more.

### **Historical Background**

In the North-western region of Indian Subcontinent lies the state of landlocked territory that is Jammu and Kashmir (J&K). After the Indian Subcontinent partitioned, Jammu and Kashmir became a disputed territory, hurdled at northeast by the Uygur Autonomous Region of Sinkiang and Tibet (both parts of the people Republic of China). J&K is encircled by Punjab, the Indian states of Himachal Pradesh on the South, on the West by Pakistan and on the Northwest by Afghanistan. The total land of the territory is 85,806 square miles (222,236 square km) out of which 31,643 square miles (81,954 square km) is forcefully constrained by India. The cutting edge province of Jammu and Kashmir advanced from the Dogra central area in Jammu as the home of various racial groups and different cultures of societies. Ladakh in 1843 was vanquished and fused as a part of the state. Dogras attached Baltistan by vanquishing it in 1840. Kashmir valley was included in 1846, at the point when the British offered it to Gulab Singh the Sikh ruler for 7.5 million rupees. The British rented Gilgit in 1935 for a very long time, almost 60 years. The lease was ended by the British in 1947. Chines took control of Aksai Chin in 1962 after the Sino-India war the same year. In 1936 Poonch joined the state, as the consequence of legal arrangement.

The occupants of the valley of Kashmir were prevalently Muslims included with a little society of Sikhs and Kashmiri Pandits. Jammu had Dogra huge Muslim constituents with a Hindu majority. The western strip from Muzaffarabad to Mirpur had a larger part of Punjabi Muslims in Gilgit, Skardu, and Kargil was likewise occupied by Muslims, and lion's share of Ladakh's occupants was Lamaistic Buddhist. In 1947 when the Subcontinent of India was partitioned, the state of Jammu and Kashmir was a part of the 564 august states that had to confront the decision of either being a part of Pakistan or India as per the geographical contiguity and self-determination of the twin principles, following the slip by of British centrality. In spite of the fact that Jammu & Kashmir had a greater Muslim part which was to be 77% in the 1941 census and imparted a stretched outskirts to the new country of Pakistan, the Maharaja was determined to not settle in Pakistan. His hesitance was rooted by longing to stay free and tumult by his transcendently Muslim subjects to his ruthless principle. He was confronted by the equipped rebellion by Muslims from Poonch in June of 1947. The Maharaja fought back with merciless power against the rebellious Muslims. The rebellion at that point spread to different regions of J&K. The Maharaja consented to an agreement to halt and settle the circumstances with the newly independent state of

Pakistan. In 1947 during August and September these circumstances weakened as the Muslim Kashmiri's straightforwardly rebelled. By the end of October 1947, the tribesmen-led revolt prevailed with regards to catching a number of towns, slaughtered an enormous number of regular people, and progressed inside the capital Srinagar up to four miles.

To hinder his impending oust by the propelling dissident soldiers the Maharaja mentioned military guide from India and chose to agree to India on October 26, 1947. The government of India acknowledged Maharaja's succession. India's military intercession for the benefit of the attacked Maharaja prompted the principal India-Pakistan battle over Kashmir. India circulated the debate before the United Nations calling for global in the issue. After their first battle over Kashmir in 1947-48, India and Pakistan consented to a case-fire arrangement on January 1, 1965 and the final line of control divided old J&K in to four political units;

- 1) Ladakh and Jammu and Kashmir valley (Indian administrated Kashmir)
- 2) Azad Kashmir (Pakistan-administrated Kashmir)
- 3) Northern Area (administrated by Pakistan)
- 4) Aksai Chin (controlled by China)<sup>3</sup>

### **Article 370**

On 17<sup>th</sup> October 1947 the Indian constituent assembly adopted Article 370 of the constitution. It clearly states that the provisions of this article with respect to the state of Jammu & Kashmir are temporary and not permanent.

Article 370, which was introduced to the Indian constitution first in the year 1949, has been in place for more than 6 decades now. The instrument of accession was signed by the then Maharaja Hari Singh, the leader of the royal state of Jammu and Kashmir. This helped the state of Jammu and Kashmir to accept to the Indian union. And ever since 1949, article 370, which was most likely to be a short-term solution in the Indian constitution, has been in place for more than 6 decades now. Article 370 empowers the state of J&K to have its own laws and constitutions which fall under both concurrent and union list, except for the matter of finance, communication, defense and foreign affairs. This article has given the leaders of Jammu and Kashmir region enormous powers and autonomy from the Indian union. While some say this article was misused by leaders to collaborate with Pakistan and increase terror operation in India, some argue that autonomy has helped the people of Kashmir.

### **Background**

Not many people know the reason behind the formulation of Article 370 in the Constitution of India, and it has played a vital role for Jammu and Kashmir to become an important part of the Indian Constitution. It was despite the political apprehension of the Sardar Patel, Political Parties and Constituent Assembly. When the B.R Ambedkar refused to frame this Article, Jawaharlal Nehru appointed his most trusted Cabinet Member N. Gopaldaswami Ayyangar to draft Article 370 of the Constitution of India. Earlier Sheikh Abdullah was directed to accompany B. R Ambedkar for framing

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<sup>3</sup>Shakoor, Farzana. "UN and Kashmir." *Pakistan Horizon* 51, no. 2 (1998): 53-69.

Article 370, but he was strictly against the formation of this Article. In 1950, the Indian Constitution came into force, Article 1 of the Constitution defined Jammu and Kashmir has a particularly special position.<sup>4</sup> Inequality in India begun from here. Jawaharlal Nehru and Sheikh Abdullah signed an agreement known as the Delhi Agreement<sup>5</sup> to improve relations between the state and the union. Jawaharlal Nehru promised the citizen of India that Article 370 is just a short-term solution and it will be deleted over time. Framers of Article did not mention the period replicate the word temporary in the provision. Does it mean one week, one month, one year, or a decade? Because it took almost half a century to justify and abrogate these words like „temporary, translational and special provision“ which is contained in part XXI of our Constitution. As per the Instrument of Accession signed by the State, Maharaja provided specifically that dominion of India on the State of Jammu and Kashmir will be limited to the matters related to defense, external affairs and communication and other matters will be decided by the Maharaja or government itself. Moreover, Clause 7 of the Instrument of Accession also defines that no further laws provided in the Constitution of India are applicable to the State of J&K.

#### **10 Lines on Article 370 of the Indian Constitution Essay**

- 1) Article 370 gives exceptional powers and position to the Indian state of Jammu and Kashmir.
- 2) Article 370 of the Indian constitution was formed in the year 1949, 17th of October.
- 3) It empowers the state to form its own constitution other than the Indian constitution.
- 4) It empowers the Jammu and Kashmir legislature to take decisions independently on all fronts but not in the matters of communication, defense, finance, and foreign affairs.
- 5) Article 370 of the Indian constitution was abrogated in 2019 by the Indian government.
- 6) Kashmir problem, where both India and Pakistan exercises its right over the territory, is the reason why article 370 was formed.
- 7) The autonomous power that is given to Jammu and Kashmir resulted in increased terrorist operations across the borders.
- 8) State of Jammu and Kashmir was removed, and two new union territories were formed which are a union territory of Jammu and Kashmir and Union territory of Ladakh, Leh and Kargil.<sup>5</sup>
- 9) Kashmir is quite possibly a part of the most hostile regions in the entire world.
- 10) Kashmir has been in curfew for a year now, since the revocation of article

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<sup>4</sup>Arora, Radhika Dev. Varma, Surender Ajnat, and Mr Harbhajan Dass Sampla. "ABROGATION OF ARTICLE 370 OF THE INDIAN CONSTITUTION: AN ANALYTICAL STUDY."

<sup>5</sup>Noorani, Abdul G. *Article 370: A constitutional history of Jammu and Kashmir*. Oxford University Press, 2014.

370.

### **NATURE OF ARTICLE 370:**

To understand the question of the basic principle of the constitution of India one should study the nature of this Article first. So, in many Supreme Court decisions, it has been decided that it is the temporary provision of the Constitution but happened to be the permanent provision from the past half-decade. This Article was the political venture and used as a weapon by the politicians of Jammu and Kashmir. It has few of the fiscal implications: 1. Applicability: Union government with the consensus of the state govt. before applying all other law except the law related to defense, external affairs. and communication. All the provision of the Indian Constitution are not applicable on the state J&K like the whole Part VI does not apply to Jammu and Kashmir. No other state has such privilege as J&.

### **Effects of Article 370 on Human Right under the cover of Article 370**

Human rights are the fundamental rights and freedoms that belong to every single one of us. No one can take these rights and freedoms away from us. Under the ambit of Article 370 state govt. of the valley failed to take care of the basic rights of the residents of J&K. Discrimination with backward people, women who cannot marry outside the state. People of Jammu and Kashmir are not getting privileged to get their desire freedom from brutality of Indian's army. Education is important of every person in the world, but the Kashmir people are forced to stay home cannot have access to the universities and colleges

The consequences of the Art. 370 in the purview of Human Rights are as follows:

**GENDER BIASES:** Article 370 cries loud the gender biases in the Jammu and Kashmir. Article 35A speaks about the rights of women who are deprived of property rights if they marry outside the state. This discriminatory behavior against the women of Jammu and Kashmir is unacceptable and demands the call for justice. There is backwardness in the state of J&K. Fundamental rights are not provided to women and children. The Right to education from the age of 8 to 14 is not compulsory and strictly followed by the people of the valley.

**BACKWARD CLASSES:** In the presence of Article 370 the chances to increase discrimination have been raised up. Backward classes can face discrimination which is a violation of human rights.

**3. POLITICAL RIGHTS:** Kashmir valley been the smallest area of all other has the maximum number of seats in the electoral constituencies which is unfair and fosters inequality amongst other states.

**4. CIVIL RIGHTS:** The Certificate of Permanent Residency is of utmost importance to enjoy the special rights in the Jammu and Kashmir. Violation of adult suffrage is caused by not giving equal rights to the people who have stayed in Kashmir for many years just because they do not hold the certificate of Permanent Residency. This is a violation of Human Rights under the Article 370.

**5. MINORITY RIGHTS:** State Minority Commission or National Minority Commission has no jurisdiction over Jammu and Kashmir hence they enjoy the minority position.

**6.EMPLOYMENT RIGHTS:** Right to equal opportunity under Article 16 is enjoyed

by every citizen of India but it is inapplicable on Jammu and Kashmir.

**7. FREEDOM OF MOVEMENT:** The right to freedom of movement cannot be guaranteed to the people of J&K under the blanket of Article 370. This is a violation of Article 19 and the human rights of the people of Jammu and Kashmir.

#### **Why was article 370 revoked?**

There are plenty of reasons that the central government has given to the people asking the reason for the abrogation of the article. Some of the reasons are:

- To prevent terrorist operation across the border
- To prevent human rights violations happening in the state
- To maintain law and order properly
- To develop a sense of inclusion for the people of Jammu and Kashmir into the Union of India
- To develop the state economically and make it socially stable

These were a few of the reasons that the central government gave in defense of the abrogation of article 370.

Irrespective of what the future holds of Kashmiris, they've been under humanitarian crisis and turmoil for more than 6 decades now. With or without article 370, an entire generation of Kashmiris has been bearing the brunt of military power, both from the Indian army as well as the Pakistani army. Kashmir should not be a guinea pig for a bigger diplomatic war between India and Pakistan.

Thousands of people (both civilians and soldiers) have been killed and thousands of crores of money has been spent on military resources in the state. Kashmir is one of the most militarized zones in the country. A proper and long-lasting solution has to be found out for the people of Jammu and Kashmir so that they prosper and grow in the future.

#### **Main feature of Article 370**

Indian Parliament can't create and pass any law without the permission of the state Assembly of Jammu Kashmir because it has its own flag and constitution.

Only Governor rule can be forced in Jammu and Kashmir and President Rule can't be indicated.

Jammu Kashmir has its own criminal code and its name is Ranbir penal code.

#### **RESEARCH OBJECTIVES WITH RESEARCH GAP**

-To review and compare the legal position of the State of J & K under the light abrogation of Article 370.

-To analyse the implication of the abolition of Article 370 and Article 35A

-To find out the middle pathway with New Constitutions and the Embedment of Basic Law Structural Change to satisfy both sides of the government and the individuals of Valley of Kashmir (Jammu -Kashmir and Ladakh) in peaceful way.

#### **Theoretical Framework**

##### **Offensive Realism**

Because of huge financial, economic, social, and somewhat political changes in India's international strategy of Asia's monster consistently gets one of the primary subjects in global relations contemplates. Perhaps the main inquiries are the concerns of India's rising military and rejecting the particular status of the state and J&K. To understand the question of the basic principle of the constitution of India one should study the

nature of this Article first. So, in many Supreme Court decisions, it has been decided that it is the temporary provision of the Constitution but happened to be the permanent provision from the past half-decade. According to John Mearsheimer's theory of offensive realism it is claimed that incredible forces living in an exceptionally serious rebel world would augment their capacity constantly with the objective to guarantee their endurance by accomplishing authority. Mearsheimer's core assumption is that there is no world government. Every state can use military against some other state. State wants to preserve their territorial integrity and autonomy. States are rational actors.

### **Literature Review**

The greatest obstruction to the combination of Jammu and Kashmir State into the Indian Union has been Article 370. That it was joined in the Indian Constitution by the ruse of two people – Sheikh Abdullah and Nehru is more lamentable. Nehru needed to eat the humble pie when he needed to capture the Sheikh for his troublesome and antinational position on 8 Aug 1953, however he didn't relinquish his idea of keeping Jammu and Kashmir a different element. Some top heads of National Conference drove by Mr. Qassim split the gathering and shaped a gathering called Democratic National Conference (DNC) in 1957.

It had repeal of Article 370 on its plan. Nehru would not creek any resistance to his approach of keeping Jammu and Kashmir a different element. He told the pioneers that another danger (China) is arising and it is an inconvenient chance to raise this issue and constrained them to drop their interest. Nehru from that point chose to pull out the Kashmir trick argument against Sheik Abdullah. This case had been going on since May 21, 1958. The proper requests were given on 8 April 1964 by the government of India.

Article 370 added in the Constitution on a brief arrangement ought to have been at last slowly repealed. In 60 years it did not happen. Truth be told, at any point, somebody makes reference to this, personal stakes raise an objection that genuine privileges of Kashmiris are being stomped all over. Expressed plan of National Conference is getting back to pre-1953 status. For what reason should a territory of Indian Union have a unique status? It passes on an off-base sign not exclusively to Kashmiris yet additionally to the separatists, Pakistan and for sure the worldwide network that Jammu and Kashmir are still to turn into a necessary piece of India, It will be better to remove Article 370 as soon as possible.

### **Conclusion**

Elimination of Article 370 from the constitution of India was such an instant step that the whole nation was in shock. Although it was supposed to ensure peace and maintain law and order within Jammu and Kashmir, however it was a very precipitous act by the government. Such a crucial change needed gradual implementation, while educating the local people about the decision regarding the elimination of Article 370 and its probable consequences on them. The government should have taken the locals in confidence first and then act accordingly. Not only did the Government kept the locals uninformed but it also put restrictions on Media, which was another violation of the rights according to Article 19 i.e. Right to speech and expression. Media censorship restricted the Media to bring forth the actual side of the story. On the other hand, if Media was allowed to highlight the problems which occurred due to the elimination of Article 370, it would have projected the issue in a positive and fruitful way when the issue could have received international recognition and hence the locals would have had international support and sympathy. The stakeholders involved in this decision making was not only the government, media and the locals, a major participant in the

act was the group of Diplomats that used this critical issue for their own benefit. The Government should pay proper attention to the major concerning issues and hurdles of the locals such as providing high-speed internet services, overcoming healthcare adversities and compliance of basic healthcare prerequisites and making virtual classes accessible for the local students. The youngsters need to be equipped with the renowned technical knowledge and latest learning resources. The women should be provided with self-defense trainings to ensure their safety and wellbeing. Vocational trainings and camps should be promoted to raise employment opportunities.

Jammu and Kashmir practice the Panchayati Raj, which is a way to strengthen democracy at a lower level only, not at the national level. Given the demographics and socio-political dynamics of Jammu and Kashmir, it should not have been given the status of Union Territories, but rather should govern as an independent state. According to Human Rights Commission, Jammu and Kashmir has suffered many casualties, people being killed, women lost their husbands, children became orphans, yet there is no record in the official documents, just because these people were militants. At least the government could have offered some form of monetary compensation or jobs for the affected people. As the Prime Minister Narendra Modi addressed in the show “App ki baat” emphasizing on promoting peace and law and order within the state and to avoid tension intra and inter-states. The PM mentioned that “All parties are united on Kashmir. They sent a message to the world, to the separatists and reached out to the people of Kashmir.”