

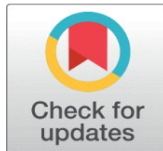
READING DOWN OF ART 370 AND 35A-2019 IN JAMMU AND KASHMIR: A CASE OF OFFENSIVE LAWFARE

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ABSTRACT

The State of JKL is populated by diverse populations and is composed of different regional identities. This has reflected in differing political aspirations in all three regions. This paper discusses how the different aspirations of three regions have been used in the Great game. It is established how Jammu has historically expressed an urge for autonomy from influences in Kashmir. It has also always been the voice for constitutional parity with the rest of the nation. Kashmir on the other hand has found a space for ethno-centric aspirations and these have been historically articulated by a closed political circle which has used these aspirations as tool for power.

The paper establishes how, the reading down of Article 370 and Art 35A was a classic case of offensive legal warfare (lawfare) to move against big power geopolitical games played through regional proxies like Pakistan.

Keywords: JKL, Aspirations, Diverse, Constitution, Policy, Partition, Region, Instrument of Accession

1. INTRODUCTION

On 5 August 2019 the Government of India made an unprecedented policy decision with respect to the erstwhile state of Jammu and Kashmir (henceforth JKL) by reading down Article 370 and 35A. This led to the first ever reorganisation of the former State of JKL whose defining boundaries went back to the era of Princely States. The reorganisation of JKL was undertaken through the partial reading down of Article 370 and the complete removal of Article 35A of the Indian Constitution.

JKL is the Northernmost region of India. Its importance rests not only on its geographical location but also on its unique geo-politics, politics and the social composition of the State. Additionally, large parts of the State are not only physically under foreign occupation but are also lost to national memory due a lack of a strategic culture, political will and historical errors of judgement. It is also the only State in India which in which an elite driven politically created ethno-national identity provides a basis for protracted hegemonic conflict. This has led to the dominance of an 'ideal-laden' narrative in which the beautiful diversity of the State is lost.

JKL has also been called the only 'Muslim dominated State of India'. For years this description has served to obscure the rich recorded history of cultural continuity that the State has represented in the Indic world. Due to this the State has also emerged as a test case for religious transformations and upheavals. This has led to a number of questions. Is Kashmir an unresolved link in the global Islamic Crescent? Is India's only Muslim majority State also one which witnessed the only recorded genocide of Hindus in India?

2. JAMMU AND KASHMIR- STATE FORMATION AND CONSOLIDATION

The contours of the Modern JKL were formed by the Dogra dynasty. In the Nineteenth century the area of Punjab north of Sutlej was part of the Sikh Empire. Kashmir was also part of the Sikh empire. Gulab Singh Dogra was the ruler of Jammu. South of Sutlej was under East India Company. The Sikh Empire clashed with the British in 1845-46 in the First Anglo-Sikh War¹.

The East India Company was not interested in acquiring all the territory of the Sikh Empire. So they only took the Doab region between Beas and Sutlej, extending their territory to the Beas river and the Sikh Empire was asked to pay a compensation of 15 million rupees. The Sikh empire was broke due to the war and they couldn't raise this money. Gulab Singh, who was the ruler of Jammu had money. So he "purchased" Kashmir (which was part of the Sikh Empire) for 7.5 million rupees which were paid to the East India company. So Kashmir became part of Gulab Singh's kingdom which now became Jammu and Kashmir. The Dogra dynasty expanded territories adding other principalities around modern Jammu. Ladakh had been annexed in 1834 and was an independent kingdom till that time. The Ladakh Wazarat of the Dogras included Baltistan. The Dogra rule thus consolidated different unique and independent areas and amalgamated it into the State of Jammu and Kashmir.

Under Dogra Administration these different disparate areas were held together by policies ranging from despotic Gulab Singh to a progressive Hari Singh who was a key player in the integration of the JKL with India. As Kashmir slipped out of the hands of Maharaja Hari Singh and became centered on Sheikh Abdullah and the construct of Kashmiriyat we see the rise and sharpening of Regional aspirations in the JKL.

3. KASHMIR: PERSONAL AMBITIONS AND ETHNOCENTRIC POLITICAL MOVEMENTS

In the political game being played by Nehru and Abdullah in Kashmir, Maharaja Hari Singh became a pawn². The politics of Sheikh Abdullah was defined by the Khilafat Movement(1919-24).The Khilafat movement rests on the Islamic world is led by the Caliph who was also the Sultan of Turkey. The Caliph was considered the religious head of the Muslims all over the world and thus the concept of a Pan-Islamic identity was imbibed by the Caliph. The disintegration of the Ottoman Empire and the subsequent de-throning of the Caliph or the Sultan of Turkey made Muslims all over the world restive. In India ruled by the British, the Muslims launched the Khilafat Movement for the restoration of the position of the Caliph.

The Congress under the leadership of Gandhi decided to support this movement. Amongst others Maulana Abul Kalam Azad, M.A. Ansari, Saifuddin Kitchlew and the Ali brothers were the prominent Muslim leaders of Khilafat. With the efforts of Gandhi the by 1920 the Khilafat Movement merged with the Non-Cooperation Movement.

The Khilafat movement had strong repercussions in India and the Moplah Riots in Kerala are seen as a manifestation of the combined radicalization of the Khilafat and local issues. The khilafat movement also led to deepening of the two-nation sentiment amongst Muslim League in India. The Ali brothers are regarded as founding-fathers of Pakistan, while Maulana Azad, Dr. Ansari and Hakim Ajmal Khan were also loud voices in Khilafat³.

Sheikh Abdullah was influenced by the Khilafat movement and its end brought about a period of political confusion for him. He was completely sure that the future of Kashmir did not lie with a future Pakistan. At the same time, he was

¹ Bhat, S. (2021). *State formation in colonial India*. [PDF file]. Retrieved August 5, 2021, from local file.

² Shankar, V. (n.d.). *My reminiscences of Sardar Patel*. Retrieved from <https://qdoc.tips/my-reminiscences-of-sardar-patel-vol1-by-vishnu-shankarpdf-pdf-free.html>

³ Qureshi, M. N. (2017). *The Khilafat movement in India, 1919-1924*. School of Oriental and African Studies. ProQuest LLC. Retrieved from <https://eprints.soas.ac.uk/28516/1/10672675.pdf>

yet to acquire the status of an alternative centre of power in Kashmir. The Maharaja was still the sovereign in Kashmir. For many Muslim leaders supporting the Pakistani cause, Sheikh Abdullah was not really a trustworthy person.

His fights with the government in Kashmir at that time were more of a personal nature. Under the Maharaja he was not considered for the post of Lecturer due to average academic achievements. He probably expected to be granted concessions in appointment. He clashed with the local administration on these issues but never directly with the Maharaja. His Muslim politics were not communal initially. However, conditions changed. An announcement was made by Mohammad Ali Jinnah declaring Chaudhry Guhlam Abbas as the leader of Kashmiri Muslims. Sheikh Abdullah needed to match the rhetoric Chaudhry Abbas to remain relevant in Kashmir's politics⁴. To fulfill this ambition he created an alliance with Nehru. Sheikh was quick to understand that his political space could only be created through an alliance with Nehru. Maharaja Hari Singh was not yet de-seated or weak.

An analysis of the relationship between Nehru and Sheikh Abdulla shows that Nehru was looking for a Muslim face at the helm of Indian Politics which could fill in the gap created by partition. Nehru foresaw that Maulana Azad being very old and Rafi Ahmed Kidwai being very young, Sheikh Abdullah could be made a Muslim leader at the national level. This was happily accepted by Sheikh Abdullah. But Nehru could not comprehend Sheikh Abdullah's strategy and manipulations. Nehru in turn did not bother to check Sheikh Abdullah's manipulations. For instance, Sheikh spread the canard that the Maharaja had demolished mosques in Jammu. Nehru pressurized the Maharaja over this allegation and did not bother to check facts. Nehru later apologized for this mis-step.

Sheikh Abdullah was a man of very well demonstrated Personal ambitions. In 1949 Sheikh had begun to declare that Kashmir should be an independent state. He asked America and Britain to take guarantee for this. Such a position created conditions for a full-fledged agitation for separating Jammu from Kashmir. This was the Praja Parishad agitation in the State.

Even as early as May 1949, after the Maharaja had acceded to India, Sheikh Abdullah had stated in a statement to the Sunday Observer and the Scotsman of England:

"Accession to either side cannot bring peace. We want to live in friendship with both the Dominions. Perhaps a middle path between them with economic cooperation with each will be the only way of doing it. However, an independent Kashmir must be guaranteed not only by India and Pakistan but also by Great Britain, the United States and other members of the United Nations"⁵.

Meanwhile all that was possible was done to create a discourse that Kashmir had only 'partially' acceded to India and that some form of 'ratification' was still pending. Speaking to the Constituent Assembly on March 25, 1952 Sheikh Abdullah said:

"Suppose for the sake of argument that the people do not ratify this accession, the position that will follow would not be that as a matter of course Kashmir becomes a part of Pakistan. No, that would not happen. That cannot happen legally or constitutionally. What would happen in such an eventuality would be that the State would regain the status which it enjoyed immediately preceding the accession. Let us be clear about it"⁶.

Till 1953, Sheikh Abdullah escalated the independence rhetoric by all means, at times giving flame to communal sentiments. This discourse that Sheikh Abdullah created, the uncertainties he created around a perfectly valid, complete integration with India by the sovereign of the State has grasped the psyche of Kashmiris in an irreversible spiral of alienation and violence.

Why was Article 370 necessitated? The Article was largely a mindgame of Sheikh Abdullah, who had been appointed Prime Minister of J&K by Maharaja Hari Singh. He had emerged as an important aide of Prime Minister Jawaharlal Nehru.

⁴ Kawale, D. A. (2024). Abrogation of Article 370: A detailed analysis. *International Journal of Legal and Social Issues*, 6(1), 132-146. <https://doi.org/10.1000/IJLSI.111752>

⁵ Kashmir Connected. (2016, February 2). Sheikh Abdullah: 'Independence ... may be the only solution'. Retrieved from <https://www.kashmirconnected.com/resources/category/scotsman>

⁶ Bhandari, M. C. (2006). *Solving Kashmir*. New Delhi, India: Lancer Publishers & Distributors. (p. 170).

Article 370 was passed by Parliament as “TEMPORARY AND TRANSITIONAL PROVISIONS”. Later this heading was amended vide Thirteenth Amendment Act, 1962 w.e.f. 1-12-1963 and the word ‘SPECIAL’ was added to it. Now it reads as ‘TEMPORARY, TRANSITIONAL AND SPECIAL PROVISIONS’.

Article 370 was used to enact Article 35A which granted the Permanent Resident status to residents of Jammu and Kashmir. On May 14, 1954, the President of India issued an order called the Constitution (Application to Jammu and Kashmir) Order 1954. It came into effect immediately and superseded the Constitution (Application to Jammu and Kashmir) Order 1950. Besides carrying out many modifications and changes, this presidential order ‘added’ a new “Article 35A” after Article 35 to the Constitution of India. This effectively meant, in this case, the President bypassed the amending procedure as laid out in the Constitution on India in order to add the new Article 35A⁷.

The 1954 order states it is being issued “in exercise of powers conferred by clause (1) of Article 370 of the Constitution, with the concurrence of the Government of Jammu and Kashmir”. Article 35(A) enabled the State Assembly to define ‘permanent residents’ and to give them special rights and privileges, as well as to restrict the rights and privileges of all citizens of India who do not fit into this definition of ‘permanent resident’. As a consequence, no one except those defined as ‘permanent residents’ are entitled to property rights; employment in state government; participation in Panchayat, municipalities and legislative assembly elections; admission to government-run technical education institutions; scholarships and other social benefits.

In 1950, with the introduction of Article 370, Jammu and Kashmir (J&K) was granted a “special status,” allowing its people to define their governance structure independently, rather than adopting the standard state governance outlined in the Indian Constitution. This unique arrangement enabled J&K to operate autonomously, with limited influence from central institutions, distinguishing it from other Indian states. In 1957, J&K’s Constituent Assembly formalized this governance framework, establishing distinct exclusions from central jurisdiction: neither the Election Commission of India nor the Comptroller and Auditor General had authority over J&K; Parliament’s law-making power was limited to specific areas; positions in J&K’s bureaucracy were reserved exclusively for its residents, excluding officers from India’s national bureaucracy; the head of state in J&K would be a locally elected “Sadar-i-Riyasat,” not a centrally appointed Governor; and the state’s representation in the Lok Sabha would be nominated by its legislature, rather than elected in national elections. These elements underscored J&K’s autonomous and unique status within India.

However, this autonomy gradually diminished from 1957 to 2019. Over time, central institutions gained influence in J&K: by 1960, the Election Commission and Comptroller and Auditor General extended their jurisdiction over the state, and J&K’s bureaucracy opened to citizens from across India. In 1964, Article 356, permitting direct central rule, became applicable, and by 1965, the role of Sadar-i-Riyasat was replaced with a centrally appointed Governor. Eventually, the Supreme Court and Indian Parliament gained broader jurisdiction, and in 1967, J&K residents participated in India’s General Elections for the first time⁸.

This gradual process aligned J&K more closely with India’s other states, progressively integrating it into the national system. By August 2019, J&K’s “special status” had become a diminished version of its former self, with most elements of substantive autonomy eroded, leaving only remnants of its original distinction.

Article 370 and later Art. 35 A were thus the first instance in recorded history of nations where a national government created a legal structure that was ambiguous and left the field open for Great power games. Both coupled with the ethnocentric movement in Kashmir and the UN resolution on Kashmir created a web of legal warfare in which the Indian State was left with dealing with constitutional and political incapacities in a volatile border state with populations susceptible to propaganda warfare⁹.

⁷ Chowdhary, R. (2019). *Jammu and Kashmir: 1990 and beyond: Competitive politics in the shadow of separatism*. SAGE Publications India.

⁸ Nadaf, A. H. (2021). Discursive representation of the Article 370 abrogation: A comparative CDA of the headlines of two major Indian online news publications. *Journalism*, 24(6), 1342–1361. <https://doi.org/10.1177/14648849211056843>

⁹ Noorani, A. G. (2011). *Article 370: A constitutional history of Jammu and Kashmir*. Oxford University Press. Retrieved from <https://ci.nii.ac.jp/ncid/BB08083873>

4. READING DOWN OF ARTICLE 370 AND 35 A: DEFENSIVE LAWFARE

Though Article 370 was '*Temporary and Transitional*' it acquired a defining status in forming a framework of federal relations between the central and state governments. The Special status of the erstwhile State of Jammu and Kashmir was cemented by Article 370 and Article 35A.

The abrogation of Article 370 on August 5-6, 2019, was achieved through a series of four legal documents issued over those two days. These included Constitution Order 272, issued by the President of India on August 5, a resolution passed by the Rajya Sabha on the same day, a resolution from the Lok Sabha on August 6, and Constitution Order 273, also issued by the President on August 6. Together, these documents replaced the original text of Article 370, thereby ending Jammu and Kashmir's "special status."

At the core of this legal framework is Constitution Order 272, which plays a pivotal role in the abrogation process. Constitution Orders, issued by the President with the agreement of the Government of J&K, have historically enabled constitutional amendments for J&K even after the dissolution of its Constituent Assembly. In 2019, this authority allowed the President, with the concurrence of the J&K Governor, to amend the procedure required for abrogating Article 370. The power to repeal Article 370, originally assigned to J&K's Constituent Assembly, was reassigned to the Indian Parliament through Constitution Order 272.

Following this, resolutions passed by both the Raj¹⁰ya Sabha and Lok Sabha asserted Parliament's authority to exercise the powers previously held by the J&K Constituent Assembly. Finally, Constitution Order 273 amended the text of Article 370, formally ending the "special status" of Jammu and Kashmir. The reading down of Article 370 and 35 A were challenged in the Supreme Court of India which established its validity in a much-publicised case in which was finally closed in August 2024.

5. CONCLUSION

Thus, we see that the regions of JKL had distinct political movements in the era around Indian independence. While Jammu was clearly articulating a regional identity independent of the valley, Kashmir was articulating a hegemonic ethnocentric identity under the leadership of Sheikh Abdullah. The Kashmiri identity and politics came to dominate the State. These diverse regions have their own aspirations. Political and administrative mishandling of these aspirations has led to a sharpening and escalation of inter-regional aspirations in the State of Jammu and Kashmir. Article 370 and 35A were the legal instruments around which lawfare was internationally launched making the region a 'dispute'.

CONFLICT OF INTERESTS

None.

ACKNOWLEDGMENTS

None.

¹⁰ Nair, B. G. (2019). Abrogation of Article 370: Can the president act without the recommendation of the constituent assembly? *Indian Law Review*, 3(3), 254–279. <https://doi.org/10.1080/24730580.2019.1700592>