

ARTICLE 370 OF THE CONSTITUTION - HUMAN RIGHTS PERSPECTIVE**-By Nirmalkumar Mohandoss**

As the Supreme Court admits plea challenging the validity of Article 370 of the Constitution of India granting special status to Jammu & Kashmir, one of the most controversial issues is back to shake the Indian politics. The plea is filed challenging the Delhi High Court Order which dismissed such plea earlier. The Jammu & Kashmir High Court had, in 2015, observed that the Article 370 is a permanent feature of the Constitution and is beyond amendment, repeal or abrogation.

Even as the Supreme Court ordered notice to the Central Government, the BJP State Chief Spokesperson Sunil Sethi told press reporters that the BJP had no intention to abrogate Article 370, as long as the common minimum programme 'The agenda of alliance' persists between the BJP & PDP. Now that the political alliance is broken, there is no clarity on the stand likely to be taken by the party that leads the centre. However, it must be noted that the BJP's election manifesto in 2014 had given sufficient importance to abrogation of Article 370.

'Mark my words and save this tweet-long after Modi's Government is a distant memory, either Jammu & Kashmir will not be a part of India or Article 370 will still exist'. This was tweeted not by any separatist but by former Chief Minister of the State, Omar Abdullah, soon after the NDA under Modi took charge in 2014. The issue is so sensitive that the inalienable right to self-determination, that is long recognized as Jus-Cogen principle in International Human Rights law, is often attached to it. The native Kashmiri population and the polity consider any discussion on abrogation of Article 370 as a violation of their basic Human Rights, which, according to them, cannot be taken away from them. The discussion has often resulted in riots, bandhs, Police shoot-out, deaths and further human rights violations. On the other hand, people from the rest of India, who are not privy to it are often amused at the kind of special treatment that is sought by the people of the State and even opine that this might lead to destruction of the unity and integrity of the 'Union of India'.

It is my firm conviction that the issue must be discussed in the light of its legislative and political history. When India attained independence in 1947 there were nearly 562 princely states in the Indian Territory. According to Section 2, read with Section 7 of the Indian independence Act, 1947, the princely states were free to join India or Pakistan, or remain independent. While most of the princely states geographically adjacent to India acceded to India, very few States like J & K, Junagadh and Hyderabad were confused.

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It is interesting to note that Maharaja Hari Singh of Kashmir had signed Stand Still agreement with Pakistan on 12th August 1947 seeking their continuous trade relationship with the Territory until he takes his decision on the status of his kingdom. The polity was undisturbed until during the early days of October 1947 when tribesmen from Pakistan started occupying western parts of the Territory. It was on 26th October, the Maharaja wrote a letter to the Governor General Mountbatten in which he says, *'With the conditions obtaining at present in my State and the great emergency of the situation as it exists, I have no option but to ask for help from the Indian Dominion. Naturally they cannot send the help asked for by me without my State acceding to the Dominion of India. I have accordingly decided to do so and I attach the Instrument of Accession for acceptance by your Government'*, indicating that he had no alternative to signing the *'Instrument of accession'* acceding his territory to India. This is followed by a number of incidents, which include the Indo-Pakistan war, the UNSC resolutions seeking plebiscite, etc., before the Constitution of India

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Truncating the history with this, *Article 370* of the Constitution provides, among other things, that: *'The power of Parliament to make laws for the State of Jammu and Kashmir is limited to-*

- (a) Those matters in the Union List and the Concurrent List, which in consultation of the Government of the State, *are declared by the President to correspond to matters specified in the Instrument of Accession,*
- (b) such other matters in the Union and Concurrent Lists only with the concurrence of the Government of the State, the President by order specify. This means that on such matters laws can be made only with the consent of the State of Jammu and Kashmir.'

Exercising his powers under *Article 370* of the Constitution, the President, from time to time, has issued orders extending several provisions of the Constitution to the State of Jammu & Kashmir. By the *Constitution (Application to Jammu & Kashmir) Order 1954* the Legislative authority of the Union was extended to the State and it, *inter alia*, provides for the following:

Firstly, The Constitution of the State of Jammu & Kashmir shall continue to be operative; *Secondly*, the Jurisdiction of the Supreme Court extends to the State except for Articles 135 & 139; *Thirdly*, the provision regarding emergencies under *Article 352* can be applied to the State only with the Concurrence (consent) of the State; *Fourthly*, The provisions for imposing the President's rule under Article 356 apply to the State. But Article 360, relating to the financial emergency does not apply; *Fifthly*, the Directive Principles of State do not apply to the State of J & K. *Sixthly*, Under Article 368, an amendment to the Constitution shall not apply to the State until the President by order applies it to the State.

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Since the provision in question is based upon the Instrument of Accession, it is pertinent to peruse the relevant provision of the same. The Instrument says, 'I hereby *declare that I accede to the Dominion of India ... but subject always to the terms thereof...*I accept the matters specified in the schedule hereto as the matters with respect to which the Dominion Legislature may make law for this State.' The matters in respect of which the Dominion Legislature was authorized to make law for the State are: Defence (including armed forces, arms, ammunitions, explosives etc.), External Affairs (which includes giving effect to Treaties and Agreements, naturalization, etc.) and Communication (which includes posts, Railways, Ports etc.).

Even as India is a federal republic with more 'unitary features' that is not the case with the State of Jammu & Kashmir as seen above. This is exactly why there is a debate on the abrogation of Article 370 of the Constitution.

After an analysis of the legal principles, legal documents and above all, the Constitution of India, it is my firm conviction that there is nothing wrong in retaining Article 370 of the Constitution on the following grounds:

1. Article 370, being an original provision of the Constitution (as against amended provisions), it cannot be inconsistent with the other provisions of the Constitution. In law, there is always a presumption that provisions of the same statute cannot be repugnant to each other. ['In Civile Est Nisi Tota Lege Perspecta Una Aliqua Particula Ejus Proposita Judicare Vel Respondere', which means 'it is an elementary rule that construction is to be made of all parts (of a statute) together, and not of one part only by itself.'] The provisions must be read together harmoniously. The purpose for which the Article was incorporated in the Constitution is quite clear. Therefore, special powers under Article 370 apply only to the State on the basis of

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its political history and the general scheme of federation under the Constitution applies to other States. There is, therefore no repugnancy within the Constitution.

2. The natural corollary to the preceding point is that Article 370 is an exception to the general rule relating to the Indian federal polity. No rule is without exceptions. For instance, though only 'States' are entitled to have legislature, Union Territory of Pondicherry has a legislature. Similarly, many other States have been armed with Special powers under Articles 370-A - I of the Constitution based on their political history and necessity. Therefore, there is nothing inconsistent in having an exception in Article 370 to the 'Federal scheme' under the Constitution of India.

3. Kashmiris are entitled to their right to Self Determination which is now recognized as a jus cogens principle in International Human Rights Law. Article 1 of the *International Covenant on Civil and Political Rights* to which India is a party provides that 'All peoples have *the right of self-determination*. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Right to self-determination should be identified with internal self-

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determination. The Kashmiris decided to merge with India in such terms as conceived in Article 370. Article 370, should, therefore, be identified with the inalienable Right to Self Determination of Kashmir and its people.

4. The Scheme of Federation in India is based on the Canadian constitution as against the American Federation. While Canada is a federation formed by Centrifugal forces (division of States for political convenience on the lines of language and other considerations), America is a federation formed by Centripetal forces (independent sovereign States coming together to meet their common needs and to defend themselves in common). India is a 'Union of States' politically divided on the basis of language and ethnicity for convenience of administration, the State of Kashmir is a territory which merged with India considering its political needs and it is not a State having its boundary drawn on the lines of language and other considerations. Therefore, though Indian federal polity is designed on the lines of Canadian federation (more powers to the Federal Government as against the Provincial Government), Article 370 of the Indian Constitution is *pari materia* to the American Federal constitution.

In these circumstances, it is my opinion that Article 370 is very much constitutional. In providing special status to J & K under Article 370 of the Constitution, India has not succumbed to any pressure, but has only honoured its promises and preserved its integrity it always possessed. By retaining Article 370 of the Constitution as long as the people of the State desire, India is only set to honour the Human Rights that we have all cherished.

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