
Demographic Changes in Indian Administered Jammu and Kashmir: A Legal Perspective

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This paper critically analyzes Indian designs to bring demographic changes in Indian administered Jammu and Kashmir (hereinafter may be referred as IaJK) by constitutional invasion. The main objective of this paper is to analyze the legal perspective of the Indian plans to alter the demography of IaJK by abrogating the article 370 and article 35–A of the Constitution of India and resolutions of the UNSC and UNCIP as well as the relevant provisions of the International law. It aims to probe the historical perspective of the article 370 and article 35–A and the legal effect of the possible demographic changes in IaJK in the light of the resolutions of the UNSC and UNCIP. It also gives an in-depth explanation of the nefarious policies of the BJP towards the IaJK to abolish its special status and legal provisions that bind all non-state subjects in purchasing property and attaining employment.

Key Words: Demographic changes, articles – 370 and 35 –A, UN resolutions, right to self-determination, Kashmir

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Introduction

Jammu and Kashmir was one of the princely states in the subcontinent¹ with a majority of Muslim population. According to the last census of the subcontinent before its partition, the population of Muslims in the princely state of Jammu and Kashmir (hereinafter shall be referred as only J&K) was 75.5 %. During the partition of British India, all the princely states either acceded to India or Pakistan except the J&K, Junagadh and Hyderabad. The Hindu ruler of the J&K allegedly signed Instrument of Accession with India on October 26, 1947, but before this event, local Muslims of Poonch, Muzaffarabad and their adjoining areas successfully revolted against the tyrannical and oppressor rule of the Maharaja and established their indigenous and revolutionary Government with the title of Azad Government of the state of Jammu and Kashmir as representative government of the entire J&K.² This led to first war of India and Pakistan on J&K. Meanwhile, India went to UN and now, this issue has been the longstanding conflict between two nuclear rival states for last 71 years and the people of J&K has been demanding their basic and fundamental right to Self-determination.

The people of IaJK have been suffering from severe violation of the gross and systematic violations of human rights.³ The J&K has been divided into two regions due to the war of 1948: one part is under the administration of Pakistan including the territories of Gilgit Baltistan and Azad Jammu and Kashmir. Out of these two, Gilgit Baltistan is under the direct administrative control of Pakistan and AJK are under the indirect administrative control and special constitutional relationship with Pakistan. The other region is under the administration of India and is the highest militarized zone in the world.⁴ The IaJK has three sub-regions: Kashmir valley, Jammu and Laddakh. Till, August 05, 2019 IaJK had a separate Constitution and a special status under the Article 370 of the Constitution of India, 1950,⁵ but on August 05, 2019, India unilaterally scrapped the Article 370 and also degraded and divided the state into two Union Territories (UTs) of J&K and Laddakh through the Reorganization of J&K Act, 2019.

IaJK has the Muslim majority and out of 22 districts, only five have a simple majority of the Non-Muslims and the rest of all the districts have the Muslims majority and overall in the entire IaJK, Muslims are in majority. According to the census of 2011 of India, the population of Muslims in IaJK was 68.31 % out of a total population of 1.25 Crore. On the other hand, the population of Hindus was 28.44 %, Sikhs 1.87 %, Christians 0.28 %, Buddhist 0.90 % and Jains 0.02 %. So IaJK is overall a Muslims majority state where Kashmir valley is predominantly Muslims with a small minority of non-Muslims. Moreover, in Jammu province of the IaJK, the Tawi region is Hindu dominated and Pir Panjal and Chanab regions are Muslims dominated with cultural and lingual diversities. As far as Laddakh region is concerned, the Leh region is dominated by the Buddhist population and

the Kargil region is dominated by Muslims however, in the overall population of Laddakh, Muslims are slightly more than Buddhists.⁶

During the Maharaja Hari Singh in 1927, the state subject rules were made to prevent non-Kashmiris from buying properties and securing jobs in the J&K. When Maharaja Hari Singh allegedly annexed with India through controversial Instrument of Accession on October 26, 1947, India sent her Army in J&K to formally capture the J&K. Through this Instrument, three important subjects of Defense, Foreign Affairs and Communications were handed over to India and the rest of the subjects were kept by the state. This relationship was formalized by India through Article 370 that gave a special status to the IaJK with a separate constitution, flag and statehood. However, the article has been diluted and eroded by India gradually through the Constitution (Application to Jammu and Kashmir) orders in pursuance of which India has had applied most of the articles of the constitution of India and subjects of the Union List in the state of IaJK.⁷

This relationship finally comes to its end on August 05, 2019 when India unilaterally scrapped Article 370. Another important article was 35–A which was stemmed out from the mandate of Article 370 and with the scraping of Article 370, Article 35–A was also abrogated ipso facto. This Article 35–A was more important than the article 370 as it had ensured the constitutional protection to the State Subject Rules of the Maharaja Hari Singh and due to this article, non-state subjects could not buy property, obtain any Government job or government funded scholarship in IaJK, This article has actually protected the demographic balance of the disputed territory on which there are many resolutions of UNSC and UNCIP. Indian recent act to unilaterally scrapped the article 370 and its connected article 35 – A reflects the Indian malicious intentions and designs to sabotage the resolutions of the UNSC and UNCIP regarding the conduct of free and fair plebiscite under the supervision of UN for which it is necessary to maintain and protect the demographic profile of the J&K. India plans to bring demographic changes in IaJK in post article 370 and 35–A scenario by allowing the non-state subjects to buy land and properties in IaJK.

Historical Background of Articles 370 and 35–A

The constitution of India came into force on 26 January 1950 and Article 370 was the part of the constitution from the date of its enforcement. However, article 35 – A was not the part of the original scheme of the Constitution of India and was incorporated in 1954 through the Constitution (Application to J&K) order issued by the President of India in pursuance of the Article 370 and on the basis of the agreed provisions of the Delhi Agreement between the Government of IaJK. Primarily Article 370 was the result of the five-month negotiations from May 1949 to October 1949 between the Sheikh Abdullah and his colleagues and the Jawaharlal Nehru to provide a formal constitutional framework to the controversial

Instrument of Accession allegedly signed by Maharaja Hari Singh with Indian dominion on October 26, 1947. Section 6 (1) of the Indian Independence Act, 1947 enabled the formerly princely states to accede to either dominion by executing an Instrument of Accession.⁸In reply to the controversial Instrument of Accession, the Governor General of India also signed a letter of acceptance of the same date signed simultaneously with the Instrument. Acceptance of the Instrument of Accession was a legal prerequisite under Section 6(1) of the Indian Independence Act, 1947 and technically and legally speaking, such a document is a collateral document and the two form an integral whole. Article 370 was incorporated to give a formal and legal framework and validity to the Instrument of Accession with certain constitutional protections.

Article 370 embodies six very important provisions for the IaJK:

- a) It exempted the state of IaJK from the provisions of the Constitution of India and IaJK was allowed to have constitution.
- b) The legislative powers of the Parliament of India were strictly and expressly restricted to the three subjects only: defence, foreign affairs and communications.
- c) The prior concurrence of the government of the IaJK is mandatory to extend the other provisions of the Constitution of India to IaJK.
- d) This prior concurrence of the state government of the IaJK is provisional.
- e) The authority of the IaJK to give concurrence lasts only to the time the state's constituent assembly is convened.
- f) Article 370 (3) gives powers to Indian President to issue an order to abrogate or amend it.⁹

After detailed negotiations between the Sheikh Abdullah and the Jawaharlal Nehru, article 370 was drafted and incorporated in the Constitution of India. (At the time of the making of the constitution of India, Article 370 was article 306 – A in the Constitution of India. The article 370 was made part of the Constitution of India as “Temporary provisions with respect to the state of J&K”.

Thus Article 370 gave a special status to the IaJK and article 370 was the only legal and constitutional relationship between the IaJK and India.¹⁰

On the other hand, Article 35–A was also the part of the Constitution of India and was incorporated in the Constitution of India in 1954.¹¹This article basically empowered the Legislature of IaJK to define the permanent residents of the state and also to protect the rights and privileges of the permanent residents.¹²The Article 35 – A was included in the Constitution of India through the presidential order, The Constitution (Application to Jammu and Kashmir) order on 14 May 1954. Article 35 – A defined the classes of the persons who shall be the permanent residents of the IaJK. Moreover, in pursuance of this article, the non-state subjects cannot purchase immovable property, cannot get employment, cannot settle and cannot obtain any government funded scholarships in the IaJK.¹³

Article 35–A has more significance and importance in the present context of the Conflict of Jammu and Kashmir as it is the only effective legal mechanism to prevent the inflow of the citizens of India to the IaJK for disturbing the social balance and existing demographic profile. Article 35 – A has its roots in the state subject Rules of 1927 issued by the Maharaja Hari Singh of the erstwhile state of J&K. The state subject definition document was signed and issued by the Maharaja on April 20, 1927. This notification of the Maharaja divided the state subjects of the erstwhile state of J&K into state subject class I to state subject class – IV. Following this notification, the Maharaja Hari Singh issued another notification on June 27, 1932 to determine the status of the state subjects of the erstwhile state of J&K who have been dwelling in the foreign countries. According to the later notification of 1932, all the emigrants from the erstwhile state of J&K to the foreign territories shall be considered as state subjects and their descendants born abroad shall be considered state subjects only up to two generations. In 1952, an agreement was signed between the Government of the erstwhile state of J&K and the representatives of India. This agreement was called the ‘ Delhi Agreement’’. This agreement paved the way for the incorporation of the spirit of the state subject rules in the Constitution of India. This also recognized the state flag in parallel with the flag of India.¹⁴

In 1954, the President of India issued the Constitution (Application to J&K) in order to include Article 35 – A in the constitution of India on May 14, 1954. Basically, in the Delhi agreement it was mutually agreed between the Government of the IaJK and India that Indian citizenship would be extended to the IaJK and in consideration of it, the legislature of IaJK would be given powers to define permanent residents. Therefore, the provision of Indian citizenship was included in the Constitution of IaJK by the constituent assembly of the IaJK. After the adoption of the provisions of the Delhi Agreement by the constituent assembly, the President of India issued the Constitution (Application to J&K) order in 1954. Article 35 – A was included in the Constitution of India through an executive order and not through the process of amendment of the Constitution as given in the Constitution of India. This article was the extension of Article 370 and stemmed out of article 370. Indian unilateral act to scrap article 370 had also abrogated the article 35 – A from the Constitution and abolish the special status of the IaJK under the constitution of India.

Main Argument

The real intentions behind the Indian unilateral act of scrapping article 370 and consequently abrogating article 35–A as well as to introduce Jammu and Kashmir Reorganization Act, 2019 is to bring demographic changes in IaJK in order to convert the Muslim majority population into minority by paving the way for the settlement of non-state subjects particularly Hindus in IaJK. But Indian unilateral

act to bring such changes in IaJK does not have any legal significance and relevance under the resolutions of the UNSC and UNCIP as well as the provisions of the International law. Indian unilateral act of scrapping the article 370 and 35 – A has no legal effect under International law as IaJK is a disputed territory under International law and any legal or constitutional change in the IaJK in accordance with the provisions of the Constitution of the occupational state of India has no validity and recognition under International law. The act of India is non-democratic, unlawful, unconstitutional and tyrannical in its nature and content. The forced annexation of IaJK by India when there are many resolutions of the UNSC and UNCIP on the conflict of Jammu and Kashmir is an *initio void* and against the basic principles of International law and jurisprudence of the United Nations system as enshrined in the United Nations' charter. This act is unlawful and unconstitutional even in accordance with the Constitution of India and the judicial decisions of the courts of India. There is a strong difference of opinion of many leading jurists of India on the legality and justifiability of the unilateral act of India to abolish the special status of IaJK by scrapping the article 370. The Jammu and Kashmir (Indian administered Jammu and Kashmir) High court have decided in a case that India cannot abrogate or scrap the article 370 as it turned permanent now. The same view was expressed and endorsed by the speakers and activists recently.

The matter of article 370 was challenged by a Jammu based Think Tank in the High court of the IaJK. The High Court decided in its verdict that article 370 attained permanence now as only the Parliament of India could only make amendment in the article 370 in consultation with the Constituent Assembly of IaJK and the Constituent Assembly of IaJK was dissolved in 1956 after making the Constitution of IaJK enforced in 1957. Now, the article 370 has become a permanent article and cannot be amended, abrogated and abridged by the Parliament of India in the absence of the constituent assembly of the IaJK. Moreover, the same verdict of the High Court of the IaJK was duly endorsed and referred by the Supreme Court of India in another decision citing the operating part of the decision of the High Court of the IaJK and the provision of the permanent status of the article 370 declaring special status of the state of the IaJK.

Indian Policies and Demographic Changes

The ruling political party of India, that is, BJP has had a clear and expressed manifesto on article 370 and the special status of the IaJK. To understand the Kashmir policy of the BJP Government of India, it is necessary to have a historical and critical perspective about the ideology and politics of the Bhartiya Janta Party (BJP) from the time of its establishment. The right-wing BJP's origin is from the Bhartiya Janah Sangh formed in 1951 by Syama Prasad Mukherjee. The same Bhartiya Jana Sangh was transformed and eventually turned BJP in 1980 with most of the members and leaders hailing from the former Bhartiya Jana Sangh. One of the three basic objectives of the right-wing and extremist BJP was to

abrogate article 370 from the Constitution of India and to abolish the special status of the IaJK. The other two objectives were uniform civil code and building of Ram Mandhar at the place of Babri Masjid.¹⁵

The leadership and workers of the BJP have close links with right-wing and an extremist group of Rashtriya Swayamsevak Sangh (RSS) that was established in 1925 by Keshav Baliram Hedgewar in Nagpur, India. The BJP has very closed and ideological ties with RSS. The mother party of the BJP was Bhartiya Jana Sangh, which was founded by Syamma Parsad Mukherjee was also inspired and supported by the RSS at the time of its foundation in 1951.¹⁶

Another important perspective regarding the political ideology of BJP is the analysis of the political ideologies of the BJP. The political leader who was behind the establishment of Bhartiya Jana Sangh was Syamma Parsad Mukherjee who was the part of the first cabinet of the Jawaharlal Nehru with the portfolio of Industries and Supply. His main reasons to quit the Indian National Congress were his differences with Jawaharlal Nehru on the policy about the IaJK. Nehru wanted to give special status to IaJK with a separate flag, certain constitutional guarantees in the Constitution of India and a separate constitution.¹⁷

He entered IaJK unlawfully in 1953 and was arrested and put behind the bars. He was staunch opponent of Article 370 and was of the opinion that the special status of the IaJK must be abolished and complete integration of IaJK must be made with Union of India. Till 1953, it was mandatory for citizens of India to seek permission to enter into IaJK and Syamma Parasad Mukherjee entered in the IaJK without any permission.

That is why, police of the state arrested him and then he died in the custody of the Police of the IaJK in a mysterious condition. This gave a very bad message to all the activists of RSS and Bhartiya Jana Sangh that eventually turned BJP in 1980. Hence, the main motivation and objective behind the creation of BJP was the ideology of the Symma Parsasad Mukherjee. That is why, when BJP came into power this time in the general elections of 2019, BJP Government scrapped the article 370 in the Constitution of India and also abrogated the article 35 – A. In the last election of IaJK, BJP participated in the elections with the objective of “Mission 44 +” so that BJP could make government without any coalition partner but eventually, BJP had to form Government in IaJK with Peoples Democratic Party (PDP).

The election campaign of the BJP in 2019 general elections of India was very expressed and clear as it was clearly evident from the Manifesto and the speeches of the candidates of the BJP during the election campaign. The manifesto of the BJP emphasized on the abrogation of article 370 and took away the special status of the IaJK. The candidates of the BJP were provoking and promising the Indian

population that if you are interested to purchase land in IaJK and want the complete integration of IaJK with India.¹⁸

The BJP's plan was to abrogate article 370 and article 35 – A and then to bring demographic changes in the IaJK in order to convert the Muslim majority into the minority in the conflict ridden disputed region of the IaJK. These demographic changes have been contemplated by BJP to sabotage the conduct of plebiscite and implementation of the right to self-determination in the erstwhile state of J&K.

In order to implement its plan, the BJP Government of India tried many plans. Firstly, BJP tried to secure 44 plus seats in the general elections of the IaJK in the Supreme Court of India but failed to attain the required mandate and then eventually formed an unnatural alliance with the PDP. Secondly, simultaneously, BJP in connivance with RSS and other right-wing extremist groups and parties of India started a legal battle in the courts of IaJK and also in the Supreme Court of India. But even, that also could not be successful and the High court of the IaJK declared the article 370 as permanent and irrevocable and subsequently, in another case, the Supreme Court of India also endorsed that decision of the High Court of the IaJK. Thirdly, Modi led BJP Government of India introduced a political project in IaJK to discredit the existing leadership and launched a new liberal leadership who firmly believes in the Constitution of India.

Fourthly, BJP divided the population of the IaJK on the basis of religions, regions, ethnicities and political interests to fracture the political aspirations and voices. Fifthly, BJP also unfolded its intentions to give permanent residents to the West Pakistan Refugees in IaJK and then pave the way for the settlement of the Baharis, Rohingyas and other non-state subjects dwelling in the state to bring about the demographic changes. Lastly, BJP highlighted the issue of Buddhist in Leh and announced to establish Union Territory for Laddakh, resettlement of Kashmiri Pundits with separate colonies and also an announcement to establish separate Sainak colonies. Moreover, the BJP agenda to increase the number of Amarnath Yatris and arranging their camps in IaJK during their yatra to give a strong communal and religious message to the local Muslims who have already under the fear of Hindu majority threat. Furthermore, the propaganda in the legal realm to highlight the issues of women rights, and equality of all to buy land and hold the permanent residents in IaJK. All these tactics and policies of the BJP Government suggested that BJP had the ulterior motives and nefarious designs to bring demographic changes in IaJK. In the wake of all these policies and tactics, BJP finally and eventually scrapped the article 370 from the Constitution of India and abrogated the article 35–A as well on August 05, 2019. The India also reorganized the state of IaJK and converted it into two Union Territories: Jammu and Kashmir with the legislature and Laddakh without the legislature.

Demographic Changes Vis a Vis United Resolutions

The conflict of Jammu and Kashmir has been the longstanding conflict between India and Pakistan since 1947. There have been around 20 resolutions of the UNSC and UNCIP on the J&K between the spans from 1948 to 1965. The conflict of Jammu and Kashmir should be resolved through a free, fair and impartial plebiscite under the auspices of the United Nations and the people of the erstwhile state of J&K have the basic, fundamental and inalienable right to self-determination.¹⁹

This right to self-determination is also recognized under the International Law through the United Nations Charter, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Social, Economic and Cultural Rights as well as the United Nations General Assembly Resolution No. 1514 (XV).²⁰

Thus unilateral act of India to scarp article 370 in order to abolish the special status of the IaJK and also to abrogate the article 35–A will not have any adverse legal effect on the disputed status of the IaJK under the Resolutions of the UNSC and the relevant provisions of the International Law. When the General council of the All Jammu and Kashmir National Conference passed a resolution to accede with India through constituent assembly, the UNSC passed a special resolution in 1951 declaring that assembly cannot take any action to determine the future political status of the erstwhile state of J&K.

According to the Resolution No 91 (1951) adopted by the Security Council on March 30, 1951, UNSC affirmed that the convening of a constituent assembly as recommended by the General Council of the “All Jammu and Kashmir National Conference” and any action that Assembly might attempts to take to determine the future shape and affiliation of the entire state or any part thereof would not constitute a disposition of the state in accordance with the above principle.”²¹

Similarly, three more Resolutions No 122, 123 and 126 were passed by the UNSC in 1957 to declare that any action that Assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire state or any part thereof, or action by the parties concerned in support of any such action by the Assembly, would not constitute a disposition of the state in accordance with the democratic method of free, fair and impartial plebiscite. ²²

India has unilaterally abrogated the article 35–A so that non-state subjects of IaJK can purchase lands, get jobs, and secure Government funded scholarships in IaJK. The careful analysis of the hidden agenda and nefarious designs of India reveals that India wants to disturb the demography of the IaJK to sabotage the implementation of the UNSC Resolutions in IaJK. So any action to disturb the

demography in IaJK will be a blatant and severe violation of the Resolution of the UNSC and UNCIP as well as the relevant instruments of the International Law.²³

Conclusion

In a nutshell, it is concluded that article 370 has been scrapped and article 35–A has been abrogated in IaJK by India to carry out its nefarious and ulterior agenda to bring about demographic changes to ultimately fail and sabotage the implementation of the Resolutions of the UNSC and UNCIP. There are many resolutions of the UNSC on the conflict of Jammu and Kashmir and till the final settlement of the conflict of Jammu and Kashmir, India cannot unilaterally bring any material changes in the demography and geographical boundaries of the IaJK. There are resolutions of the UNSC passed in 1951 and 1957 specifically declaring that any assembly in IaJK cannot take any action to finally determine the future political status of the erstwhile state of J&K. As India has already scrapped and abrogated the relevant articles of the Constitution of India dealing to the IaJK, now India has to halt its policy of changing in the demography of the IaJK so that the final settlement of the longstanding conflict of the Jammu and Kashmir shall be resolved through UN's supervised free and fair plebiscite.

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