



Debating Article 370 of Indian Constitution

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Abstract

The paper highlights the myths and realities of article 370 of the Indian constitution. The article 370 endows a special status to the state of Jammu and Kashmir. Here the effort is to dig much deeper into the debate whether article 370 has any relevance in the federal scheme of Indian union vis-à-vis state of Jammu and Kashmir. The paper aims at exploring various schools of thought with regard to article 370 of Indian constitution. It is more of analysis than prescription which constitutes the nature of this piece. The legal aspect of the article also finds a mention in this paper.

Key Words

Article 370; Jammu and Kashmir; Special Status; Accession; Indian Constitution; Accord; Nehru; Indira; Nanda; Sheikh Abdullah; War, India, Pakistan, Federal Scheme, Erosion, Union, State, Debate, Modi, Negotiation, Abrogation, Temporary, Amendment, Constitutional link and Article 306A.

Introducing Article 370

Article 370 (article 306A in the draft) of the Constitution of India endows a special autonomous status to the state of Jammu and Kashmir. It came into force on 26 January 1950. Article 370 is drafted in Amendment of the Constitution section, in Part XXI, under Temporary and Transitional Provisions. And

article 370 provides a constitutional link between the State of Jammu and Kashmir and India. Under article 370 of Indian Constitution, Indian Parliament needs the concurrence of the State of Jammu and Kashmir for applying all other laws to the state except for Defense, Foreign Affairs, Communications and ancillary matters (matters specified in the instrument of accession). Therefore, a separate set of laws is made for the people residing in the state of Jammu and Kashmir, which includes all those related to ownership of property, citizenship as well as fundamental rights as compared to other Indians. Because of this provision, Indian citizens from other states can't buy land or property in the State of Jammu & Kashmir. Under Article 370, the Centre has no power to declare financial emergency under Article 360 in the state. It can declare emergency in the state only in case of war or external aggression. The Union government can therefore not declare emergency on grounds of internal disturbance or imminent danger unless it is made at the request or with the concurrence of the state government. Under this article, the Indian Parliament cannot increase or reduce the borders of the state. The article also affirms that the provisions of Article 238, which was omitted from the Constitution in 1956 when Indian states were reorganized, shall not apply to the state of Jammu and Kashmir. The state legislature has a six-year term, unlike other elected bodies, which have a five-year period,



including the Parliament. The Indian Supreme Court has no jurisdiction in J&K. The state High Court is the highest court of appeal. J&K residents enjoy dual citizenship. A State woman will lose her J&K citizenship if she marries a resident of other states. A Pakistani resident gains J&K citizenship if he marries a J&K citizen. The 1952 Delhi Agreement also specified that the state should have its own flag in addition to the Union flag and they should have the same status. The 1974, famous Indira-Sheikh Accord between the then Prime Minister of India and Sheikh Mohammad Abdullah asserted that the State of Jammu and Kashmir which is a constituent unit of the Union of India, shall, in its relation with the Union, continue to be governed by Article 370 of the Constitution of India. So, article 370 of the Indian Constitution grants a special autonomous status to the State of Jammu and Kashmir.

Introducing the Debate

The Prime Minister of India Narendra Modi in his rally at Lalkar Jammu asserted that article 370 of Indian constitution needs to be debated and revisited. He said, “Irrespective of whether article 370 of the Indian constitution remains a part of the Indian Constitution or not, the time has come for at least a debate to find whether Article 370 has benefited the common man in Jammu and Kashmir. This is the need of the hour. The Congress has unfortunately obfuscated this issue with the rhetoric of secularism to the extent where it is hard to count its merits and demerits” (The Hindu, 2013). This statement of Narendra Modi has generated a debate in academic and nonacademic circles on article 370 of Indian constitution. Some believe that article 370 has outlived its utility while others counter argue that there is no case to abrogate article 370.

Sanjiv Shankaran argues that the mania and obsession with article 370 is misplaced as it has been weakened to a large extent by the applicability of central laws to the state of Jammu and Kashmir. He adds that regardless of its intricate nature, article 370 can't be abrogated. Chandan Nandy makes a counter argument to Shankaran. He contends that article 370 has outlived its utility and needs to be abrogated. His argument flows from the logic that since article 370 was a temporary provision which is no more valid in the federal scheme of Indian political system (Shankaran and Nandy, 2014). Amitabh Mattoo says, “Article 370 was and is about providing space, in matters of governance, to the people of a State who felt deeply vulnerable about their identity and insecure about the future” (Mattoo, 2014). Gulzari Lal Nanda, the then Home Minister of India expressed his opinion on article 370 in 1964 as, “the only way to carry the constitution of India into Jammu and Kashmir is via article 370” (Nanda, 1964). This article has been a result of five month long debates and discussions between the Union of India and the State of Jammu and Kashmir. A. G. Noorani mentions that the State of Jammu and Kashmir is the only state in the Union of India which negotiated the terms of its relationship with the Union. While quoting the Ex. Home Minister of India (Chidambaram), Noorani affirms that the State of Jammu and Kashmir had accessed to India in unique circumstances which makes it a unique problem with unique solution (Noorani, 2011). This manifests that the State of Jammu and Kashmir has a unique identity in the federal structure of India as it had accessed to India under unique circumstance. The chief drafter of Article 370 was Gopalaswami Ayyangar. He argued that Kashmir, for many reasons, was not ready for the integration unlike



other states. The reason for Ayyangar's principal role in drafting this article was the refusal of Dr Ambedkar to draft the article 370 of the Indian Constitution. The first Prime Minister of India and one of the architects of article 370 believed that there was no need to put an end to article 370. He justified that article 370 would be gradually eroded and the erosion would continue till Kashmir is fully integrated with India. Noorani argues that article 370 cannot be abrogated or amended by recourse to the amending provisions of the Constitution of India under article 368, which apply to all other states. He adds that article 368 has a proviso which says that no constitutional amendment shall have an effect in relation to the state of Jammu and Kashmir, unless applied by order of the President under article 370. That requires the concurrence of the state's government and ratification by its constituent assembly (Noorani, 2011). Dr Amin Malik argues that the state of Jammu and Kashmir is mentioned among the states of the Union of India in the First Schedule of Indian Constitution under article 1(2). However, article 370(1) (c) mentions that the provisions of article 1 and of this article shall apply in relation to that state. Therefore article 1 of the constitution of India is applied to the state of Jammu and Kashmir through article 370 of Indian Constitution. He cautions that the abrogation of article 370 would mean that Jammu and Kashmir ceases to be a part of Indian Union (Malik, 2010). Rajiv Dhavan makes a similar point when he says, "the Article 370 can't be abrogated because by abrogating it, the very basis of accession will be in jeopardy (Dhavan, 2014)." B. A. Khan says "If Article 370 was abrogated, then technically and legally the foundation of Jammu and Kashmir's accession to India would cease to exist (Khan, 2014)." Shanti Bhushan

mentions that under Article 368 of the Constitution, the 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. According to him obtaining the opinion of the Supreme Court is a must before going ahead with the abrogation of Article 370. There are doubts over whether Article 370 is a part of the basic structure of the Constitution or not (Bhushan, 2014). However, there are others who believe that article 370 is the biggest impediment in the way of Jammu and Kashmir's integration with the Union of India. Sheru Thapliyal says, "Why should a state of the Indian Union have a special status? It conveys a wrong signal not only to Kashmiris but also to the separatists, Pakistan and indeed the international community that J&K is still to become integral part of India, the sooner Article 370 is done away is better. Thapliyal adds that Nehru's promise that Article 370 was a temporary provision and will get eroded over a period of time has turned out to be a fantasy (Thapliya, 2014).

Concluding the Debate

The debate over article 370 of the Indian Constitution is an intricate one. It is a debate in which least consensus has evolved and emerged. Different legal experts provide different opinions on it and for a layman; it is difficult to understand the evolution, emergence and outcome of article 370. However, on one important area where most of the people agree is the meaning of article 370. All of us know that article 370 provides a special status to the state of Jammu and Kashmir. Some want this status needs a revision and revisit while others believe that it needs to be left untouched. Therefore, to



reach a conclusive conclusion is an uphill task. The better way to conclude is that the Jammu and Kashmir state has a historical importance in the federal setup of India. It is a unique state as affirmed by the various governments at the centre from time to time. One opinion is that the State of Jammu and Kashmir is the unfinished job of 1947 partition of India which can only be finished with the right to self determination. The other opinion is that the state of Jammu and Kashmir has a special status in the constitutional scheme of India. With the passage of time, some more opinions have evolved (self-rule and achievable nationhood) with the evolution of different political parties. For the sake of classification, the first opinion holders are known as separatists while the rest of the opinion holders are called as mainstream politicians. The separatists have a clear agenda of not fighting the elections within the ambit of the Indian constitution. On the other hand, the mainstream politicians believe in elections within the ambit of Indian constitution. This makes the election of the state of Jammu and Kashmir a unique exercise. On the one hand, there are people who boycott elections while on the other hand there are people who campaign for winning elections. Some believe article 370 provides space to the separatists while others believe that article 370 is a route of integration between the state of Jammu and Kashmir and India. Some main stream parties in the state have an agenda that the state of Jammu and Kashmir is a political issue which needs a political solution. This makes the state politics more complex and complicated. It is belief in the dictionary of world politics that every problem has a solution. Debating article 370 will not resolve the issue. The better is to debate the methodology through which this long pending issue can be resolved. And in my

opinion the methodology of rationality and sincerity can be very effective in resolving this serious issue.

References

- Behera C. Navnita (2006) *Demystifying Kashmir*, Brookings Institution Press.
- Bhattacharjea, Ajit (2008), *Sheikh Mohammad Abdullah: Tragic Hero of Kashmir*, Faridabad: Roli Books.
- Bushan, Shanti (2014), "Abrogation of Article 370 a very complex affair". Accessed on 13. 12. 2014. Url: <http://ibnlive.in.com/news/abrogation-of-article-370-a-very-complex-affair-say-legal-experts/474895-3-245.html>
- Dhavan, Rajiv (2014)), "Abrogation of Article 370 a very complex affair". Accessed on 13. 12. 2014. Url: <http://ibnlive.in.com/news/abrogation-of-article-370-a-very-complex-affair-say-legal-experts/474895-3-245.html>
- Ganguly, Summit (1997), *The Crisis in Kashmir: Portents of War, Hopes of Peace*, Woodrow Wilson Center Press: Cambridge University Press.
- Khan N. (2014)), "Abrogation of Article 370 a very complex affair". Accessed on 13. 12. 2014. Url: <http://ibnlive.in.com/news/abrogation-of-article-370-a-very-complex-affair-say-legal-experts/474895-3-245.html>
- Malik. Amin (2010), *The Role of national Conference in Politics of Jammu and Kashmir*, Tahzeeb Publishers.

Mattoo, Amitabh (2014), “*Understanding Article 370*”. Accessed on 30. 11. 2014. Url: <http://www.thehindu.com/opinion/lead/understanding-article-370/article5426473.ece>

Noorani, A. G. (2011), *Article 370: A Constitutional History of Jammu and Kashmir*, Oxford: Oxford University Press.

Sanjiv, Shankaran and Chandan, Nandy, (2014), “*BJP may not push for abrogation of Article 370 in manifesto for J&K polls*”. Accessed on 30. 11. 2014. Url: <http://blogs.timesofindia.indiatimes.com/toi-editorials/bjp-may-not-push-for-abrogation-of-article-370-in-manifesto-for-jk-polls/>

Thapliyal, Sheru, (2014), “*Article 370: The untold story*”. Accessed on 10. 12. 2014. Url: <http://www.indiandefencereview.com/news/article-e-370-the-untold-story/>

The Hindu, (2013), “*Modi seeks debate on Article 370*” accessed on 01. 12. 2014. Url: <http://www.thehindu.com/news/national/modi-seeks-debate-on-article-370/article5410739.ece>

Widmalm, Sten (2006), *Kashmir in Comparative Perspective: Democracy and Violent Separatism in India*, Oxford: Oxford University Press.

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