

# **The Agony of Article 370 - The Legal Framework that Binds Jammu and Kashmir State with India by Maharaj Kaul**

The notoriety of Article 370, the legal framework that connects India with Jammu and Kashmir State (J&K) as a nation, has grown to a mythic level for its political implications both among its vested players and its casual observers.

This article attempts to demythologize Article 370 and bring it down to its functional basis, which was the original intent of its framers. But to do that one has to go to the birth and evolution of the Kashmir Problem, to engage in its details, as the devil lies there.

When Britain decided in June, 1947 to leave India the problem of the latter's effective survival after its exit from the scene became a gnawing anxiety for it, as India had remained a fragmented fabric throughout its deep history. But the lines of the pattern of new India were already inscrutably crystallizing. A lot of Indian Muslims had already decided to have their own space as far back as early twentieth century. The ongoing accelerating Indian freedom movement, comprising both Hindus and Muslims, to free India from the yoke of Britain, did not bring the two closer, but put them on divergent goals of achieving separate nationalities, Indian and Pakistani. Following historical outline aims at providing an experience of the evolution of Article 370, which is more meaningful than just learning its dry final facts.

## **Instrument of Accession**

Instrument of Accession (IOA) was a legal instrument which Britain first created in Government of India Act 1935 for precisely establishing its relationship with the Princely States. But when Britain decided to leave India in June 1947 (Indian Independence Act 1947), it was decided by Britain, Indian National Congress, and Muslim League that IOA should be used to facilitate the incorporation of the Princely States in the new nations of India and Pakistan, which were called dominions at the point of their independences in 1947, before they made their constitutions and fully became republics, breaking completely free of the British yoke.

By 1947 India under Britain was divided into British India and Princely States. While the former was directly under the British government the latter were 578 states, basically ruled by either their princes or their controllers, but having a subsidiary alliance relationship of suzerainty or paramountcy with Britain. Typically, Britain controlled their defense, foreign affairs, and communications. British India had 54% of India's area and 77% of its population. The territories under British India were called provinces but those under the princes were called states.

By early 1947 it was well established which provinces of British India will the new dominions of India and Pakistan incorporate. Although almost all the princely states had also decided which new dominions they will join but at the time of the independence of India and Pakistan, August 15 and 14, 1947, a few states' incorporation took up to several years.

The significant situations were that of Hyderabad, Junagarh, and Jammu and Kashmir. While the Instrument of Accession for the Princely States was set up for the princes to decide which new dominion they wanted to join but the reality of the religious composition of the three mentioned states, where the religious orientations of the princes and their subjects differed, forced a change in it. The amendment, accepted by all the three parties, Britain, Indian National Congress, and Muslim League, spelled that in case of differing religious orientations between a prince and his subjects, the will of the subjects would prevail in

choosing which of the two dominions they would join. In case of Junagarh, where the prince created a lot of difficulty in following the amendment, a plebiscite was conducted which decided that it will go to India. In case of Hyderabad the situation was more complicated as Nizam wanted Hyderabad to be an independent nation, though his Hindu-majority subjects wanted to join India. India did not want to have a foreign nation in its middle, so it forced Hyderabad to join it by a military intervention in 1948.

Since Maharaja Hari Singh of J&K harbored a deep ambition to make his state an independent nation, a Switzerland of the East, he would not choose one of the two dominions he would like to join even after their formation on August 14 and August 15, 1947. He asked for a Standstill Agreement to have more time to decide from the two entities, which Pakistan granted but India did not respond to. As India did not have any cards to play with, as Maharaja leaned for independence and the majority of his subjects were Muslims, it did not do anything to capture J&K. As time ticked on Pakistan's greed to acquire J&K swelled, seeing Maharaja's indecisiveness and India's lack of hunger to get it. On Oct. 22, 1947 it attacked J&K, its army camouflaged by a tribal militia, giving an appearance of their revolt against Maharaja's government over some grievances. Maharaja had a miniscule army which evaporated momentarily. As the invaders came closer to Srinagar, Maharaja panicked. He sent an SOS to Governor General of India, Mountbatten, on October 25, 1947, to help him save his countrymen and himself. Mountbatten recommended to the newly founded Indian government that Maharaja should be helped, but only after he accepted the IOA. Indian government accepted his advice and Maharaja signed the IOA on October 26, in Jammu, where he had run after invaders closed on him in Srinagar. The following day, Oct. 27, Mountbatten, on behalf of India, accepted it. But it is one of the errors of history that Kashmir's accession to India is celebrated on Oct. 26, while it was consummated on Oct. 27, when Mountbatten signed it into law.

But one item in the approval of the IOA, not mentioned above, influenced the subsequent history of J&K-India relationship. While India accepted Maharaja's IOA, it added a rider condition to it, which was conveyed in the approval letter Mountbatten attached to it. That condition is the following:

“...it is my Government’s wish that, as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State’s accession should be settled by reference to the people.”

What it meant was that the accession of J&K to India would only be completed after the will of its people about the accession is determined. India did this to be consistent with the principle it used in incorporating Junagarh and Hyderabad with it. Also, because J&K was under an invasion, people’s will could only be properly known when it was cleared. It did not specify how that will could be determined. But it is well known that there are a few ways to do that: plebiscite, elections, through an empowered panel. But popular notion among the people, politicians, and the press was that it would be done through a plebiscite.

There was a second element in IOA that was also significant, though not as much as the first one. It was the Clause 7 Maharaja added to the standard IOA:

“Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future constitution.”

It meant that Maharaja was not obligated to accept any future changes in the constitution of India which it might think applicable to his state. Only foreign affairs, defense, and communications were under the union government but all other matters were under the state government.

India’s war with Pakistan in defense of Kashmir went on through 1948, but on January 1, 1948, India went to U.N. to plead for forcing out of the invader, a

ceasefire, and a plebiscite. Pakistan accepted the ceasefire, which took effect on Jan. 1, 1949. But it took U.N. sometime to investigate the Pakistani attack. Then on April 21, 1948, under U.N. Security Council Resolution 47, in Chapter VI jurisdiction, it asked both the countries to accept certain conditions before a plebiscite was conducted. Because Pakistan would not fulfill U.N. conditions, therefore, the plebiscite was never conducted. U.N. could not enforce its resolution because its Chapter VI status was non-binding. Later, U.N. declared that since the demographics in J&K had changed significantly since the Pakistani attack in 1947, it was unfeasible to conduct the plebiscite. In 2003, President Musharraf of Pakistan announced that Pakistan will drop the demand of a U.N. resolution on Kashmir Problem. In Nov., 2010, U.N. announced that it had dropped J&K among the disputed territories in the world.

Outside the U.N. Nehru twice offered Jinnah a plebiscite but he declined it, because he believed Pakistan would lose it. One of the things Pakistan relied on in its attack on Kashmir was the support of Kashmiri Muslims (KMs). But it never received that support. Mountbatten, in 1948, at the end of his term as the Governor General of India, with the agreement of India, offered Pakistan a division of Kashmir, which it rejected. Then in 1954, during Pakistan's Prime Minister Mohammed Ali's visit to India, Nehru offered him a plebiscite. Ali rejected it because he insisted that General Nimitz, then U.S. representative to U.N., be the plebiscite in-charge, which Nehru did not agree to, as he wanted someone from a smaller nation for that job. This was the last time India offered Pakistan a plebiscite. But plebiscite in J&K was put to death by its Constitution when it declared in Article 3 (Part II): *J&K is and shall be an integral part of the Union of India*. Since Musharraf's time Pakistan has given up on the plebiscite to solve its claim on Kashmir. Its new thinking is that since Kashmir has Muslims as its majority, it ought to be with it. In the last decade majority of Kashmiri Muslims, about 95%, have moved away from joining Pakistan, instead they want to be an independent nation.

## **Constitution of India**

There was a significant shortcoming in the newly formed dominions on account of a lack of a constitution to govern by. It was decided by all parties that India Act of 1935 would serve as a temporary constitution until new constitutions were framed. But it was done after some revisions to it, and served under Indian Independence Act of 1947, as a temporary constitution of India until Jan, 25, 1950, when on the following day, Jan. 26, India became a republic under its own constitution.

In India the work on the framing of a new constitution started right at its independence. The constitution had to incorporate in its framework broadly two areas: Union government and the Princely States. Since the latter were incorporated in the Union on a voluntary basis, it was Union's obligation to ask them if they would accept the union constitution fully or if they would like some amendments to be made to it. If they wanted the latter, they were asked to send their representatives to the Indian Constitution Assembly or to make their own constitution assemblies to create the amendments. Most of them were unable to make the assemblies in time. But a few of them did: Saurashtra Union, Travancore-Cochin, and Mysore. All the suggested amendments were accepted by the Union. Eventually, all the States accepted the Union constitution, except J&K, which wanted to have its own constitution. India had no choice but to accept it.

### **Article 370**

In May, 1949, the rulers of all the states agreed to accept the finalized Union constitution, with the exception of J&K, which fell in a separate category altogether.

J&K negotiated its constitutional relationship with the Union from May through October, 1949. It was agreed upon that it would set up its own constitutional assembly to frame its constitution. While it would take time to get that done, meanwhile, a temporary framework was created. That was called Article 370,

which during its drafting was called Article 306A. It is Part XXI of the Indian Constitution, under Temporary, Transitional, and Special Provisions.

Nehru appointed a minister in his cabinet, without portfolio, Gopaldaswami Iyyengar, especially to frame Article 370. Iyyengar had been a Prime Minister of J&K for six years and, also, a Dewan. So, he was considered eminently qualified for the job.

Article 370 was debated in the Indian Constitutional Assembly in the presence of the five representatives from J&K: Sheikh Abdullah, Mirza Afzal Beg, Maulana Massoodi, and Moti Ram Baigra. (I do not have the name of the fifth representative) Some of them had some disagreements initially with it but eventually they were taken care of. On October 17, 1949, Article 370 was unanimously approved by the Constitutional Assembly of India. On Nov. 25, 1949, Karan Singh, acting as the Regent of J&K signed it. And on January 26, 1950 President of India, Rajendar Prasad, signed it into law.

### **Salient Points of Article 370**

1. It fully incorporates I.O.A., notably its clause of J&K's accession to India. (Article 1,b,i)
2. Union Parliament can only make laws for J&K which fall within the three spheres of Foreign Affairs, Defense, and Communications, as stipulated by IOA. (Article 1, b, i)
3. But because IOA did not give details of which items in the Union and Concurrent List covered the three spheres, a mechanism of establishing them was set up. President of India in *consultation* with the J&K Government can do it. (Article 1, b, i)

4. Also, the same mechanism will deal with matters beyond the three spheres, if India thought that they were needed for good governance, with *concurrence* of J&K Government. (Article 1, b, ii)
  
5. Since J&K Government was not fully developed by January 26, 1950, Maharaja of J&K, in *consultation* with its Council of Ministers, *for the time being*, was considered the Government of the State. There were no Legislative Assembly and Council of Ministers at that time, only thing there was was Maharaja's Proclamation of March 5, 1948 to form a constitutional government. It was expected that when they were formed, along with the J&K Constitution, then the final Government of the State would be established. This clause was put as Explanation in Article 370, which made Sheikh Abdullah unhappy, and has figured in Supreme Court's deliberation on Article 370. (Explanation)
  
6. If laws outside the three spheres of IOA are created, as indicated in Item 4 above, before the Constitutional Assembly is commissioned, then they would be subjected to its review before they are considered final. J&K Legislative Assembly could only give a *provisional* approval to them meanwhile. (Article 2)
  
7. President may declare Article 370 void, modify it, may make exceptions to it, or change dates of its or its clauses' applicability, if recommended by the J&K Constitution Assembly. (Article 3)

## **J&K Constitution**

Maharaja's Proclamation of March 5, 1948 declared that J&K would have a constitutional government. Which implied that a new constitution would be

created. The extant laws were not set up in a constitutional framework to meet the situation flowing from IOA.

But Maharaja by his proclamation on June 9, 1949, transferred all his powers over the government to his son, Karan Singh, because of his stated reason of health. He left J&K soon after, never to return.

Karan Singh made a proclamation on May 1, 1951 to convene J&K Constitutional Assembly. In it he also cited some items in the original proclamation by his father on the subject of not being able to meet the present situation.

J&K Constitution Assembly was set up on Oct. 31, 1951 by J&K Legislative Assembly. It went through rigorous steps of establishing the basic principles of the future constitution and covered significant matters affecting its citizens and its relationship with India.

The correspondence on the negotiations on the constitution's framework and some of its significant items among Nehru, Abdullah, Ayyangar, Patel, and other national and state leaders is imbued with passion and a sense of high purpose. Especially, passionate and poignant are letters between Abdullah and Nehru. The former was a nitpicker but latter wanted the integration of J&K and India to be consummated fast, leaving the details to be settled later. Abdullah had come to believe by his arrest on Aug. 9, 1953 that Indian government was not going to be honest in giving J&K the full extent of autonomy it owed to it by virtue of Article 370. Though he trusted Nehru but he was not sure about other Indian leaders. By his exit from the Constitutional Assembly it lost its most demanding leader. These negotiations between Indian and J&K leaders over the content of J&K's constitution were called Delhi Agreement. They were just negotiations, they lacked legal authority.

J&K Constitutional Assembly was dispersed on Nov. 17, 1956 and was dissolved on Jan, 25, 1957. President of India, by his Order on Jan. 26, 1957, made it effective.

### **Salient Point of J&K's Constitution**

Note: There have been 29 amendments made to J&K Constitution since its inception on Jan. 26, 1957.

1. Preamble: J&K has acceded to India on Oct. 26, 1947.
2. Article 3 (Part II): J&K is and shall be an integral part of the Union of India.
3. Article 4 (Part II): J&K territories are those which were under the Ruler of the State on Aug. 15, 1947.
4. Article 5 (Part II): The executive and legislative power of the State to extends to all matters except those with respect to which Parliament has powers to make laws for the State under provisions of the Constitution of India.
5. Article 147 (Part 12): No bill shall be introduced or moved in State Legislative assembly to amend or change the above indicated Articles 3

and 5, which relate to J&K's relationship with India.

6. Also, if J&K Assembly wants to make changes to some aspects of the institutions of Governor and Election Commission, then it needs President's assent for them to come into effect.
7. J&K has its own flag but it can only be flown with deference to the Indian national flag.
8. Article 48 (Part VI): Defines Pakistan administered Kashmir as "Pakistan Occupied Territory" and reserves 24 Assembly seats for it, which remain inoperative till the territory is handed over to J&K.
9. India has no power to declare financial emergency under Article 360 in the State. Only the State can initiate such an emergency.
10. India can declare security emergency in the State only in case of war or external threat, but not on account of State's internal disturbance, unless State asks for it. Under certain conditions, India can impose Governor's rule.
11. Matters related to Defense, Foreign Relations, Finance, and Communications are directly under the jurisdiction of India.

12. Head of State is the Governor, who is appointed by President, for five years at a time, and serves under his pleasure.

13. Citizens of India who do not qualify to be Permanent Residents of the State do not have a right acquire property there.

### **Article 35A**

This article was made part of Indian Constitution by a Presidential Order in 1954. It protects J&K's Permanent Resident and other state laws above those of the rights of any other citizen of India. Like an Indian citizens outside J&K cannot own property there and cannot claim state government jobs and other protections meant solely for J&K citizens. This article was incorporated in the Indian Constitution without a debate. Because of these matters it is considered to be a dark spot in India's Constitution and is being challenged in the Supreme Court. It was a gift given by India to J&K to make its accession to India strong.

### **Life after Article 370 and J&K Constitution**

Article 370 stipulated that J&K Constitutional Assembly could declare it to be inoperative or be operative with such exceptions and modifications and from such date as it may specify. But it did not. So, it became permanent. But why is it still called "temporary, transitional, and special" under Part XXI of Indian Constitution? It is because it helps India to impose new legislation for J&K through Article 370, giving an appearance that the integration between India and J&K is still incomplete due to the history of latter's accession to India.

Ninety-four of the ninety-seven entries in the Union List were extended to J&K, as were 260 of the 395 Articles of the Indian Constitution from 1954 to 1994 by Presidential Orders made under article 370. The validity of these orders have been upheld by the Supreme Court of India. Its rationale has been that even though the J&K Constitutional Assembly was dissolved on Jan. 25, 1957, India could make new laws for the State with the concurrence of its government. This defies in the face of Article 370, which mandates that new laws have to be concurred by the Constitutional Assembly. So, logically speaking if the Assembly ceases to exist, then no new laws can be made for J&K. But who are we to challenge the Supreme Court, it makes the laws of the land.

J&K's Constitution was overridden by India in the following matters:

1. J&K had the Head of State, Sadar-i-Riyast, elected by its Legislative Assembly. Karan Singh became the first such head in 1952. But India got it changed to Governor, appointed by President, on Nov. 24, 1966, after the State Constitution was amended on April 10, 1965, by the use of the Sixth Amendment, in violation of the Section 147 of the State Constitution.
2. India amended State's constitution debarring the state legislature from amending matters with respect to Governor, Election Commission, and the composition of the State Upper House (Legislative Council).

J&K's political leaders and people believe that India has committed a fraud by passing laws beyond the dissolution date of its Constitutional Assembly but latter believes that it has done so by the permission of Article 370, which has been upheld by the Supreme Court. So this erosion of Article 370 is very much affecting the relationship between the two. The former is calling for going back to pre-1953 level of J&K's autonomy.

## **Concluding Thoughts on Article 370**

Article 370 is not the devil behind Kashmiri Muslims' political insurgency in Kashmir but it is a catalyst for that. If it were not there the place would have been quieter and more cooperative with the center. Engendering more private businesses in J&K and, therefore, more jobs for the unemployed youth. The supreme irony is that Kashmiri Muslims do not know the extent of harm they are doing to themselves. By living in a permanent state of anarchy, Kashmiri Muslims are destroying their economic growth and peace of mind.

Kashmiri Muslims by nature are slothful. Their only expression of energy is in talking, and there are no facts so sacred for them that they cannot twist them into figments of their imagination to protect their ego, past inhuman actions, and Islam. They hounded out innocent Kashmiri Pandits in 1990, who were miniscule and a harmless community living with them ever since the advent of Islam in Kashmir in 1339. The original inhabitants of Kashmir were Pandits, dating back to 5,200 years.

The concept of plebiscite to determine the political status of J&K, which originated in India asking for it in IOA in 1947, was put to death when J&K settled the matter by providing in its constitution, in Article 3, in 1957, that it was an integral part of India. Also, the constitution forbids Article 3 to be amended.

Article 370 stands like a sword of Damocles for the center, for its autonomy privileges to Kashmiri Muslims is potent with separatism, alliance with Pakistan, and turning Kashmir into a Middle East-like Islamic state, discouraging Hindus to travel there, let alone living there. This is all the more painful because India is the largest democratically secular nation in the world.

The supreme irony is that Kashmir cannot be independent as it does not have the

economic and military resources for that. Within weeks after the hypothetical independence of Kashmir, Pakistan will capture it, and Kashmiri Muslims will be rendered second-class citizens. Even independence overseen by U.N. will not prevent Pakistan infiltrating to control reins in Kashmir. Sensible Muslims know that but they want to keep the anarchy alive in Kashmir as it helps them maintain their political power, financial resources, and ego.

India cannot let go of Kashmir because first of all it has done nothing illegal and immoral in holding on to it. It was not India that captured Kashmir but it was Kashmir that asked for its help when Pakistan attacked it in 1947. Ceding Kashmir to its arch enemy will invite huge security problem for India. It means Pakistan will be nearer to New Delhi by about 500 miles in north. Indian military will strongly advise against it and Indian Parliament will never approve it.

### **What Should India Do About Article 370?**

What should we do about Article 370? First of all, it was a necessary legal instrument to let India and J&K live together. A lot of effort and cool thinking went into its formulation. Why it failed was because J&K political leaders promoted a lot of distrust between India and J&K, which they attributed to Indian manipulation to undercut it. This led to a permanent state of anarchy in J&K, which has suffocated its political, economic, and cultural progress.

Although India can keep on effecting legal changes in J&K through the mechanism embedded in Article 370, as it has done since Jan. 26, 1950, when it was born, but that cannot give it a peace of mind, as the continuous political turbulence in Kashmir is politically unsettling to India. Kashmir is a bomb waiting to explode, with the connivance of India's arch enemy, Pakistan. This foreign policy implication of Kashmir Problem is not something India can throw under its rug. Let us see if it is feasible to jettison Article 370.

But India has never asked for the abrogation of Article 370. But recently B.P.Yadav, a lawyer based in Andhra Pradesh, petitioned before the Supreme Court of India, that it be abolished and that all laws of India be applicable to J&K. The Chief Justice of Supreme Court of India, H.L. Dattu, on October 30, 2015, decided that “We can strike down a provision if it is unconstitutional but we cannot be asking Parliament a provision. It has to be done by them.” That meant that Article 370 has been in Indian Constitution for 66 years and, therefore, Supreme Court cannot remove it, so it is Indian Parliament which has to come up with a new law that abolishes it.

If India is strong on changing J&K political nightmare, it must pass a new bill in Parliament rescinding Article 370. Supreme Court then will have no choice but to accept it. There will be uproar in J&K and Pakistan will beat its chest, and some nations will castigate India for its immorality. But that would not matter as history is replete with cancellation of treaties among nations and their parts.

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