

## Ideological edifice of Article 370

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### Abstract

Article 370 of the Constitution of India relating to the State of Jammu and Kashmir is now over sixty years old. The Constitution came into force on 26 January 1950 and with it, this unique provision. All other provisions were debated in the Constituent Assembly of India after deliberations in its Drafting Committee and, sometimes, in discussions in the Congress Parliamentary Party.

This article notes that the redrafting of Article 370 and a review of the Constitution of Jammu and Kashmir are necessary. It holds those amendments must be based on agreement between all the major parties in Jammu and Kashmir. Given the political will, sincerity of purpose, and a spirit of compromise, it is not difficult to retrieve from the wreckage of Article 370 a constitutional settlement which satisfies the aspirations of the people of Jammu and Kashmir.

**Keywords:** Article 370, Constitution, Jammu and Kashmir

### INTRODUCTION

Article 370 has been a talking point since it came into force. Since the current BJP government came to power, the Article 370 debate has often been at the forefront of political discourse in India. This article does not intend to go into the technicalities of Article 370. Even the political churning between the Left, Right and the Centre around Article 370 has become cliched now. What this piece does is take a glance at the significance of Article 370, which may help us gauge the political narrative built around it across the political spectrum. Included in the Indian Constitution on October 17, 1949, Article 370 exempts Jammu & Kashmir (J&K) from the ambit of Indian Constitution (except Article 1 and Article 370 itself) and permits the state to draft its own Constitution. It restricts Parliament's legislative powers in respect of J&K. Earlier, the Instrument of Accession (IoA) came into play when the Indian Independence Act, 1947, divided British India

into India and Pakistan. For the 565 princely states whose sovereignty was restored on Independence, the Act provided three options: to remain an independent country, join the Dominion of India, or join the Dominion of Pakistan — and this joining with either of the two countries was to be through an IoA. Powers relating to foreign affairs, defence, and communication remained with the Union of India. Laws on other matters enacted by India's Parliament, however, require ratification by the state's own legislature. Article 35A gives further immunity by mandating that no act passed by the J&K legislature can be challenged for violating the Indian Constitution or other laws passed by India's Parliament. N. Gopalaswami Ayyangar, one-time Prime Minister of Kashmir and the chief drafter of Article 370, saw it as a temporary and interim arrangement. While the judgment in *Kesavananda Bharati* directed that any amendment to the Constitution could be tested for potentially violating the basic structure of

the Constitution, Articles 370 and 35A were passed before the judgment and thus cannot be challenged based on this.

### **The Role of Dr. Shyama Prasad Mukherjee**

If the scrapping of Article 370 has all along been among the BJP's top priorities, it is because of the sharp spotlight cast on the contentious topic by Syama Prasad Mookerjee, founder of the BJP's political precursor, the Bharatiya Jana Sangh.

Mookerjee not only launched an agitation against a separate Sadr-e-Riyasat (head of state), a separate flag and a State Constitution for J&K in 1952 but popularized the slogan *Ek desh mein do vidhan (two Constitutions), do nishan (two flags) aur do pradhan (two heads of state) nahin challenge.*'

Son of a famous Calcutta high court judge, Mookerjee entered the Bengal legislative council in his 20s and became vice-chancellor of Calcutta University at age 33. When he met V D Savarkar at N C Chatterji's home in 1939, he decided to join the Hindu Mahasabha, later succeeded Savarkar as its chief and in 1947 became one of three non-Congress nominees in free India's first Cabinet.

As industries minister in the Nehru regime and after he quit the ministry in 1950, Mookerjee received a slew of complaints from the Hindus of J&K, who drew his attention to "violation of civil rights" by the Kashmir government led by Sheikh Abdullah and to alleged separatist tendencies fomented by the state's leadership. On forming his own party, Jana Sangh, in 1951, Mookerjee said that Article 370, which gave the Centre powers in J&K only in terms of defence, foreign affairs and communications, placed serious limits on the state's accession to India and urged that provisions of the Indian Constitution such as those on fundamental rights, citizenship and other key matters be extended to the state.

### **The Origins of the Jammu and Kashmir Dispute**

During British rule, the subcontinent was governed in part through territories that British authorities directly administered and in part through a number of semi-autonomous vassals known as Princely States. One of the largest of these Princely States was Jammu and Kashmir, situated in the northwest corner of British India. The territory came under British suzerainty in 1846 when the British East India Company sold the Valley of Kashmir to the Raja of Jammu, Gulab Singh, and recognised him as a Maharaja in return for his acceptance of British overlordship (Schofield 2000, 7–10). When the British withdrew from the subcontinent in 1947, they partitioned their former colony roughly along sectarian lines to create India and Pakistan in a futile effort to reduce the bloodshed between supporters of the bitterly feuding All India National Congress of Mahatma Gandhi and Jawaharlal Nehru and the Muslim League of Muhammad Ali Jinnah. As part of this partition, all the Princely States would be forced to sign the Instruments of Accession which would incorporate their lands into one of the new states. Although the respective 'princes' could choose which state their realm would be absorbed into, they were encouraged by the British to consider both their geographical location and the demographics of their subjects (Behera 2006, 5–14).

At the time of the British withdrawal, Kashmir was approximately 77% Muslim and bordering the western wing of Pakistan. This would have theoretically ensured that joining Pakistan would have been a natural choice. However, there also existed several minorities within Kashmir which favoured India, most notably the Buddhist Ladakhis in the north and the Sikhs and Hindu Dogras in the south (Behera 2006, 104–105). Additionally, the Muslim population of Kashmir was not homogeneous, with many following the mystic Sufi tradition of Islam with significant pockets of Shia and orthodox Sunni populations (Snedden 2013, 9–10). A final issue came from the political leanings of the local authorities and personalities of Kashmir. Although there were supporters for acceding to either India and

Pakistan, the key Kashmiri political actors at the time were the Hindu Maharajah, Hari Singh, and the leader of the All Jammu and Kashmir National Conference, Sheikh Abdullah.

Singh had ruled Kashmir with increasing despotism since he ascended to the throne in 1925, paying little attention to his ministers or local council when passing laws, imposing discriminatory taxes on Muslims. As a result, Singh was a highly unpopular ruler and often had to use his military, often with the assistance of British forces, to crush local unrest (Schofield 2000, 17–18). Nonetheless, as the Maharajah, Singh was empowered to make the decision whether to accede his kingdom to India or Pakistan. However, Singh personally disliked both Jinnah and Nehru and clearly wished to maintain his control over Kashmir. Thus, Singh deliberately equivocated in declaring for either India or Pakistan, seemingly believing that by delaying the decision he could achieve *de facto* independence for Kashmir (Subbiah 2004, 175). Abdullah and the All Jammu and Kashmir National Conference represented the main local opposition to Singh. Hence, their primary policy aims were concerned with ending the Maharaja's rule and establishing a secular representative government in Kashmir. Yet, while Abdullah hated the ideological concept of Pakistan and was good friends with Nehru, his clearly preferred status for Kashmir since 1944 was to establish it as 'an independent political unit like Switzerland in South Asia' (Lamb 1991, 187–190; Snedden 2013, 25).

By the end of October 1947, two months after Britain formally withdrew from the subcontinent, both India and Pakistan were growing impatient for Singh to make his accession decision. It was Pakistan, increasingly convinced that India was trying to smother it or at least cheat it out of economic and strategically important territory, that moved first (Hajari 2015, 180–189). In an effort to secure Kashmir for Pakistan, several members of the Pakistani military and government orchestrated an invasion of pro-Pakistan Islamic zealots from the Pashtun tribes

on Pakistan's western frontier. The Maharaja's forces, already occupied trying to pacify an unrelated anti-Maharaja pro-Pakistan rebellion in the Poonch region, were completely unprepared to resist such an invasion and were swiftly routed. India refused to assist unless Singh signed the Instrument of Accession in favour of India. Thus Singh, recognising that his political position had collapsed and desperate to gain Indian help in repulsing the invasion, formally signed the document in favour of India on 26 October 1947 (Schofield 2000, 41–54).

Despite the obviously coerced nature of Singh's signature and the fact that it went against the pro-Pakistan or independence aspirations of many Kashmiris, India's leadership was convinced that Singh's accession gave India both the legal and moral right to the Princely State. This mentality was buttressed by the fact that India was able to rush in enough troops to halt the advance of Pakistan's proxy forces upon the Kashmiri capital of Srinagar and even reverse some of their territorial gains. However, India was not able to inject enough troops into Kashmir to advance far before winter made further operations impossible. With the weather ending any further campaigning from either side, Nehru decided to call upon the Security Council to mediate believing the UN would compel Pakistan to withdraw (Subbiah 2004, 176–177). Thus, on 1 January 1948, Nehru wrote a letter to the UN Security Council (S/628), arguing that:

"Under Article 35 of the Charter of the United Nations, any member may bring any situation, whose continuance is likely to endanger the maintenance of international peace and security to the attention of the Security Council. Such a situation now exists between India and Pakistan owing to the aid which invaders...are drawing from Pakistan for operations against Jammu and Kashmir, a State which acceded to the Dominion of India...The Government of India requests the Security Council to call upon Pakistan to put to an end immediately...[this] act of aggression against India."

Pakistan responded with their own letter to the UN Security Council on 15 January 1948 (S/646), rejecting India's claims, outlining its own position concerning Kashmir and airing several other grievances regarding India's conduct.

Much to India's indignation, the UN Security Council did not order Pakistan to withdraw but instead passed Resolution 39 on 20 January 1948 establishing the UN Commission for India and Pakistan (UNCIP). The UNCIP was empowered to investigate the facts on the ground and act as a mediator between India and Pakistan and to resolve the dispute (S/RES/39). Notwithstanding the Security Council's efforts, combat operations began to resume in February, with both sides clashing as soon as the territory began to thaw. After a few months of deliberation, the UN Security Council passed the more detailed Resolution 47 on 21 April 1948 in an effort to provide the basic guidelines for resolving the conflict. In essence, Resolution 47 called upon Pakistan to secure the withdrawal of its proxies, followed by a withdrawal of Indian troops. The UN would then establish a temporary Plebiscite Administration in Kashmir, with the mandate to conduct a fair and impartial plebiscite 'on the question of the accession of the State to India or Pakistan' (S/RES/47). To oversee the implementation of this Resolution, the UNCIP was expanded and immediately dispatched to the subcontinent.

### **UN Involvement in the Jammu and Kashmir Dispute**

The clear intention of Resolution 47 was to put into practice the principle of self-determination. However, in practice the question of self-determination was quickly superseded by concerns about international peace. Indeed, by the time the UNCIP arrived in July, on the 20 April 1948 Jinnah which authorised the Pakistan Army to occupy the territory held by their tribal proxies and pro-Pakistani rebels, had begun to be pushed back by an Indian offensive. Although this order was given prior to Resolution 47, Pakistan disregarded the UN Resolution's call for a ceasefire and

withdrawal, with Pakistani Army units arriving in force in May. Hence, the UNCIP considered its duty first and foremost to be brokering a truce between India and Pakistan rather than any efforts to determine the Kashmiris' desires or even lay the groundwork for a plebiscite. To that end, the Commission passed a resolution on 13 August 1948 proposing that both sides issue a ceasefire and accept a truce overseen by the UN (S/1100, 28–30). However, this plan was largely unimaginative, with the UNCIP simply proposing that the ceasefire be monitored by UN observers before reiterating the model for resolving the dispute outlined in Resolution 47.

### **Twisting the words of the Father of the Constitution**

Consider the opinions of Dr. B.R. Ambedkar, India's key architect of its Constitution, on this issue, which we'll get to later in this section of the article. Every time the conflict in Kashmir makes headlines, a viral post expressing Ambedkar's point of view is widely circulated on social media.

Dr. B.R. Ambedkar had refused to draft Article 370 of Indian Constitution by saying:

"You wish India should protect your border, she should built roads in your areas, she should supply you food, grains and Kashmir should get equal status as India. But government of India should have only limited powers and Indian people should have no right in Kashmir. To give consent in your proposal, would be treacherous thing against the interest of India and I, as a Law Minister of India, will never do."

Also innumerable messages in Marathi talk about Dr. Ambedkar advising to send Mahar battalion, and also he explained that guerrilla tactics to be applied. During the series of lectures organised on behalf of New India Debate Society for over three years on Ambedkar writings, we researched through all of the written literature of Ambedkar. Specifically, his writings and speeches on Pakistan and the Partition of India, Consituent

Assembly debates, etc. contained no authenticated writing on Article 370, nor did any document from his exhaustive literature.

Rather, the only documentary evidence about Dr. Ambedkar's views on Kashmir can be found in his speech of 10th October 1951, which is reproduced in Ambedkar's Writings :

“The third matter which has given me cause, not merely for dissatisfaction, but for actual anxiety and even worry, is the foreign policy of the country. Anyone who has followed the course of our foreign policy and along with it the attitude of other countries towards India, could not fail to realize the sudden change that has taken place in their attitude towards us. On 15th of August, 1947 when we began our life as an independent country, there was no country which wished us ill. Every country in the world was our friend. Today, after four years, all our friends have deserted us. We have no friends left. We have alienated ourselves. We are pursuing a lonely furrow with no one even to second our resolutions in the U.N.O. When I think of our foreign policy, I am reminded of what Bismark and Bernard Shaw have said. Bismark has said that “politics is not a game of realizing the ideal. Politics is the game of the possible.” Bernard Shaw not very long ago said that good ideals are good but one must not forget that it is often dangerous to be too good. Our foreign policy is in complete opposition to these words of wisdom uttered by two of the world's greatest men. How dangerous it has been to us this policy of doing the impossible and of being too good is illustrated by the great drain on our resources made by our military expenditure, by the difficulty of getting food for our starving millions and by difficulty of getting aid for the industrialization of our country. Out of 350 crores of rupees of revenue we raise annually, we spend about Rs. 180 crores of rupees on the Army. It is a colossal expenditure which has hardly any parallel. This colossal expenditure is the direct result of our foreign policy. We have to foot the whole of our Bill for our defence ourselves because we have no friends on which we can depend for help in any emergency that may arise. I have been wondering whether this is the right sort of foreign policy. Our quarrel

with Pakistan is a part of our foreign policy about which I feel deeply dissatisfied. There are two grounds which have disturbed our relations with Pakistan – one is Kashmir and the other is the condition of our people in East Bengal. I felt that we should be more deeply concerned with East Bengal where the condition of our people seems from all the newspapers intolerable than with Kashmir. Notwithstanding this we have been staking our all on the Kashmir issue. Even then I feel we have been fighting on an unreal issue. The issue on which we have been fighting most of the time is, who is in the right and who is in the wrong. The real issue to my mind is not who is right but what is right. Taking that to be the main question, my view has always been that the right solution is to partition Kashmir. Give the Hindu and Buddhist part to India and the Muslim part to Pakistan as we did in the case of India. We are really not concerned with the Muslim part of Kashmir. It is a matter between the Muslims of Kashmir and Pakistan. They may decide the issue as they like. Or if you like, divide into three parts; the Cease fire zone, the Valley and the Jammu-Ladhak Region and have a plebiscite only in the Valley. What I am afraid of is that in the proposed plebiscite, which is to be an overall plebiscite, the Hindus and Buddhists of Kashmir are likely to be dragged into Pakistan against their wishes and we may have to face same problems as we are facing today in East Bengal. Ambedkar's views were praised by most of the national as well as international newspapers including the Manchester Guardian.”

Parallely, it is considered highly unusual for a sitting president or vice-president to weigh in on a contemporary political controversy. However, M. Venkaiah Naidu may have crossed two Rubicons when an op-ed he wrote defending the Modi government's move to strip Jammu and Kashmir of its special constitutional status attributed this fake quote to Dr B.R. Ambedkar as well.

Venkaiah Naidu's reliance on a fake quote reflects a wider irony: the official volumes show Ambedkar's views on Kashmir to be totally at variance with the BJP's “nationalist” thinking. The father of Indian constitution, for

example, advocated a “zonal plebiscite” in Jammu and Kashmir so that the ‘Muslim’ Valley could go to Pakistan if it so desired. Ambedkar also pushed the erstwhile Nehru government to resolve the Kashmir dispute as quickly as possible, so that India’s hefty defence budget, necessitated by the instability in the Kashmir valley, could be cut down.

This mishap can be traced back to the book “Facts and Law on Article 370 & 35A” written by Advocate Monika Arora, who is a well-known name in the legal fraternity. She currently represents Government of India as its standing counsel in Delhi High Court and Standing Counsel of JNU in High Court and Supreme Court. She represents Army, Navy, Air force, BSF, CRPF, CISF and other paramilitary forces.

Therefore, clearly, Ambedkar, a staunch democrat and therefore, a strong advocate of the right to self-determination is being portrayed as a war-monger over such a sensitive subject pertaining to one of the longest running conflicts ever. History may be always written by the victors, and by tyrants. However, in modern times, it must be noted that the subaltern narrative is the alternate mainstream.

### **Stance of the Opposition**

The All-India Congress Committee (AICC) on has said “the August 6, 2019 CWC resolution on the J&K issue is the party’s stand” on the matter and urged all party leaders to follow that. It is understandable since the letter and spirit of the said CWC resolution, then passed by rejecting a group of party leaders’ backing to the Centre scrapping Article 370, was a strong rejection and denouncement of the Narendra Modi government scrapping Article 370 and bifurcating J&K. Yet, the CWC resolution had also chosen to not dwell on what the Congress will do on the matter in future.

However, two years since then, several Congress leaders have become less vocal on scrapping Article 370, which some say is because of the perceived public mood.

On the day the Modi regime pushed its J&K agenda through in Parliament, a combative CWC resolution stated, “The CWC deplors the unilateral, brazen and totally undemocratic manner in which Article 370 of the Constitution was abrogated and the state of Jammu and Kashmir was dismembered by misinterpreting the provisions of the Constitution. Every principle of constitutional law, states’ rights, parliamentary procedure and democratic governance was violated”.

Several opposition parties broke ranks with the Congress and sided with the government in the Rajya Sabha on scrapping the special status to Jammu and Kashmir under Article 370, a replay of sorts of voting on crucial bills in the current session of Parliament.

The biggest surprise came from the Aam Aadmi Party, which for the first time took a stand different from that of other opposition parties and supported the government. Delhi chief minister and the AAP’s national convener Arvind Kejriwal on Monday said his party supports the central government’s move to scrap Article 370 of the Constitution, which granted special status Jammu and Kashmir.

### **Conclusion**

In acknowledging the role of international law, we also need to come to terms with how international law plays out on streets and in resistance (quite like the constitution during the anti-Citizenship Amendment Act protests), and brings visibility and sometimes attached pressures by international actors to end abuses of power.

Looking beyond constitutional/domestic laws and institutions does not necessarily mean giving up on engagement with them altogether. Further, despite the inertia of the international legal process and the frustrations it has seen in places like Palestine and Western Sahara, it is important to start asking these questions and counteract, in the limited capacity that law can, the barriers and blind spots seen elsewhere in attaining results. By delaying a debate on these questions in our discussions, or at least an

acknowledgement, we make the delay attached to international law a self-fulfilling prophecy.

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