
Indian Secularism and the Erosion of Article 370

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Abstract

The erosion of article 370 since mid-1950s by diminishing the special status of J&K questioned the claim of New Delhi that secularism remained a cardinal principle of the Indian state. According to 42nd amendment of the Indian constitution enacted in 1976, India was declared as a secular state. The Indian state has no official religion and recognizes all religions. Yet, the phenomenon of Indian secularism is often contested and tested either when there are communal riots or when the Indian state is held responsible for promoting Hindu nationalism particularly during the BJP regimes. This paper will examine in detail the nature of article 370 of the Indian constitution; its gradual erosion and its implications on Jammu & Kashmir. That how a sense of alienation and deprivation deepened and the sustained use of force by the Indian state to quell popular surge against the excesses of security forces transformed the Valley of Kashmir from a heaven on earth to a large-scale prison camp manned by hundreds of thousands of Indian military and border security forces. Furthermore, the paper will also analyze consistent assertion by the Modi regime that article, 370 needs to be undone and the special status given to J&K be abolished so as to fully integrate that disputed territory under the Indian Union.

I. Introduction

Article 370 of the Indian constitution provided special autonomous status to the people living under the Indian controlled parts of Jammu & Kashmir (J&K). Enforced on January 26, 1950, article 370 was termed as an attempt made by New Delhi to achieve two objectives. First, to prevent the secession of Indian controlled parts of Jammu & Kashmir by providing special privileges in the form of autonomy. Second, to ensure the secular nature of the Indian state. Jammu & Kashmir as the only Muslim majority state in the Indian Union was termed as a model of religious diversity and unity of the Indian state. The argument given

since the days of Prime Minister Jawaharlal Nehru that special status given to J&K under article 370 of the Indian constitution was essential to guarantee the secular status of the Indian state is however contested by critics.

The erosion of article 370 since mid-1950s by diminishing the special status of J&K questioned the claim of New Delhi that secularism remained a cardinal principle of the Indian state. According to 42nd amendment of the Indian constitution enacted in 1976, India was declared as a secular state. The Indian state has no official religion and recognizes all religions. Yet, the phenomenon of Indian secularism is often contested and tested either when there are communal riots or when the Indian state is held responsible for promoting Hindu nationalism particularly during the BJP regimes.

Jammu & Kashmir is another test case of Indian secularism because J&K is the only state, although disputed, which is termed as a Muslim majority state in the Indian Union. The argument raised by some Indian circles that if J&K secedes from India, it will be a serious blow to the Indian constitution and the future of Indian Muslims who happen to be around 15% of the total Indian population will be in jeopardy. The connection between article 370 and the question of Indian secularism, may be remote but in reality there exists perception in India that the pledge of Indian state to guarantee the rights of religious minorities may be at stake if J&K leave the Indian Union.

With the passage of time, the Indian state not only reneged from its pledge to hold plebiscite to determine whether the people of J&K want to join India or Pakistan but also began to curtail the so-called autonomy given to that former princely state under article 370 of the Indian constitution. For instance, the positions of Sadar-e-Riasat (President) and Prime Minister were abolished and deepening of center's rule in J&K became a policy of the Indian state. The two positions which were created under article 370 to assure the identity of Jammu and Kashmir were replaced with Governor and Chief Minister respectively. As years passed, the original shape of article 370 eroded as the state of Jammu & Kashmir came under the virtual occupation of the Indian military with brutal acts of human rights violations particularly against the Kashmiri Muslims calling for "Azadi." Periodic dismissal of state government and the imposition of governor's rule in J&K along with the deployment of around half a million of Indian military and para-military force contradicts the Indian argument that Jammu & Kashmir is its integral part. Even in Jammu, where New Delhi feels confident to have legitimacy because of a relative non-Muslim character of that region, in fact, the genocide and expulsion of millions of Kashmiri Muslims in Jammu¹ helped create so-called Hindu majority.

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how a sense of alienation and deprivation deepened and the sustained use of force by the Indian state to quell popular surge against the excesses of security forces transformed the Valley of Kashmir from a heaven on earth to a large-scale prison camp manned by hundreds of thousands of Indian military and border security forces. Furthermore, the paper will also analyze consistent assertion by the Modi regime that article 370 needs to be undone and the special status given to J&K be abolished so as to fully integrate that disputed territory under the Indian Union.

II. India's Divergent Perceptions On Article 370

The Indian house is divided as far as the repeal or maintaining of article 370 is concerned. There are two schools of thought in India on dealing with article 370: the first school of thought wants to repeal that article by abolishing the special status given to J&K and fully absorbing it in the Indian Union. According to BJP national spokesman, Sambit Patra, "as far as the abrogation of Article 370 is concerned, it continues to be part of the core ideology of BJP, but right now we don't have enough numbers in Parliament to do away with it... but in future when we have the required numbers we will work towards its removal."² It is yet to be seen, if BJP has required numbers in the Indian parliament, will it be able to undo with article 370 as it is not just abrogating that article but the future of Indian Union may be at stake if such an attempt is made by those who are currently at the helm of affairs in New Delhi.

The second school of thought is against the repeal of that article as it considers that article a guarantee of Indian secularism and to maintain the identity of J&K. During his election campaign more than two years ago, Modi made it clear that once in power BJP will take all necessary measures to abrogate article 370 from the Indian constitution and annex J&K in the Indian Union. It was termed as an irresponsible approach by the critics of BJP with dangerous implications on the Indian Union but the hard line BJP leadership maintained such a stance. However, it will be an uphill task for the Modi regime to abrogate article 370 from the Indian constitution because of technical reasons, yet the mindset which favor its annulation cannot be ignored. It is not only since the assumption of power by Narendra Modi and his Bharataya Janata Party led government that one can observe assertive voices to undo with the special status of J&K and completely absorb in the Indian Union, but such voices are being raised since long. The Praja Prasad Movement in Jammu launched by the Hindus of Jammu in reaction to article 370 demanded integration of J&K in the Indian Union.

According to Kashmir observer, under the article, "Kashmir's demographic changes and the UN, "there are attempts to settle non-State retired army officers in Sainik Colonies, settle West Pakistan Refugees, non-State beggars in

temporary shelters, non-State white collar officers serving in State and non-State students studying in various institutions in Kashmir. Indian administration has plans to parachute non-State Hindu colonies in State. Delhi is working on a fast track basis to finalize the acquisition of 350 Kanals of land for Raiya Sainik Board, to settle non-State retired army people in district Srinagar and district Budgam. Government also plans to settle the Kashmiri Pandits in separate colonies away from the normal contact of Kashmiri Muslims. Government of India is all out to overwhelm Kashmir in all aspects of its status and dignity. It has proposals to lease out land in Jammu and Kashmir to outsiders through their local contacts for industrial development. The local investors would act as front men to tie-up with non-state subjects for new industrial venture.³⁰ One can see a replica of what the Modi regime intends to do to change the demographic complexion of the Valley of Kashmir where unlike Jammu and Ladakh, there is overwhelming Muslim majority and what the successive Israeli governments have been doing with once Arab dominated West Bank by establishing scores of Jewish settlements. Israel's advantage in colonizing the lands of West Bank is the absence of any constitutional hitch and it is also not complying with the UN Security Council resolution of 242 passed in November 1967 which called for the withdrawal of Israeli forces from the Arab occupied areas which it occupied during the June 1967 Arab-Israeli war. However, India's confidence on maintaining its control over Jammu & Kashmir stems from the fact that the Kashmiri resistance against the Indian occupation lacks proper unity or the support from the international community.

One interesting argument which is given by those who are against repealing article 370 from the Indian constitution is based on the premise that its abrogation will result into the settlement of millions of Indian nationals particularly Hindus in J&K thus transforming the demographic complexion of local population particularly in the Muslim dominated Valley of Kashmir. Furthermore, it is also argued by the opponents of abrogating article 370 of the Indian Constitution that the model of settlement policy of Jews in occupied West Bank by Israel which transformed the Palestinian majority into a relative minority will also be applied in J&K. Those who want J&K to lose its Muslim identity argue that the only obstacle in a way to achieve such an objective is article 370 of the Indian constitution. As long as that article exists, Jammu & Kashmir will continue to have special status thus denying Indian nationals to buy property and vote in J&K as local citizens. Since Israel had occupied West Bank during the 1967 Arab-Israeli war and is not able to annex it in the state of Israel as it did in case of Golan Heights which it seized from Syria, the Jewish state followed the policy of establishing Jewish settlements which ultimately resulted into the surge of Jewish population at the expense of local Palestinian people. Israel do not

takes into account international condemnation and UN General Assembly or Security Council resolutions which were passed terming such settlements as illegal but Israel is determined and consistent to sustain such a policy which according to its vision means reclaiming the holy land of Jerusalem and other places in the West Bank which has been considered by Israel to be religiously sacred for Jews. Will India be able to follow the Israeli model of altering the demographic complexion of a territory which is disputed in its controlled parts of J&K is yet to be seen but certainly Hindu nationalists led by BJP are certain to proceed for fully absorbing J&K in the Indian Union. For them, it is just a matter of time and when the ripe moment will come they will proceed with their agenda to repeal article 370 of the Indian constitution which grants special status to Jammu & Kashmir in the Indian Union.

III. The Dynamics of Article 370

How article 370 of the Indian constitution, which is directly related to Jammu & Kashmir impacts on the local conditions and why its erosion took place? In an article entitled, "What is article 370: Three key points" it is stated that,

Article 370 of the Indian Constitution is a temporary provision which grants special autonomous status to Jammu & Kashmir. Under Part XXI of the Constitution of India, which deals with Temporary, Transitional and Special provisions, the state of Jammu & Kashmir has been accorded special status under Article 370. All the provisions of the Constitution which are applicable to other states are not applicable to J&K. For example, till 1965, J&K had a Sadr-e-Riyasat for governor and prime minister in place of chief minister.⁴

If one goes into some detail about article 370, the article provides:

- (I) The Union Parliament is to legislate on such matter in List 1 and List III of the Seventh Schedule of the Constitution as correspond with those mentioned in the Instrument of Accession signed by the king of Kashmir. The president of India can identify subjects on List 1 and III which correspond with broad subjects mentioned in the instrument of Accession but the order of the president specifying such subjects must be made in consultation with the state government.

- (II) The president can extend the legislative power of Parliament in respect of subjects in the union and Concurrent Lists of the Seventh Schedule not included in the Instrument of Accession by an order, which can be made only with the concurrence of the state government.
- (III) Article 1 of the Constitution of India which defines the territories of India, and article 370 itself apply to Kashmir *ipso facto*. All other articles of the Constitution of India may be extended to Kashmir, by an order to be issued by the president under article 370 only in consultation with the state government of Jammu and Kashmir if it pertains to matters regarding legislative power of Parliament, and with the concurrence of the state government if it pertains to matters other than those regarding the legislative powers of the Parliament.⁵

Special status of Jammu and Kashmir stipulated in article 370 of Indian constitution is examined by an Indian writer Bodh Raj Sharma in the following words: "According to Article 370 the Parliament of India can exercise limited law-making power so far as the Jammu and Kashmir state is concerned. Article 370 also stipulates that only two articles of the Indian Constitution will apply to this state and that other provisions of the Constitution will apply to this state with exceptions and modifications specified by the President in his Order and that all such Orders of the President shall be issued either in consultation with or the concurrence of the government of the state."⁶ Paradoxically, the special status given to J&K in the Indian Union is under a temporary provision which was drafted in 1947 by Sheikh Abdullah who was appointed as prime minister of J&K by Maharaja Hari Singh and the Indian Prime Minister Jawahar Lal Nehru. Nehru with his Kashmiri credentials wanted to maintain the identity of J&K by providing a special status in the Indian Constitution pending its final settlement. Whereas, Sheikh Abdullah made it clear that J&K will not become an integral part of the Indian Union and will have full autonomy. "Pandit Nehru gave an assurance to the world and to the peoples of India and Jammu and Kashmir that though by accession the State became part of the Indian Union, yet the people of the State were free to confirm it or decide otherwise by a plebiscite."⁷ It is worth mentioning the fact that it was India which approached the United Nations in the aftermath of its war with Pakistan in 1948 of J&K.

Furthermore, according to this article (370), except for defense, foreign affairs, finance and communications, Parliament needs the state government's concurrence for applying all other laws. Thus the state's residents live under a

separate set of laws, including those related to citizenship, ownership of property, and fundamental rights, as compared to other Indians. As a result of this provision, Indian citizens from other states cannot purchase land or property in Jammu & Kashmir. Under Article 370, the Center has no power to declare financial emergency under Article 360 in the state. It can declare emergency in the state only in case of war or external aggression. The Union government can therefore not declare emergency on grounds of internal disturbance or imminent danger unless it is made at the request or with the concurrence of the state government.⁸ Furthermore, “according to the President’s order of 26-1-1950 Parliament could make laws applicable to the Jammu and Kashmir state only on matters specified in 39 entries out of 97 in the Union list. Some of these 39 entities had to be further modified so that they may correspond to matters specified in the Instrument of Accession of the state. Any law enacted by Parliament on any of the matters specified in the 47 entities of the concurrent list was not applicable to this state.”⁹ It seems that the actual substance of article 370 is clear: New Delhi has only control over defense, foreign affairs, finance and communications and other matters rest with the state government. Moreover, “accession to India was conditional on Kashmir retaining its distinct cultural and regional identity. Article 370 assured the state all benefits of independent Kashmir without sacrificing the advantages of being part of them in larger Indian federation. It conferred maximum autonomy to Kashmir.”¹⁰ On the issue of sovereignty, “the sovereignty of the Indian Union is not absolute over the State of Jammu and Kashmir. It extends only to those subjects which have been delegated to the Union by the Instrument of Accession or by the Constitution (Application to Jammu and Kashmir) Order, 1950. Over the residual subject matter the State is sovereign, over which the Indian Union possesses no power whatsoever, any attempted legislation with respect to any of those subjects on the part of the Indian Union would be unconstitutional. With respect to the State of Jammu and Kashmir the Union Parliament can legislate only those subjects which have been expressly delegated to it; on all the other matters the State has full power of legislation.”¹¹ Unfortunately, the architect of article 370 Sheikh Abdullah by early 1950s had developed difference with the Indian Prime Minister on the matter of granting maximum autonomy to J&K which resulted his removal from his office and arrest. In 1954, Article 35-A was added to the Indian Constitution which covered matters pertaining to employment, immovable property and so forth. According to an article written on “PIL against article 35 A: Special Status to State Permanent Feature of Constitution, says J&K government” in the *Indian Express*, it is argued that, “Article 35 A, which was added to the Constitution by a Presidential Order in 1954, accords special rights and privileges to the natives of J&K and empower its legislature to frame any law without attracting a challenge

on grounds of violating right to equality of people from other states or any other right under the Indian Constitution.”¹²

It is quoted that “Gopalaswami Ayyangar, who was also the Indian representative to the UN, while introducing article 306-A (now article 370) in the Indian Constituent Assembly on 17 October 1949, said that a distinction was made for Kashmir due to special conditions prevailing in Kashmir where a war had led to an agreed ceasefire in the year. According to him, the Government of India had made certain commitments to the people of Kashmir, which included an undertaking that an opportunity would be given to them to decide for themselves whether they wished to remain with the Indian republic or leave it. The people of Jammu & Kashmir would have their own constitution framed by a constituent assembly set up for the purpose as well as to determine the sphere of the Union jurisdiction over the State.”¹³ Furthermore, “it was also agreed that the will of the people would be ascertained by means of a plebiscite, provided peaceful and normal conditions were restored and impartiality of the plebiscite could be guaranteed.”¹⁴ Jammu and Kashmir is one of state of the Indian Union which has experienced maximum number of Governor rule. So far since 1977, six times, Jammu and Kashmir has been placed under the Governor’s rule either on account of law and order problem or withdrawal of support of Congress to National Conference. Popular resentment, particularly in the Valley rose when during the Governor’s rule of Jagmohan in 1990, large-scale human rights violations by the Indian security forces took place.

Repealing of article 370 is however an uphill task because, “the president of India may by public notification, declare that the article shall cease to be operative or shall be operative with such exceptions and modifications as he may specify. The president can issue notification only on the recommendation of the Constituent Assembly of the state. Since the Constituent Assembly no longer exists, the provision has become inoperative” The only way to repeal Article 370 will be to issue an order under article 370 making constitutional amendment made under Article 368 *ipso facto* applicable to Jammu and Kashmir. Such an order can be made only with the concurrence of the state government. After making such an order, Parliament may pass a bill, to amend the Constitution, containing a provision for the repeal of Article 370. Such an amendment will have to be passed by two-thirds of the members present and voting and absolute majority of total membership in each house of Parliament. Since an order under Article 370 making the constitutional amendment under Article 368 *ipso facto* applicable to Jammu and Kashmir cannot be issued except with the concurrence of the state government, no unilateral action can be taken by the Center in this regard.”¹⁵ What went wrong between Sheikh Abdullah and Jawahar Lal Nehru and how the erosion of article 370 shattered the faith of Kashmiri Muslim on the

Indian Union? Why India failed to restore the confidence of Kashmiri Muslims and instead resorted to large-scale use of force particularly since the popular uprising of 1990?

According to Balraj Puri in his article, "The Challenge of Kashmir" in January 27, 1990 issue of *Economic and Political Weekly* stated that,

On a representation made by the present writer, prime minister Nehru agreed to extend the logic of Article 370 to state-region relations within the state to allay the apprehensions of Jammu as also of Ladakh. In a joint statement on July 24, 1952 Nehru and Abdullah declared that the constitution of the state would provide for regional autonomy. The arrangement might have provided a stable basis for reconciling regional urges within the state and the state's status within the country. But the agreement was not acceptable to the Bharitiya Jan Sangh which along with the Jammu Paja Prashad launched an agitation for abrogation of Article 370 which more than anything else, shock the faith of the Kashmiri Muslims about the security of their identity within India. A number of other factors also contributed to the first emotional rupture between Kashmiri nationalism and Indian nationalism marked by Sheikh Abdullah's dismissal from power and indefinite detention in August 1953.¹⁶

A piece of advice given by an Indian author to retain article 370 in the Indian constitution reflects perception prevailing in India on that matter. According to S P Sathe, "It is in India's interest to retain Article 370 until the government of Kashmir agrees to its repudiation. Article 370 should morally strengthen India's claim over Kashmir. Ultimately no one people can keep another people in subjection against their will. The central government will have to win over the people of Kashmir and convince them that their interests are safe in India and that they enjoy the fruits of democracy and autonomy within the Indian federation. This is the real challenge before the Indian leadership and any talk of abrogating Article 370 would further alienate the people of Jammu and Kashmir from India."¹⁷ Ironically, the central government, despite its claims to launch developmental programs, particularly in the Valley so as to address grievances among local people, failed to seek popular support. Hatred and antagonism, primarily among the Muslims of the Valley against New Delhi has much to do with decades of suppression and oppression of Indian security forces.

IV. The Way Forward

What is the way forward from the predicament emanating from the debate on Article 370 of the Indian constitution? Three broad scenarios emerge from around seven decades of standoff on Jammu & Kashmir particularly with respect to Article 370. First, the hard line BJP and Hindu nationalist mindset is firm on diluting the special status and identity of Jammu & Kashmir by using tactics ranging from establishing colonies in the Valley for non-residents and Kashmiri Hindu pundits who were expelled from the Valley after 1990 violence, so as to transform the demographic complexion to their advantage. With such a mindset which wants to forcibly integrate the Valley of Kashmir in the Indian Union, one can expect more violence and bloodshed in J&K having regional and international implications. Although, Jammu and Ladakh are not Muslim majority regions of Jammu & Kashmir, the predominant Muslim majority in the Valley transforms J&K as a Muslim majority area. That is the reason why the concentration of BJP led government is to alter the demographic ratio in the Valley by side tracking article 370. In J&K there is a coalition government of PDP and BJP which puts the latter in an advantageous position because it has a government also in the Center and can manipulate things for implementing its age old agenda of ending the special status given to J&K under article 370.

Second, the Indian civil society, democratic institutions and technical complications in a way to repeal article 370 of the Indian constitution are sufficient to deter any move to undo with that article. The Modi regime also knows the fact that any attempt to repeal article 370 will have far reaching consequences which may be detrimental to the Indian Union. It is argued that it was an election rhetoric on the part of BJP in its election campaign to repeal article 370 of the Indian constitution. It has been more than two years since the BJP is in power but it has not taken any noticeable initiative to repeal that article. Yet, it will be a wishful thinking to expect the current leadership of BJP to abandon its age-old dream to fully absorb J&K in the ambit of Indian Union. Third, given the heterogeneous nature of the Kashmir conflict it will be an uphill task to seek a resolution of that issue without taking on board the local stakeholders representing the five regions of Jammu and Kashmir.¹⁸ Therefore, as things stand today, article 370 of the Indian constitution despite its erosion is considered as a guarantee of unity of the Indian Union. But, as long as India pursues the use of hard power and is indifferent to the plight of the people of J&K, one cannot expect any breakthrough as far as peace and normalcy in that conflict zone is concerned.

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- 15 S P Sathe, *op.cit.*,
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 - 17 *Ibid.*, pp. 932-33.
 - 18 The five regions of Jammu and Kashmir are: Valley, Jammu, Lakadh controlled by India and Azad Kashmir and Gilgit Baltistan under the control of Pakistan.