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JAMMU & KASHMIR & THE POLITICS OF ARTICLE 370: SEEKING LEGALITY FOR THE ILLEGITIMATE

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Abstract

Article 370 of the Indian Constitution stipulates autonomy for the state of Jammu and Kashmir (J&K). Terms of the Article have remained mired in controversy owing its unequal dispensation within the framework of free India. This paper examines Article 370 and the validity of politics attached to it, based on four specific arguments. First, the Genesis of Article 370 spawns inequality in India. Second, its Retention implies festering of contentious issues. Third, its Ramifications forge inequality within J&K. Fourth, how Politics over Article 370 only seek limited leverage from it. These arguments have been examined through an engagement with primary and secondary sources and views analyzed in different traditions. The case universe comprises views across a spectrum of opinion. An interpretivist approach classifies this debate in the larger context of Continuation or Revocation of Article 370, based on the research question whether Article 370 has worked in the manner envisaged, or has aggravated inequality and fuelled growth of conflict in J&K.

Keywords

Jammu & Kashmir, Politics, Constitution, Conflict, Article 370, Inequality

1. Introduction



Article 370 of the Constitution of India provides special autonomy to the state of Jammu & Kashmir (J&K). The erstwhile Article 238, pertaining to Part B states or former princely states was repealed by the 7th Constitutional Amendment in 1956 after the reorganisation of Indian states. However Article 370 overrode the provisions of Article 238 as special stipulations for J&K. Article 370 have been controversial right from inception, with Dr BR Ambedkar as the principal drafter of the Constitution, having refused to draft the article owing its bias and unequal dispensations within the framework of a free India. The drafting was eventually done by Gopalaswami Ayyangar, who was a confidante of Prime Minister Jawaharlal Nehru and former aide of the Maharaja of J&K. It was initially meant to be temporary in nature; hence it was included in the Temporary and Transitional Provisions in Part XXI (Varshney 1992; Thapliyal 2011). This paper intends to examine the Article and the validity of the politics attached to it, based on four specific arguments, these being as under:

First, the very Genesis of Article 370 spawns conditions for inequality in India. Second, how the Retention of Article 370 implies festering of contentious issues. Third, how the Ramifications of Article 370 forge inequality within the state of J&K. Fourth, how the Politics over Article 370 only seek limited leverage from it.

Was Article 370 used for the delegation of power as it was originally intended to do for a vulnerable population who were insecure about their identity and their culture? Did the logic of ethnic nationalism damage the fabric of secularism? Did Article 370 recreate power structures as it was intended to, or did it just add another level of subterfuge to extant biases in society? Did Article 370 indeed increase the level of accountability in the institutions of the state that were meant to protect the rights of the people and therefore empower them? Has Article 370 improved social mobility in any manner, or has it in fact served to only curb it further? Is there an underlying and inherent contradiction in the debate about whether the state wants to be a part of India or its quest for self-governance? Finally, has Article 370 worked in the manner it was envisaged to, or has it succeeded in aggravating inequality within the state and in the larger context of India? The analyses of these arguments would seek to answer the question whether Article 370 should continue or be revoked, and whether it is related to the growth of conflict in J&K.

The above arguments have been examined through an engagement with primary and



secondary sources, and attempt to address the views presented in sources representing different traditions. The case universe comprises points of views across a spectrum of opinion; an interpretivist approach tries to classify this debate in the larger context of its continuation or revocation.

2. Argument 1: Genesis of Article 370 created inequality in India

The Instrument of Accession for the state of Jammu & Kashmir was signed by Maharaja Hari Singh on 26th October 1947, making the state an integral part of the newly independent India. It also marked the culmination of the longest standing conflict in South Asia. In these the most desperate of circumstances, in an act signifying sheer despondency, the wily Maharaja still managed to insert clauses in to the agreement to ensure Indian jurisdiction remained confined to defence, external affairs and communications. Effectively, these clauses were meant as safeguards to his own sovereigntyⁱ (Akbar 2008: 135). It also signified in some ways the Maharaja's difficulty in swallowing a situation wherein he not only had to deal with Nehru, Prime Minister of India, but also Sheikh Abdullah, who had consistently opposed him for over twenty yearsⁱⁱ (Schofield 2010). Despite some opposition from the Constituent Assembly of India, the issue never drew the kind of vehement opposition that would have ensured its timely burial, and ultimately it became the effective precursor to Article 370 of the Indian Constitution. Due to the opposition of Dr BR Ambedkar in drafting the article, owing its bias and unequal dispensation within the framework of independent India's Constitution, the task was entrusted to Gopalaswami Ayyangar, trusted by Prime Minister Nehru, and a former aide of the Maharaja (Thapliyal 2011). Ayyangar argued that the special article governing J&K was due to the special conditions of its accession to India coupled with the military conflict that had overtaken it immediately. Further, with the involvement of the United Nations, it was seen as a positive projection of the nascent Indian republic trying to base such issues on the 'will of the people'. Thus, Article 370 confers special status to the state of J&K, which is one of the vexing conundrums of contemporary Indian politics; in fact the inherent inequality gave rise to the entire debate about a special status given unlike other princely states which acceded to India in 1947 (Varshney 1992).

Had it not been for this special status, certain realities may not have changed even in this



case, and the quandaries may have still remained as complex. It would still be a Hindu Maharaja ruled state with a dominant Muslim population. Post the accession, the opposition to the imbalance between the two would still have been palpably present; in fact, possibly more so, given the imposition of a secular, social and democratic order (as per the Indian Constitution). Post-Independence India would still see a churn in terms of its social outlook, policies, and laws giving some manner of equality to its diverse population, of which the people of J&K would partake equally. Sheikh Abdullah as a popular leader may not have changed, but the differences between him and the central government may never have arisen. Even if they had, the differences may have been of the nature that political differences arose with leaders such as JP Narayan. Yet the yearning of the people for equality, for development, for justice, would have existed. It may have resulted in J&K taking a route akin to the other Indian states of Bihar or Uttar Pradesh or Madhya Pradesh; extant differences in various regions (whether based on identity or religion) may have seen the division of the state into simpler administrative units (as has been the case with Jharkhand or Chhattisgarh or Uttarakhand). Individual states and/or union territories of Jammu, Kashmir and Ladakh being formed to cater to the aspirations of the distinct people of each of these parts may have sprung up in due course.

Given the nature of social conflicts, unequal terms will invariably create conditions for the conflict to take a destructive turn. The inexorable nature of conflict would not necessarily mean unbridled violence, provided the conflict is moulded or turned towards a positive and constructive turn. The choice to make the social conflict in J&K constructive in nature was within the grasp of the Indian government, as Sheikh Abdullah initially professed his fidelity to India and its Prime Minister, Jawaharlal Nehruⁱⁱⁱ (Akbar 2008). He propagated the cause of joining India, especially in terms of the peasant reforms he intended to usher in, which would never reach fruition in a feudalism protected Pakistan. This would also have proved to be the death knell of an unequal and controversial Article 370. However as history bears us out, events turned in a different direction.

Therefore in its very genesis, Article 370 sought to create unequal terms for people who were citizens of the same country, living in different regions. This was also a precursor to the unequal development of people in J&K itself and in comparison to the rest of the country. The multiple cause and effect of the Maharaja's bid to safeguard his own sovereignty, Nehru's bid to



invalidate Jinnah's Two Nation Theory, and Sheikh Abdullah's bid to ascend to power; all of these have only resulted in effecting an unequal playing field and creating roots for future disharmony.

3. Argument 2: Retention of Article 370 allowed the contentious issue to fester

Part XXI of the Indian Constitution stipulates autonomy for the state of J&K^{iv} (Constitution of India Updated 2015). Part XXI of the Constitution deals with the Temporary, Transitional and Special Provisions. Some of these provisions also exist for tribal areas in India, such as Arunachal Pradesh, Andaman & Nicobar Islands and Nagaland. However the special status granted to J&K after accession has been retained as such. The ostensible reason for this is the on-going dispute at the UN Security Council between India and Pakistan.

Despite the grant of special status to J&K, it remained mired in controversy and political intrigue right from accession itself. Conflicting interests of the main protagonists resulted in a series of differences on a number of key issues (Varshney 1992). Needless to say, it set the tone for the future as well. For instance, India and Pakistan were at loggerheads on the legality of accession, both making claims and counter claims. With the issue being raised before the UN, the question of a plebiscite became more complex. This complexity was owed to Pakistan's refusal to concede the territories annexed by it and ostensibly named *Azad Kashmir* or free Kashmir. India on the other hand used this as an argument against the conduct of plebiscite; plebiscite after all was meant for the complete state of J&K, and not just the portion which remained under Indian control. A special United Nations Commission for India and Pakistan (UNCIP) was set up to negotiate modalities of withdrawal in terms of the Security Council resolution. The commission made three visits to the subcontinent between 1948 and 1949, trying to find a solution agreeable to both India and Pakistan. A resolution was passed in August 1948 proposing a three-part process, which was accepted by India but rejected by Pakistan^v (Korbel 1953). India insisted on Pakistan withdrawal first, whereas Pakistan's contention was that there was no guarantee that India would withdraw afterwards. This resulted in a stalemate.

Within India, the veracity of a special status was being heatedly debated. Sheikh Abdullah had his own vision of a new Kashmir, and was frequently conflicting with the Maharaja on issues of command and control, including the future of the state forces. This got



further exacerbated by the absence of the Maharaja from the seat of power in Srinagar, making any communication between the two even more minimal. With the Sheikh enjoying the patronage of Nehru, in May 1949, the Maharaja was eventually asked to take a holiday away from the state, a euphemism for advising him abdication of the throne^{vi} (Singh 1982). It was less than two years since the accession. In some ways this emboldened Sheikh Abdullah, as was seen in later years.

In the next few years, the Sheikh was seen making repeated flip-flops in his stance towards the future status of J&K. While publicly proclaiming allegiance to India, he was seen dallying with the establishment in Pakistan, as well as exploring the option of an independent Kashmir. In 1948 at the United Nations (UN), Abdullah spoke in favour of the Accession, but in a private meeting with Warren Austin the United States (US) representative to the UN, he discussed this third option of independence, with British and American aid to help develop the new country^{vii} (Varshney 1992; Bhattacharjea 1994). In the same instance there were reports of his discussions with the Pakistani delegation wherein he assuaged their fears by the argument that an independent Kashmir would naturally tilt towards Pakistan. This was viewed with suspicion by the government of India amidst growing political din on the issue of a continued special status. Sardar Vallabhbhai Patel, the Home Minister of India was indeed very worried about the Sheikh being in constant communication with his erstwhile comrades across the Cease Fire Line, especially Ghulam Abbas. The same has been noted with some concern in his correspondence with Nehru^{viii} (Patel 1948, 1950). The constituent assembly of J&K which had 100 seats, continued to retain 25 seats for the members from Pakistan occupied Kashmir (PoK)^{ix} (The Constitution of Jammu and Kashmir).

In the areas of Jammu and Ladakh, other reasons for dissent were fermenting. In Jammu, the sudden shift from a Jammu based Hindu ruler to a Kashmir based Muslim rule, was cause for tremendous heartburn, as were the issues of a separate flag, a separate constitution and a separately elected governor (not nominated by the centre in Delhi). Similarly, in Ladakh, it soon became evident that Sheikh Abdullah was far removed from the Ladakhis and their way of life. As early as 1949, they wrote to Nehru to ask for integration with Jammu or East Punjab, as separate from the valley. The enormous wealth of Buddhist monasteries was threatened by the land reforms of Sheikh Abdullah, setting off a religious friction, as also the fear of eventual



accession to Pakistan. Further, the Shia Muslim population of Kargil did not harbour any intentions of joining up with a cause largely championed by Sunni Muslims as also a Sunni dominated Pakistan. All these issues served to make the question of Article 370 even more vexed and contentious.

In 1953, Sheikh Abdullah was arrested and almost continuously for the next 20 years continued to be detained by the Government of India. The intervening years saw the rise of Bakshi Ghulam Mohammad and later GM Sadiq, with the worst of political manoeuvring to stay in power keeping Article 370 artificially propped. After the Sheikh was finally released in 1973, detailed discussions were conducted between him and Prime Minister Indira Gandhi, with the focus on a self-rule by a democratically elected government. Accordingly, the Indira Gandhi-Sheikh Abdullah accord of 1974 committed itself to continue status quo under provisions of Article 370.

Thereby the Centre's jurisdiction extends to Defence, External Affairs, Communications and Finance. J&K can be placed under the Governor's Rule in a state of Emergency only under certain conditions. The state has its own Constitution, titled Constitution of Jammu & Kashmir, which was ratified in law by the Centre in 1957, after its adoption by the state in November 1956. The two main bones of contention that have emerged as part of the narrative are:

- Why two constitutions? This is considered unequal with the rest of the country. Even if the special status is justified by the special circumstances surrounding the accession of J&K to India, the second point becomes difficult to answer in logical terms. Further, in the other parts of the country which were given special status owing various reasons, a separate constitution has not been sought. This exacerbates the bias, and qualifies the argument in favour of inequality.
- Why have an article in the Indian constitution that leaves so much room for continued misinterpretation, which has been repeatedly proved by events over the intervening years. Whether it was Abdullah citing the special status to justify his dalliance with Pakistan, or the inciting of violence by Pakistan, or the creation of an unequal platform within India, all these are indicative of the kind of misinterpretation of Article 370.

A counter argument offered is the gradual erosion of Article 370 by a series of Presidential orders which have left only a shadow of the original article; the only substantial differences



pertain to the rights of permanent residents, emergency provisions and name and boundaries of the state^x (Mattoo 2014). This has been viewed as a cause for an ideological clash. However, the nationalists perceive this as only a lame excuse to justify the on-going conflict. In any case history bears out the fact that the very people responsible for the political and constitutional erosion are now assuming the moral high ground of autonomy. The mainstream polity and intelligentsia profess that the continued retention of Article 370 has allowed contentious issues to fester beyond reasonable limits. Had the Article been time bound or incorporated in a manner to allow its lapse in due course of time, a very high probability of the contentions being resolved would have existed. Integration in to the mainstream of society and polity has normally been seen as equalizers. The flow of liberal opinion, people and ideas does not reduce the autonomy or the identity; to the contrary they only serve to secure.

4. Argument 3: Ramifications of Article 370 create inequality within J&K

Although J&K was adopted as the 15th state of India, the special status conferred on the state under Article 370, limits the jurisdiction of the Centre over the state. Despite this, Sheikh Abdullah considered the inclusion of the article under Temporary and Transitional Provisions of the Constitution dubious, and insisted on iron-clad guarantees. Notwithstanding the guarantees offered by the Constitution which result in severe restrictions on the Centre Abdullah used these as the underlying (mis)interpretations for his historical shift from a pro- India stance to one of Independence/ self-determination. It got him arrested in 1953, as well as dismissal of his government – the start to what would be nearly 20 years in detention.

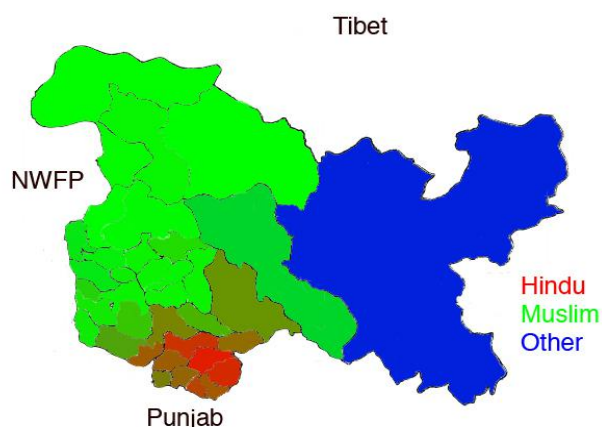
Under Emergency Provisions, the Centre can only declare emergency in J&K in case of war/ external aggression. It cannot declare financial emergency or an emergency on the grounds of internal disturbances without state government concurrence. It remains the only state to not have to account for the monies flowing in and out of the state. Further, Fundamental Duties and Directive Principles of State do not apply to J&K. The Constitution of J&K cannot be amended in respect of the provisions of Article 370 by the state legislature. The Centre cannot revoke Article 370 without the recommendations of the Constituent Assembly of J&K. J&K's Constituent Assembly ceased to exist in 1957 hence the revocation of Article 370 cannot be done without an amendment of the Constitution of India. (It is pertinent to note here that this



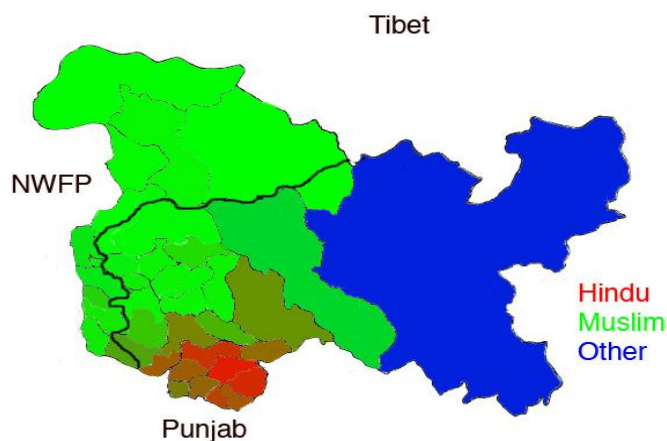
convoluted state of affairs is largely attributable to the political opportunism embraced by the leaders of the state and their inter-se relationship with the polity and the political thought at the Centre). If the Indian Parliament amends the Constitution of India in order to remove Article 370, apart from the political machinations required for such an exercise, such an act may be subject to judicial review. Opinion is divided on whether such an occurrence will be able to stand up to judicial scrutiny.

Certain issues which stand out in the context of inequality in the state are being highlighted in the argument. First, inequality pertaining to religion; second, inequality of resident status. Third, deprivation of rights to underprivileged sections, and last but not the least, gender bias inherent to the provisions of Article 370.

Inequalities pertaining to religion have been persistent since accession of J&K to the Indian state. At the time of accession, J&K had about 4 million people, 76.4% being Muslim, 20.1% Hindu, and 3.49% others, mostly Sikh and Buddhist. Srinagar had 208,000 people (78.4% Muslim, 20.7% Hindu, 0.9% others), and Jammu had 50,000 people (60.7% Hindu, 31.6% Muslim, 7.8% others, mostly Sikh). Demographics changed on account of the occupation of almost one third of the territory by Pakistan, called PoK, then by the Chinese occupation of Aksai Chin, and then by the ceding of Sakshgam by Pakistan to China. As a result a census in J&K is not complete; yet if the Line of Control (LoC) were to become the de-facto International Boundary (IB), the demographics would be very different than what is being claimed as a Muslim majority state. Areas of Jammu and Ladakh are not demographically similar to those of Kashmir; also, large tracts of J&K are Shia dominated, such as Kargil in India and Gilgit-Baltistan on the Pakistani side of the LoC. Historically, Shias have largely not been a part of the separatist demand, and more so since Pakistan is Sunni dominated and has a long and bloody history of Shia persecution in its occupied territories. The demographics involved at each stage are being illustrated by maps below.



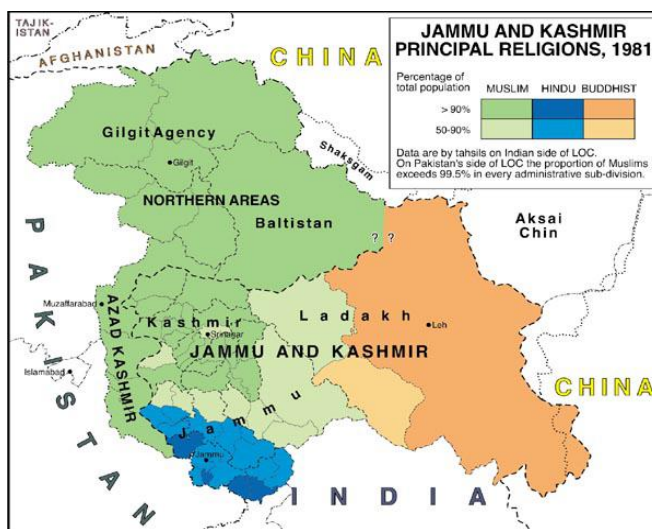
Illustrative Map 1: Religions of Jammu and Kashmir, 1931 Census (Source: <https://southasiablog.wordpress.com/2014/02/12/how-has-kashmirs-religious-makeup-changed-since-1947/>)



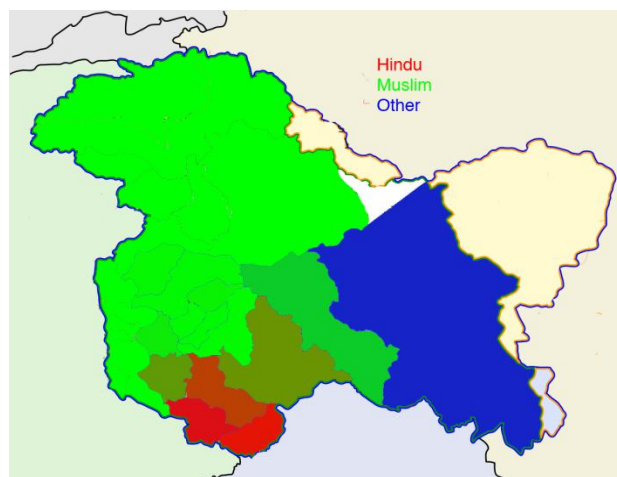
Illustrative Map 2: Religions of Jammu and Kashmir, 1948, post occupation of territories by Pakistan, Black line distinguishing Pakistan occupied Kashmir, Gilgit and Baltistan, and Indian state of Jammu and Kashmir (Source: <https://southasiablog.wordpress.com/2014/02/12/how-has-kashmirs-religious-makeup-changed-since-1947/>)



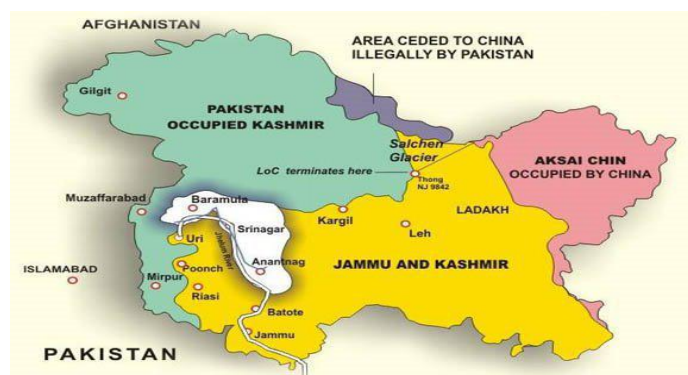
Illustrative Map 3: *Regions of Jammu and Kashmir, post occupation of territories by Pakistan and China in 1962 (Source: Google maps)*



Illustrative Map 4: *Religions of Jammu and Kashmir, 1981 census, with areas occupied by China NOT KNOWN (Source: Google maps)*



Illustrative Map 5: Religions of Jammu and Kashmir, current, with areas occupied by China NOT KNOWN (Source: <https://southasiablog.wordpress.com/2014/02/12/how-has-kashmir-religious-makeup-changed-since-1947/>)



Illustrative Map 6: Regions of Jammu and Kashmir, post occupation of territories by Pakistan and China, GREEN denoting Pakistan occupied Kashmir and Gilgit-Baltistan, PINK denoting Chinese occupied Aksai Chin, PURPLE denoting Sakshgam illegally ceded to China by Pakistan, and WHITE denoting areas with separatist agenda (Source: Google maps)

Given below is a tabulated form of population figures in J&K which further amplify the argument, indicating the change in demographics, as illustrated in the maps above.



Table 1: Population of Jammu & Kashmir by religious figures*

Division	%Area	%Population	Population	%Muslim	%Hindu	%Sikh	%Buddhist/Others
Kashmir	15.73%	54.93%	6,888,475	96.40%	2.45%	0.98%	0.17%
Jammu	25.93%	42.89%	5,378,538	33.45%	62.55%	3.30%	0.70%
Ladakh	58.33%	2.18%	274,289	46.40%	12.11%	0.82%	39.67%
Jammu & Kashmir	100%	100%	12,541,302	68.31%	28.43%	1.87%	0.89%

*Source: Census of India, 2011

As per records, approximately 525,000 people migrated from Indian J&K to Pakistan and PoK in 1947- 48, as against about 226,000 from PoK to India (Snedden, 2013). Since the 1990s, about 300,000 Kashmiri Pandits have been displaced from Kashmir as per analyses by various agencies, including the Central Intelligence Agency (CIA).

In the larger context of the scenario today, Article 370 seems to be unjustly tilted in favour of the Muslim population of (only) Kashmir, whereas it seemingly neglects the aspirations of Shia Muslims in other parts of J&K, Hindus, Sikhs and Buddhists. These communities have close links with their brethren in other parts of the country. For instance, Hindus, largely Dogras, in Jammu are closer to the Dogras in Himachal Pradesh and Punjab, Sikhs have ties with the Sikhs of Punjab and north India, and even the Buddhists are closely linked to the Buddhist communities settled in Himachal Pradesh and other parts of north India. Therefore, is it fair to impress Article 370 on these communities, who may want to maintain and further their ties within their respective ethno- cultural religious communities in other parts of the country, but are invariably restricted by the issue of losing their rights as citizens of J&K by doing this? This argument can be further carried forward if one were to include the occupied territories of PoK. It is well known and documented that Pakistan has followed a single point agenda in PoK, wherein it has encouraged large scale migration by its Punjabi population in to these areas in order to change the demographic profile in the long run. It hopes to upset the plebiscite vote in its favour in the (remote) eventuality of that event taking place. Over the years,



it has sought to do the same with Gilgit- Baltistan by way of its maturing relationship with China, the ceding of Sakshgam valley, and lately the China-Pakistan Economic Corridor (CPEC) that runs smack through the middle of disputed territory. Rising protests from the local population for economic, political and demographic reasons have been highlighted in the media and drawn the attention of analysts.

Therefore, the facts as mentioned above point directly to a positive correlation of Article 370 with promoting religious inequality in the state. Pertinent here is that the issue of religion has crept in to J&K politics only recently and that too, likely at the behest of Pakistan to further its own aims. If J&K were to be amalgamated in to India, even with certain provisions relating to protection of its autonomy in Article 370, there need not be any insecurity on account of religious denomination. This is especially so given the secular fabric of India. On the other hand, this continued retention of the article is creating unnecessary religion based rifts owing its tilt to one community.

Inequalities pertaining to resident status have existed since J&K acceded to India in the aftermath of partition. The rights of Permanent Residents (PRs) as brought out earlier, extend to property, citizenship etc. Effecting this was seen as a means to protecting the identity of the Kashmiris, but the state saw a migration of almost 525,000 people towards the territories under Pakistani control and about 226,000 towards India. In PoK, no such concern was exhibited towards protection of the Kashmiri identity, and over the last six decades, a massive influx of people from other parts of Pakistan has been encouraged, for settlement in the region. The Resettlement Bill was passed by the Abdullah government in the early 1980s. This bill is now an Act and under judicial review of the Supreme Court. The purpose of the bill was to resettle those who migrated to Pakistan and their descendants to return and reclaim property and citizenship rights in J&K. This matter was taken to the Supreme Court, after massive protests by both the Congress and Bhartiya Janta Party (BJP). Though under judicial review, the Act exists, and does gross injustice to the cause of Kashmiri identity, because the demographics in PoK are no longer what they were sixty years ago. And indeed, if this were to be implemented, then what about the rights of those who came in from Pakistan, or the Kashmiri Pandits in exile? Ironically, a Pakistani woman getting married to a Kashmiri will get this status. On the other hand those who migrated from West Pakistan, and despite living in the state for more than six decades, are



denied their fundamental rights as citizens of the state^{xi} (Economic Times 2016). In addition, there is the Kashmiri Pandit community which has seen mass exodus 1990 onwards; very legitimately, their concerns about their resident status remain one of the biggest questions facing any settlement of the J&K issue (Evans 2002).

Here again, what does the vexatious Article 370 have to offer? If we were to assume PoK being a foregone conclusion, then the state of J&K as it stands today on the Indian side of the LoC can no longer justify the provisions of this article, because the fundamental rights of a large section of people residing in the state or having been forced to leave, both have to be ensured and restored. However, if we optimistically hope to see the state of J&K in its original form, then those who argue in favour of Article 370 will not have any means to justify the change in demographic patterns in PoK. For those who argue about the erosion of Article 370, it is also important to remember that Presidential Orders have served to provide the same benefits that underprivileged sections in India enjoy. Herein the inequalities arising due to deprivation of rights to such underprivileged sections come in to play. If Article 370 were to be restored to its original form, the entire gamut of reservations to Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs) in education and employment would get rolled back. Would that not be a regressive move? Without entering any debate about reservations as such, it suffices here to agree that certain sections of society need some reservation to enable them to reach some semblance of equality with the more privileged lot. In the run up to the Parliamentary Elections of 2014, the BJP's Prime Ministerial candidate Narendra Modi made some remarks about the lack of status afforded to women in J&K^{xii} (Tehelka 2013). Though factually inaccurate, and which was gleefully pointed out by his opponents, the fact remained that his remarks raised the bogey of Article 370 once again. In this instance, it was at the national level, opening up a debate about whether it was time for Article 370 to be revisited and possibly revoked (Joshi 2014).

Citizens of the state enjoy special rights. These rights pertain to permanent settlement, acquisition of property, employment, scholarship and forms of aid. For instance, only permanent residents of the state are allowed to acquire property. Though both males and females are PRs, females lost their PR status upon marriage, till as late as 2002. In that year, a J&K High Court judgement by a full bench, one judge dissenting, forced the government to rescind this unequal



provision, making women eligible to remain PRs and continue to enjoy the various rights of a PR (Puri n.d). Yet a measure of the resistance to any change can be found in the then People's Democratic Party (PDP) government introducing a Bill titled PR (Disqualification) Bill 2004, which even found political backing from its arch rival the National Conference party. The Bill was passed in the lower house of the Assembly; fortunately it did not see fruition in the upper House. This gives rise to a debate on gender bias inherent within the provisions of the article.

The positive correlation between Article 370 and the inequality in the state is evident from these ramifications of the article. What was incorporated to ostensibly protect the rights of the people of J&K seems to have evolved in a way to create the mythical hydra. In its present form, Article 370 seeks to create inequality in a society which is already reeling from its effects.

5. Argument 4: Politics of Article 370 are manifestations of limited political leverage

Due to the politically charged atmosphere, Article 370 finds a mention in various fora. These can largely be viewed as bids to gain political ground or create political space for parties seeking media attention. Alternatively, with a mention of Article 370, political parties try to popularise their respective agendas and polarise their respective constituencies. Usually such political statements are made without reference to the fact that J&K is not a homogeneous entity; Jammu has a majority Hindu population and Ladakh comprises Buddhists and Shia Muslims. That Article 370 is grossly incompatible with the full integration of J&K with the rest of India tends to get overlooked by political rhetoric. The fact that a concurrence is required for every decision of the Centre by the state government effectively serves as a veto. Other facts such as Article 352 and 360 (declaration of national and financial emergency) not being applicable to J&K, citizens having dual citizenship etc. are all lost in the political din. Article 356 for imposition of President's rule cannot be enforced in J&K without the consent of the Governor.

To get an idea of the extent to which Article 370 is misinterpreted to suit the interests of the state government (and not the people), a landmark judgement by the National Human Rights Commission (NHRC) in the case of the custodial death of a rickshaw puller, Mohan Lal in police custody due to torture, highlights the issue very well. In an order dated 19th August 2009 the NHRC directed the State Government to pay a sum of Rupees Five Lacs (500,000) to the next of



kin of the deceased rickshaw puller Mohan Lal. However, the state government refused to comply with this order. On 28th October 2010, the state government answered, challenging the jurisdiction of the NHRC to pass such orders due to Section (2) of the Protection of Human Rights Act, 1993 which specifically excludes the operation of the said Act in J&K because it relates to entries enumerated in List II of the VII Schedule of the Constitution of India. On 27th December 2010, the NHRC set this contention of the state government aside, with a detailed justification of its order^{xiii} (Asian Centre for Human Rights n.d).

The facts mentioned above indicate the level to which Article 370 is deliberately misinterpreted. However this gets covered up in the political rhetoric which accompanies any mention of the article. As brought out in the Argument 3 above, the mere mention of Article 370 by the BJP's Prime Ministerial candidate Narendra Modi set in to motion a cacophony of voices across the political spectrum^{xiv} (Tehelka 2013). Immediately after the Parliamentary elections, with the BJP now in power, statements both in the print and digital media set the issue afire. Having promised the abrogation of Article 370 in its pre-election promises, the BJP found itself answering these statements. Official positions of various parties were now solidified keeping in view the upcoming state elections in J&K. The ruling NC which stood on the wrong side of an anti-incumbency wave sought to right some of the wrongs perceived during its six year term by reiterating its stand on Article 370 being a matter of faith to its party ethos. The NC's Omar Abdullah (then Chief Minister of J&K, and grandson of Sheikh Abdullah) had a veritable war of words including over social media with the Minister of State, Dr Jitender Singh as also Ram Madhav, senior leader of the Rashtriya Swayamsevak Sangh (RSS), a right wing organisation and considered to be the hand behind the success of the BJP with its right wing Hindu agenda^{xv} (Economic Times 2014; Joshi 2014). Much before this round of war-of-words started, the BJP had been expressing the fact that Article 370 was being used as an excuse to stop gainful legislations of India to the common man in J&K^{xvi} (Economic Times 2013). Not to be left behind, the Congress too, put forth its point of view via Dr Karan Singh (son of the erstwhile Maharaja, and now Member of Parliament from the Congress), desperately trying to balance the political equation as well as the opinion on the street^{xvii} (Times of India 2014). A stark example of how politics makes for strange turn of events, unfolded thereafter. Mehbooba Mufti, leader of the PDP, daughter of now late Mufti Mohammad Sayeed, is now the Chief Minister of J&K, after



the demise of the Mufti. In an interview with the Editor-in-Chief of the Tribune, Mehbooba Mufti categorically denied any possibility of an alignment with BJP in the elections^{xviii} (Chengappa 2014). In another part of the same interview, she was asked about the issue of abrogation of Article 370 being raised by the Modi government. Her reply was in the negative, saying, ‘....I do not think they can do it....this is the relationship on which accession is based....feel that there is no place or space in this huge and great democracy for the people of Jammu and Kashmir to live with dignity and honour, and we are being disrobed, then we may have to revolt’. As things stand, post the elections, the PDP aligned itself with none other than the BJP, and this coalition is still governing the state. The BJP has not changed its stance after the coalition being formed; indeed it still seems to be waiting to get its majority in parliament before taking the abrogation of Article 370 to the next level^{xix} (Firstpost 2015).

July 2016 onwards the state has been virtually afire, with massive protests and stone pelting taking a vicious turn. The main political parties both at the state and the Centre are still busy doing lip service while the man on the streets is left to fend for himself. No one is discussing the nuances of what Article 370 has done to the state. There is no mention of the status of refugees, mere political posturing on issues of rights of the people, and generally a feeling of procrastination in the air. Hence the argument that Politics derived from Article 370 are merely seeking to gain leverage from the debate-of-the-month, polarise constituencies, and create political space. It means nothing to any of them beyond that.

6. Conclusion

Article 370 was envisaged as an instrument for a vulnerable populace, unsure of protection of their identity and culture. In the same instance it was meant to assure autonomy to create space in governance and empower people to decide their future. As can be seen from the arguments above, this delegation of power has remained mired in the clutches of only a few. The very basis of the autonomy granted is challenged due to the lack of accountability in public life. In the larger context of India, whether it is the refugees from Poonch, Mirpur and Muzaffarabad, or the case of Kashmiri Pandits in exile, the state has failed to provide a mechanism for redress^{xx} (Asian Centre for Human Rights n.d; Economic Times 2016). The extreme case of discrimination cannot be justified in terms of any reasoning offered by Article 370 or those who



advocate it. Instead of empowering the people to decide their own future and fate, the article risks this very underlying reason for its incorporation in the first place, and has been abused without any qualms^{xxi} (Asian Centre for Human Rights n.d). Therefore, the argument that it is the erosion of Article 370 and not its creation that is helping separatism bloom stands without merit. It is these factors which make a strong case for revocation of Article 370 to be taken at the highest levels without further delay and discord.

This paper also raises relevant questions which could be best addressed through future study and analysis. One of the important issues demanding resolution is the rehabilitation and return of Kashmiri Pandits whose exodus came in the wake of militancy in J&K. Similarly, the status of the population of Pakistan occupied Kashmir and Gilgit- Baltistan comes under a question mark. In the context of the conflict with seemingly no end in sight, entire generations of people affected have passed away. Possibly, the generation of today has only institutional memory connecting it to events of the decades gone by. As things stand, will these people ever see justice meted out?

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- ⁱ Clause 7 says: Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future constitution of India.... Clause 8 says: Nothing in this Instrument affects the continuance of my sovereignty in and over this State....
- ⁱⁱ Capt Dewan Singh, Former ADC to the Maharaja, in an interview to Victoria Schofield in Jammu, 1994.
- ⁱⁱⁱ **“We have decided to work with and die for India”**, Sheikh Abdullah at a press conference in 1948, after becoming Prime Minister.
- ^{iv} Constitution of India, and Constitution of India (Updated up to One Hundredth Amendment 2015).
- ^v “Though India accepted the resolution, Pakistan attached to its acceptance so many reservations, qualifications and assumptions as to make its answer tantamount to rejection”.
- ^{vi} **Karan Singh: “My father was stunned. Although rumours to the effect that he might be pushed out of the state had been in the air for some time, he never believed that even the Sardar would advise him to adopt this course....”**
- ^{vii} Warren Austin, representative of the US at the UN, to the US Secretary of State, reporting the conversation with Sheikh Abdullah. Similar evidence comes from Loy Henderson, US Ambassador to India, in a telegram to the US Secretary of State in September 1950.
- ^{viii} **“In particular, Sheikh Sahib's manoeuvres to have a separate talk with Ghulam Abbas fill me with misgivings...the attitude of Sheikh Sahib, his failure to deal with the communist infiltration in the state and the dissensions within the National Conference...both National Conference and Sheikh Sahib are losing their hold on the people of the valley....”**
- ^{ix} After delimitation of constituencies in 1988, the J&K Assembly has 111 seats, with 24 reserved for Pakistan occupied territories.
- ^x Emergency provisions on grounds of internal disturbances cannot be invoked without state concurrence; similarly the state's name and boundaries cannot be altered without the consent of the legislature.
- ^{xi} West Pakistan refugees have been seeking domicile in J&K (<http://economictimes.indiatimes.com/news/politics-and-nation/pakistan-refugees-seek-domicile-in-jammu-and-kashmir/articleshow/54486629.cms>)
- ^{xii} The issue of women not enjoying equal rights has been highlighted time and again (<http://www.tehelka.com/2013/12/do-women-enjoy-equal-rights-in-jk/>)
- ^{xiii} Complete details of the case can be accessed at: http://www.achrweb.org/ihrq/issue2/order_extraordinaire.html
- ^{xiv} Narendra Modi made a statement with regard to revisiting Article 370 which set of a slew of counter allegations. <http://www.tehelka.com/2013/12/do-women-enjoy-equal-rights-in-jk/>
- ^{xv} **“What's the Politics behind Article 370”**, in *The Sunday Tribune, Bathinda Edition*, 1st June 2014, p.9. Also see Omar Abdullah reacting to the statement of Ram Madhav at http://articles.economictimes.indiatimes.com/2014-05-29/news/50182311_1_article-370-jk-mehbooba-mufti



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^{xvi}Nirmala Sitharaman, Spokesperson of BJP at http://articles.economictimes.indiatimes.com/2013-12-03/news/44710557_1_article-370-jammu-and-kashmir-jk

^{xvii}Karan Singh at <http://timesofindia.indiatimes.com/india/Integral-review-of-Article-370-overdue-but-needs-cooperation-not-confrontation-Congress-leader-Karan-Singh/articleshow/35733023.cms>

^{xviii} Question (by Editor-in-Chief): "Would you like to align with the BJP in the coming Assembly elections?" Answer (by Mehbooba Mufti): "Not at all. This is the last thing we can think of".

^{xix} Sambit Patra, BJP national spokesman speaking to reporters in Jammu: "As far as the abrogation of Article 370 is concerned, it continues to be part of the core ideology of BJP, but right now we don't have enough numbers in Parliament to do away with it ... but in future when we have the required numbers, we will work towards its removal". <http://www.firstpost.com/politics/will-work-towards-removal-article-370-enough-numbers-parliament-bjp-2260292.html>

^{xx} The issue has been highlighted by Asian Commission for Human Rights in its India Human Rights Report, October- December 2010, http://www.achrweb.org/ihrrq/issue2/hindu_and_sikh_refugees.html . Opposition within India has been brought out at: <http://economictimes.indiatimes.com/news/politics-and-nation/pakistan-refugees-seek-domicile-in-jammu-and-kashmir/articleshow/54486629.cms> .

^{xxi} The abuse of Article 370 has been brought out here: <http://www.achrweb.org/ihrrq/issue2/Abuse.html>