

**REVOKING OF ARTICLE 370**

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**ABSTRACT**

*In 1949 the framers of the constitution inserted, a special provision to India's Constitution providing a special status to the State of Jammu and Kashmir. The Article was allowing the State to have its own constitution, a separate flag, and independence over all matters except foreign affairs, defence, and communications. Another provision later added under Article 370 was Article 35A that gives special privileges to permanent residents, including State Government jobs and the exclusive right to own property in the State of Jammu and Kashmir.*

*On August 5, 2019 the Hon'ble Prime Minister of India, Narendra Modi, announced that the Centre Government's decision on abrogation the provision of Article 370 for Jammu and Kashmir. Moreover, the PM announced the bisection of the State into Union Territories. He stated that the government's move will bring more opportunities for development in the state of Jammu and Kashmir. He also invited the investors and industry to come and invest in the region which will bring economic growth and employment opportunity in the region. He added that before the revoking of Article 370, the people of Jammu and Kashmir were deprived of various guarantees and schemes that people in other States enjoy. The Sanitation Worker Act and several laws to stop atrocities against Dalits were missing in J&K.*

*Keywords:- Revoking of Article 370, Jammu & Kashmir .*

**Introduction**

After the end of British rule in India and from 15th August 1947, the main object of the Indian Independence Act 1947 was to set up two independent *Dominions* in India known as *India* and *Pakistan*. After that was the lapse of the mighty British Rule in India. The Constituent Assembly set up in 1946 according to the Cabinet Mission Plan was not a Sovereign body. After the Independence of the country, it became the

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task of the Constituent Assembly to draft the Constitution for the country. The drafting committee was prepared on 1947 by the constituent assembly to draft the constitution for the country. B. R. Ambedkar, the Chairman of the Drafting Committee, moved for its consideration on the same and in his speech stated that, - "No constitution is perfect and the Drafting Committee itself is suggesting certain amendments to improve the Draft Constitution. But the debates in the Provincial Assemblies give me courage to say that the constitution as settled by the Drafting Committee is good enough to make this country start with. I feel that it is workable, it is flexible and it is strong enough to hold the country together both in peace time and war time. Indeed, if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is, that Man was vile".

The draft committee prepared a draft constitution consisting 315 Articles and 8 schedules which further went under several amendments. The Draft Constitution was finalized by the Constituent Assembly on 26th November 1949 and came into force on 26th January 1950. It took the Constituent Assembly about three years to frame the Indian Constitution which is the World's lengthiest Constitution. The Independence Act 1947 gave birth to two independent dominions known as India and Pakistan and over 560 princely states got sovereignty and became completely independent. All Indian states but three (Junagarh, Hyderabad and Kashmir) acceded to either dominion. The states which entered India agreed upon the condition that their constitutions would be framed by their own constituent assemblies. However it was soon realized that the constitutions for the respective states would also be framed by the constituent assembly of India and would form an integral part of India.

Regarding the state of Jammu and Kashmir the government of India had to face many difficulties then ruler Maharaja Hari Singh wanted the accession of the state of Jammu and Kashmir to India only on the three conditions; Defense, Foreign Affairs and communication. The Drafting Committee pointed out that under the provisions of the Draft Constitution all States in Part III would accept List I, List II, all provisions relating to fundamental rights and the provisions relating to High Courts and Supreme Court. However, with regard to the State of Jammu and Kashmir the Government of India decided that the accession of the State should continue on the existing basis until

the State could be brought at par with other States. For this purpose a special provision was made in respect of the State of Jammu and Kashmir. The Ministry of States suggested for consideration.

The State of Jammu and Kashmir, situated in the Himalayan range which is famous for its natural beauty throughout the world, has been since centuries, a ground of dispute. Whether political, communal, terroristic or affected by a threat from a foreign power. The three parts of J&K, which are Jammu, Kashmir and Ladakh, are different from each other demographically but disturbance in a particular region of the State has disturbed the whole of it.

Majority of political and defence expert attribute disturbances in Jammu and Kashmir (J&K) to India's incapacity to fully integrate the State into the union. The challenges towards such integration have very old roots, dating to the circumstances under which the State, led by the Maharaja Hari Singh, the king of Jammu and Kashmir, acceded to India, following Pakistan's attempts to capture the State through force. Historically, Pakistan has also consistently provided support to terrorism and pro-independence movements in J&K and has also extended such support to promote terror in other parts of the country, in furtherance of its own interests. The third element is the imposition of Article 370 in the Indian Constitution and addition of Article 35A, through the provisions of Article 370.

### **Circumstances of inclusion and Controversy regarding Article 35A**

Article 35A is a provision incorporated in the Constitution giving the Jammu and Kashmir Legislature a carte blanche to decide who all are 'permanent residents' of the State and confer on them special rights in government jobs, purchase of immovable property in the State, subsidies and other public welfare policies. The provision directs that no Act of the legislature coming under its umbrella can be tested for violating the Constitution or any other law of the land.<sup>2</sup>

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<sup>2</sup>Tnn, What Is Article 370? Three Key Points - Times Of India(2018), <https://timesofindia.indiatimes.com/India/What-Is-Article-370Article-370/Articleshow/35678708.Cms> (Last Visited Mar 26, 2019).

The text of Article 35A reads as follows:<sup>3</sup>: “Saving of laws with respect to permanent residents and their rights”. – Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the legislature of the State.

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects –

(i) employment under the State government;

(ii) acquisition of immovable property in the State;

(iii) settlement in the State; or

(iv) right to scholarships and such other forms of aid as the State government may provide,

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this part.”

As per Article 35A of the Constitution of India, Jammu and Kashmir is allowed to make a division between permanent and non-permanent residents in relation to purchase of immovable property, settlement in the State and job opportunities, and various other aspects.

### **Explanation, History and Debate regarding the relevancy of Article 370**

Article 370 of the Indian Constitution is a 'temporary provision' which grants special status to the State of Jammu & Kashmir. The Article comes under Part XXI of the Constitution of India, the title of the Part is "Temporary, Transitional and Special provisions" from where the Article derives its temporary character. It is through Article 370 that the State of Jammu & Kashmir has been given a special status. Various Legislative Acts of the Union and the provisions in the Constitution of India, which are applicable in other States, are not applicable to the State of Jammu and

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<sup>3</sup> The Constitution Of India, Art. 35A.

Kashmir through this Article. Through this article, the State of Jammu and Kashmir has the total control over 94 of the 97 items in the Union list, the other three being Defence, Foreign Affairs and Communication. Whereas, the Parliament requires the State government's approval for application of laws relating to the other 94 items mentioned in the Union list all other laws. Due to this, the residents of the State live under a different set of laws than the Union, having different laws even relating to Citizenship, Ownership of Property and Fundamental Rights as well. Due to this Article, Indian citizens who are not the Permanent Residents of the State cannot purchase land or property in Jammu and Kashmir.<sup>4</sup>

*“The terms of this my instrument of accession shall not be varied by any amendment of the Act or the Indian Independence Act, 1947, unless such amendment is accepted by me by Instrument supplementary to this Instrument”<sup>5</sup>.*

### **Powers relating to Emergency Provisions**

As per the Article, the President of India cannot declare an emergency in the State of Jammu and Kashmir using Article 352 without the consultation of the Jammu and Kashmir Governor. The provision of Article 360 which allows the President to proclaim Financial Emergency (allowances reduction & salaries) is not applicable in the State as well. Emergency under Article 352 can only be proclaimed by the President of India, in a situation of War and External Aggression. Also, there is not provision of implementation of President's rule under Article 356, but it talks about the rule of Governor. Therefore, in a situation of failure to comply with the required directions, no power is vested by the Union Government for suspension of the Constitution of Jammu and Kashmir.<sup>6</sup>

### **Text of Article 370**

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<sup>4</sup>07 RGICS POLICY WATCH(2018), <Http://Www.Rgics.Org/Wp-Content/Uploads/PW-7.04.Pdf> (Last Visited Mar 26, 2019).

<sup>5</sup>Instrument Of Accession Of J&K Stated Dated 26<sup>th</sup> Oct. 1947

<sup>6</sup>Krishnadas Rajagopal, WHAT IS ARTICLE 35A?THE HINDU(2017), <Https://Www.Thehindu.Com/News/National/What-Is-Article-35a/Article19567213.Ece> (Last Visited Mar 26, 2019).

Article 370 of the Constitution reads: -<sup>7</sup>

- (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 to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that 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 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 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.
- (2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (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.

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<sup>7</sup> Ibid

(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.

### **Historical Background of Article 370**

The Article was drafted by Sheikh Mohammed Abdullah in late 1947. He also had argued that the Article should not be placed as a temporary provision of the Indian Constitution but should have a permanent nature instead though the Centre didn't comply to it. The State of Jammu and Kashmir as opposed to other princely States, was not ready to accept the *Constitution of India* and was inflexible on acting only on the basis of the terms of Clause 7 of the Instrument of Accession. Gopaldaswami Ayyangar, who was a Minister without portfolio in the Nehru's government, moved the Bill for incorporation of Article 370 to the Indian Constitution, in the Constituent Assembly of India.<sup>8</sup>

Other influences leading to the drafting of the Article were the situation of political turmoil in the State, the resolution by the United Nations calling for a referendum in the State of Jammu and Kashmir relating to the accession of territory to India, Both, Indian and Pakistani Governments establishing control over the territories of Jammu and Kashmir and the instance that the State has a separate constitution of its own.<sup>9</sup>

### **Debate regarding the Article**

The issue of Article 370 is raised into public domain for political motives. It comes into focus after intervals of few months or few years. The Right-Wing political parties

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<sup>8</sup>All You Need To Know About Article 35A - What Is Article 35A?, THE ECONOMIC TIMES(2019), <https://economictimes.indiatimes.com/News/Politics-And-Nation/All-You-Need-To-Know-About-Article-35a/What-Is-Article-35a/Slideshow/68232956.cms> (Last Visited Mar 26, 2019).

<sup>9</sup>Prarthana Mitra, ARTICLE 35A: HERE'S WHAT TO EXPECT FROM THE SC HEARING QRIUS(2019), <https://qrius.com/article-35a-heres-what-to-expect-from-the-sc-hearing/> (Last Visited Mar 26, 2019).

of the nation have been demanding it to be repealed due to the reason that the State was not benefited from it but on the other hand, has raised anti-national sentiment in the Kashmiri valley and the sooner it goes, better it would be for the State and its population. On the contrary, the regional political parties of the State, Jammu and Kashmir National Conference, have been backing its continuation on the ground that it is the bridge between this State and the Union of India.<sup>10</sup>

### **Conclusion**

The Constitution of India is one the most efficiently written Constitution, any country of the world has ever produced. It contains within it the best provisions of other Constitutions. Members of our Constituent Assembly had to be very reasonable in producing our Constitution owing to the diversity of the Nation. India is called the land of Unity in Diversity and this can be attributed to our beautiful constitution and our brilliant Constitution maker.

In Article 370 Clause 3 was added only to give permanency to this Article 370 says that:

Notwithstanding anything in the foregoing provisions of this article, the President may, by public Notification, declare that the article shall cease to be operative. But the President cannot issue such a Notification without the recommendation of the Constituent Assembly of that State.<sup>11</sup>

As the Constituent Assembly of Jammu and Kashmir dissolved after completing its work on 26<sup>th</sup> Jan. 1956 now if you would you like to read that J&K Constituent Assembly means legislative or state assembly and all those power now rest with parliament because state was going through a presidential rule. It is nothing but a constitutional tragedy without the concurrence of J&K constituent assembly, the constituent assembly which doesn't exist. You cannot abrogate Article 370, this is the wrong interpretation of Constitution.

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<sup>10</sup> Ibid

<sup>11</sup> Constitutional Law Of India By Dr. J.N. Pandey Pg. No. 791



*“Also, it is important to note that Article 370(2) does not in any manner state that the said Article shall cease on the completion of the work of the Constituent assembly or its dissolution. Having regard to all these factors, the court clearly held that though the marginal note refers to article 370 as only a temporary provision, it is in fact in current usage and will continue to be in force until the specified event in sub clause (3) of the said Article takes place”<sup>12</sup>.*

Soon after the removal of Article 370 communication lines were snapped across J&K or telephone exchanges were shut down as the part of the communication blockage. Curfew was imposed tourist and pilgrims were evacuated from the state and several political leaders were detain .All this leading to the violation of basic human and fundamental rights.

In the case of *Anuradha Bhasin versus Union of India* 10<sup>th</sup> and *Gulam Nabi Azad versus Union of India and Others*, the Hon’ble Supreme Court of India held that

*“We declared that the freedom of speech and expression and the freedom to practice any profession or carry on any trade, business, or occupation over the medium of internet enjoys constitutional protection under Article 19 (1) (a) and Article 19 (1) (g). The restriction upon such fundamental rights should be consonance with the mandate under Article 19(2) and (6) of the Constitution, inclusive of the test of proportionality”.*

*“The power under Section 144,Cr.P.C cannot be used to suppress legitimate expression of opinion or grievance or exercise of any democratic rights”.*

Despite its beauty, Constitution has also been used for Politics because of the controversial character of some of its provisions. Article 370 which talks about the partial authority of India in Jammu and Kashmir’s administration, has been controversial because of differences in opinions regarding its relevancy. Population of States other than Jammu and Kashmir has shown strong resistance against the Article and demanded its abrogation as they look upon it as a threat to India’s integrity and

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<sup>12</sup>State Bank Of India V. Santosh Gupta With SBI V. Zaffar Ullah Nehru And ANR. ETC

sovereignty. The demand has also been supported by various Right-wing political parties including the one in power at the present time. Whereas the population of Jammu and Kashmir are against this repealment and the State's political parties are also in support of the same.