



Special Provisions in the Indian Constitution with Reference to Abrogation of Article 370 and its Implications

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Abstract

The Constitution of India Part XXI Articles 369-392 contains special provisions for some states in India. These were known as “Temporary, Transitional and Special Provisions”. Article 369 is “Temporary power to Parliament to make laws with respect to certain matters in the state list as if they were matters in the concurrent list”. Article 370 contains about temporary provisions with respect to the State of Jammu and Kashmir. Articles 372-392 different powers of the President, the Supreme Court and other sub-ordinate Courts, the Parliament etc. regarding abrogation, alteration and duration and composition of some State Legislative Assemblies. On August 5 2019, both Houses of the Parliament of India voted in favors of a resolution tabled by Home Minister Amit Shah to revoke the temporary special provision granted to the state of Jammu and Kashmir under Article 370. It was followed by Executive order of the President of India stating “Article 370 has been scrapped”. It was followed by Bi-furcation of the state into two Union Territories- Jammu and Kashmir with Legislature and Ladakh Union Territories without Legislature. The main concern of this paper will be abrogation of Article 370 recently by the Parliament of India and its impact and possible impacts.

Keywords: Constitution, Special Provisions, Parliament, Supreme Court.

Introduction

The Constitution of India Part xxi Articles 369-392 contains special provisions for some state in India. These were known as “Temporary, Transitional and Special Provisions’. Article 369 is “Temporary power to Parliament to make laws with respect to certain matters in the state list as if they were matters in the concurrent list”. Article 370 contains about “Temporary provisions with respect to the State of Jammu and Kashmir”. Article 371 is a “Special Provisions with respect to the States of Maharashtra and Gujarat “. Article 371A is a “Special Provision with respect to the State of Nagaland”. Article 371B contains “Special

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Provisions with respect to the State of Assam”. Article 371 C is” a special Provision for the State of Manipur”. Article 371 D and 371E concerns about a special Provisions to the State of Andhra Pradesh and establishment of Central University in Andhra Pradesh”. Articles 371 F, G, H and I contains” Special Provisions to the States of Sikkim, Mizoram, Arunachal Pradesh and Goa respectively”. Articles 372-392 different powers of the President, the Supreme Court and other sub-ordinate Courts, the Parliament etc. regarding abrogation, alteration, duration and composition of some State Legislative Assemblies¹.

Under Article 1 of the Indian Constitution, the state of Jammu and Kashmir (J&K) is a constituent state of Indian Union and its territory forms a part of the territory of India. On the other hand, Article 370 in Part XXI of the Constitution grants a special status to it. Accordingly, all the provisions of the Constitution of India do not apply to it. It is also the only state in India which has its own separate state constitution ie, the Constitution of Jammu and Kashmir. The special status enjoyed by Jammu and Kashmir is unique and unparalleled to a special status enjoyed by other eleven states of Indian Union under Article 371². Insertion of Article 370 in the Constitution is a result of signing of “Instrument of Accession” between Prime Minister J. L. Nehru and Maharaja Hari Singh who is the ruler and King of Jammu and Kashmir during Indian independence. As per the agreement the Government of India will have control over Jammu and Kashmir upon three areas-External affairs, Defense and Communication only. Simultaneously, the Parliament also added Article 35 A for prevention of acquisition and transfer of land to Non-Residence Kashmiris and inter-case marriage³.

Surprisingly, On August 5 2019 the Union Home Minister introduce “The Jammu and Kashmir Re-organisation Bill in the Parliament and the bill was unanimously passed by both houses of the Parliament after a very hectic debate and it was followed by the announcement of Home Minister about the Bill., In an announcement with massive repercussion for Jammu and Kashmir, on the same day Union Home Minister Amit Shah announced in Rajya Sabha that the Government has repealed Article 370 of the Constitution which grants special status to the state of J&K. The government also decided to bifurcate the state into two Union Territories vis-à-vis Jammu and Kashmir, which will have a legislature, and Ladakh, which will be without a Legislature. This announcement was immediately followed by massive uproar in the Upper House with opposition M.Ps protesting in the well of the House. In the Kashmir valley three of the Jammu and Kashmir prominent politicians- Mehbooba Mufti, Omar Abdullah and Saijad Lone are under house arrest and a massive security- build up in the State. Internet services and mobile services have been suspended in several places and all public gatherings are banned in Srinagar District and Section 144 of CRPC was imposed from midnight⁴. A large number of Security forces were deployed in the different places of the State to control violence uproar and possible happening of anarchy. Under severe criticism from different sides, the government justifies the move as necessary and unavoidable re-arrangement of India’s internal administration.

What is Article 370 and Article 35a Guaranteed by Constitution of India?

For an in-depth study of implications of abrogation of Article 370 let us discuss about Article 370 along with Article 35A guaranteed by the Constitution to the state of Jammu and Kashmir in brief:

Article 370: In pursuance of the commitment made by the government of India at the time of inclusion of J&K to Indian Union, Article 370 was incorporated in the Indian Constitution. It is defined under part xxi of the Constitution which deals with Temporary, Transitional and Special Provision. It clearly states that the provision with respect to the state of Jammu and Kashmir are only temporary not permanent. It became operative on 17 November 1952⁵.

Though in this part (xxi) special provisions are given to the states of Maharashtra, Gujarat, Nagaland, Assam, Arunachal Pradesh, Sikkim, Mizoram and Goa, the special power and provision of J&K are nowhere when compared. According to Article 370 autonomous state status is given to J&K, it restricts Indian Parliament to make any laws for the state and it can only preside over the subject like defence, External Affairs, and Communication. It allowed the state to have a separate constitution and separate flag. Laws relating to Union and Concurrent list can be passed only after consultation with the state government.

Article 35A: If we said about Article 370, it is important to know about Article 35A because it is the brain child of Article 370. Article 35A is a provision incorporated in the constitution giving the state of J&K Legislature a carte blanche to decide who all are 'permanent resident' of the state and confer on them special rights and privileges in public sector jobs, acquisition of property in the state, scholarship and other public aid and welfare. It was added to the constitution as a testimony of special consideration which Indian government accorded to the 'permanent residence' of J&K⁶. Critics said this article as "unconstitutional and contradicted with Fundamental Rights which was provided under part iii of the constitution"⁷.

Implications of the Abrogation of Article 370 by the Indian Government

The abrogation of Article 370 will have a big impact in the lives of Kashmir residence in general and internal administration of India in particular. It also has a great impact on Indo-Pakistan relationship. In a historic move, Article 370 has been revoked in Jammu and Kashmir on 5th August 2019. In preparation for this move, the state witnessed increased security deployment over the weekend while top political leaders were placed under house arrest and curfew was imposed on Monday morning. The revocation of Article 370 and 35A implications and possible implications can be discussed as under⁸:

- **No more special status for the State:** Article 370, which came into force in 1952, empowered J&K to be a near autonomous state since it limit, the centre's authority to just external affairs, defence, finance and communication. This provision allowed the state to have a Sadar-e-Riyasat for governor and prime minister in place of chief minister till 1965 as well as its own constitution and flag. But, now these things shall cease to exist due to removal of Article 370xiii. Special status enjoyed by the state is no more after the abrogation of this Article.
- **Extension of Union Government Authority over the State:** With the abrogation of Article 370, the center control over the state is re-affirm by conferring more power

and authority to it. The passage of ‘The Reorganization of Jammu and Kashmir Bill 2019’ allows the central government to bifurcate the state into two Union Territories i.e., The Union Territory of Jammu and Kashmir with Legislature and the Union Territory of Ladakh without Legislature. It extends the control and authority of Union government to these newly created Union Territories⁹.

- ***Extension of Parliamentary Control over Jammu and Kashmir:*** Prior to the removal of Article 370, the Union Parliament has no right to make laws on J&K without the approval of the Legislature of the state no Parliamentary laws are applicable in the state. As per the Constitution (Application to Jammu and Kashmir) Order, 2019, in place of this special status all the provisions of the constitutions are applicable and it also extends parliamentary control over the state. It can make any laws towards the Union territories without the consent of the Legislature¹⁰.
- ***Stopping of Unique Privileges under Article 35A:*** Article 35A, which comes under Article 370, prevented non-permanent residents of J&K from permanently settling in the state, buying immovable property, Acquiring land, applying for government jobs or any kind of scholarship, aids as well as other public welfare projects. The people of Jammu and Kashmir now lost these benefits associated with the permanent resident certificate¹¹. Right now every citizen of India can move and settle here and could also buy land and other immovable properties.
- ***Loss of Legislative Powers:*** J&K Legislative Assembly will no longer be in a position to clear any significant Bills within the state- the balance of power was shifted in favor of the Union Government. Significantly, in the absence of an elected government in the state the Presidential order reportedly states that the State governor shall exercise the powers of the elected members. The so called Legislative Assembly of the state has been dissolved¹².
- ***Loss of Preferential Employment Opportunities:*** The Kashmir’s enjoys special opportunities to get government jobs in the state under Article 35A. According to this Article no outsiders could bag a government job in the state. Companies in the state were even forced to hire any locals. The revoking of this rule intends to level the playing field. In a blog post in March, BJP stalwart and former finance minister Arun Jaitley had claimed that Article 35A crippled J&K’s ability to raise financial resources- despite not having enough of it- and denied its people a booming economy, economic activity and jobs. “ No investor is willing to set up an industry, hotel, private educational institutions or private hospitals since he can neither buy”¹³.
- ***No more Separate Constitution:*** Earlier Jammu and Kashmir was the only state in the country with its separate constitution as per the provision mentioned in Article 370, a ‘temporary provision’ that grants power to the state to have its own constitution. But now, the government’s decision to revoke Article 370 revoked the special provision that grants power to J&K to have its own constitution. With the revocation of this Article, J&K will adhere to the constitution of India, much like the rest of the country¹⁴. After the Article has been scrapped no more separate constitution for the state.
- ***Right to buy Property:*** Earlier, Article 35A , which is based on Article 370, empowered the state legislature to define the state’s ‘permanent residents’ and grant

them special rights and privileges. No outsiders could buy land and property in the state. But, now with the scrapping of Article 370 and hence Article 35A people from outside J&K will also be able to buy property in the state and settle there¹⁵.

- **Law and Order:** Earlier, law and order was under the control of state government. Now, following the bifurcation of the state into two Union Territories ie, J&K and Ladakh, the law and order machinery have to be restructured. The government can structure the power-sharing model on the lines of either NCT Delhi or Puducherry, both Union Territories. In Delhi, law and order is under the control of the Union Government, while in Puducherry, law and order is in the state subject xxi.
- **Applicability of Central Laws:** Earlier, the central government had to seek approval of the state legislature to draft and enact laws. Now, Central laws will automatically apply to the state without consulting the legislature of J&K. The Union government could imposed different types of emergencies especially, Article 356 (State emergency or President Rule) on the basis of Article 365 (Failure to comply with the directives of Union government) and breakdown of constitutional machinery in the state¹⁶.
- **Tensions and Strain between India and Pakistan:** As soon as revocation of Article 370 by the Indian government, a swift and sharp reaction was taken by Pakistani Prime Minister Mr. Imran Khan. He expel Indian High Commissioner of Islamabad, and it was followed a press conference by foreign minister Shah Mahmud Querasi declaring all diplomatic ties between India and Pakistan has been stopped. And he added wrong action of India shall be moved to United Nations Security Council meeting and this announcement was quickly followed by China. Pakistan along with her allies including China strongly condemns India's decision on Kashmir. But India claims it as restructuring of her internal administrative system and no need to intervene the third party. Pakistan failed to draw international support in the UNSC meeting and the resolution favours India's stand on Kashmir issue. But, the relationship between India and Pakistan was badly deteriorated due to scrapping of Article 370¹⁷.

Criticism

- a) Terming the revoking of Article 370, P. Chidambaram, who is former finance minister and senior congress leader "a catastrophic step" and said it marks a "black day" in the constitutional history of India¹⁸.
- b) "No Article 370 reaction: the darkest day in democracy"- Mehbooba Mufti, former Chief Minister of J&K¹⁹.
- c) The mechanism that the government used to railroad its rigid ideological position on J&K through the Rajya Sabha was both hasty and stealthy. This move will strain India's social fabric not only its impact on Jammu and Kashmir but also in the portends it holds for federalism, Parliamentary Democracy and diversity.
- d) A purported process to change the constitutional status of a sensitive border State has been achieved without any legislative input or representative contribution from its people.

- e) The entire exercise of getting Article 370 of the constitution effectively abrogated has been marked by executive excess.

Rationale behind this Move²⁰

- a) Article 370 has prevented J&K to merge with India rather than being a basis of its merger.
- b) Article 370 was seen as discriminatory on the basis of gender, class, caste and place of origin.
- c) Post the repeal of Article 370, doors to private investment in the state would be opened, which would increase the potential for development.
- d) Increased investments would lead to increase job creation and further betterment of socio-economic infrastructure in the state.
- e) Opening of buying of lands would bring in investment from private individuals and multinational companies and give a boost to the local economy.

Conclusion

Part XXI of the Indian Constitution from Article 370-370(i) contain special provisions for different states of India Union. This is a symbol of co-operative federalism. But, recently the revocation of Article 370, which offers special status for the state of Jammu and Kashmir, has a deep impact on Indian politics. It has tangible and intangible impact on the lives of the Kashmiri in general and India as a whole in particular. From our analysis it is clear that the abrogation of Article 370 along with Article 35A has negative and positive impact. It is too early to take judgment about whether it is good or bad for Indians. The intension to integrate the J&K with Indian Union without the consent of the people of the state could have unexpected and dangerous consequences.

End Notes and References

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