

LEGALFOXES LAW TIMES

ABROGATION OF ARTICLE 370: AN OVERVIEW

By Surbhi Jhanwar

Jahangir, the Mughal emperor, once said and that I quote, "AGAR FIRDAUS BAR ROO-E ZAMEEN AST, HAMEEN AST-O HAMEEN AST-O HAMEEN AST" which infers that paradise if ever exists on earth, it's here (Jammu and Kashmir).

Jammu and Kashmir, the northernmost tip of India, originally had three regions: Jammu, Kashmir, and Ladakh. Jammu is acknowledged for its temple, Kashmir for its awe-inspiring landscapes, and Ladakh for its rare beauty. Presently, after the passage of the Jammu and Kashmir Reorganisation Act by the parliament, the state of Jammu and Kashmir is split into two union territories -the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh.

Jammu and Kashmir though is a state of beauty, but it is equally known for controversies, be it regarding the relation with Pakistan or China or the plight of Kashmiri pandits or Indo-China boundary dispute. It once again came into the picture on 5th August 2019 when the centre revoked article 370. With this revocation, the privileged status of the state came to an end. Article 370 is termed as 'the umbilical cord' of the Indian Constitution considering it is the only link between India and Jammu and Kashmir and is considered as the most sensitive provision of the constitution.¹

What is Article 370?

The Constitution of India talks about the 'Temporary, Transitional and Special Provisions' under Part XXI of the constitution. Article 370 is incorporated under this part of the Indian constitution and provides independent status to Jammu and Kashmir. It lawfully authorised the state to have

¹Prof. Pradeep Kulshrestha, *Article 370: Constitutional Obligation and Compulsion*, Vol-IV Issue 1 IJELLH 94, 94 (2016) https://www.academia.edu/33288050/Article_370_Constitutional_Obligation_and_Compulsion.

its own constitution, its own flag and freedom to formulate its own laws, while allowing centre to make laws only on three subjects- foreign affairs, defence, and communication. It also provides that to extend other constitutional provisions to the state, the centre can do so with the prior concurrence of the state government. Once the state constituent assembly is established the authority of the state government to give concurrence ends. It also provides that only the President can abrogate or amend this article and that too on the recommendation of the Constituent Assembly of the state.

History of Article 370

After the independence of India on 15th August 1947, all the princely states became sovereign and were given the option of either joining India or Pakistan or to remain an independent sovereign state. Almost every princely state except Kashmir joined the dominion of India. The ruler of Jammu and Kashmir, Maharaja Hari Singh decided to remain independent and this decision was respected by India. However, Pakistan wanted Kashmir to join its dominion and therefore, it tried to forcefully conquer it. Unable to cope with the situation Maharaja sought the help of India and in exchange agreed to join India. For this purpose, an instrument of accession was signed between the ruler of Kashmir and the government of India. The instrument contained provisions enabling the central legislature of India to legislate only on matters of defence, foreign affair and communication and the rest of the powers were retained with the ruler of the state to be governed by the Jammu & Kashmir Constitution Act, 1939, then in force in the state². Further, under clause 7 of the instrument, it was declared that the state cannot be compelled to follow the Constitution of India.

When the Constitution of India was formed Jammu and Kashmir was recognised as part B states under the constitution however with subsequent constitutional amendment it was regarded as the 15th state under Article 1 as a part of Indian territory and retained its special status under Article 370.³

²Jai Shankar Agrawal, *Article 370 of the Constitution of India: A Genesis*, Academia https://www.academia.edu/10840788/Article_370_of_the_Constitution_of_India_a_genesis.

³K V Thomas, *Abrogation of Article 370 and Reintegration of Jammu & Kashmir*, CENTRE FOR PUBLIC POLICY RESEARCH <https://www.cppr.in/wp-content/uploads/2019/08/Abrogation-of-Article-370-and-Reintegration-of-Jammu-Kashmir-.pdf>

The Constituent Assembly of Jammu and Kashmir was set up to decide on the matter of accession to India and the same ratified the accession on 15th February 1954. The state's constitution under Section 3 declared Jammu and Kashmir to be an integral part of India.⁴The Constituent Assembly was also empowered to recommend the articles of the Indian Constitution to be applied to the state and to abrogate Article 370, but it dissolved without giving any recommendation on the abrogation of the article. Also, under Section 147 of the state's constitution, Article 370 was made unamendable by the future legislative assembly of the state.

Merits and demerits of Article 370

Merits:

Article 35 A which is a part of Article 370 was introduced through the presidential order of 1954 provides exceptional privileges to the people of Jammu and Kashmir. Through this article, the local legislature of the state is empowered to define who are 'permanent residents' of the region. Such permanent residents enjoy special privileges and rights regarding the matter of public employment, settlement in any part of the state, acquisition of immovable property, voting rights, scholarship rights, and other aids which state government provides. It further debar any outsider from holding any immovable property, and any government jobs in the state. It also results in more profit for the residents as it is not easy for the outsiders to conduct their business in the state.

Demerits:

The Article encourages separationist tendencies as the people of Jammu and Kashmir do not think of themselves to be a part of India. It more significantly affects the economy of the state as the outsider cannot invest in Kashmir and are not allowed to make any construction there.⁵ They cannot hold any property or carry on any business which hampers the development of the state.

⁴Supra note 2.

⁵Asim Jaiswal, *Article 370*, Vol-II Issue 5 IJTSRD 1011, 1014 (2018)
https://www.academia.edu/37528449/Article_370.

The special status has further led to an increase in corruption as the anti-corruption bodies of the nation possess no control over Kashmir.

Many welfare programs and progressive measures of the government cannot be implemented in this state due to Article 370 and hence the people of the state are deprived of such benefits. The weaker and vulnerable groups of the state are rendered voiceless since the constitutional safeguards provided under the Indian constitution are unavailable to them. The article is anti-women as the women marrying non-Kashmiris loses their property rights as well as the citizenship of the state. The people of the state are deprived of the Right to information as no provisions are provided under Jammu and Kashmir RTI Act for the appointment of Information Commission, moreover there is no compulsion on the state authority to provide such information.

Whether Article 370 is temporary or permanent?

The parliament was given the power to legislate only on the matter relating to defence, foreign affair, and communication and if any other 'constitutional' provisions or the union powers were to be applied to the state of Jammu and Kashmir, the prior 'concurrence' of the state government was required. Furthermore, under article 370 (3) President is given the power to abrogate or amend article 370 but for that also the recommendation of the constituent assembly of the state is necessary before the President issues notification for such.⁶

Since the constituent assembly did not make any such recommendation before its dissolution, therefore, Article 370 shall deem to be a permanent provision. In a case, *Kumari Vijayalakshmi Jha v. Union of India & Anr.* where a PIL was filed before the High Court of Delhi seeking a declaration from the court that article 370 was a temporary provision and with the dissolution of constituent assembly it had lapsed. The High Court of Delhi dismissed this plea, and its order was challenged before the Supreme Court which upheld the decision of the High Court and ruled that Article 370 is not a temporary provision.

Government's stand on revoking Article 370

⁶SBI v. Santosh Gupta, (2017) 2 S.C.C. 538, Prem Nath Kaul v. State of J & K, A.I.R. 1959 S.C. 749.

The governments defended its action by arguing that scrapping of article 370 was in the party's manifesto of the 2019 election and to bring Kashmir into the same footing as other states. Other reasons for removal were that Article 370 was the root cause of terrorism, corruption, and poverty, it was anti-women plus discriminatory based on class, caste, and place of origin, besides it hinders the economic development of the state. Also, the refugees from Pakistan who settled in Jammu and Kashmir during the partition were still denied citizenship due to this article. The government justified the abrogation as a move to fully integrate Jammu and Kashmir into India, to provide opportunities for employment to the youth of the state and to ensure proper economic development of the state.

The path taken by the government to abrogate Article 370

Under Article 370 (1) (d) of the Indian Constitution, the president is conferred with the power to exercise other constitutional provisions to Jammu and Kashmir with the prior 'concurrence' of the state government. Using this power, Article 367 which provides for guidelines regarding interpreting the constitution was amended through presidential order C.O.272. A fourth clause, applicable to Jammu and Kashmir only, was added to article 367 according to which all the reference to 'the government' implies a reference to 'the governor' and reference to 'the constituent assembly of the state' in Article 370(3) shall read 'legislative assembly of the state.'

Under Article 370 (3) the president is empowered to abrogate Article 370 with the concurrence of the constituent assembly and since the constituent assembly is no more in existence the legislative assembly plays the role of the former. Since the state was under the President's rule, the concurrence of the governor would be enough, and the administrative functions of the state would be taken up by the president and the legislative functions of the state assembly by the parliament.

On 6th August 2019, another presidential order C.O.273 was issued through which all the provisions of the Indian Constitution were made applicable to Jammu and Kashmir which resulted in the revocation of the special status of the state.

Aftermath of Revocation

The notion of 'One nation, one constitution' is finally achieved as the Jammu and Kashmir is now fully integrated into India. After the revocation of Article 370 now all the provisions and constitutional safeguards of the Constitution of India are applicable in Jammu and Kashmir. This implies that the special privileges of having a separate flag and constitution have come to an end. Further, no more dual citizenship will be granted to the people of Jammu and Kashmir. The word 'minority' was never recognised by the Jammu and Kashmir Constitution but now the minorities will be able to take advantage of reservation and various beneficial Central Government Schemes. The woman resident of Kashmir will now be able to marry any person freely, without any fear of losing her rights and identity.

The Centre will now be able to adopt effective measures to control corruption and terrorism in the state. Hereafter, any Indian will be qualified to purchase property in the state of Jammu and Kashmir and there will be an increase in the economic development of the state as land investments will increase, more industries will be set up, private-sector investments will also increase and outsiders will be able to set up their business in the state. With the central government's control, the educational and employment opportunities will be improved. Right to Education and Right to Information will be duly applicable in the state. Tourism will be increased.

Despite the abovementioned benefits the revocation of Article 370 has some shortcomings too such as many Kashmiris were unable to accept the government's decision and a massive protest was observed when abrogation of Article 370 was announced. This further resulted in the imposition of curfew and the internet and calling services were discontinued in many places of the region. It has also worsened the relationship between India and Pakistan. It further arose a fear of insecurity in the minds of a certain group of citizens that the government may perhaps take similar steps in other states also.

Criticism

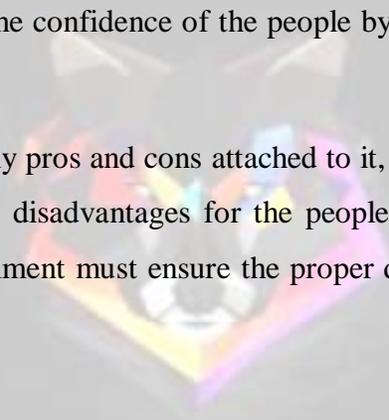
The method of revocation has faced many criticisms such as it being a threat to the federal system of India considering that the government can in the future similarly adjust the territory of a state without its consent. Also, the abrogation of the article without taking into consideration the views of the opposition party, consent of the people of the state, and not giving enough time for its discussion in the parliament is against the norms of democracy. A. G. Noorani, the constitutional

expert, criticized the government's way of abrogation as, "utterly and palpably unconstitutional". Also, the imposition section 144 of CrPC and severe restriction on the people was considered violative of human rights and was also criticised by Amartya Sen as an excuse to prevent counterattacks on the move of the government.

Conclusion

Article 370 has been the most controversial Article of the constitution and due to this reason, the abrogation of the Article seemed to be an impossible task. The government of India decided on a very bold and clever step of abrogating this article, but this created uneasiness among the citizens due to the manner it was carried out which appears to be undemocratic. Therefore, the government needs to gain back the confidence of the people by taking proper steps to safeguard their rights.

Although the abrogation has many pros and cons attached to it, it appears that the benefit arising out of it is much more than the disadvantages for the people of Jammu and Kashmir. In the present circumstances, the government must ensure the proper development of the state and that peace and security prevails.



LEGAL FOXES

"OUR MISSION YOUR SUCCESS"