



ARTICLE -370 OF THE INDIAN CONSTITUTION : A SOLUTION OR A REASON BEHIND KASHMIR PROBLEM ?

Jayeeta Chatterjee, M. A., M.Phil, University of Calcutta, West Bengal

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Abstract: Article 370 was included in the Indian Constitution, not as an after thought but after mature consideration by the Constitution makers. By this Article the state of Jammu and Kashmir got some ‘special’ provisions for being a part of India. Treating ‘special’ sometimes create confusion and even sometimes its suspicious. Article 370 gave the legitimacy to the separate Constitution of Jammu and Kashmir. This Article as assured the state all benefits of the independent Kashmir without sacrificing the advantages of being a part of the larger Indian Federation. It conferred maximum autonomy on Kashmir. Article 370 was included in the Indian Constitution for the betterment of Jammu and Kashmir, but that’s become a reason behind the alienating attitude of the people of Jammu and Kashmir. Even the increase of terrorist violence generates a corresponding hysteria and a sense of insecurity in the rest of the country. There is feeling that the people who are causing the problem are pampered undeservedly and so the popular mood is against the minority – means the Kashmiri Muslims. There is a clamour for abrogating Article 370 as it provides safeguards for the people of Kashmir, which if done away with will resolve the problem. The claim to abrogate Article 370 is a part of this political stance. But what actually Article 370 envisages is a different type of centre-state relationship than the one that exists between the centre and other states. So, intentionally the Article 370 was formed due to the historical, natural and communal circumstances, but unintentionally because of the abuses of this Article, it becomes a reason behind Kashmir problem.

Key Words: Constitution, special, boon, bane, abrogation.

Introduction:

Article 370 of the Indian Constitution is an Article that grants special autonomous status to the state of Jammu and Kashmir. In the Part XXI of the Indian Constitution this Article drafted as ‘Temporary, Transitional and Special Provisions’. But somehow this ‘Special’ provisions became confusing and even suspicious, not only for the people of Jammu and Kashmir but also for the whole India (sometimes for Pakistan too). That’s why Article 370 which actually formed to include Jammu and Kashmir within Indian territory, somehow become a reason behind the agitations or terrorist activities for exclusion of Jammu and Kashmir from India. Since the eruption of the present crisis in Kashmir, some people and parties like the BJP have been maintaining that Article 370 of the Constitution is responsible for separatist tendencies and ought, therefore be abrogated. Though Article 370 was included in the Constitution, not as an afterthought but after mature consideration by the Constitution makers. It was a condition of Kashmir’s accession to

India and if that accession is sacrosanct, the condition must also be sacrosanct. Article 370 assured the state all benefits of the independent Kashmir without sacrificing the advantages of being a part of the larger Indian federation. It conferred maximum autonomy on Kashmir.

The History and Reason behind the Formation of Article 370

India got independence from British rule in 1947 and United India was divided into two separate nations – India and Pakistan. At that time, the Hindu king of Jammu and Kashmir decided not to be a part of either India or Pakistan and remain as an independent state between India and Pakistan. But as soon as Pakistan came into existence, its army attacked Jammu and Kashmir, the king of the state sought India’s help in order to rescue Jammu and Kashmir from being captured by Pakistan. Then, India’s first home minister, Sardar Ballav Bhai Patel asked the Hindu king to sign reunification agreement with India if he wanted India’s military help. The king signed reunification agreement with Indian side.

But Indian army could not liberate the entire territory of Jammu and Kashmir and approximately 55% of the state remains in the business of Pakistan even today and remaining 45% is ruled by India. That's why Indian government could not able to treat Jammu and Kashmir as comfortably as the other states of the Indian territory. So, the makers of the Indian Constitution formed Article 370 with some 'special' provisions for Jammu and Kashmir. The makers of the Indian Constitution thought that by giving some special benefits and autonomy to Jammu and Kashmir, they will not express their view to join Pakistan. But the future scenario was something else as we all knew.

Special Provisions for Jammu and Kashmir

Article 370 embodied six special provisions for Jammu and Kashmir -

1. It exempted the state from the complete applicability of the Constitution of India. The state was allowed to have its own Constitution.
2. Central legislative powers over the state were restricted to the three subjects of defence, foreign affairs and communications.
3. Other Constitutional provisions of the Central Government could be extended to the state only with the concurrence of the State Government.
4. The 'Concurrence' was only provisional. It had to be ratified by the State's Constitutional Assembly.
5. The State Government's authority to give 'Concurrence' lasted only until the State Constituent Assembly finalized the scheme of powers and dispersed, no further extension of powers was possible.
6. Article 370 could be abrogated or amended only upon recommendation of the of the State's Constituent Assembly.

The Way Article 370 Differentiate Jammu and Kashmir from Other States of India

Article 370 gave the legitimacy to the separate Constitution of Jammu and Kashmir. That's why many provisions of the Indian Constitution which are applicable to other states are not applicable

to Jammu and Kashmir. For example, till 1965, Jammu and Kashmir had a Sadr-e-Riyasat for Governor and Prime Minister in place of Chief Minister. Because of this Article except for defence, foreign affairs, finance and communications, the Parliament needs the state government's concurrence for applying all other laws. Thus the state's residents live under a separate set of laws, including those related to citizenship, ownership of property and fundamental rights, as compared to other Indians. As a result of this 'special' provisions, Indian citizens from other states can not purchase land or property in Jammu and Kashmir. Even under Article 370, the central government has no power to declare financial emergency under Article 360 in Jammu and Kashmir. It can declare emergency in Jammu and Kashmir only in case of war or external aggression. Therefore the Union government can not declare emergency on grounds of internal disturbance or danger unless it is made at the request or with the concurrence of the state government.

Under Article 368 of the Indian Constitution, powers and procedure for amendment of the Constitution have been provided. This Article is applicable for all over the India except Kashmir. Article 368 as applied to Kashmir provides that no amendment passed in accordance with that Article to Kashmir by an order issued by the President under clause(1) of the Article 370. Such an order will require to the concurrence of the state government. Since Article 370 expressly provided for its own repeal, it could very well be argued that Article 368 is subject to Article 370 in so far as the repeal of Article 370 is concerned.

Article 370 : Both- a boon and a bane

Whether Article 370 is a boon or a bane is actually very controversial. It is related with the uses and abuses of this Article. Because, if we use Article 370 in positive sense then only it will be a boon. Like under Article 360 the Union of India has power to declare Financial Emergency in any state within Indian Territory except Jammu and Kashmir. The Union can declare emergency in Jammu and Kashmir

only in case of War or External Aggression. No proclamation of emergency made on the grounds of internal disturbance or imminent danger thereof shall have effect in relation to the state (a) it is made at the request or with the concurrence of the government of the state; or (b) where it has been made, it is applied subsequently by the President to the state at the request or with the concurrence of the government of the state. Even Article 370 of the Indian Constitution grants special autonomous status to Jammu and Kashmir, according to this except for defence, foreign affairs, finance and communications, Parliament needs the state government's concurrence for applying all other laws. Thus the state's residents live under a separate set of laws, including those related to citizenship, ownership of property, and fundamental rights, as compared to other Indians. But how much it has helped Jammu and Kashmir is a subjective issue.

Yes, that's even true that this Article 370 impose some negative impacts for Jammu and Kashmir. Because, it is a barrier in implementation of progressive central laws in Jammu and Kashmir. For this Article, the 73rd and 74th amendments of the Indian Constitution was not implemented in Jammu and Kashmir, due to which the basic institutes of democracy could not function properly and discharge their duties as per Constitution. This controversial Article 370 had actually came as a temporary provision for Jammu and Kashmir, but with the time, its abuses has not only divided Indian citizens in two categories but also deprived the people of the Jammu and Kashmir of progressive laws of India, like reservations to backward communities and women, right of education, right to information.

Article 370: should be modified or removed or abrogated

Because of the lots of controversy regarding Article 370, there have many demands whether Article 370 should be modified or removed or abrogated according to the needs. But it can not happens unilaterally. Article 370 came into being not

because only J.Neheru and S.Abdullah were romanticizing a different Jammu and Kashmir. Jammu and Kashmir was acceded into Union of India, in October 1947 through Instrument of Accession, while all other princely states were succeeded into Union of India. This is where we mistake our Article 370 with the media language of hypocrisy. Article 370 does not tell us the sentiments of people, it just tells that India is running union of states and a state who runs a different Constitution. Moreover, Article 370 codifies a relation of India with Jammu and Kashmir.

There was an agreement between Jammu and Kashmir and Union of India on three matters: External Affairs, Communication and Defence. The Constitution of India has no full jurisdiction on Jammu and Kashmir. Actually Jammu and Kashmir is a military zone and India has a policy on Rehabilitation of Militants in Kashmir. It is a special policy for those militants who were trained under Pakistan. But the rehabilitation will happen only at certain places. Means the person has to be present at any of the following places – IGI airport (New Delhi), Wagah Border (Amritsar), Baramulla and also in special situations. That militant has to confess in front of recognised media that he is a militant and he has to say this sentence “I accept the integrity of India”.

I am discussing these because these types of policies which is protected only under the umbrella of Article 370, itself establishes the feeling that Kashmir is a two nation country. It is India's state but administered by Pakistan.

In 2014, as part of Bharatiya Janata Party manifesto for the 2014 general election the party pledged for integrating the state of Jammu and Kashmir in to the Union of India. After winning the elections, attempts were made by the party along with RSS party for abrogation of Article 370. Also Congress leader Karan Singh, son of Maharaja Hari Singh, has opined that an integral review of Article 370 is overdue and to be worked with the state of Jammu and Kashmir. But in October 2015, the High Court of Jammu and Kashmir has ruled that Article 370 can not be

“abrogated, repealed or even amended”. It explained that the clause (3) of the Article conferred power to the State’s Constituent Assembly did not make such a recommendation before its dissolution in 1957, the Article 370 has taken on the features of a ‘permanent’ provision despite being titled a temporary provision in the Constitution.

Actually there are several issues that need strategic attention and not political attention. I believe that Jammu and Kashmir is still on its way to become the integral part of India and Article 370 should be removed on the agreement of both Constitutions. Special status to Jammu and Kashmir is itself a plain wrong signal to Kashmiris and separatists of Pakistan. But at the same time it’s even true that removal or abrogation of article 370 may invite disaster and lend an impetus to the anti-national forces which demand on unconditional plebiscite and worse, independence for Kashmir. It may also fuel division in the rest of the country.

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Conclusion

Nobody ever talks about the feelings and basic emotions of the people residing in Jammu and Kashmir. We, all only talk about militants, violence, terrorist activities, ministers and special Jammu and Kashmir. There people are breathing with confusion. Whether to integrate with Pakistan or hoist the flag of India as it provides written protections under the Constitution and every citizen can fight for their rights with court guarantee.

The reality is Kashmiri people are even threatened of their own existence. They do not want to be part of this dual nature of citizenship. Even we, the people of India, are confused that whether the people of Jammu and Kashmir are citizens of India or a creation of Article 370. So, we need to ensure that they feel right about the longest written Constitution of the world. . It is in India’s interest to retain Article 370 until the government of Kashmir agrees to its repudiation. Article 370 would morally strengthen the India’s claim over Kashmir. Ultimately no one people can keep another people in subjection against their will.

The Central Government will have to win over the people of Kashmir and convince them that their interests are safe in India. They can enjoy the democracy and autonomy within the Indian federation. This is the real challenge before the Indian leadership.

References

- Basu, Durga Das.(2013) *Introduction to the Constitution of India*, Haryana : LexisNexis publication, 21st ed
- Jammu and Kashmir. [India] (1956) *The Constitution of Jammu and Kashmir*, Jammu: Ranbir Govt. Press
- Noorani, A.G.[ed] (2011) *Article 370 : a Constitutional history of Jammu & Kashmir*, New Delhi : Oxford University Press
- Engineer, Asgar Ali [ed] (1991) *Secular Crown On Fire: The Kashmir Problem*, Delhi : Ajanta Publication
- Teng, Mohan Kishen. (1990) *Kashmir Article 370*, New Delhi : Anmol Publication
- Sarma, S.K. (2011) *The Constitution of Jammu and Kashmir : a perspective with reference to the Constitution of India*, New Delhi : Universal Law Publication