

LEGAL LOCK JOURNAL
2583-0384

VOLUME 1 || ISSUE 2

2021

This Article is brought to you for “free” and “open access” by the Legal Lock Journal. It has been accepted for inclusion in the Journal after due review.

To submit your Manuscript for Publication at Legal Lock Journal, kindly email your Manuscript at legallockjournal@gmail.com.

HISTORY AND REVOCATION OF ARTICLE 35A AND ARTICLE 370**Pallash Pamnani¹****ACCESSION OF JAMMU AND KASHMIR**

“Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge...”² this is how it all started. At the night of 14th August 1947, nearing midnight, Jawaharlal Nehru delivered this speech. India found freedom as of 15th August 1947. There were celebrations all around the country. Indian Tri-color was being raised across the length and breadth of the nation. Citizens were happy. But there was another section of citizens who were utterly devastated. The joy and celebration of finding the long awaited freedom was sullied. Under the Indian Independence Act 1947, the country was divided into two dominions namely India and Pakistan³. India, which till now had more than 500 princely states⁴ was now being united to form one nation. But many states also were divided into two parts, one which would stay with India and the other with Pakistan. Like the state of Bengal and Punjab, both of which were divided into Eastern and Western provinces⁵. There were some provinces that were a problematic situation from the perspective of India, for example Hyderabad. The Nizam of Hyderabad wished to join Pakistan but after a brief war with India, the Nizam of Hyderabad had to surrender and Hyderabad was finally acceded to India⁶. The princely state of Jammu and Kashmir was also amongst the one that preferred to be Independent. Maharaja Hari Singh, the sovereign of J&K, who was a Hindu ruler with majority Muslims as his subjects, wanted to sign a standstill agreement with both India and Pakistan. Pakistan agreed to the agreement readily but India did not and instead ask for a delegate to be sent to Delhi for further discussion on the agreement⁷. However, within 12 days of signing the standstill, Pakistan started threatening J&K. Pakistan had expected that Raja Hari Singh will join the instrument of accession with Pakistan but because of the delay

¹ The author is a student at Maharashtra National Law University, Mumbai.

² IndianNationalCongress, *Tryst with destiny – Jawaharlal Nehru Independence Day Speech 1947*, YouTube (Aug. 15, 2020) <https://youtu.be/HukPQ7fOaKg>

³ Indian Independence Act, 1947 (10 & 11 Geo. 6, c. 30) § 1

⁴ Sanchari Pal, The Making of a Nation: How Sardar Patel Integrated 562 Princely States, The better India, (Dec. 16, 2017), <https://www.thebetterindia.com/124500/sardar-patel-vp-menon-integration-princely-states-india-independence/>

⁵ Indian Independence Act, 1947 (10 & 11 Geo. 6, c. 30) § 3(a) & § 4(I)

⁶ Serish Naniseti, Accession of Hyderabad: When a battle by cables forced the Nizam's hand, The Hindu, (Sept. 16, 2018 09:16 IST), <https://www.thehindu.com/news/cities/Hyderabad/accession-of-hyderabad-when-a-battle-by-cables-forced-the-nizams-hand/article24956708.ece>

⁷ Sajid Ali, How, on this day 72 years ago, Jammu & Kashmir agreed to become a part of India, The Print (Oct. 26, 2019 11:38 am), <https://theprint.in/past-forward/how-on-this-day-72-years-ago-jammu-kashmir-agreed-to-become-a-part-of-india/311724/>

they started threatening J&K⁸. Already partition related tensions were on a high near the border areas and then small band of armed mercenaries started invading the bordering villages. These small attacks are now seen as Pakistan testing if India would send its troops to save J&K. Even after multiple attempts by the king to talk Pakistan into stopping this, it was all in vain⁹. Eventually, on October 22, Pakistan launched an attack on Jammu and Kashmir. It was codenamed operation Gulmarg. Pakistan did not attack with full military force but the attack was done by tribal who were commanded by the Pakistani army officers. On October 22, thousands of tribal mercenaries with Pakistan's army regulars invaded the Kashmir valley, defeated the outpost's that were manned by the King's army¹⁰. Raja Hari Singh's army was outnumbered. Moreover, the Muslim soldiers in the army had deserted and joined the tribal instead to fight against the King. There was only one way out for the king and it was to seek help from India. Hari Singh, reached out to India on 24th October requesting help and it was taken up by the defense council of India on 25th October¹¹. Finally it was decided that India will send troops to help J&K and in return Raja Hari Singh will sign the Instrument of Accession to India¹².

ARTICLE 370

After the accession, Indian troops were air lifted to Kashmir valley and the tribal were fought back. But in the instrument of succession signed by Raja Hari Singh, he demanded special status for the people of Jammu and Kashmir on the lines of a 1927 law that prohibited outsiders to buy land in Jammu and Kashmir¹³. In March 1948, an interim government was formed in the state of Jammu and Kashmir with Sheikh Abdullah as the prime minister¹⁴. The Jawaharlal Nehru agreed to Hari Singh's conditions and brought the matter in front of the constituent assembly of India. They were already with the task of drafting the constitution and the matter of Kashmir was discussed and debated very fiercely¹⁵. In July 1949, Sheikh Abdullah with three of his colleagues joined the Constituent assembly to discuss further and negotiate the

⁸ *Id.*

⁹ Prabhash K Dutta, On October 22, 1947, Pakistan invaded Kashmir. Here is what happened, India Today, (Oct. 22, 2020 16:37 IST), <https://www.indiatoday.in/india/story/black-day-october-22-pakistan-kashmir-invasion-pakistan-what-happened-in-1947-1734011-2020-10-2>

¹⁰ *Id.*

¹¹ Ali, *Supra* note. 6

¹² *Id.*

¹³ Prabhash K Dutta, How Kashmir got Article 370: History retold, India Today, (Aug. 8, 2019, 12:45 IST), <https://www.indiatoday.in/news-analysis/story/kashmir-situation-article-370-history-1578495-2019-08-08>

¹⁴ Business Standard, WHAT IS ARTICLE 370, ARTICLE 370 NEWS, ARTICLE 370 PROVISIONS, HISTORY BUSINESS STANDARD, <https://www.business-standard.com/about/what-is-article-370>

¹⁵ Dutta, *Supra* note. 13

special status for Jammu Kashmir¹⁶. Sardar Vallabhbhai Patel played the most important task of convincing the members of the constituent assembly and the congress party executives despite his own other misgivings¹⁷.

Finally, after a lot of debating, article 370 was inserted in the twenty first part of the constitution. A point which is really important and noteworthy is the conditions were accepted “Subject to future final settlement”¹⁸ and also, the twenty first part of the constitution is called “Temporary, Transitional and Special Provisions”¹⁹ moreover, article 370 itself is titled as “Temporary provisions with respect to the state of Jammu and Kashmir”²⁰ It can clearly be established that the article was ‘Temporary’ in its nature. Article 370 gave special status to the state of Jammu and Kashmir. Under the provisions of article 370, the parliament required Jammu Kashmir’s government’s approval to apply any law there except in cases of defence, foreign affairs, finance and communication. This basically gave Veto power to the government of Jammu and Kashmir. Under 370, citizen from outside the state of Jammu Kashmir could not buy property or reside there permanently. Also, centre does not have power to declare financial emergency in the state.

ARTICLE 35A

Article 35A gives power to the government of Jammu and Kashmir to define its “Permanent residents” and to give special privileges to them. It was inserted through the Constitution (Application to Jammu and Kashmir) Order, 1954 which was issued by the then president Dr. Rajendra Prasad under the powers of article 370 and on the recommendation of the Jawaharlal Nehru led government²¹. When the Jammu and Kashmir constitution was adopted in the year 1956, it defined permanent resident as “someone who was a state subject on May 14, 1954, or who has been a resident of the state for 10 years, and has lawfully acquired immovable property.”²² The article says that no act of the state legislature that comes under this article can be challenged for violating the constitution of India.

¹⁶ *Supra* note. 14

¹⁷ Maj Gen Sheru Thapliyal, PhD, *Article 370: The untold Story*, Indian defense review, (Feb. 14, 2019), <http://www.indiandefencereview.com/news/article-370-the-untold-story/>

¹⁸ Dutta, *Supra* note. 13

¹⁹ INDIA CONST. part 21

²⁰ INDIA CONST. art 370

²¹ Business Standard, WHAT IS ARTICLE 35A, ARTICLE 35A NEWS, AMENDMENT, CURRENT STATUS BUSINESS STANDARD, <https://www.business-standard.com/about/what-is-article-35a>

²² Article 35A: What is article 35A and why is everyone in India talking about it now, THE ECONOMIC TIMES (2019), <https://economictimes.indiatimes.com/news/politics-and-nation/what-is-article-35a-and-why-is-everyone-in-india-talking-about-it-now/articleshow/70507788.cms>.

The text of Article 35A reads,

AFTER ARTICLE 35, THE FOLLOWING NEW ARTICLE SHALL BE ADDED, NAMELY:

“35A. saving of laws with respect to permanent residents and their rights,—

Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State,—

- A) Defining the classes of persons who are, or shall be, permanent residents of the State of Jammu & Kashmir; or
- B) Conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects
- 1) Employment under the State Government
 - 2) Acquisition of immovable property in the State
 - 3) Settlement in the State; or
 - 4) Right to scholarships and such other forms of aid as the State Government may provide, shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part.”

REVOCAION OF ARTICLE 370 AND 35A

Early in the month of August, there was some disturbance going on in the state of Jammu and Kashmir. Students and tourist were asked to leave the state, additional military force was mobilized and everything went into a lockdown. Several leading Kashmiri politician and people of some influence were out into a “preventive detention”²³ The army claimed that Pakistan was planning an attack on the border but it was assumed by the people that the government is set to revoke article 35A, which gives certain privileges to the residents of Jammu and Kashmir. But the government then shocked everyone when it revealed, on August 5th 2019, its plans to abrogate article 370 as well as article 35A²⁴. There were protests against and this and a lot of outcries not only from within the country but even from international community. The people of Jammu Kashmir were devastated at losing their identity²⁵. The Modi government had already had this plan in their election manifesto and

²³ Article 370: What happened with Kashmir and why it matters, BBC NEWS (2019), <https://www.bbc.com/news/world-asia-india-49234708>.

²⁴ *Id.*

²⁵ Pti, WE HAVE LOST OUR IDENTITY, SAY PEOPLE OF KASHMIR AS GOVERNMENT SCRAPS ARTICLE 370 THE HINDU (2019), <https://www.thehindu.com/news/national/we-have-lost-our-identity-say-people-of-kashmir-as-government-scraps-article-370/article28824520.ece>.

when they won a second time with a landslide majority, they did not waste any time to act upon it. There were a lot of reasons for which we can say that the government revoked the articles. For example, the special status to the citizens ensured that non-residents of the state cannot buy property in J&K but if nobody outside the state can buy property then how can industries be set up? And if industries cannot set up there will be slow development in the region. Then there were these discrimination, the special status essentially prohibited women to marry outside the state on the pain of losing their citizenship of Jammu and Kashmir. Then the matter of defence, centre was not allowed to build any kinds of cantonment in J&K without the permission of the state constituent assembly, which in this case, did not exist. The government of India also bifurcated the state of Jammu and Kashmir into two union territories namely, Jammu & Kashmir and Ladakh²⁶.

WAS THE REVOCATION LEGAL?

In 2018, Supreme Court in its judgment held that even though article 370 was temporary, it has now attained permanency since the state constituent assembly has ceased to exist²⁷.

Legally speaking, the only way to scrape article 370 was through the recommendation of the state constituent assembly. But since the state constituent assembly had been abolished in the year 1957 without and recommendation as to what to do with article 370, there seemed to be no possible way. But the government found a way to across this barrier. Four Five presidential orders had been extended the components of Indian constitution into J&K. 94 out 97 subjects of the Union list and 260 out 395 article of the Indian constitution had been extended to Jammu and Kashmir. The government claimed that article 370 had been modified so many times that it can be removed from the constitution without any concurrence with the non-existing constituent assembly of the state²⁸. In 2019, the order which was issued by the president stated that all the provision of the Indian constitution will be applied the state of Jammu and Kashmir. This meant that article 370 stood abrogated. The president issued order with the “Concurrence of the Government of state of Jammu and Kashmir” but what this really meant was “Concurrence with the Governor of Jammu and

²⁶ Outlook Web Bureau, JAMMU AND KASHMIR BIFURCATION: ALL YOU NEED TO KNOW [HTTPS://WWW.OUTLOOKINDIA.COM/](https://www.outlookindia.com/) (2019), <https://www.outlookindia.com/website/story/india-news-jammu-and-kashmir-bifurcation-all-you-need-to-know/341419>.

²⁷ Dhananjay Mahapatra, Article 370 has acquired permanent status: Supreme Court, Times of India, (Apr. 04, 2018 09:13 IST), <https://timesofindia.indiatimes.com/india/article-370-has-acquired-permanent-status-supreme-court/articleshow/63603527.cms>

²⁸ The Hindu, FULL TEXT OF DOCUMENT ON GOVT.'S RATIONALE BEHIND REMOVAL OF SPECIAL STATUS TO J&K THE HINDU (2019), <https://www.thehindu.com/news/national/full-text-of-document-on-govts-rationale-behind-removal-of-special-status-to-jk/article28821368.ece>.

Kashmir” but before this, the government used its powers under article 370(1) to amend article 367 (Interpretation clause) so that the references to “Government of the state [Jammu and Kashmir]” in article 370 would be construed as the governor of Jammu and Kashmir (§ 2), and the expression “Constituent Assembly of the State” in article 370(3) will be read as “referring to the current legislative assembly of Kashmir”²⁹. Now, since there was no legislative assembly at the time of this order and the presidential rule was applied, the government could basically took the concurrence of the governor instead of the constituent assembly. The order was used under article 370 clause 3 which gave power to the president of India to declare the article inoperative with exceptions and modification, if recommended by the state constituent assemble to do so. But again, since there was no state constituent assembly, the recommendation of the governor did the work.

A lot has changed since the revocation of article 370 and article 35A from the constitution of India. Since the special status of the state of Jammu and Kashmir has been revoked. There was a severe backlash to the government after the revocation. Not only did the leaders of the state of J&K revolted but many leaders across the globe criticized this move. It was claimed that there was severe violation of human rights in the state. Pakistan, which claims Jammu and Kashmir to be its own, said that they will do whatever they can to free the state from the atrocities of India. But everything was shut down by the government stating that this was an internal matter of the nation and leaders and countries outside does not have any right to give their opinion against this.

Here is a list of some of the major changes in the state³⁰:

- J&K had a separate flag of its own which has now been replaced by the Indian Tri-Colour.
- The state had a bicameral assemble with legislative assembly and legislative council. Now it only has a unicameral assembly and the new UT of Ladakh will have no state assembly.

²⁹ Kelly Buchanan, FALQS: ARTICLE 370 AND THE REMOVAL OF JAMMU AND KASHMIR'S SPECIAL STATUS FALQS: ARTICLE 370 AND THE REMOVAL OF JAMMU AND KASHMIR'S SPECIAL STATUS | IN CUSTODIALEGIS: LAW LIBRARIANS OF CONGRESS (2019), <https://blogs.loc.gov/law/2019/10/falqs-article-370-and-the-removal-of-jammu-and-kashmirs-special-status/>.

³⁰ Revocation of Article 370 and after-effects in J&K and Ladakh, Indian Legal, (Sept. 22, 2020), <https://www.indialegalive.com/column-news/revocation-of-article-370-and-after-effects-in-jk-and-ladakh/>

- The state laws specially meant for the state will continue to remain in force, such as the Jammu and Kashmir Shri Mata Vaishno Devi Shrine Act, 1988; the Jammu and Kashmir Saffron Act, 2007; the Jammu and Kashmir Aerial Ropeways Act, 2002; Sher-i-Kashmir University of Agricultural Sciences and Technology Act, 1982; the Jammu and Kashmir State Sheep and Sheep Products Development Board Act, 1979 etc. There are a total of 166 state laws.
- Some acts were also replaced with the central laws, acts like, The Jammu and Kashmir Benami Transaction (Prohibition) Act, the Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act, 2013 were some of the acts replaced.
- Ranbir Penal Code of Jammu and Kashmir is now replaced with the Indian Penal Code.

CONCLUSION

In conclusion, it can be argued that the revocation of article 370 and article 35A from the constitution of India is wrong, or it can also be argued that it was completely and legally sound. But there are few merit points of the revocation that one cannot overlook. There are also a few demerits of the revocation that also need to be considered while discussing on the future of this issue. I personally am in favor of the decision as it gives certain rights to the citizen of Jammu and Kashmir that they did not have before. Also, it deals with the discrimination faced, albeit small, by the state's own women and children and everyone outside the state of Jammu and Kashmir.