

A research paper on the topic

“UNDERSTANDING ARTICLE 370, 35-A ALONG WITH A BACKDROP OF HISTORY”

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❖ ABSTRACT

This paper primarily talks about the *Legal, social and political* dimensions of Article 370 and 35-A of the Indian constitution.

In the paper, the Author hopes to explain;

1. What is the *history* of Jammu and Kashmir?

- Pakistan's intervention in Jammu & Kashmir, 1947.
- Instrument of accession, 1947.
- Delhi Agreement, 1952.
- Simla Accord, 1972.

2. What is *article 370* of the Indian constitution?

(here, it is assumed that Article 370 and 35-A are fully applicable i.e. condition before passing of the order on 5th August, 2019.)

- Powers of the parliament to legislate in Jammu & Kashmir.
- Law applicable in Jammu & Kashmir.
- Can the article cease to exist?

3. What is the *present situation* of Jammu and Kashmir after the order passed on 5th August, 2019?

- Arguments in favour of the order.
- Arguments against the order.



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❖ INTRODUCTION

The Jammu and Kashmir issue has been dynamic in nature since the creation of *India and Pakistan*. Both the countries have never backed down whenever the issue of Jammu and Kashmir was raised. However, the *status quo* of Jammu and Kashmir isn't a result of one event but of *multiple events* in the history such as;

- Pakistan intervention of Kashmir, 1947.
- Instrument of Accession, 1947.
- Delhi agreement, 1952.
- Presidential order, 1954.
- Simla accord, 1972.
- Presidential order, 2019.

It is essential to understand all of the above events in order to have a clear understanding of current *situation and politics*.



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❖ HISTORY OF JAMMU & KASHMIR DURING INDEPENDENCE OF INDIA

There were primarily two objectives of the *Mountbatten plan*:

- Divide British India into Pakistan and India.
- To find a Solution for *princely states* in British India.

British India and Muslim league decided that all the areas having *Muslim majority* will be given to *Pakistan* and all the areas having *Hindu majority* will be given to *India*.

Indian independence act, 1947 was passed in order to enact the Mountbatten plan but the definite boundaries were not defined. Therefore, *aboundary commission* was set up and to manage the affairs, *Sir Cyril Radcliffe* was appointed. He reached India on *18th august, 1947*.

The problems faced by him were:

- Time constraint of 5 weeks
- Limited resources. (availability of geographical data required for defining boundaries)
- Lack of knowledge as he wasn't aware of cultural diversities of India.

Nevertheless, *Radcliffe line* was created and west Pakistan and east Pakistan were created. Now, the only hurdle to India's independence were the princely states.

The princely states existing at that time had *three options*:

- Become a part of India.
- Become a part of Pakistan.
- Remain in an independent state.

Lord Mountbatten and sardar Vallabhai Patel had the job to convince them to integrate and become a part of India.

There was a total of **565 princely states** in India and Pakistan.

India had 552 and Pakistan had 13.

Out of the 552 India had, 549 signed the **instrument of accession**.

Three princely states that did not sign the accession were:

➤ **Junagarh:**

Junagarh had a **Muslim nizam** but population was **Hindu** and nizam wanted to be a part of Pakistan and the crowd wanted to be a part of India. **Referendum** was held and Junagarh signed the instrument of accession.

➤ **Hyderabad:**

Hyderabad at that time was the one of the richest princely states and the nizam of Hyderabad wanted to stay **independent** state but they had **religious tensions** in Hyderabad. Consequently, **operation polo** was launched by Sardar Vallabhai Patel. In operation polo, they were given **military support** by the surrounding states in **exchange of accession**. Subsequently, in September, 1948, instrument of accession was signed.

➤ **Jammu and Kashmir:**

When the constitution of India was being formulated, on the basis of which the citizens of India would get **certain rights and responsibilities**, one unique problem that Jammu & Kashmir had was a **combination of Junagarh and Hyderabad**.

Jammu & Kashmir had **Muslim majority** residents but their **Raja** was a Hindu. **Maharaja Hari Singh**. Since, they had a Muslim majority, it was **presumed** that Jammu & Kashmir would go to Pakistan but Hari Singh wanted Jammu & Kashmir to remain **independent**.

However, in October, 1947, Pakistan slowly started sending its army into Kashmir and starts to occupy the territory in order to **dethrone** Maharaja Hari Singh. He approached the **Indian government for assistance** but the government asked as to why should it assist Him since he was reluctant on signing the instrument of accession.

Therefore, **on 26th October, 1947**, Hari Singh signed the Instrument of accession making Jammu & Kashmir an **integral part of India**.

✓ *let's dwell into the specifics and discuss the time when Hari Singh signed the accession and India sent its army in Jammu and Kashmir.*

- Sardar Vallabhai suggested that *India should go in a state of war with Pakistan* go all in with the army and remove all *the troops of Pakistan from Kashmir*.
- But *Jawaharlal Nehru* was against getting into another war and told *Mohammed Ali Jinnah* that India has already signed an instrument of accession with Maharaja Hari Singh. Ali Jinnah argued that the accession was *signed by force and in bad faith*. Therefore, they don't believe in the *accession*. Jawaharlal Nehru did the most obvious and took the *matter to the UN*.

The UN *didn't give much importance to the accession* signed between Hari Singh and India since it was signed in bad faith and thus the UN suggested *a plebiscite* so that the people could decide the fate of Jammu & Kashmir and for the time being to declare Jammu & Kashmir as a *Disputed area*.

However, there were two pre conditions to this;

- India removes its army from Kashmir.
- Pakistan removes its army from Kashmir.

Sadly, *none of the nations* removed the army as a result of which plebiscite never took place. The outcome of this action was that on 1st January, 1948, *a ceasefire was signed between India and Pakistan* to establish LOC and that decided that the armies covering the areas in Kashmir will keep on occupying them. 2/3rd of J&K was occupied by India and 1/3rd was occupied by Pakistan.

At the same time, *Sheikh Abdullah* gained popularity as he was representing political issues and his party was known as all *India Jammu & Kashmir Muslim conference* which was later changed to *national conference* so as to represent suppressed classes of Jammu & Kashmir.

At that time, Jawaharlal Nehru thought that even if the *plebiscite is held or not*, Jammu and Kashmir should feel as an integral part of India. On the *foundation of this thought*, article 370 was *created* and this was a *political move* by him hoping that Kashmir becomes a part of India permanently.

Indian government and Sheikh Abdullah had a meeting called the *Delhi agreement* where the conditions to *incorporate the instrument of accession into article 370* were discussed.

❖ **UNDERSTANDING ARTICLE 370:**

The scope of this article is *so complex that we should divide it into 3 major parts* for a better understanding.

1. POWER OF THE PARLIAMENT.

Generally, the parliament can legislate on all the matters of *central and concurrent* lists but the *article 370 says that the power to legislate is limited when it comes to Jammu & Kashmir* and parliament can legislate only on those matters of *Concurrent and Central list which were decided in the Delhi agreement.*

These matters are;

- Defence
- Communication
- External affairs.

2. LAWS APPLICABLE IN JAMMU & KASHMIR.

- Article 1 & 370
- Subjects decided in the *Presidential order of 1954*. It is updated from time to time.

3. CAN ARTICLE 370 CEASE TO EXIST?

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 issue such a notification.

However, the constituent assembly of Jammu & Kashmir was dissolved in 1957.

❖ WHAT HAPPENED ON 5TH AUGUST, 2019?

It is believed that article 370 has been *abrogated*. However, Article 370 says that only those articles of Indian constitution will be applicable to Jammu & Kashmir which was mentioned in the *instrument of accession and the presidential order of 1954*. This order is updated from *time to time and same thing was done on 5th august, 2019*.

In the 1954 order it was mentioned that *Part III of the Indian constitution* will be applicable in Jammu & Kashmir with an exception of *article 35A. This article defines the special powers of Jammu & Kashmir*.

The 2019 presidential order *has now superseded* the 1954 presidential order. There is nothing *illegal* about it. A *loophole* was found and has been used to *fully integrate* Jammu & Kashmir.

Yes, one may debate about how *wise it is* to not consult the people of the state while deciding their fate but *not debate upon its legality*.



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❖ PRESENT SCENARIO

✓ ARGUMENTS IN FAVOUR OF THE ORDER

➤ **Better development of Kashmir:**

People in Favour of this order say that Jammu and Kashmir will now *be at par* with all the other states in India and there will be better, unrestricted development of the state since the special status has been taken away.

The reason for removing special status by the government was that it was need of the hour but the question arises is that in future, *something important for them would not be important for the nation* but an example has already been set and this could *encourage misuse of power.*

➤ **Less terrorism more jobs:**

There was *mass unemployment* and *tough economy* because of the special status given and now that the special status is done away with, there could be a higher chance of acceptance and more jobs because of more *investment opportunities* and more labour requirement in the industrial sector.

➤ **One nation one flag:**

There will be a *feeling on oneness* when the whole country has same set of laws governing the nation and one flag represents one nation instead of two. The doing away of special status will inculcate the *feeling of pride* within the people of the nation and even the Kashmiri's will call themselves as proud Indians.

❖ **ARGUMENTS AGAINST THE ORDER:**

➤ **no consent of people:**

Taking away the special status/ integration may or may not be good for Jammu & Kashmir and India, that time will tell. Point is, *no one was consulted*. There are allegations that the BJP government made the people *deaf, dumb, blind and rendered them stateless*. The act of the government is being called as *fascism* since the fate of people was decided for them without even the tiniest thought of consulting them.

➤ **Unconstitutional:**

Bifurcation of Jammu & Kashmir and creation of another Union territory requires *consent of the elected assembly of the state*. The fate of nearly 1.2 million people was decided when the state assembly was in a *suspended state*. The central government *could have waited till the time emergency was uplifted*.

➤ **Breach of contract:**

The Line of control was the military line between the Indian and Pakistani controlled parts of Jammu & Kashmir. It was a result of *ceasefire* which was later re-designed into being the *Simla agreement* signed on *3rd July, 1972*. With the alteration of article 370, India has included POK as a part of our Union territory too which is allegedly a *violation of Simla agreement*.

In the Simla agreement, it was agreed that "neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretation"

❖ **CONCLUSION AND SUGGESTIONS**

At the end of the day, its *one against the another*. Some people believed in complete independence of Jammu & Kashmir; some believe in its accession to Pakistan while others

considered as an integral part of India. As it stands today, this move may be criticised but, in the end, the government wanted Jammu & Kashmir to be united with *the rest of India and make one nation one law*.

The latest developments are *surprising, joyous for some* and *Discouraging for others* but surprising for sure. However, we need to throw light upon the fact that there is a growing concern in the country about the future of Kashmir and the focus is on the Kashmiri youth. Numerous Efforts are now going to be made to get the Kashmiri youth back into the national mainstream. It is hoped that *religious congregations to spread radicalism and promote hate India campaign will be stopped*.

As things stand today, the *2019 presidential order* has now superseded the *1954 presidential order*. There is *nothing illegal about it*. A loophole was found and has been used to fully integrate Jammu & Kashmir.

Yes, you may debate about how *wise it is to not consult the people of the state* while deciding their fate but *not debate upon its legality*.



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