

Jammu and Kashmir: Four Years after the Abrogation of Article 370

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Abstract

Jammu and Kashmir, a rare jewel of the Himalayan region of the Indian federation, has the distinction of having multifaceted, variegated and unique cultural blend, making it distinct from other parts of the world. The geographical, demographically, ethical, social entities, forming a distinct spectrum of diversity and diversions into Kashmir, Jammu and Ladakh, all professing diverse religion, language

and culture but continuously intermingling, making it vibrant specimens of Indian unity amidst diversity. The monumental decision of August 5, 2019 abrogating Article 370 and Article 35A from Jammu & Kashmir and Ladakh set in motion a series of transformative changes that have had a profound impact on the region, its people, and its potential for growth. This move removed the special status that had limited the region's full participation in the Indian Union and opened up new avenues for its citizens to realise their true potential. Jammu and Kashmir is passing through a transitional phase. There are problems and challenges of consolidating the politico-administrative structures of the state, on the one hand and realizing the popular needs and aspirations on the other.

Keywords: Article 370, Jammu & Kashmir, Article 35A, Ladakh

Introduction

The Constitution of India envisages a clearly defined division of powers between the centre and states. The division of powers envisaged by the Constitution of India is embodied in an elaborate scheme under which the legislative, administrative and financial powers of the Union and the states are enumerated in detail. A characteristic feature of the distribution of powers between centre and states, the Indian federal structure embodies, is that, all the residuary powers are secured to the Union Government. The Constitution of India vests the Parliament the exclusive right to legislate in regard to any matter in addition to enumerated head of the Union List, which is not given in the State List or the Concurrent List. The powers transferred to the Union Government for its exclusive operation are specified in the Union List as the subjects with regard to whom the provisions of the 7th Schedule are applicable to the state. The powers which are not included in these two categories are retained by the state in residuum. This is, in fact the most characteristic feature of the division of powers between the centre and states.

The Constitution of India deals with centre and State executive separately but the provisions follow a common pattern for the Union government and the State governments. The scheme of distribution of administrative powers between the centre and states followed in the Constitution of India in various administrative fields. Apart from the wide range of subject allotted in the VII schedule of Constitution of India, even

in normal time parliament can assume legislative power over a subject falling within the sphere exclusively reserved for the states, under certain circumstances. Beside the power to legislate on a very wide field, the Constitution of India vests in the Parliament, the constituent power or the power to initiate amendment of the Constitution.

There is a provision in constitution to establish an inter-state council under article 263 of the constitution to solve the problems and disputes among the various states. But so far the centre has not given any attention towards the setting up of inter-state council. Therefore the inter-state water dispute and dispute of boundaries have remained unsettled for a long period. This attitude of the centre is responsible for the tensions and the bitterness between centre-state and among the various states. Even the Administrative reforms commission of 1966 (ARC) has referred to the failure of the centre to establish such a council to benefit the constitutional provision, relating to the states. Therefore, the Party has suggested that the inter-state council should be set-up to prevent the misuse of Article 356 of the Indian Constitution which is regarding the President's rule in concerned States. The Centre has total control over mass-media like radio and the television and the legitimate rights of the states regarding the mass media have been denied. The monopoly of the centre over the mass media must be ended. The party has suggested that there should be autonomous corporations to deal with the affairs of mass-media.

As, we know that a strong centre was created under the Constitution of India. But gradually it has grown stronger and stronger by assuming transferring and encroaching upon and misusing the various powers in different field. The Centre has misused its powers in third, sixth, seventh schedule and 42nd amendments of the constitution of India. Even in various other fields like Planning Commission, implementation of five year plans, emergency powers, imposition of present rule, appointment of governors of states, toppling of opposition party governments in the states, reservation of the state bills by the governor for approval of the president, control over the officers of all India services, appointment and transfer of judges in all these cases the centre has been playing a dominant role in the states. The Union has also the powers to control the states in the names of grants-in-aid, loan and the overdrafts. The law and order is a state subject, but the union government has been dealing with this aspect under its special powers without the consent of states government. At present various regional parties have been coming in to power in states. The people of the concerned states have been supporting such regional parties since 1967. This is because of the negligence of concerned regions by the union government. When there is a concentration of power at the centre, then the Centre-State relations will be degenerate. The executive powers has not been defined in the constitution with the enormous expansion of state activities, executive powers does not mean merely execution of laws but also includes all service operations of the state.

As modern States are welfare states, the administrative powers have gained importance even at the cost of legislative and judicial functions. Executive power is as a rule coextensive with legislative powers, unless there is any specific provision to the contrary. Articles 73 and 162 of the Constitution of India dealing with the executive power of the centre and States given effect to this rule. Thus under Article 73 of the Constitution of India, the executive powers of the union extends to matters with respect to which the union parliament has exclusive power to make laws, i.e. Matters listed in the Union list. This article of the Indian Constitution, also specifically confers on the executive power of the union in relation to any treaty or agreement with the foreign countries. Also, under Article 162 of the Indian Constitution, states have exclusive executive power

over patterns incorporated in the state list. However, in order to enable the executive to function in respect of any subject, it is not necessary that there should be prior legislation on the same subject. The Article 365 of the constitution relating to the administrative relations says that, where any state has failed to give effect to any directions given in the exercise of the executive power of the union under any of the provision of the Indian Constitution, the President may hold that situation has arisen in which the Government of the state cannot run on in accordance with the provisions of the Constitution of India.

Article 370 and the Paradox of Federalism

In the state of Jammu and Kashmir, the division of powers between the state of Jammu and Kashmir and the Union Government is determined within the provisions of Article 370 of the Indian Constitution as amended and modified by the various Constitutions (Application to Jammu and Kashmir) Orders, promulgated by the President of India from time to time. Under the constitution of India, Article 370, in

its original and unamended form did not provide for the application of the provisions, which are underlined for the Centre-state relations, to the Jammu and Kashmir State. According to the provisions of the constitution, the powers of the union parliament to make laws for the state were limited to:

I. Those matters which are given in the Union List and in the Concurrent List, which in consultation with the Government of states, were declared by the President; and

II. Such other matters which are also given in the Union List and in the Concurrent List, as were specified by the President with the concurrence of the government of the states.

Thus the powers of the Union Government did not transfer, in other words, the residuary powers, were retained by the state of Jammu and Kashmir. But this scheme of the distribution of powers between the union government and the government of the state of Jammu and Kashmir was drastically changed in 1954, when the President of India promulgated the Constitution (Application to Jammu and Kashmir) Order, 1954, and part XI of the Constitution of India together with Seventh Schedule, was made applicable to the state of Jammu and Kashmir with certain reservations and modifications. The Part XI of the Indian Constitution, which deal with legislative, administrative and financial relations between the central government and the States. The application of these provisions of the Jammu And Kashmir State unmistakably brought the division of power between the centre and the State, in line with the

federal principle envisaged by the constitution. The later Presidential Orders further defined the two orbits of authority, pruning and modifying the reservation imposed on the application of the provisions of the Constitution of India to the state of Jammu and Kashmir.

However, after the signing of the Instrument of Accession the relationship of the Jammu and Kashmir state with India was determined by various provisions of the India constitution, which came into force on 26th January 1950. Under the constitution of India, Article 1 which deals with the name and territory of the Union also includes the State of Jammu and Kashmir as a part of the Indian Territory and the name of the State are also included in the First Schedule of the Indian Constitution. The Constitution of India under article 370 further clarifies the relationship of Jammu and Kashmir with India by enumerating the heads in which the union Parliament would have power to make laws for the Jammu and Kashmir state. As per the Instrument of Accession only Defense, External Affairs and Communications were acceded to India, Article 370 of the Constitution of India 1950, provided union Parliament with power only to make laws for the State of Jammu and Kashmir with regards to Defense, External Affairs and Communications. Under Article 370 the Constitution of India 1950 further provided the Jammu and Kashmir state with the right to form a Constituent Assembly to draft a Constitution for the State. On 26th January 1957 the Constitution of Jammu and Kashmir, was enacted and under Section 3 of the state Constitution, the relationship of the Jammu and Kashmir State with the Union was further clarified wherein it is clearly stated that the State of Jammu and Kashmir is an integral part of the Constitution of India. Under Article 370 of the Indian Constitution, Jammu and Kashmir enjoys a special posi-

tion within the Indian Dominion. The position, guaranteed by Article 370 of the Indian constitution was not even changed when the State of Jammu and Kashmir was transferred to Part A from Part B of Schedule 1 of the Indian Constitution. The special constitutional position Jammu and Kashmir enjoyed under Article 306A of the original Constitution has been maintained. Hence, all the provisions of the Constitution of India relating to the States in the First Schedule are not applicable to Jammu and Kashmir even though it is one of the States specified in that Schedule.

The Constitution of Jammu and Kashmir 1957, is unique in its nature as it is the only State constitution within the Indian Dominion. However, the Constitution of the state of Jammu and Kashmir, 1957 is not a rival the Constitution of India 1950. It is the Constitution of India that provides for the framing of a separate constitution for the State of Jammu and Kashmir under Article 370(2). The Constitution of Jammu and Kashmir state, 1957, also helps to determine the relationship of the State with the Union of India. The Preamble of the Constitution of Jammu and Kashmir state, 1957, inter alia, states that the object of the Constitution is to "further define the existing relationship of the Jammu and Kashmir State with the Union of India as an integral part thereof." The relationship of the State with the Union is dealt with in Section 3 of the Constitution of Jammu and Kashmir state in 1957. It is pertinent to mention that the relationship between the centre and the State of Jammu and Kashmir was further defined on 13th November 1974, by an agreement between the Prime Minister of India Indira Gandhi and Sheikh Mohammed Abdullah. The said agreement, referred to as the Kashmir Accord, states that, "The Jammu and Kashmir state, which is constituent unit of the Union of India, shall, in its relations with the Union, will continue to be governed by Article 370 of the Constitution of India."

Special Status to Jammu and Kashmir

During the year 1949 when the Constitution makers were busy framing the constitution, the question of the State's relation to the Centre also came under discussion. As a matter of fact the Constitution of India was

in the final phase of its making and the constitutional provisions with regard to the States were required to be defined. By that time the other States had integrated closely by the Constitution Seventh Amendment Act, 1956 and lost their identity and the process of integration and constitutional adjustment which had been adopted in regard to these states could not be followed in the case of Jammu and Kashmir State.

There were certain factors responsible for not bringing Kashmir at par with other States in the Constitution of India. Because of the Accession issue case in United National Organization, its geographical position and administrative problems, made the Indian Constitution framers treat Jammu and Kashmir State at some separate footing.

Pandit Jawaharlal Nehru, the Prime Minister of India supported the case of Jammu and Kashmir State for special consideration. Discussing the constitutional relationship between India and Jammu and Kashmir on 24 July, 1952, in the House of People, he said that the process of integration adopted in case of other States could not be adopt-

ed in regard to Jammu and Kashmir State for variety of reasons such as the whole matter was in a fluid State before the United Nation. From the very beginning they recognised that the position of Jammu and Kashmir was somewhat different for obvious factors and they had repeated even before the partition that no steps would be taken about Jammu and Kashmir State without the concurrence and consent of Jammu and Kashmir State.

When the almost whole task of integration was completed, the Indian constitution framers found it necessary that State of Jammu and Kashmir should also be integrated after taking its concurrence and consent. In order to, have that the relationship between the two Governments and delimitation of their respective spheres of authorities came up for consideration. The Jammu and Kashmir Government that was consulted was the Interim Government of Jammu and Kashmir which the Maharaja Hari Singh had proclaimed on 5 March, 1948, and its composition reflected the largest political party in the State. The main subjects which were discussed between the Indian leaders and leaders from Jammu and Kashmir at their meeting held in Delhi in May 1949 were the framing of the constitution for the State including the abolition of monarchical form of Government in the State and the subjects in respect of which the State should accede to the Union of India.

However, the first subject was left up to the State of Jammu and Kashmir Constituent Assembly to decide. In regard to the second it was decided Jammu and Kashmir State acceded to Indian Union in respect of three subjects,

namely, Foreign Affairs, Defence and Communications, and for the rest of the matters it was left up to the State Constituent Assembly to decide. On the basis of this discussion N. Gopaldaswami Ayyanger prepared a draft of Article 306-A. But the provisions of Article 306-A were different from the items mentioned in the discussion between Sheikh Mohammad Abdullah and Nehru. The provisions drafted by Ayyanger envisaged the applicability of Citizenship, Fundamental Rights and Directive Principles of the Indian Constitution to Jammu and Kashmir State, whereas the applicability of such like matters had earlier been left to the Constituent Assembly of Jammu and Kashmir to decide. On this ground Sheikh Mohammad Abdullah found it impossible to accept the draft and he therefore wrote to Ayyanger on 12 October, 1949, that draft sent by you was not acceptable, as it failed to implement the pledges given to us by Pandit Jawaharlal Nehru on behalf of the Government of India and was opposed to the stand taken by the National Conference in these matters. And then Sheikh Mohammad Abdullah prepared an alternative draft on behalf of the National Conference and sent it to the Indian Union. In it he restricted the power of parliament to make laws for the State and application of the provisions of the Constitution of India in relation to the subjects specified in the Instrument of Accession.

After receiving the draft Ayyanger felt distressed because he did not find any adequate excuse for these changes. But Indian Government had the commitment with Jammu and Kashmir State that no steps would be taken about Jammu and Kashmir State without its concurrence and consent. Consequently, Ayyanger redrafted Article 306-A, and omitted the provisions pertaining to the Fundamental Rights and Directive Principles. But this re-draft was also rejected by the State leaders because

its provisions were not in accordance with the alternative draft sent by Sheikh Mohammad Abdullah. In a letter Sheikh Mohammad Abdullah wrote to Ayyanger on 17 October, 1949, that it was not possible to accept your revised draft and in order to accommodate your view point to the maximum extent possible he submitted another draft to you. Sheikh Mohammad Abdullah insisted on certain changes of a fundamental character. These changes excluded the application of Fundamental Rights and citizenship. Actually the National Conference leaders were fearful that the application of the provisions of the Constitution of India with regard to the citizenship and Fundamental Rights would affect the State subject laws by prohibiting the acquisition of property by other citizens of India in the State, and prejudice the Land Reforms undertaken by the State Government. Sheikh Mohammad Abdullah in his draft suggested that concurrence of the State should be taken on these matters as well as those defined in Instrument of Accession. This concurrence was sought to define as Maharaja acting on the advice of the Council of Ministers appointed under the proclamation of 5 March, 1948. When the Indian constitution was in its final stage, it was necessary to make provision in it, regarding the status of the Jammu and Kashmir State. Therefore, certain broad principles were agreed upon by the centre and the state's leadership in a meeting held in Delhi in May 1949. Finally they cleared, that when the Article 306A, was drafted, it should be placed before of India. This draft was revised three times just to accommodate the view-points both of the parties.

Thus, the provisions for giving a special status to the Jammu and Kashmir State were finally embodied in the Article 370 of the Indian constitution. It was a step to fulfill the long desire of the National Conference leaders with regard to the States autonomy. The main object behind this article was to recognise the special status for the State of Jammu and Kashmir by limiting the powers of the Union President and the Parliament.

The analysis of the provisions of the Article 370 clearly shows that the competence of the Indian Parliament was restricted to such articles in the Union and concurrent list of 7 schedules to the Indian constitution as correspond to the subject specified in the Instrument

of Accession. Elaboration of subjects to be done by the President by an order, in consultation with the State Government and in addition to which were to be made with the concurrence of the state Government. Moreover, the further progress about the Constitutional relationship between the State and the Centre was contingent on the recommendations of the States Constituent Assembly. In other words the residuary powers were reserved for the State and the State Constituent Assembly was made the sole and decisive actor in this regard. Both the President and the Parliament enjoyed only a formal authority. The explanation clause of Article 370 pointed out that the Government of the State would mean the person then being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of Council of Minister being in office under Maharaja's Proclamation.

The controversy of special status granted to the Jammu and Kashmir State as envisaged in Article 370 of the Indian Constitution, has been subjected to heated debates and discussions since its incorporation in the Constitution and the subse-

quent application to the State. Different view-points had been expressed by the cross section of the people as well as political parties inside and outside the legislature.

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