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The Kashmir Debacle - 'Revocation of Special Status'

Article- 370 & 35(A)

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ABSTRACT

Indian constitution is one of the most well organized written constitution it is a blend of different constitution Dr. BR Ambedkar was the chairman of the Drafting committee of Indian constitution and he has given an enormous shape to the constitution and form it has today. Indian constitution is one of the most diverse constitution which gave a unique status to almost every state of India But the most unique and captivating Status was of Jammu and Kashmir given by Art 370 .

The purpose of this paper is to take a look at all the perplexing questions starting from the Past of Jammu and Kashmir towards what was the need and circumstances to include this article in the constitution of India, the controversy on this Article and at last this paper would end with the conclusion which tells us that the whether Article 370 should hold up or not, Article 370 would be covered with all the important aspects.

I. INTRODUCTION

“There Cannot Be Two Constitutions, Two Premiers and Two Flags In One Country. “

Said: -Syama Prasad Mukherjee

Kashmir is known as land of heaven; it is said as “Paradise on Earth.” The nature over there gives more peacefulness and positive vibes in oneself because of its dazzling beauty. It always offers you panoramic views of the beautiful landscape, but as every coin has two sides so does Kashmir has.

GLIMPSE OF THE PAST

The month of August in the year 1947, when after two hundred years in India, the British finally left, the subcontinent was separated into two independent State where all the Muslim dominated region becomes Pakistan and the rest remained India, but there was one more character in this story and that were the “The Rajwadas” (Princely States) one of the Rajwadas was Kashmir, having Muslim population but ruled by a Hindu King , and as all the Muslim

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dominated the area went with Pakistan though Pakistan wanted Kashmir too.

But with the help of “Indian Independence Act 1947”, the Princely States had three Options;

First: - They can join India.

Second: - They can join Pakistan.

Third: - They can remain Independent State by not joining any of the Country.

Rajwadas were free to opt any option as per their wish and their choice. Kashmir opted the third option to be Independent State and did not access either of the nations. Kashmir also signed a Standstill agreement with Pakistan which Pakistan breached by sending thousands of troops and tribesmen in an attempt to take Kashmir by force, Pakistan terrified Maharaja Hari Singh who came knocking India's door for help. India was more than willing to help but first it asked him to sign the instrument of agreement.

On 26-27 October 1947 Maharaja Hari Singh and on the day itself India's ‘Sikh Light Infantry’ landed in Kashmir and stopped the Lashkar-e-Taiba, which was sent by Pakistan. The part which India Occupied remain with India and the part which India did not occupy is now known as Pakistan Occupied Kashmir (POK) in India and Pakistan call it as Azad Kashmir. Since then Jammu and Kashmir has been an integral part of India and following this Infantry day is celebrated on October 27 by the Indian Army as on this day an infantry company of the first Battalion of the Sikh Regiment was airlifted from Delhi to Srinagar to set free Kashmir from the invading tribal who were buttressed by the Pakistan's Army.

²How Kashmir Instrument Of Accession Different?

Many other princely states had signed the instrument of accession with India but, in case of Kashmir it was slightly different because of Clause-7 & Clause-8.

- Clause-7: states that Kashmiris (people of Kashmir) are not committed to accept the Constitution of India.
- Clause-8: states all the steps must be taken to ensure the sovereignty of Kashmir.

Hence it was a Conditional Instrument of Accession and not the unconditional one. The main role in this difference was because of Maharaja Hari Singh and Shaikh Abdullah, WHO represented the interest of Kashmir in the Constituent Assembly.

²Kelly Buchanan, Article 370 and the Removal of Jammu and Kashmir's Special Status, (Oct 3, 2019) <https://blogs.loc.gov/law/2019/10/falqs-article-370-and-the-removal-of-jammu-and-kashmirs-special-status/> (Last visited on 24th August, 2020)

THE IRON CLAD AUTONOMY

Shaikh Abdullah started demanding The Iron Clad Autonomy for the state, which our law minister didn't comply with.

"You wish India should protect your borders, build roads in your area, endow food stuffs to you and give equal status and rights to Kashmiris all over the country, but the government of India should have no rights in Kashmir. To give consent to this proposal, would be a treacherous thing against the interest of India and I, as the Law Minister of India will never do it." Said Dr. B.R Amedkar.

II. ARTICLE- 370 AND ARTICLE- 35(A)³

As Dr. B.R Ambedkar was clearly against in giving special status to Kashmir but due to the efforts of Pandit Jawaharlal Nehru and Mr. Gopalaswamy Ayyangar who was known as Minister without Portfolio, Article- 306-(A) in the draft of the Indian Constitution was inserted which later on become Article- 370. Article-370 was added as a temporary provision in the Indian Constitution.

What is Article 370?

ARTICLE-370⁴ excludes Jammu and Kashmir State from Indian Constitution, it permits the Indian-controlled locale ward to make its private laws in all issues with the exception of finance, defense, international concerns and communications. In other states of India, when the government does not work as per Constitution of India, then Presidential rule under the Article-356 of the Indian Constitution is imposed, but when the state of J&K is not governed as per rule of law, Section-92 of the J&K Constitution is imposed that means Governor rule is executed there.

Article 35A

Article 35A is a provision incorporated in the Constitution that gives the Jammu and Kashmir's Legislature an unbridled power to choose who all are 'perpetual occupants' of the State and give on them special rights and entitlement in public sector jobs, an acquisition of property in the State, bursary and other open guide and government assistance. The arrangement amends that no demonstration of the council going under it very well may be tested for disregarding the Constitution or some other tradition that must be adhered to.

³Anant Pratap Singh Chauhan, *An Insight to Article 35A and Article 370 of the Constitution of India*, https://www.researchgate.net/publication/334131946_An_Insight_to_Article_35A_and_Article_370_of_the_Constitution_of_India (Last visited on 24th August, 2020)

⁴ Article-370, Constitution of India, 1949

HOW DID ARTICLE-35A TAKE PLACE?

Article 35A is an article which was incorporated into the Constitution in 1954 by an order from the then President Rajendra Prasad on the guidance of the Jawaharlal Nehru Cabinet. The petulant Constitution (Application to Jammu and Kashmir) an Order of 1954 followed the 1952 Delhi Agreement get included into among Nehru and the then Prime Minister of Jammu and Kashmir Sheikh Abdullah, which hold forward Indian citizenship to the 'State subjects' of Jammu and Kashmir. The Presidential Order was given under Article 370 (1) (d) of the Constitution. This arrangement permits the President to make certain "exceptions and moderations" to the Constitution for the government assistance of the 'State subjects' of Jammu and Kashmir. Along these lines, Article 35A was added to the Constitution as a declaration of unique thought, the Indian government agreed to the 'ceaseless inhabitants' of Jammu and Kashmir.

CRITICAL ASPECT OF ARTICLE 35A:

Article 35A is in opposition to “*very spirit of oneness of India*” as it forms a “*class within a class of Indian citizens*”.

It treats non-permanent householders of Jammu and Kashmir as 'peasants'. Non-permanent householders of Jammu and Kashmir are not qualified for work under the State government and are additionally suspended from contesting elections.

Praiseworthy students are denying to grants, scholarships and they can't look for redressal in any court. Further, the issues of dislodged individuals who relocated to Jammu and Kashmir all through Partition are as yet not treated as 'State subjects' under the Jammu and Kashmir Constitution.

It was embedded illegally, bypassing Article 368 which approve just Parliament to correct the Constitution. The laws endorse in compatibility of Article 35A are ultra vires of the basic rights award by Part III of the Constitution, particularly, and not confined to, Articles 14 i.e. 'Right to Equality' and Article 21 i.e. 'Protection of Life'.

III. REVOCATION OF SPECIAL STATUS & HUGE HISTORIC STEP⁵

On 5th August 2019, The Government of India revoked the special status or limited autonomy, granted under article 370 of the Indian constitution to Jammu and Kashmir.

- ***Before 5th August 2019***

⁵ International Journal of Law ISSN: 2455-2194 Impact Factor: RJIF 5.12 www.lawjournals.org Volume 4; Issue 3; May 2018; Page No. 01-04

Article-370(3) states that Despite everything given in the Art-370 President may, by Public notification, declare that this Article shall cease to be operative, provided that the recommendation of the Constituent Assembly of the state referred to in (2) shall be necessary before the President issues Such a notification, but the issue was that the Constituent Assembly of J&K was dissolved in 1957, now the question arises that has it become permanent?

- ***After 5th August 2019***

On 5th August 2019, *THE CONSTITUTION'S APPLICATION TO JAMMU AND KASHMIR, ORDER 2019* was Passed, Which Notifies That The Following Order Made By The President Is Publish For General Information. And In That Order An Amendment Was Made As “IN PROVISIO TO CLAUSE (3) OF ARTICLE 370 OF THE CONSTITUTION, THE EXPRESSION ‘CONSTITUENTASSEMBLY’ OF THE STATE REFFERED TO IN CLAUSE (2) SHALL NOWREAD AS ‘LEGISLATIVE ASSEMBLY’ OF THE STATE.”

As such, the word Constituent Assembly was replaced by the word Legislative Assembly and by utilizing this the Government of India evacuated Art-35(a) which gives the benefits of lasting inhabitants with respect to immovable property, a settlement in state and business and changes Art-370.

IV. KEY CHANGES⁶

- The Constitution (Application to Jammu and Kashmir) Order, 2019 has replaced Presidential Order of 1954.
- Subsequently, the Jammu and Kashmir Reorganization Bill, 2019, passed by Parliament partitions the territory of Jammu and Kashmir into two new Union Territories: Jammu and Kashmir, and Ladakh.
- This is the first occasion when that a state has been changed over into a Union Territory.
- Of the six Lok Sabha situates as of now with the province of J& K, five will stay with the association region of J&K, while one will be allocated to Ladakh.
- The Union Territory of J&K will have an Assembly, like in Delhi and Puducherry.
- Instead of twenty-nine, India will now have twenty-eight states. Kashmir will not have a Governor, rather it will have Lieutenant Governor like in the Delhi or Puducherry.

⁶ International Journal of Law ISSN: 2455-2194 Impact Factor: RJIF 5.12 www.lawjournals.org Volume 4; Issue 3; May 2018; Page No. 01-04

STATUS OF J&K UNION TERRITORY ⁷

- J&K Assembly will have a 5-year term, not 6-year term, just like the previous case.
- Section 32 of Jammu and Kashmir 2019 Bill suggests that the Assembly can make laws regarding any matters in the State and Concurrent records aside from on state subjects identifying with "public order" and "police".
- This is like Article 239 of the Constitution that is applicable to UTs of Puducherry and Delhi.
- However, by embeddings Article 239AA and by virtue of the 69th Constitutional Amendment, the Delhi Assembly can't administer on issues in entry 18 of State List, i.e. land.
- In the case of Jammu and Kashmir, the Assembly can make laws on land.
- The exceptional status gave to J&K under Article 370 will be abrogated.
- Jammu and Kashmir will no longer have the different constitution, a flag or an anthem.
- The citizens of J&K will not have dual citizenship.
- As the new association domain of J&K will be dependent upon the Indian Constitution, its residents will currently have the Fundamental Rights cherished in the Indian constitution.
- Article 360, which can be utilized to announce a Financial Emergency, will currently likewise be material to Jammu and Kashmir.
- All laws passed by Parliament will be pertinent to J&K, including the Right to Information Act and the Right to Education Act.
- The Indian Penal Code will supplant the Ranbir Penal Code of Jammu and Kashmir.
- Article 35A, which starts from the provision of Article 370 stands invalid and void.
- Since Presidential Order has broadened all arrangements of the Constitution to J&K, remembering the part of Fundamental Rights, biased arrangements under Article 35A will currently be illegal.

⁷International Journal of Law ISSN: 2455-2194 Impact Factor: RJIF 5.12 www.lawjournals.org Volume 4; Issue 3; May 2018; Page No. 01-04

V. CONCLUSION

Before this step Jammu and Kashmir was treated as a territory, therefore the moment this drastic change took place, Now J&K can be treated not only as a territory, but now it has been bifurcated into two Union territories with Legislative Assemblies. What's more, in my view, such advances are essential, however inside the system of the constitution since India is a Federation and because of this unique status, a manner of thinking was produced in the brains of individuals that the legislature has "Made a class inside a class of residents" and this is absolutely against the government spirit and administrative spirit is against the fundamental structure convention. This was the logic behind taking away the Special status and it has been taken for the betterment and for the development of Jammu and Kashmir.

“It is our priority to win the hearts of people of J&K and that could only be achieved through their development and welfare. We have a responsibility to see that people of the state are flourishing. We are not talking about Hindus and Muslims, but the people of Jammu and Kashmir.” Prime Minister of India: - Narendra Modi.
