



Jammu and Kashmir's Special Status: An Analysis

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ABSTRACT: Article 370 has been often a point of discussion regarding the Jammu and Kashmir state. The article is rooted in the unique historical past of the J&K state. The fact remains that Kashmir politics is inseparably tied with article 370. The article encapsulates within itself all the vicissitudes of the historical past of Kashmir especially that of 1947 and the related developments. There is a need to decode the nature of this article and contextualize its emergence within the broader parameters of Kashmir's unique political and historical past. This article is an effort in that direction. The historical tracing of the emergence of this special constitutional provision has been specially focused with a discussion of its contentious nature.

KEYWORDS: Instrument of Accession, Article 370, Princely State, Partition of India.

I. INTRODUCTION

Article 370 is arguably the most contentious provision of the constitution of India. It deals exclusively with Jammu & Kashmir State that came under the administrative control of the Government of India after the Maharaja of the Jammu and Kashmir state signed the Instrument of Accession with the Indian Dominion. Besieged by controversy right from its draft stage, Article 370 has been the subject of heated debate ever since the Constitution came into full effect from 26th January 1950. While one section of the Indian polity has strongly demanded its abrogation, others have vehemently opposed this demand lock stock and barrel. The analysis of the historical context in which this article came into existence becomes important.

Lord Mountbatten as the then Crown Representative addressed the British Chamber of Princes on July 25, 1947. In this address he advised the Princes and their representatives, although legally they had become independent, to accede to one or other of the Dominions before the transfer of power, keeping in mind the "geographical contiguity" of their states (KCA, 1947, p. 8765).

A state could accede to either Dominion by executing an Instrument of Accession signed by the Ruler and accepted by the Governor-General of the Dominion concerned. Legally, the interests of India and Pakistan in a particular state had no relevance; the decisions whether to accede or not and to which Dominion were not only independent of such considerations but an exclusive right of the Ruler (Gupta, 1957, p. 126).

On October 20 1947, Srinagar trembled before the danger of the tribesmen's invasion (Korbelt, 1954, p. 77). The invasion caused great devastation. By October 24th even the chronic indecision of Hari Singh had given place to deep seated alarm and to a genuine concern for his personal safety (Mores, 1956, p. 390). The raiders were fast approaching Srinagar, the summer capital of Kashmir; the Maharaja was extremely nervous. The Dogra Army and the National Militia force formed by the National Conference, tried to hold the enemy's onrush but "prolonged resistance to well trained and well equipped invaders was out of the question" (KFA, n.d.). The Maharaja saw his dream of independent Kashmir shattered like a 'house of cards'. He thought of accession to save his State. Panikar suggests "...it was only as a last resort that the Maharaja approached the Dominion of India to accept the accession" (Panikar, 1948, p. 240).

Accession and Kashmir

The Instrument of Accession was in no way different from that executed by some 500 other states. It was not subject to any exceptions. Thus, the Maharaja of Jammu and Kashmir, the ruler of one of the Princely States in India, as mentioned above, acceded to the Indian Dominion in the wake of stormy events which followed the tribal raid in October, 1947 (Teng, 1977). As a condition of its accession to India, Kashmir was given a special status in terms of article 370 of the constitution. The Kashmiris demanded a special status in order to ensure that the cultural heritage of Kashmir was preserved. In fact, Sheikh Abdulla felt that the Indian political system will function more efficiently at a regional level of federal units than at an all-India level under a unitary form of government.

The Instrument of Accession, which the ruler of Jammu and Kashmir was made to sign, reads as under (Teng, 1977).

Whereas the Indian Independence Act, 1947, provides that as from the fifteenth day of August, 1947, there shall be set up an independent Dominion known as INDIA, and that the Government of India Act 1935 shall with such omissions, additions, adaptations and modifications as the Governor General may by order specify, be applicable to the Dominion of India.

And whereas the Government of India Act, 1935, as so adapted by the Governor General, provides that an Indian State may accede to the Dominion of India by an Instrument of Accession executed by the Ruler thereof.

Now, therefore, I Shriman Inder Mahinder Rajrajeswar Maharajadhiraj Shri Hari Singhji, Jammu & Kashmir Naresh Tatha Tibbet adi Deshadhipati, Ruler of Jammu & Kashmir State, in the exercise of my Sovereignty in and over my said State do hereby execute this my Instrument of Accession and

1. I hereby declare that I accede to the Dominion of India with the intent that the Governor General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall by virtue of this my Instrument of Accession but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the State of Jammu & Kashmir (hereinafter referred to as "this State") such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India, on the 15th day of August 1947, (which Act as so in force is hereafter referred to as "the Act").

2. I hereby assume the obligation of ensuring that due effect is given to provisions of the Act within this State so far as they are applicable therein by virtue of this my Instrument of Accession.

3. I accept the matters specified in the schedule hereto as the matters with respect to which the Dominion Legislature may make law for this State.

4. I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor General and the Ruler of this State whereby any functions in relation to the administration in this State of any law of the Dominion Legislature shall be exercised by the Ruler of the State, then any such agreement shall be construed and have effect accordingly.

5. The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or the Indian Independence Act, 1947, unless such amendment is accepted by me by Instrument supplementary to this Instrument.

6. Nothing in this Instrument shall empower the Dominion Legislature to make any law for this State authorizing the compulsory acquisition of land for any purpose, but I hereby undertake that should the Dominion for the purpose of a Dominion law which applies in this State deem it necessary to acquire any land, I will at their request acquire the land at their expense, or, if the land belongs to me transfer it to them on such terms as may be agreed or, in default of agreement, determined by an arbitrator to be appointed by the Chief Justice of India.

7. Nothing in this Instrument shall be deemed to commit in any way to acceptance of any future constitution of India or to fetter my discretion to enter into agreement with the Government of India under any such future constitution.

8. Nothing in this Instrument affects the continuance of my Sovereignty in and over this State, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.

9. I hereby declare that I execute this Instrument on behalf of this State and that any reference in this Instrument to me or to the Ruler of the State is to be construed as including a reference to my heirs and successors.

Given under my hand this 26th day of October, nineteen hundred and forty seven.

Hari Singh

Maharajadhiraj of Jammu and Kashmir State

The Maharaja of Jammu and Kashmir, thus, acceded the following subjects to the Indian dominion (Ghosh, 199, p. 229):

- Military, air and naval forces of the Dominion, armed forces raised or maintained by the Dominion or maintained by the State operating with any of the armed forces of the Dominion, naval, military and air force works and the administration of the Cantonments arms, ammunition and explosives;
- External affairs, treaties, and agreements with other countries, extradition, admission, emigration, expulsion of nationals, regulation of movement of the foreign nationals, pilgrimages to places outside India and nationalization;
- Communications, posts and telegraphs, telephones, wireless, broadcasting and other communications, railways, shipping and navigation, admiralty jurisdiction, ports and port authorities of delimitation-ports, port quarantine, air craft and air navigation; aerodromes, air traffic, light houses, beacons, safety for shipping and air craft, carriage of passengers and goods by sea and air and police force of the railways;

- Election to the Dominion Legislature, offences against laws with respect to any of the matters transferred to the Dominion of India, inquiries and statistics with regard to these matters and the jurisdiction of all courts with regard to these matters.

The State reserved powers in regard to all the residuary subjects and the terms of the Instrument of Accession were not to be altered by any subsequent amendment of the Indian Independence Act, unless such an amendment was accepted by the Ruler of the State by a supplementary instrument. The accession stipulated a minimal transfer of power to the Dominion Government and the State's Ministry offered to the Rulers of the States to accept the accession on a basis whereby they would be permitted to retain most of the prerogatives they exercised under the British Paramountcy.

The accession assured the state all benefits of an independent Kashmir without sacrificing the status of being a part of the larger Indian federation. It conferred maximum autonomy on the state.

THE SPECIAL STATUS OF JAMMU AND KASHMIR

The article 370 constitutionalised this arrangement. Article 370 envisages a different type of centre-state relationship. It (as it stood by 26th January 1950) reads as under (Anand, 2004):

1). Temporary provisions with respect to the State of Jammu and Kashmir.

Notwithstanding anything in this Constitution,-

(a). the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b). the power of Parliament to make laws for the said State shall be limited to:-

(i). those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii). such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation.- For the purposes of this article, the Government of the State means the person for the time being recognized by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(c). the provisions of article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify :

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

2). If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

3). Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

Article 370, which encapsulated the Instrument of Accession, thus, provides for the following:

➤ The union parliament is to legislate on such matters in the List I and List III of the Seventh Schedule of the constitution as correspond with those mentioned in the Instrument of Accession signed by the King of Maharaja. The president of India can identify subjects on Lists I and III which correspond with those broad subjects mentioned in the Instrument of Accession but the order of the President specifying such subjects must be made in consultation with the state government.

➤ The president can extend the legislative power of parliament in respect of subjects in the Union and Concurrent lists of the Seventh Schedule included in the Instrument of Accession by an order which can be made only with the concurrence of the state government.

➤ Article I of the constitution of India, which defines the territories of India, and article 370 itself apply to Kashmir *ipso facto*. All other articles of the constitution of India may be extended to Kashmir by an order to be issued by the president under article 370 only in consultation with the state government of Jammu and Kashmir if it pertains to matters regarding the legislative power of parliament, and with the concurrence of

parliament, and with the concurrence of the state government if it pertains to matters other than those regarding the legislative powers of parliament.

The words 'consultation' and 'concurrence' show the meticulousness observed in preserving the autonomy of Jammu and Kashmir.

The state of Jammu and Kashmir is a part of Indian territory as per the accession that the ruler of the Jammu and Kashmir state executed on 26.10.1947 and is included in the list of the first schedule of the institution. But the position of this state differs from others states in the following respects:

- a) the provisions dealing with governmental machinery in the state of the union do not apply to the state of J&K.
- b) the legislative authority of the Union Parliament in respect of this state is limited to those matters in the Union and current list, which are declared by the president, in consultation with the Government of State, to conform to the terms of the Instrument of Accession.
- c) only such of the provisions of the constitution shall apply to this state as the president may by order specify.

A. G. Noorani (2000) maintains that article 370 embodies six special provisions for Jammu and Kashmir:

1. It exempted the State from the provisions of the Constitution providing for the governance of the States. Jammu and Kashmir was allowed to have its own Constitution within the Indian Union.

2. Parliament's legislative power over the State was restricted to three subjects - defence, external affairs and communications. The President could extend to it other provisions of the Constitution to provide a constitutional framework if they related to the matters specified in the Instrument of Accession. For this, only "consultation" with the State government was required since the State had already accepted them by the Instrument.

3. If other "constitutional" provisions or other Union powers were to be extended to Kashmir, the prior "concurrence" of the State government was required.

4. The fourth feature is that that concurrence was provisional. It had to be ratified by the State's Constituent Assembly. Article 370(2) says clearly: "If the concurrence of the Government of the State... be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon."

5. The fifth feature is that the State government's authority to give the "concurrence" lasts only till the State's Constituent Assembly is "convened". It is an "interim" power. Once the Constituent Assembly met, the State government could not give its own "concurrence". Still less, after the Assembly met and dispersed. Moreover, the President cannot exercise his power to extend the Indian Constitution to Kashmir indefinitely. The power has to stop at the point the State's Constituent Assembly drafted the State's Constitution and decided finally what additional subjects to confer on the Union, and what other provisions of the Constitution of India it should get extended to the State, rather than having their counterparts embodied in the State Constitution itself. Once the State's Constituent Assembly had finalized the scheme and dispersed, the President's extending powers ended completely.

6. The sixth special feature, the last step in the process, is that Article 370(3) empowers the President to make an Order abrogating or amending it. But for this also "the recommendation" of the State's Constituent Assembly "shall be necessary before the President issues such a notification".

Article 370 cannot be abrogated or amended by recourse to the amending provisions of the Constitution which apply to all the other States; namely, Article 368. For, in relation to Kashmir, Article 368 has a proviso which says that no constitutional amendment "shall have 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.

Jammu and Kashmir is mentioned among the States of the Union in the First Schedule as Article 1 (2) requires. But Article 370 (1) (c) says: "The provisions of Article 1 and of this Article shall apply in relation to that State". Article 1 is thus applied to the State through Article 370.

The constitutional position to the state referred to above under article 370, made the state of J&K distinct as compared to all other states of India. However, the constitution put the article 370 as temporary provision of the constitution.

II. CONCLUSION

In recent years there has been insistent emphasis on the recognition of sub-national diversities of India as components of the Indian federal system. Article 370 actually encapsulates that sub-national identity which the state of Jammu and Kashmir came to have due to its peculiar accession episode. The founding fathers did not recognize any sub-national boundaries, which divided India, into the denominations of the federal structure, they devised. The Provinces and the States were cultural, linguistic and religious pluralities, and their political boundaries did not synchronize with any specific sub-national gradients (Frankel, 2005, p. 693). The one

exception to this principle, adopted by the framers of the Indian constitution, was the special position; the Jammu and Kashmir state was accorded. The Jammu and Kashmir State was recognized as an autonomous identity, based upon the Muslim majority character of its population (Teng, 1990). The representatives of the Jammu and Kashmir State, participated in the deliberations of the Constituent Assembly of India, but the National Conference which formed the Interim Government in the State, favored the exclusion of the State from the constitutional organization of India. Consequently special constitutional provisions were embodied in Article 370 of the Constitution of India for the State. The state was reserved the right to convene a separate Constituent Assembly was convened in 1951. In November 1956, it completed the task of framing the Constitution of the State. The Constitution of the state was brought into force on 26 January 1957. The Jammu and Kashmir state has ever been governed by two sets of constitutional provisions, the first envisaged by the constitution of Indian state. The position of the state, in the Indian constitutional organization has been determined by the constitution of India and the instruments of the State Government have been devised by the constitution of the state. Indian federalism did not represent the division of political authority on the basis of distribution of powers between the federal authority and sub-national identities. It was based upon the division of political authority which was not related to sub-national pluralities in India and which underlined the integration as well as the autonomy of political power in a concrete political system. The Indian federal organization was embedded in an environment which was culturally plural and diverse, but its boundaries were clearly defined, and did not overlap with the cultural, linguistic or religious pluralism of the Indian society. The Jammu and Kashmir State alone involved a variation of the federal principles the Constitution of India envisaged, as it symbolized a federal relationship which was based upon the recognition of special political identity of the State. When the Constitution of India was framed, the National Conference claimed a separate political identity for the State on the basis of the Muslim majority character of its population (Teng, 1990, p. 42). The institutionalization of political power on the basis of the recognition of the State, as a sub-national identity, a principle which the Constitution of India did not recognize in respect of any other religious denomination, had deep and wide repercussion on the evolution of the political personality of the State and its relations with the rest of the country.

There were many forces both inside the state and outside the state which were strongly opposing the inclusion of Article 370 in the Indian Constitution. Among them Praja Parishad became one of the prominent parties. Small-scale protests against Abdullah's government had been going on for some time in Jammu, mainly through this party formed by Bal Raj Madhok in 1947. Its main demands were for the abrogation of Article 370 and the complete merger of Jammu and Kashmir with India. Opposition to the Delhi Agreement took the form of violent demonstrations, student protests (e.g., against the hoisting of the Kashmiri flag in colleges), hunger strikes and pro-Maharaja chants.

In order to reduce the Kashmiri Muslims domination, the Parishad proposed that Hindu and Sikh migrants from Pakistan to settle in the vale.

The Praja Parishad movement received strong encouragement from Hindu groups within India, notably the Jana Sangh. Formed by Shyama Prasad Mookerjee in 1951, one of the four points for 'strengthening' Indian unity listed in its manifesto, was the full integration of Jammu and Kashmir into the Indian Union. In making this demand, the Jana Sangh was motivated not only by concern for fellow Hindus in Jammu, but also by its desire to 'overthrow' the Indian government's secular policy and have Hinduism be officially acknowledged as the state religion. As part of its propaganda, the Jana Sangh argued that giving Jammu and Kashmir a special status and a high degree of autonomy, would encourage Muslim separatism and cause it to follow the example of Pakistan. The Sangh also organized demonstrations in India to support those taking place within Jammu. Thus the existence of article 370 became controversial and the same controversies have continued up till now.

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