

## ARTICLE 370: why can't we atleast debate its pros and cons?

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### ABSTRACT

*Some politicians are so paranoid that they are screeching 'communal' and 'separatist' notions in their opposition to even a debate on Article 370. Be it citizens of Kashmir, Jammu or Ladakh, everyone yearns for and deserves better. Neither the supporters of Article 370 nor those who rue its insertion have been able to give the people of Jammu and Kashmir the society they deserve. Many feel that the Article is the biggest social barrier imposed upon the common man. Yet others feel that it is the biggest impediment to integration of J&K State into the Indian Union. Many politicians support the Article because of the immense political and economic benefits it has bestowed upon the ruling dynasty of the National Conference. This research paper will investigate whether this Article is a boon or a bane for Jammu and Kashmir.*

### Introduction

Because of the existence of Article 370 there is limited power of the Union Legislature to legislate for the State, inability of the Union of India to declare financial emergency with respect to the State, inapplicability of Fundamental Duties & Directive Principles and restriction on the power of the High Court of Jammu and Kashmir to issue writs to enforce fundamental rights. This has been one of the reasons for the resounding slogan – ‘Scrap Article 370’, shouted by thousands from the MuslimRashtriyaManch (MRM). As

reported on Wednesday, May 15, 2013 - ‘The two-day national seminar organized by MRM on “Hum Hindustani Jammu-Kashmir Hindustan Ka” was a befitting reply to those separatist and militant elements that had been day-dreaming about segregating Kashmir from India since the days of independence. Mohd. Afzal highlighted the activities and programs of MRM vis-à-vis concern for J&K. He vividly described how the MRM activists under his leadership had participated in the Amarnath Shrine Board agitation, how they unfurled the tricolor at LalChowk in Shrinagar braving the terrorists’ bullets and unfriendly administration, how the MRM rejected the DilipPadgaonkar Committee report on J&K and how the MRM had organized a massive dharna demonstration at Jantar-Mantar in New Delhi on December 18, 2011. He also highlighted the response elucidated by the MRM signature campaign from the Muslims of India over J&K. He categorically reaffirmed that the MRM would not allow further vivisection of Mother India in the name of religion to a thundering applause. In the subsequent sessions the speakers including Chaudhary Lal Hussein of Jammu, Mohd. Iqbal Bhatt of Doda, Bashir Ahmed of Kashmir, Chaudhary Manzoor Hussein, MohdFaiz Khan, Mohd Siddique of Anantnag, Munnawar Chaudhary of Jaipur, GulamMohd of Jammu, IshratKhatun from Bihar, Shahnaz Afzal from Delhi and others demanded abrogation of Article 370

and denounced separatism and militancy in the strongest words.<sup>1</sup>

### Why is Article 370 detrimental?

Article 370 facilitates the following undemocratic policies and thereby, not only the survival of corruption but the thriving of it.

1. Anti Defection Law is not applicable to J&K.
2. The beneficial laws such as Wealth Tax, Gift Tax & Urban Land Ceiling Act do not operate in Jammu and Kashmir.
3. The Union of India is incompetent to declare financial emergency and emergency in case of failing of constitutional machinery with respect to Jammu and Kashmir.
4. Only emergency due to War or External Aggression can be declared.
5. Even Article 356 under which President of India can impose his rule in any State cannot be enforced in Jammu and Kashmir without consent of the Governor who himself is an appointee of the President. The State of J&K can refuse building of any cantonment on any site or refuse to allot land for defense purposes.<sup>2</sup>

The President of India had been conferred with the power to suspend or modify Article-370 by issuing a notification, but for that purpose the recommendation of the

constituent assembly of J&K “shall be necessary”. Since the constituent assembly no longer exists, there is no question of asking for its recommendation. Alternatively, Article-370 can be abrogated by an amendment to the Constitution of India as contemplated by Article-368. Also, just because the Constituent Assembly no longer exists, it does not mean that it is implied that a temporary provision becomes a permanent provision.

In Supreme Court case of *Abdul Ghani Vs. The State of Jammu & Kashmir*<sup>3</sup>, it was held that by Article 370, the President is given the full discretion to apply the Constitution with such exception and modifications as he may, by order specify. The President of India has also been given power to amend the Constitution of Jammu and Kashmir by a Presidential order and this position has been clarified by the Supreme Court vide its judgment in *PuranlalLakhanpal v. President of India*<sup>4</sup> reported in (1962).<sup>5</sup>

### Rampant corruption in Jammu and Kashmir

It is alleged that the historical Kashmir problem had died by the 1980s and that it was reborn only because people were denied their fundamental democratic rights<sup>6</sup> (under the State Administrative Machinery which is ridden with corruption. There are numerous examples of the State Government’s tardiness and inefficiency.

<sup>1</sup><http://rsshennai.blogspot.in/2013/05/scrap-article-370-demands-Muslim.html>-- referred on 1-09-14 at 17:14

<sup>2</sup>Maj Gen SheruThapliyal, Art. 370: The Untold Story – Indian Defense Review. ([www.indiandefensereview.com/news/Art-370-the-untold-story/](http://www.indiandefensereview.com/news/Art-370-the-untold-story/)) referred on 20/10/2014 at 10:00.

<sup>3</sup> AIR1971SC1217; (1970)3SCC525; [1971]3SCR275

<sup>4</sup> (1962) 1 SCR 688 = AIR 1961 SC 1519

<sup>5</sup> Can be found online at LegalCrystal (Law search engine)

<sup>6</sup> Article by Tavleen Singh, Article 370 is a historic blunder, Published on 23th Aug,2014 in NITI CENTRAL

For example:- A write up in Greater Kashmir in March, 2012 revealed that three years after the Government of India had asked state governments to appoint ombudsmen for monitoring implementation of the Centre's flagship, National Rural Employment Guarantee Scheme (NREGS), Jammu and Kashmir Government had yet to act on the directive. Informed sources told Greater Kashmir (news paper) that although the state government was getting crores of rupees from the Centre under the scheme, it was yet to put in place the effective monitoring mechanism that includes appointment of the district-wise ombudsmen.<sup>7</sup> 100 applicants including former judges awaited selection. The appointments would put a strong accountability mechanism in place for effective implementation of the scheme.

### **Pampering of Jammu and Kashmir by the Union Government of India.**

The Central Government also gives grants to the State for the furthering of Islam despite the Pakistani propaganda that Indian Union Government is anti-Muslim. This article published in the GREATER KASHMIR; SRINAGAR, FRIDAY, 08 RABI-AL-SAANI 1433 AH ; 02 MARCH 2012 CE<sup>8</sup>It read as follows:-

Rs 8.86 crore received for Madrassas:  
Govt

### **PRESS TRUST OF INDIA**

Jammu, Mar 1: The Jammu and Kashmir government Thursday said it has got a central grant of Rs 8.86 crore for providing quality education in Madrassas in the state. Rs 886.47 lakh fund from the Centre was received in installments from 2009 for providing quality education in Madrassas, Minister for Education said in a written reply to a query by CPI(M) MLA MY Tarigami in the state Assembly. The Madrassas have to apply to the state government in the prescribed format for receiving the grant-in-aid, he said.

These factual statistics commendably collected by Shankkar Aiyar on October 14, 2002 gives the reader a startling realization that the State of J&K is the most favoured child of the Indian Union. The details are as follows:<sup>9</sup>

Besides direct assistance and grants, the Centre pushed major projects in Jammu and Kashmir worth over Rs.25,000 crore.

RAILWAYS:- Rs.4,496 crore.

Jammu-Udhampur Rail Link: Rs.446 crore, Udhampur-Srinagar-Baramulla

Project: Rs.3,564 crore, Jammu Tawi-

Jalandhar Link: Rs.486 crore.

ROADS:- Rs.1,700 crore.

NH 1-A Project: Rs.1,200 crore, Batote-

Kishwar-Singhan Pass: Rs.200 crore, Leh via Manali Road: Rs.1,300 crore.

PUBLIC WORKS:-Rs.318 crore.

Reconstruction of gutted bridges: Rs.224 crore, (1997-2001) Planning Commission projects: Rs.29.73 crore, Schools: Rs.64.63 crore.

POWER:- Rs.16,000 crore.

Salal Power Project: Rs.921.21

crore, Dulhasti Hydro Project:

Rs.4,279 crore, Uri Project:

<sup>7</sup><http://www.greaterkashmir.com/news/2012/Mar/2/3-yrs-on-govt-yet-to-recruit-ombudsmen-for-nregs-63.asp> referred on 22/12/2014 at 12:00

<sup>8</sup><http://www.greaterkashmir.com/news/2012/Mar/2/rs-8-86-crore-received-for-madrassas-govt-58.asp> referred on 20/12/2014 at 9:00

<sup>9</sup><http://indiatoday.intoday.in/story/jammu-and-kashmir-most-pampered-state-in-india/1/218463.html> referred on 23/12/2014 at 13:00

Rs.3,300 crore, NHPC also plans seven other projects.

TOURISM:- Rs.115 crore.

Dal Lake clean up: Rs.100 crore, 82 tourist facility projects: Rs.19.24 crore, (only Rs.12.61 crore used) Leh Convention Centre: Rs.2.46 crore.

**Suffering of the Scheduled caste and other backward classes of people due to article 370.**

Dr. Ambedkar, a democrat to the core, was a great visionary. He never supported Art.370. Jammu and Kashmir State Governments by banking on the support of Art. 370 have made selective application of the Laws passed by the Parliament. It has created more problems than solving them. The reforms carried by Sheikh Sahib were taken much before this article came into application. Thereafter his political heirs have only diluted those revolutionary provisions.<sup>10</sup>

Owing to his differences with Congress and Pt. Jawaharlal Nehru for backing out of his promise to get the Hindu Code Bill passed, as drafted by Dr.Ambedkar on the intensions of the Prime Minister, he tendered his resigned from the Union Minister as Law on 28<sup>th</sup> September 1951. While resigning Dr.Ambedkar sighted five reasons for doing so. In the third reason he wrote that the Congress’s Kashmir policy was wrong.<sup>11</sup>

The worst sufferers of the selective application of rules passed by the Parliament in J&K are the poor Reserved

Category people such as Scheduled Castes, Scheduled Tribes and OBC’s particularly in matters of Reservation in recruitment and promotions. These rules came into force in the Union of India except in J&K even before Indian independence. A number of hunger strikes,dharnas,agitations,resolutions by scheduled caste people have failed to get their rightful share in services or promotions. Even Bhagat Amar Nath Laid his life for the denied rights of the SC’s in the state. The first government SRO in 1971 was issued 25 years after India got independence. This has now been given the shape of an act after lapse of another 35 years.. But practically, the 8% fixed quota in services has not crossed even 4% mark. Recently nearly a lakh of recruitments were made in different departments under the garb of *Rehberet Talim* and other such flimsy names throwing the share of Reservation claims of SC’s to the winds. Even in the matter of nominations in the Legislative Councils from 1952-1996, out of 172 nominations only 6 were members of SC’s. These anomalies would have been avoided had the opposition to Art.370 by Bharat Ratana Baba Sahib Bhimrao Ambedkar been acceded to by the then political masters. The integration of minds not of words matters which is lacking.<sup>12</sup>

The princely states varied in size. States like Hyderabad and Jammu being as big as the British mainland, but some were as small as a dot on the world map. Many States besides J&K had delayed in signing the Instrument of Accession. Some states had signed the Instrument even later than J&K did. Maharaja Hari Singh decided to sign the Instrument of Accession on October 26<sup>th</sup>, 1947 (72 days after he was given a choice to accede to either dominion). By no stretch of imagination

<sup>10</sup>ErH.R.Phonsa,Article 370 with Role of Dr. B.R. Ambedkar in Shaping Peaceful Jammu and Kashmir State - Wednesday, February 20, 2013; <http://dalitvisionn.blogspot.in/2013/02/role-of-dr-ambedkar-in-shaping.html> referred on 20/12/2014 at 12:00.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

can this be called an undue delay, as the churlish term it.<sup>13</sup>

### **How the unfortunate article came to be.**

The Constitution drafting body had 292 members and was headed by Dr Rajendra Prasad, the first President of India as its head. Dr B.R. Ambedkar was called to shield the responsibility of being the first Law Minister of free India and subsequently, the Chairman of the Constitution Drafting Committee of seven members. This was despite the fact that throughout his life he had been a critic of Gandhi and the Congress. He was not a Congress Party man. The Draft of the Constitution of free India was written having 315 articles and 8 schedules consuming as little as 114 days.<sup>14</sup> This initial Draft contained nothing of the contents of the temporary and transitional provision which we know as Article 370.

In the draft constitution Article 306 provided for some temporary provisions to frame laws in respect of certain matters falling in the State List for the first 5 years, as they were in the Concurrent List. In the article 306 sub clauses (A) and (B) were made during draft Constitution discussions. These 306(A) and 306(B) were again re-drafted as 370 and 371 in the final Draft of the Constitution.<sup>15</sup>

During the second revision of the Draft Constitution, the National Assembly for Constitution had a break of 15 days in September 1949 when Dr Ambedkar spent a few days at Srinagar, Kashmir to have little rest. Surely he might have met some people there to assess the impact of the new developments in the country then. He is reported to have reached back to Delhi

on October 3, 1949.<sup>16</sup> Parts of J&K were still under the illegal control of Pakistani troops and Pakistan in blatant violation of the U.N. directives had refused to withdraw its troops from there. In the prevailing circumstances it was thought to make certain temporary provisions in respect of J&K State in the Indian Constitution. During discussion by Sheikh Sahib with Pt. Jawaharlal Nehru on the subject, Panditji suggested to Sheikh Mohd. Abdullah to discuss it first with Dr. Ambedkar, the Chief Architect of the Constitution. Legend has it that, when Sheikh Sahib came to discuss the proposal with Dr. Ambedkar, he plainly refused.<sup>17</sup>

### **The Honourable Dr. Ambedkar's tryst disagrements with the controversial article.**

Professor Balraj Madhok has reported in the Deepavali Special issue of 'Organiser' November 14, 2004, on the basis of his talk with Dr. Ambedkar on this topic. 'Dr. Ambedkar told Sheikh Sahib "Mr. Abdullah, you want that India should defend Kashmir, India should develop Kashmir and Kashmiri's should have equal rights as the citizens of India, but you don't want India and any citizen of India to have any rights in Kashmir. I am the Law minister of India. I cannot betray the interest of my country."' It is said that at this point Pt. Nehru asked Gopaldaswami Ayyangar (Minister without portfolio in his Cabinet) to draft the necessary Legislation and pilot it in the National Constituent Assembly'.<sup>18</sup>

N. Gopaldaswami Ayyangar sent an express telegram to East Punjab on 19<sup>th</sup> December, 1947, asking for supply of 150 motor vehicles to Kashmir Civil Administration,

<sup>13</sup> Ibid.

<sup>14</sup> Ibid

<sup>15</sup> Ibid.

<sup>16</sup> Blog on the cause of untouchables of India; Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

when normally such requests for civil supplies were made to the (Central) Ministry of States.<sup>19</sup>

Just in the recent past before this happened, a most unusual event took place.<sup>20</sup> “A transaction of as large as Rupees 20 lakhs was put through by the Prime Minister’s Secretariat with Sheikh Abdullah without the Ministry concerned coming to know of it until at a later stage. Sardar Patel wrote to Mr.Ayyangar “I do not know whether you are aware that the Ministry of States has its own Financial Advisor and therefore it makes it all the more incumbent that a transaction involving any financial commitment either on the part of a State or of ourselves should be centred in the Ministry of States.”<sup>21</sup>

The concessions Maharaja Hari Singh granted to the Scheduled Caste in 1931 were after attending the Round Table Conference where Dr.Baba Sahib Ambedkar’s speeches had shaken the conscience of right thinking Indians and the British. Dr.Ambedkar explained the plight of 20% of the Hindu Population in India (dalits). Maharaja Hari Singh granted permission to allow use of public wells and tanks to the Scheduled Castes. He ordered opening of temple doors to them. He accorded sanctions to give scholarships to their school going children. He

nominated two SC members to Praja Sabha and issued orders that there be no discrimination against any SC on the basis of their caste. The untouchable students were allowed to attend class rooms along with the other high caste students.<sup>22</sup>

### Conclusion

The accession of J&K State into Indian Union was approved by J&K Assembly in 1956. Nehru’s promise that Article 370 was a temporary provision and will get eroded over a period of time has turned out to be a chimera.<sup>23</sup>

<sup>19</sup> Reference to this was made in Patel’s letter to Ayyangar dated 22<sup>nd</sup> December, 1947, in which he expressed surprise at the telegram, as it was not ordinarily the procedure to ask another State for supplies but instead he should have asked the Ministry of States for supplies.

<sup>20</sup>Hon’ble Jawaharlal Nehru was P.M. at the time, whose unstinting support for Abdullah(who had, in time, become his personal friend) is well documented.

<sup>21</sup> Extract from Letter of Patel to GopalswamiAyyangar (Minister without portfolio), dated 23<sup>rd</sup> December, 1947. To be found in ‘Nehru-Patel: Agreement with Differences’ by Neerj Singh.

<sup>22</sup>Blog on the cause of untouchables in India- Wednesday, February 20, 2013:Article 370 with Role of Dr. B.R. Ambedkar in Shaping Peaceful Jammu and Kashmir State:- by ErH.R.Phonsa; <http://dalitvisionn.blogspot.in/2013/02/role-of-dr-ambedkar-in-shaping.html> referred on 20/12/2014 at 12:00.

<sup>23</sup>Maj. Gen.SheruThapliyal, Article 370: The untold story, Issue Vol 26.1 Jan-Mar 2011 | Date : 13 Nov , 2014; Indian Defense Review. ([www.indiandefensereview.com/news/Art-370-the-untold-story/](http://www.indiandefensereview.com/news/Art-370-the-untold-story/)) referred on 20/10/2014 at 10:00.