



THE AGREEMENT THAT MADE KASHMIR “SEPARATE”: DELHI AGREEMENT A CRITICAL STUDY

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Abstract

On June 19th, 2018 when Chief Minister of State of Jammu and Kashmir Mehbooba Mufti resigned from the post of Chief Minister due to break of alliance between BJP and PDP, the buzz around the struck down of Article 35A and Article 370 again gained the momentum after the state elections in 2015. The BJP from its time of Bharatiya Jana Sangh, commonly known as the Jan Sangh has been advocating the removal of the above-mentioned article. BJP way back in 1999 and 2014 manifesto promised the removal of the Article 35A and 370. On July 24, 1952 a Delhi Agreement was announced. As the Constituent Assembly expected time to deliver an authoritative report, Nehru, as a break measure, chose to get from Sheik Abdullah, a feeling of the sort of relationship that would develop between the Indian association and the province of J&K. A progression of transactions was held in Delhi between the delegates of J&K (speaking to the National Conference) and the Government of India, the consequences of which were typified in a report called the Delhi Agreement. This was declared on July 24, 1952; however, it had no protected legitimacy. This paper focuses on how the delhi agreement has influenced both the life and political direction of the people of state of Jammu and Kashmir. The paper shall be

based on the review of various literature on the concerned subject matter.

Introduction

“An India in which all communities shall live in perfect harmony.”¹

An extensive number of political and safeguard examiners quality insecurity in Jammu and Kashmir (J&K) to India's failure to completely incorporate the state into the association. The difficulties towards such joining have verifiable roots, dating to the conditions under which the state, drove by Maharaja Hari Singh, agreed to India, following Pakistan's endeavors to add the state through power. Truly, Pakistan has additionally reliably offered help to psychological oppressor and dissenter developments in J&K and has likewise stretched out such help to advance fear in different parts of the nation, in assistance of its own advantages. The third factor is the inconvenience of Article 370 in the Indian Constitution and the expansion of Article 35A, through the arrangements of Article 370.

Article 35A of the Indian Constitution is an Article that engages the J&K state's governing body to characterize "changeless inhabitants" of the state and give exceptional rights and benefits to those lasting occupants. It was added to the Constitution through a Presidential Order, i.e., the Constitution (Application to Jammu and Kashmir) Order, 1954, issued by the President of India on May 14, 1954, "in exercise of the forces given by" proviso (1)

¹ India of My Dreams - Page 10 - M. K. Gandhi



of Article 370 of the Constitution, with the simultaneousness of the Government of the State of Jammu and Kashmir.²

- History

The Government of India Act, 1935, presented the idea of the Instrument of Accession, wherein a leader of a Princely State could consent his kingdom into the 'Federation of India'.

Between May 1947 and the exchange of intensity on August 15, 1947, by far most of the states marked Instruments of Accession. This was encouraged by the Congress, with its pioneers, for example, Rajagopalachari contending that "as centrality "appeared as a reality and not by assertion," it would essentially go to the administration of autonomous India, as the successor of the British.³

A couple, in any case, waited. Among them were Hyderabad and Kashmir, which pronounced that they proposed to stay free. Hyderabad had a Muslim ruler and Muslim respectability in a mind-boggling Hindu lion's share state.

After "Operation Polo," an Indian military activity to reestablish arrange in the state, Hyderabad agreed to India and was ingested into the association. The province of J&K, in any case, represented a test of a by and large diverse nature.

² The Constitution (Application to Jammu and Kashmir) Order, 1954, Published in the Gazette of India extraordinary Part II Section 3, May 14, 1954

³ E. W. R. Lumby, *The Transfer of Power in India, 1945-7* (London: George Allen & Unwin Ltd.), pp. 218-233.

- State of Accession Jammu and Kashmir

At the time of the exchange of power, the province of J&K was controlled by Maharaja Hari Singh, who had declared his aim to stay autonomous. Sheik Abdullah, the pioneer of Kashmir's biggest political gathering, the National Conference, was against Hari Singh's administer and was vociferously requesting his renouncement. Pakistan, meanwhile, endeavored to constrain the hand of the Maharaja and sent in bandits, helped by the Pakistan Army, to attach the state by drive. Being stood up to by a militarily sad circumstance, the Maharaja looked for India's assistance to push back the trespassers. India required the marking of an Instrument of Accession and setting up of a break government headed by Sheik Abdullah consequently.⁴

The Maharaja consented, yet Nehru pronounced that it would need to be affirmed by a plebiscite, although there was no legitimate necessity to look for such affirmation. That was maybe a screw up of epic proportions. Many more would be submitted in the years to come. The Indian Army was transported to Srinagar and the looters were ended a couple of miles from the city. At that point, in a progression of gallant activities, the Indian Army pushed back the Pakistan Army-helped pillagers till the beginning of winter stopped the tasks. Nehru presently announced a truce and looked for UN mediation—a second bungle following the primary, which viably internationalized a two-sided issue. The UN supported truce became effective on January 01, 1949. Right now, parts of the state's

⁴Ibid., pp. 247-48.



region were still under Pakistan's unlawful occupation. With the truce coming into constrain, the state stood successfully partitioned and the contradicting powers took positions over a line which came to be known as the Cease Fire Line (CFL). The plebiscite was never held as Pakistan did not pull back from the territories it had coercively involved—an obligatory pre-condition for holding the plebiscite. These regions are presently alluded to as Pakistan Occupied J&K (POJ&K), and incorporate the Mirpur-Muzaffarabad regions and the recent Northern Areas, now called Gilgit-Baltistan.

- Article 370

“The terms of Article 370 were negotiated by the Kashmiri Muslims keeping only their interest and sentiments in mind, while completely ignoring the sentiments and aspirations of the people of Jammu and Ladakh Divisions.”

Article 370 reads as:-

“370. Temporary provisions with respect to the State of Jammu and Kashmir

(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 Maharajas 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

(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”⁵

On 26 January 1950, when the constitution of India came into force special provisions were made for the state of Jammu and Kashmir as Article 370, which was an impermanent arrangement and remains so till date.

In the liquid circumstance that got quickly after autonomy, Sheik Abdullah named a 4-part group to the Indian Constituent Assembly. They declined to sit in the Assembly yet consulted from outside the status of J&K opposite the Indian association. They demanded to acquiesce just those three subjects to the association that was incorporated into the Instrument of Accession. In the expressions of Ayyangar, Nehru's partner and drafter of Article 370, "At last, the will of the general population through the instrument of the [J&K] Constituent Assembly will decide the Constitution of the State and additionally the circle of Union purview over the State."⁶

The inclusion of Article 370 was to characterize the pertinence of the Constitution of India in the province of J&K until the point when the Constitution of the state was concluded. It was nevertheless an extra administrative component to encourage this change. In 1950 itself, the

Government of India had elucidated the impact of Article 370 of a White Paper on Indian states which among others incorporated the accompanying:

- The Constituent Assembly will be met to go into the issues in detail.
- When the Assembly will go to the choice on every one of the issues, it will suggest to the President who will either repeal Article 370 or coordinate that it will apply with such alteration and exemptions as he may indicate.

Article 370 was drafted in Part XXI of the Constitution, which identifies with "Temporary, Transitional and Special Provisions". Proviso 3 of the Article enables the President of India on the suggestion of the J&K Constituent Assembly to issue a warning for the repeal of Article 370. Be that as it may, the J&K Constituent Assembly broke down itself on January 25, 1957, without prescribing annulment of Article 370, abandoning a few people to contend that Article 370 had turned into a changeless the apparatus of the Constitution of India, regardless of being titled a brief arrangement in the Constitution.⁷

- Delhi Agreement

As the Constituent Assembly expected time to create a complete archive, Nehru, as an interval measure, chose to get from Sheik Abdullah, a feeling of the sort of relationship that would develop between the Indian association and the territory of J&K. A progression of transactions was held in Delhi between the agents of J&K (speaking to the National Conference) and the

⁵The Constitution of India 1950

⁶Anil Gupta, "Kashmir's Special Status: Contentious Constitutional Provisions," Indian Defence Review

⁷Nirmal Ghorawat, "Article 370 - A Primer," available at <https://www.pgurus.com/article-370-primer/>



Government of India, the aftereffects of which were exemplified in a record called the Delhi Agreement. This was reported on July 24, 1952, however, it had no sacred legitimacy.

The eight salient points included in the agreement were as under:

- The head of the state of J&K would be a person recommended by the state legislature and recognised by the President of India and would be called the Sadar-i-Riyasat.
- The Indian flag would have the same status in J&K as in any part of India, but the state flag would also be retained.
- Citizenship would be common in two parts of the country, but the state legislature would have the power to define and regulate the rights and privileges of the permanent residents in Kashmir.
- The fundamental rights, as laid down in the Indian Constitution, would be extended to Kashmir, but these would not come in the way of the state's program of land reforms.
- The power to reprieve or commute death sentence would belong to the President of India.
- The Indian President's power to declare a state of emergency in case of external danger or internal disturbances would be extended to Kashmir, but regarding internal disturbances, it would be used only at the request of the state government.
- Residuary power would be retained by the state, but the state could transfer more rights to the union.
- The Supreme Court could adjudicate regarding disputes between the state and

the Centre and other provincial governments and on fundamental rights agreed to by the state.

❖ Article 35 A

“Article 35A abuses the specific idea of fairness revered in the Constitution of India. Its treatment of non-changeless inhabitants of J&K is much the same as regarding its own kin as peons. The arrangements of Article 35A likewise abuse the standards of gender equality. Article 6 of the Constitution of J&K, which gets its capacity from Article 35A, segregates against women's occupants of the state who wed a man from another state.”

Article 35 A reads as

ARTICLE 35A: 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 on India by any provisions of this part.⁸

In February 1954, the Constituent Assembly approved the state's increase to India. In this way, the confirmation given to the general population of India was satisfied. In compatibility of this approval, the President of India proclaimed the Constitution (Application to Jammu and Kashmir) Order, 1954, putting on a last balance the relevance of alternate arrangements of the Indian Constitution to J&K and concurred legitimate holiness to the Delhi Agreement. Section 2(3) and 2(4) of the Order made Part II of the Constitution of India managing citizenship, and Part III managing basic rights relevant to the province of J&K. Notwithstanding, it presented forces to the state council to make unique arrangements for the changeless occupants of the state and for that reason, Section 2(4)(j) of the Order embedded.

The change made to Article 35, the consideration of Article 35A and the way that Articles 12 to 15 of the Indian Constitution don't make a difference to the province of J&K must be contemplated together to comprehend why the J&K Constitution is an assault on the mainstream and popularity based texture of India. Under the Constitution of India, the Right to Equality is the bedrock of majority rule government. This stands relinquished as far as the arrangements of Article 35A. J&K is the main state in the Indian association which has the forces to control the rights and freedoms of other Indian residents in J&K. This is the reason there is disavowal of legal redressal for the non-lasting inhabitants of J&K. Article 35A blesses and legitimizes

this fundamental resistance of the Indian Constitution. A great many people in the legitimate calling stay uninformed of this viewpoint, since it was embedded as an Appendix, which isn't a piece of the official content of the Constitution. It was never displayed the Parliament as the sole specialist to correct the Constitution is vested just in the Parliament of India. It is additionally very amazing that Sheik Abdullah and his National Conference, the primary draftsmen of the State Constitution, who were resolved to annul all images of Dogra manage, were exceptionally quick to hold the State Subject Act, 1927, ordered by the Maharaja.

Reason for expunging of the Article 35A

Article 35A is an image of "Kashmiri expansionism" over whatever remains of J&K.

In a circumstance verging on joke, the possibility of Article 35A being struck around the Supreme Court has united all political, aggressor, religious and other extremist gatherings in the Valley that have been customarily at war with each. Presently, in help of Article 35A, all such different gatherings—the National Conference (NC), People's Democratic Party (PDP), Congress Party and Hurriyat—have met up, to bolster the most backward proviso in the state's history. Dreading political underestimation, PDP pioneer, and Chief Minister Mehbooba Mufti was the first to caution the Center that "there will be nobody left in Kashmir to give a shoulder to

⁸ Constitution of India 1950



the Indian tricolour if 35A is struck down".⁹ Her most despised opponent, Farooq Abdullah, the previous Chief Minister and leader of the NC, had the audacity to caution New Delhi, "Kashmiris will influence you to overlook the change of the Amarnath development when they ascend against invalidating of 35A."16 Leaders of the Hurriyat and other aficionado bunches too have propelled another schedule of hartals (open strikes) and cautioned New Delhi of a bloodbath if the Supreme Court gives such a decision. Clearly, annulment of Article 35A is seen by such individuals as the initial step to rolling back the shared plan took after for quite a long time and the beginning of another period of participatory vote-based system, which sick suits their political purposes.

Article 35A is an image of "Kashmiri expansionism" over whatever is left of J&K. In a reminder to the Union Home Minister and to the National Human Rights Commission, the Jammu and Kashmir People's Forum exhibited instances of the networks whose major rights have been "legitimately" grabbed by the state government—the privilege to property; ideal to vote; appropriate to business; ideal to marriage by decision; ideal to advanced education; ideal to be an individual from a panchayat or an agreeable society; ideal to benefit bank advances. These people group are:

- Refugees from POJ&K who were compelled to live and settle outside J&K after they traversed to Jammu in 1947.
- Kashmiri Pandits and Sikhs who were persuasively pushed out of Kashmir Valley.
- West Pakistan Refugees (WPR) who moved to abutting Jammu in 1947.
- Families uprooted because of consistent terminating along the Line of Control (LOC) with Pakistan.
- Balmiki people group individuals who were convinced by Sheik Abdullah to relocate from Punjab to J&K to attempt the searching of night soil.
- Descendants of Gorkha officers of the Maharaja's Army.
- Women of J&K who wedded men from different states. The youngsters conceived of such posterity too are denied all rights. No such arrangement exists for the men who wed non-state subjects, making it a sexual orientation one-sided issue.
- The general population of Ladakh who show to inhabit the kindness of the Kashmiri organization.

Except for the ousted Pandit families and the general population of Ladakh, every single other network specified in this rundown have been precluded the status from securing lasting inhabitants or state subjects due to Article 6 of the J&K Constitution, which draws its forces from Article 35A of the Indian Constitution.

It involves disgrace that the weakest strata of society, the Balmikis, keep on being liable to the most noticeably bad type of human rights mishandle. According to the principles of the express, the occupant

⁹ "If Article 35A Tinkered with, There Would be no one in Kashmir to hold Tricolour: Mehbooba Mufti," Financial Times, July 28, 2017, available at <http://www.financialexpress.com/india-news/nobody-will-protect-tricolor-in-kashmir-if-constitutional-statuschanged-mehbooba-mufti/783824/>



authentication issued to such people, regardless of whether they are third or fourth era pioneers, brands them as "qualified just for the activity of a scrounger". In this way, regardless of whether a young woman from the network holds a MBBS degree, she must be utilized in the state as a safai karamchhari (cleaning staff). Such manhandle would put much Hitler's Nazis to disgrace. In any case, the majority in India stay oblivious of such arrangements.

In 1981, the J&K State Assembly utilized its total Kashmiri greater part to pass a law, the J&K Resettlement Act, which opened the entryways for those Kashmiris and their relatives who had moved to Pakistan, or POJ&K amid parcel in 1947, to come back to J&K as its honest to goodness subjects and assume responsibility of their familial properties. In any case, evacuees from POJ&K and their relatives, numbering around 1.5 million today, have not exclusively been kept out of this legitimate arrangement however the state government has reliably declined to give them or their relatives a chance to settle in J&K as state subjects". These people group have been requesting their entitlement to those 24 situates in the Assembly which are left empty for the sake of POJ&K.

Amusingly, the Muslim outcasts from Xinjiang and Tibet, who had relocated to Kashmir following the Chinese control of their nations in 1949 and 1959, separately, have been allowed "state subject" status, alongside voting rights in the Assembly by the J&K government. The collective motivation of past state organizations was, thus, clear. The state was being transformed into a state for Muslims just and Article 35A

was the instrument used to complete such a terrible demonstration.

Conclusion

Jammu and Kashmir is a fundamental piece of India. The State involves an exceptional status in the political domain of the nation because of verifiable and geological components. The Article 370 of the Indian Constitution agrees lawful support to this comprehension and act like an extension between the Indian Constitution and the Constitution of Jammu and Kashmir. As the present debate over the Article 35A, but in a roundabout way, is endless supply of the major inhabitants representing the Center-State relationship opposite Jammu and Kashmir, the legal, as the caretaker of the Constitution, is the correct stage to settle on the issue.
