



## KASHMIR: WIN OF/OVER PEOPLE

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This article outlines arguments for the relevance of the valorous decision taken by Narendra Modi-led NDA(National Democratic Alliance) government by rendering Article 370 and Article 35A redundant and integrating the State of Jammu and Kashmir which has been glorified nationwide. The Article granted a special status to the state through which the Indian Parliament needed the state government's concurrence in the application of all other laws — except in cases of defence, foreign affairs, finance, communications and ancillary matters (matters specified in the Instrument of Accession). The Instrument of Accession, a legal document under the provisions of The Indian Independence Act 1947 agreeing to accede to the Dominion of India executed by Maharaja Hari Singh, ruler of the Princely state, on 26 October 1947.

While this decision, what seemed to be taken in a precipitous haste is actually a well calculated prudent action of the Government. "We are committed to overcome all obstacles that come in the way of development and provide adequate financial resources to all the regions of the state. We reiterate our position since the time of the Jana Sangh to the abrogation of Article 370," BJP had said in its 2019 election manifesto. The Union home minister Amit Shah reiterated that the decision was solely aimed at pushing the restive state towards development.

However, the nation is disintegrated with differential opinions about the revocation,

while a portion of the population are convinced that Article 370 was set up as a temporary measure and along with it Article 35A being effective which protected the laws such as bar on the outsiders buying property in the state and women marrying non-kashmiris losing their property rights. While a section of population is not willing to acknowledge the revocation as the integration of the state with the rest of the nation needs to be carefully assessed. Not only the nullification will bring in cultural acclimatization but also "administrative, economic and social-psychological" integration. Firstly, the union territories of Jammu and Kashmir and Ladakh would be under direct rule from Delhi after relinquishing Art. 370 which administratively, would therefore result into complete integration with rest of India. Considering, the mismanagement oriented rapport between the central government and the state government of Delhi, it is evident that the relationship between the states would be quite unstable. While in the instances where since the commencement of the Constitution, the Union Government deployed the Central Reserve Police Force (CRPF) Suo motu on three occasions, viz., once in Kerala in 1968 for the protection of its offices and property there during the strike of Central Government employees, and twice in West Bengal in 1969, for the protection of Farakka Barrage and in connection with clashes between the workers of the Durgapur Steel Plant and the U.P. Provincial Armed Constabulary stationed by the Union Government at the Plant. Both Kerala and West Bengal were then ruled by the opposition parties, and the Congress Government at the Centre in the first two cases, did not agree with the demand of the State Government for the withdrawal of the



CRPF, but in the third, case, agreed to do so. "In all these cases," observed the Sarkaria Commission, "It seems that care was taken by the Union Government not to provoke confrontation with the State Governments concerned and precipitate a constitutional crisis." However, the fact remains that in all these events there was sharp resistance from the State Government to suo motu deployment of Union armed forces which resulted in intense Union-State controversy on the role and use of the CRPF.<sup>1</sup>

Secondly, Prime Minister Narendra Modi stated that Article 35A and 370 held back development in Jammu & Kashmir "There must be investment and job opportunities in Jammu and Kashmir. Article 35A, 370 have been standing in the way of development." Adding the numbers to the present scenarios of lessened employment opportunities in the valley, data according to Centre for Monitoring Indian Economy's (CMIE) monthly time-series data on unemployment, Jammu & Kashmir had the highest monthly average unemployment rate of 15 per cent between January 2016 and July 2019 among all the states. It is more than double the national monthly average unemployment rate of 6.4 per cent during the period. However, would the scraping of Art 370 create employment opportunities in the valley still remains to be accessed. Naturally, economy would be willing to flourish in the favorable, yet now deprecated areas as Private companies and PSUs will be moved to invest. Apparently, as a result, manufacturing and services will suddenly flourish, and jobs will abound for Kashmiris but also others. However, would the state with few natural resources, poor infrastructure and a lack in

skilled workers will be an acceptable condition for investments. Provided, the Land Acquisition Act and Law and order disturbances adding terrorism will discourage businesses and labour from moving into the state. However, looking at the other side of the same coin, Restrictive legislations like Art 370 and 35A preventing ownership of property in J&K as also prohibiting employment to "outsiders" (referring to the rest of India) has for long hampered smooth economic movement and social development in the state. Manpower and human skills within J&K have not been effectively tapped as is apparent from its poor economic development. It might improve the "ease of doing business". There might be freedom to acquire land and invest in commercial ventures. As much as it seems to proceed in a certain direction, it is completely dependent on the active involvement of the nation provided with a peaceful scenario of acceptance of one another might pave it's way towards integrated development. Thirdly, Would the valley psychologically integrate with the rest of the nation naturally, socially? While the people in the disturbed region were supposed to be given a chance for expressing themselves over the suppressed chances with disrupted internet connections, poor power supply and the threatening presence of military forces. The association which seems afar as an integration with an India increasingly hostile to Muslims – under a Hindu majoritarian party that looks set to rule for the next 30 years and an opposition that is divided. With increasing separatist insurgency and communal violence, a sudden unity would

<sup>1</sup> Sarkaria Commission "center-state administrative relations in respect of public order duties"



seem to bring in revolts and persistently overpowering majoritarianism mindset.

Following this unprecedented move by the government many legal experts are of the view that nullifying the provision would put the accession of the state to India in jeopardy because the nature of the accession of Jammu and Kashmir into the Union of India is totally different from the merger of all other states. Moreover, there is a debate over whether Article 370 is a part of basic structure of the Constitution and whether it can be amended. Moreover the amendment of the constitution by the parliament, according to Lok Sabha legislation rules, Money Bills and bills seeking to amend the Constitution can't be passed by calling a joint session of Parliament. According to the Constitutional provisions, it is stated in the statute that "Article 108(1) of the Constitution provides that when a Bill (other than a Money Bill or a Bill seeking to amend the Constitution) passed by one House is rejected by the other House or the Houses have finally disagreed as to the amendments made in the Bill or more than six months lapse from the date of the receipt of the Bill by the other House without the Bill being passed by it, the President may, unless the Bill has lapsed by reason of dissolution of Lok Sabha, notify to the Houses by message, if they are sitting, or by public notification, if they are not sitting, his intention to summon them to meet in a Joint Sitting. The President has made the Houses of Parliament (Joint Sittings and Communications) Rules in terms of clause (3) of Article 118 of the Constitution to regulate the procedure with respect to Joint Sitting of Houses. So far, there have been

three occasions when Bills were considered and passed in a Joint Sitting of the Houses of Parliament." And According to constitutional expert Rajiv Dhavan, "Article 370 can't be abrogated because if the government does away with it, the very basis of accession will be in jeopardy. But he asserts that accession of J&K to India is permanent."

To scrap Article 370, the President needed a recommendation of the Constituent Assembly of the state. This amendment of Article 367 equated the Constituent Assembly to the state legislature, and the state legislature was made equal to the governor, and the abrogation was completed. The Constituent Assembly of Jammu and Kashmir was dissolved in 1957. Therefore, the provision of Article 370 may be seen as permanent and cannot be removed by a Presidential order because there is no Constituent Assembly to take consent from. Also, the state's Legislative Assembly cannot have the same powers that the Constituent Assembly had. "The reason why 'Constituent Assembly' was amended to 'state legislature' was to overcome the Supreme Court judgment in the Sampat Prakash<sup>2</sup> versus State of Jammu and Kashmir case. The judgment held that "Article 370 was a permanent provision of the Constitution as the Constitution Assembly of J&K was dissolved". Under Article 368 of the Constitution, Parliament has the power to amend the Constitution. But in view of the Supreme Court's ruling in the Kesavananda Bharati case, Parliament can't amend the basic structure of the Constitution. Hence, obtaining the opinion of the Supreme Court is a must before going ahead with the

<sup>2</sup> Sampat Prakash vs State Of Jammu & Kashmir & Anr on 10 October, 1968, 1970 AIR 1118, 1970 SCR (2) 365



abrogation of Article 370 and therefore the basic structure is beyond the Parliament's powers to alter.

The decision, has been subjected to legal scrutiny on the basis of Firstly, the presidential order using Article 367, an interpretive provision on August 5 that substituted the words "governor" for "the government of Jammu and Kashmir" and the "legislative assembly" for the "constituent assembly" was inherently flawed. The president cannot alter Article 370 using powers granted under the same article. Secondly, since the presidential order substituting the "governor" for the "government of Jammu and Kashmir" was issued during president's rule, the concurrence of the governor to the changes made to Article 370 amounted to the Centre taking approval from itself to remove the state's special status and reorganize it into Union territories. Lastly, the petition said that in substituting "constituent assembly" with "legislative assembly" to give concurrence to the move to render Article 370, the presidential order has assumed that the legislative assembly has such powers. This is flawed, because Article 147 of the Jammu and Kashmir Constitution prohibits such a move.<sup>3</sup> Provided, any changes to the Jammu and Kashmir Constitution needs the approval of two-thirds of the members of the legislative assembly. The governor does not have the powers to make unilateral decisions on behalf of the people of Jammu and Kashmir without consultations as he is an unelected representative in the state. In the Rajya Sabha, the BJP might have been eight seats short of a majority, but the House

passed the J&K Reorganisation Bill with a two-thirds majority. The BJP even had the support of political parties such as the AAP, TDP and BSP.

When the decision to scrap valley's special status hit the Valley, it was greeted with befuddlement and public anger over the abruptness of the move. Most people, however, were simply confused. As the nation is in a frenzy discussing and debating the issue in magnanimous proportions, one glaring voice remains unheard. The voice of the Kashmiri people. They have been silenced, and their democratic rights have been nullified for the foreseeable future. While there are many areas where Article 370 is posing a sense of hindrance in the progress of the state and its people, there is undeniably many paths of advances the rendering of the article has paved. There are many progressive legislations and provisions of the central government which cannot be extended to Jammu and Kashmir because they have not been legislated upon by the state government. However, it is a matter of being opinionated until it falls down upon the time and people to decide whether development actually manifested or not. Further, this abrogation and resulting bifurcation can be challenged for having been adverse in nature to the constitutionality of the code. The abrupt move made by government questionable and is kept under the eye of judicial scrutiny. The Kashmiris are deprived of tranquility in their own land which they deserve along with an end to the cycle of militant attacks, repression, protests and more militant attacks that have devastated the economy. Hence, all in all, the

<sup>3</sup> Mohammad Akbar Lone and Hasnain Masoodi, The petition



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question persists, whether it will be a “win of people” or “win over people”.

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