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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

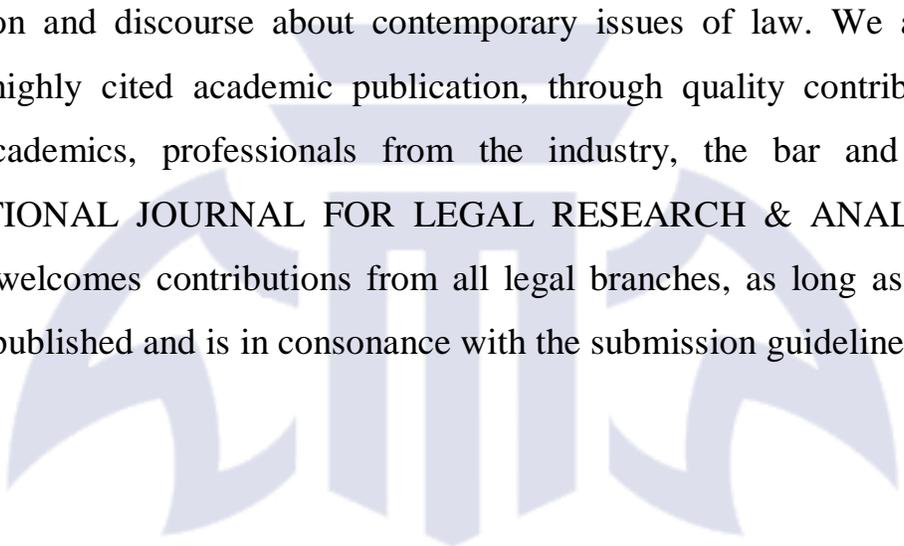
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ARTICLE 370 AND 35(A)



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Authored By- Shreya Jha

DELHI METROPOLITAN EDUCATION AFFILIATED TO GURU
GOBIND SINGH INDRAPRASTHA UNIVERSITY
DELHI, INDIA

Abstract

Article 370 was drafted in the Part XXI of the Indian Constitution, titled "Temporary, Transitional and Special Provisions", which provided Jammu & Kashmir a special constitutional status in India. It therefore stated that the Constituent Assembly of Jammu and Kashmir would be empowered to recommend the extent to which the Indian constitution would apply to the state. It also restricted any Parliamentary legislation's powers to rule on Jammu & Kashmir as Article 370 exempts Jammu & Kashmir from the Indian Constitution and permits the state to draft its own flag and constitution and therefore, citizens of Jammu & Kashmir lived under the different set of rules. On 27th October, 1947, an instrument of accession was signed between the Maharaja Hari Singh and India thereof, which gives Parliament of India to interfere in the matters of Defence, External Affairs and Communication only. According to Article 35(A) of the Indian Constitution the special rights and privileges were given to the citizens of the state. As a result, it gives authority to the state to decide that who is the permanent citizen of the state and as per the Article 35(A) privileges were given to the permanent member of Jammu & Kashmir i.e. employment with the state government of Jammu & Kashmir, acquisition of the property in the state, settling in the state and Right to scholarships and other benefits that were given by the state government. A presidential order was issued by the Government of India on 5th August, 2019 that all the provisions was implemented on the state i.e. Jammu & Kashmir and therefore order was passed by both the houses of the Indian Parliament with the 2/3 majority. As a result, on 6th August 2019 all the clauses of Article 370 of the Indian Constitution except one was suspended and therefore made inoperative.

Keywords: Article 370, Instrument of accession, Article 35(A), Presidential order.

Introduction

Article 370 Of Constitution of India provided the State of Jammu and Kashmir (J&K) special constitutional status. The provision substantially limited Parliament's power to legislate for the State in comparison to other states.¹ Article 370 was drafted in Part XXI of the Indian Constitution titled "**Temporary, Transitional and Special Provisions**" and provided the state that the Constituent Assembly of Jammu and Kashmir would be empowered to recommend the extent to which the Indian constitution would apply to the state.

Article 370 was incorporated in the Constitution Of India on 17th October , 1949. It says that only two Articles would apply in Jammu and Kashmir i.e. Article 1 and Article 370. Also Article 1 states that Jammu and Kashmir is a part of India. The Article can be endorsed with the permission of Constituent Assembly of Jammu and Kashmir, Article 370 grants an autonomous status to J&K, while Article 35A, incorporated into the Constitution in 1954, provides special rights and privileges to the citizens of the state.²

What Is Article 370?

It restricts Parliamentary legislation's powers to rule on Jammu & Kashmir as Article 370 exempts Jammu & Kashmir from the Indian Constitution and permits the state to draft its own constitution. For the extension of central law which are the elements of Instrument of Accession, **mere consultation** of the state government is needed. But, for the extending it to other matters, **concurrence** of the state government is needed.

Provisions Of Article 370

The Parliament hereby needs the permission of Jammu & Kashmir government for applying any laws in the state except Defence, Foreign Affairs, Finance and communications.

The law of citizenship, ownership of property and the fundamental rights of the residents of Jammu & Kashmir is different from the people of rest of the India. No power was given to the central government to declare financial emergency in the state i.e. Jammu & Kashmir.

¹<https://www.scobserver.in/cases/manohar-lal-lohia-union-of-india-article-370-case-background/>

²https://www.business-standard.com/article/current-affairs/explained-what-are-articles-370-and-35a-impact-on-kashmir-if-it-is-removed-why-is-bjp-against-article-35a-in-kashmir-mufti-pdp-abdullah-modi-119072900626_1.html

What Is Article 35(A)?

Article 35(A) gives authority to the state to decide that who is the permanent citizen of the state i.e. Jammu & Kashmir are. Some privileges were given to the permanent member of Jammu & Kashmir i.e. employment with the state government of Jammu & Kashmir, acquisition of the property in the state, settling in the state and Right to scholarships and other benefits that were given by the state government.

The state government can impose any restrictions on the person who is not a permanent resident of the Jammu & Kashmir regarding the above. The powers of Supreme Court of India and Election Commission of India have limited power on the state.

Historical Aspects

The Indian Independence Act, 1947, divided British India, i.e., the territories under the direct administration of the British, into India and Pakistan. However, India and Pakistan gained their Independence on 15th August and 14th August 1947, respectively, the 580-odd princely states that had signed subsidiary alliances with the British had their sovereignty restored to them, and were given the options of remaining independent, or joining the Dominion of India/Pakistan. Under the Section 6(a) of The India Independence Act joining either India or Pakistan would have to be through an Instrument of Accession. States could specify the terms on which they were joining one of the new dominions.

However, Jammu and Kashmir choose to remain independent. There was an agreement between Pakistan, India and J&K that none of them will attack on J&K. While India respected the agreement and exercised restraint, On 6th October 1947, Kashmir was attacked by “Azad Kashmir Forces” supported by Pakistan in a bid to annex it by force.

Instrument Of Accession

Technically, The Instrument of Accession was like a treaty between two sovereign countries that had decided to work together.

To save J&K, Maharaja Hari Singh (The ruler of Jammu and Kashmir) choose to accede J&K to India. Maharaja Hari Singh signed the Instrument Of Accession, and gave Parliament the power to legislate in Jammu and Kashmir only in the matter of **Defence, External Affairs and Communications**.

The State enjoys a greater measure of autonomy and the power of the Union of India is restricted.³

ARTICLE 370

The Article was included in the Constitution on 17th October, 1949. Article 370 was drafted in **Part XXI** of the Indian constitution titled "Temporary, Transitional and Special Provisions. The Article 370 includes that the citizens of Jammu and Kashmir have dual citizenship. The time period for J&K legislative assembly is 6 years. It allows Jammu and Kashmir to establish a separate

constitution and a separate flag. Under this, Citizens from other states can't buy any property in Jammu & Kashmir. Thereby, under this article the centre has no power to declare a financial emergency in the state.



Constitutional And Legal Status: Kashmir Prior To The Revocation Of Article 370 And 35(A)

Article 370 of the Indian Constitution is named as temporary provision, which allows Jammu & Kashmir (state) a special constitutional status within the Union of India. According to Article 370(1)(b), the Parliament of the India can only make rules for the state with the consultation of the "State Government", matters such as Defence, Foreign Affairs and Communications are only included.

³<https://www.slideshare.net/altacitglobal/article-370>

Therefore, the Jammu & Kashmir constituted his own constitution and flag, which was officially adopted by constituent assembly on November 17th, 1956 and came into force on January 26th, 1959. Article 370(1)(d) says that other constitutional provisions may be applied to the state from time to time, “subject to such modifications or exceptions” made by the president of India, also through a presidential order, as long as they do not fall within the matters referred to above and except with the concurrence of the state government.

Jammu And Kashmir Reorganization Bill, 2019

The Bill provides the reorganisation of the state of Jammu and Kashmir into “The Union Territory of Jammu and Kashmir” and “The Union Territory of Ladakh”.The Bill reorganises the state of Jammu and Kashmir into:

- (i) The Union Territory of Jammu and Kashmir with a legislature
- (ii) The Union Territory of Ladakh without a legislature.

The Union Territory of Ladakh will comprise Kargil and Leh districts, and the Union Territory of Jammu and Kashmir will comprise the remaining territories of the existing state of Jammu and Kashmir. The Union Territory of Jammu and Kashmir administered by the President, through an administrator appointed by him known as the Lieutenant Governor. The Union Territory of Ladakh will be administered by the President, through a Lieutenant Governor appointed by him.

The Bill provides for a Legislative Assembly for the Union Territory of Jammu and Kashmir. The total number of seats in the Assembly will be 107. Of these, 24 seats will remain vacant on account of certain areas of Jammu and Kashmir being under the occupation of Pakistan. Further, seats will be reserved in the Assembly for Scheduled Castes and Scheduled Tribes in proportion to their population in the Union Territory of Jammu and Kashmir. In addition, the Lieutenant Governor may nominate two members to the Legislative Assembly to give representation to women, if they are not adequately represented. The Assembly will have a term of five years, and the Lieutenant Governor must summon the Assembly at least once in six months.

The Legislative Assembly may make laws for any part of the Union Territory of Jammu and Kashmir related to:

- (i) Any matters specified in the State List of the Constitution, except “Police” and “PublicOrder” .
- (ii) any matter in the Concurrent List applicable to Union Territories.

Further, Parliament will have the power to make laws in relation to any matter for the Union Territory of Jammu and Kashmir.

On 5th August, 2019, The Jammu and Kashmir Reorganisation bill was introduced in Rajya Sabha by the minister of Home Affairs Mr. Amit Shah, it was passed by Rajya Sabha and was introduced in Lok Sabha 6th August, 2019.

Contentions related To demand For Abrogation

Both the parties who are in favour or in opposite of abrogation had valid arguments.

Contentions that are in favour of the abrogation of bill are as follows-

The issue created psychological barriers as they say that Article 370 of the Indian Constitution is the main root of all these problems. Afterwards, they stated that Article 370 encourages the secessionist activities within Jammu & Kashmir and other parts of the country. They stated that at the time of enactment, it was a temporary arrangement which therefore, need to be erode gradually.

Contentions of the members in against of the abrogation are as follows-

It will encourage the secessionists to demand plebiscite which will lead to internationalisation of the issue of J& K. They further argue that the contention of Article giving rise to the secessionist activities is baseless as Punjab, Assam, which don't have any special status have experienced such problems. It would not only constitute a solemnly undertaking given by India through the instrument of succession, but would also give unnecessary misgivings in the minds of the people of J & K, making the issue more sensitive.

High Court Of Jammu & Kashmir

There will be the same high court for both of the union territories i.e. Union Territory of Ladakh and Union Territory of Jammu & Kashmir. Furthermore, The Union Territory of Jammu & Kashmir will have an Advocate General to provide the legal advice to the government of Union Territories.

Different Countries Response

○ **PAKISTAN'S REACTION**

The Foreign office of Pakistan issued a revocation against India, which states that the step to remove Article 370 is all illegal and a “unilateral step” after 6th August 2019 and also the Prime Minister of Pakistan compared India with the Nazis on 11th August, 2019. As Army chief of Pakistan state that the army of Pakistan will go to any extent to help the people in Kashmir. Also, all the type of cultural exchanges between the two countries were suspended, which includes banning of Films and Dramas of India in Pakistan.

○ **CHINA'S REACTION**

The Foreign minister of China states “it undermined China's territorial sovereignty, and India's action is unacceptable and would have any legal effect”. Also the Foreign minister of China meets the Foreign minister of Pakistan and afterwards stated that “seriously concerned about the turbulence and escalating tensions in Kashmir and China will firmly continue to support Pakistan in safeguarding his illegitimate rights”.

○ **AUSTRALIA'S REACTION**

Harinder Sidhu, the Australian High Commissioner “ the India stated this thing in an internal meeting and Australia respected the decision of India and wants that both the countries Pakistan and India can resolve bilaterally.

○ **CANADA'S REACTION**

The Foreign Minister, Chrystia Freeland stated that “Canada is concerned about the risk of escalation, on civil rights and reports of detentions.”

HUNGARY`S REACTION

The government of Hungary, Fidesz supported India and Citizenship Amendment Act Protest.

KUWAIT`S REACTION

In a National Assembly Session, a Kuwait groups of lawmakers expressed their concern regarding “abusive legislative and repressive security measures” taken by the Government of India.

USA`S REACTION

Morgan Ortagus, a US State Department spokesperson stated there had been no change in the US position with Kashmir continuing to be regarded as a disputed region despite India's characterization of it as an "internal matter" and stressed the need for bilateral talks between India and Pakistan, and further stated "We are concerned about reports of detentions and urge respect for individual rights and discussion with those in affected communities."^[239] When asked by reporters if there had been any change in America's policy on Kashmir, State Department spokesperson Morgan Ortagus replied "No. And if there was, I certainly wouldn't be announcing it here, but no, there's not". The US policy has been that Kashmir is a bilateral issue between India and Pakistan and it is up to the two countries to decide on the pace and scope of the talks on the issue.^{[240][241]} During prime minister Imran Khan's visit to the United States in July 2019, President Donald Trump offered to mediate Kashmir conflict between Pakistan and India.^[242] The Bureau of South and Central Asian Affairs of the US State Department in a statement said "the Indian government did not consult or inform the US Government before moving to revoke Jammu and Kashmir's special constitutional status".^[243] US President Donald Trump spoke to both Indian and Pakistani Prime Ministers. He emphasised the need to reduce tensions and moderate rhetoric while speaking to the Pakistani PM, after speaking to the Indian PM on 19 August 2019 On 21 August 2019, US President Trump offered to mediate the "explosive" situation in Kashmir, adding that he will meet Prime Minister Narendra Modi at the 45th G7 summit, which was held on 24–26 August 2019. Many Indian American communities welcomed the Indian decision.⁴

RUSSIA`S REACTION

Russia has called upon both India and Pakistan to save the situation in Kashmir from spiralling out of control and carry out the changes in the region within the constitutional parameters, the change

⁴https://en.wikipedia.org/wiki/Revocation_of_the_special_status_of_Jammu_and_Kashmir

in the status of the state of J&K and its division into two union territories are carried out within framework of the Constitution of the Republic of India. We hope that the differences between them will be resolved by political and diplomatic means on a bilateral basis in accordance with the provisions of the Simla Agreement of 1972 and the Lahore Declaration of 1999," the Ministry of Foreign Affairs said. Russian envoy to India Nikolay Kudashev backed the decision, saying "India's decision (on Jammu and Kashmir) is a sovereign decision which is as per its Constitution. Our position on the issue is totally identical to India's position."⁵

OTHER ARTICLES PROVIDED IF THE INDIAN CONSTITUTION WHICH ARE USED IN THIS ARTICLE ARE AS FOLLOWS:

- **Article 370 (3)**: provides President of India has the powers to amend or repeal the Article by issuing a notification, based on a recommendation of Constituent Assembly of Jammu & Kashmir.⁶
- **Article 370(1)(b)**: such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify Explanation For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharajas Proclamation dated the fifth day of March, 1948.⁷
- **Article 370(1)(d)**:such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (b) shall be issued except in consultation with the Government of the State: Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.⁸

⁵https://en.wikipedia.org/wiki/Revocation_of_the_special_status_of_Jammu_and_Kashmir

⁶[https://www.legalserviceindia.com/legal/article-895-articles-370-and-35a-of-the-constitution-of-india-have-now-been-buried-ultimately.html#:~:text=Article%20370%20\(3\)%20of%20Constitution,Constituent%20Assembly%20of%20Jammu%20%26%20Kashmir.](https://www.legalserviceindia.com/legal/article-895-articles-370-and-35a-of-the-constitution-of-india-have-now-been-buried-ultimately.html#:~:text=Article%20370%20(3)%20of%20Constitution,Constituent%20Assembly%20of%20Jammu%20%26%20Kashmir.)

⁷<https://indiankanoon.org/doc/1944301/>

⁸<https://indiankanoon.org/doc/589802/>