

Article 370: Abrogation and Its Implications

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Article 370 grants a special status to disputed territories of the State of Jammu and Kashmir (J&K), under Indian control, in the Indian Union, and regulates the relationship between India and the State. But Bhartiya Janta Party (BJP) seeks to completely integrate the state of J & K into the Indian Union and extend full constitutional framework to it. Consequently, if a BJP led government in India indeed amends or abrogates Article 370 it will have far reaching implications on the nature of dispute as it will transform the relationship between India and the people of J&K. It will change the role of India as party to the dispute. Moreover, it will also undermine the commitments India had made at the United Nations, when it referred the dispute to the world body, and agreed to abide by the UN Security Council resolutions. The BJP has, in last few decades, made abrogation of Article 370 from the Indian Constitution one of its core agenda points. This was evident during election campaign of 2014 when BJP led by current Prime Minister of India Narendra Modi called for debate on, and eventual abrogation of Article 370 from the Indian Constitution.

BJP's opposition to Article 370 goes back to early 1950s when Dr. Syama Prasad Mookerjee, leader of its predecessor party Bharatiya Jana Sangh (BJS) had opposed Indian National Congress led by Jawaharlal Nehru to grant Kashmir the special status with its own flag and then a Prime Minister. He termed the arrangement as further division of India as it gave rise to prospects of self-rule and even independence.¹ Thus, full integration of J&K remained political objective earlier of BJS and now of BJP. In 1990s, BJP also called for abrogation of Article 370 and its manifesto for election 2014 also advocated the same.²

In this context, the first section of this essay will situate Article 370 in the context of the Kashmir dispute between India and Pakistan and explore the provisional arrangements made in the article. The second section will examine the recent domestic politics (reactions and opinions of leading political parties) surrounding the Article 370 debate in India and the reactions emanating from J & K during the recent election campaign after BJP announced its intent. The third section will

explore the international dimension of the Article 370 and the question: can integration of J&K into Indian Union be replaced by Indian commitment to determine fate of the State through plebiscite made at UN? The fourth section will look into possible ramifications of abrogation of the Article 370 for India, Pakistan and the Kashmir dispute.

Question of States and Evolution of Kashmir Dispute

Origins of Kashmir dispute lie in the fact that on the eve of Partition, the State of Jammu and Kashmir (J&K) was among the 562 princely Indian states under the suzerainty of the British Crown. It meant while not being part of British Indian territories, they were subjects of British Crown for defense, foreign affairs, communications and currency.³ The status of princely states and their legal course on the eve of transfer of power from British crown to successor states was defined in a Memorandum of Cabinet Mission in May 1946, thus:

His Majesty's Government will cease to exercise power of paramountcy. This means that the rights of the States which flow from their relationship with the Crown will no longer exist and that all the rights surrendered by the States to the paramountcy will return to the States. Political arrangements between the States on the one side and the British Crown and British India on the other will thus be brought to an end. The void will have to be filled either by the States entering onto a federal relationship with the successor Government or Governments in British India, or failing this, entering into particular political arrangement with it or them.⁴

Therefore, with the lapse of paramountcy resulting from transfer of political and administrative power to Dominions of India and Pakistan, the Indian princely states became theoretically sovereign, and could choose to accede to either of the two Dominions or remain independent. Section 7(1)(b) of the Indian Independent Act, 1947, passed by the British Parliament, stated that from August 15, 1947 when British Crown transfers power to new Dominions, 'suzerainty of His Majesty over the Indian States lapses' and consequently "all treaties and agreements in force" between them.⁵

The political positions of Muslim League and Indian National Congress, the leading political parties, at that time also requires mentioning. Mr. Jinnah, then Governor-

General Designate of the still to be born Dominion of Pakistan in a statement on July 30, 1947, said:

The legal position is that with the lapse of paramountcy on the transfer of power by the British, all Indian States would automatically regain full sovereign and independent status. They are therefore free to join either of the two Dominions or remain independent.⁶

On the other hand, Indian National Congress in a resolution passed on June 15, 1947 stated that:

“The lapse of paramountcy does not lead to the independence of the state...it is clear that the people of the States must have a dominating voice in any decisions regarding them.”⁷

Theoretically, states had freedom to choose any dominion or remain independent, but, then British Viceroy, Lord Mountbatten advised princely rulers to factor in ‘geographical compulsions’ and the religion of the majority community of a state while taking decision of acceding to India or Pakistan.⁸ Princely rulers had to sign two documents: a) Standstill Agreement for continuance of the treaties and arrangements on matters of mutual interest that were in place between princely states and the British Crown in a similar fashion with the Dominion it was signing the agreement with, b) Instrument of Accession, by which ruler of the princely state agreed to accede his territories to either Dominion and granting it control over agreed subjects of ‘defense, external affairs, and communications’.⁹

Historical record of the events of 1947 highlights that the ruler of the state of Jammu and Kashmir, Maharaja Hari Singh was hesitant about accession to either India or Pakistan. J&K had a Hindu ruler who belonged to Jammu region, while majority of population was Muslim which resided in Kashmir valley. Moreover, it was contiguous to Pakistan and only road connecting India and Kashmir went through territories that became Pakistan. On August 12, 1947 Hari Singh signed a standstill agreement with Pakistan to ensure that services of trade, travel and communication would continue without disruption as they did under British Raj.¹⁰ Thus, Pakistan retained control of these services. Hari Singh also proposed such an agreement with India, but it did not sign it.¹¹

While political maneuvering by both India and Pakistan was underway to ensure that Hari Singh acceded to either state, an internal revolt from Poonch against the Maharaja's rule, that had begun prior to the partition, escalated.¹² Fighting between Maharaja's forces and locals expanded with the support of tribesmen from FATA and former NWFP, in Pakistan. It deepened the communal tensions in the state. As the events progressed tribesmen and locals kept on capturing territory. Maharaja in a desperate attempt to hold on to power, called on India to provide military assistance. To do so, however, the state of J&K had to accede to India.

What followed next, to this day remains disputed through historical record. Some say that the Maharaja acceded to India when he had fled from Srinagar,¹³ and others say that it was done under duress after the Indian army had intervened in J&K, as documented by the British historian Alistair Lamb.¹⁴ Nevertheless, on October 27, 1947 troops of Indian army were airlifted to Srinagar and Governor General Mountbatten accepted the Instrument of Accession in accordance with Indian policy that in any state where issue of accession had become a political dispute, after restoration of law and order, "the question of State's accession should be settled by a reference to the people".¹⁵ After Indian army entered into Kashmir, fighting ensued first with locals and tribesmen, and later with regular Pakistan army. In January 1949, a ceasefire was called between India and Pakistan by the United Nations (UN), after India approached UN to halt fighting between the two countries.¹⁶ After the ceasefire, both countries decided to establish governing structures and political administration in the territories of Kashmir under their control.

The disputed Instrument of Accession signed between Maharaja and New Delhi, made India responsible for defence, external affairs and communications. As for the rest of political and governance matters, clause 7 of the Instrument guarded autonomy of state and its right to ratify the future constitution of India and its applicability on its territory. It read:

Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or fetter my discretion to enter into arrangements with the Government of India under any such future Constitution.¹⁷

Thus, state of Jammu and Kashmir, even via disputed Instrument of Accession did not merge into the Indian Union, rather it continued to be governed by its own Constitution of 1939. Even Sheikh Abdullah led administration in J&K was not willing to accept application of Constitution of India. A.G. Noorni has observed that J&K was the only state in India to negotiate its entry into the Indian Union. Sheikh Abdullah was adamant only on acting according to the terms of the Instrument, in particular clause 7. Thus J&K only entered into a temporary arrangement with India by which New Delhi would look after subjects of 'defense, foreign affairs and communication' while state government will continue to have its own constitution, flag and even Prime Minister. This was channeled through incorporation of Article 370 in the Indian constitution. The special arrangement was also endorsed by Sardar Patel, then Indian Minister of States, when addressing Indian Constituent Assembly he said:

In view of the special problem with which the Jammu and Kashmir Government is faced, we have made special provisions for the continuance of the State with the Union on the existing basis.¹⁸

Article 370 and its Significance

Article 370 is a 'temporary provision' of the Indian constitution that regulates the relationship between the Indian Union and the state of J&K under Indian control. It grants 'special status' to the state in the Indian Union. Because of the disputed nature of territories of J&K falling under Indian control, Article 370 was negotiated by Central government in New Delhi, and the local government of the state led by then Prime Minister of J&K Sheikh Abdullah. Though Article 1 (2) and First Schedule of the Indian Constitution, mentions Jammu and Kashmir among the States that comprise the Indian Union, but this article is applied to J &K *in relation with* Article 370. This in turn yield two conclusions: First, article 370 is the only constitutional linkage of the State of Jammu and Kashmir—which India claims had acceded on 27th October, 1947—to the Indian Union. Second, all the provisions of the Indian Constitution, which are applicable to other states of the Indian Union, are not applicable to J &K.

Article 370 denotes six distinctive provisions for the State of J&K. First, it exempted J&K from other articles of the Indian constitution that were applicable to princely states acceding to Indian Union. As an exception, J&K was allowed to draft and

abide by its own constitution, while being part of the Indian Union. Second, power of Indian parliament to legislate over the State was confined to the subjects 'specified in the Instrument of Accession' i.e., 'defense, external affairs and communications'. Moreover, President of India can expand it to other relevant provisions of the Constitution to ensure adequate legal framework, if those provisions relate to subjects specified in the Instrument of Accession. For this, consultation with the state government, not the state legislature, was made a precondition. However, if Central government sought to extend additional 'constitutional' clauses or extra powers of the Union to J&K, the prior 'concurrence' of the state government was made a prerequisite. Fourth, according to Article 370 (2) every such concurrence by the state government was provisional and Constituent Assembly of the state had to ratify it, whenever it would be convened for framing the Constitution. Fifth, state government only has 'interim' power to give concurrence, until the time Constituent Assembly of the State is convened. Sixth, Article 370 (3) empowers President of India to issue an order for abrogating or amending the Article 370, but the 'recommendation' of Constituent Assembly of J & K is required before the President can issue such an order.

While providing a mechanism for a governance relationship between the Indian Union and the State, and granting autonomy to the state, Article 370 also protected the Muslims of disputed territories of J&K. Jammu and Kashmir is the only territory under Indian control where Muslims are in majority, thus protection of demographic character of the territories would be vital for any future settlement of the Kashmir dispute. Article 370 also allowed State of J&K to frame its own constitution for internal governance. It was drafted by Constituent Assembly of J&K and came into force in 1956,¹⁹ thus, ensuring that a separate legal framework regulates fundamental rights, citizenship and ownership of private property of Kashmiris. It also meant that Indian citizens belonging to other states cannot purchase land or own property in J&K, thus protecting the demographic makeup of J&K. Recognition of distinct character and separate identity, of people of J&K through Article 370, also makes this article a politically sensitive issue in the Indian administered Kashmir.

Article 370 and domestic politics of Indian Administered J&K

Soon after assuming reins of power in New Delhi, one of the first political controversies of Narendra Modi government centered around Article 370 and the

Kashmir question. Dr. Jitendra Singh, a Member of Parliament from Udhampur and a junior minister in Prime Minister Narendra Modi's office, said process for repealing Article 370 from the constitution has begun.²⁰ He claimed his party secured more than 50 percent vote thus, it had the mandate to do so.²¹ This statement by Dr. Singh was not the first one from a member of BJP. In March, 2013 M. Venkaiah Naidu, a senior BJP leader told a public gathering that his party would revoke Article 370 which allows autonomy to Jammu and Kashmir.²² Later in December 2013, the then prime ministerial candidate of BJP, Narendra Modi addressing a political rally in the state, called for 'at least a debate' on this Article, notwithstanding its continuous inclusion, or future exclusion from the Constitution.²³

It was in this context that Dr. Jitendra Singh's statement sparked a forceful reaction from political parties of Jammu and Kashmir. Omar Abdullah, then Chief Minister of J&K, was concerned about state's constitutional relationship with Indian Union. Pointing to absence of constituent assembly, he said it was impossible to abrogate Article 370²⁴ but he also warned Modi government that if it tampered with Article 370 then either J&K won't remain part of Indian Union or Article 370 will continue to be part of the Constitution.²⁵ Similarly, Mehbooba Mufti of People's Democratic Party advised Modi led government to forget abrogation of Article 370,²⁶ because it could ensue division in the state along communal lines and possibly another partition.²⁷ Farooq Abdullah of National Conference too criticized Modi government and said he already had reservation that if BJP assumed power it will move towards abolition of Article 370 and his fears 'have come true'.²⁸ Likewise, Manish Tewari, a leader of Congress party harshly criticized Jitendra Singh and said, Article 370 "cannot be repealed" without the consent of J&K's constituent assembly which now cannot be "resurrected". Congress advised developing an understanding of constitutional nuances before making politically explosive statements on sensitive issues.²⁹

On the other hand, those who advocate independence or accession with Pakistan initially kept distance from the controversy surrounding Article 370, as Mirwaiz Umar Farooq, leader of All Parties Hurriyat Conference, said "removing Article 370 is a non-issue for us". Terming Kashmir dispute larger than New Delhi-Srinagar relationship, he said it is about entire state of Kashmir that also included those areas under Pakistani control.³⁰ Yaseen Malik, leader of Jammu and Kashmir Liberation Front vowed BJP won't be allowed to 'tamper with the provision'.

Meanwhile, he termed debate on Article 370 an attempt to “change the discourse in Kashmir” away from freedom struggle.³¹

In spite of this widespread backlash from all political parties, Uddhav Thackeray, President of Shiv Sena and supporter of BJP, said government should do what it intends to do on Article 370 without any consultation with local parties.³² Interestingly, the election manifesto which BJP put forward during elections to local assembly of Jammu and Kashmir, did not mention abrogation of Article 370 as one of its electoral promises.³³ This could be the result of internal pressures and fear of electoral defeat as Article 370 remains a sensitive issue in the state. This domestic debate, however, overlooked the international dimension of Article 370 associated with the commitment of plebiscite given by India to people of Jammu and Kashmir.

Article 370: The International Dimension

The issue of Jammu and Kashmir was one of the first territorial disputes in which the United Nations (UN) played a role and attempted to mediate. Article 370 was adopted at a time when India had committed to holding an impartial plebiscite in Kashmir by accepting United Nations Security Council (UNSC) resolution of April 21, 1948, which said that:

India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite.³⁴

Moreover, Resolution of UN Commission for India and Pakistan of August 13, 1948, which later became the basis for ceasefire on January 1 1949, mandated Government of India to:

[E]nsure that the Government of the State of Jammu and Kashmir will take all measures within their power to make it publicly known that peace, law and order will be safeguarded and that all human and political rights will be guaranteed.³⁵

It was in this context, that Constituent Assembly of India adopted Article 370 in 1949. Article 370 also included this commitment and it still exists, however, in a

quite undermined form. N. Gopalaswamy Iyenger, Indian Union Minister without portfolio in the first Indian cabinet, while addressing the Indian Constituent Assembly to move the adoption of Article 370 on October 17, 1949 said that it did not intend to rule out plebiscite. He said:

In the first place there has been a war going on within the limits of Jammu and Kashmir. There was a cease-fire agreed to at the beginning of this year and that cease-fire is still on. It is, therefore, necessary that the administration of the State should be geared in these unusual conditions. We are still entangled with the United Nations in regard to Jammu and Kashmir and it is not possible to say now when we shall be free from this entanglement. That can only take place when the Kashmir problem is satisfactorily settled. Again the government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic or wish to go out of it. We are also committed to ascertaining the will of the people by means of a plebiscite provided that peaceful and normal conditions are restored and impartiality of the plebiscite could be guaranteed.³⁶

Acknowledging that Constituent assembly of J&K was only intended to function as a representative government of Kashmir and not an alternate to plebiscite, he said:

We have, to deal with the Government of the State which, as represented in its Council of Ministers, reflects the opinion of the largest political party of the State. Till a Constituent Assembly comes into being only an interim arrangement is possible. At the present moment, we could establish only an interim system. Article 306A (now Article 370) is an attempt to establish such a system.³⁷

In 1949, when New Delhi government brought four representatives from the state of J&K to participate in the Constituent Assembly of India, during the drafting of the Indian constitution, the Pakistani government registered a strong protest. In response Sir Girja Shankar Bajpai, secretary general of external affairs ministry, in a letter on November 21, 1949, set out Indian position in the following words:

Such participation was not intended to, and does not, in fact, alter the Government of India's determination to abide, in the matter of accession, by the freely declared will of the people of Jammu and Kashmir. Should that will be against the State continuing to be part of India, if and when it comes to be expressed in a constitutional way under conditions of peace and impartiality, the representation of the State in Indian Parliament would automatically cease and the provision of Constitution of India that govern the relations of the State of Jammu and Kashmir with the Union of India would also cease to operate.³⁸

He assured that such an eventuality, if it arises, can be ratified by the Parliament. He wrote:

Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.³⁹

Indian entanglement with the UNSC and its resolutions, was again evident in 1957. At that time, State government of Jammu and Kashmir led by Bakshi Ghulam Mohammad adopted the constitution of the State and also passed a resolution ratifying instrument of accession with India. Pakistan protested and raised the issue at UNSC. On January 24, 1957, UNSC stated that Constituent Assembly proposed by Jammu and Kashmir National Conference does not constitute a resolution of the dispute as defined in UNSC Resolution 91 of 1951,⁴⁰ and again reiterated that any future solution of Kashmir dispute must be "in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations".⁴¹

Possible ramifications of abrogation of Article 370

For India, the Kashmir question has had two dimensions i.e. internal and external. Internal is how they administered the territory of J&K under their control and established its political structures. External is linked with their commitment at the United Nations and resolutions of UNSC that India agreed to implement and hold plebiscite to resolve the dispute. It is in the context of entanglement with the UN that India cannot fully integrate territories of Kashmir into the Indian Union. India,

as mentioned above, did attempt to integrate territories of Jammu and Kashmir under its control with the Indian Union. This resulted in a 'unique relationship' between Indian administered State of Jammu and Kashmir and Indian Union. Even this was in violations of the UN resolution related to Kashmir question, as UN also termed it as such.

In this context, if BJP succeeds in repealing Article 370 from Indian constitution it can have ramifications at three levels: constitutional (intra-India), political (intra-Kashmir and Kashmir-India), and international (UN and Pakistan).

Constitutional level

Internally, Article 370 regulates and establishes linkage between territories of Jammu and Kashmir under Indian control, and Indian Union. Naturally, its abrogation will dissolve the constitutional link between India and Jammu and Kashmir, as Article 370 is the device that translated the Instrument of Accession into the relationship between State of J&K and Dominion of India. Moreover, as Article 370 states, "notwithstanding anything in the Constitution", thus Article 1 listing territories of India is currently applied on J&K through Article 370, thus abrogation of Article 370 will exclude state of J&K from the constitutionally listed territories comprising Indian Union. This in turn would mean, Indian constitution would no longer be applicable to J&K. Logically, this will free the territories under Indian control from Indian legal framework, thus making them independent territories. If then, India continues to maintain its military forces in J&K, its presence will turn into illegal occupation by its own legal framework and make India an aggressor or an invader. This was also argued by Justice BA Khan, former Chief Justice of Jammu and Kashmir High court, when he said, "if Article 370 is abrogated, then technically and legally, the foundation of Jammu and Kashmir's accession to India would cease to exist".⁴²

Political level

At the political level the implications of abrogation of Article 370 can result in a multitude of responses from political parties and groups active in Indian administered Kashmir. At present there are three categories of political parties in Indian administered Kashmir; those favoring accession with India like, National Conference and Congress, those calling for greater autonomy and advocating self-

rule under the ambit of Indian constitution such as Peoples Democratic Party, and those who advocate independence from India or accession with Pakistan i.e., Jammu and Kashmir Liberation Front and All Parties Hurriyat Conference.

If Article 370 is abrogated, then a political storm may unleash whereby, even those parties which advocate accession with India and those which seek greater autonomy within Indian Union might be forced to side with those seeking independence. During campaign for state assembly's election in late 2014, these parties vowed to defend and protect retention of Article 370 at every cost. This in turn, symbolizes a shift in domestic politics in Kashmir.

Those who advocate independence or accession with Pakistan, as mentioned above, already view debate on Article 370 a political ploy to distract from real issues of plebiscite and freedom struggle. Initiation of a debate and focus of political discourse on Article 370 symbolizes that political issue is not of independence or self-determination but, of securing autonomy and more rights from New Delhi under a constitutional arrangement.

If BJP at the Centre somehow succeeds in abrogating article 370, then it will strengthen the groups mentioned in third category. It will drive more people towards those seeking independence or accession with Pakistan. Thus, if New Delhi is determined to have its way at any cost, then the consequences could be of loss of support and onset of political instability.

This in turn means that relationship between J&K and India will undergo a drastic transformation. Another insurgency might commence as coercive political stability will dissipate. In 1988, insurgency began after rigged election in the valley. But this time, it will be different from such earlier rounds of violence. Earlier, New Delhi relied on the support of political parties such as National Conference, Congress and in last decade of PDP. But now, BJP government will also undermine these parties, consequently strengthening political profile of those demanding independence or accession with Pakistan.

International level

At the international level possible implications can again be of two types: legal relating to UN resolution, and political, relating to settlement and political situation

in Kashmir. Beyond India, there are two stakeholders in the Kashmir dispute namely, UN and Pakistan. Current Pakistani position is that India cannot unilaterally change the status of territories under its control,⁴³ meaning India cannot integrate disputed territories into its Union. But, if Article 370 is abrogated, territories currently under Indian control will become independent sovereign territories. Like they were from August 15, 1947 to October 27, 1947, the day Indian troops landed in Srinagar. This will mean, the United Nation's resolutions would automatically be applicable on Jammu and Kashmir. Therefore, people of Kashmir will decide the future course of the State of Jammu and Kashmir in a free and impartial plebiscite held under UN auspices to decide if they wished to accede to India or Pakistan.

Article 370 of the Indian constitution can also be seen in the context of Article 257 of Pakistani constitution that says, constitutional relationship between Pakistan and state of Jammu and Kashmir will be determined according to wishes of the people of J&K, when they decide to accede to Pakistan. These two articles provide a domestic constitutional balance between India and Pakistan on the territories of state of J&K under their respective control. Both countries streamlined their control over the territories through articles in their constitutions. India established claim via Article 1 and provided special status to disputed territories through Article 370 as discussed earlier, while Pakistan did not lay claim on the territories *per se*, but indirectly through clause (d) of Article 1(2) which stated that territories of Pakistan also include those joining by "accession or otherwise". Pakistan provided it a constitutional cover through Article 257. Thus any amendment in the Article 370 or its abrogation will change the current status quo domestically. Hence eminent Pakistani jurist, Ahmer Bilal Soofi, says both countries "shouldn't alter one without altering the other article".⁴⁴ Thus, if BJP government abrogates Article 370, then according to Mr. Soofi this will be an attempt to "integrate Kashmir into Indian Union".⁴⁵ Pakistan will be forced to react by such a unilateral Indian move, and an option it can exercise could be of amending Article 257 and formally integrating and extending constitutional framework to regions of Azad Kashmir and Gilgit Baltistan while laying claims to rest of the territory of J&K.

Conclusion

Implications of abrogating Article 370 are manifold. It will undermine coercive political stability in the state of J&K and might trigger violence. International

community will condemn it and will call for granting political rights to the people. Historically, such calls have always hardened Indian approach towards political dissent. In such a situation, Pakistan will not remain aloof and might provide political and material support to those fighting for freedom, which consequently will further destabilize the fraught relationship between India and Pakistan.

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ENDNOTES

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