

From Partition to Abrogation: Tracing the History of Article 370

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Abstract:

Kashmir isn't "just another city" or just another place that exists on earth. It is a place described by the famous poet Amir Khusrau in the following words, "Gar Firdaus Bar Ruhe Zamin ast, Hamin asto, Hamin asto, Hamin ast...." Which when translated, means, "if there is Paradise on earth, it is here, it is here, it is here...." The place was once compared to the paradise. The region had been choice of many British officials for their holidays in the British raj period and it remained a frequent location for film shootings by many directors in the 80s and 90s. However, apart from being a great tourist attraction with amazing scenic valley, it also holds a long and painful history of political instability during the latter half of 20th century. The troubles began for Kashmir since the partition of India was proposed and it took a long line of governments and thousands of lives in pursue of the solution to its troubles. This article is an analysis to understand and highlight all the turbulence that valley of Kashmir went through from partition to present day. We will see phase to phase developments that took place in Kashmir from the time of partition to formation of Article 370 and its abrogation along with its impact on the nation in general and the state in particular.

Keywords: Kashmir, partition of India, article 370, article 35A, abrogation of article 370, constitution of India.

Introduction

It is necessary to understand the background of Jammu and Kashmir before getting into its political analysis. Area wise, it was the largest princely state measuring 84,471 sq. Miles. It is made up of four regions, (a) mountainous regions of Jammu with slight Hindu majority, (b) northern regions and valley of Kashmir with Sunni Muslim Majority, (c) high mountainous regions of Ladakh with Buddhist Majority and (d) thin track regions of Gilgit and Baltistan with Shia and Ismaili Muslims. The princely state was integrated under the rule of Dogra Rajput in 19th century.

Partition of India, August 1947

With the end of British paramount in India, two dominions were created- "India" and "Pakistan" in 1947. The princely states were given freewill to either **join India** or **Pakistan** or **stay independent**. Most princely states opted to join the dominion of India, mostly due to geographical factors and religious composition of their region. However, the princely state of Jammu and Kashmir shared borders with both India and Pakistan. Religiously speaking, it had a Muslim majority with a Hindu ruler, Raja Hari Singh. Up until the day of transfer of power, Maharaja had not decided about ceding to either of the

dominions. It is believed that the Maharaja harbored a desire to stay independent and autonomous from both the dominions.

However, despite clear expression of their will to stay independent, the Maharaja was pressurized from both the dominions to join either of them. In such a state, Maharaja Hari Singh sent his Prime Minister Ramchandra Kak to sign a *Standstill Agreement* with both, India and Pakistan in order to maintain the existing economic and political activities with the territories. Pakistan signed the agreement on 15th August 1947 while India insisted on a discussion with the Maharaja Government. Indian leadership supported people's choice in matters of integration of a region. Therefore, in order to win hearts of people of Kashmir, Indian National Congress developed a close proximity with Sheikh Abdullah, the founder of Jammu and Kashmir Muslim Conference. Sheikh Abdullah launched "Quit Kashmir Movement" against the Maharaja Hari Singh's administration and was supported by Gandhi and Nehru. He was, however, arrested in 1946 in the charges of sedition.

Meanwhile, Jinnah under his two nation theory had thought that Pakistan was the natural choice for Jammu and Kashmir due to its majority Muslim population. In mid of September 1947, Pakistan stopped rail services and lorry carrying goods from Sialkot and Jammu. Maharaja Hari Singh released Sheikh Abdullah under pressure from Nehru. Majority of Muslims, Sikhs and Hindus from the Jammu region supported merger with India while the majority of Muslim from Kashmir region relied on leadership from Sheikh Abdullah.

Instrument of Accession, October 1947

On October 22nd 1947, the Pashtun tribe from North West Frontier Province attacked Jammu and Kashmir from northern side. By October 24th, the tribes reached Bara mullah and plundered the local people i.e., Hindus and Muslims equally. Under such circumstances, Maharaja Hari Singh and Sheikh Abdullah both turned towards India for help. Then Governor General of India, Lord Mountbatten insisted on signing of instrument of accession before Indian help. On 26th October 1947, Maharaja Hari Singh signed the *Instrument of Accession* for safety of the region from the raiders and the Indian armed forces entered and diffused the attack until the northern region.

Provisions of instrument of accession

1. Maharaja Hari Singh declares *the legal merger* of state of Jammu and Kashmir **with the Dominion of India**.
2. Maharaja Hari Singh declares that Governor General of India, Indian Legislature and Federal court will be authorized to carry out actions in relation with the state.
3. **According to the clause 7** of the agreement, the Indian Dominion could only legislate on the subject of Defense, Communication and External affairs in respect to Jammu and Kashmir.
4. **The clause 7 further states** that the instrument *shall not be deemed as an acceptance of any future Indian constitution*.
5. **According to clause 5** of the instrument, it is mentioned that it can't be varied by any amendment in Government of India act, 1935 or Indian independence act, 1947, unless it is accepted by Maharaja Hari Singh.
6. Further, **Clause 8** reiterates that, *nothing in the instrument shall affect the continuance of State's sovereignty*. This meant that the state of Jammu and Kashmir will have its own set of rules for

internal governance and another set of rules for external governance wherein provisions of Indian constitution will be applicable.

In order to constraint the power of Indian parliament the clauses within the Instrument of Accession provide clauses that safeguarded the autonomy of the state. Thus, Instrument of accession linked the state of Jammu and Kashmir with India but also limited the control of the union of India over the state.

On October 31st 1947, Sheikh Abdullah became the Prime Minister of the emergency government of Jammu and Kashmir with Maharaja Hari Singh as its ruler. The final decision on accession with India was left for the constituent assembly of J&K State. Therefore, Kashmir was the only princely states to sign an instrument of accession along with holding the power to negotiate the terms of Instrument of Accession.

United Nations Resolution, January 1948 to December 1949

On 1st January 1948, the Prime Minister Jawaharlal Nehru had taken this case to United Nations on the advice of Governor General Lord Mountbatten. But the United Nations altered the agenda from Jammu and Kashmir issue to India and Pakistan issue. The United Nations passed **Resolution 39** to **form a three member commission** in order to “investigate the facts”. However, the commission did not bore any fruition until May 1948.

Thereafter, on 21st April 1948, UN adopted the **RESOLUTION 47** on the matter of Jammu and Kashmir. According to the resolution, **a five member commission** was asked to proceed to the Indian subcontinent to mediate between India and Pakistan. It further recommended **a three step procedure** to restore peace and suggested a plebiscite. The three steps were,

1. For Pakistan to withdraw all the tribals and Pakistani nationals and put an end to the fighting
2. For India to progressively reduce its armed forces in the region to minimum level required to maintain law and order.
3. India was asked to ensure participation of all major political parties in state government at ministerial level and form a coalition cabinet

Furthermore, the resolution stated the following as well:

1. India to appoint a plebiscite administrator nominated by UN to ensure free and impartial plebiscite in the region.
2. Called for measures to be taken for the return of refugees, release of political prisoners and for political freedom in the region.

The resolution was approved by nine votes against none. Soviet Union and Ukraine abstained from voting.

India objected that the resolution put both India and Pakistan on equal footing and of ignoring the complaints of Pakistani aggression towards Kashmir. It also felt that provision of return of all refugees was unrealistic. Finally, India wanted Pakistan out of the conduct of plebiscite. Pakistan objected the retention of Indian forces even at the minimum levels allowed by the resolution. It also demanded for the participation of Pakistan’s dominant party in the Kashmiri government.

Despite reservations, questions and dissents, the governments of both dominions accepted the proposal and the ceasefire were held on 1st January 1949. The commission returned to the subcontinent in February 1949 to move further the ceasefire and prepare for plebiscite. India demanded disbandment of Azad forces as an essential condition before the plebiscite. Another demand was regarding the northern areas of Gilgit-Baltistan where India demanded the territories to be restored to state government. The

commission proposed the governance of the northern areas to be managed by the local authorities. However, the compromise was rejected by both, India and Pakistan. The UN commission submitted its report of failure to the Security Council on 9th December 1949 and recommended a single mediator for the issue.

Article 370 of the Indian constitution, January 1950

The constitution of India came into effect from 26th of January 1950 throughout the Union of India. However, in case of Jammu and Kashmir, the representatives of the state of Kashmir requested to the Indian constituent assembly that only those provisions of the constitution which were in accordance to the Instrument of Accession shall be applied to the state of Jammu and Kashmir. Thus, **Article 370** was drafted in part XXI of Indian constitution that stated the authority of **CONSTITUENT ASSEMBLY OF THE STATE OF JAMMU AND KASHMIR**

According to the article 370, the constituent assembly of Jammu and Kashmir would determine the extent to which the Indian constitution will be applicable on the state. The instrument of Accession and article 370 of the constitution gave the authority to the constituent assembly of Jammu and Kashmir to draft its own constitution for the state of Jammu and Kashmir. It also empowered the assembly to abrogate the article 370 altogether and that would follow applicability of Indian constitution throughout the state of Jammu and Kashmir. Thus, for the aforesaid provisions, a constituent assembly of Jammu and Kashmir was formulated on 1st may 1951 and **on 26th January 1957 it adopted the constitution of Jammu and Kashmir.**

Article 370 was titled as *“temporary, transitional and special provisions”*. However, *the constituent assembly of Jammu and Kashmir* dissolved itself on 25th of January 1957 *without recommending the abrogation of Article 370* which meant that the “temporary” provision was now **DEEMED to be a permanent feature of Indian constitution.**

The provisions of article 370:

Article 370 embodies six provisions for the state of Jammu and Kashmir:

1. It exempted the state from applicability of Constitution of India and conferred upon the state the authority to have its own Constitution.
2. The legislative powers of the Indian parliament were limited to only three subjects, as decided by IOA, on defense, communication and external affairs.
3. Other constitutional powers of the central government could be extended to the state only with concurrence with the state
4. The concurrence was provisional and subject to ratification by the constituent assembly
5. State Government's authority to give 'concurrence' lasted only until the State Constituent Assembly was convened. Once the State Constituent Assembly finalised the scheme of powers and dispersed, no further extension of powers was possible.

1. The article 370 could be abrogated or amended only on the recommendations of the constituent assembly of the state.

Delhi agreement and article 35A, July 1952

In July 1952, Indian Prime Minister Jawaharlal Nehru signed an agreement with Prime Minister of Jammu and Kashmir, Sheikh Abdullah. This agreement was known as Delhi Agreement. This agreement ensured that the other subjects apart from those mentioned in the Instrument of Accession were vested in the hands of the state. It also ensured with the state's legislature to define “permanent resident” of the

state. To legitimate the agreement, Article 35A was introduced in the Indian Constitution through a presidential order, *The Constitution (Application to Jammu and Kashmir) Order, 1954*.

Article 35A:

1. Empowers the state legislature to decide on permanent residency. Accordingly, a permanent resident of Jammu and Kashmir is defined as a person:
 - who was a state subject on or before 14th May 1954
 - Residence in the State for 10 years before this date.
 - Lawfully acquire properties in the state before this date.
 - Migrated to Pakistan Border Areas after 1st march 1947, and come back with resident permit of the state.
2. State Government has right to give or withdraw privileges to other Indian Nationals migrated to Jammu and Kashmir.
3. State Government shall also confer on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects
 - Employment under the State Government;
 - Settlement in the State;
 - Acquisition of immovable property in the State;
 - Right to scholarships and such other forms of aid as the State Government may provide.

Drawbacks of the article 35A

It can be rightly said that Article 35(A) was gender biased and discriminatory against women. When a man from Jammu and Kashmir married a woman from outside the state, he along with his wife and children get citizenship of the state. But when a woman from the state married a man outside the state, she will be deprived of her citizenship right and her husband and children wouldn't get an opportunity to become citizen of the state. In 2002, The High Court of Jammu and Kashmir had permitted the woman of the state marrying an outsider to retain state citizenship but her husband and children will not be considered as a citizen of the state. Among the refugees of West Pakistan, Hindus and Sikhs were not given citizenship unlike Muslims who migrated to the Pakistan and comeback to the state. This was a communal issue reckoned the whole state along with the rest of India in 1950s.

These legal provisions were also against reservation for schedule castes and schedule tribes. The protective and developmental steps for the upliftment of SCs and STs are not directly applicable to the state. It needs a Presidential Order each time to make it applicable to the state.

The call for abrogation

Since its formation in 1990, 'Panun Kashmir' highly criticized the article and supported its abrogation. The Jammu and Kashmir workers party and 'Ikkjutt Kashmir' also supported the abrogation of article 370 and article 35A. The Bharatiya Janata Party in his manifesto for 2014 General elections, pledged to integrate the state of Jammu and Kashmir and scrape article 370

However, in October 2015, the High Court of Jammu and Kashmir ruled that "article 370 cannot be abrogated, repealed or even amended". On 3rd April 2018, Supreme Court of India gave a similar ruling stating that the article has acquired a permanent character and cannot be repealed.

In 2019, as a part of 2019 general elections manifesto, the Bharatiya Janata party again pledged for integration of state of Jammu and Kashmir into the union of India.

Revocation of article 370 and Re-organization of the state

The fate of Kashmir was changed by a presidential order and an act.

Presidential Order of 2019:

On 5th August 2019, Home Minister Amit Shah announced at the Rajya Sabha that the President of India had issued an order. *The Constitution (Application to Jammu and Kashmir) Order, 2019* superseded The Constitution (Application to Jammu and Kashmir) Order, 1954, according to which only a few articles of Indian Constitution were applicable to the state of Jammu and Kashmir. However, now, according to the presidential order of 2019, *whole of Indian Constitution was applicable upon the state of Jammu and Kashmir*. This in effect meant that the separate constitution of the state of Jammu and Kashmir stood abrogated.

The legal aspects behind the Presidential Order of 2019:

As analyzed above, Constitutional provisions related to only those subjects mentioned in Instrument Of Accession were applicable to the state of Jammu and Kashmir, as per the clauses of article 370 and for the laws related to other subjects, “consultation” and “concurrence” of the state government (i.e., of the constituent assembly of Jammu and Kashmir) was mandatory. Clause of Article 370 stated that President of India can issue an order to declare the article inoperative only with concurrence of the constituent assembly of the state. This means that for the President of India to issue any Presidential order applicable to Jammu and Kashmir, concurrence from state Government was required. However, this constituent assembly of Jammu and Kashmir was dissolved in 1957.

But, during the period of February 1954 to February 1994, 47 presidential orders were issued “with concurrence of the state” even when constituent assembly of Jammu and Kashmir ceased to exist. This was due to *Article 367* which deals with interpretation of the constitution. *The term, “constituent assembly of Jammu and Kashmir” in Article 370 was replaced by the term “Legislative Assembly of Jammu and Kashmir”*. Therefore, some of these 47 orders were issued with concurrence from the Jammu and Kashmir Legislative Assembly while some were also issued during President’s Rule in the state.

When a state is under President’s rule and the Legislative assembly of that state is suspended, it is directly governed by the Central government through its appointed Governor and the Indian legislature becomes the Legislative assembly of that state. (in this case, *Parliament of India = Legislative Assembly of Jammu and Kashmir*)

Since the Legislative Assembly of Jammu and Kashmir was the constituent assembly of Jammu and Kashmir and the Parliament of India became the Legislative Assembly of the State of Jammu and Kashmir during the President’ rule of 2019, *the Indian Parliament was therefore, an authorized body to grant concurrence on state’s behalf to the President of India to issue a presidential order applicable to state of Jammu and Kashmir*.

Thus, by utilizing this authority, the then President of India Shri Ramnath Kovind issued the Presidential Order of 2019 stating the applicability of Indian Constitution throughout the state of Jammu and Kashmir and abrogating article 370 and constitution of Jammu and Kashmir altogether. Thus, the legality of the Presidential Order was upheld.

The Jammu and Kashmir Reorganization Act, 2019:

The Jammu and Kashmir Reorganization Bill, 2019 was introduced by Minister of Home Affairs, Mr. Amit Shah in Rajya Sabha on 5th August 2019 and was passed on the same day. It was then passed in Lok Sabha on 6th August 2019 and received President's assent on 9th August 2019. The introduction of the bill was preceded by Presidential order of 2019 which indirectly abrogated article 370.

The act states the reorganization of the state of Jammu and Kashmir into two Union Territories: the Union territory of Jammu and Kashmir and Union Territory of Ladakh. The two union territories came into existence on 31st October 2019, marking the birth Anniversary of Sardar Vallabhai Patel, who played an integral role in unification of India. A Lieutenant governor was appointed by the president of India for both the Union Territories and sworn in by Chief Justice of Jammu and Kashmir (and Ladakh) High Court, Justice Gita Mittal.

Reaction to the Abrogation

Support:

- The member of Lok Sabha for Ladakh Constituency, Jamyang Tsering Namgyal praised the abrogation of the article. He stated that, "under Kashmir, our development, our political aspirations, our identity, our language, if all of this got lost, it was because of article 370". He further added that the move had support from all of the regions of Ladakh, including Kargil.
- The Ladakh Buddhist association organized a "Thanksgiving" dinner at Leh as a welcome of the move.
- Local parties and groups like 'Panun Kashmir' and 'Ikkjutt Kashmir' lauded the move of abrogation.
- Some congress leaders as well openly came out in support of the move. Former Prime Minister of India, Dr. Manmohan Singh said that the revocation had, in principle, support from the congress but its execution was not appropriate.
- It also gathered support from various leaders of regional parties like, Mayawati from Bahujan samaj party and Arvind Kejriwal from Aam Aadmi Party.

Opposition:

- The Chief Minister of Jammu and Kashmir, Mehbooba Mufti called it "the Blackest day of Indian democracy". Former Chief Minister of Jammu and Kashmir, Omar Abdullah, called the move on Article 370 as "unilateral and shocking" and "complete betrayal of trust of people of Kashmir"
- Historian Ramchandra Guha said that the President has acted in Haste and "revocation is an arbitrary misuse of the state power".
- Indian novelist, Arundhati Roy also condemned the move in her article piece in *The New York Times*.
- The leaders of Indian National Congress were divided on the matter. While some were in support, others like Ashok Ghelot, Amrinder Singh and Rahul Gandhi were critical of the move.
- Hundreds of people marched rally in Delhi as a protest against the government's move in Kashmir and demanded a reconsideration.

International reactions:

- **Israel:** Israel said that the scrapping of Article 370 in Jammu and Kashmir is an internal matter of India. Ron Malka, the Israeli ambassador to India said that "As we see it, it's within Indian borders,

something that is internal in India, an Indian issue. We know India is the biggest democracy in the world, (it) respects individual rights, respects the rule of law and I am sure India will resolve this issue in democratic ways and in peaceful ways and that's what we are just waiting to see

- **Saudi Arabia:** Saudi Arabia urged relevant parties in Jammu and Kashmir to maintain peace and stability and to take into account the interests of the inhabitants of the region. On 2 October 2019, media reports stated that Saudi Arabia conveyed to India that it understands the "Indian approach" behind the decision.
- **United States of America:** 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.

Conclusion

Post partition of the British India, Pakistan believed that it was the natural choice for the princely state of Jammu and Kashmir since it had an overwhelming Muslim population. However, the Hindu ruler of Kashmir, Maharaja Hari Singh found himself at crossroads with the decision of merger with either dominion. It is believed that Maharaja considered the third option of establishing an Independent state of Jammu and Kashmir and signed the standstill agreement on 15th August 1947 with this idea on his mind. However, the idea couldn't turn into a reality because the Maharaja had to sign Instrument of Accession in order to save Kashmir from the attack of Pashtuns. This agreement made Jammu and Kashmir's merger with India official. However, the provisions of the agreement also limited the powers of central government over the state of Jammu and Kashmir and granted greater autonomy to them over many subjects. They were, according to the article 370 of the Indian constitution, given an authority to formulate their own state constitution. The Right to abrogate article 370 was with the constituent assembly of Jammu and Kashmir, which was dissolved in 1957, thus making the temporary provision a permanent feature of the Indian constitution. Therefore, Instrument of Accession became the precursor of Article 370 and also a bridge that established a link between Union of India and state of Jammu and Kashmir.

When the matter was taken to United Nations, the resolution passed by Security Council was, according to some scholars, not much in favor of India. The post-cold war experts state that the support of western countries to Pakistan on Kashmir issue was a plot to keep an Islamic nation between India and USSR communism. Some contemporary historians see the western stand towards Pakistan on Kashmir was compensation to Muslim world on the cost of Israel which was established in Palestine territories in 1948.

According to B.R. Ambedkar, it was unfair of Jammu and Kashmir to get complete protection and privileges from Union of India and retain autonomy instead of complete merger with India. Agitation against article 370 started from the days of Dr. Shayam Prasad Mukherjee, the founder of Jana Sangha, which later developed into Bharatiya Janata Party. It demanded for "Ek Vidhaan, Ek Nishan, Ek Pradhan" for a single country. The major opposition of the article 370 was that a resident of Jammu and Kashmir was allowed to reside, settle and get employment anywhere in the country while a Resident of India was not allowed to do the same in Jammu and Kashmir.

The opposition to the article and demand for its abrogation bore result in 2019 when President of India issued Presidential Order (Application to Jammu and Kashmir), 2019 which indirectly abrogated article 370 and constitution of Jammu and Kashmir. It was followed by the Jammu and Kashmir Reorganization act, 2019 which divided the state into 2 UTs of Jammu and Kashmir and of Ladakh.

The scraping of article 370 had positive as well as negative reactions. First of all, Kashmiris had an emotional attachment to article 370, so the immediate reaction from the people of valley was that of betrayal and humiliation. However, the step of UT of Ladakh was also highly welcomed by the people in Ladakh. Secondly, many policy makers and thinkers apprehended that this step may give rise to never ending series of protests in the valley. Next, Pakistan's reaction to any step related with Kashmir cannot be ignored, since the scraping, they had been trying to internationalize the issue. However, most western countries like USA, UK, Israel and even Islamic nations like Afghanistan and Saudi Arabia supported the abrogation by stating it as an internal matter of India and that no nation has right to interfere in any nation's domestic affairs.

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