

## REVOCATION OF ARTICLE 370

By Anshum Agarwal

### INTRODUCTION

Jammu and Kashmir functioned as a princely state under the British Raj between 1846 and 1947. The state, as identified today, was formed as a result of the First Anglo-Sikh War, when the Britishers annexed the state from the then ruler and sold it to Gulab Singh. The Indian state got Independence in 1947, and the Mountbatten Plan was proposed to partition the Indian mainland into two separate dominions of India and Pakistan, largely on communal lines. According to the Mountbatten Plan, it was left to the princely states to either accede to the two newly created dominions or to remain independent. The interim government of India under the leadership of Sardar Vallabhbhai Patel moved pro-actively and adopted swift actions to get 560 princely states to accede to India in a small amount of time. The only outliers were the three princely states of Junagadh, Hyderabad and Jammu and Kashmir, which were going to witness their own unique struggles and journey. The state of Junagadh was eerily similar to Jammu and Kashmir. While J&K had a Hindu, ruling over a majority Muslim population, Junagadh had a Muslim ruler, governing a majority Hindu population. When the ruler of Junagadh decided to accede to Pakistan, it was met with severe backlash by its Hindu population and he was ultimately forced to join India. The order of the Nawab was followed by a referendum wherein people overwhelmingly voted to join India. The state of Hyderabad, ruled by a Nizam, and having a majority Hindu population, faced a lot of turmoil and indecisiveness. However, India on the pretext of maintaining stability and peace intervened and in an interesting turn of events 'forced' the state to accede to India. But, distinct from these two, the state of Jammu & Kashmir was to undergo its own struggles and movements which made its accession to India all the more unique and exemplary.

### **THE PATH TRAVELLED: THE GENESIS OF ARTICLE 370**

The story of Jammu and Kashmir is perhaps one of the most remarkable and striking accounts to be witnessed by the world in recent times. J&K has always, demographically and topographically, been a complex region. The state can be divided, and such division will be helpful in explaining its current divisions, into four natural regions. In the south lies Jammu, which contains the summer

capital of Srinagar, and hosts around 66% Hindus and 30% Muslims, while the remainder are mostly Sikhs. To the north lies Gilgit and to the centre is Kashmir Valley. In between the scenic valleys and Tibet lies the province of Ladakh.

Maharaja Hari Singh ascended the throne in 1925. Even before he was handed over the reins of the kingdom, the region was flooded with a lot of able-bodied men who wanted to be employed in their native state and sought to restrict outsiders from claiming the available jobs.<sup>29</sup> The resentment, which started in the aftermath of the First World War, grew much more. It was primarily against the western educated men from the neighbouring districts of Punjab, who were perceived as encroaching upon the rights of the state's indigenous population.<sup>30</sup> At first, the Maharaja chose to ignore the rising dissent but with the agitation growing manifold and showing no signs of withdrawal, Maharaja Hari Singh was forced to issue a promulgation declaring that state subjects would be given preference in employment to outsiders<sup>31</sup>. The order also barred outsiders from holding immovable property within the state.<sup>32</sup> Even after the order, communal and regional tensions were high and kept brewing throughout the year, culminating with the events of the Indian Independence. The promulgation, in essence, founds its way in the Indian constitution and the state's law, by virtue of Article 35A and 370.<sup>33</sup>

The British government maintained that on the withdrawal of their reign, India was to be divided into two separate dominions but the division on communal lines would have no effect on the functioning of princely states and their sovereign status. Consequently, the sole power got transferred to the ruler of the state, who got the power to accede to either dominion or remain independent.<sup>34</sup> For acceding to either dominion, the ruler had to sign an *Instrument of Accession* with either of the two. The state of Jammu & Kashmir, didn't take any decision on the eve of Indian independence and consequently started functioning independently of both the dominions.<sup>35</sup>

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<sup>29</sup> Shailender Singh Jamwal, *Article 370- Its Genesis and Reactions in J&K State* in PROCEEDINGS OF THE INDIAN HISTORY CONGRESS 467-471 (Vol. 54, 1993).

<sup>30</sup> *Id.*

<sup>31</sup> Gazala Peer & Javedur Rahman, *An Unpleasant Autonomy: Revisiting the Special Status for Jammu and Kashmir*, Economic and Political Weekly 72-75 (Vol. 47, No.23, 2012).

<sup>32</sup> JAMWAL, *supra* note 1.

<sup>33</sup> ALJAZEERA, *Kashmir special status explained: What are Article 370 and 35A?*, August 5, 2019, available at <https://www.aljazeera.com/news/2019/08/kashmir-special-status-explained-articles-370-35a-190805054643431.html> (Last visited on March 30, 2020).

<sup>34</sup> Peer & Rahman, *supra* note 3.

<sup>35</sup> Irfan Rasool, *Jammu and Kashmir: A Confederate within a Federal System*, Economic and Political Weekly, vol. 49, no.4, 2014, pp. 68-73.

This indecisiveness brought the state to a standstill with both sides contesting for the region. However, Pakistan aggravated its methods and on October 20, 1947 several tribesmen armed with guns and mortars attacked the frontiers of the state. It is alleged that the tribesmen were actively aided by the state of Pakistan because of the heavy artillery and aeroplanes at their disposal.<sup>36</sup> The state of J&K, was on the verge of collapsing and the Maharaja, as a last resort and due to the threat on his own life, approached the Dominion of India to accept his accession and provide military help in return to ward off the tribal invasion.<sup>37</sup> The hasty accession by the Maharaja to India was met with severe criticism. It was claimed by Pakistan that the instrument was fraudulent and did not uphold the wishes of the people of the state and should therefore not be held to be binding. However, any such claims lacked any substance as the ruler had the ultimate power to accede to either dominion and it was not conditional upon him to factor in wishes of anyone. As a result of the accession, Indian state immediately flew in its troops to drive the invaders out. However, to successfully halt the attack it was pertinent to attack the bases, which fell within the territory of Pakistan, something which the newly independent nation of India was unwilling to do.<sup>38</sup>

As a result of the unique diplomatic tensions, India submitted to the UNSC. A ceasefire was agreed upon and it was decided that India would hold a plebiscite in Kashmir to ultimately determine the status of Kashmir as and when peace is restored in the region.<sup>39</sup> After the adoption of the Indian Constitution in 1949, Article 370 was added to the text, based upon the *Instrument of Accession* signed between the state of J&K and India.

While all other princely states signed an *Instrument of Merger*, in addition to the IOA, which merged them completely with India, with no special relations, the state of J&K, never did the same.<sup>40</sup> The special status of Jammu and Kashmir had always been a bone of contention. While some were of the view that the Article was essential to establish autonomy of the state which helped it to exist, others believe that the Article is the hurdle which has stopped J&K's proper

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<sup>36</sup> Fatheyab Ali Khan, *Kashmir: Last Colony in the Subcontinent*, Pakistan Horizon, vol. 43, no. 2, 1990, pp. 71-85.

<sup>37</sup> *Id.*

<sup>38</sup> Kamal Chenoy, *Contending Nationalisms: Kashmir and the Prospects for Peace*, Harvard International Review, vol. 28, no. 3, 2006, pp. 24-27.

<sup>39</sup> Aswini K. Ray, *From Autonomy to Self-Determination: The Politics of East Pakistan and Kashmir*, Economic and Political Weekly, vol. 36, no. 49, 2001, pp. 4538-4543.

<sup>40</sup> Bodh Raj Sharma, *The Special Position of Jammu and Kashmir in the Indian Constitution*, The Indian Journal of Political Science, vol. 19, no. 3, 1958, pp. 282-290.

integration with India and is the root cause of all its present problems. The division of opinion also has interesting demographical variations with majority in Hindu-populated Jammu upholding the latter view in contrast to the Muslim-populated region of Kashmir.<sup>41</sup>

After the accession took place, the Maharaja issued a proclamation in March 1948, to convene a national assembly on adult suffrage to draft a unique constitution for the land of J&K.<sup>42</sup> On 15<sup>th</sup> February, 1954, the state's constituent assembly ratified its accession to India and enacted a constitution for J&K which completed the legal integration of the state with India.<sup>43</sup>

### **THE BATTLE OF EXCLUSION AND AUTONOMY**

The circumstances in which the Maharaja decided to integrate into India were indeed challenging and weren't ideal. External forces played a largely significant role in his decision to join India. Article 370, which found its place in the Indian constitution after much deliberation and thought, is seen as an article that encompasses or enlists the conditions under which the state of J&K acceded to India.<sup>44</sup> Article 370 aims to make the compromise an equitable one wherein the independent and autonomous character of the land isn't compromised and their struggles aren't discounted. The article conferred extensive rights on the state of J&K which would help to maintain its distinct cultural and regional identity without compromising on the benefits that might accrue by being part of the larger Indian federation.<sup>45</sup> On a plain reading of the Article 370, it is evident that it permits the Indian state to legislate only on those matters which were provided for in the *Instrument of Accession*, namely defence, external affairs and communications.<sup>46</sup> Also, it only allows the application of Article 1 of the Indian Constitution to the state of J&K. It is also envisaged that any modifications to be done in the future should be with the 'consultation' and 'concurrence' of the state legislature. Thus, in totality, Article 370 envisages a centre-state relation which is distinguishable from other centre-state relations in India. This difference is also rooted in the fact that although all other princely states signed an *Instrument of Merger*, which governs their

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<sup>41</sup> Balraj Puri, *Jammu and Kashmir: The Issue of Regional Autonomy*, Economic and Political Weekly, vol. 43, no. 34, 2008, pp. 8-11.

<sup>42</sup> Bodh Raj Sharma, *supra* note 12.

<sup>43</sup> Balraj Puri, *The Challenge of Kashmir*, Economic and Political Weekly, vol. 25, no. 4, 1990, pp. 191-192.

<sup>44</sup> Jai Shankar Agarwala, *Article 370 of the Constitution*, vol. 50, no. 16, 2015.

<sup>45</sup> N.Y. Dole, *Kashmir: A Deep-Rooted Alienation*, Economic and Political Weekly, vol. 25, no. 18/19, 1990.

<sup>46</sup> Bodh Raj Sharma, *supra* note 12.

relations with the Indian state, the state of J&K never did so.<sup>47</sup> Therefore, Article 370, is the one which governs Jammu and Kashmir's relation with the Indian state.

There are two sides to this debate and both view Article 370 in entirely different lights. For one it provides the much-needed autonomy and protection the turbulent region needs and for the other it serves as an instrument which legitimises exclusion, separation and underdevelopment of the region. The original black letter of Article 370 clearly establishes the extent of autonomy granted to the state. By virtue of Article 370, the state was free to establish its own Constitution, legislature, executive and judiciary. Moreover, the subjects under the residuary list came under the state government's purview and not the centre, and barring some exceptions mentioned above, the central government didn't have any power to nullify the state's assent while subjecting it to any law.<sup>48</sup> Despite the autonomous nature promised to the state of J&K in letter, the Indian state started showing signs early on of not respecting the promise. The constitution has been repeatedly misused to water down the provisions and protection envisaged under Article 370. The encroachment started early on and the then Prime Minister Pt. Jawaharlal Nehru remarked in 1963, "This process of gradual erosion of Article 370 is going on... we should allow it to go on."<sup>49</sup> The Indian president by using his power under Article 370(1) in 1954, promulgated an order called Constitution (Application to Jammu and Kashmir) Order, 1954, which extended many provisions to the state of J&K. The central government, by taking advantage of successive ineffective government in the state tried to bring the autonomous character of the state to its knees. Due to the constant interference and meticulous planning, much of Article 370 remained only on paper.<sup>50</sup> The article came to be recognised only as a reminder of Kashmir's special relation with Delhi, as envisaged at the time of its accession to the Indian republic. The article having lost its real importance, became a political tool in the hands of many. The Bhartiya Janta Party (BJP) and its predecessors, made the issue of integration of Article 370 their election manifesto as far back as in 1980s. Even the local leaders have tried to ignite separatist tendencies in the people of Kashmir by portraying the water-shed Article 370 as a bed of false promises made by the Indian state. The failure of

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<sup>47</sup> Agarwal, *supra* note 16.

<sup>48</sup> Balraj Puri, *Independence, Autonomy and Freedom in Kashmir?*, Economic and Political Weekly, vol. 43, no.12/13, 2008, pp. 20-21.

<sup>49</sup> Peer & Rahman, *supra* note 3.

<sup>50</sup> Asghar Ali Engineer, *Can Autonomy Be a Solution*, Economic and Political Weekly, vol.35, no.27, 2000, pp. 2359-2360.

central government to account for the public sentiment of Kashmir in their hopes of a united India is very much visible. There has been a high level of resentment by the people of Kashmir in recent times who feel betrayed by India, the very country they chose to trust with the preservation of their 'Kashmiryat'. Evidently, the growing resentment of people has also bolstered the hopes of our bordering nation, Pakistan, to further its secessionist agenda among the masses in Kashmir and enable it to politicise the issue on an international level.

Amidst the various legal and political turmoil which the state has faced over the years, the one thing which is apparent is the disharmony and distrust felt by the people in the state towards the Indian mainland. These feelings have taken many forms over the years, both legitimate and illegitimate. It is quite evident that terrorist activities within the state have been going on at an alarming rate throughout decades which has necessitated the application of draconian laws such as AFSPA throughout the state. What the application of such laws and the increased atrocities by the army has done is that it in turn fuelled the feelings of alienation and forced thousands of young to pick up arms against the state. Community discontent cannot be the only factor providing a move towards terrorist tendencies but also a lack of alternate forms of raising their concerns and feeling of alienation necessitates the same. The role of Pakistan, in providing arms, financial and logistical support across its border has also been a prominent factor giving rise to terrorism in the state and its acceptability in the common masses. For a long time, Congress served as conduit for expressing discontent with the state government, and National Conference for expressing discontent against the centre. However, with both of them joining hands and forming a coalition, much of the discontent got diverted either to secessionist or communal outfits or to channels outside India.<sup>51</sup>

Over the years, the issue of Kashmir has garnered attention from organisations and countries around the globe. Pakistan has used it as an effective tool and has repeatedly tried to highlight India's failure on a global scale. It has even engaged in direct conflicts with India 1947, 1965, 1971 and the most serious one in the form of Kargil war in 1999. This war resulted in Pakistan acquiring military control over Almost one-third area of Jammu and Kashmir which is now claimed by Pakistan as "Azad Kashmir". Kashmir has also served as a bone of contention between

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<sup>51</sup> Balraj Puri, *supra* note 15.

the two nations and if we add to this the illegal occupation of China in Aksai Chin (part of Ladakh), the region has been both a decisive and a stalemate factor in South Asian politics.

### **REVOICATION: THE FINAL NAIL?**

In May of 2019, the Narendra Modi led Bhartiya Janata Party, got an astounding mandate to lead the country for the next five years. The BJP has majorly been represented as a right-wing party which has served as a conduit for establishing the Hindu nationalist agenda in India. The BJP, or its predecessor, the Jana Sangh had a long-standing demand for revocation of Article 370 from the Indian Constitution. Their call has been resonated largely with the Hindu majority region of Jammu, which also helped them form a short-lived coalition government in the state with the local party PDP, led by Mehbooba Mufti. However, the coalition which drew criticism from all quarters was short lived and was followed by a governor rule in November, 2018, which is in effect till now.

The newly elected government didn't waste time in moving forward with its long-standing poll promise and in the beginning of August, 2019 moved in a large number of troops, arrested local leaders and snapped internet services across the state.<sup>52</sup> This was followed by an address by the Home Minister, Amit Shah that Article 370 and Article 35A stands revoked by a presidential order<sup>53</sup> and further moved a constitutional amendment bill to bifurcate the state of J&K.<sup>54</sup> The bill proposed to make a separate Union Territory of Ladakh, bifurcating the erstwhile state of Jammu and Kashmir. While Ladakh was to be centrally administered, Jammu & Kashmir was to function as a Union Territory with its own legislature. The move, although contemplated, came as a shock to people all around the globe. The historic move was done almost instantly, with no time given for considerations and deliberation. The government acted decisively to achieve its goal but the method in which the goal was achieved was unprecedented. The decision sent shockwaves around the globe and evoked sharp criticisms in the country. The fears of Kashmir becoming an

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<sup>52</sup> Emily Schmall, *Troops lock down Kashmir as India votes to strip its status*, August 6, 2019, available at <https://www.pbs.org/newshour/world/troops-lock-down-kashmir-as-india-votes-to-strip-its-status> (Last visited on 10th April, 2020).

<sup>53</sup> Ministry of Law and Justice, *The Constitution (Application to Jammu and Kashmir) Order, 2019*, C.O. 272 (5th August, 2019).

<sup>54</sup> Ministry of Law and Justice, *The Jammu and Kashmir Reorganisation Act, 2019*, No. 34 of 2019 (9th August, 2019).

international issue once again and the possibility of a military attack from Pakistan seemed imminent concerns.

The BJP government maintained that it had delivered on its poll promises and the massive lockdown was essential to maintain peace and harmony in the state by keeping cross border and separatist activities at a bay. The Home Minister affirmed that the ruling party is committed to maintain peace and harmony in the Himalayan region and their steps are aimed at fully integrating Jammu and Kashmir with the rest of the country in the true sense. Further, the ruling government stated that Article 370 acted as a barrier to development of the region and improvement of livelihood of the people. Whatever the stance of the government be, the opposition was quick to mount attacks on the ruling government on both fronts. Firstly, they criticised the lack of consultations done with the stakeholders before coming up with the decision, ultimately denying the Kashmiris their rights to be heard on an issue which is inherently theirs. Secondly, the opposition vehemently criticized the legality of the procedure followed to give effect to the revocation and the steps taken by the government to control the fallout. However, even while criticising the method many in the opposition did not directly attacked the revocation itself, and their seemed to be a tacit acceptance of the act.

However, those vehemently criticizing Article 370's revocation, forget, that the ideals they are upholding to justify their criticism are the same one's which were not being practiced due to the continuance of the "temporary" Article 370. The revocation of Article 370 doesn't turn the Kashmiri's to second class citizens, rather it brings them on an equal ground with the rest of the Indian population. The fundamental rights which the opposition cries are being violated by the government's decision are the same ones which were never given to a large section of the Indian and Kashmiri population.<sup>55</sup> The J&K Constitution never protected minorities rights, tribal rights, educational rights and the same constitution never aided the population of Kashmiri Pandits when they were forced to flee their homeland in the 1990s.<sup>56</sup> The Article 35A which is projected as being a protector of the state's people rights by providing right to hold property only to the Permanent Residents, is also heavily discriminatory to any woman who marries a non-PR and scores of

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<sup>55</sup> Sandipan Deb, *The Revocation of Article 70 ends a foul majoritarianism*, August 12, 2019, available at <https://www.livemint.com/opinion/columns/opinion-the-revocation-of-article-370-ends-a-foul-majoritarianism-1565549062884.html> (Last visited on 10th April, 2020).

<sup>56</sup> *Id.*

refugees and immigrants who have resided in the region for decades.<sup>57</sup> Under the new arrangement, everyone residing in the state will be benefitted from the gifts our Constitution has to bestow and not just a select few.

### **MOVING FORWARD**

The legality of the constitutional orders and the reorganisation act are pending before the Supreme Court. In the meanwhile, it is important to look at the ground realities of the region to assess the impact, abrogation of Article 370 has brought in. While the extended period of communication blockade was seen as severely problematic, things have changed for the better. The central government had ordered resumption of post-paid services across the state in the month of October.<sup>58</sup> However, it was in January, following the SC's judgement of upholding internet access as a fundamental right and an order for re-assessment of the restrictions in Kashmir, that the people started enjoying full internet and communication facilities.<sup>59</sup> The administration still continued restrictions on internet speed and the number of websites to be accessed.<sup>60</sup>

On March 13, the former chief minister of J&K and a present Union Parliament member, Dr Farooq Abdullah, was released from detention after 8 months in captivity.<sup>61</sup> Interestingly, the other two former chief ministers, Mehbooba Mufti and Omar Abdullah continued to be detained. The release of Farooq Abdullah was welcomed by many as a step in the right direction to help re-establish genuine political process in the state. Days later, an interesting development took place in the political arena of Jammu & Kashmir, with the announcement of a new political party, named 'Apni Party'.<sup>62</sup> The party, established by a former PDP member, is seen by many as a step by the central government to rekindle the political process in Kashmir, now that the security situation has

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<sup>57</sup> Deb, *supra* note 27.

<sup>58</sup> The Wire, *Postpaid Mobile Phone Services in Kashmir Restored After 72 Days*, 14 October, 2019, available at <https://thewire.in/rights/postpaid-mobile-phone-services-in-kashmir-restored-after-72-days> (Last visited on 10th April, 2020).

<sup>59</sup> Times Now, *Article 370: SC orders restoration of internet in Kashmir for all essential services*, January 10, 2020, available at <https://economictimes.indiatimes.com/news/politics-and-nation/article-370-sc-orders-restoration-of-internet-in-kashmir-for-all-essential-services/videshow/73183765.cms> (Last visited on 10th April, 2020).

<sup>60</sup> *Id.*

<sup>61</sup> Azaan Javaid, *What Farooq Abdullah's release means for mainstream politics in Kashmir*, March 14, 2020, available at <https://theprint.in/politics/what-farooq-abdullahs-release-means-for-mainstream-politics-in-kashmir/381213/> (Last visited on 10th April, 2020).

<sup>62</sup> Greater Kashmir, *Apni Party delegation to meet PM today*, March 14, 2020, available at <https://www.greaterkashmir.com/news/front-page-2/apni-party-delegation-to-meet-pm-today/> (Last visited on 10th April, 2020).

stabilised. Following these events, Omar Abdullah was also released from detention on 24<sup>th</sup> March.<sup>63</sup> The recent developments have given positive signs that the region of J&K is ready to advance into the next stage of its political development and the revocation of Article 370 is something which has to be accepted as a reality by the people and the parties alike.

During the course of this paper, one thing which becomes crystal-clear is that whatever the political situations be, it is the consent, aspiration and hopes of the people of Kashmir which has been trampled upon. Their voices have been neglected, overpowered, coerced or moulded to serve someone's vested interest all through their life. Even the revocation of Article 370, left the people of the region high and dry. It is therefore imperative that any future attempts at achieving normalcy in the heavily disputed region cannot without taking in account the people's view. While a plebiscite, which was promised may never take place, attempts should be made to inculcate the will of the people as far as possible in any future journey the state witnesses. The reasons for stagnation are simple, a region cannot be expected to move forward without taking on-board its people. It is hoped, that moving forward, the region of Jammu & Kashmir can work on its economic, social, cultural and political development, such that it truly exemplifies its title of "Paradise on Earth".

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Azaan Javaid, <i>What Farooq Abdullah's release means for mainstream politics in Kashmir</i> _____	11

Emily Schmall, <i>Troops lock down Kashmir as India votes to strip its status.</i> _____	8
Greater Kashmir, <i>Apni Party delegation to meet PM today.</i> _____	11
Indian Today, <i>In a bit of daze: Omar Abdullah released.</i> _____	11
Sandipan Deb, <i>The Revocation of Article 70 ends a foul majoritarianism.</i> _____	10
The Wire, <i>Postpaid Mobile Phone Services in Kashmir Restored After 72 Days.</i> _____	10
Times Now, <i>Article 370: SC orders restoration of internet in Kashmir for all essential services.</i> _____	11



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