

ARTICLE-370 AND 35(A) OF INDIAN CONSTITUTION- A REVIEW

Dr. R.RANGAPPA.M.A. PH.D.
ASSOCIATE PROFESSOR
DEPARTMENT OF POLITICAL SCIENCE
GOVERNMENT ARTS COLLEGE CHITHRADURGA-577501

Abstract

Article 370 grants special status to Jammu & Kashmir and also limits the powers of the Parliament for making laws concerning the state. Article 370 of the Indian Constitution extends a provision by which Jammu & Kashmir enjoys special autonomous status. Article 370 is a "temporary provision" drafted in the Constitution's Part XXI: Temporary, Transitional and Special Provisions. The most sinister aspect of proposed Article 370 was the provision that any changes could be brought about in it only by the concurrence .. of J&K assembly. Nehru's promise that Article 370 was a temporary provision and will get eroded over a period of time has turned out to be a chimera.

- 1.Jammu and Kashmir will become a Union Territory instead of an independent state.
- 2.Ladakh will be separated from Jammu and Kashmir.
- 3.Ladakh will also become another Union Territory.
- 4.Jammu and Kashmir will not have a separate constitution of its own.
- 5.Constitution of India will apply on Jammu and Kashmir.
- 6.No separate flag of Jammu and Kashmir.

Key words: *Article 370 and Article 35A, temporary provision, Union Territory, No separate flag of Jammu and Kashmir*

INTRODUCTION

Article 370 grants special status to Jammu & Kashmir and also limits the powers of the Parliament for making laws concerning the state.

Article 370 of the Indian Constitution extends a provision by which Jammu & Kashmir enjoys special autonomous status.

The residents of the state live under a separate set of laws, such as those relating to "citizenship, ownership of property, and fundamental rights".

All the provisions of the Constitution that apply to other Indian states are not applicable to the northern state.

What is Article 35A?

Article 35A stems from Article 370, having been introduced through a Presidential Order in 1954. Article 35A is unique in the sense that it does not appear in the main body of the Constitution Article 35 is immediately followed by Article 36 but comes up in Appendix I. Article 35A empowers the J&K legislature to define the state's permanent residents and their special rights and privileges.

Why is it being challenged?

The Supreme Court will examine whether it is unconstitutional or violates the basic structure of the Constitution. But unless it is upheld, many Presidential Orders may become questionable. Article 35A was not passed as per the amending process given in Article 368, but was inserted on the recommendation of J&K's Constituent Assembly through a Presidential Order.

Article 370 is not only part of the Constitution but also part of federalism, which is basic structure. Accordingly, the court has upheld successive Presidential Orders under Article 370.

Since Article 35A predates basic structure theory of 1973, as per Waman Rao (1981), it cannot be tested on the touchstone of basic structure. Certain types of restrictions on purchase of land are also in place in several other states, including some in the Northeast and Himachal Pradesh.

Domicile-based reservation in admissions and even jobs is followed in a number of states, including under Article 371D for undivided Andhra Pradesh. The Centre's recent decision extending to J&K reservation benefits for

SCs, STs, OBCs and those living along international borders, announced last week. throws the spotlight back on Article 35A.

Background: Article 370, a temporary provision, according to Constitution

Article 370 is a "temporary provision" drafted in the Constitution's Part XXI: Temporary, Transitional and Special Provisions.

The architect of the Constitution, Dr. BR Ambedkar, had refused to draft Article 370. The then PM Jawaharlal Nehru, in 1949, asked Kashmiri leader Sheikh Abdullah to draft it. However, Gopaldaswami Ayyangar, a Union Minister and former Diwan to J&K's Maharajah Hari Singh, eventually drafted Article 370.

The Article: Article 370 restricts applicability of various Constitutional provisions to J&K

Article 370 restricts the applicability of various Constitutional provisions to J&K, limiting the Parliament's power to make laws on subjects falling under the Union and Concurrent lists.

According to the article, except for laws related to defense, foreign affairs, finance, and communications, the Parliament requires the J&K state government's agreement for applying all the other laws in the state.

Fact: Residents of other Indian states cannot purchase property in J&K

Under Article 370, as mentioned before, J&K has separate laws for its residents compared to other Indians, including laws concerning citizenship, fundamental rights, and property ownership. Also, because of this, residents of other Indian states cannot purchase land or other property in J&K.

Details: Center cannot declare financial emergency in J&K

Under Article 370, the Union government doesn't have the power to declare a financial emergency in J&K as per Article 360.

The Center can declare an emergency in the state only in cases of war or external aggression. Even on the grounds of internal disturbances or dangers, the Center cannot declare an emergency unless requested by or with the concurrence of the J&K government.

Article 370(1) in The Constitution Of India 1949

A. the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

B. the power of Parliament to make laws for the said State shall be limited to

a. those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

b. such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify Explanation For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharajas Proclamation dated the fifth day of March, 1948 ;

C. the provisions of Article 1 and of this article shall apply in relation to that State;

D. such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (b) shall be issued except in consultation with the Government of the State: Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

It is often not realized that among the causes of Kashmir problem – inclusion of plebiscite in the Instrument of Accession, reference of Kashmir to UN, halting Indian offensive when it was poised to drive out the invaders from Kashmir, Article 370 has played no less a part in preventing J&K from becoming an integral part of the Indian Union. Not many people are aware as how and why this Article was formulated and included in the Indian Constitution despite grave misgivings of Sardar Patel.

It is often not realized that among the causes of Kashmir problem – inclusion of plebiscite in the Instrument of Accession, reference of Kashmir to UN, halting Indian offensive when it was poised to drive out the invaders from Kashmir, Article 370 has played no less a part in preventing J&K from becoming an integral part of the Indian Union. Not many people are aware as how and why this Article was formulated and included in the Indian Constitution despite grave misgivings of Sardar Patel and indeed a large number of the members of Congress Working Committee and Constituent Assembly.

Article 370 was worked out in late 1947 between Sheikh Abdullah, who had by then been appointed Prime Minister of J&K by the Maharaja and Nehru, who kept the Kashmir portfolio with himself and kept Sardar Patel, the

home minister, away from his legitimate function. Hence Nehru is answerable to all acts of commission and omission, consequences of which we are suffering till date as far as J&K is concerned.

While it was Mountbatten who persuaded Nehru to take the J&K issue to the UN, it was Sheikh Abdullah, who, driven by his ambition to be ruler of an independent Kashmir and his hatred for the Maharaja, persuaded Nehru to give special status to J&K. Among his reasons were occupation of one third of J&K by Pakistan, reference to the UN and plebiscite.

The most sinister aspect of proposed Article 370 was the provision that any changes could be brought about in it only by the concurrence.. of J&K assembly. Nehru's promise that Article 370 was a temporary provision and will get eroded over a period of time has turned out to be a chimera. The first thing that Sheikh Abdullah got done was to abolish hereditary monarchy and re designate him as Sadar-e-Riyasat who was to be elected by the Assembly. The accession of J&K State into Indian Union was approved by J&K Assembly only in 1956.

Jawahar Lal Nehru The handsome Harrow educated aristocrat who gave up a life of luxury to join the freedom movement. Babu's choose heir and darling of the masses, he had a fatal flaw. He cared for personalities rather than issues and institutions, be it selection of Lord Mountbatten as the first Governor General of free India, retaining a senior British officer as the Commander-in-Chief of India Army or backing Sheikh Abdullah to the hilt his choices were unfortunate. Finally the Chinese aggression of 1962 shattered his image of a world statesman.

Sardar Patel The Iron Man of India silent, strong and pragmatic with a complete hold on congress party organization rightly credited with creating a unified India by integrating 565 princely states in it he would have included Kashmir also in it if allowed to do so by Nehru. The only blot on him was the insinuation that he failed to protect his beloved Bapu. The slur only hastened his end in Dec 1950.

Sheikh Mohammed Abdullah Charismatic Kashmiri leader who never let go of his dream of ruling an independent Kashmir even while masquerading as a secularist architect of Article 370 along with Nehru. He must share with Nehru the grave consequences. Lion of Kashmir brought Nehru under his spell from 1938 onwards to the extent that in May 1947 when he was arrested by the Maharaja for sedition, Nehru represented Sheikh as his lawyer and was even arrested in Jun 1947 by the Maharaj . for sedition, Nehru represented Sheikh as his lawyer and was even arrested in Jun 1947 by the Maharaja while trying to enter J&K. Finally Nehru had to eat the humble pie by arresting Sheikh Abdullah for sedition on 9 Aug 1953.

Maharaja Hari Singh The Maharaja saw an opportunity at the end of British Raj to keep Kashmir as the Switzerland of the East. Trying to repeat history when his ancestors Maharaja Gulab Singh and Ranbir Singh gained handsome dividends by keeping aloof during the Sikh War and Great Mutiny, Hari Singh tried to sign a standstill Agreement with India and Pak at the time of independence, Pakistan signed, India declined. Maharaja died a lonely man, forced to abdicate and exiled from his beloved land. ..

Dramatic behavior

Having finalized the text of Article 370 with Sheikh Abdullah, Nehru brought in Gopalswamy Ayyangar, IAS, as a minister without portfolio to help him deal with Kashmir portfolio and plead the case of Article 370 in the Constituent Assembly.

Gopalswamy Ayyangar had been prime minister of Kashmir for six years with Maharaja Hari Singh. When Sardar Patel expressed his misgivings this is what Nehru had to say on Dec 27, 1947.

"Gopalswamy Ayyangar has been especially asked to help in Kashmir matters. Both for this reason and because of his intimate knowledge and experience of Kashmir, he had to be given full latitude. I really do not know where the States Ministry (Sardar Patel's ministry) comes into the picture except that it should be kept informed for the steps taken. All this was done at my instance and I do not propose to abdicate my functions in regard to matters for which I consider myself responsible.

The Sardar thereupon resigned and the matter fell in Gandhiji's lap to bring the two colleagues together. During this period, V Shankar, IAS was the personal secretary to Patel and had maintained a record of all events. It is clear from these records that Nehru finalized the draft of Article 370 alongwith Sheikh Abdullah without even informing Patel. Thereafter it fell to Gopalswamy Ayyangar to get the draft passed in the Constituent Assembly discussions. The proposal was torn to pieces by the Constituent Assembly and also Congress Party Executive.

Nehru, who was abroad at the time, swallowed his pride and rang up Patel and requested him to get the Article 370 approved It speaks volumes of Patel's loyalty to a colleague that despite his own and others misgivings, he managed to convince the members of Constituent Assembly and Congress Party Executive. But to V Shankar he said "Jawaharlal Royega". V Shankar, in his record has described the meeting of the Congress Executive Committee "The meeting was one of the stormiest I have ever witnessed barring the party meeting which discussed the proposition relating to Rajaji becoming the first President of Indian Republic. The opinion in opposition to

Gopaldaswamy's formula was forcefully and even militantly expressed and the issue even brought in the sovereignty of the Constituent Assembly to draw up the Constitution without being tied down to the apron-strings of the Kashmir State Constituent Assembly. In such a situation even Maulana Azad was shouted down.

The Party was in uproar. The Sardar had to plead that because of the international complications, a provisional approach alone could be made leaving the question of final relationship to be worked out according to the exigencies of the situation and mutual feelings and confidence that would have been by then created.

Once the Sardar had taken charge, all opposition to the draft was silenced" And how Nehru responded to this great act of loyalty on part of Sardar? On 24 July 1952, after Sardar was no more, Nehru made a detailed statement on Kashmir in the Parliament on slow integration of Kashmir into India Union and mentioned that "Sardar Patel was all the time dealing with these matters." Even Gopaldaswami Ayyangar was dismayed at this blatant lie and mentioned to V Shankar "It is an ill return to the Sardar for the magnanimity he had shown in accepting Panditji's point of view against his better judgment."

Consequences of Article 370

Article 370 has been the biggest impediment to integration of J&K State into Indian Union. That it was incorporated in the Indian Constitution by the machination of two individuals – Shiekh Abdullah and Nehru is all the more regrettable. Nehru had to eat the humble pie when he had to arrest the Sheikh for his divisive and anti national stance on 8 Aug 1953 but he did not let go of his concept of keeping J&K a separate entity. In 1957, some top leaders of National Conference led by Mr Qasim split the party and formed a group called Democratic National Conference (DNC).

It had abrogation of Article 370 on its agenda. Nehru would not brook any opposition to his policy of keeping J&K a separate entity. He told the leaders that a new threat (China) is emerging and it is an inopportune time to raise this issue and forced them to drop their demand. Nehru thereafter decided to withdraw the Kashmir conspiracy case against Sheikh Abdullah. This case had been going on since May 21, 1958. The formal orders however were issued by Govt of India on 8 April 1964.

It is often forgotten that J&K state is not a homogeneous entity. Apart from Valley Muslims, Jammu has a predominantly Hindu population while Ladakh has a mix of Buddhist and Muslims. Then you have the Gujjars & Bakarwals. Why is Article 370 detrimental to the full integration of J&K state into Indian Union. Firstly the Central Govt can make laws only with concurrence of the State govt, practically giving it the Veto power. Article 352 and 360 for declaration of national and financial emergency respectively cannot be applied in Kashmir. While a citizen of India has only Indian citizenship, J&K citizens have two citizenships. Anti Defection Law is not applicable to J&K. No outsider can buy property in J&K state.

The beneficial laws such as Wealth Tax, Gift Tax & Urban Land Ceiling Act and intermarriage with other Indian nationals do not operate in J&K State. Even Article 356 under which President of India can impose his rule in any state cannot be enforced in J&K without consent of the Governor who himself is an appointee of the President. State of J&K can refuse building of cantonment on any site or refuse to allot land for defense purposes.

Article 370, included in the Constitution on a temporary provision should have been gradually abrogated. This has not happened in sixty years. In fact whenever someone mentions this, vested interests raise an outcry that legitimate rights of Kashmiris are being trampled upon. Stated agenda of National Conference is return to pre 1953 status. Why should a state of Indian Union have a special status? It conveys a wrong signal not only to Kashmiris but also to the separatists, Pakistan and indeed the international community that J&K is still to become integral part **India, the sooner Article 370 is done away is better.**

New Delhi, August 5: The Article 370 and Article 35A of the Indian Constitution have been a bone of contention between politicians of Jammu and Kashmir and the Bharatiya Janata Party (BJP) which rules at the Centre. On Monday, Union Home Minister Amit Shah moved a resolution to revoke Article 370, announcing that Jammu and Kashmir will no longer be a state. President Ram Nath Kovind also passed an order abolishing Article 35A.

Article 35A of the Indian Constitution empowered the Jammu and Kashmir state's legislature to define "permanent residents" of the state and provide special rights and privileges to those permanent residents. This was added to the Indian Constitution through the Constitution (Application to Jammu and Kashmir) Order, 1954, which was issued by then President Rajendra Prasad under Article 370, on the advice of the Jawaharlal Nehru-led government

Article 35A gives Jammu and Kashmir state government special rights and privileges regarding employment with the state government, acquisition of property in the state and settling in the state.

Article 370, drafted by Sheikh Abdullah, confers an autonomous status to Jammu and Kashmir. It says Parliament needs the Jammu and Kashmir state government's approval for applying laws in the state except defense,

foreign affairs, finance, and communications. Under Article 370, the Centre has no power to declare a financial emergency in the state. Article 370 also bars citizens from other states from buying property in Jammu and Kashmir.

Here it may be noted that Article 370(1)(c) explicitly mentions that Article 1 of the Indian Constitution applies to Kashmir through Article 370. Article 1 lists the states of the Union. This means, according to those who are against the abolishment of the provision, that it is Article 370 that binds the state of Jammu and Kashmir to the Indian Union. Removing Article 370 would, therefore, make the state independent of India, they say.

Now that Article 370 and Article 35A have been revoked, all central laws will be applied to Jammu and Kashmir. Citizens of other states won't require prior approval from Jammu and Kashmir legislature to buy a property in the state. Job in the state government will now be available for citizens of other states as well.

The Constitution (Application to Jammu and Kashmir) Order 2019 will supersede the Constitution (Application to Jammu and Kashmir) Order, 1954, which was issued to add Article 35A to the Indian Constitution by then President Rajendra Prasad under Article 370, on the advice of the Jawaharlal Nehru-led Union Government.

Some key changes:-

1. Jammu and Kashmir will become a Union Territory instead of an independent state.
2. Ladakh will be separated from Jammu and Kashmir.
3. Ladakh will also become another Union Territory.
4. Jammu and Kashmir will not have a separate constitution of its own. Constitution of India will apply on Jammu and Kashmir.
5. No separate flag of Jammu and Kashmir.
6. Any citizen of India can buy a property or land in Jammu and Kashmir as article 35 A is scrapped.
7. Ladakh will not have a Legislative Assembly.
8. Jammu and Kashmir will become a Union Territory instead of an independent state.
9. Ladakh will be separated from Jammu and Kashmir.
10. Ladakh will also become another Union Territory.
11. Jammu and Kashmir will not have a separate constitution of its own. Constitution of India will apply on Jammu and Kashmir.
12. No separate flag of Jammu and Kashmir.
13. Any citizen of India can buy a property or land in Jammu and Kashmir as article 35 A is scrapped.
14. Ladakh will not have a Legislative Assembly.
15. Jammu and Kashmir will have elections for Legislative Assembly as before.
16. Post of Governor will be changed into Lt. Governor (same as in other Union Territories)
17. Article 356 of Indian constitution will apply on Jammu and Kashmir which will allow president's rule in case of state emergency. Earlier it was governor's rule.
18. It will be a criminal offence to defame Indian flag etc.
19. Jammu and Kashmir will not have a separate decision making in defense, communication or foreign affairs (earlier too they weren't having).

CONCLUSION

We can see some indirect changes in future too.

As, all rules and regulations related to Constitution and other laws will apply on Jammu and Kashmir, we can see less of separatist growth there. Centre can take strict actions against people who are encouraging terrorism in valley.

Slowly, if people of nearby states/ UT such as Uttar Pradesh and Delhi buy land over there, we can see less of anti-national feelings / separate country feeling and more of cooperative feelings for one country INDIA.

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