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Genesis of Special Status to Kashmir and its Abrogation

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ABSTRACT

Scrapping off the special status of Jammu and Kashmir was one of the major steps taken by the NDA government headed by Mr. Narendra Modi since it came to power after Lok Sabha elections of 2019. Abrogation of Article 370 was one of their political agenda since the very beginning, because of which the abrogation was expected but what was not expected was the process and the duration to remove the special status. The Modi government scrapped the special status of J&K within just 75 days of coming into power. There are hundreds of people along with the opposition who were against the decision but there was almost an equal number who supported this decision. The Supreme Court witnessed a number of petitions questioning the constitutionality of abrogation which are still pending due to the sudden outbreak of COVID-19.

In this paper an attempt has been made to explain the origin of special status given to the state of Jammu and Kashmir, connecting it with the UN intervention along with analyzing the question of constitutionality of the abrogation.

I. INTRODUCTION

The bloodshed in Kashmir has been in continuation since the very beginning. Starting from the first leader i.e. Sheikh Abdullah till the current leader PM Modi, the state has been in miserable condition that it is unfair to even to call it an independent state. Kashmir has have been one of the major reasons for conflict between Indian and Pakistan, to the extent that both the countries have fought four wars till now and still continues to maintain that position. A terror attack is one of the highly used terms for people residing there as there have been hundreds of attacks on Kashmir attempted by Pakistan.

The current Prime Minister without being sensible of the repercussions scrapped Article 370 which provided special status to Jammu and Kashmir.² The Article³ was not just a provision to the Kashmir is but an emotion, something which had both psychological and symbolic

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² INDIA CONST. art. 370

³INDIA CONST. art. 370

significance for them. However, scrapping it was not an unexpected move of the BJP-led government but was a calculated one as scrapping of special status given to Jammu and Kashmir has always been one of the party manifestos.

II. HISTORICAL BACKDROP DURING INDEPENDENCE

Throwing light on circumstances during Indian independence, it can be said that the very inception of the dispute of Jammu and Kashmir dates back to 1947. During this time the partition of the Indian sub-continent was made along the religious lines, which resulted in the formation of India and Pakistan. However, there subsisted a problem concerning 650 princely states which were under the reign of their respective kings. These princely states existed in both the newly formed countries. Jammu and Kashmir was one of the 565 princely states which existed in India. The discretion which was given to the princely states was that they could be a part of either India or Pakistan or remain independent.

Maharaja Hari Singh, the ruler of Kashmir was a Hindu while most of his subjects and the majority population in Jammu and Kashmir were Muslims. Being unable to decide which nation to join, Hari Singh decided to remain neutral.

Following this, a standstill agreement was signed between Pakistan and Kashmir. Upon receiving the agreement, Pakistan accepted the offer and communicated the same to the then Prime Minister of Jammu and Kashmir. India, on the other hand, refused to accept the proposal and instead recommending Hari Singh on sending the representatives to Delhi, to have talks on the issue of Jammu and Kashmir.

(A) INSTRUMENT OF ACCESSION

Even after entering in a standstill agreement with Jammu and Kashmir, Pakistan possessed an interest in acquiring Jammu and Kashmir. Being in line with its interest, Pakistan unfolded a tribal attack on Jammu and Kashmir, and their prime motto behind taking out the attack was to drive out the ruler- Hari Singh from the dominion of Kashmir. Simultaneous to the intervention of Pakistan in Jammu and Kashmir, there arose a revolt called 'Poonch Uprising' which was brought into effect by the people of Kashmir as a mark of protest against the reign of Hari Singh, and they, in turn, demanded a stable government and secured future and this liberated the idea of 'Azad Kashmir'. Kashmir saw a series of such development, and as a result of this, there was pressure mounted on Hari Singh concerning Kashmir's future. In an attempt to ameliorate the developments in Kashmir, Hari Singh sought the help of India, in order to drive away the Pakistani tribes from his land.

It was on October 22nd 1947, that Hari Singh was left with no other alternative but to seek the help of India to drive out the armed men backed by the Pakistani army, who had attacked the state of Jammu and Kashmir from the south. These turn of events not only forced Hari Singh to seek help from India but it also eventually lead him to accede with the Indian sub-continent. By the way of Instrument of Accession (IoA), Article 370 was brought into effect and was further incorporated in the Indian Constitution. It can be stated that Instrument of Accession is a legal document which was executed by Hari Singh, the then ruler of the princely state of Jammu and Kashmir with the ultimate declaration that the state would accede to India. The IoA conferred a unique restrive power on India parliament, whereby it was allowed to legislate in Jammu and Kashmir only in matters of Defence, Communication and External Affairs. In addition to this, there is also a mention of Ancilliary Powers, which includes under its ambit numerous subjects like that of elections to the dominion legislature, and offences against laws to any of the said matters. The attention of the readers is now to be dragged to some of the important clauses under IoA, which cast a spell of doubt on the recent amendments made with respect to the state of Jammu and Kashmir.

Under clause 5 of IoA, Hari Singh has given an explicit mention that the terms of the IoA “Cannot be varied by way of any amendment” of the Government of India Act 1935 or the Indian Independence Act, 1947, there was an inclusion of a contrary sub-clause which also stated that such an amendment can be brought into effect if only it is accepted by Hari Singh, in an Instrument supplementary to this instrument. Clause 7 of IoA becomes another important aspect as it is mentioned by Hari Singh in it- “Nothing in the instrument is deemed to commit Hari Singh in any way to acceptance of any future constitution of India or to fetter his discretion to enter into any kind of arrangements with the government of India under any of such future Constitution”.

Hari Singh had agreed that J&K’s accession, the very dominion of India would be in lines and with the intent that the Dominion Legislature, Federal Court, Governor-General of India or any other dominion authority established, the dominion will be legally authorised to carry out the functions vested in them by or under the Government of India Act 1935 with respect to the state of Jammu and Kashmir. An interim state was instituted soon after the accession, by the way of a proclamation made by the Maharaja on March 5th 1948.

III. ABROGATION OF ARTICLE 370

(A) CONSTITUTIONALITY OF ABROGATION

One of the major questions which appeared after the abrogation of Article 370 is the

constitutionality of the abrogation. Some people put forth their views that the abrogation was unconstitutional, while some others state there was nothing unconstitutional in scrapping the special status of J&K. There have been numerous debates from both ends. Firstly, the matter has to be dealt with in accordance with the procedure prescribed in the Constitution of India. Article 370 of the Indian Constitution does mention the procedure of scraping of special status to the state of Jammu and Kashmir. The President of India has the authority to abrogate the provision of Article 370 by issuing a public notification only after consulting the Constituent Assembly of the State as mentioned in Article-370(3). The Constituent Assembly which framed the constitution for J&K was dissolved in 1957 and was replaced by a legislative assembly, thus making it impossible to abrogate Article 370.⁴ Therefore, the abrogation of Article 370 is unconstitutional according to the provisions laid down in the Indian Constitution.

Considering the contrasting side where people perceived the notion that the abrogation was constitutional in nature, various note-worthy views can be found. The Union Home Minister, Amit Shah has also mentioned while proposing the Bill for revoking the special status of J&K that it is constitutional and legal as Article 370 was amended twice by the Congress government in 1952 and in 1962 and the NDA government has adopted the same strategy by initially amending the Article and then abrogating it.⁵ The government of India amended Article 370 by way of a Presidential order which changed the word “constituent assembly” as mentioned in sub-clause (3) to “Legislative Assembly of the State”.⁶ Soli Sorabjee, an Indian jurist and the former Attorney-General of India has also stated that abrogation of Article 370 was not unconstitutional at all as the note in Article 370 mentions that it is a temporary provision and can be abrogated anytime by the President of India. He also stated that this provision was not covered under the basic structure of the Indian Constitution and was therefore amendable.⁷

(B) SHYAMA PRAKASH MUKHERJEE VIEWS

⁴Manavi Kapur, *A timeline of key events that shaped the unique identity of Kashmir within India*, QUARTZ INDIA (Aug. 6, 2019), <https://qz.com/india/1682124/a-timeline-of-jammu-kashmirs-modern-history-and-article-370/>

⁵Amit Shah says Congress amended Article 370 twice in past, INDIA TODAY (Aug. 5, 2019, 2:24 PM), <https://www.indiatoday.in/india/story/j-k-article-370-amit-shah-congress-1577402-2019-08-05>

⁶Shiju Mazhuvanchery, *Constitution as a puzzle: Abrogation of Article 370 and Kashmir conundrum*, THE WEEK (Aug. 9, 2019, 8:40 PM), <https://www.theweek.in/news/india/2019/08/09/constitution-as-puzzle-abrogation-article-370-kashmir-conundrum.html>

⁷Soli Sorabjee, *Soli Sorabjee: Abrogating Article 370 is constitutional, detaining leaders disturbing*, THE ECONOMIC TIMES (Aug. 11, 2019, 10:42 AM), <https://economictimes.indiatimes.com/news/politics-and-nation/soli-sorabjee-abrogating-article-370-is-constitutional-detaining-leaders-disturbing/articleshow/70622834.cms>

“Ek desh mein do Vidhan, do Pradhan aur do Nishan nahi challenge” (one country cannot function with two different sets of legislature, executive and judiciary), every single person who lived during the 1940s can trace the existence of this quote and hence the existence of renowned politician Shyama Prasad Mukherjee.⁸ He was the founding father of Bharatiya Jana Sangh (BJS) which was later converted into Bharatiya Janata Party (BJP). He was one of the critics of J&K being given special status by the Congress Party as in his opinion it is impractical to have two constitutions, two flags and two heads in one country. He continued dissenting the notion of Article 370 and entered in the state of J&K illegally where he died in 1953 under mysterious circumstances after being detained.⁹

(C) NEED FOR PLEBISCITE? OR PLEBISCITE A MOOT?

Plebiscite refers to the popular vote by which people of a particular section or region express their opinions either against or in favour of some matter of national importance. In 1948, the UN passed a resolution proposing the Indian government to conduct a plebiscite in order to decide the accession of Jammu and Kashmir through popular vote. Sheikh Abdullah who was heading the emergency administration of the state at that time disagreed with the idea of plebiscite which will allow the people of Kashmir to choose between India or Pakistan as he wanted the territory of J&K independent from the control of any other country. Muhammad Ali Jinnah, the founder of newly formed Pakistan was also against the idea of the plebiscite as proposed by the UN. Therefore, the Pakistani government didn't remove its troops deployed in the region and continued to occupy one-third of the state because of which peace was never restored hence leading to no plebiscite.¹⁰ Both countries blame each other for hindering the conduct of plebiscite in J&K.

The Abrogation of Article 370 granting special status to the state of J&K was meant for ending terrorism, the progress of the whole region in terms of economic, political and educational development. Furthermore, the abrogation of Article 370 was meant for “retaining the Kashmiriyat” as mentioned by the present-day Home Minister Amit Shah in his speech in Rajya Sabha, but the government never asked for the perspectives of the Kashmiris. The drastic step of removing the special status of Jammu and Kashmir was taken by the Indian government under the shade of conserving the Kashmiri people but the irony

⁸*Ek desh mein do Vidhan nahi challenge: BJP realizes founders Shyama Prasad Mukherjee's dream*, INDIA TODAY (Aug. 5, 2019, 8:47 PM), <https://www.indiatoday.in/india/story/ek-desk-mein-do-vidhan-nahi-challenge-bjp-realises-founder-shyama-prasad-mukherjee-dream-1577345-2019-08-05>

⁹Subhash Gatade, *Shyama Prasad Mukherjee's Role: Official Myths on J&K Busted*, NEWS CLICK (Aug. 11, 2019), <https://www.newsclick.in/shyama-prasad-mukherjees-role-official-myths-jk-busted>

¹⁰*How India nixed United Nations in Jammu and Kashmir*, THE TIMES OF INDIA (Aug. 13, 2019), <https://timesofindia.indiatimes.com/india/how-india-nixed-united-nations-in-jammu-kashmir/articleshow/70602296.cms>

here is not even a single Kashmiri was asked for his views before scrapping Article 370 which could have been done through a plebiscite. Not conducting of a plebiscite was a question back then in the 1940s and the same question pertains even today.

(D) THE INTERVENTION OF UN IN THE ISSUE

It was in 1948 when the armed forces of India and Pakistan were pushing each other for regaining the control over the territory of Jammu and Kashmir. Pandit Jawahar Lal Nehru, the then Prime Minister of India who initially was in disagreement with approaching to an International Organization for resolving this dispute took this matter to the United Nations Security Council in 1948. One of the most controversial facts here is about approaching the United Nations with an internal matter of the country, as some resources state that Nehru drew UN's attention to the matter of J&K without consulting the cabinet¹¹ whereas there are other resources confirming the intervention of an international body with the consultation of the whole cabinet.¹² It was then after referring the issue to the UN that it passed a resolution on April 21, 1948¹³ demanding the Pakistan government to call back its troops deployed in the Kashmir valley followed by the removal of the Indian troops from the region. Furthermore, it also asked the Indian government to conduct a plebiscite in J&K after restoring peace in order to decide what the people residing there demanded.

In the present scenario, Antonio Guterres the current Secretary-General of the United Nation rejected the appeal filed by Pakistan over intervening in the issue of Jammu and Kashmir after the NDA government led by Narendra Modi abrogated Article 370 on August 5, 2019, which granted special status to the territory of Jammu and Kashmir. The UN chief has also proposed to both India and Pakistan to solve their disputes bilaterally considering the Simla Agreement of 1972 which was a peace treaty mentioning the conduct of relations by the Indian government with the Pakistan government through peaceful means.¹⁴

(E) PAKISTAN'S STANCE

The historic international conflict over the territory of J&K started in the 1940s. After signing of the Instrument of Accession by Hari Singh, Lord Mountbatten made it clear that Kashmir

¹¹Dhirendra Tripathi, *J&K's Article 370: Clause for peace is now laid to rest*, LIVEMINT (Aug. 5, 2019, 11:21 PM), <https://www.livemint.com/news/india/j-k-s-article-370-clause-for-peace-is-now-laid-to-rest-1565026669848.html>

¹²Jai Velury, *Denigrating Nehru for the 'Kashmir problem' reflects on our ignorance towards facts*, YOUTH KI AWAAZ (Nov. 13, 2018, 8:02 PM), <https://www.youthkiawaaz.com/2018/11/indias-kashmir-ignorance/>

¹³*Security Council resolution 47 (1948) [The India-Pakistan Question]*, REF WORLD (June 8, 2020, 4:04 PM), <https://www.refworld.org/docid/3b00f23d10.html> [accessed 12 August 2019]

¹⁴*Simla Agreement July 2, 1972*, MINISTRY OF EXTERNAL AFFAIRS (July 2, 1972), <https://mea.gov.in/in-focus-article.htm?19005/Simla+Agreement+July+2+1972>

will only be merged with any of the country i.e. either India or Pakistan after consulting the people of Kashmir.¹⁵ According to the perspectives of the Pakistani government, India has hindered every attempt of conducting a plebiscite and therefore obstructed the Kashmir, a Muslim-majority state to integrate with Pakistan. This evokes a war between India and Pakistan in 1947 during which Pakistan occupied a part of Kashmir which is under the direct control of the central Pakistani government. The ceasefire line became the actual borderline between the countries.¹⁶

The abrogation of Article 370 by the Modi government has instigated the wrath in Pakistan. The Pakistani government including its Prime Minister Imran Khan is trying its best to revoke the decision taken by the Indian government on the Kashmir issue. PM Imran Khan while addressing a session in Parliament has warned India of attacks similar to the Pulwama attack of 2019 and has also given an indication of waging a nuclear war against India which will affect the whole universe.¹⁷

IV. CONCLUSION

It has almost been a year since the abrogation was announced with a belief that it will provide a better economy, administration along with better governance to the state of Jammu and Kashmir but the status quo depicts otherwise. Despite the government's efforts of bringing normalcy in the state or making it a better state, the scrapping of special status has brought nothing but a sense of fear, terror and suspicion within the people in respect to their identity, culture and religion. There have been as many as 79 terror attacks¹⁸ in the state as compared to the wordings of Union Home Minister Amit Shah, who claimed that abrogation is the way to stop terrorism, firing of bullets in the state and to lead it into the path of development.¹⁹

The tactics adopted by the central government just before severing the state into two separate union territories were undemocratic as it took away the right to speak, to protest from all the pro-Kashmiri supporting politicians. Leaders like Mehbooba Mufti and Omar Abdullah were

¹⁵*Kashmir- The History*, PAKISTAN MISSION TO UNITED NATIONS (2020), <http://www.pakun.org/kashmir/history.php>

¹⁶Asad Hashim, *Timeline: India-Pakistan relations*, ALJAZEERA (Aug. 16, 2019, 8:46 PM), <https://www.aljazeera.com/indepth/spotlight/kashmirtheforgottenconflict/2011/06/2011615113058224115.html>

¹⁷*Pulwama- like attacks can happen after revocation of Article 370: Imran Khan*, BUSINESS STANDARD (Mar. 1, 2019), https://www.business-standard.com/article/pti-stories/pulwama-like-attacks-can-happen-after-revocation-of-article-370-imran-khan-119080601360_1.html

¹⁸*79 terror incidence in Jammu and Kashmir since abrogation of Article 370*. DECCAN HERALD (Mar. 17, 2020, 3:52 PM), <https://www.deccanherald.com/national/north-and-central/79-terror-incidents-in-jammu-and-kashmir-since-abrogation-of-article-370-814580.html>

¹⁹*Kashmir on way to development after Article 370 revocation: Amit Shah*, ECONOMIC TIMES (Oct. 26, 2019, 4:54 PM), <https://economictimes.indiatimes.com/news/politics-and-nation/kashmir-on-way-to-development-after-article-370-revocation-amit-shah/articleshow/71774463.cms?from=mdr>

put under house arrest at the time when the abrogation was announced and were released after months of detention without giving them any access to media, telephone etc. The central government could have done it in a democratic way; in a way acceptable to the people at large, which would have prevented hundreds of stone-pelting in the state.

On the contrary, the central government is making all the efforts in providing domicile rights to the residents of newly formed union territories over the land and in government jobs. The word “minorities” never existed in the constitution of J&K, because of which rights of minorities were never recognized and were also not given any importance in the state²⁰. Even the Scheduled Castes and Scheduled Tribes were not allowed to get a caste certificate which would have ensured various benefits from the central government. Now, after the abrogation of special status to J&K, all these untouched areas will be slowly and eventually be brought on par to other states of the country.

²⁰ Sandipan Deb, *Opinion- The revocation of Article 370 ends a fowls majoritarianism*, LIVEMINT (Aug. 12, 2019, 12:24 AM), <https://www.livemint.com/opinion/columns/opinion-the-revocation-of-article-370-ends-a-foul-majoritarianism-1565549062884.html>