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Understanding Article 370: Origin, Evolution and Significance

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ABSTRACT

The abrogation of Article 370 and the subsequent enactment of the Jammu and Kashmir Reorganisation Act, 2019, marks a significant constitutional and political milestone in the history of India. This study aims to critically analyse the implications and ramifications of this historic move, particularly focusing on its legal, political, social, and economic dimensions.

The study begins by providing a comprehensive overview of Article 370 of the Indian Constitution, its historical context, and the unique special status it conferred upon the state of Jammu and Kashmir. It delves into the debates and controversies surrounding Article 370, examining the arguments both in favour of its retention and those advocating for its abrogation.

Furthermore, the study conducts a detailed examination of the Jammu and Kashmir Reorganisation Act, 2019, analysing its provisions and the manner in which it alters the administrative and political landscape of the region. Special attention is given to the implications of the reorganization on governance, citizenship rights, and socio-economic development in Jammu and Kashmir and Ladakh.

Moreover, the study explores the responses and reactions elicited by the abrogation of Article 370, both domestically and internationally, assessing the geopolitical implications and diplomatic ramifications of this transformative constitutional amendment.

Through a multidisciplinary approach encompassing legal analysis, political science, and socio-economic perspectives, this study seeks to contribute to a nuanced understanding of the complexities surrounding the abrogation of Article 370 and its aftermath. It aims to provide insights that can inform future policy decisions and academic discourse on the subject, while also fostering a deeper appreciation of the historical and constitutional significance of this landmark event.

Keywords: *Jammu and Kashmir, Special status, constitutional significance.*

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I. INTRODUCTION

The abrogation of Article 370 of the Indian Constitution and the subsequent enactment of the Jammu and Kashmir Reorganisation Act, 2019, mark a significant turning point in the political landscape of India, particularly in the context of Jammu and Kashmir. These constitutional and legislative changes have sparked widespread debate, discussion, and analysis across various domains, ranging from politics and law to socio-cultural implications.

Article 370, a provision granting special autonomous status to the state of Jammu and Kashmir, had been a subject of contention since its inception. Its abrogation on August 5, 2019, by the Government of India, effectively revoked the special status accorded to Jammu and Kashmir, integrating it more closely with the rest of the country.

The Jammu and Kashmir Reorganisation Act, 2019, accompanied the abrogation of Article 370, leading to the bifurcation of the state into two separate Union Territories – Jammu and Kashmir, and Ladakh. This reorganisation not only altered the administrative structure but also aimed to usher in socio-economic development and better governance in the region.

This study seeks to delve into the multifaceted implications of the abrogation of Article 370, with a specific focus on the Jammu and Kashmir Reorganisation Act, 2019. It aims to critically analyse the legal, political, socio-economic, and cultural ramifications of these significant constitutional and legislative changes. By examining various perspectives and drawing upon empirical evidence, this research endeavours to provide a comprehensive understanding of the impact of these measures on the region and its people.

Through a meticulous examination of legal frameworks, historical contexts, and contemporary developments, this study endeavours to contribute to the ongoing discourse surrounding the abrogation of Article 370 and its aftermath. By shedding light on the complexities and nuances of this transformative process, it seeks to facilitate informed dialogue and policy formulation for the sustainable development and integration of Jammu and Kashmir within the broader framework of the Indian Union.

II. ARTICLE 370 – A FIRST ACQUAINTANCE WITH ITS PROVISIONS

Article 370 reads as follows.

370. Temporary provisions with respect to the State of Jammu and Kashmir. –

(1) Notwithstanding anything in this Constitution, --

(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 –

(i) 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

(ii) 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 recognized 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 Maharaja's 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 the matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.³

³ COI...pdf (legislative.gov.in)

(A) Statement of the problem

Article 370 has been used as a poll ploy and various political interests are served by continuing to perpetuate the ignorance and misconception that abounds in the minds of the common man. When it comes to this Article that is a temporary and transitional provision as was decided at time of insertion; there are myths and realities that surround it. Unfortunately for the people of Jammu and Kashmir, it is very unfair that they suffer discrimination in the sense that they are not certain of the applicability of their constitutional rights, even though the Constitution came into existence in 1950. This problem needs to be addressed.

(B) Research Questions

In order to understand Article 370 and its impact, it is imperative to answer comprehensively certain questions.

1. What exactly is the nature and what are the operational functions of Article 370?
2. Is Article 370 an integral part of the Constitution of India?
3. Does Article 370 come under the 'basic structure' doctrine?
4. What was the intended lifespan of temporary article at the time of insertion?
5. Does this article serve any benevolent purpose or does it not serve any purpose today?

(C) Rationale/motivation for the study

Confusion as to the applicability of the Constitution of India to the state of J&K – which constitutional provisions apply and which do not:-

The application of the constitutional provisions to the State has been made so confusing and even most lawyers will have to spend time searching and verifying which constitutional safeguards are applicable and which are not. Further, if the lawyer finds that the constitutional provision is in fact applicable then he will have to check for the modifications, if any, that may be made applicable. The purpose of this study is to alleviate some of the confusion regarding legal aspects of the article, without going into power politics.

(D) Characteristics of the study

Legal research generally takes into consideration even social and behavioral phenomena. This study will endeavor to take into consideration the surrounding socio-political conditions that prevailed in 1947-49, when studying the nature of the article and its insertion into the Constitution of India.

This legal research will serve the purpose/objective of verifying the established facts regarding

the repercussions of Article 370 and discovering new facts based on existing judicial decisions, etc.

This legal research will endeavor/attempt to find the factual connection between the making of and the purpose fulfillment of Article 370. It will be an attempt to find whether the effects that the Article has produced were intended by the founding fathers at the time of the Article's inclusion on the constitution of India, or whether the article has been misused.

Since one of the supreme aims of legal research is to find solutions for all socio-legal problems, this study will entail an attempt to factor-in whether Article 370 has a role to play in the problems of J&K or in the solutions of that State of the Union.

The research will inquire into and try to discover the challenges and issues faced by Jammu and Kashmir in the last 70 odd years; and to see whether Article 370 of the Constitution of India has any part to play in that regard.

It will be my endeavor to conduct the research in such an unbiased way that this study will lay the path for new searches into important constitutional questions that will have a bearing upon the future of Jammu and Kashmir.

(E) Objectives and scope of the study

Broad classification of the objectives of my research are under the various headings as given below. The headings will also show the scope of my research.

1. Explanatory Research

In this study I will endeavor to familiarize myself with Article 370 and to obtain/acquire new insights into the ramifications of the existing facts concerning the article.

2. Diagnostic Research

I will endeavor to determine the frequency with which human rights violations occur or problems are perpetuated in India (especially in J&K), as well as the frequency with which they are associated with the existence of Article 370 and impacted by this article of the Constitution of India.

3. Descriptive Research

I will endeavor to portray, accurately, the characteristics of Article 370 and its effects in J&K as well as the rest of India, with main emphasis on a humanitarian perspective. I will deal with the purely legal point of view and eliminate any sensationalization of the subject, or other political propaganda.

4. Distinguishing Research

I will endeavor to separate fact from speculation in regard to Article 370. This is very essential because there are umpteen misconceptions when it comes to the common man's understanding of the article.

5. Comprehensive Research

This study will be an endeavor to inspect all the pros and cons of the existence and application of Article 370 from a legislative, executive and judicial point of view.

Generally society will find solutions to its problems/issues by enacting protective legislation. Therefore, it is simple logic that Article 370 had a purpose, and a temporary purpose or an interim purpose. Let me make it simple by explaining with an example. If there is no murder in a certain society, then there will be no laws made, punishing or preventing murder, because the problem of murder has never arisen. In the same way, since Article 370 was expressly made as a temporary provision, there was a temporary problem that had to be addressed. That temporary problem was in existence at that time. This research will endeavor to find out the scope and extent of that problem and when it ceased to exist, thereby the purpose of the Article 370 having been fulfilled. The study will also look into whether the Article still has a contemporary purpose to fulfill, which would mean that the temporary problems that Ayyangar had mentioned at the time of advocating the Article, those conditions still exist, i.e. India is still in a State of War with Pakistan for the last 70 years.

III. SIGNIFICANCE AND CONTRIBUTION OF THE STUDY

Certain legal luminaries claim that Article 370 is detrimental due to its redundancy and because it gives Jammu and Kashmir an inferior status in the Union of India. Some others are of the opinion that Article 370 serves many useful purposes and it needs to be converted from a temporary article into a permanent article of the Constitution, by amendment to the Constitution of India. There are still others who believe that it serves no useful purpose but it cannot be effaced because the only body that could repeal this article was the Constituent Assembly of Jammu and Kashmir (which is no more in existence). Furthermore, there are other experts who oppose this thinking in saying that even if the Constituent Assembly is no more in existence, the article can be repealed by simple Presidential Order or by majority vote in the Indian Parliament. Their reasoning is that both the Parliament and the President have a status that is constitutionally superior to the Constituent Assembly of J&K, therefore, the fact that the Constituent Assembly is no more, is of no consequence.

All these divergent view-points have created too much confusion in respect of the nature and effect of Article 370. An elementary reading of the debates of the Constituent Assembly of India, clarifies many points, subject to the condition that all the debates are read comprehensively.

This is a tedious task, therefore, most Indians are unaware of what the founding fathers of the Constitution of India intended in respect of the Indian States. To clarify this conundrum I will also discuss, in this thesis, about the position of the Indian States at the time of making of the Constitution of India (as succinctly as possible, due to word limit constraints).

I will try to explain how in 1946, it was decided that all the States of the Indian Union would set up Constituent Assemblies to make their own State Constitutions. Three States - Mysore, Saurashtra and Travancore-Cochin started to make their State Constitutions, but since it was rapidly becoming clear that the task was an arduous one, the States collectively agreed that they would give up the idea. They decided that it would be better to have one Constitution for the whole of the Indian Union.

The rulers of the Indian States, collectively liased with the great and remarkable Indian leader Sardar Patel. To ensure that the Constitution of India would be made in keeping with their wishes, it was facilitated that each State of the Union of India would be represented in the Constituent Assembly of India.

Thus, by 1948-49, the whole position changed and the people of the Indian States were to be treated on par with the people of the Provinces. This was because the popular representatives of the Indian States were given equal right and opportunity to lay their views and demands on the floor of the House (Constituent Assembly of India). Their demands were given due consideration.

Sheikh Abdullah, the leader of the Interim government of Jammu and Kashmir was also a part of the Constituent Assembly of India and had played as much a part in the formulation of the Constitution of India as any other State representative. At the time of the formulation of the Constitution of India, when other States representatives agreed that they would not retain their State flags or Constitutions, Sheikh Abdullah was agreeable; he raised no objection.

Yet, somehow, later he decided to have a State Flag and began to set up a State Constituent Assembly to formulate a State Constitution. If one looks at Parliamentary debates, one will see that this move was vehemently opposed by the representatives of the States. At this juncture the situation could take a turn in either direction. Either by coming under popular pressure from the whole of India, all the States would see to it that Jammu and Kashmir not recant on its promises

in the Constituent Assembly of India; thereby no State flag or State Constitution would be made in Jammu and Kashmir. Or the other alternative was to appease the representatives of the Indian States. Here is where Pandit Jawaharlal Nehru stepped in and explained to the members of Parliament, and by extension to the people of India as a whole, that the Flag of Jammu and Kashmir was not being retained on legal grounds but on sentimentality, nothing more. If one were to plainly read the Parliamentary Debates, this is also apparent.

In this study I will attempt to do as much justice to the topic as I can, by not giving my interpretation, but that of the founding fathers. The topic is quite vast. In the initial draft, I had included much more matter. Unfortunately, due to constraints such as maximum word limit, I have had to cut down on the length of this thesis in the final draft. If in the interest of brevity, I am unable to explain certain intricacies of the subject, I beg forgiveness. I pledge to write about certain nitty-gritties of the subject in my book publications. As a precursor to this thesis, I have released two books that give an introductory idea of the subject to readers. One of the books pertains to Article 370 and the other is about the UN resolutions in respect of Jammu and Kashmir. The book on UN Resolutions became necessary because one of the reasons put forward at the time of insertion of Article 370 was that we have a UN entanglement in respect of J&K. The other reason was that India was invaded by Pakistan, and the invasion happened to take place in that part of our country i.e. J&K.

All in all, this research work is something I will approach very objectively and also with dedication, since it is a burning issue for every Indian, and it is of immense importance that I separate fact from fabrication and present it as simply as possible for the reference of India and the world.

This work will study the reasons why J&K has suffered discrimination ever since 1949, as was pointed out by Maulana Hasrat Mohani in the Constituent Assembly of India at the time that Article 370 was proposed by Mr. Ayyangar. Maulana was not allowed to continue, he was abruptly directed to stop asking such questions. Thereafter no debate followed, and the article was inserted. This research will study about this apparent discrimination against J&K.

IV. SIGNIFICANT FACTS ABOUT JAMMU AND KASHMIR

Jammu & Kashmir: Geography which includes Gilgit, Baltistan, and the rest of POJK.

In 1947 the area of the State of J&K was approximately 2,37,870 sq. km. or roughly double the area of Denmark, the Netherlands, Belgium and Luxemburg combined.⁴It held a population of

⁴ Operations in Jammu and Kashmir 1947-1948, Ministry of Defence, Government of India, ISBN 81-8158-053-2, Reprint 2005.

just over four million. Essentially mountainous in its geography, the State consisted of successive ranges of snow-clad mountains and beautiful valleys. For administrative convenience the State could be divided into four distinct regions:

- 1) Jammu region
- 2) To the East and North – the areas of Ladakh which includes Baltistan, Leh, Kargil, etc.
- 3) The Kashmir Valley – the most tiny portion of the State (it comprises only 7 to 8% of Jammu and Kashmir State).
- 4) Gilgit (with its strategic position across the river Indus) in the North.

In fact, Jammu and Kashmir, as its area is measured after 1947, is not accurate because parts of the State are under the belligerent Occupation of Pakistan. But a look at the pre-1947 maps will show how gigantic Ladakh (which includes Baltistan, Leh, Kargil, etc.) and Gilgit are. The poets used to refer to Jammu and Kashmir as comprising three parts –

- a. The region of Rock and Ice – Gilgit, Leh, Kargil, Baltistan and other parts of Ladakh.
- b. The region of Water – Kashmir Valley
- c. The region of Plains – Jammu region

This classification was popular with the Dogra Dynasty (1846-1947) because the Dogras were skilled military generals and rulers. They did not classify the State on the basis of caste or religion. But towards 1925, Jammu and Kashmir started to get infested with communal minded people, who started to sow the seeds of communalism and hate. His Highness Maharaja Hari Singh is famous for his legendary statement Justice is my Religion and he is also famous for giving equal opportunity in matters of education and employment. He refused to give the Hindus and Sikhs reservation even in areas where they were in minority. He condemned the caste system and declared that all people may drink from common wells and be allowed without barrier into all places of worship.³ He favored the Muslims; a large section of them would not educate themselves; he encouraged them to obtain education and imbibed them in large numbers in his military and civil service. He rebuked communalism, which became one of the reasons that many communal minded leaders of that time hated the Maharaja General Sir Hari Singh.⁵ He refused to divide and categorize people on the basis of belief, faith, class, caste, and so on.

⁵ For more details see Dr. Shabir Choudhry's Blog at <http://drshabirchoudhry.blogspot.in>

He is recorded to have reiterated on too many occasions that merit is the only consideration that deserves address. This is also one of the reasons why his State was not affected like Punjab and Bengal at the time of the Partition of India; because his Muslim subjects loved him, for all he had done for them. In his legendary letter to Lord Mountbatten at the time that his State was being looted, raped, burned, sacked by marauders from across the border, the magnanimous Maharaja wrote that the Muslims of his state gave no help to the invaders, but were faithful to their conscience and their Maharaja.

For a better understanding of the situation, one may read the letter sent by Maharaja Hari Singh to Lord Mountbatten on 26th October, 1947.

V. HISTORICAL BACKGROUND

(A) Background Circumstances during Formulation of Article 306 A

Upon reading the Constituent Assembly debate that took place at the time when Article 370 was proposed for insertion, as well as the text of Article 370 of the Constitution of India, we realize that:

a) At the time that Article 370 was proposed it was numbered as 306 A.

b) We ask the question, why was the House not debating Article 306 B right after it started to debate Article 306 A. The reason was that 306 B was debated long ago. This article 306 A was a last minute insertion. If we refer to the Assembly debates of that day and the previous days, we will see that at this point, it was made clear to the House that no new additions would be entertained; only modifications that were scheduled would be discussed and then the house would go straight to deliberations over the Preamble.

c) Therefore, in view of the words of the House, a new Article like 306 A being introduced was an extraordinary consideration given due to certain existing exigencies. Those exigencies were that:

India was under attack from Pakistan and the war was still waging. This Pakistani invasion was happening in Jammu and Kashmir.

India had approached the UNO over this matter. India wrote a letter to the UN asking that a declaration be made against Pakistan, not to continue to violate international law by aggressively attacking its neighbor India (in the region known as Jammu and Kashmir – which included Ladakh-Baltistan and Gilgit, Jammu and Kashmir).

A stable government could not be formed due to the Pakistanis burning the J&K villages, therefore an interim administration was set up.

d) Due to the temporary Pakistani invasion resulting in War, and due to the transitional situation of an interim government being set up in the State, Ayyangar proposed that there was need for Article 306 A for the time being.

e) Thus, article 306 a came to be inserted under the temporary and transitional title. It later came to be numbered 370.

f) Before inserting every article of the Constitution, there was much debate. At least five members spoke for or against each article before any of the articles were put to a vote. When we take a look at the debates surrounding this article before it was moved for insertion, we are shocked. There seems to have been no debate on it. But it seems that from evidence of the last 67 years, this Article has had a substantial impact over the human rights of the common man. Therefore, it was far from insignificant.

g) How come such a significant article was inserted with no debate, remains an enigma. There could be speculation that since it was only a temporary and transitional article, inserted for an interim period, as long as the interim of J&K was functioning, therefore, there was no much objection or deliberation. But, then why was Maulana Hasrat Mohani not allowed to raise his objections to the Article? Maulana asked why this discrimination against Jammu and Kashmir? Why was he not given a fair hearing?

Reason 1 for Article 370 – the Pakistani Invasion of India- 1947 after J&K Acceded to India

It is true that one of the reasons mentioned for inserting Article 370 was that, at that juncture, a stable government could not be set up in the State due to the Pakistani Invasion. But there are those who believe that this means Article 370 has communal undertones. People also believe that the Pakistani invasion was on communal grounds. Let us see if the following recorded facts give the impression that there was a communal issue or just a matter of political strategy.

1. J&K is very strategic from the economic as well as the military perspective. If Pakistan secured J&K by invasion, it would have control over all the five major Indian rivers and be in a position to cut off India's water supply. India has not done the same to Pakistan, India still directs 80% of her water to Pakistan, till this day.
2. The legendary Khaiber Pass in J&K has been an ancient trade and business route. It is famously known as the Silk Route. By aggressive invasion, Pakistan took control of this profitable pass.
3. The population of the Kashmir Valley (comprising 7% of the State of Jammu and

Kashmir) was over 90 percent Muslim and that of Gilgit was wholly Muslim. Untold travesties of justice and acts of horrific violence were committed by the Pakistan troops on the people of these parts. Their women were auctioned off in Pakistan. This is all recorded in the media reports and the books written on the subject. This is ample proof that the invasion was not on religious grounds. Then what were the reasons?

4. The Haji Pir Pass and other important passes in Jammu and Kashmir, overlook Islamabad. India had control of these passes and could train her missiles on Islamabad, wiping out the capital of Pakistan in a heartbeat. This pass was captured by Pakistan during the invasion of India in 1947. Later it was redeemed by Indian troops during the Indo-Pakistan war of 1965, when Pakistan suffered a humiliating defeat even though Indian troops were outnumbered by the Pakistanis. During this war India even won over Lahore.

But India agreed to vacate her troops from the Haji Pir Pass via the Tashkent Declaration of 1966, in the spirit of mercy towards Pakistan.

a. Significant Facts about 1947.

From Srinagar (the summer capital of Kashmir) one road led to Pakistan, branching off at Domel via Muzaffarabad and Abbottabad, but proceeding straight through Kohala and Murree to Rawalpindi. The other road connected Srinagar with Jammu. The usual line of communication from Jammu to India before partition was through Sialkot, but after partition from Jammu to Pathankot over a fair weather road.

The Dogra Dynasty ruled Jammu and Kashmir from 1846 to 1947. The last crowned prince of this spectacular dynasty was His Highness Maharaja General Sir Hari Singh. In October 1947, he signed the Instrument of Accession. By unconditionally signing this document, he agreed that his State would be an integral part of the Dominion of India, absolutely and forever.

b. Judicial Approach to Article 370

The Supreme Court vide its judgment in **Puranlal Lakhanpal v. President of India** observed⁶ that the objective of introducing Article 370 was to recognize the unique position of Jammu and Kashmir and to empower the President to apply the provisions of the Constitution of India in Jammu and Kashmir with the required exceptions and modifications as deemed fit.

The learned judge, however, interpreted that power as extending to the abrogation of a certain provision of the Constitution entirely, when it comes to the applicability in Jammu and Kashmir.

⁶ Puranalal Lakhanpal v. President of India (1962) 1 SCR 688 = AIR 1961 SC 1519

Analysis of this case:-

The only problem with this interpretation is that in saying that the President has the power to repeal a certain provision of the Constitution in its application to any area of India, the learned judge is allowing for the President to alter that specific or any other provision of the Constitution, which power is in fact denied the President and assigned to the Parliament (under the Constitutional scheme and according to the doctrine of Separation of Power).

The doctrine of separation of power is not followed in absolute rigidity in India because of the fact that the Union of India does not admit of water tight compartments for the functions of the three organs. This promotes smooth working of the Constitutional structure, with a few functions over-lapping. That does not mean to say that the Constitution of India allows the executive to usurp the powers of the Legislature under malicious interpretation of interim Articles like 370, etc. The 'essence' of the separation of power doctrine with the doctrine of constitutional limitation and trust implicit in the scheme was duly recognized in the *Delhi Laws case*⁷. Separation of power was also emphasized in a multitude of other cases⁸.

It is pertinent to note that the doctrine of separation of power was expressly declared to be one of the basic features of the Constitution in the landmark case of *Indira Gandhi v. Raj Narain*⁹, as well as other landmark cases like **S.R. Bommai Vs. Union of India** which will be discussed later on in this chapter. *In the legendary case of Keshavananda Bharti vs. State of Kerala*, the learned bench held *the parliament is supreme, it can change any part of the constitution including the fundamental rights but cannot change its basic structure*.

c. Analyzing the separation of power doctrine in application to India.

The Supreme Court has stated that, The Indian Constitution has not indeed recognized the doctrine of separation of powers in absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that the Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also exercise judicial functions in a limited way, when so empowered, by law. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of article 154 of the Constitution, yet, it does not

⁷ *Delhi Laws case* AIR 1951 SC 332

⁸ *Chandra Mohan v. State of U.P.*, AIR 1966 SC 1987.

⁹ *Indira Gandhi v. Raj Narain* AIR 1975 SC 2299

follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of executive are limited merely to the carrying out of these laws¹⁰

(B) Can article 370 efface the entire constitution of india?

Coming back to the other parts of the judgment in the case of **Puranlal Lakhanpal v. President of India**, the learned judge said that the President is empowered under Article 370 to efface any provision of the Constitution. The judgment presented one problem. With this kind of an interpretation it was tantamount to saying that the Parliament is redundant; the work of amending the Constitution can be done by the President as far as Jammu and Kashmir is concerned.

But then why did the founding fathers specifically provide for Article 368? Why did Ambedkar say that the only way to amend the Constitution of India would be by majority vote in Parliament? The Constituent Assembly did not provide that Article 370 was an exception and that as a consequence Article 368 would not apply to Jammu and Kashmir. In this case the learned judge has interpreted the term exceptions and modifications to mean and include the power to efface any provision of the Constitution altogether in its application to the State of Jammu and Kashmir. He does not take any pains to explain on what basis or under what wordings he finds the said 'amply wide' power implicitly or expressly declared anywhere in the constitution of India.

These fundamental questions cannot find an answer if one refers to the case of **Puranlal Lakhanpal v. President of India**. Therefore, this judgment is controversial.

a. Power of the president to amend the constitution of india

The Constituent Assembly expressly declared that only Parliament can amend the Constitution of India. They also made it a point during the debates to give reasons for the same, i.e. the Constitutional of India should not become a play thing. But in the case of **Puranlal Lakhanpal v. President of India** the learned judge interprets that there is no limit to the power of the President in the matter of amendment of any provision of the Constitution of India (under the power assigned by Article 370). When he so chooses not to apply the provision to J&K, in effect not only is J&K affected, but the provision also stands amended in its scope and extent. This power cannot and was not given to the President. Had Article 368 not been inserted into the Constitution of India then it would be possible to interpret the power of the President to give it such wide amplitude. But because of the existence of Article 368, the President does not have

¹⁰ Rai Sahib Ram Jawaya Kapur And Ors. vs The State of Punjab (1955).

the power to amend the Constitution, nor did Article 370 give the President that right.

The Supreme Court vide its judgment in **Sampat Prakash vs. State of Jammu and Kashmir and anr.**¹¹

Maintained that Article 370 of the Constitution has never ceased to be operative and there can be no challenge on this ground to the validity of the Orders passed by the President in exercise of the powers conferred by this Article. The learned judge declared that as per Article 367, the provisions of the General Clauses Act applied to the interpretation of all the articles of the Constitution, inclusive of Article 370.¹² In this case the Court takes recourse to Section 21 of the General Clauses Act, 1897.

b. Article 370 and Human Rights

Since human rights are cherished above all other rights, it is necessary to study the effect of Article 370 on human rights. The problem that is faced while doing research on Article 370 is that when the State administration wishes to perform an act that goes against the fundamental precepts of the Constitution of India, it takes recourse to Article 370, even though the article may not be granting that power within its scope. Therefore, Article 370, by itself may not be in contravention of many human rights, but the acts done in the name of Article 370 like the discrimination against backward classes of people or oppression of the people by not allowing a woman the freedom to marry a man of her choice, these acts are in violation of basic human rights. They are not provided any remedy on the pretext that as long as Article 370 continues in operation, such acts are allowed.

Article 370 is shown to have the following implications in respect of Human Rights. This is apparent from the cases in the judicial chapter. Yet, it is necessary to set forth in a brief manner, the cumulative effect of the legislation and judicial decisions in Jammu and Kashmir.

(C) Discrimination against S.C. and S.T.

1. Under the blanket of Article 370 it is possible to discriminate against the Scheduled Castes and Scheduled Tribes, and minorities in Jammu and Kashmir. This is because Article 370 does not allow reservations for these categories of people, in the same way that it is allowed in other parts of India.

¹¹ Decided on : Oct-10-1968. Judge : M. Hidayatullah, C.J.,; J.M. Shelat,; V. Bhargava,; G.K. Mitterand; C.A. Vaid.

¹² Sampat Prakash Vs. The State of Jammu and Kashmir AIR1970SC1118; 1970LabIC873;[1969]2SCR365

2. The S.C. and S.T. Commission does not function effectively in Jammu and Kashmir. The result of the same can be seen by the pitiful plight of the S.C. people as explained in the case study of Safai Karamcharis.

a. Political Rights

The way that the electoral constituencies are divided in Jammu and Kashmir is not in-keeping with equity and good conscience. The smallest division of the State, namely the Kashmir Valley, has the largest number of seats. This results in a denial of civil and political rights to the people of other parts of the State. The main result of the faulty distribution of seats is that people from many parts of the State have no say in their legislative body, due to no proper representation. Since, the Legislative Assembly of every State is supposed to be representing all parts of the State adequately and without discrimination, there is an anomaly in Jammu and Kashmir State on in their legislative assembly is concerned.

b. Women's Rights

If a woman from Jammu and Kashmir (holding the Permanent Resident Certificate) marries a non-resident of Jammu and Kashmir, her husband does not have the right to buy a house for his family or work for the Jammu and Kashmir Government. Moreover, the children from such a marriage are almost treated as if they are illegitimate, in the sense that they do not get any rights in the ancestral property of their mother and they cannot avail any government scholarship or employment in Jammu and Kashmir. On the other hand, if a man from Jammu and Kashmir (holding a Permanent Resident Certificate) marries a woman who does not have a Permanent Resident Certificate, he does not lose any right to employment or property and his children suffer no discrimination. Therefore, the discrimination is reserved only for the women of Jammu and Kashmir. The Constitution of India expressly prohibits such discrimination against women.

c. Civil Rights

A person living in Jammu and Kashmir for generations is not allowed to cast their vote in Jammu and Kashmir State, if he does not hold a Permanent Resident Certificate. This is a violation of the right of adult suffrage. This Permanent Resident Certificate has nothing to do with Article 370, except that by Presidential Order the Constitution of India was amended to add an independent Article to the Constitution namely, Article 35 A. This Article gives protection to unconstitutional regulations like the Permanent Resident Certificate (PRC). Therefore, the violation of human rights by this abominable PRC rule is also attributed to Article 370.

d. Access to justice

- i. A person who does not hold PRC cannot be a member of the Legislature of Jammu and Kashmir (under Section 51 of the Jammu and Kashmir Constitution). This injustice is again protected from judicial review on the pretext of Article 370, even though when Article 370 was inserted into the Constitution, it was not intended to serve such unconstitutional purposes.
- ii. Section 140 of the Constitution of Jammu and Kashmir specifically mentions that non-residents of the State have no right to adult suffrage. This provision is immuned from judicial review because of Article 35 A.
- iii. Article 35 A being added to the Constitution of India by Presidential Order, was itself in contravention of Article 368 of the Constitution of India. But it was claimed that the entire Constitution of India can be changed under the power of Article 370.¹³
- iv. Generally the Permanent Resident Status is accorded to even people who reside in foreign countries for a certain span of time, but in Jammu and Kashmir only those people are given the PRC who have resided there since 1944 or before 1944. As was explained in the case of S. R. Bommai and other landmark judgments (also can be found in this study - set forth in detail in the chapter on judicial approach).

e. Minority Rights

Jammu and Kashmir has a population that is diverse. There are many people who are in minority, but do not enjoy the benefit of minority rights. Even among the Muslims there are Buddhists, Hindus, Sikhs, Jains, Christians, and Shias who enjoy no minority status. The National Minority Commission does not function in Jammu and Kashmir and there is no State Minority Commission. Yet, ironically, the majority Community of Jammu and Kashmir (i.e. Muslims) avail of all the benefits of Union Government Schemes.

f. Right to employment

Article 16 of the Constitution of India which provides for equality of opportunity in matters of public employment and appointment is not applicable in Jammu and Kashmir due to this PRC, which is protected by Article 35 A, which in turn is protected by Presidential Orders under Article 370. Even though the State of Jammu and Kashmir has the distinction of receiving the highest amount of grant in funds from the Union Government of India, the Constitution of India cannot guarantee fundamental rights and freedom from discrimination in Jammu and Kashmir.

¹³ For an indepth analysis refer the chapter on Judicial Approach to Article 370 in this work.

g. Right to freedom of movement

Article 19 of the Constitution of India guarantees the freedom of movement to any part of India and freedom to reside in any part of India. These are just on paper. In actuality, the Constitution of India cannot guarantee these rights to the people of India, because of provisions like Article 370.

VI. CONCLUDING POINTS

The Union Government of India has by Presidential Order declared that it has no power to declare Financial Emergency in Jammu and Kashmir part of the Union of India, while in other parts of the Union financial emergency can be declared under Article 360 of the Constitution of India. Every Article of the Constitution is interpreted such that it cannot go against the ethos of the Constitution of India. This arrangement wherein the Union will not declare financial emergency even if the State Government accounts are not in order seems to have no foundation. It is not enough to put forward the reason that as long as Article 370 is in operation it is okay. There is a need to give a valid explanation as to why it is not proper to declare financial emergency even though there may be an actual financial emergency in Jammu and Kashmir. Laws cannot exist for no reason. They have to have a justification.

(A) CAG

If the Comptroller and Auditor General of India cannot audit the accounts then there will be no discovery as to mismanagement of funds or any inappropriate accounting practices. Therefore it is unjust that other States in India have to maintain proper accounts but Jammu and Kashmir does not have to abide by those rules. If there is no fault in the accounts then there remains no reason why the Comptroller and Auditor General of India cannot inspect the accounts of Jammu and Kashmir on the same lines as it may inspect the accounts of other States of the Union of India. Therefore if there is no foul-play, the CAG should be able to audit accounts of Jammu and Kashmir and the Presidential Order denying such should be simply reversed.

(B) Panchayati Raj

There is no proper full-fledged implementation of Panchayati Raj in the 73rd and 74th amendments of the constitution of India.

(C) Minority Commission

Articles 25 to 30 of the Constitution of India cannot be availed in Jammu and Kashmir due to the fact that there is no function exercised by the National Minority Commission in that region and there is also no State Minority Commission. This is a gross violation of basic human rights.

There is no justifiable basis to deny human rights to a person of the minority community like Sikhs, Parsis, Hindus, Christians, Buddhists, etc. just because he happens to live in Jammu and Kashmir. Just saying that as long as Article 370 continues in operation it is allowed, is adding insult to injury.¹⁴

(D) Minority Affairs

While giving data about state-wise distribution of scholarships to the minorities, Dr. P.S. N. Murthy, Advocate, Andhra Pradesh High Court records in All India Reporter that in the year 2009, the Union Ministry of Minority Affairs, awarded Muslims 717, Christians 2, Sikhs 22 and Buddhists 12 student scholarships in the State of Jammu and Kashmir.²¹¹ This is against the proper procedure because in the State of Jammu and Kashmir, Muslims are the majority, therefore, they cannot avail the scholarship that are allotted to minorities. Minorities are stipulated State-wise on the basis of the number of people of a certain community residing in the State.

(E) Minority Rights

Trikoni Nath Vs the State of Jammu and Kashmir, S.N. Challo Vs the State of Jammu and Kashmir, are just a tip of the iceberg when it comes to the cases instituted in the Supreme Court of India, which deal with the oppression and blatant discrimination against minorities in Jammu and Kashmir.

(F) Minorities Act

Clause 1 sub-clause (2) Chapter I of the National Commission for Minorities Act, 1992 lays down: It (the Act) extends to the whole of India except the State of Jammu and Kashmir.¹⁵ Article 3 sub-clause 2 of the National Commission for Minorities Act, 1992 says that: *the Chairperson of the National Commission for Minorities shall be from amongst the minority community*. It signifies that no community in Jammu and Kashmir, whether majority or minority, falls within the ambit of the Act, for the reason that the entire State of Jammu and Kashmir is outside the operative jurisdiction of the Commission for Minorities, and by implication, that of the Union Ministry of Social Welfare where address is to be made to the minorities only.

(G) Secularism

There is no application of the word secularism in Jammu and Kashmir. This is very strange.

¹⁴ AIR, 2010 Feb, Table 4

¹⁵ The Act received the assent of the President of India on 17 May, 1992 henceforth called The National Commission for Minorities Act 1992, No. 19 of 1992.

The makers of the Constitution of India did not include the word secular in the Preamble of the Constitution of India. But it was added by Constitutional amendment. Is it our intension as Indians to show the world that Jammu and Kashmir is a part of India where secularism is not followed? If not then, it is not enough to say that because of Article 370 secularism is not allowed to be extended to Jammu and Kashmir. Either we are a secular country or we are not. Therefore, either the word secular should be removed from the Constitution of India, or if it stays then it has to apply to Jammu and Kashmir also.

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