



## GENESIS OF THE CONSTITUTIONAL SIN: ARTICLE 370

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### Introduction

It was hailed as a baneful legacy of the Nehruvian past. Towering leader and one of the members of the interim cabinet, Shyama Prasad Mukherjee gave up his life for the cause of abrogating it, he directed his tirade against the then central government and said : “*Ek desh mein do vidhaan, do pradhaan aur do nishaan nahi challenge*”<sup>1</sup> ( A nation can't have two constitution, two premiers and two flags). Senior Congress leader Janardan Dwivedi cited Socialist stalwart Ram Manohar Lohia who had adopted a similar stance against it and backed the government's move to put an end to it.<sup>2</sup> The critical questions that need to be answered is that how this article came into being? What were the compulsions? Whether it enshrines the constitutional principles or not and moreover whether it was necessary to abrogate it?

### Article 370: At the very inception

The temporary and transitory provision of the Constitution<sup>3</sup>, which was the necessity at that time was given a unchangeable status because of the erroneous judgement of the then establishment. The ruler of Kashmir, Maharaja Hari Singh convinced the Indian government to surrender only three jurisdictions namely, external affairs,

defence and communications. The mistakes of the governments can be summed up as follows:

- ❖ The prime minister made the error of not using effective methods like Home Minister did with the Nizam of Hyderabad to merge the state unconditionally and without any residuary powers.
- ❖ Under the pressure of Lord Mountbatten, the prime minister agreed that final decision to accede would be ratified by the state's constituent assembly.

The said article was only intended for temporary period, that is “until the ratification of the Instrument of Accession by the state's Constituent Assembly”. This article, in brief specifies that except for defence, foreign affairs and communications the Indian Parliament needs state government's concurrence for applying other laws. In this manner, state executive was given special powers, citing which the premiers of the state justify and emphasise Jammu and Kashmir's special status.

The Constituent Assembly of Jammu and Kashmir formalized the accession of the state in the year 1954. Later on, as the constitution was adopted in 1956, its section 3 read : “The state of Jammu and Kashmir is and shall be an integral part of the Union of India”<sup>4</sup>. At that time, the section was immune from any amendment. After that, there was no persisting rationale for retaining article 370 in the Constitution of India.

### Effect of Art 370

<sup>1</sup>Thakur, A. (2019, August 5<sup>th</sup>) *J&K flag to be removed permanently after revocation of special status for J&K*, India Today.

<sup>2</sup> Ketkar, P. (2019, August 5<sup>th</sup>) *Article 370 revoked in J&K: A look back at its history and what now*, The Hindustan Times.

<sup>3</sup> Art 370, Constitution of India

<sup>4</sup> Section 3, The Constitution of Jammu and Kashmir



Albeit the central government extended many of its powers over the state since 1953, retention of Article 370 has produced many detrimental consequences, both for the state and also for the country. Similar to the demand of referendum, it became a constant source for nurturing the mindset of separatism among a section of Kashmiri leaders, undoubtedly at the instigation of their masters across the border. Under article 19 (1)(e) and (g)<sup>5</sup> of the Indian Constitution, a citizen is free to reside and settle in any part of the nation and to practice any profession or carry on any trade, occupation or business. But Article 370 deprives Indians from rest of the nation to settle permanently in Jammu and Kashmir. It is also detrimental to the rights of the women born in the state. If a woman, who is permanent citizen of the state, marries a man from outside the state, she is destined to lose her property. She is even deprived of her ancestral property. But a Kashmiri man who is a permanent resident can own property and bequeath his property to his children even if he is married to a woman who is not a permanent resident.<sup>6</sup> Thus, the said article is gender biased and encourages patriarchy. Though these were the products of Article 35A, it was the corollary of Article 370. As a matter of fact, the said proviso was struck down in the landmark judgement, State of Jammu and Kashmir vs Dr Susheela Sawhney, the three judges bench held that: “In view of the majority opinion, we hold that a daughter of

a permanent resident marrying a non permanent resident will not lose the status of permanent resident of the state of Jammu and Kashmir.”<sup>7</sup>

In the landmark judgement, T.M.A. Pai Foundation and Ors. Vs. State of Karnataka and Ors.<sup>8</sup> Under this case the Hon’ble Chief Justice India B.N Kirpal observed: “Linguistic and religious minorities are covered by the expression “minority” under Article 30 of the Constitution. Since reorganization of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30, have to be considered State-wise.”<sup>9</sup>

But in the state, the government has neither notified the minorities (the constitution of the state is also silent on the issue) nor the National Commission for Minorities Act, 1992 is applicable in the state (because of the said article). The byproduct is that when the National Minorities Development and Finance Corporation in 2011 constituted Jammu and Kashmir Entrepreneurship Development Institute to channelise the loan schemes, the beneficiaries of the said schemes were Muslims, Sikhs, Buddhists and Christians (excluding Hindus)<sup>10</sup>. Thus, the state government had covertly recognised Hindus to be in majority and Muslims to be

<sup>5</sup> Art 19, Constitution Of India

<sup>6</sup> Chandran, R. (2017, July 31<sup>st</sup>) *Kashmiri Women Challenge state’s ‘discriminatory’ property law*, Thomas Reuters

<sup>7</sup> State of Jammu and Kashmir vs Dr Susheela Sawhney, AIR 2003 J K 83

<sup>8</sup> T.M.A Pai Foundation and Ors. Vs. State of Karnataka and Ors, AIR (2002) 8 S.C.C 481

<sup>9</sup> Kirpal, B. (1993) C.J.I

<sup>10</sup> Government Of India, (2016, May 20<sup>th</sup>) *Jammu and Kashmir Entrepreneurship Development Institute Official Report*



in Minority, disregarding the census report of 2011 which estimated the population of Muslims in the state to be around 68.31%.<sup>11</sup>

### **Opposition to Art 370**

The most vocal critic of the article was none other than Bharatiya Jan Sangh, the precursor of Bharatiya Janata Party. Perhaps no other party had ever incorporated the issue in its election manifesto and even with such regularity. In the party's resolution of 1966, the Jana Sangh said: "Jammu and Kashmir is an integral part of India. Pakistan has aggressively occupied one third of the state since 1947. To get that aggression vacated and secure the liberation of Pak occupied part of the state is the duty of the government of India.... The question of the constitutional integration of that part of Jammu and Kashmir with the rest of India is a purely internal affair of India. The temporary and transitional article 370 of the Indian Constitution on the basis of which Jammu and Kashmir has a separate constitution of its own is a big hindrance in the way of such integration. It has created a psychological barrier between the people of the state and their counterparts in the rest of India, which has been exploited all these years by anti-national element and Pak agents to the detriment of India's vital interests. Its abrogation and application of the Indian Constitution in full to Jammu and Kashmir, is an essential prerequisite for the normalization of the situation within the state"<sup>12</sup>

Even J.L Nehru, ultimately realised the long lasting harmful effects of article 370. Perchance he was more influenced by the

repercussions of the pacifist policies that his regime followed. Thus on 27 November 1963, he said in Lok Sabha: "*Our view is that Article 370, as is written in the constitution, is a transitional, in other words a temporary provision... as a matter of fact, as the Home Minister has pointed out, it has been eroded, if I may use the word, and many things have been done in the last few years which have made the relationship of Kashmir with the Union of India very close. There is no doubt that Kashmir is fully integrated.. So we feel that this process of gradual erosion of Article 370 is going on...*"<sup>13</sup>

### **Long Term effects**

The country was shell shocked on 26 June 2000, during the NDA rule, when the Jammu and Kashmir assembly adopted a report of the State Autonomy Committee( SAC ) and urged New Delhi to implement it forthwith. The SAC recommended complete reversal of situation in J&K to its pre 1953 status, by restoring to the state all subjects for governance except defence, foreign affairs and communication.<sup>14</sup>

The Union Cabinet met on 4<sup>th</sup> July 2000 and the state autonomy resolution. The then Home Minister, LK Advani told the media: "*Its acceptance will set the clock back and reverse the natural process of harmonising the aspirations of the people of the state with integrity of the nation...If the government were to accept it, it would encourage trends that will not be conducive to national unity... there is a clear case for devolution of more financial and administrative powers from the centre to the states', the NDA government*

<sup>11</sup> Government Of India, (2011)*Office of the Registrar General & Census Commissioner, India*

<sup>12</sup> Bharitya Jan Sangh Party Resolution, (1966) "*Abrogate Article 370*", Kanpur

<sup>13</sup> Nehru, J. (1963, November 27<sup>th</sup>), Lok Sabha

<sup>14</sup> Government Of India, (2000, April 8<sup>th</sup> )*Official report of Jammu and Kashmir Legislative Assembly Debates*



*favoured this for all the states and not for J&K alone. In any case devolution of greater powers to states was very different from granting autonomy to states. I also reminded that the issue of restoring the constitutional situation in J&K to its pre 1953 status had been discussed and settled a quarter century ago, in the 1975 accord between Indira Gandhi and Sheikh Abdullah. This agreement had clearly affirmed that provisions of Constituion of India already applied in the state of J&K without modification or adaption are unalterable”<sup>15</sup>*

***Sardar, Nehru and Gopalswamy: Final Incorporation of Article 370***

In his memoirs, LK Advani had wrote in detail how the three actors played their respective roles to incorporate the said article. Advani writes: “*One day in early 1990s, I went to the parliament library to search for archival records about decades on his subject...In the course of longish statements on Kashmir made in Lok Sabha on 24 July 1952, Nehru defended the Article... He went on to add that the matter relating to J&K position in the constitution was cleared in November 1949 and that it was Sardar Patel who was all the time dealing with it*”<sup>16</sup>

The statement made by Nehru was incorrect. Sardar’s private secretary unveiled the truth as to the then PMs statement. V Shankar writes in the two volume book : “ Sheikh Abdullah didn’t trust the Indian Government and while he accepted a constitutional relationship with the Indian Union , he wanted to reserve to the government of J&K of his choice the final word as to the detailed account of the accession- three subjects of defence, external affairs and communication-

and any further accretion to such accession”<sup>17</sup> These words clarify that Sheikh just accepted overlordship of Republic of India, in fact he wanted J&K to be vassal state not an integral part of India.

Nehru entrusted the task of inserting the provisions pertaining to J&K to the then defense minister Gopalswamy Iyengar. He first presented the proposals to congress parliamentary party .No one could predict the extent of opposition that the said provision could invite. Shankar further writes: “ It provoked a storm of angry protests from all sides and Iyengar found himself a lone defender with Maulana Azad an ineffective supporter”<sup>18</sup> Thus, their was resounding protests against the article within the CPP. According to Shankar: “In the party, there was a strong body of opinion which looked askance at any suggestion of discrimination between J&K state and other states as members of the future Indian Union and was not prepared to go beyond certain limits in providing for the special position J&K. Sardar was himself fully in accord with his opinion, but due to his usual policy of not standing in the way of Pandit Nehru and Gopalswamy Iyengar, who sorted out problems in their own light, he had kept his own views in the background. In fact, he had not taken any part in framing the draft proposals with the result that he heard the proposals only when Gopalswamy Iyengar announced them to Congress Party”

Iyengar was completely taken aback, he didn’t expect such kind of opposition. Neither he enjoyed political support nor he had moral standing. He rushed to Sardar for help. Shankar recounts this experience as: “

<sup>15</sup> Advani,L.(2008). *My Country My Life*.India,Rupa Publications India , pg 678

<sup>16</sup> See Supra note 15

<sup>17</sup> Shankar,V.(1974) *My Reminisces of Sardar Patel*, Macmillan

<sup>18</sup> See Supra note 17



Sardar heard him and lapsed into silence. To my query as to what reply he would like to give, he said he would like to think it over. Later in the evening, he rang me up and told that he had sent for Satyanarayan Sinha, the Congress party chief whip, and asked him to convene a meeting of party executive, together with some of prominent stormy petrels and they would discuss the matter; he wanted me to be present at the meeting. The meeting was held at the appointed hour and Maulana Azad was also present. The meeting was one of the stormiest I have ever witnessed. The opinion in opposition to Gopaldaswamy's formula was forcefully and even militantly expressed...even Maulana was shouted down. It was left to Sardar to bring the discussion down to the practical plane and to plead that because of international complications, a provisional approach alone could be made..."<sup>19</sup> Later on it seemed that INC kowtowed to Sardar's will. This can explain why there was little resistance in constituent assembly because the steam had already been let off. In Sardar's entourage, the most affected was none other than Shankar, he even turned down offer of lunch given by Maniben (Sardar's daughter). After constant insistence he agreed for a talk, Shankar recounts the conversation as: "So you're annoyed with me for accepting Gopaldaswamy formula (Sardar spoke) ... I was deeply concerned at the situation ... If Jawaharlal were here I could have had it out with him. But how could I do so with Gopaldaswamy, who was only acting under orders? If I did, people would have said that I was taking revenge on his confidante when he was away. Gopaldaswamy had appealed to me for help. How could I have let him down in

the absence of his chief? ... He (Sardar) conceded the validity of criticism but pointed out the delicate international position of the state and the issue of relationship with India... He also said that neither Sheikh Abdullah nor Gopaldaswamy was permanent. *The future would depend on the strength and guts of the Indian government and if we cannot have confidence in our own strength we do not deserve to exist as a nation*"<sup>20</sup>

### Analysis

Thus, one can safely conclude that July speech of Nehru<sup>21</sup> was an ill return to Sardar for magnanimity he had shown in accepting his point of view against his better judgement. The reason why he gave the statement is still enshrouded in mystery and it can be safely left to the readers to speculate. On 5<sup>th</sup> of August 2019, Indian Government effectively revoked the article. With the benefit of the hindsight, one can say that the act was neither masculine nor agile but was belated fulfilment of nationalist aspirations. It was not only required for national cohesion but also to create national consciousness amongst Kashmiri people. The repercussions, feared by many may or may not prove themselves to be true, but the truth lying before us is that, Kashmir the land of Kashyap rishi has become more Indian than ever.

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<sup>19</sup> See Supra note 17

<sup>20</sup> See Supra note 17

<sup>21</sup> See Supra note 15