

ARTICLE 370: GENESIS, ABROGATION, & ITS RAMIFICATIONS FOR IIOJK

August 2023



Prepared by Legal Forum For Kashmir - LFK
www.lfkashmir.com

Report

Article 370: Genesis, Abrogation, & Its Ramifications For IIOJK



Legal Forum For Kashmir – LFK
www.lfkashmir.com

Report

Article 370: Genesis, Abrogation, & Its Ramifications For HIOJK

Published by: Legal Forum for Kashmir – LFK

Published on: Aug 1st, 2023

© LFK 2023

About Report

On August 5, 2019, India revoked the semiautonomous status of the Indian Occupied Jammu and Kashmir thereby downgrading the erstwhile state into two centrally governed union territories – Jammu and Kashmir, and Ladakh. The illegal annexation of the UN-recognized disputed territory was accompanied by massive human rights violations with India jailing and torturing thousands of people including political leaders across the region. The months-long internet shutdown turned the region into an information blackhole as India, in addition to its one million occupying armed forces, deployed thousands of more troops in an effort to quell protests against the move.

This report discerns the important aspects of the reading down of Article 370 and 35-A, highlighting the nuances of this article in a systematic manner. Giving a brief introduction of foreign rules on Jammu and Kashmir, it gives a detail of the alleged accession of the erstwhile princely state with the Indian Union and how Article 370 became part of the constitution of India, and under which circumstances was the text draft of Article 370 tempered, leading to its ineffectiveness. Besides delving into the different rulings of the Supreme Court of India, this report underlines the Presidential Orders and the erosion of Article 370 and addresses the question of whether this Article could be abrogated or not. Moreover, this report highlights the impact of the abrogation of Article 370 which defined the residents of Jammu and Kashmir. Importantly, this report demystifies the much-touted notion of Article 370 being “temporary” in nature, shedding light on the historical context and how it evolved over time.

Table of Contents

<i>Introducing Kashmir</i>	2
<i>History of Oppressive Dogra Regime in Jammu & Kashmir</i>	3
<i>Genesis of Article 370</i>	4
<i>Could Article 370 be abrogated?</i>	25
<i>Successive Rulings of the Supreme Court of India</i>	32
<i>Special Status in the Constitution of India</i>	37
<i>Presidential Orders and the Erosion of Article 370</i>	39
<i>Presidential Orders</i>	41
<i>Presidential Order of 1950</i>	42
<i>Presidential Order of 1952</i>	42
<i>Presidential Order of 1954</i>	44
<i>Further Presidential Orders</i>	46
<i>Article 35A and Permanent Residents</i>	48
<i>Ineffectiveness of Article 370</i>	51
<i>Impact of the Abrogation of Article 370</i>	53
<i>New Amendments</i>	54
<i>Economy and Employment</i>	55
<i>Policy Recommendations</i>	58

Introducing Kashmir

Foreign rule is not new in Kashmir. Ever since its annexation by the Mughal empire in 1589 AD through deceit, Kashmir has never been ruled by Kashmiris themselves. After the Mughals, the region was ruled by the brutal Afghans (1753-1819), and Sikhs (1819-46). Due to the broke down of Sikh rule in Punjab, Raja Gulab Singh of Jammu became the Maharaja of Jammu &

Kashmir (henceforth J & K)-a Muslim majority area- by paying 7.5 million *nanak shahi* to the British Indian Government on March 16, 1846, and ruled till 1947. Exactly a hundred years later in 1947, Kashmir would hit headlines when India took its military control on 27 October 1947 with the active assistance of Sheikh Abdullah who endorsed the accession of the State with India as a 'popular leader'.

The British Government announced 3rd June 1947 plan for dividing India into two sovereign nation states namely India and Pakistan. From that day, up to the third week of October, the Kashmir Government pondered over the question of whether to accede or not to accede and if so, to which Dominion. So as not to be hurried into a decision, it sought to enter into standstill agreement with both Dominions. Pakistan accepted this, but India, for some reasons held back.¹

The State of J & K became a part of Indian Union when the then Maharaja Hari Singh allegedly executed the Instrument of Accession

¹ Maurice Cohen, *Thunder over Kashmir* (Hyderabad: Orient Longman, 1954), p. 02.

(IoA) on October 26, 1947, of course, under pressure from National Conference led by Sheikh Abdullah.² This accession was then given a final seal of approval subsequently by Article 3 of the Constitution of Jammu and Kashmir which was unanimously adopted by a Constituent Assembly of the state on November 17, 1956, and reads that '*the State of J & K is and shall be an integral Part of the Union of India*'.³

History of Oppressive Dogra Regime in Jammu & Kashmir

The Kashmir question arose in the 1930s of the last centuries, when much of the local population began to see injustice as the reason for their backwardness, poverty, disease, and misery which they started to say was the result of neglect of their Dogra rulers. Throughout the history of Dogra rule, the state had been notorious for its autocratically wayward methods of administration and its religious intolerance. Killing of a cow was a cognizable offence punishable with seven years rigorous imprisonment. There was a special tax on the slaughter of goats and sheep, which were sacrificed by Muslims once a year as part of religious ritual. A Hindu on conversion forfeited all inherited property. Under such a medieval and intolerant mode of government, Muslim places of worship and pilgrimage within the state were not likely to have been respected by the rulers. Many of them were usurped by the state and had to be restored to the Muslims because of the enquiry into the affairs of

² Gupta, Prem Sagar, *Article 370: National Unity and Integrity* (New Delhi: New Age Printing Press), p. 03.

³ Ibid.

Kashmir held by the Glancy Commission in 1931. The Arms Act in force in the state exempted Hindu Rajputs from obtaining license for guns and swords. The schools and colleges were located to be easily accessible to the Hindu population. The Hindus held about 80 percent of the services. Almost unlimited jagirs were granted to the Maharaja's kinsmen whose sway as unbridled landlords extended to over a hundred thousand acres of land on which the Muslim peasantry subsisted as serfs. Taxation was arbitrary and was collected by extortionist methods; and forced labour was a common practice. The police had vast powers. The masses of Kashmir, largely Muslim lived-in squalor, penury, and terror⁴. As a natural reaction, the rise of political consciousness in the country was reflected much more strongly and led to more serious and frequent clashes between the people and the Maharaja's government.

Genesis of Article 370

The importance of Article 370 in J & K and the significance it holds in the Constitution of India are issues that needs to be constantly reiterated to dispel the considerable misinterpretation and misunderstanding about this provision in the Indian Constitution. Article 370 of the Constitution of India was an essential facet of Indian federalism as like in the compact in the US⁵, it governed New Delhi's relationship with J & K. It is

⁴ Bakshi, S. R. 1997. *Kashmir: Valley and Its Culture* (New Delhi: Sarup & Sons), p. 248.

⁵ The most important feature of federalism in the United States of America (USA) was the "compact" between the erstwhile 13 British colonies that constituted themselves first into a confederation and then into a federal polity under the 1791 constitution of the USA. In a confederation units do have a right to secede, but in a federation, they do not have such a right though in this system they are given a lot of autonomy to operate

therefore necessary to understand the origin of Article 370, the related constitutional issues such as its temporary status and frequent calls for its abrogation, and the Supreme Court of India's response to these issues.

At the time of Indian Independence in 1947, there were two kinds of territories in India -- one was British India that was under the direct administrative control of the British. The other comprised the princely states that had signed subsidiary alliance treaties with the British and had a British resident posted in the territories. The maharajas, rajas and nizams were still the *de jure* rulers administering these territories/states. In vital matters of war and peace, these rulers were required to take the concurrence of the British resident.⁶

The Indian Independence Act 1947 divided British India, i.e., the territories under the direct administration of the British, into two countries -- India and Pakistan -- on August 15, 1947. But some 560 princely states that had signed subsidiary alliances with the British also had their sovereignty fully restored to them and given three options -- to remain as independent countries or join the Dominion of India or join the Dominion of Pakistan. Section 6(a) of the 1947 Act said that this act of joining one of the two countries was to be through an Instrument of Accession (IoA). Though no prescribed form was provided, a state so joining under Section 6(2) could specify the terms on which it was deciding to join one of the new dominions. All it required was that the

within their allotted spheres. See more on Riker, William. H, *The Development of American Federalism* (Boston: Kluwer Publishers, 1987)

⁶ See Jeffrey, Robin (ed.), *People, Princes, and Paramount Power: Society and Politics in the Indian Princely States* (Delhi: Oxford University Press, 1978).

Instrument declare the act of accession and specify its terms. These terms would be those which the ruler of the princely state accepted as matters on which the dominion legislature may make laws for the state. And, with respect to the limitations on the power of the dominion legislature to make laws for the state and exercise executive authority of the dominion in the said princely state. Thus, the IoA was supposed to regulate and govern the distribution of powers between the central government and the concerned princely state.

Technically, the IoA was therefore like a treaty between two sovereign countries which had decided to work together. If there is a breach of contract, the general rule is that parties are to be restored to the original position, i.e., the pre-agreement status. In any talk of abrogation of Article 370, this aspect of international law should have been kept in view because if due to the breach of any condition of the IoA, the princely state of Kashmir gets its pre-accession status.

Desire for Justice

Pre-1947, Kashmir was a princely state with a Hindu king and a majority Muslim population. Due to its strategic geographical location, its ruler Maharaja Hari Singh initially decided to remain independent and preferred to sign standstill agreements with India and Pakistan. Pakistan had accepted his proposal and operated the post and telegraph system in Kashmir. But

India held back citing further negotiations with the Maharaja's government and did not sign the draft of the agreement.⁷

Maharaja Hari Singh, on the advice of Sheikh Abdullah, allegedly signed the IoA on certain terms on 26 October 1947 and Lord Mountbatten as Governor General of independent India accepted it on 27 October 1947 on behalf of the Government of India. The Schedule appended to the Instrument of Accession gave the Indian Parliament power to legislate for Jammu and Kashmir on only defence, external affairs, and communications. In Clause 5 of Kashmir's Instrument of Accession, Maharaja Hari Singh explicitly mentioned that the terms of:

“my Instrument of Accession cannot be varied by any amendment of the Act or of Indian Independence Act unless such amendment is accepted by me by an Instrument supplementary to this Instrument.”⁸

Its Clause 7 said:

“nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such [a] future constitution.”⁹

⁷ Aijaz Ashraf Wani, Imran Ahmad Khan, and Tabzeer Yaseen, Article 370 and 35A: Origin, Provisions, and the Politics of Contestation in Serena Hussain (ed.) *Society and Politics of Jammu and Kashmir* (Cham: Palgrave Macmillan, 2021), p. 56.

⁸ White Paper on J & K, Government of India, 1948, pp. 46-7.

⁹ Ibid.

Accordingly, in India's acceptance of the Instrument of Accession of Kashmir, Governor General Mountbatten, clearly stated:

“it is my Government's wish that as soon as law and order have been restored in Kashmir and her soil is cleared of the invader, the question of the State's accession be settled by a reference to the people”.¹⁰

Thus, India regarded accession as purely temporary and provisional. This was said in the Government of India's White Paper on Jammu and Kashmir in 1948. In a letter to Sheikh Abdullah dated 17 May 1949, Nehru, with the concurrence of Vallabhbhai Patel and N. Gopalaswami Ayyangar (who drafted Article 370), wrote:

[I]t has been settled policy of Government of India, which on many occasions has been stated both by Sardar Patel and me, that the constitution of Jammu and Kashmir is a matter for determination by the people of the state represented in a Constituent Assembly convened for the purpose.¹¹

The process of accession and the different stages of the applicability of the provisions of the Indian Constitution to J & K is very revealing. It was on October 26, 1947, that the then Maharaja of J & K sent a letter to the Governor General of India offering to accede to India. Very next day the Governor General accepted the offer very certain stipulations.

¹⁰ Letter from Governor General of India, Lord Mountbatten to Maharaja Hari Singh on 27 October 1947. See White Paper on J & K, Government of India, 1948, p. 46-7.

¹¹ Letter from N. Gopalaswami Ayyangar to Sardar Patel enclosing Nehru's Draft letter to Sheikh Abdullah for his Approval. Cited in Durga Das (ed.), *Sardar Patel's Correspondence 1945-50: New Light on Kashmir*, Navajivan Publishing House, Ahmedabad, 1971, p. 275-309.

The IoA eventually had to be made part of the Constitution of India so that the powers of the Government of India and Parliament vis-a-vis Kashmir are clearly delineated.

The IoA was signed by the then Maharaja Hari Singh on October 26, 1947, and Indian Union, had under its jurisdiction only three subjects, namely, defence, foreign affairs, and communications in its relationship with J & K. It was also agreed that the ‘question of states’ accession should be settled by a reference to the people’. J & K state had to frame their own constitution through their own Constituent Assembly. It is thus that the state got a special status. This feature was the only special status under Article 370 which was different from any state of the Union of India.

Except J & K, every other princely state accepted Part B of the Constitution of India which contained provisions uniformly for the governance of these states. J & K was the only state to declare its intention to have its own Constitution drafted by its own Constituent Assembly.

That was as far back as 5 March 1948, by the Maharaja’s Proclamation, which is why it negotiated its terms of Article 370 to protect those rights.¹² The Constituent Assembly of India began its first substantial discussions on J & K on 27 May 1949 and on the basis of population, the State was allotted four members out of 93 allotted to the princely

¹² The *Maharaja’s Proclamation* dated 5 March 1948, Press Information Bureau, Govt. of J & K.

states.¹³ On November 25, 1949, Yuvraj Karan Singh, to whom power had been entrusted by the Maharaja, issued a proclamation, and directed that the Constitution of India be adopted by the Constituent Assembly of the state in so far it was applicable to J & K state to govern the centre-state relations. The Constitution of India was adopted on November 26, 1949, and on that very date certain provisions of Indian Constitution were made applicable to the J & K state, the remaining provisions having come into force on January 26, 1950, the day Indian Republic was declared. The President issued the Constitution (Application to J & K) order 1950 on January 26, 1950. On May 14, 1954, in suppression of this order of 1950, the President in exercise of powers conferred by Article 370 (1) of the Constitution of India with the concurrence of the state government (it had no mandate) issued another order extending the application of various provisions of the Indian Constitution to the state. Again in 1965 certain more provisions were applied. And all the provisions of the Indian Constitution were fully applicable to the state in their jurisdiction of the Supreme Court, Planning Commission, Election Commission, Census Commission, Comptroller and Auditor General, Official Language of the Union, Institution, appointment, and tenure of the Governor of the state at the pleasure of the Governor of the state, labour laws, etc. Thus, most of the provisions of the Indian Constitution were made applicable with the help of local collaborators.

¹³ Constituent Assembly Debates (henceforth CAD), Vol. VIII, dated 27 May 1949. The digitised records of the debates available do not have page numbers yet any one can access by entering a particular date. See more on https://www.constitutionofindia.net/constitution_assembly_debates

The State had acceded to the Union of India in 1947 in respect only of defence, foreign affairs, and communications. Direct negotiations were held on 15 and 16 May 1949 between Sheikh Abdullah and Nehru at Sardar Patel's New Delhi residence for the future of J & K. A text of a draft was agreed upon them and the topics they dealt with were the 'framing of the Constitution' for the state and 'the subjects in respect of which the State should accede to Indian Union'. They all agreed that it will be for the Constituent Assembly of the State when convened, to determine in respect of the subjects the state may accede. In an earlier letter to Sheikh Abdullah, Nehru recorded that:

"it was a matter for the State's Constituent Assembly in regard to J & K that the J & K now stands acceded to Indian Union in respect of three subjects namely defence, foreign relations, and communications and it is up to Constituent Assembly of the state when convened to determine in respect of which other subjects the state may accede".¹⁴

Article 370 embodied this basic principle which were reiterated throughout. When the representatives of J & K joined the Constituent Assembly of India, negotiations began in earnest on Article 370 (Article 306 A in the earlier draft). A text draft, agreed on 16 October 1949, was moved by Gopalaswami Ayyangar¹⁵ on 17 October in the Constituent Assembly of

¹⁴ J & K's Representatives Join the Constituent Assembly of India on 16 June 1949, CAD, Volume 8, p. 915.

¹⁵ N. Gopalaswami Ayyangar was a civil servant who had been closely associated with J&K in various capacities, including serving as the princely state's prime minister

India. The text draft read as follows:

“Temporary Provisions with respect to the State of Jammu & 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 on the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for the 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 recognised by the President as the Maharaja of Jammu and Kashmir acting

from 1937 to 1943 and as a member of its council of state from 1943 to 1947. He was the principal drafter of Article 370 of the Indian Constitution.

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 relations to that State subject to such exceptions and modifications as the President may by order specify.

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

- (2) If the concurrence of the Government of the State referred to in paragraph (ii) of subclause (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”.¹⁶

There were serious differences between Sheikh Abdullah and Sardar Patel; and Gopalaswami Ayyangar tried to reconcile between them. The Constituent Assembly of India moved a draft in the hall, and it was unilaterally altered by Ayyangar. Ayyangar unilaterally altered the text of the draft and claimed a 'trivial change' made by him. Sheikh Abdullah and Mirza Afzal Beg were in the lobby and rushed in when they learnt about it. However, they could not make a difference in the text of the changed draft presented by Ayyangar. Sheikh Abdullah threatened to resign from the Constituent Assembly of India. He wrote to Ayyangar in detail:

“This morning when we expected the final draft, which had appeared in the List of Amendments circulated by the Secretary of the Constituent Assembly, to come up before the Assembly, you and Maulana Azad came to me and asked me if I could accept an important change in the Explanation to Sub-clause (b) of Clause (I) of the draft Article 306-A, as appearing in the List of Amendments. After careful consideration of the proposed

¹⁶ A. G. Noorani, *Genesis and Wreckage of Article 370*, dated 16 May 2016. <https://criterionquarterly.com/article-370-genesis-and-wreckage/>

amendment in the Explanation. My colleagues and I told you both in the lobby that it was not possible for us to accept this change in the final draft and you, and Maulana Sahib left us. While we were still discussing the matter in the lobby amongst ourselves, the draft Article 306-A was moved by you in the Constituent Assembly, and, therefore, we took our seats in the Assembly Hall. We could not convince that any amendment in the final draft, as circulated in the List of Amendments, would be made by you without conveying your final decision in the matter to us, and so we took it for granted that the final draft Article 306-A was presented before the Assembly in the form in which it had our consent; and, therefore, when it was passed by the Assembly, we did not take part in the debate...In these circumstances, it was not possible for us to move any amendment and we did not get an occasion to express our views on the matter before the open House...In case I fail to hear from you within a reasonable time, I regret to say that no course is left open for us but to tender our resignation from the Constituent Assembly”.¹⁷

Nehru was in United States on the day when this change in the ‘agreed draft’ was moved by Ayyangar in the House, and on his return, Sardar Patel explained to him the details that took place in the Assembly Hall. It seems that the change was introduced deliberately by Ayyangar with Nehru’s consent because Nehru could not have faced Sheikh Abdullah in the Assembly

¹⁷ Letter from Sheikh Abdullah to Gopalaswami Ayyangar, dated 17 October 1949. See Durga Das (ed.), *Sardar Patel’s Correspondence 1945-50*, Navjivan Publishing House, Ahmedabad, 1971, p. 306-307.

Hall, given their understanding and friendly relationship between them from mid-1930s. Ayyangar wrote back to Sheikh Abdullah and called his unilaterally altered version of the agreed draft as ‘a trivial change’. He wrote to Sheikh in the following words:

“Article 306-A, as finalised in the agreement between us, was given notice of on the evening of the 16th of October after I got your letter of that date, and it was immediately circulated to the Members of the House. The attempt was made by me and Maulana Azad the next morning, when the House was sitting, to persuade you to accept a trivial change was due to the desire expressed by a large number of the leading Members of the House. All of us, including myself, Maulana Azad, and Sardar Patel, were of the opinion that it was necessary from many points of view that the change suggested should be accepted. Personally, having agreed with you to the language of the original draft I felt a special responsibility in agreeing to this change. And I may tell you at once that I agreed to it because I was, and am, convinced that the change in the actual words used in that particular connection did not alter the meaning of the draft agreed to between us”.¹⁸

If Sheikh Abdullah had been successful in persuading the Constituent Assembly the original text of the draft agreed between him and Nehru, his dismissal and imprisonment in 1953 would have been impossible.¹⁹ This unfortunate breach created distrust between Sheikh and the Union

¹⁸ Letter from Gopalaswami Ayyangar to Sheikh Abdullah dated 18 October 1949. See Durga Das (ed.), *Sardar Patel's Correspondence 1945-50*, Navjivan Publishing House, Ahmedabad, 1971, p. 308.

¹⁹ A. G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (New Delhi: Oxford University Press, 2011), p. 05.

of India. Sardar Patel also justified the alteration of the original text of the draft. He wrote to Nehru about the provision relating to Kashmir. He chose to write Nehru in the following words:

“There was some difficulty about the provision relating to Kashmir. Sheikh Sahab went back on the agreement which he had reached with you in regard to the provision relating to Kashmir. He insisted on certain changes of a fundamental character which would exclude in their application to Kashmir the provisions relating to citizenship and fundamental rights and make it necessary in all these matters as well as others not covered by the accession to three subjects to seek the concurrence of the State Government which is sought to define as the Maharaja acting on the advice of the Council of Ministers appointed under the Proclamation of 8 March 1948. After a great deal of discussion, I could persuade the party to accept all the changes except the last one... Since Sheikh Sahab has not reconciled himself to this change, but we could not accommodate him in this matter and the provision was passed through the House as we had modified”.²⁰

There was only one member in the Constituent Assembly who send few demurrals when Ayyangar was introducing article 306-A. Hasrat Mohani (a Constituent Assembly member from UP) politely disagreed with Ayyangar’s draft of Article 360-A (Article 370) and made comments about, why J & K was being treated more fairly and liberally than the other princely states. Except Hasrat Mohani, no other member

²⁰ Letter from Sardar Patel to Nehru, dated 03 November 1949. See Durga Das (ed.), *Sardar Patel’s Correspondence 1945-50*, Navjivan Publishing House, Ahmedabad, 1971, p. 310.

(not even Dr. Shyama Prasad Mukherjee) or the representatives from J & K stood up to either praise or bury Article 370.²¹ Thus, Article 370 was passed unopposed in the Constituent Assembly of India. Article 370 embodied six special provisions for the state of J & K.

- (i) It exempted the state from the provisions of the Constitution providing for the governance of all the states, J & K was allowed to have its own Constitution.
- (ii) Parliament's legislative power over the State was restricted to three subjects—defence, foreign affairs, and communications. The President could extend to the State other provisions of the Constitution so as to provide a federal constitutional framework if they related to the matters specified in the IOA. For this, only 'consultation' with the State government was required since the State had already accepted them by the Instrument.
- (iii) If other 'constitutional' provisions or other Union powers were to be extended to Kashmir, the prior 'concurrence' of the State government was required.
- (iv) That this 'concurrence' was strictly provisional. It had to be ratified by the State's Constituent Assembly.
- (v) The 'State Government's authority to give the 'concurrence' last only till the State's Constituent Assembly is 'convened'. Once the Constituent Assembly met, the State government could not give its own 'concurrence'; still less, after the Assembly met and dispersed. Moreover, the President of India can't exercise his power to extend the Indian Constitution to J & K. Once the State's Constituent Assembly had finalised the scheme and dispersed, the President's powers ended completely.
- (vi) That Article 370(3) empowers the President to make an order abrogating or amending it. But for this also 'the

²¹ Mridu Rai (2018) *The Indian Constituent Assembly and the making of Hindus and Muslims in Jammu and Kashmir*, Asian Affairs, 49 (2), p. 205-221.
<https://doi.org/10.1080/03068374.2018.1468659>

recommendation’ of the State’s Constituent Assembly ‘shall be necessary before the President issues such a notification’.

The state of J & K is mentioned among the states of the Union in the First Schedule as Article 1(2) requires. But Article 370(1) (c) says that ‘the provisions of Article 1 and of this Article shall apply in relation to that State’, thus Article 1 was applied to the State through Article 370. Gopalaswami Ayyangar gave full exposition of Article 370 in the Assembly Hall on 17 October 1949 and was very authoritative.²² He said:

“The Govt. of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic or wish to go out of it. We have also agreed that the will of the people, through the instrument of a Constituent Assembly will determine the Constitution of the State as well as the sphere of Union jurisdiction over the State...You will remember that several of these clauses provide for the concurrence of the Govt. of J & K State. Now, these relate particularly to matters which are not mentioned in the IoA, and it is one of our commitments to the people and Govt. of Kashmir that no such additions should be made except with the consent of the Constituent Assembly which may

²² A. G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (New Delhi: Oxford University Press, 2011), p. 06.

be called in the State for the purpose of framing its Constitution”.²³

Ayyangar further explained that the recommendations of the Constituent Assembly of J & K will be required if Article 370 shall cease or be operative. He wrote:

“you will recall that in some of the clauses of this article we have provided for the concurrence of the Government of the State...the provision is made that when the Constituent Assembly of the State has met and taken its decision both on the Constitution for the State and on the range of federal jurisdiction over the State, the President may on the recommendation of that Constituent Assembly issue an order that this Article 370 (read 306-A) shall either cease to be operative, or shall be operative only subject to such exceptions and modifications as may be specified by him. But before he issues any order of that kind the recommendation of the Constituent Assembly will be a condition precedent. That explains the whole of this article”.²⁴

So, the Article 370 cannot be abrogated or amended by recourse to the amending provisions of the Constitution of India which apply to all the other states, namely Article 368. One of the provisions of Article 368 says that no constitutional amendment ‘shall have effect in relation to the State of J & K’ unless applied by order of the President under Article 370. That required the concurrence of the State’s government and

²³ Extracts of Gopalaswami Ayyangar’s Full Exposition of Article 370 (read 306-A in the Draft) in the Constituent Assembly of India, dated 17 October 1949. Cited in A. G. Noorani, Article 370: A Constitutional History of Jammu and Kashmir (New Delhi: Oxford University Press, 2011), p. 64-72.

²⁴ Ibid, p. 71.

ratification by its Constituent Assembly. In other words, Article 370 cannot be invoked after the State's Constituent Assembly has 'taken its decision' on the Constitution and 'on the range of federal jurisdiction over the State'. So, the unique process of a Presidential Orders altering constitutional provisions by a mere executive order ended with the final decision of the State's Constituent Assembly. Once Kashmir's Constituent Assembly was 'convened' on 31 October 1951, the State government lost all authority to accord any 'concurrence' to the Union of India. With the Assembly's dispersal on 17 November 1956, after adopting the Constitution of J & K, vanished the only authority which alone could vide a) more powers to the Union and b) accept Union institutions other than those specified in the IoA. All the additions to the Union powers since then are unconstitutional.

Article 370 is nothing, but a constitutional recognition of the conditions mentioned in the IoA that the ruler of Kashmir signed with the Government of India in 1947. It reflects the contractual rights and obligations of two parties. The original draft of Article 370 (306-A) was proposed by the Government of Jammu and Kashmir in the following words:

306-A. Notwithstanding anything contained in this Constitution, until on the recommendation of the Constituent Assembly constituted for the purpose of framing the Constitution of the Jammu and Kashmir State, the President may, by public notification, alter, modify, or amend this Article,

- (a) Only such provisions of this Constitution shall apply in relation to the State as are declared by the President, in

consultation with the Government of the State, to relate directly to the matters specified in the IoA governing the accession of the State to the Dominion of India.

- (b) The power of Parliament to make laws for the State shall be limited to: -

those matters in the Union List and the Concurrent List which are declared by the President, in consultation with the Government of the State, to correspond to matters specified in the IoA governing the Accession of that State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for the State.²⁵

This draft was then modified, and negotiations were held between the Government of India and the state of Jammu & Kashmir for over five months.²⁶ The Govt. of India tried to incorporate J & K in the category of Part III States. But the main difficulty in adopting this procedure was that the Premier of the State (Sheikh Abdullah) expressed his inability to extend the content of the accession of the State till the Constituent Assembly of the State has taken a decision in that matter. So, the Drafting committee desired that the accession of the State should be continued on the existing basis till the State could be brought to the level of other States. The Ministry of States suggested for the consideration of the Drafting Committee the following approach to this question:

²⁵ *Draft Article 306-A as proposed by the Government of Jammu & Kashmir*, Indian Constitutional Document, Munshi Papers, Bhartiya Vidya Bhavan, Bombay, 1967, Volume II, p. 519-20.

²⁶ See A. G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir*. (New Delhi: Oxford University Press, 2011)

1. J & K State may be treated as part of the Indian territory and shown in States specified in Part III of Schedule 1.
2. A special provision may be made in the Constitution to the effect that until the Parliament provides by law that all the provisions of the Constitution applicable to the States specified in part III will apply to this State, the power of the Parliament to make laws for the State will be limited to the items specified in the Schedule to the IoA governing the accession of this State to the Dominion of India or to the corresponding entries in List I of the new Constitution...²⁷

On 16 June 1949, Sheikh Abdullah and three others²⁸ joined India's Constituent Assembly as its members. New Delhi's commitment to the plebiscite and drafting of a separate Constitution by Kashmir's Constituent Assembly was repeated by Ayyangar on 17 October 1949 when Article 306-A (now 370) was finally adopted and included in the Constitution by the Constituent Assembly.²⁹ Ayyangar told the Constituent Assembly that:

“The Accession was offered by the Maharaja, and it was accepted by the Governor General of the time. I have a copy of that document before me. It is an absolutely unconditional offer...the correct position is this that the accession is complete. No doubt, we have offered to have a plebiscite taken when the conditions are created for the holding of a proper, fair, and impartial plebiscite. But that plebiscite is

²⁷ *Amendments Proposed by the Ministry of States of the Government of India*, Indian Constitutional Document, Munshi Papers, Bhartiya Vidya Bhavan, Bombay, 1967, Volume II, p. 473 and 476-477.

²⁸ The following members took the pledge and signed the Register were Sheikh Abdullah, Mirza Afzal Beg, Maulana Syed Masoodi, and Motiram Baigra. See more on CAD, Vol. 08, p. 915.

²⁹ J & K's Representatives Join the Constituent Assembly on 16 June 1949. *CAD*, Vol. 08, p. 915.

merely for the purpose of giving the people of the State an opportunity of expressing their will, and the expression of their will, will be only in the direction of whether they ratify the accession that has already taken place”.³⁰

He further said that if the accession is not ratified by the Constituent Assembly of J & K, then:

“but if the plebiscite produces a verdict which is against the continuance of accession to India of the Kashmir State, then what we are committed to is simply this, that we shall not stand in the way of Kashmir separating herself away from India....Our commitment is simply this, that if and when a plebiscite comes to be taken and if the verdict of that plebiscite is against India, then we shall not stand in the way of the wishes of the people of Kashmir being given effect to, if they want to go away from us”.³¹

Thus, Article 370 granted a special status to the state of J & K. Relevant article reads as follows:

(a) 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 IOA governing the accession of the state to

³⁰ Revision of the Rules for Admission of J & K's Representatives to the Constituent Assembly of India, dated 27 May 1949, CAD, Volume 08, p. 357.

³¹ Ibid.

the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for the 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.

- (b) The provisions of Article 1 (i.e., defining the Union of India) and of this article shall apply in relation to the State.³²

Could Article 370 be abrogated?

The tampering of Article 370 with its text draft (read Article 306A) was started in the Constituent Assembly of India itself. Some changes were introduced by Gopalswami Ayyangar in the text draft when the members of J & K were out of the hall for some time. The members from J & K including Sheikh Abdullah objected to the changes made in the draft of Article 370, but they were assured by the other members of the Constituent Assembly of India that the changes would not affect the enforceability of the Article.³³ Therefore, the erosion of Article 370 of the Constitution of India continued with the passage of time and the jurisdiction of the Supreme Court of India, Election Commission of India was extended to the State. Similarly, the Permit system³⁴ was

³² A. G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir*, New Delhi, Oxford University Press, 2011.

³³ Letter from Gopalswami Ayyangar to Sheikh Abdullah, dated 18 October 1949. Cited in Durga Das (ed.), *Sardar Patel's Correspondence 1945-50*, Navjivan Publishing House, Ahmedabad, 1971, p. 308.

³⁴ The Permit System was a creation of Maharaja Hari Singh. It was mandatory for non-State subjects to secure a special permission from the Maharaja's government before their entry into the State. During his rule, the administration took strict measures to prevent sale of land to non-State subjects. The Maharaja himself was enforcing it in

abolished and the Accession was ratified through client regime of Gh. Muhammad Bakhsi. Legally and constitutionally, the Article 370 of the Indian Constitution couldn't be abrogated by India unless it has the approval of the Constituent Assembly of J & K. Morally, the Union of India was committed to a federal character and autonomy of the states including the autonomy for J & K. This article permitted the state to have its own constitution as formulated by its own constituent assembly, which was to decide the constitutional relationship between the state and the Union of India. Indeed, the Constitution Bench decision of the Indian Supreme Court in *Prem Nath Kaul vs State of Jammu and Kashmir* held that the purpose of Article 370 was to limit the accession of the state to the dominion of India to the terms of the IOA until the Constituent Assembly determined the constitutional relationship between the two.³⁵

The relationship between the state and the Union of India was crystallized in the form of Delhi Agreement of 24 July 1952 between Sheikh Abdullah and Nehru. The Delhi agreement gave the state a special status as compared with the other states that had acceded to the Union of India. The preferential treatment primarily comprised the vesting of residuary powers of legislation in the state legislature, and not in the Union Parliament as in the case of the other states; permitting the state legislature to make laws conferring special rights and privileges

letter and spirit. Through this system, Jawaharlal Nehru was detained when he tried to enter the State without permission during the Quit Kashmir Movement. Although Nehru was released immediately but his arrest reflected the Government's writ to resist acts of aggression.

³⁵ Prem Nath Kaul vs State of Jammu and Kashmir, cited in Hingorani, Aman M, *Unravelling the Kashmir Knot* (Sage Publications: New Delhi), p. 328.

upon the state subjects and allowing the state to have its own flag in addition to the Union flag.

Broadly speaking, Article 370 of the Constitution of India mandated that the Indian Parliament will not have the power to make laws for the state of J & K on a matter beyond the subjects specified in the IOA, unless and until the President of India obtained the ‘concurrence’ of the state government to permit the Indian Parliament to legislate on such matter. The idea was to restrain New Delhi from dealing with matters of the state not ceded to the dominion of India and to enable the state to be governed by its own constitution. India, however, used this very provision to pass a series of Presidential orders and thereby to apply successive executive action almost the entire Constitution of India to the state. India’s defence that such application was with the ‘concurrence’ of the regimes in the state, though technically correct, missed the point, particularly in light of an unenviable history of rigged elections in the state. B. K. Nehru, who was installed as the Governor of the state on 26 February 1981, writes that:

“From 1953 to 1977, Chief Ministers of that State had been nominees of Delhi. Their appointment to that post was legitimatised by holding of farcical and totally rigged elections in which the Congress Party led Delhi’s nominee was elected by huge majorities”.³⁶

³⁶ Nehru, B. K. 1997. *Nice Guys Finish Second*, pp. 615-15. New Delhi: Viking/Penguin Books

So, Article 370 was meant to preserve the autonomy of the state, whose ruler had chosen not to adopt the Constitution of India in its entirety and had instead expressly sought to retain his sovereignty over the state. The effect of the Presidential orders issued by New Delhi under Article 370 (1) of the Constitution of India was exactly the opposite.

Interestingly, the framers of the Constitution of India might not have even contemplated that New Delhi (through the President of India) could issue successive executive orders under Article 370(1) of the Constitution of India. At least, the then President of India, Rajendra Prasad, who had presided over the Constituent Assembly of India, and Gopalaswami Ayyangar, who had drafted Article 370 (draft Article 306A), did not think that the President of India could.

Rajendra Prasad questioned, in his Note to Nehru on 6 September 1952,

Desire for Justice

‘the competence of the President to have repeated recourse to the extraordinary powers conferred on him by Article 370’ and noted that ‘any provision authorising the executive government to make amendments in the Constitution’ was an incongruity.³⁷

After all it is a legislative function to amend a constitution, and, for the rest of India, the Constitution of India vests such power in Parliament

³⁷ Rajendra Prasad’s note to Jawaharlal Nehru, dated 6 September 1952. See Valmiki Chowdhary (ed.), *Dr. Rajendra Prasad: Correspondence and Select Documents*, Vol. 15, Allied Publishers, New Delhi, 1991.

and not in the executive. Rajendra Prasad, while agreeing with Ayyangar, stated that he had ‘little doubt’ that:

‘the intention is that the power {under Article 370(1)} is to be exercised only once, for then alone would it be possible to determine with precision which particular provisions should be excepted, and which modified’.³⁸

The issue as to whether the President of India could exercise his power under Article 370(1) of the Constitution of India from time to time was considered by the Constitution Bench of the Indian Supreme Court in *Sampat Prakash*. The question arose as to whether the President could take repeated recourse to Article 370(1) to make modifications. Regrettably, the Supreme Court said that he could, and the court opined that the ‘legislative history’ of this article indicated that the Constituent Assembly’ framing the Constitution of India ‘preferred’ to confer on the President the power to apply the various provisions of the Constitution with exceptions and modifications, in view of the special circumstances prevailing in the state. This reasoning of the Indian Supreme Court is totally inconsistent with the purpose for which Article 370 was framed by the Constitution-makers, as noted by the earlier Constitution Bench decision of the Supreme Court itself in *Prem Nath Kaul*-namely, to limit the accession of the state to the dominion of India to the terms of the IOA until the state Constituent Assembly determined the constitutional relationship between the state and the Union of India. Indeed, the Supreme Court failed to appreciate that its interpretation of the powers

³⁸ Ibid.

of the President of India under clause (1) of Article 370 of the Constitution of India nullifies the protection accorded to the state under clause (3) of Article 370 against encroachment upon its autonomy by New Delhi. Surprisingly, *Sampat Prakash* case was decided by the Supreme Court without reference to its earlier decision in *Prem Nath Kaul*, though one of the judges was common in both cases.

Not only did New Delhi take repeated recourse to Article 370 (1) of the Constitution of India to apply to J & K almost the entire Constitution of India, but it also chose to apply the state certain provisions of the Constitution of India with substantial modification. What made worse was that these substantial modifications were made by New Delhi in exercise of its executive power, with the concurrence of pliant regimes in the state. In other words, India bypassed its own Parliament in applying drastically amended laws to the state. An earlier decision of the Indian Supreme Court in 1961 in *Puranlal Lakhanpal*³⁹, which had ruled that the widest interpretation be given to term ‘modification’ in Article 370(1), came in handy in emasculating the constitutional protection granted to the state of J & K. As a result, the state did get a ‘special status’, though certainly not of an ‘autonomous republic’ within the Union of India. Rather, it found itself at the other end of the spectrum, with mere executive directions by New Delhi deciding its fate.

³⁹ *Puranlal Lakhanpal vs President of India*, 1961: AIR 1961 SC 1519 at p. 1521.

*Mohd Maqbool Damnoo*⁴⁰ illustrates this position. It may be recalled under the Delhi Agreement, the Sadr-i-Riyasat was to be the head of state and was to be elected by the state legislature itself, instead of a Governor appointed by the President of India on the advice of the Government of India. Pursuant to the state Constituent Assembly, New Delhi issued an order under Article 370 of the Constitution of India on 15 November 1952 to reflect this position. However, through the Constitution (Application to J & K) Sixth Amendment Order of 1965, New Delhi used its executive powers to replace the Sadr-i-Riyasat of the state with a Governor who was to be appointed by the President of India on the advice of the Govt. of India. This action of Indian Government was questioned before the Supreme Court in *Mohd Maqbool Damnoo*. The Constitution Bench of the Supreme Court had an answer that defied comprehension. The court held that it:

“is true that the Governor is not elected as was the Sadr-i-Riyasat, but the mode of appointment would not make him any the less a successor to Sadr-i-Riyasat as both are ‘heads of state’, and that since the Governor was the ‘successor’ of the Sadr-i-Riyasat, he was entitled to exercise all the powers of the Sadr-i-Riyasat”.⁴¹

Given that the Article 370 of the Indian Constitution was intended as a tool to continue the constitutional relationship between New Delhi and Kashmir till they further defined this relationship, it is regrettable that the Supreme Court did not feel that there was anything illegal or

⁴⁰ *Mohd Maqbool Damnoo v State of Jammu and Kashmir*: IR 1972 SC, p. 963.

⁴¹ *Ibid.*, p. 969.

improper about New Delhi replacing the elected head of the state by its own appointee. But, interestingly, a single judge of the J & K High Court took the view in December 2015 that the replacement of an elected Sadr-i-Riyasat with New Delhi's appointed Governor was unconstitutional, in as much as the 'elective' status of the head of state was an important attribute of the constitutional autonomy enjoyed by the state, a part of the "Basic Framework" of the state constitution.⁴² It is another matter that within days, the Division Bench of the same High Court stayed this judgement on 1 January 2016.⁴³

Successive Rulings of the Supreme Court of India

Article 370 is the first article of Part XXI of Indian Constitution and is unique in many ways. The heading of this part is "Temporary, Transitional and Special Provisions." The article exempted J & K from the Indian Constitution and permitted it to draft its own constitution. It restricted Indian Parliament's legislative powers in respect of J & K. To extend a central law to J & K on the subjects included in the IOA, mere "consultation" with the state government was needed but to extend other matters, "concurrence" of the state government was mandatory. There is a huge difference between consultation and concurrence. In the former,

⁴² Basharat Masood, 'Changing Sadr-i-Riyasat to Governor goes against J & K Constitution: says High Court', The Indian Express, New Delhi, 29 December 2015. <https://indianexpress.com/article/india/india-news-india/conversion-of-sadar-e-riyasat-into-governoragainst-state-constitution-says-jk-hc/>

⁴³ Arun Sharma, 'J & K's High Court stays order to hoist state flag on buildings', The Indian Express, New Delhi, 2 January 2016. <https://indianexpress.com/article/india/india-news-india/jk-high-court-stays-single-bench-order-on-stateflag/>

discussions would suffice but in the latter acceptance by the other party, i.e., the Government of J & K, was mandatory.

Article 370 was temporary in the sense that the Constituent Assembly of J & K was given the right to modify/delete/retain it. The Constituent Assembly of J & K decided to retain it and Article 370 became permanent. Sheikh Abdullah in his address to the Constituent Assembly on August 11, 1952, makes it clear that:

Here I would like to point out that the fact that Article 370 has been mentioned as [a] temporary provision in the Constitution does not mean that it is capable of being abrogated, modified, or replaced unilaterally. In actual effect, the temporary nature of this Article arises merely from the fact that the power to finalize the Constitutional relationship between the State and the Union of India has been specifically vested in the Jammu and Kashmir Constituent Assembly. It follows that whatever modifications, amendments, or exceptions that may become necessary either to Article 370 or any other Article in the Constitution of India in their application to the Jammu and Kashmir State are subject to decisions of this Sovereign body.⁴⁴

Sheikh Abdullah's position was also upheld by the Supreme Court of India in *Sampat Prakash* case by refusing to accept that Article 370 as a temporary provision and the five-judge bench argues that "Article 370

⁴⁴ Government of Jammu and Kashmir. 2000. *Report of the State Autonomy Committee*. Srinagar/Jammu: General Administration Department, p. 104.

has never ceased to be operative.”⁴⁵ The other view was that it was temporary till a plebiscite was held to ascertain the people’s wishes. The Narendra Modi government itself said in 2015 in a written reply in Parliament that there was no proposal to remove Article 370.⁴⁶

The Delhi High Court in *Kumari Vijayalaxmi (2017)*⁴⁷ rejected a petition arguing that Article 370 was temporary and its continuation a fraud on the Constitution. The Supreme Court of India too said in April 2018 that despite the headnote using the word “temporary”, Article 370 was not temporary. The apex court in *Santosh Kumar (2017)* also accepted that due to historical reasons, Jammu & Kashmir had a special status.

In *Prem Nath Kaul (1959) v State of J & K*, a Constitution Bench of the Supreme Court consisting of five judges unanimously held that Article 370(2):

“shows that the constitution-makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provisions of Article 370(1) is made conditional on the final

⁴⁵ Faizaan Mustafa, 2019. “Explained: What are Articles 370 and 35A?” Indian Express, August 6 <https://indianexpress.com/article/explained/understanding-articles-370-35a-jammu-kashmir-indian-constitution5610996/>

⁴⁶ <https://www.indiatoday.in/india/north/story/mehbooba-mufti-meets-pm-modi-no-proposal-to-delete-article370-241908-2015-02-24>

⁴⁷ <https://www.indiatoday.in/india/story/article-370-not-a-temporary-provision-says-sc-1204024-2018-04-03>

approval of the Constituent Assembly of Kashmir”.⁴⁸

Jammu and Kashmir’s Constituent Assembly was thus given the right to take a call on Article 370. The unanimous judgment was authored by Justice P. B Gajendragadkar on his behalf and on behalf of Chief Justice of India S. R Das. Thus, the bench of eminent judges was convinced that Jammu and Kashmir’s relationship with India was to be finally determined by the Jammu and Kashmir Constituent Assembly. But in *Sampat Prakash (1968)*, another bench of the apex court, without even bothering to cite its own 1959 judgment, decided that Article 370 could still be invoked even after the dissolution of Jammu and Kashmir’s Constituent Assembly.⁴⁹

The Supreme Court of India has refused to accept that Article 370 is temporary in nature. A five-judge bench said, “Article 370 has never ceased to be operative”.⁵⁰ Thus, Article 370 is a permanent provision. If it is a permanent feature of Indian Constitution, then it cannot be amended and thus can be said to be the part of the basic structure. Under Article 368, the Indian Parliament can amend any provision of the

⁴⁸ The Supreme Court’s Judgements on Article 370, Prem Nath Koul vs State of J & K, 1959, *Supreme Court Journal* 797. Cited in A. G. Noorani, *Article 370: A Constitutional History of Jammu & Kashmir* (New Delhi: Oxford University Press, 2011), p. 387.

The five judges who were present and sat on the bench were S. R. Das, *Chief Justice*, S. K. Das, P. B. Gajendragadkar, K. N. Wanchoo, and M. Hidayatullah, J. J.

⁴⁹ *Sampat Prakash vs State of J & K*, (1968). AIR 1970 *Supreme Court Journal* 1118. Cited in A. G. Noorani, *Article 370: A Constitutional History of Jammu & Kashmir* (New Delhi: Oxford University Press, 2011), p. 391402.

⁵⁰ <https://indianlawlive.net/2021/03/14/article-370-little-chance-for-supreme-court-interference-2/>

Constitution but as per the *Keshvanand Bharti* judgment ⁵¹, no constitutional amendment can either destroy the Constitution or alter its basic features. Interestingly, those opposed to Article 370 made contradictory arguments. On the one hand, they argued it was a temporary provision and therefore is no more valid or needed. On the other, they continued to justify repeated use of Article 370 by the Government of India.

The Supreme Court had the power to interpret words used in the Constitution. In fact, its decisions under Article 141 are considered binding law. Thus, the Court in its interpretation of “life” under Article 21 held that life means “to live with human dignity”. It even held that the right to privacy is implicit in Article 21. Similarly, it held that the word “temporary” in the heading of Chapter XXI does not mean temporary. Any temporary provision may indeed be termed as “special”. Thus, the word “special” in the heading of this chapter was inserted by the 13th constitutional amendment in 1962. Sardar Patel himself had said in the Constituent Assembly that a “special provision” had been made for the Kashmir in view of the existing relationship of the centre with the state.⁵²

⁵¹ Details of the Kesavananda Bharti Judgement can be found by using the following link: <https://indiankanoon.org/doc/257876/>

⁵² Durga Das (ed.), *Sardar Patel's Correspondence 1945-50: New Light on Kashmir*, Navajivan Publishing House, Ahmedabad, 1971.

Special Status in the Constitution of India

J & K is not the only state, which had a special status accorded to it in the Constitution of India. Under Article 371A, Nagaland has special status, and no Act of Parliament is automatically extended to Nagaland unless its legislative assembly so decides in matters of the religious or social practices of the Nagas, Naga customary law and practices, ownership and transfer of land and its resources. Even the administration of civil and criminal justice of Nagas is exempt from Indian laws. Thus, the Indian Penal Code, the Code of Criminal Procedure etc. do not automatically extend to Nagaland. Moreover, Nagaland has another level of autonomy under which even the Acts passed by the state legislative assembly do not extend to Tuensang District of Nagaland. There must be a Minister of Tuensang Affairs. Thus, there can be autonomy to even certain districts within a state.⁵³

Similarly, there is a special status for Maharashtra and Gujarat in Article 371. There are special provisions for many other states as well like Assam (Art.371B), Manipur (Art.371C), Andhra Pradesh (Art.371 D&E), Sikkim (Art.371F), Mizoram (Art.371G), Arunachal Pradesh (Art.371H) and Goa (Art.371I). With respect to Sikkim, even the Supreme Court's jurisdiction has been restricted on issues of treaties. As an asymmetric federal polity, the Constitution of India gives varying degrees of autonomy to different states. Those who think of all states as

⁵³ H. Srikanth & C. J. Thomas, Naga Resistance Movement and the Peace Process in Northeast India, Peace and Democracy in South Asia, Vol. 1, Issue 2, 2005.
https://himalaya.socanth.cam.ac.uk/collections/journals/pdsa/pdf/pdsa_01_02_04.pdf

having just one kind of relationship with the centre are neither aware, nor have they read various provisions of Article 371(A-I) as applicable to states other than J & K. Moreover, the Fifth and Sixth Schedules also give a lot of autonomy to certain areas.

Article 370 (3) stated:

“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”.⁵⁴

Article 370(3) can certainly be deleted by a presidential order, but due to the proviso given in this clause such an order is to be preceded by the recommendation of the Constituent Assembly of J & K. Since the assembly was dissolved on 26 January 1957, one view is that Article 370(3) cannot be deleted and has acquired a permanent status. The Constituent Assembly of Jammu and Kashmir was convened on 31 October 1951 and after adopting the J & K Constitution a decision was taken to dissolve it from 26 January 1957. On the other hand, after the signing of three copies of the Constitution of India on 24 January 1950, India's Constituent Assembly

⁵⁴ Subclause 3 of Article 370. See more on A. G. Noorani, *Article 370: A Constitutional History of Jammu & Kashmir* (New Delhi: Oxford University Press, 2011).

was merely adjourned “sine die”. The other view is that Article 370(3) can probably be deleted with the concurrence of the state legislative assembly, which today represented the will of the people through the ‘elected’ representatives.

Presidential Orders and the Erosion of Article 370

Over time the frequent use of presidential orders – allowed under Article 370 – to extend the writ of New Delhi to J & K considerably weakened this special provision in the Constitution. Nehru himself admitted in Lok Sabha on 27 November 1963 that “Article 370 has eroded”.⁵⁵ India used Article 370 more than 45 times to extend provisions of the Constitution of India to

J & K. Even President Rajendra Prasad was not very happy about the frequent use of Article 370, and he wrote a letter to Nehru on 6 September 1952 specifically saying that executive powers should not be used in this manner. As a matter of fact, using mere presidential orders we have almost nullified the effect of the special constitutional status of J & K.⁵⁶ By the Presidential Order of 1954, almost the entire Constitution (including most constitutional amendments) were extended

⁵⁵ Lok Sabha Debates; 27 November 1963; Volume XII, Columns 1231-2; also Vide A.G. Noorani; Article 370: *A Constitutional History of Jammu and Kashmir* (New Delhi: Oxford University Press, 2011), p. 304-5.

⁵⁶ Rajendra Prasad’s note to Jawaharlal Nehru, dated 6 September 1952. See Valmiki Chowdhary (ed.), Dr. Rajendra Prasad: Correspondence and Select Documents, Vol. 15, Allied Publishers, New Delhi, 1991, p. 104108.

and 94 out of 97 entries of the Union List were applied to J & K.⁵⁷ Thus, on 94 subjects Indian Parliament already had the exclusive power to pass laws that were applied to J & K just like any other state. 260 out of 395 Articles of the Constitution had been extended to the state. Similarly of the 12 Schedules of the Constitution of India, seven had already been extended to J & K.

Surprisingly, the Indian government used Article 370 to even amend several provisions of J & K's Constitution though that was not the power given to it under this Article of the Constitution of India. Article 370 had a limited mandate to extend the applicability of the Constitution of India to J & K. Thus Article 356 (on imposition of President's rule in the states) was extended to J & K though a similar provision was already there in Article 92 of its Constitution, which indeed required imposition of President's rule in the state only with the concurrence of the President of India.

To change the provision (in the J & K Constitution) of the governor being elected by the state assembly, Article 370 was used to convert the position into a nominee of the President. This was an undemocratic step as governors have proved to be the centre's agents in the state. In fact, ideally, the governor of each state should be elected by the legislative

⁵⁷ The Constitution (Application to J & K) Order, 14 May 1954. Cited in A. G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (New Delhi: Oxford University Express, 2011), p. 264-274.

assembly of the state. If he/she is to be nominated by the centre, the concurrence of the chief minister should always be taken.

To extend President's rule beyond one year in Punjab, India had to bring in the 59th, 64th, 67th and 68th constitutional amendments as Article 356(5) explicitly laid down that President's rule in a state cannot be extended beyond one year unless there is a national emergency, or the Election Commission of India certifies that elections cannot be held to the state's legislative assembly. India achieved the same result in J & K just by invoking Article 370 without any need to amend the Constitution.⁵⁸ Similarly, Article 249, i.e., the power of Parliament to make laws on entries in the state list, was extended to J & K without a resolution by the state assembly. It was done just on the recommendation of the then Governor Jagmohan. There was hardly anything in Article 370 except the shell. In fact, decades ago Gulzarilal Nanda, the then Union Home Minister, had said it had been almost completely emptied. It is more useful for them today than for the people of J & K.

Presidential Orders

The Article 370 was the basis of J & K 's Accession to the Union of India at a time when the erstwhile princely states had the choice to join either India or Pakistan or remain independent. The article, which came into effect in 1949, exempted J & K state from the Indian Constitution. It allowed the state jurisdiction to make its own laws in all matters except

⁵⁸ In Jammu and Kashmir, Presidential rule was enforced for a longer period from 1990 to 1996 by the Government of India after the eruption of militancy in 1989.

finance, defence, foreign affairs, and communications. It established a separate constitution and a separate flag and denied property rights in the region to the outsiders. That meant that the residents of the state lived under different laws than the other states such as property ownership and citizenship.

In exercise of the powers conferred by clause (1) of Article 370 of the Constitution, the President with the 'concurrence' of the state Government made a series of orders applying almost entire Constitution to the state.

Presidential Order of 1950 The Presidential order of 1950, officially The Constitution (Application to Jammu and Kashmir) Order, 1950, came into force on 26 January 1950 contemporaneously with the Constitution of India. It specified the subjects and articles of the Indian Constitution that correspond to the IOA as required by the clause b(i) of the Article 370. The order conferred on the Parliament the power to make laws for the state regarding matters contained in the Union List.

Thirty-eight subjects from the Union List were mentioned as matters which the Union legislature could make laws for the state. Certain articles in ten of the twenty-two parts of the Indian Constitution were extended to J & K, with modifications and exceptions as agreed by the state government. This order was superseded by the Presidential order of 1954.

Presidential Order of 1952 The Presidential order of 1952 was issued on 15 November 1952, at the request of the state government. It amended the Article 370, replacing the phrase "recognised by the President as the Maharaja of Jammu and

Kashmir” by “recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadr-i-Riyasat”. The amendment represented the abolition of the monarchy of J & K.

Background: The Constituent Assembly of J & K was ‘elected’ in 1951 unopposed and convened on 31 October 1951. The Basic Principles committee of the Constituent Assembly recommended the abolition of the monarch, which was unanimously approved by the Assembly on 12 June 1952. In the same month, the Hindu-dominated Jammu Praja Parishad submitted a memorandum to the President of India demanding the full application of the Indian Constitution to the state. The Government of India summoned a delegation from J & K in Delhi for discussions on the relations between New Delhi and the state. After discussions, the 1952 Delhi Agreement was reached. Though this agreement acknowledged the complete internal autonomy of the state of Jammu and Kashmir, but truly paved way for the extension of the Union Laws to the State, like extended the limited Jurisdiction (Appellate Jurisdiction) of the Supreme Court of India to Jammu and Kashmir, whereas the Board of Judicial Advisors was still functioning as the highest court of Judicial authority in Jammu and Kashmir state; extended Article 352 of the constitution of India to Jammu and Kashmir, which empowers the President of India to proclaim emergency arising due to war or external aggression etc. Delhi Agreement awoke the conscience of the Sheikh Abdullah (remained Prime Minister of J & K from 1947 – 1953) whose utterances were, in fact, the expression of his resentment against the moves which attempted to deprive the state, in this way or that, of its autonomous status. Moreover, the Sheikh would have certainly resisted any attempt that would abnormally affect the autonomy of the state during the course of constitution – making in his own state, but before the Sheikh was allowed to play the

part of a defender he was removed from the seat of authority as well as imprisoned on August 9, 1953 by the Sadr – i – Riyasat (President of Jammu and Kashmir) on the ground that he had failed to carry his colleagues along with him on matters of policies of the government, and Bakshi Gulam Mohammad was appointed the Prime Minister of Jammu and Kashmir.

The Prime Minister of J & K, Sheikh Abdullah was slow to implement the provisions of the Delhi Agreement. However, in August 1952, the State Constituent Assembly adopted a resolution abolishing the monarchy and replacing the position by an elected Head of the State called Sadr-i-Riyasat. Despite reservations on this piecemeal approach, the New Delhi government acquiesced, leading to the Presidential Order of 1952. The Legislative Assembly elected Karan Singh, who was already acting as the Prince Regent, as the new Sadr-i-Riyasat.

Presidential Order of 1954 The Presidential Order of 1954, officially The Constitution (Application to Jammu and Kashmir) Order, 1954 came into force on 14 May 1954, issued with the agreement of the State's 'Constituent Assembly', it was a comprehensive order seeking to implement the 1952 Delhi Agreement. Arguably, it went further than the Delhi Agreement in some respects. The provisions implementing the Delhi Agreement were: the Delhi Agreement between Nehru and Sheikh Abdullah of July 1952 covered extension of the federal relationship in respect of (a) Residuary Powers, (b) Citizenship, (c) Fundamental Rights, (d) Supreme Court of India, (e) National Flag, (f) The President of India, (g) The Headship of the State, (h) Financial Integration, (i) Emergency Provisions, and (j) Conduct of Elections to Houses of Parliament. The terms were set out by Nehru on 24 July 1952 and Abdullah on 11

August 1952.⁵⁹ Kashmir must have its own flag. There would be an elected head of State in place of the monarchy, the Sadr-i-Riyasat. Residuary powers would reside in the State. In 1986 this was wiped out when the State was ruled by the Governor. A Central appointee gave his “concurrence” as the State Government.⁶⁰ Sheikh Abdullah’s delay in implementing the Delhi Agreement riled Nehru. Abdullah publicly warned the Centre that any unilateral change would “invite serious consequences for a harmonious association of the State with India” – that is, if Nehru allowed him to remain in power if he did not toe the line. Sheikh Abdullah did not.

In addition, the following provisions which were not previously decided in the Delhi Agreement were also implemented:

- i Financial relations between New Delhi and the State were placed on the same footing as the other states. The State’s custom duties were abolished.
- ii Decisions affecting the disposition of the State could be made by New Delhi government, but only with the consent of the state government.⁶¹

Background: The state government’s decision to abolish the monarch led to increased agitation by Jammu based Praja Parishad which found support among the Ladakhi Buddhists and the Hindu parties in India. In response, Sheikh Abdullah started questioning the value of Kashmir’s accession to India, leading to a loss of support from Nehru. On 8 August 1953, Sheikh Abdullah was dismissed from the post of prime minister by the Sadr-i-Riyasat Karan Singh and was imprisoned for a

⁵⁹ A. G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (New Delhi: Oxford University Press, 2011), p. 138-172.

⁶⁰ *Ibid.*, p. 419.

⁶¹ Suresh Verma, *Kashmir and Article 370* (New Delhi: Solar Books, 2020), p. 39-41.

long time. Bakshi Ghulam Muhammad was handpicked by Nehru as replacement of Sheikh Abdullah for the post. The Constituent Assembly led by Bakshi unanimously adopted on 6 February 1954, the recommendations of its Basic Principles Committee and the Advisory Committee on Fundamental Rights and Citizenship. According to the Basic Principles Committee:

“while preserving the internal autonomy of the State, all the obligations which flow from the fact of aggression and also its elaboration as contained in the Delhi Agreement should find an appropriate place in the Constitution. The Committee is of the opinion that it is high time that finality in this respect should be reached, and the relationship of the State with the Union should be expressed in clear and precise terms. The Presidential order of 1954 was issued based on these recommendations”.⁶²

Further Presidential Orders

In addition to these original orders, forty-seven Presidential orders have been issued between 11 February 1956 and 19 February 1994, making various other provisions of the Constitution of India applicable to J & K. All these orders were issued with the ‘concurrence’ of the state government without any Constituent Assembly. The effect of these orders has been to extend 94 of the 97 subjects in the Union List (the powers of the Indian Government) to the state of J & K, and 260 of the 395 Articles of the Constitution of India. All these orders have been issued as amendments to the Presidential Order of 1954, rather than as

⁶² Suresh Verma, *Kashmir and Article 370* (New Delhi: Solar Books, 2020), p. 09-11.

replacements to it, presumably because their constitutionality was in doubt. This process is termed as the erosion of the Article 370. The impact of such Presidential Orders on the ‘autonomy’ of J & K is as follows:

- a) Forty-two Presidential Orders were passed since 1952 to 1986 with respect to matters other than ones specified in the IOA despite the fact that President’s powers in this regard should have expired on dissolution of the State’s Constituent Assembly.
- b) The Constitution (Application to Jammu and Kashmir) Order, 1954, applied all the entries of the Central list without following properly procedure to obtain the concurrence of the ‘Constituent Assembly’ which was convened in 1951.
- c) The issuance of several Presidential Orders by the central government from time to time not only restricted the powers of J and K Legislature, but also at the same time extending the Union’s legislative powers, the application of the Financial provisions of the constitution of India, application of provisions relating to All India Services, Central Bureau of Investigation, application of provisions relating to emergency, regulation of the judiciary under the provisions of the constitution of India, etc.
- d) Moreover, the Presidential Orders has not only undermined the autonomy of the state but has also put the state under disadvantage vis – a – vis other states. For instance, Parliament amended the constitution by means of the 59th, 64th, 67th, and 68th constitutional amendments for the purpose of extending President’s rule to Punjab, however, in the case of J and K, President’s rule was imposed and continued merely on the basis of executive orders from 1990 to 1996.
- e) Article 249 of the constitution of India was extended to the J & K on 30th July 1986, through Presidential Order under Article 370. This Presidential Order was issued by merely a resolution

passed by the Rajya Sabha, and obtained concurrence of then governor of Jammu and Kashmir, instead of obtaining concurrence of a ‘democratically’ elected legislature.⁶³

Article 35A and Permanent Residents

Article 35A is the consequence of the autonomy given to Jammu and Kashmir under Article 370 of the Indian Constitution. It was the continuation of the pre-1947 definition of permanent residents. In many states, there is reservation based on domicile in educational institutions. Article 35A was certainly not passed as per the amending process outlined in Article 368. It was inserted by a presidential order on the explicit recommendation of J & K’s Constituent Assembly. Any challenge to it may open a Pandora’s box about the validity of several other presidential orders.

The J & K Constituent Assembly, while decided to have Indian citizenship, did laid down that the then existing three classes of state subjects be merged into one to create one category of “permanent residents”. Thus, every person who was a state subject of Class I or Class II or who after having acquired immovable property in the state and had been ordinarily residing there for a period of not less than ten years prior to enforcement of this provision, was considered a permanent resident under the Jammu and Kashmir Constitution.

⁶³ Gazala Peer, Javedur Rehman. 2012. An Unpleasant Autonomy: Revisiting the Special Status for Jammu and Kashmir. *Economic and Political Weekly*, 47 (23), p. 73.

Article 35A gave certain benefits to the permanent residents of J & K such as in employment in the state government, acquisition of immovable property, settlement in the state and scholarships and other government aid. This was just the continuation of pre-1947 existing laws so that the benefits to which residents of the erstwhile princely state were entitled were not withdrawn with Kashmir joining the Indian Union.⁶⁴

Article 35A also laid down that any law dealing with definition of “permanent residents”, or above-mentioned benefits shall not be invalid on the ground that it is inconsistent with or takes away or abridges any rights conferred on other citizens of India. Such an exemption from fundamental rights is also there in Constitution of India in the form of Article 31B. Thus, any law that is included in the IXth Schedule cannot be challenged on the ground that it violates fundamental rights. There are some 285 laws that have so far been included in the IXth Schedule.

The BJP made a lot of hue and cry about Article 35A being inserted into the Constitution without following the procedure of passing a constitutional amendment under Article 368. But there are other amendments that have similarly been carried out through presidential orders under Article 370. Thus, the Constitution (Application to Jammu & Kashmir) Order, 1950 did amend Article 368 itself. It inserted a further proviso in Article 368, (which like Article 35A is not printed in the text

⁶⁴ Article 35A empowered the government of J&K in two matters—one, to define a particular group of people as constituting what is referred as “permanent residents” of the state and, secondly, to bestow on these permanent residents special rights and privileges concerning matters of public employment and acquisition of immovable property in the state.

of the Constitution of India) which laid down that no constitutional amendment shall have effect in relation to the state of Jammu & Kashmir unless applied by an order of the President under Clause (1) of Article 370.

Thus, for any constitutional amendment to be applicable to J & K, India needed to follow the process under Article 368 plus have an order by the President. Moreover, the President can pass an order only in consultation with the state government. Therefore, it is not right to say that Article 35A is the only amendment to Indian Constitution that had been passed without following the amendment process under Article 368.

Similarly, while no word can be replaced in the Constitution without a constitutional amendment, yet the expression “Maharaja acting on the advice of council of ministers” was replaced first by the expression “Sadr-e-Riyasat of Jammu and Kashmir” and subsequently by “the Governor”. Indeed, Article 370 was a self-applying Article of the Indian Constitution and applied *ex proprio vigore* (meaning “of its own force”) without having to depend on any other Article for its enforceability.

In fact, Article 370 was not only part of the Constitution of India but was part of the federalism that is the basic structure of the Constitution. Accordingly, courts had upheld successive presidential orders under Article 370. Certain benefits had been given to the permanent residents so that the wealthy from outside Jammu and Kashmir did not exploit the state’s resources, including by purchase of land, to their own benefit. Since Article 35A predates the basic structure theory of 1973, as per

Wamon Rao (1981), it cannot be tested on the touchstone of the basic structure. Certain types of restrictions on the purchase of land are also there in several other states like Arunachal, Nagaland, Himachal Pradesh, and Manipur etc.

Prior to the 2019 Lok Sabha elections, the New Delhi government used Article 35A to extend reservation benefits to the SCs, STs and OBCs and those who live along the Line of Control (Ceasefire Line). The Indian Parliament has since endorsed it, though it may not be strictly speaking in consonance with the text of Article 370 since the state government was not consulted.

Ineffectiveness of Article 370

The judicial sanction accorded to the dilution of Article 370 of Indian Constitution rendered it toothless to check extension of India's jurisdiction over the state on matters not covered either by the IOA or otherwise ceded by the state, even after the Constituent Assembly of J & K had been convened and dispersed. Article 368 of the Indian Constitution mandated that a constitutional amendment in relation to states required a two-third majority in both Houses of Indian Parliament, along with the ratification by one half of the states. For the state of J & K, executive orders under Article 370 have sufficed to bring about constitutional amendments till date. Sukumar Muralidharan points out that as many as 42 orders were issued by the President of India under Article 370 (1) of the Constitution of India, between 1954 and 1986, and

thus, applying central legislation to the state.⁶⁵ A. G. Noorani asserts that eventually 94 of the 97 entries in the Union List were extended to Kashmir, as were 260 of the 395 Articles of the Constitution of India-in each case with the ‘concurrence’ of the state government, which had no authority to accord the concurrence in the absence of the constituent assembly. Noorani further records that Article 370 was used freely not only to amend the Constitution of India in its application to J & K, but also the state Constitution. On 23 July 1975 ‘an Order was made debarring the same legislature from amending the state Constitution on matters in respect of the Governor, the Election Commission and even “the composition” of the Upper House, the Legislative Council’.⁶⁶

A.C. Bose agrees that Article 370 has never stood in the way of the Government of India behaving with or in this State as it liked.⁶⁷ Indeed, G. L. Nanda, the then Home Minister of India, stated in the Lok Sabha on 4 December 1964 that Article 370 was ‘not a wall or a mountain but a tunnel’⁶⁸ and that⁶⁹ ‘it is through this tunnel that a good deal of traffic has already passed and more will. Article 370, whether you keep it or not, has been completely emptied of its contents. Nothing has been left in it’.

⁶⁵ Muralidharan, Sukumar. 2000. ‘*From demand to dialogue*’, Frontline, 4 August, p. 23. Chennai: Kasturi & Sons, Ltd.

⁶⁶ Noorani, A. G. 2000. ‘*Article 370: Law and Politics*’, Frontline, 29 September, p. 92. Chennai: Kasturi & Sons, Ltd.

⁶⁷ Bose, A. C. 1996. ‘*Fragmentation of J & K and Article 370*’.

⁶⁸ Lok Sabha Debates; 27 November 1963; Volume XII, Columns 1231-32

⁶⁹ Ibid.

The emasculated Delhi Agreement of 1952 was followed by the Sheikh Abdullah-Indira Gandhi Accord of 1975 to restore a semblance of autonomy to the state. This Accord, too, was not honoured by New Delhi. The consistent demand in Kashmir mainstream political circles has, accordingly, been the restoration of the sanctity of Article 370 of the Constitution of India and relegation of the state to its pre-1953 status.

Impact of the Abrogation of Article 370

Article 370, although diluted since 1954, still remained an important symbol of sovereignty for the people of J & K. On the other side, Article 35A⁷⁰ helped the people to preserve its distinct cultural identity. The revocation of Article 370 and further downgrading of J & K from a State into two Union territories under the Jammu and Kashmir Reorganization Act, 2019 created a war like situation between India and Pakistan. The abrogation of Article 370 to fully 'integrate' J & K with India reflected the BJP's long standing ideological and political demand-has serious implications for the people of the state and impacted their lives on socio-economic and political terms. The BJP had also been campaigning for a long time to annul Article 35A which defined permanent residents of J & K, so that they would carry out a major demographic change in the state.

⁷⁰ Article 35A was incorporated into the Constitution in 1954 by an order of the then President Rajendra Prasad on the advice of the Jawaharlal Nehru Cabinet. Article 35A empowered the Jammu and Kashmir State Legislature to define the rights and privileges of State's 'permanent residents' and their special rights and privileges.

New Amendments

In October 2020, the Government of India abolished 12 Acts and amended 14 laws which had protected land holdings for permanent residents as defined by laws of the erstwhile state of J&K.⁷¹ This was done to facilitate vast demographic changes within the state by issuing permanent residency status to the children of Union of India's government officials posted in J&K for 10 or more years; anyone who has resided in J&K for 15 years; studied in J&K for seven years and/or sat class 10 and 12 exams in an educational institution located in J&K.⁷² Going by the new amendments of the Government of India, any person can purchase nonagricultural land in J & K without producing permanent resident certificate. With the new laws in hand, the agricultural land can be transferred with the government's approval. That means, if a person wants to sell his/her agricultural land to a non-agriculturist person, he is free to do so as which was not allowed when state laws were in practice.⁷³ The government can declare specially formulated to protect the State subject laws that had already been defined under the Dogra ruler Maharaja Hari Singh's regime and notified in 1927 and 1932 any area as 'strategic' for operational and training purposes if an army officer request for the same. In order to lure outside investors from mainland

⁷¹ Bhadra Sinha, 12 laws repealed, 14 amended — what exactly changes under new land orders in J&K, dated 29 October, 2020. Link: <https://theprint.in/judiciary/12-laws-repealed-14-amended-what-exactly-changes-undernew-land-orders-in-jk/533038/>

⁷² <https://thewire.in/government/excluded-from-law-making-for-two-years-kashmiris-are-angry-and-alienated>

⁷³ <https://theprint.in/india/anyone-in-india-can-now-buy-land-in-jammu-and-kashmir-but-conditionsapply/531828/>

India to invest in J & K, the govt. declared that they will be provided new incentives to relocate to the state.⁷⁴ The Government of India replaced J & K State Human Rights Commission (JKSHRC) with National Human Rights Commission (NHRC).⁷⁵ This means there will no longer be a separate human rights commission for the region, as there was before the state's re-organisation into two UTs and goes against the J & K Law Commission's recommendations of creating a separate rights body. Likewise, the J & K Right to Information (RTI) Act, 2009 was repealed after the abrogation of Article 370. Not only this, the State Commission for Protection for Women and Child Rights was dissolved by New Delhi's administration, despite the women's rights debate used to be a focus whenever Article 35A came up for discussion.⁷⁶ Through Jammu and Kashmir Re-organisation Act 2019, seven such important commissions were dissolved by the Government of India.

Economy and Employment

Due to abrogation of Article 370, the economy of J & K suffered huge losses and massively impacted the job sector as well as others like horticulture, transportation, etc. J & K Chamber of Commerce estimated

⁷⁴ The incentives include acquisition of land at subsidized rate, cheaper power charges and purchase and installation of quality control and equipment tests at a subsidized rate.

<https://economictimes.indiatimes.com/news/politics-and-nation/jk-administration-restarts-work-on-global-bizsummit/articleshow/77248857.cms?from=mdr>

⁷⁵ <https://thewire.in/rights/kashmir-human-rights-nhrc>

⁷⁶ Sanika Athavale, 'How Omission of Commission Left Kashmiri Women in Lurch' dated August 20, 2020, Kashmir Observer. See more on <https://kashmirobsrver.net/2020/08/20/how-omission-of-commission-leftkashmiri-women-in-lurch/>

that at almost fifty thousand jobs were lost due to reading down of Article 370. Likewise, Hilal Mandoo, the President of Kashmir Traders Association in an interview given to News Click in July 2020 stated the following:

“J&K’s economy has been massively impacted. We are facing massive losses of over Rs 40,000 crore including transporters, hosiery, and others. We have lost around 1.5 crore per day. The situation is grim.”⁷⁷

The heads of two regional political parties, Omer Abdullah of National Conference and Mehbooba Mufti of Peoples Democratic Party echoed the same sentiments whenever they spoke of economic losses in the State after the abrogation of Article 370. Omer Abdullah described the economic situation in the state as ‘brink of collapse’ in the following words:

“The economy of J&K, it goes without saying, is at the brink of collapse. There is no sector of Jammu & Kashmir’s economy — be it tourism, horticulture, transport, or trade — that hasn’t suffered losses in the past two years. Our local Economy is already on its deathbed due to the ravaging deluge of 2014 followed by the demonetization and then successive lockdowns, the Series of occurrences over the years also had a backbreaking impact on the people. The ongoing

⁷⁷ Sagrika Kisku, ‘J & K: End of 149-year-old Darbar Move Tradition Hits Already Struggling Businesses’ 12

July 2021. <https://www.newsclick.in/J%26K-149-year-old-Darbar-Move-Tradition-Hits-Already-StrugglingBusinesses>

crisis has diminished all hopes of economic revival”⁷⁸

Mehbooba stated that ‘J & K has been placed on open sale by New Delhi’⁷⁹. Mehbooba Mufti further stated that:

“It seems that the sole purpose of neutralizing Article 370 was to loot Jammu and Kashmir. Top positions are being given to outsiders in Chenab Valley Power Projects. Our electricity and water are going out. Our transporters are in trouble. They have to pay toll tax and much more”.⁸⁰

After the revocation of Article 370, the UT administration began to take control of many institutions and universities and are now under direct control of the office of Lieutenant Governor (LG). The selected LG nominated by New Delhi became the chancellor of many universities in J & K like Islamic University of Science & Technology (IUST), Baba Ghulam Shah Badshah University (BGSBU), and the cluster universities of Jammu and Srinagar. Many laws were tweaked to disempower the people of J&K and undermine its institutions much before the Bhartiya Janata Party-led Central government read down Article 370 of the constitution and dismembered J&K into two union territories in 2019. On 17 July 2020, the administrative council headed by LG proposed changes in state laws that were earlier on prohibited under the J & K Reorganization Act. The LG government proposed changes in two laws

⁷⁸ <https://www.nationalheraldindia.com/national/jammu-and-kashmirs-economy-on-brink-of-collapse-omarabdullah>

⁷⁹ <https://kashmirilife.net/five-decisions-put-our-land-resources-jobs-on-sale-says-mehbooba-293465/>

⁸⁰ Ibid.

that govern construction to declare a portion of the land held by the armed forces as “a strategic area” so as to allow constructive activities within it.⁸¹ The recurring theme in all this rewriting of laws is that the inhabitants of J&K, for whom the laws are being written, have no role to play in decision-making processes.

Policy Recommendations

Even while Article 370 has been de-operationalised, it does of course have a huge sentimental value for the people of J & K who viewed its abrogation with a great deal of unhappiness. In any case it is a violation of commitments given to the people of J & K at the time of accession with the Union of India. The dramatic events of 05 August 2019 sealed the fate of Article 370 and Article 35A and led to many changes in the state of Jammu and Kashmir. The de-operationalisation of these articles was unconstitutional and in contradiction with the Constitution of India itself, and to implement it-the state of J & K was put under intense military siege which had immediate implications for the civil liberties of the people of the state. As a result of abrogation of these articles, the administrative changes and the legal amendments that took place in J & K have been described in detail in the above discussion. However, the consequences of the abrogation of these articles are potentially far reaching in terms of the demographic composition of J & K through the in-migrations of Indian citizens and ownership of the land by external

⁸¹ <https://thewire.in/government/excluded-from-law-making-for-two-years-kashmiris-are-angry-and-alienated>

investors. So, the immediate concern should be to protect the people's right to participate in the pending plebiscite based on the subject status. The major stakeholder communities continue to voice their demands of reversing the decision of 05 August 2019 and reinstate J & K's special status. However, the reading down of Article 370 and Article 35A has the potential to provide a moment of pause to review the failed political strategies in resolving the Kashmir dispute. It can also serve as a catalyst for uniting the people irrespective of the regions and create a space for intra-state political alliances. The existing political powers will continue to get to the seat of power; there should be an urge to revisit the need to hold a plebiscite which will stop India to make the state of J & K a Palestine in South Asia.





Legal Forum For Kashmir - LFK

www.lfkashmir.com