

Article 370: Abrogation is the Way Forward

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Abstract :

Article 370 has remained a subject of debate and discussion ever since its promulgation. A perusal of Article 370 with respect to its reasons for continued existence, however, presents an obfuscated picture of the whole paraphernalia surrounding the definition, politics and enigma of the Article itself. The State of Jammu and Kashmir and its relations with India, as defined by the Article, has been overhyped and the politics has remained the core factor behind the revival of this issue time and again. This article tries to scrutinise the real agenda behind the Article and as to why political parties in J&K and some even at the central level want its continuation in true spirit. Notwithstanding, this article seeks to bring forth a descriptive and nuanced analysis of the Article 370, thereby highlighting the need for its abrogation which is a prerequisite for the overall development of J&K. Thus, this article strongly supports the viewpoint that Article 370 has rather been a stumbling block in the development of the region and foster discrimination towards other states of India.

Introduction

Article 370 defines the provisions of the Constitution of India with respect to Jammu and Kashmir (J&K). Any significant debate on Article 370 must, however, separate delusion from reality and fact from concoction. In its manifesto just before the general elections of 2014, the Bharatiya Janata Party maintained that it would abrogate the Article if it comes to power. There was also a lot of clamour when Narendra Modi, the Prime ministerial candidate of BJP, mentioned during his campaign in Jammu, that there should be a debate over pros and cons of Article 370. Scholars who support this point of view have long argued that the militancy and secessionist movement in J&K was the result of the undue entitlement meted out under Article 370. On the other hand, political parties of J&K have described the Article as their life-breath and have challenged any such thought of its abrogation or *erosion* as Jawaharlal Nehru had once described it. Thus, Article 370 has long been shrouded and a detailed analysis of the Article is the first step towards its purposeful delineation from fiction.

Article 370: Unravelling the Prognosis

1. Amitabh Mattoo (2013),
“Understanding Article
370”, *The Hindu*, 06
December.

2. Jawaharlal Nehru (1942),
The Unity of India, New
York: The John Day
Company, p. 223.

3. Amitabh Mattoo (2013),
“Understanding Article
370”, *The Hindu*, 06
December.

4. Adrija Shukla (2014),
*Abrogation Of Article 370:
A Step Towards
Development Of Jammu &
Kashmir?*, 14 August.
Accessed at [https://
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4/08/abrogation-article-370
-step-towards-
development-j-k/](https://www.youthkiawaaz.com/2014/08/abrogation-article-370-step-towards-development-j-k/)

Article 370 of the Indian Constitution confers special autonomous status to J&K. It is a ‘temporary provision’ under Part XXI of the Constitution of India, which deals with “Temporary, Transitional and Special Provisions”. Parliament needs J&K government’s nod for applying laws in the state — except defence, foreign affairs, finance, and communications. The law of citizenship, ownership of property, and fundamental rights of the residents of J&K is different from the residents living in rest of India. Under Article 370, citizens from other states cannot buy property in J&K and the Centre has no power to declare financial emergency. The question which arises here is how did the Article 370, granting special status to J&K, come into being and what was the need for such a discriminatory provision for one of the states of the Union of India?

Maulana Hasrat Mohani asked in the Constituent Assembly on October 17, 1949: “Why this discrimination please?” While answering, Gopaldaswami Ayyangar argued that for a variety of reasons Kashmir, unlike other princely states, was not yet ripe for integration. India had been at war with Pakistan over Jammu and Kashmir and while there was a ceasefire, the conditions were still “unusual and abnormal.”¹

Jawaharlal Nehru was undoubtedly quixotic and romantic about Kashmir. He wrote: “Like some supremely beautiful woman, whose beauty is almost impersonal and above human desire, such was Kashmir in all its feminine beauty of river and valley...”² Sardar Patel, however, had a much more pragmatic view and — as his adept assimilation of princely states revealed — little time for capricious state leaders or their separatist tendencies.³ In fact, Kashmir could also have been one of the states to be integrated into India if Sardar Patel, the then Home Minister, would have been allowed to do so by the then Prime Minister, Jawaharlal Nehru. Sheikh Abdullah, on the other hand, was an ambitious leader, who had a dream to rule an independent Kashmir. He persuaded Nehru to grant special status to J&K, and was the architect of Article 370, along with Nehru. Jawaharlal Nehru obliged and fulfilled his wish by appointing him the Prime Minister of J&K in 1947.⁴

As time passed, the vested interests within J&K and the compulsions of various political parties outside the state to appease their vote banks ensured its retention. No thought was spared by the votaries of ‘the retention of Article 370’ for the enormous potential this would have to wreak havoc on the unity and integrity of the country.⁵

Article 370: An Eroding Temporary Provision

J&K never wanted to join Pakistan. J&K decided to procrastinate between accession to India and independence later. Accession to India was conditional on Kashmir retaining its distinct cultural and regional identity. Article 370 was successful in assuring the state all benefits of independent Kashmir without sacrificing the advantages of being a part of the larger Indian federation. Apart from that, it conferred maximum autonomy on Kashmir. The exact purpose of this Article was that it provided:

(a) Union Parliament the right to legislate on such matters in List I and List III of the Seventh Schedule of the Constitution which ultimately corresponded with those highlighted in the Accession Instrument signed by the king of Kashmir, (b) another important purpose was that the president can extend the legislative power of Parliament in respect of subjects in the Union and Concurrent Lists of the Seventh Schedule not included in the Instrument of Accession by an order, which can be made only with the ‘concurrence’ of the state government, and (c) Article I of the Constitution of India, which defines the Indian territories, and Article 370 itself apply to Kashmir *ipso facto*. All other articles of the Constitution of India may be extended to Kashmir, by an order to be issued by the president under article 370, only in ‘consultation’ with the state government of Jammu and Kashmir if it pertains to matters regarding the legislative powers of Parliament, and with the ‘concurrence’ of the state government if it pertains to matters other than those regarding the legislative powers of Parliament.⁶

However, Article 370 and the ‘autonomy’ as envisaged in the Constituent Assembly are no more intact in original form as has been argued by many. A series of Presidential Orders has eroded Article 370 substantially. While the 1950 Presidential Order and the Delhi Agreement of 1952 defined the scope and substance of the relationship between the Centre and the State with the

5. Tej Kumar Tikoo (2018), “Impact of Article 370”, *Indian Defence Review*, 15 March. Accessed at <http://www.indiandefencereview.com/spotlights/impact-of-article-370/>

6. S.P. Sathe (1990), “Article 370: Constitutional Obligations and Compulsions”, *Economic and Political Weekly*, 25 (17), p. 932.

support of the Sheikh, the subsequent series of Presidential Orders have made most Union laws applicable to the State. In fact, today the autonomy enjoyed by the State is a shadow of its former self, and there is virtually no institution of the Republic of India that does not include J&K within its scope and jurisdiction.⁷ The only substantial differences from many other States relate to permanent residents and their rights; the non-applicability of Emergency provisions on the grounds of ‘internal disturbance’ without the concurrence of the State; and the name and boundaries of the State, which cannot be altered without the consent of its legislature.⁸

7. Amitabh Mattoo (2013), “Understanding Article 370”, *The Hindu*, 06 December.

8. *Ibid.*

9. Tej Kumar Tikoo (2018), “Impact of Article 370”, *Indian Defence Review*, 15 March. Accessed at <http://www.indiandefencereview.com/spotlights/impact-of-article-370/>

Clause 3 of Article 370 is also indicative of the fact that though Article 370 cannot be revoked unilaterally but it is not intractable. Although the President may, by public notification, declare that this Article shall cease to be operative but only on the recommendation of the Constituent Assembly of the State, but the Parliament has the power to amend the Constitution to change this provision.

Ramifications of Article 370

Provoking Separatist Tendencies

The whole question of abrogation of Article 370 rises from the fact that the Article has proved to be detrimental rather than being beneficial for J&K and the whole country. It is no more hidden that Article 370 has strengthened separatist tendencies in J&K. It can be reasonably argued that the creation of this Article has aggravated separatist tendencies in the State. Moreover, many of the Kashmiri locals do not think of them as part of India. This challenges the very Indian cultural attribute of *Unity in Diversity* which loses its meaning in J&K.

Article 370 has built poignant and psychological barriers between the people of J&K and the rest of India and has, thus, fostered a psychology of separatism. Existence of this statute is used by Pakistan and its proxies in the valley to mock at the very concept of ‘India being one from Kashmir to Kanyakumari’.⁹ It has kept alive the two-nation theory. Over a period of time, the separatist lobby in the state has used this barrier to build a mindset of alienation. Such a possibility had been clearly visualised by many political

stalwarts who comprised the Constituent Assembly of India. While speaking in the Constituent Assembly of India on October 17, 1949, one of its distinguished members, Hasrat Mohani had said, “The grant of special status would enable Kashmir to assume independence afterwards.”¹⁰

Threatening Indian Security

It is familiar to all how Pakistan, through its involvements in terror acts, has been posing a great threat to India. As a countermeasure, it is imperative upon us all that we fight the menace together. But, as a matter of fact, Article 370 gives Pakistan’s citizens entitlement to Indian citizenship, if he marries a Kashmiri girl. Thus, unintentionally, we are embracing terrorists. This makes the whole issue very sensitive, thereby needing to be re-looked upon with great discretion. How can this be justified when terrorism is not only a national issue of concern but global as well and more importantly when Kashmir is the eye of Pakistan and a thorn in the flesh, though more a narrative, right from the time of Independence.

Impediment to Development of J&K

As per the provisions of Article 370 people from outside Kashmir cannot invest in Kashmir, they cannot buy any property or carry on any business. Where rest of the India enjoys right to move freely and carry on trade in any part of India thereby developing India as a whole, Kashmir due to restriction put by Article 370 is closing doors of development for itself.

The main source of household income in the valley is tourism and small scale industries due to absence of large scale industrial investments. Since any kind of investments by residents who aren’t from J&K, within the valley is illegal, there hasn’t been any kind of FDI/domestic industrial developments either.¹¹

Political parties have, right through, been hesitant to touch Article 370, fearing to lose their vote bank. If one contemplates upon what special benefits this Article has given to the people of J&K, one may not be able to find much. Literacy rate of the state is 67.16 percent.¹² Economic growth

10. *Ibid.*

11. Amitabh Mattoo (2013), “Understanding Article 370”, *The Hindu*, 06 December.

12. Adrija Shukla (2014), *Abrogation Of Article 370: A Step Towards Development Of Jammu & Kashmir?*, 14 August. Accessed at <https://www.youthkiawaaz.com/2014/08/abrogation-article-370-step-towards-development-j-k/>

hasn't been up to the mark, and poverty prevails in many areas. Due to steady attacks carried out from Pakistan people live in impending fear. Moreover, J&K is lagging behind and cannot accrue the benefits of private investments as citizens from other states are not allowed to buy property in J&K. This is affecting the economic growth of the state to a great extent. This is also affecting the youth, as the people are left with very little employment options. J&K has not been able to generate sufficient revenues from its own resources and has been facing serious financial problems. J&K's plan expenditure are 100 per cent financed by the Central government. Kashmir is presently the most subsidized state of India. Bihar is the poorest state of India, but J&K gets 11 times more central assistance than Bihar.¹³

13. *Ibid.*

14. *Tej Kumar Tikoo* (2018), "Impact of Article 370", *Indian Defence Review*, 15 March. Accessed at <http://www.indiandefencereview.com/spotlights/impact-of-article-370/>

Camouflaging Unwarranted Corruption

Corruption looms large in J&K and goes unwarranted as can be gauged from the fact that J&K does not come under the anti-corruption bodies like Central Bureau of Investigation (CBI), Comptroller and Auditor General (CAG) and Central Vigilance Commission, like any other Indian state, to investigate corruption issues in the state. This raises serious concerns and questions over the affairs in the state which are not subject to checks and balances. Moreover, people in the state are not only deprived of right to information (RTI) but also the procedure to file the complaint, signalling the absence of a significant aspect of democracy and transparent government. In the absence of RTI it can be assumed that politicians of J&K want to escape from accountability and thereby deliberately refuse to abrogate Article 370 altogether. Article 370 has also been misused by political oligarchs to perpetuate their hold on power by preventing various democratic legislations from being applied to the state. Take the case of 'anti-defection law', which is a useful provision for preventing defections. This legislation vests the powers of deciding whether a legislator has defected or not, with the Speaker. However, in Jammu and Kashmir, the power has been vested with a party chief, thus turning the leader into a virtual dictator.¹⁴

Article 370 has been misused by the political and other influential classes in

J&K having vested interests. They have done so for their own nefarious purposes by exploiting the poor and the down-trodden people of the state. The rich have consistently used Article 370 to ensure that no financial legislation is introduced in the state, which would make them accountable for their loot of the state treasury. These include the provisions dealing with Gift Tax, Urban Land Ceiling Act, Wealth Tax, etc.¹⁵ This has ensured that the rich continue to grow richer and the common masses are denied their legitimate share of the economic pie. Article 370 has also helped create power elites and local Sultans, who wield enormous power, which they use to trample upon the genuine demands of common people for public welfare. As no outsider can settle in the state and own any property there, the politically well-connected people stand to gain enormously. It is these influential people who make the rules, decide the price and determine the buyer, since any competition from an outsider is completely ruled out.¹⁶

The anathema of threat to the Kashmiri identity that the abolition of Article 370 will pose is merely a subterfuge to camouflage the political ambitions of the leaders in J&K. In fact, these leaders are themselves causing a great damage to Kashmiri culture, as no culture can survive without the stimulus of outside contact and opportunity to cross-fertilise. It was this mindset that has been responsible for creating the violent communal upsurge of 1989, which finally led to the exodus of Kashmiri Pandits.¹⁷

Article 370: Necessitating Abrogation

The J&K High Court in October 2015 had ruled that Article 370 is “permanent, beyond amendment, repeal or abrogation”. However, the J&K High Court’s recent observation may cause some disquiet but the High Court’s comments should be seen in the limited context in which it was made. Its remark that Article 370 is beyond amendment, repeal or abrogation flows from an analysis of the question whether the section had become inoperative after the State’s Constituent Assembly framed its Constitution, and then the Assembly itself ceased to exist. In fact, the question whether its temporary provisions had acquired permanence was not before the court; nor was the court hearing a challenge to the validity of the Article per se.¹⁸

15. *Ibid.*

16. *Ibid.*

17. *Ibid.*

18. “The Importance of Article 370”, *The Hindu*, 15 October 2015. Accessed at <http://www.thehindu.com/opinion/editorial/the-importance-of-article-370/article7762192.ece>

So, should Article 370 be annulled? The answer for the question is simple and it is yes. The reasons behind the need for the abolishment or withdrawal are many. Since J&K is a part of India, the first question that perturbs any fellow citizen of the country is why s/he has been disallowed to own land and settle in J&K. Moreover, in having granted J&K a special status and continuing with the provisions, India has been mistakenly signalling to the world that J&K is one of the disputed areas. Apart from that, the Article must be removed because it eventually creates division between Kashmir and rest of India. It should also be noted that if Article 370 stands abrogated, the resultant social amalgamation will reduce the threat of militancy.

The removal of Article 370 will be for full integration of the state of J&K with India. The writ of the Indian Constitution and the Parliament will run over this territory, and the discriminatory laws enacted by the state legislature under the guise of Article 370 and the constitution of J&K will vanish away, since they will become ultra vires of the Indian Constitution. The fundamental rights that are enjoyed by the citizens of India will be extended to the citizens of India in this state also, as well as the residents of J&K. All the provisions of the Constitution of India will be applicable to J&K, and there will not remain any difference between the citizens of J&K, and those of rest of India. Pakistan will also get a message that there is no dispute over the state of J&K, being fully integrated with the Union of India.

The various resolutions of the state assembly that restrict the delimitation of the assembly constituencies in the state till 2026, will be declared null and void; the state will be forced to delimit the constituencies as has happened elsewhere in India. The financial mismanagement and corruption that are shielded by the Article 370, by giving extraordinary powers to the state government, will go away, as the Union will have full power to ask for financial integrity. Those few families, who have made indecent gains by way of this Article, will have to cut a sorry figure.

Conclusion

Too much of a fuss, little concurrence! The hue and cry around Article 370 is not new. However, knowledge has taken over ignorance and questions are

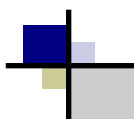
being raised, more often than not, concerning the Article, its application and its continued existence knowing the fact that it has added miseries to the state further.

The redrafting of Article 370 and a review of the Constitution of J&K, thus, becomes necessary. Article 370 is only adding miseries to state of Jammu & Kashmir and threatening the security of India and its citizens. So, removal of Article 370 is must for the betterment of the state. No doubt, people of J&K deserve to be treated just like the rest of Indians and the Government of India needs to pay more attention to eliminate poverty from the valley and provide more social welfare. So, we can conclude that there will be gain in abrogating Article 370 only if government will be able to make Kashmiris believe that their interests, belief and identity will be protected at any cost and government should create proper institutions to check this.

The state of J&K would remain an integral part of India irrespective of Article 370 being repealed or not. Moreover, it is time for the entire state and its people residing in all the three regions, as a matter of their right, to look afresh into the pros and cons of the Article and assess things themselves instead of getting entrapped every time into the jargon of J&K politicians who won't let the wave subside ever. Article 370, which continues to keep the state in isolation, must therefore be scrapped for the betterment of fellow citizens in J&K. India must have 'Ek Pradhan, Ek Vidhan, Ek Nishan' (One PM, One Constitution, One Flag).

Dr B.R. Ambedkar had forewarned the country on this score in reply to Sheikh Abdullah's demand for a special status in the Constituent Assembly of India. He had said, "You want India to defend Kashmir, give Kashmir equal rights over India, but you deny India and Indians all rights in Kashmir. I am Law Minister of India; I cannot be a party to such betrayal of national interests."¹⁹ His words still echo in the minds of common citizens of the country.

19. Tej Kumar Tikoo (2018), "Impact of Article 370", *Indian Defence Review*, 15 March. Accessed at <http://www.indiandefencereview.com/spotlights/impact-of-article-370/>



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