

The Abrogation of Article 370

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Abstract

Did you know that there are 488 articles in the Indian Constitution and only two of them are relevant exclusively to the erstwhile state of "Jammu & Kashmir"?

That's articles 370 and 35, for you

Article 35A of the Indian Constitution empowers the Jammu and Kashmir state legislature to define who the state's "permanent residents" are. It also lets the state legislature decide what special rights and privileges permanent residents will have.

This article was added by a 'Presidential Order' and not as an Act of Parliament, in 1949.

Article 370 gives the state of Jammu and Kashmir autonomous status. Before it became a part of India, J&K was a princely state that operated under British suzerainty.

This article will shed light on how different entities (Govt of India vs. State of Kashmir) view these two articles as either constitutional or unconstitutional.

Keywords: Article 370, 35, Communication lockdown, Emergency, Abrogate, Bifurcation, Instrument of Accession

1. Introduction

The Princely State of Jammu and Kashmir was under British Suzerainty and it was controversially ambiguous in both existence as well as legal character.

Maharaja Hari Singh the ruler of the kingdom decided to sign a treaty of accession to India when it was attacked from the north by Pakistan sponsored rebels.

The essence of the treaty lay in the kid gloving and special status of the state whence birthed were the Articles 370, 35.

2. Review of Literature

A careful yet bird's eye perspective that's very centrist and non-conforming to any narrow political ideologue. The authorship takes care to avoid declamation or supplanting of fact with hearsay. All facts are open in the public domain and hence a peer review should suffice as an able critique.

3. Objectives of the Paper

The Paper strives to summarise the Babel tongues of a hundred commentaries into a single article looking to lend balance to views and fully empathise with both versions across the table.

4. Methodology

The Paper uses news articles, history books, commentaries as well as political analysis to arrive at an independent summation of facts.

The authorship has no emotional or political inclinations towards the subject.

No primary data has been utilised even as there's much scope for subjective or conflicting interpretations.

5. The Historicity of a Princely state

In October 1947, before the Kashmiri people could make the decision of choosing between Pakistan or India, Pakistani tribals infiltrated the border.

The Hindu ruler of this Muslim majority state, Hari Singh, was forced to ask India for military support and this meant signing up to be part of India. But everyone concerned recognized that this was a decision taken under duress. Special circumstances called for special provisions for Kashmir. So article 370 was the promise made and the legal document drawn up that made Kashmir part of India.

But the promise of this special status was never fully upheld.

From 1954 to 1994, ninety-four entries were made to the list of subjects where the centre would have jurisdiction over the state and many of these additions altered the essential nature of article 370 – the promise made to the Kashmiris for signing on to India.

As Home Minister Gulzarilal Nanda explained on the floor of the Lok Sabha on 4th December 1964: *'the only way of taking the Constitution (of India) into Jammu and Kashmir is through the application of Article 370...It is a tunnel.'*

On August 5th 2019, when Home Minister Amit Shah pushed a presidential order abrogating Article 370, simultaneously, there was the awareness of the deep distress this may cause the people of Kashmir, so a huge number of security personnel was sent into the state in advance, elected leaders placed under house arrest. So Shah was effectively saying, 'Sorry, I don't even believe in the original promise made and I know you will not like it.'

6. Article 35A

Article 35A of the Constitution protects any laws in Jammu & Kashmir relating to the definition and privileges of permanent residents from being challenged as discriminatory or unconstitutional.

As an example of these privileges, Jammu & Kashmir restricts anyone except permanent residents from acquiring

immovable property. Article 35A grants the Legislative Assembly in the state the power to make such a restriction, and prevents a challenge against this on the basis that this is inconsistent with the laws that apply to other citizens of India.

Arguments against Article 35A

1. It discriminates against women.
2. It does not have parliamentary approval, but was enforced through a Presidential order.

7. Article 370

When the J&K Constituent Assembly's only representation was invited, it was set up to incorporate only the relevant provisions that are fully aligned with the Instrument of Accession.

It was agreed that the dominion of India would have access to only three main portfolios that is Defence, Foreign Affairs and Communications.

This customised agreement ratified by a constitutional order came to be known as *Article 370*.

Arguments against Article 370

It was meant to a temporary provision. The contenders argue that this Article lapsed with the dissolution of the State's Constituent Assembly in 1957.

8. The Final Abrogation

On the 5th August 2019, the Union Home Minister made a swift dissolution of Article 370 by introducing a new bill in Parliament. It became an Act immediately after the President's assent

The Jammu and Kashmir Reorganisation Act, 2019 will become effective on October 31 2019. It contains provisions to reconstitute the state of Jammu and Kashmir into two union territories, one to be eponymously called *Jammu and Kashmir*, and the other *Ladakh*.

Since, this Act has the backing of a 'Presidential Assent' it means that technically even Article 35A stands abolished.

9. The Aftermath

- Panic grips valley
- Travel Advisories
- Communication Black out
- Detention of thousands of local youth
- Arrests of present and former Chief Ministers.
- United Nations urges restraint.
- The ICJ (International Court of Justice) condemns the Government of India
- Several MPs visiting the state were either detained or whisked away.
- Ministry of Home Affairs asks Twitter to block handles that report J&K
- Supreme Court refers to intervene

10. Conclusion

The constitutionality of the move itself is suspect, since Article 370 can be abrogated by the president, but under clause 3, he can only do so following the recommendation of the state's constituent assembly, which was itself dissolved in 1956.

No country in the world recognises Kashmir to be a part of India. They all view it as a disputed area whose final status

needs to be worked out through negotiations between India and Pakistan.

The decision will generate wholesale alienation in the Valley and will almost certainly give a fillip to separatism in the short term.

11. References

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