



## THE (UN)MAKING OF ARTICLE 370 AND 35A OF INDIAN CONSTITUTION

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### ABSTRACT:

The Constitution of India is a living instrument, with capabilities of enormous dynamism made for a progressive society. Working of such Constitution depends upon the prevalent atmosphere and conditions. One who has to study the Indian Constitution today may come to grief if he has in his hand only a text of the Constitution as it is promulgated in November, 1949, for, momentous changes have since been introduced not only by numerous amendment acts but by scores of judicial decisions emanating from the highest tribunal of the land.<sup>1</sup> One such evolved topic over the years has been the issue of Jammu & Kashmir. Everyone who goes through the pages of the Indian Constitution will be struck by the peculiar position of the Jammu and Kashmir state. It is one of the twenty nine states which make up the Union of India and is enumerated as number 15 state in Schedule 1 of the Constitution. Part VI of the Constitution deals with these 29 states. But the very first article (i.e. Art. 152) of this part reads as follows:

"In this part, unless the context otherwise requires the expression, 'State' does not include the state of Jammu and Kashmir."<sup>2</sup>

An attempt has been made in this paper to explain and justify the causes for this special treatment and whether these articles should be repealed in the light of federalism. This issue has been one of the most important agendas of the national political parties over the years. The first term of NDA Government just ignited the dying flame by promising the abrogation of Article 370 and 35A of the Constitution in their election manifesto.

Keywords: Article 370, Article 35A, Constitution, Instrument of Accession, Jammu and Kashmir, Special Status.

### INTRODUCTION:

The state of Jammu and Kashmir holds a peculiar position under the Constitution of India. It forms a part of the territory of India as defined in article 1 of the Constitution. In the original Constitution, Jammu and Kashmir was specified as a Part B state. The States Reorganization Act, 1956 abolished the category of Part B states and the Constitution (7<sup>th</sup> amendment) Act, 1956 which implemented the changes introduced by the former act, included Jammu and Kashmir in the list of the Union of India all of which were now included in one category. Nevertheless, under article 370 of the Constitution the state of Jammu and Kashmir enjoys a special Constitutional position so that all the provisions of Constitution of India relating to the states in the first schedule are not applicable to Jammu and Kashmir even

<sup>1</sup> DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA, 22<sup>ND</sup> EDITION, 2015.

<sup>2</sup> Bodh Raj Sharma, THE SPECIAL POSITION OF JAMMU AND KASHMIR IN THE INDIAN

CONSTITUTION, The Indian Journal of Political Science, Vol. 19, No. 3 (July-September 1958), pp. 282-290, <https://www.jstor.org/stable/42743614>.



though it is one of the states specified in that schedule. Also its relation with the central government somewhat differs from that of other states. This is because of certain commitments made by the Government of India with the ruler of State of Jammu and Kashmir at the time of accession to India. The instrument of accession signed by the Ruler of was accepted by the Governor General of India on 20-10-1947. Under this instrument only three subjects- external affairs, defence and communications were surrendered by the state to the dominion. The two characteristic features of the special relationship are:

- i. The state has a much greater measure of autonomy and power than enjoyed by other states;
- ii. The centre's jurisdiction within the state is more limited than what it has with respect to other states.

Due to these special features not all the provisions of Indian Constitution apply to the state some of the provisions apply, some do not apply at all, while others apply in a modified form. The Constitutional position of the state has not remained static since it became a constituent unit of the Indian union. It has been growing since then towards a closer affinity of the state with the Indian union.<sup>3</sup>

#### **POLITICAL AND LEGAL HISTORY OF JAMMU AND KASHMIR:**

Kashmir has a very huge background of politico legal history. It dates back to the 14th century when Buddhist and Hindu rulers ruled over it. After four centuries of Muslim rule it was conquered by Maharaja Ranjit

Singh of the Punjab in 1819. Soon after his death in 1839 the East Indian Company defeated the then Sikh ruler of the Punjab who ceded Kashmir to the Company in lieu of Rupees One Crore (about two million dollars), the war indemnity imposed upon him. The Company sold Kashmir to Raja Gulab Singh, the Dogra Governor of Jammu. The Dogra dynasty ruled over this state till 1949. Kashmir had almost the same political relations with the Paramount Power (the British Crown) as the other native states of India. These relations came to an end on the 15th August, 1947, when the British handed over the governance of India to the two new dominions of India and Pakistan.

On quitting India the British government gave freedom to the Indian states to accede to India or to Pakistan or to set up as sovereign independent states. By the 15th August, 1947 all except three states having geographical contiguity with India, had acceded to India on the three subjects of Defence, External Affairs and Communications. The three states which had not acceded to India were Junagadh, Hyderabad and Kashmir. All these acceding states had also entered into standstill agreements with India. The Ruler of Kashmir offered to enter into standstill agreements both with Pakistan and India. Pakistan signed such an agreement but India did not show much anxiety to do so. India had announced that it would enter into standstill agreements only with those states which had signed the Instrument of Accession. Kashmir had not acceded to India, so there could be no *Stand still* agreement with it. Then circumstances, too strong for the ruler of Kashmir compelled him to accede to India.

<sup>3</sup> M. P. JAIN, INDIAN CONSTITUTIONAL LAW, 7<sup>TH</sup> EDITION, 2014.



On the 22nd October, 1947 tribesmen who were assisted by soldiers and officers of the Pakistan army invaded Kashmir. On the 24th, the Maharaja felt quite helpless and requested the Government of India for help against this naked aggression. On the 26th he requested the Governor General of India, to accept the accession of his state to India. This request was supported by the leaders of the National Conference, then present in Delhi. Lord Mountbatten, the Governor-General of India accepted the accession of the state but said that the accession would be finally settled after a reference to the people of Jammu and Kashmir. Thus Kashmir became a legal part of India in the same way as the five hundred and fifty and odd other native states had become, viz. through their rulers signing an Instrument of Accession and its acceptance by the Government of India.

India sent its forces to defend Kashmir. The tribal raiders and their helpers had to flee from the Kashmir valley but because of the mountainous nature of the territory fighting continued for about fifteen months. On the 31st December, 1947, India took the matter to the Security Council. The Security Council appointed a Commission who were successful in persuading Pakistan and India to order a cease fire effective from January 1, 1949. Both India and Pakistan also accepted the proposals of the Commission contained in their resolutions of the 13th August, 1948, and 5th January, 1949. According to these resolutions the future of Kashmir was to be decided by a free and impartial plebiscite under the United Nations auspices. But the plebiscite was to be held when Pakistan and India had withdrawn their troops from the state territory. Pakistan was to withdraw its

troops first. But Pakistan has not withdrawn its troops up to this day. The so called Azad Kashmir troops are in illegal occupation of one third of the state territory and so no plebiscite has been held so far. Since Pakistan has not allowed India to carry out its plighted word, India has been forced to make special provisions in its Constitution for the state of Jammu and Kashmir.<sup>4</sup>

### **INSTRUMENT OF ACCESSION AND ITS LEGAL IMPLICATIONS:**

The Governor General of India Lord Mountbatten accepted the Instrument of Accession. It was no different from that executed by other 500 states of India. It was unconditional, voluntary and absolute. It was not subject to any exceptions. Since the liberality of the Government of India has been misunderstood and misinterpreted in interested quarters, overlooking the legal implications of the accession of the state to India we should pause for a moment to explain these legal implications lest they be lost sight of in the turmoil of political events which have clouded the patent fact of accession. The first thing to be noticed as such it bound Jammu and Kashmir legally and irrevocably a part of the territory of India and that the government of India was entitled to exercise jurisdiction over the state with respect to those matters to which the Instrument of Accession extended. Therefore there is no doubt regarding the legality of the accession in the judicial sense. If, in spite of this, the Government of India had given an assurance to the effect that the Accession or the Constitutional relationship between India and the state would be subject to confirmation by the people of the state, under

<sup>4</sup> *Supra* note 2.



no circumstances can any third party take advantage of such extra legal assurances and claim that the legal act had not been completed. The accession was confirmed by the people of the state through their constituent assembly on November 17, 1957. Section 3 the Constitution of the Jammu and Kashmir state says that the state of Jammu and Kashmir is and shall be the integral part of the Union of India. Thus at the time of the commencement of the Constitution, the position of the state of Jammu and Kashmir was different and therefore article 370 was inserted in the Indian Constitution. Under article 370 the President is empowered to issue orders. The President thus acts as a legislature in issuing orders under this article.<sup>5</sup> It has been held by the Supreme Court in the case of Puranlal Lakhanpal v. President of India<sup>6</sup> that the President may by orders extend certain provisions of the Constitution to that state with such modifications and exceptions as he thinks fit. The President may subsequently make amendments and modifications in such orders as stated in the case of Sampat Prakash v. State of Jammu and Kashmir<sup>7</sup> by the Supreme Court.

### CONSTITUTIONAL STATUS OF JAMMU AND KASHMIR:

In the Indian Constitution which was adopted on 26-11-1949 and which went into force on 26-1-1950 the territory of India was to comprise the territories of the states specified in Parts A, B and C of the I Schedule of the Constitution and of territories in Part D of this Schedule. The state of Jammu and Kashmir was one of the eight states specified in Part B of this Schedule. All

these Part B states were governed by Article 238 of the Constitution. But the Jammu and Kashmir state was not so governed. For this state the Constitution-makers drafted a special article - Article 370. According to Article 370 the Parliament of India can exercise limited law-making power so far as the Jammu and Kashmir state is concerned. In the case of the other 13 states 9 as reorganized on 1-11-1956, the Indian Parliament can make laws on all subjects enumerated in the Union and the Concurrent lists. But for the Jammu and Kashmir state the Parliament can make laws only on those matters in these two lists which in consultation with the government of this state are declared by the President to correspond to matters specified in the Instrument of Accession of the state and on such other matters in the two lists which the President may, with the concurrence of the state government, specify in his order.

Article 370 also stipulates that only two articles (Art. 1 and Art. 370) of the Indian Constitution will apply in full to this state and that other provisions of the Constitution will apply to this state with exceptions and modifications specified by the President in his Order and that all such Orders of the President shall be issued either in consultation with or the concurrence of, the government of the state. The President can, however, by public notification declare that Article 370 ceases to be operative from a particular date. This means that this is a temporary provision and will be withdrawn as soon as the people of the state have given their verdict on the issue of accession. Only two authorities acting together can amend or

<sup>5</sup> Dr. J.N. PANDEY, THE CONSTITUTIONAL LAW OF INDIA, 48<sup>TH</sup> EDITION, 2011.

<sup>6</sup> AIR 1961 SC 1519.

<sup>7</sup> AIR 1970 SC 1118.



abrogate Article 370. These authorities are the President of India and the Constituent Assembly of the state. That body ceased to exist after it had enacted the State's Constitution on 17 November 1956 to come into force on 27 January 1957. One of the reasons for the temporariness of this article is that in 1949 India was committed to a plebiscite. No reason for the temporariness is valid any longer. Plebiscite is rightly ruled out and the State's constituent assembly is gone.<sup>8</sup>

#### **GENESIS OF ARTICLE 370 AND WHAT DOES IT PROVIDE FOR:**

The amendment to the constitution relating to Jammu and Kashmir was moved in the Constituent Assembly by Gopaldaswami Ayyangar, a prominent member of the Constituent Assembly, former Prime Minister of Jammu and Kashmir under the Maharaja and India's representative at the United Nations. While introducing the amendment, he expressed his hope that it was a prelude to the state's full integration into the Union of India.

"The discrimination is due to the special conditions of Kashmir. That particular State is not yet ripe for this kind of integration [that of the other princely states that had merged with the Indian provinces directly administered by the British]. It is the hope of everybody here that in due course even Jammu and Kashmir will become ripe for the same sort of integration as has taken place in the case of other States. At present it is not possible to achieve that integration."<sup>9</sup>

He outlined the special conditions in the state as follows:

1. The war within the state - a ceasefire had held since the beginning of the year but conditions are still "unusual and abnormal", "normal life" not yet restored. 2. Part of the state is still in the hands of "rebels and enemies". 3. "Entanglement" with the United Nations over the issue of J&K and the Government's commitment to giving the people of the State the opportunity to decide for themselves whether they wish to remain with the Republic or to leave it (including a plebiscite if the right conditions prevail) 4. Agreement that the will of the people, through a constituent assembly, will determine the constitution of the state and the sphere of Union jurisdiction over the state.

Gopaldaswami Ayyangar did not mention the distinct nature of Kashmir's society or culture as a reason to grant the state a special status, although the fact that Jammu and Kashmir had a Muslim majority and sat on the border between India and Pakistan lay behind the disputed status of the state. There was only one intervention in the Constituent Assembly debate at which the state's special status was enshrined in what was then Article 306A of the draft constitution and what remains today as Article 370 of the constitution. The unique circumstances of Kashmir's position within the Union were difficult to contest. No other state in the Union was embroiled in a war involving a foreign country or was the subject of a United Nations resolution. All other princely states had by this point decided to join the Union, or their decision had been secured through the use of force (such as Hyderabad, where the Muslim ruler of a majority Hindu state had held out against

<sup>8</sup> V.D. KULSHRESHTHA, LANDMARKS IN INDIAN LEGAL AND CONSTITUTIONAL HISTORY, 11<sup>TH</sup> EDITION, 2017.

<sup>9</sup> Constituent Assembly Debates 1946-9 1999, October 17th 1949, vol 5.



accession to India). Article 370, then, recognized Kashmir's distinct position at the moment of constitutional design, but it was intended as an interim measure before the convening of a Constituent Assembly in Kashmir and/or the holding of a plebiscite. A major area of controversy surrounding Kashmir's constitutional position was over the state's exemption from the Fundamental Rights and Directive Principles of the constitution. Sheikh Abdullah, the National Conference leader to whom Maharaja Hari Singh had handed over power after his accession to India, had sought such an exemption in order to be able to see through the redistribution of land without compensation promised by the National Conference in the Naya Kashmir (New Kashmir)' manifesto published in 1944 (the Fundamental Rights, which were justiciable, included a "right to property"). Sardar Patel, Indian Deputy Prime Minister and Home Minister wrote to Gopalaswami Ayyangar on October 16th 1949 to express his concern about this: "You can yourself realise the anomaly of the State becoming part of India and at the same time not recognising any of these provisions." He continued, however, "Any question of my approval does not arise. If you feel it is the right thing to do, you can go ahead with it". That Kashmir's exemption from the legal protection to the right to property was one of the most controversial aspects of Kashmir's constitutional status. The tenor of the debate at the time of the adoption of Article 370 reflected the fact that differential autonomy had not been granted to Jammu and Kashmir as a final settlement of ethnopolitical conflict by recognizing a

distinct religious or regional identity. The Indian government regarded Article 370 as a prelude to the state's full integration. It soon became strikingly clear that Article 370 did not protect Kashmir's relationship with India as a "union of equals" despite the distinctive history of popular mobilization in Kashmir. The history of center-Kashmir relations since 1953 has been one of increasing central intervention, including both an erosion of constitutional autonomy and involvement of the central government in the state's democratic processes.<sup>10</sup>

According to some jurists Article 370 of the Constitution is one of the most controversial but least studied provisions. As discussed throughout the paper article 370 provides for the autonomy of the state with the least intervention from centre. To recapitulate what its effects are: the Parliament, except for matters pertaining to defence, foreign affairs, finance & communications needs the state governments concurrence for application of any legislation. The entire set of laws governing citizenship, ownership of property and most essentially fundamental rights are different in J&K as compared to rest of India. Indian Citizen from any other state cannot purchase land or property in J&K. The Government of India cannot declare Financial Emergency under Article 360 in the state of J&K, Emergency can only be declared in state of external aggression and war. No amendment of the Constitution of India shall extend to Jammu & Kashmir unless it is extended by an Order of the President under article 370(1). The provisions of Art. 368 of the Constitution of

<sup>10</sup> Louise Tillin, *United in Diversity? Asymmetry in Indian Federalism*, *Publius*, Vol. 37, pp. 45-67, <https://www.jstor.org/stable/4624781>.



India are not applicable for the amendment of the State Constitution of Jammu & Kashmir.<sup>11</sup> In pursuance

### DELHI AGREEMENT AND SUBSEQUENT ORDERS:

The next major step was the Delhi agreement between Nehru and Abdullah in July 1952 on topics like the Supreme Court's jurisdiction, financial integration, limited emergency powers and conduct of elections of Parliament, etc. It was an Agreement between the Government of India and of the State at Delhi in June, 1952 as to the subjects over which the Union should have jurisdiction over the state, pending the decision of the Constituent Assembly of Jammu and Kashmir. The Constituent Assembly of Jammu & Kashmir ratified the Accession to India and also the decision arrived at by the Delhi Agreement as regards the future relationship of the state with India, early in 1954. In pursuance of this, the President in consultation with the State Government, made the Constitution (Application to Jammu & Kashmir), Order, 1954, which came into force on the 14<sup>th</sup> May, 1954. This Order implemented the Delhi Agreement as ratified by the Constituent Assembly and also superseded the Order of 1950. According to this Order, in short, the jurisdiction of the Union extended to all Union subjects under the Constitution of India. This Order was amended in 1958, 1963, 1964, 1965, 1966, 1972, 1974, 1986 and these subsequent orders deal with the entire Constitutional position of the State.<sup>12</sup>

### INDIRA - ABDULLAH AGREEMENT OF 1975:

Under the Indira Gandhi – Abdullah Accord of February 1975, the state could review only those posts 1953 Central laws which were in the Concurrent List and related to welfare measures, cultural matters, social security and personal laws. Meanwhile, Supreme Court had delivered the judgement in 1968 in Sampat Prakash case.<sup>13</sup> It ruled that even after the State Constituent Assembly had ceased to exist, the President could, with the concurrence of the State Government – ungratified by that body – add to the Union's powers. In 1968 the court opined that “the situation that existed when this article was incorporated in the Constitution has not materially altered”. It ignored completely his exposition of Article 370 itself that the Assembly alone had the final say. The court said that since the Assembly made no recommendation that Article 370 be abrogated, it should continue. The Supreme Court totally overlooked the fact that on its interpretation, Article 370 can be abused by collusive State and Central Government's to override the State's Constitution. Notwithstanding the liberal measures introduced in the State by the adoption of a separate State Constitution, the pro-Pakistani elements in Jammu and Kashmir continued their agitation for the holding of a plebiscite to finally determine whether the State should accede to India or Pakistan and there were violent incidents initiated by the ‘Plebiscite Front’. Sheikh Abdullah got involved in these anti-Indian movements and went on criticizing the Indian policy towards the State, as a result of which he had been placed

<sup>11</sup> *Supra* note 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Supra* note 7.



under preventive detention from 1955 and externed from State in 1971. This was followed by a series of negotiations and an agreement was finally reached. All Abdullah wanted was “maximum autonomy” for Kashmir as a unit of the Federation. The net political result of this agreement was that the demand for plebiscite was abandoned by Abdullah and his followers and, on the other hand, it was agreed that the special status of the State of Jammu and Kashmir would continue to remain under the provisions of Art. 370 of the Constitution of India.<sup>14</sup> It should however be mentioned that owing to differences over matters arising out of the Agreement, it has not been implemented by issuing a fresh Presidential Order under Art. 370.

#### 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 and privileges in public sector jobs, acquisition of property in the State, scholarships and other public aid and welfare. The provision mandates that no act of the legislature coming under it can be challenged for violating the Constitution or any other law of the land. Article 35A was incorporated into the Constitution in 1954 by an order of the then President Rajendra Prasad on the advice of the Jawaharlal Nehru Cabinet. The controversial Constitution (Application to Jammu and Kashmir) Order of 1954 followed the 1952 Delhi Agreement entered into

between Nehru and the then Prime Minister of Jammu and Kashmir Sheikh Abdullah, which extended Indian citizenship to the ‘State subjects’ of Jammu and Kashmir. The Presidential Order was issued under Article 370 (1) (d) of the Constitution. This provision allows the President to make certain “exceptions and modifications” to the Constitution for the benefit of ‘State subjects’ of Jammu and Kashmir. So Article 35A was added to the Constitution as a testimony of the special consideration the Indian government accorded to the ‘permanent residents’ of Jammu and Kashmir.

The parliamentary route of lawmaking was bypassed when the President incorporated Article 35A into the Constitution. Article 368 (i) of the Constitution empowers only Parliament to amend the Constitution. So did the President act outside his jurisdiction? Is Article 35A void because the Nehru government did not place it before Parliament for discussion? A five-judge Bench of the Supreme Court in its March 1961 judgment in *Puranlal Lakhanpal v. The President of India*<sup>15</sup> discusses the President’s powers under Article 370 to ‘modify’ the Constitution. Though the court observes that the President may modify an existing provision in the Constitution under Article 370, the judgment is silent as to whether the President can, without the Parliament’s knowledge, introduce a new Article. This question remains open.<sup>16</sup>

#### ANALYSIS OF CASE LAWS:

<https://www.thehindu.com/news/national/what-is-article-35a/article19567213.ece>

<sup>14</sup> *Supra* note 8.

<sup>15</sup> *Supra* note 6.

<sup>16</sup> KRISHHNADAS RAJAGOPAL, WHAT IS ARTICLE 35A? THE HINDU, August 26<sup>TH</sup>, 2017,



As mentioned above there were two important case laws which threw some light on the issues concerned with article 370 and 35A. They mentioned what were the powers granted by these articles. After the interpretation by the Supreme Court as to what was granted in these article there arose many issues, which gave rise to filing of many writ petitions and PILs.

A writ petition filed by NGO We the Citizens challenges the validity of both Article 35A and Article 370. It argues that four representatives from Kashmir were part of the Constituent Assembly involved in the drafting of the Constitution and the State of Jammu and Kashmir was never accorded any special status in the Constitution. Article 370 was only a ‘temporary provision’ to help bring normality in Jammu and Kashmir and strengthen democracy in that State, it contends. The Constitution-makers did not intend Article 370 to be a tool to bring permanent amendments, like Article 35A, in the Constitution.

The petition said Article 35 A is against the “very spirit of oneness of India” as it creates a “class within a class of Indian citizens”. Restricting citizens from other States from getting employment or buying property within Jammu and Kashmir is a violation of fundamental rights under Articles 14, 19 and 21 of the Constitution.

A second petition filed by Jammu and Kashmir native Charu Wali Khanna has challenged Article 35A for protecting certain provisions of the Jammu and Kashmir Constitution, which restrict the basic right to property if a native woman marries a man not

holding a permanent resident certificate. “Her children are denied a permanent resident certificate, thereby considering them illegitimate,” the petition said. Attorney-General K.K. Venugopal has called for a debate in the Supreme Court on the sensitive subject. Recently, a Supreme Court Bench, led by Justice Dipak Misra, tagged the Khanna petition with the We the Citizens case, which has been referred to a three-judge Bench. The court has indicated that the validity of Articles 35A and 370 may ultimately be decided by a Constitution Bench.<sup>17</sup>

#### LEGAL HURDLES IN REPEALING ARTICLE 370 AND 35A:

Article 370(3) provides 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. Since the Constituent Assembly of the State no longer exists, the President’s power appears to be unfettered now. Therefore, if any modification is to be made to article 370, recourse will have to be had to article 368 regarding amendment of the Constitution. The hurdle here is whether any amendment made to article 370 under article 368, without the concurrence of, or consultation with, the State Government will be effective. Article 35A is a recognition of the conditional accession of J & K into India. Article 35A says that no law in J&K regarding restrictions imposed on employment under the State government, or acquisition of immovable property, or

<sup>17</sup> *Id.*



settlement in the State, or scholarships and aid given by the State government shall be void on the ground that it is inconsistent with any fundamental rights in the Constitution. Because of the limited accession of the State of J&K and the relatively greater autonomy given to the State, Article 35A is only a recognition of the conditional accession of J&K into India and the restrictions placed on both Parliament and the Constitution that the normal powers of Parliament to make laws will not apply to J&K. It is Article 370 that restricted the application of certain provisions of the Constitution to J&K. It is pursuant to Article 370 that Article 35A was inserted by way of the 1954 Presidential Order. All that it says is that the laws made by the state regarding settlement and acquisition of property will prevail and not be struck down on the ground that they violate fundamental rights.

Incidentally, Himachal Pradesh and Uttarakhand have laws which say that no outsider can buy land. Strictly speaking, these laws are unconstitutional and violate two fundamental rights — the freedom to reside and settle in any part of the territory of India and the freedom to practise any profession, trade and business. Those laws are void. But because the accession of J&K was conditional to their being given their rights, their sovereignty with regard to matters concerning land and settlement are preserved. Therefore, it cannot be challenged on the ground that it violates fundamental rights or the basic structure of the Constitution because it is pursuant to an original part of the Constitution and pursuant to the limited accession signed with J&K.

Kashmir never acceded fully to India. Therefore, it is a quasi-sovereign State. It is not like any other State. Article 35A follows the Instrument of Accession and the guarantee given to the State of J&K that the State's autonomy will not be disturbed even by the Constitution.<sup>18</sup>

### *TERRORISM AND CONFLICT: ONE OF THE REASONS*

During 1989, a widespread and armed insurgency started in J&K. After the 1987 state legislative assembly election, some of the results in elections were disputed which resulted in the creation of militant groups which laid the foundation of the Mujahadeen insurgency, which continues to this day and the main conflict is between various Kashmiri separatist and the Government of India. In J&K some groups back for complete independence of Kashmir ( Azad Kashmir), while others pursue Kashmir's full control to Pakistan. Though an age-old demand of the BJP to repeal the special status accorded to J&K, the ruling party has now a imminent opportunity to scrap of Article 370. Due to this rage between the groups and the armed forces of India the rise in violence takes place and situations like infamous massive stone-pelting towards the security forces, everyday protests violence etc. are on the rise. The attack on a CRPF convoy in Jammu and Kashmir's Pulwama district that **killed at least 40 jawans** is the biggest terror attack in the past five years. However, data released by the BJP government on February 5, 2019 reveal that J&K has been viewing regular terror attacks in the past five years. The

<sup>18</sup> PRASHANT BHUSHAN, SHOULD ARTICLE 35A BE SCRAPPED? THE HINDU, August 24<sup>TH</sup>, 2018,

<https://www.thehindu.com/opinion/op-ed/should-article-35a-be-scrapped/article24763536.ece>



responsibility for the Pulwama Feb 14, 2019 attack was claimed by the Pakistan-based Islamist militant group Jaish-e-Mohammed. The Hon'ble Supreme Court of India has accepted the urgent hearing of a PIL<sup>19</sup> challenging the constitutional validity of the infamous Article 370 of the Constitution of India, which grants special status to J&K and limits the Parliament's power to make laws for the J&K state. In the present PIL, which was raised in September 2018, it has contended that the Article 370 special provision was temporary in nature at the time of framing of the Constitution.

The PIL also prays for declaration from the Supreme Court that the separate Constitution of J&K is arbitrary and unconstitutional on many grounds, including that it is against the supremacy of the Constitution of India. The Constitution of J&K is invalid mainly for the reason that the same has still not got the assent of the President, which is a mandatory as per provisions of the Constitution of India.<sup>20</sup>

### **CONCLUSION:**

Kashmir has enacted its own Constitution, it has its own flag, it has its own separate administration, Indian laws do not apply to it and it has its own laws all these things have encouraged them to nurse an impression that they are independent of India and India is their treasury where from they may draw as much as they wish without accountability.

One must understand that secularism is a threat in Kashmir. This all arguments pave way to the solution as to which option is better a complete Azad Kashmir as Pakistan proposes or an autonomic state. There is no better option than autonomy given that plebiscite is not a possibility, it is the best option for both the State and the Central government. Where Indian state would respect human rights and work for economic development. The central government will have to win over the people of Kashmir and convince them that their interests are safe in India and that they enjoy the fruits of democracy and autonomy within the Indian federation. This is the real challenge before the Indian leadership and any talk of abrogating Article 370 would further alienate the people of Jammu and Kashmir from India. We cannot invoke the sanctity of the Constitution when it suits us and call it a mere technicality when it does not suit us. If the Constitution is sacrosanct, and we are willing to negotiate with terrorists within its framework, we must not talk of abrogating Article 370 which is a part of that framework. In fact, those who are interested in solving the Kashmir issue should use the present provisions of Article 370 to assure the people of Jammu and Kashmir that even if the Indian Parliament wants, with an overwhelming majority, to undo Article 370, it would not be able to do so except with the Concurrence of

<sup>19</sup> Ashwini Kumar Upadhyay V. Union of India, Writ Petition Civil No.1162 of 2018

<sup>20</sup> Shubham Borkar and Lakshay Kewalramani, **All About Article 370 (Jammu & Kashmir) From Dawn Till Dusk**, <http://www.mondaq.com/india/x/785148/Constitutional+Administrative+Law/All+About+Article+370+Jammu+Kashmir+From+Dawn+Till+Dusk>



the state government.<sup>21</sup> But the people of Jammu and Kashmir must be informed that this is not merely a matter of the good will of any government in power. The Constitution of India does not allow any government to unilaterally abrogate Article 370. This will go a long way in assuaging the fears of the people of the state. One of the most controversial topics on the manifesto of BJP was abrogating article 370. Recently they even made a plea that the President should declare that article 370 shall cease to operate. It was faced with huge criticism for its inept handling of the issue at hand. Presently the top most priority in the state is to restore normalcy. The state has been without an elected government almost for a year now. Enough lives have already been laid down and the time has now come for the government to finally take its stance as to complete integration or autonomy. Any decision taken ultimately should be for the benefit of people and safeguarding their rights. The Supreme Court's urgent hearing of the PILs gives us the weight of the situation. The central government should also think faster before it's too late that human rights are violated to their farthest extent and people are tired of democracy and seek other means like terrorism to improve their lives. Democracy is at threat in Kashmir, and it's complicated to decide. Finally any choice lies with the people of Jammu and Kashmir and it is for the State to decide.



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<sup>21</sup> S. P. Sathe, Article 370: Constitutional Obligations and Compulsions, Economic and Political Weekly,

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