

The Kashmir Problem: Article 35 A & 370

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Abstract

The state of Jammu and Kashmir, ruled by Maharaja Hari Singh at the time of independence of India, finally acceded to India when the area was attacked by Pakistani rangers. The Hindu ruler of the state wanted to remain independent but under the contemporary situation the state had to merge with India. However, the two opposite political poles were having different aims. One was of the then ruler Maharaja Hari Singh and another was of Sheikh Abdullah. The fate of the state was to be decided by these two streams. Finally, agreements were concluded, Article 370 and Article 35 A were added in the Constitution of India. In fact, these two were added without approval of the Parliament but through Presidential orders. The Delhi Agreement was also an important milestone in this journey. The powers of the Government of India and the supremacy of the Constitution of India cannot have the same force in the state because it framed its own Constitution. The accession will be complete only after the repealing these two provisions of the Constitution of India.

Keywords: *Dogras, Constitution, Delhi Agreement, Article 370, Article 35 A, Accession, Constituent Assembly*

The State of Jammu and Kashmir is full of uniqueness and has a distinct cultural heritage. Situated in the north of India in the lap of the Himalayas, this state shares its international boundaries with Pakistan and China and the domestic border is shared with Punjab and Himachal Pradesh. The state of Jammu and Kashmir has diversity in itself. The Jammu region is relatively plain while the Kashmir region is hilly terrain. The third region is Ladakh which

is famous for Buddhist monasteries and a very cold climatic area. Kashmir and Ladakh have been the tourist attractions also because of beautiful landscape and religious worship.

During colonial rule it was a princely state under the Dogras. The last ruler of Jammu and Kashmir was Maharaja Hari Singh who signed the Instrument of Accession with the Government of India in the year 1947 just after the independence of India. Since its accession with India till date, there have been troubled times because Pakistan, the former territory of United India, has never agreed to accept the fact that Jammu and Kashmir has voluntarily accepted to be a part of India. The Instrument of Accession was signed under special circumstances when Jammu and Kashmir was very near to losing its identity under the threat from Pakistan. The herculean task of framing the Constitution of India was already underway so it was felt that there was no need to disturb the existing administrative set up of the state but to continue with the same. Later on, the change was witnessed at the behest of Pt. Nehru, the then Prime Minister of India. The two provisions of the Constitution of India namely Article 370 and Article 35 A were incorporated and since then, they have been the center of controversy. Article 370 gave a protected status to the state of Jammu and Kashmir and Article 35 A thereby ensuring the independent identity of the people of Kashmir. The state has undergone tremendous pressure because of cross-border terrorism on the one hand and on the other the pressure to save its distinct cultural heritage. Whenever there is less oil in the politics, it tries to bring those issues in the front that can be used as fuel. The fate of these two articles have been the same.

The Accession of Jammu and Kashmir

Jammu and Kashmir was a part of the Sikh Empire before becoming an independent state in 1846 during the colonial period of India. It continued with the status of a Princely State from 1846 to 1947. After its accession with India, it continued as a kingdom up to 1952. Raja Gulab Singh was the first ruler of the Dogra Dynasty who occupied the throne in the year 1846 and continued till 1857. The last king from this dynasty was Raja Hari Singh who ruled the state from 1925 to 1948. Dr. Karan Singh was the Prince Regent from 1948 to 1952. Mehar Chand Mahajan was the first Prime Minister of Jammu and Kashmir (for 142 days only) during the reign of Maharaja Hari Singh and Sheikh

Abdullah was the second Prime Minister of the state (for 5 years 5 months).

The Instrument of Accession was signed between Maharaja Hari Singh, the then ruler of the state of Jammu and Kashmir, and the then Government of India. The accession day, either 26 October or 27 October, is also under shadow but it did take place. Lord Mountbatten replied to Maharaja Hari Singh on the request for help from the Indian Dominion:

My dear Maharaja Sahib, Your Highness' letter dated 26 October has been delivered to me by Mr. V. P. Menon. In the special circumstances mentioned by your Highness my Government has decided to accept the accession of Kashmir State to the Dominion of India. Consistently with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question if accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invader the question of the State's accession should be settled by a reference to the people¹.

The Indian side of this story of accession is unconditional while the Pakistani version considers it as conditional. Thereby the terms and conditions of this accession is disputed. According to India's position on Kashmir, the argument being that irrespective of surrounding circumstances and conditions, the choice of Maharaja Hari Singh to acquiesce to the Indian Union is final and lawful and it can't be disputed (Singh, 2011, p. 1). On the other hand, Pakistan considers the province of Jammu and Kashmir to be a disputed domain because the accession of the state of Jammu and Kashmir to India was unlawful, maintaining that Maharaja Hari Singh had no legal authority to execute an Instrument of Accession on 26 October 1947. From India's position, the plebiscite which was concurred by Nehru had affirmed the increase which was, in all regards, officially complete. India further maintains that the UN Resolutions requiring the desire of the general population to be discovered are not valid (Pauls, 2012, p. 33). Pakistan also claims and accuses that the Maharaja's offer of accession was accepted by the Governor-General of India, Lord Mountbatten, on the condition that as soon as law and order had been restored, the question of accession of the state would be decided by a reference to the people but India is violating the commitment to hold a plebiscite in the future.

A Composite Map of J & K



Source-<https://jkdat.nic.in/pdf/Rules-Constitution-of-J&K.pdf>ⁱⁱ

Article 370

When the British rulers were leaving the sub-continent in August 1947, a choice was offered to the Princely States either to merge with India or Pakistan or to remain independent. Maharaja Hari Singh decided to maintain equal distance with India and Pakistan. He signed a standstill treaty with Pakistan to uphold the sovereignty of Jammu and Kashmir. Pakistan violated the terms of this treaty when it tried to invade Jammu and Kashmir through a planned aggression, started on 24 October 1947. When Hari Singh sought help from India after Pakistani invasion, the Instrument of Accession was signed in October 1947 between Maharaja Hari Singh and the Government of India. It mentioned that Jammu & Kashmir would transfer three specific powers to the Government of India namely Foreign affairs, Defence and Communications. Rest of the powers were left with the Maharaja. It meant that the internal sovereignty of the State was maintained. The denial of property rights to outsiders in the region was also continued. All the conditions were agreed on the ground that final settlement will take place in future. Meanwhile an interim government was appointed in the state with Sheikh Abdullah as Prime Minister. Pt. Nehru and Sheikh Abdullah both were in agreement regarding a special status for Jammu and Kashmir. In July 1949, Sheikh Abdullah and three other colleagues joined the Indian Constituent Assembly and negotiated for the special status of the state leading to the adoption of Article 370. It was introduced in the Constituent Assembly as draft article 306 by N. Gopalaswami

Ayyangar ensuring a special status and internal autonomy to Jammu and Kashmir due to its special conditions. It was presented as a partially disputed territory, since the United Nations mandated for a fair and impartial plebiscite. After debates and amid apprehensions, Article 370 was inserted in the Part XXI of the Constitution of India as a temporary and special provision.

Salient Features of Article 370

Ultimately on 17 October 1949, Indian Constituent Assembly adopted Article 370 with the following features:

- It was added in Part XXI of the Constitution of India as Temporary, Transitional and Special Provisions.
- Article 238 (repealed) shall not apply in relation to the state of Jammu and Kashmir.
- The Parliament will have limited power to legislate for the state i.e. only on the subjects of union list and concurrent list and that too in consultation with the state government in line of the instrument of accession.
- The state was allowed to frame its own constitution through a constituent assembly meaning hereby that there was no complete applicability of the Constitution of India.
- The state was empowered to make its own laws in all matters except defence, foreign affairs, communications and finance.
- This article could be abrogated or amended only after the recommendations of the state assembly³.

Consequences of Article 370

The instrument of accession established a special relationship between the state of Jammu and Kashmir and the Union of India. Since its implementation till date, it has served as a mechanism for managing Centre-State relations with specific reference to Jammu & Kashmir. Later on, the Delhi Agreement and insertion of Article 35 A to the constitution of India were the direct outcomes of Article 370. The residents of the state have lived under different laws from the rest of the country especially in matters such as property ownership, citizenship, criminal procedure code etc. The elections for the constituent

assembly of Jammu and Kashmir were held in September-October 1951. The assembly completed the task of framing the constitution on 17 November 1956 and it was dissolved on 25 January 1957, one day before the constitution came into force. The constitution of the state became operational from 26 January 1957. According to Article 48 of the constitution of Jammu and Kashmir, out of 87 seats, 24 seats were allocated for Pakistan administered Kashmir. Article 370 itself provides the method of its amendment or revocation in the constitution, that the Article will cease to be operative on the recommendation of the Constituent Assembly of the State. The Constituent Assembly was dissolved without recommending any amendment in Article 370 or its revocation from the constitution of India. This article acted as a shield for the politicians of the region on the one hand and to the residents also to some extent. The temporary provisions of this article became a permanent feature of the Indian Constitution.

The Delhi Agreement

In post independent India, the Kashmir Agreement was signed between Sheikh Abdullah and Pandit Jawaharlal Nehru on 24 July 1952. The agreement is also called 'Delhi Agreement 1952'. This agreement was the need of the hour as Pt. Nehru felt that certain changes have to be brought in the administrative set up of the state. This agreement ensured a number of benefits for the people of the state, at the same time saving the state from direct control of the Government of India. Sheikh Abdullah tried to cover all the areas such as land reforms, termination of hereditary monarchy in the state and that the office of head of state shall be elective etc. According to this agreement, the state of Jammu & Kashmir remained sovereign in all matters except the four core areas mentioned in the instrument of accession. It is believed that article 35 A is the result of this agreement.

People from different sides had reached the understanding that the greater part of the sacred issues in the Constitution of India, concerning citizenship, fundamental rights, the jurisdiction of the Supreme Court and the division of forces between the Union and the States, will be identified with. Likewise, understanding over abrogation of the Dogra rule, separate flag and authority language of the state was also drawn. It was also agreed that the State Government would put the terms of the agreement before the Constituent

Assembly. Thus, the special position of the state of Jammu & Kashmir was endorsed by Article 306-A (later to become Article 370) of the Indian Constitution, which also guaranteed its internal autonomy. However, it was made clear that the Article was a temporary arrangement, pending final settlement of the Kashmir dispute. That New Delhi's jurisdiction in Jammu and Kashmir would remain limited to the three categories of subjects specified in the Instruments of Accession was affirmed in the same. After India became a republic in January 1950, Article 306-A became the basis of Article 370 of the Indian Constitution which asserts Jammu and Kashmir's autonomy within the Indian Union. The power of the Government of India is not at par with other states because in relation to the state of Jammu and Kashmir without prior approval of the state assembly, it cannot be enforced in the state.

Sheikh Abdullah reported the agreement in the Constituent Assembly of the state and the salient features of Delhi Agreement 1952 were as:

- Sovereignty in all issues other than those predetermined in the Instrument of Accession continues to reside in the state.
- The residents of the state would be the citizens of India. "It was further agreed that the state legislature shall have power to define and regulate the rights and privileges of the permanent residents of the state, more especially in regard to acquisition of immovable property, appointments to services and like matters" (Bakshi, 1997, p. 51).
- The Fundamental Rights would apply to Jammu and Kashmir except those rights which (a) might come in the way of their land reforms legislation including the compulsory acquisition of property without compensation and the liquidation of the debts of the peasantry, and (b) which might hamper the state's extra precautions against infiltration, sabotage or espionage by the enemy from across the border.
- Residuary powers would vest in the state in the case of Kashmir, although in regard to all other states it would vest in the Union.
- The Supreme Court should have only appellate jurisdiction.
- The state will have its own flag in addition to the Union flag. It was also recognized that the Union flag should have the same status and position

in Jammu and Kashmir as in the rest of India.

- The power to grant reprieve and commute death sentences would belong to the President of the Union.
- The Union Government will have limited emergency powers in the state and that too in the case of internal disturbances only. The Union's forces would stretch out to the state just with the concurrence of state government.
- Hereditary rule of the Dogras would be abolished and the Head of the State, Sadar-I-Riyasat, would be recognized by the President of India on the recommendations of the State Legislature and hold office for a period of five years.

India agreed to give a special position and status to the state of Jammu and Kashmir in the constitution whereby complete internal autonomy was assured to the State. On the one hand this agreement spelt out the details of the independence of the State inside the Union of India and then again, it confirmed that Jammu and Kashmir was an integral part of India.

Sheikh Abdullah projected the incorporation of the Article 370 as an attempt to secure the maximum autonomy for the state in the given situation. His focus was on securing an independent state within the federal structure of India. The institution of the hereditary monarchy was also abolished through this agreement in November 1952, the Constitutional Act of 1939 was revised to incorporate the arrangements of the resolution passed by the State Assembly. As per the Amendment Act, the institution of the hereditary monarchy was nullified, and it was pronounced that the head of the State was assigned as the "Sadar-I-Riyasat". The state government was to be governed by the Sadar-e-Riyasat, who was chosen by the State Legislature and affirmed by the President of India.

Article 35 A

The genesis of this article is not in vacuum, but it is a derivative of Article 370. A presidential Order was issued on 14 May 1954 and in concurrence of the Government of Jammu and Kashmir to secure the status of permanent residency of the citizens of Jammu and Kashmir. Such a mandate was already

given under the instrument of accession. It can be seen as a continuation of the policy of closed space of the region for the outsiders, something regulated during the days of Maharaja in the year 1927 and 1932. This presidential order came even when the new constitution was being drafted. The Jammu and Kashmir legislative assembly got the legal authority to frame laws and decide regulations regarding the three core domestic areas as:

- Who is a permanent resident
- Who is eligible to vote and work
- Who can own land and get admission in colleges

It was also provided that no alteration or increase or decrease in the area of the state or altering the name or boundary of the state shall be introduced in Parliament without the consent of the Legislative Assembly of the state. Although it was against the spirit of fundamental rights granted by the constitution of India, but it allowed that a person, who migrated to Pakistan Occupied Kashmir at the time of partition and returned on valid documents, was eligible to buy property in the State while the Indian citizen could not.

Article 35 A disregards the very idea of equality enshrined in the Constitution of India. The dual citizenship was protective for the citizens of the state but discriminatory for the citizens of India. The provisions of Article 35 A also violated the principles of gender equality. Section 6 of the Constitution of Jammu and Kashmir, which derives its power from Article 35 A, discriminates against women residents of the state who marry a person from another state. The children from such unions are not entitled to the Permanent Resident Certificate (PRC) or the benefits consequent thereupon, such as the right to acquire immovable property and a government job. However in 2002, court authorized the PRC for native women but still discrimination continued because her children could not get PRC. It meant that they were not entitled for any job or the property of their mother.

Consequences of Article 35 A

Article 35 A has widened the gap further between the Union of India and its legal entity, the state of Jammu and Kashmir. The region was enjoying the benefits of being with India as well as the exclusive privileges within the state. The only Muslim dominated state got an opportunity to pursue the policy of

selective discrimination and gradually, with the support of our neighbour, religious extremism started emerging. The minority Hindu population, including the Sikhs, was forced to feel the alienation. However, it was not so from the beginning but at a later stage, it turned to extremism.

The state continued with a separate constitution, separate flag and exclusive power to decide citizenship rights. The acquisition and termination of citizenship was not in accordance with the constitution of India. The rules framed by Indian legislature, could not be implemented in the state. No act of the State legislature could be challenged for violating the Constitution or any other law of the land. It was seen against the gender equality and individual liberty granted by fundamental rights. Women could not exercise their choice of marrying someone from the rest of India or any other part of the world except Pakistan. Doing so, they were to lose their property rights along with the loss of citizenship of the state. Article 35 A virtually closed the doors of the state for the Indian citizens and the scope of complete integration with India also.

Preamble of the Constitution of J & K and India

We, the people of the State of Jammu and Kashmir, having solemnly resolved, in pursuance of accession of this State to India which took place on the twenty-sixth day of October, 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof, and to secure to ourselves.

JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among us all;

FRATERNITY, assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY This seventeenth day of November, 1956 do Hereby Adopt Enact and Give to ourselves this constitution.

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY, of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

Source-https://www.constitutionofindia.net/constitution_of_india/preamble

The Constitutional Implications of Article 370 and 35 A:

- An NGO, We the Citizens, challenged Article 35 A in the Supreme Court of India in 2014 on grounds that it was not added to the Constitution through change under Article 368.
- It was never presented in the Parliament for debate or discussion, and against the parliamentary practices. The power to legislate was bypassed and enforced through presidential orders.
- Article 370 was just a 'temporary provision'. The intention was to normalise the situation in the state and not to continue it forever.
- Article 35 A is against the preamble of the constitution of India since it creates layers within layer, class within class.
- These rules restricted the right of having business or purchase of property or entrepreneurs to start innovations.

Maharaja Hari Singh tried to protect his subjects along with himself when he asked for help from the then Government of India. The British accorded it an independent status with the Treaty of Amritsar that happened in the year 1846 (Singh, 2011, p. 7). The Maharaja acceded his state to India, he was forced to appoint Sheikh Abdullah as the Prime Minister and finally he left for Bombay where he lived in exile. The Abdullah family had developed a strong control of the politics of the state since the days of Maharaja and of course with the support of Nehru, the then Prime Minister of India. The state was being exploited and the protected status provided suitable grounds for it and the two articles, namely 370 and 35 A, were a facilitator in this process. The state was a Muslim majority state but not a Muslim state. The close door policies being pursued under these two articles was acting as a hindrance in the assimilation of this region with the rest of India. The democratic process was also under doubts. The decades of 1990s started witnessing the rise of fundamentalism and terrorism with cross-border support. Once called a heaven on earth, the state of Jammu and Kashmir was no more an attractive tourist destination. As long as the two constitutional provisions namely Article 370 and 35 A remain in operation, the politics of the state will continue to be controlled by family rule, religious fanaticism and sectoral interests. The democratic process of the

country is so strong that it will solve the issues in due course with the removal of these two protracted provisions.

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Endnotes

ⁱ <http://www.jammu-kashmir.com/documents/harisingh47.html>

ⁱⁱ <https://jkdat.nic.in/pdf/Rules-Costitution-of-J&K.pdf>

ⁱⁱⁱ https://en.wikipedia.org/wiki/Article_35A_of_Constitution_of_India