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Research Article

Article 370 and the Constitutional Status of Jammu and Kashmir: Issues and Challenges

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Abstract

Article 370 of the Constitution of India, enacted as a provisional and transitory article, laid out the constitutional relationship between the former State of Jammu and Kashmir and the Union of India for more than seventy years. The objective of this paper is to trace the history of that relationship from the date of accession in 1947 until the abrogation of the special status of the State in August 2019 and further restructuring of the State into two Union Territories. Specifically, it analyses the judgement of the Supreme Court in In Re: Article 370 of the Constitution (2023), which validated the abrogation of Article 370, and highlights the constitutional and federal questions left unanswered, such as the correctness of modifying Article 370(3) through Article 367 of the Constitution, the impact of the judgement on asymmetrical federalism and the question of restoring statehood of the region. Legal validity does not necessarily mean constitutional propriety.

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INTRODUCTION

Article 370 of the Constitution of India was unique in its constitutional status in the Constitution of the Indian Union for almost seven decades, which worked as the constitutional link between the former princely State of Jammu and Kashmir and the Indian Union.¹ The article, conceived in the context of the peculiar conditions under which the state joined the union, conferred upon the region a distinct constitutional position which was different from all other units of India.² The clause was subject to much deliberation and discussion on its true nature, whether it was to be a permanent part of the asymmetric federalism or just a temporary transitional provision for some time to come.

The repeal of the operative clauses of Article 370 through the Constitution (Application to Jammu and Kashmir) Order, 2019 and the subsequent passing of the Jammu and Kashmir Reorganisation Act, 2019 was certainly one of the most important constitutional events in the history of free India.³ Action taken by the Union government divided the State into two Union Territories of Jammu and Kashmir and Ladakh and applied the entire corpus of Indian law to the territory without the consent of an elected legislature of the State because at that time the State was ruled by President's Rule.⁴ These laws were questioned in the Indian Supreme Court and the matter was conclusively determined in the historic ruling rendered in December 2023.

The present research paper aims at conducting a thorough analysis of the constitutional history of Article 370 of the constitution from its inception in the Constituent Assembly debates to its abrogation and the judgment of the Indian Supreme Court in the case *In Re: Article 370 of the Constitution*.⁵ The paper goes on to explore the major constitutional, political, and federal problems and challenges which have been continuing after the change in the constitutional status of Jammu & Kashmir, and provides some thoughts about the way forward for Centre-State relations in the region.

II. Historical Background: Accession and the Genesis of Article 370

Position of the Princely State of Jammu and Kashmir When British Paramountcy Lapsed in August 1947, Jammu and Kashmir was a unique case among the princely states when British paramountcy lapsed in August 1947. This State was under the rule of Maharaja Hari Singh who entered into a Standstill Agreement with Pakistan.⁶ After the raids carried out

by tribal invaders aided by Pakistan in October 1947, the Maharaja asked for help from India only on the condition that he accede. Consequently, the Maharaja signed the Instrument of Accession on 26 October 1947, granting India powers to legislate in regard to defence, foreign affairs, and communication, same as all other princely states of India.⁷

It was not the nature of the legal act, similar in many respects to the accession of the other princely states, that made the accession of Jammu and Kashmir unique; rather, it was the political commitment made by the Government of India to ascertain the wishes of the people in the state at some future date, along with the territorial dispute with Pakistan taken to the United Nations.⁸ It was in this context that the negotiations for the constitution were conducted.

In the course of dealing with the issue of Jammu and Kashmir's constitutional relationship with the Union, in the Constituent Assembly of India, the representatives of the State, under the leadership of Sheikh Abdullah, pressed for retaining a large degree of internal autonomy, confining the legislative authority of the Union only to the three subjects in the Instrument of Accession.⁹ The compromise thus arrived at has been drafted mainly by N. Gopalaswami Ayyangar, who was then a Minister without Portfolio in the Union Cabinet, and who has served as Prime Minister of Jammu and Kashmir, and has been made a part of the Constitution as Article 370 of the Constitution.¹⁰ Ayyangar, the author of this provision, himself made it clear to the Constituent Assembly why the special position of Jammu & Kashmir was required due to the fact that a considerable portion of the State was yet under hostile control and the form that the constitution of the State would take had to be decided by a Constituent Assembly of the State.

Further explanation of the relationship between the Union and the State came from the Delhi Agreement of 1952 negotiated between Prime Minister Jawaharlal Nehru and Sheikh Abdullah which settled various issues still left open by Article 370. These include, among others, citizenship of India in respect of the people of the State, application of fundamental rights but subject to the law regarding permanent residents of the State, and continuation of the office of *Sadar-i-Riyasat* as the elected head of the State in place of Governor.¹¹ The Delhi Agreement was a move towards putting flesh on the skeletal framework set out in Article 370 of the constitution, and many of the provisions in the Delhi Agreement were thereafter implemented through Presidential Orders. Yet, the Delhi Agreement had weaknesses, for the unsettled politics of the State during the

¹ P.M. Bakshi, *The Constitution of India* 344 (14th ed., Universal Law Publishing, 2017).

² A.G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* 1 (Oxford University Press, 2011).

³ *The Constitution (Application to Jammu and Kashmir) Order*, 2019, C.O. 272, *Gazette of India*, Aug. 5, 2019.

⁴ *Jammu and Kashmir Reorganisation Act*, 2019, No. 34 of 2019.

⁵ *In Re: Article 370 of the Constitution*, 2023 SCC OnLine SC 1647.

⁶ V.P. Menon, *The Story of the Integration of the Indian States* 396 (Orient Longman, 1956).

⁷ *Instrument of Accession executed by Maharaja Hari Singh*, Oct. 26, 1947, reproduced in A.G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* 232-234 (Oxford University Press, 2011).

⁸ Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* 39-41 (Harvard University Press, 2003).

⁹ *Constituent Assembly Debates*, Vol. X, 423-433 (Oct. 17, 1949).

¹⁰ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 255-258 (Oxford University Press, 1966).

¹¹ Balraj Puri, *Kashmir: Towards Insurgency* 52-56 (Orient Longman, 1993).

1950s, which included the dismissal and detention of Sheikh Abdullah in 1953, ensured that many of its provisions were not honored at all, and relations between Centre and State in Jammu and Kashmir took a new course, determined by unilateral action from the Union side.¹²

III. Constitutional Text and the Contested Nature of Article 370

As originally framed, Article 370 stipulated that the legislative powers of the Parliament with respect to the State of Jammu and Kashmir would extend only to such matters in the Union and Concurrent Lists as relate to the matters mentioned in the Instrument of Accession, and that the other provisions of the Constitution shall not apply to the said State except as applied by the President through an Order made after consulting the Government of the State.¹³ Clause (2) of the Article envisaged that recommendations of the State Government which required the concurrence of the Constituent Assembly of the State would be laid before the Constituent Assembly, while Clause (3) conferred the authority on the President to issue a public notification declaring that the Article 370 shall stand abrogated, subject to the recommendation of the State Constituent Assembly.¹⁴

Proviso to clause (3) became the subject matter of the most persistent controversy in connection with Article 370. Given the fact that the Constituent Assembly for Jammu and Kashmir had been dissolved in 1957 having framed its own constitution without proposing an amendment of the said Article, there was a considerable school of thought among constitutional authorities which argued that the power vested under clause (3) had been exhausted.¹⁵ However, others had a different opinion, arguing that the marginal note stating that the particular article was temporary and transitional, along with the location of such an article in Part XXI, implied that the framers did not want to make it a permanent part of the Constitution, and thus, the dissolution of the State's Constituent Assembly would not make the powers of the President in clause (3) eternal.¹⁶

The next textual issue that arose was about the residuary legislative powers of Parliament. According to the scheme of the Constitution, all residuary powers that have not been specifically mentioned in the Union List, State List, or Concurrent List lie with Parliament in accordance with Article 248 and Entry 97 of the Union List. However, the special case of Jammu and Kashmir made the residuary legislative power lie with the State Legislature.¹⁷ In the same vein, while Article 1 of the Constitution, which speaks about the Union of India, where

among others is included the State of Jammu and Kashmir, became applicable to the State from the very day that the Constitution came into existence, the State was allowed to have its own Constitution, framed by its own Constituent Assembly in 1956 and put into operation on 26 January 1957, an honor unique only to the State of Jammu and Kashmir.¹⁸ Indeed, the Supreme Court of India has in the past, well before 2019, also offered a view on the nature of Article 370 of the Indian Constitution. In its judgment of *Prem Nath Kaul v. State of Jammu and Kashmir*, it described Article 370 as a device that was meant to achieve certain purposes, limited in their scope.¹⁹ Much later in *Sampat Prakash v. State of Jammu and Kashmir*, the Court maintained the working of Article 370 despite the dissolution of the Constituent Assembly of the State on the ground that clause (3) did not have any time limit for the exercise of the power of the President and hence the Article was still operative.²⁰ This line of authority later assumed considerable significance when the Union government sought to invoke clause (3) in 2019.

IV. Article 35A and the Permanent Residents' Regime

The next provision that is very much related to Article 370 is Article 35A, which was added to the constitution not through the regular amendment process of Article 368 but through the Constitution (Application to Jammu and Kashmir) Order, 1954.²¹ Under Article 35A, it was the responsibility of the State Legislature to determine what people would be regarded as the permanent residents of Jammu and Kashmir, and to grant such residents certain special rights and privileges, including that of employment in the State government services, acquisition of immovable property, settlement in the State and scholarships, while imposing certain restrictions on those who were not permanent residents.²²

The introduction of Article 35A via Presidential Order as opposed to an amendment of the constitution raised academic controversies on the grounds that it amended the Part III of the Constitution, which can be done only under Article 368 of the Constitution.²³ Various writ petitions challenging the constitutional validity of Article 35A have been instituted in the Supreme Court from time to time, though no decision was delivered on any of them until 2019, when the article became redundant with the application of the whole Constitution in the State.²⁴ The permanent residents system, despite its constitutional shortcomings, had over the course of sixty years determined land ownership, employment, and political

¹² Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* 65-70 (Harvard University Press, 2003).

¹³ The Constitution of India, art. 370(1).

¹⁴ The Constitution of India, art. 370(3).

¹⁵ A.G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* 148-152 (Oxford University Press, 2011).

¹⁶ H.M. Seervai, *Constitutional Law of India*, Vol. 3, 3115-3122 (4th ed., Universal Law Publishing, 1996).

¹⁷ M.P. Jain, *Indian Constitutional Law* 958-960 (8th ed., LexisNexis, 2018).

¹⁸ Constitution of Jammu and Kashmir, 1956, s. 3 (declaring the State to be an integral part of the Union of India).

¹⁹ *Prem Nath Kaul v. State of J&K*, AIR 1959 SC 749.

²⁰ *Sampat Prakash v. State of J&K*, AIR 1970 SC 1118.

²¹ The Constitution (Application to Jammu and Kashmir) Order, 1954, C.O. 48, Gazette of India, May 14, 1954.

²² The Constitution of India, art. 35A (as it stood prior to 2019).

²³ Radha Kumar, *Paradise at War: A Political History of Kashmir* 214-217 (Aleph Book Company, 2018).

²⁴ *We The Citizens v. Union of India*, W.P. (C) No. 722 of 2014 (pending disposal before the Supreme Court until 2019).

representation in the State, and its abolition is one of the most significant and contentious features of the 2019 reforms.

After the abrogation, the Government of India introduced a new system based on domicile status under the Jammu and Kashmir Reorganisation (Adaptation of State Laws) Order, 2020, which made domicile available, along with the rights of residence and employment in public service, to those who have been living in the Union Territory for a continuous period of fifteen years, or studying in the UT for seven years and appearing for an eligible test, apart from some categories of employees of the Union Government and their dependents.²⁵ Advocates of this reform considered it to be a necessary step in rectifying what they considered a discriminatory system, which had failed to provide citizenship rights such as voting rights and government employment to some residents of the state for several years, who included refugees from West Pakistan as well as members of the Valmiki community living in Jammu since 1947. On the other hand, the new domicile provisions were seen as laying the foundation for an overhaul of the demographic and political composition of the region.²⁶

V. The Abrogation of 2019: Legal Process and Controversies

The Constitution (Application to Jammu and Kashmir) Order, 2019 was issued by the President of India through Article 370(1) in concurrence with the Governor of Jammu and Kashmir representing the State Government on 5th August 2019. This order repealed the previous order in 1954 and extended all provisions of the Indian Constitution to the State, including Article 367 dealing with interpretation.²⁷ The 2019 Order, on the other hand, introduced a new provision to Article 367 which stated that any references to Constituent Assembly of the State under the proviso to Article 370(3) should be construed to mean references to the Legislative Assembly of the State.

Inasmuch as there existed President's Rule in the State by virtue of a proclamation made under Article 356 of the Constitution, and the Legislative Assembly had been dissolved, Parliament itself was exercising the functions of the State Legislature.²⁸ Both the Houses of the Parliament have in their role passed a resolution to the effect that Article 370 should no longer remain in force and on 6 August 2019, another notification has been issued by the President under Article 370(3) according to which all parts of Article 370 would no longer be operative, except Part (1), which has been modified and made applicable to the State of India.²⁹

²⁵ The Jammu and Kashmir Reorganisation (Adaptation of State Laws) Order, 2020, Gazette of India, Mar. 31, 2020.

²⁶ Ministry of Home Affairs, Government of India, Frequently Asked Questions on Jammu and Kashmir Reorganisation, at 6-7 (Aug. 2019).

²⁷ The Constitution (Application to Jammu and Kashmir) Order, 2019, C.O. 272, Gazette of India, Aug. 5, 2019.

²⁸ Proclamation under art. 356 of the Constitution of India, Gazette of India, Dec. 19, 2018.

²⁹ The Constitution (Application to Jammu and Kashmir) Order, 2019 (second order), C.O. 273, Gazette of India, Aug. 6, 2019.

This series of executive and legislative acts elicited constitutional criticism from various quarters for the following reasons. The petitioners challenging the validity of the presidential order before the Supreme Court have argued that the invocation of Section 367, a provision that was meant to interpret and clarify, to substantively amend the proviso to Article 370(3) was a colourable exercise of power and a method adopted to avoid obtaining the concurrence of the Constituent Assembly of the State. It was also argued that since the Governor of the State was appointed by the Union Government and the State was being administered by President's Rule, he could not be deemed to be the State Government for the purposes of giving concurrence in pursuance of Article 370(1). Further, it was pointed out that Parliament cannot take the place of the State Legislature in a matter that involved the constitution of the State when the State was unable to constitute its own legislature.

The manner in which the abrogation has been affected on the ground has also been a matter of concern. In the few days leading up to 5 August 2019, the Union Government sent additional troops to the State, put key political leaders, including three former Chief Ministers, under preventive detention under the provisions of the Jammu and Kashmir Public Safety Act, 1978, and enforced a massive communication blackout that included suspension of mobile telephony and broadband services in the entire Kashmir valley.³⁰ Such restrictions have been tested in *Anuradha Bhasin v. Union of India* in the Supreme Court, wherein the Court ruled that the indefinite suspension of internet services was unconstitutional and that the freedoms of speech and expression and conducting business through internet were guaranteed under Article 19 of the Constitution of India, without invalidating the contested orders but directing administrative review of such restrictions periodically.³¹ While these methods were justified by the Union government as precautionary measures needed to prevent the possibility of public unrest on a massive scale, they have been criticized by human rights watchdogs at home and abroad as excessive, and are used even now to highlight the conflict between security needs and constitutional rights.³²

VI. Reorganisation of the State into Union Territories

Simultaneously, the Parliament passed the Jammu and Kashmir Reorganisation Act, 2019, using the power vested in the Parliament under Article 3 of the Constitution to divide the State of Jammu and Kashmir into two Union territories – one having a legislature, and another not having a legislature. This is the first time in the constitutional history of India that a State was converted into a Union territory, whereas generally, the reverse trend prevails.

³⁰ Amnesty International India, Kashmir: A History of Internet Shutdowns, at 4-9 (2020).

³¹ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637.

³² Human Rights Watch, World Report 2020: India, at 292-296 (2020).

This decision of the reorganisation faced opposition based on the argument that even though Article 3 of the Constitution empowered Parliament to change the boundaries or name of a State, it did not envisage the abolition of statehood without the agreement or at least consultation of the State Legislature, and further that it was not possible to fulfil the proviso to Article 3 calling for sending of the Bill to the State Legislature for its opinion since the State was under President's Rule and there was no Legislature but Parliament itself.³³ However, the Union government argued that downgrading to Union Territory was explicitly made temporary and that there was a promise of restoring the status of statehood later on and that it fell within the ambit of the powers of the Parliament under Article 3.³⁴

However, the reaction to the restructuring varied significantly between the erstwhile state's three regions. In the region of Ladakh, which consists of the two districts of Leh and Kargil, the decision to establish a Union Territory of its own found much support especially in the district of Leh, since the local political factions there had long been seeking separation from Kashmir-centric governance.³⁵ On the other hand, in the valley of Kashmir, the reorganization was viewed as a one-sided demotion of political status without discussion, whereas the political response in Jammu region has been varied – with some groups welcoming the reorganization while some being worried about the loss of state status and the associated powers over land and public order.³⁶ The regional disparity in the response shows the difficulties of treating the former State of Jammu and Kashmir as politically homogenous, which still plays an important role in the contemporary discussions on the institution that could be established in the region.

VII. Issues and Challenges

The constitutional restructuring of Jammu and Kashmir gives rise to a number of open-ended questions which still persist for scholars researching into Indian federalism. The use of Article 367, an interpretive provision, to change the substantive interpretation of the proviso of Article 370(3), is seen as creating a precedent whereby the Union Government could amend fundamental constitutional provisions through the simpler process outlined under Article 368, which according to some constitutional scholars has not been adequately dealt with in the judgement.³⁷

Furthermore, this episode shows how vulnerable the Constitution becomes when there is an extended period of President's Rule in a State, during which the powers of

legislation that belong to the State Legislature can be exercised by Parliament with regard to the very constitutionality of the State itself, posing the question whether such a rule is consistent with the federal concept embodied in the Constitution.³⁸ Thirdly, the abrogation of the permanent resident's status in erstwhile Article 35A has raised concerns about demographic changes that may occur after domicile rights are provided to those who have not been residents before, an area which continues to be controversial despite the promises made by the Union government in this regard.³⁹

Fourth, the continuing Union Territory status of Ladakh despite the fact that Ladakh was happy to break away from Kashmir in 2019 is itself an area of new controversy as social organizations within Ladakh have been demanding guarantees for themselves under the Sixth Schedule of the constitution because of their ecological sensitivity and tribal identity.⁴⁰ Finally, the restoration of the statehood of Jammu and Kashmir, ordered by the Supreme Court to take place as soon as possible, is yet to be completed, and the fact that there is no definite time period for this adds ambiguity regarding its future constitutional status.⁴¹

The issue is complicated still further by the question of the nature of Jammu and Kashmir's erstwhile special status in terms of the larger context of asymmetric federalism in India. Under Article 371 and various Articles under the same number 371A to 371J, a few States have been given special provisions where local customary laws, land holdings and social and religious practices have been shielded from legislation by the Union Government without the permission of the State Legislature. Unlike Article 370, these provisions were never meant to be temporary but permanent provisions of the Constitution, and even after the 2023 judgment, these have not lost their effectiveness as the judgment applies only to Article 370. Yet, the abrogation of Article 370 has made a few States in the north-east concerned about their similar provisions being diluted through the exercise of similar powers by the executive and the Parliament, despite the explicit clarification of the Supreme Court that it applied to Article 370 and not to Article 371.⁴²

There is, however, an unavoidable international dimension to the issue of Jammu and Kashmir which has not ceased to have an impact on the domestic constitutional debate. Pakistan has been opposing all along the claim of sovereignty of India over the whole area of the former princely State, and has responded to the abrogation of 2019 by lowering its level of diplomatic relations, suspension of bilateral commerce and raising the

³³ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* 341-345 (HarperCollins, 2019).

³⁴ Statement of Objects and Reasons, Jammu and Kashmir Reorganisation Bill, 2019.

³⁵ Sonam Wangchuk, *Ladakh's Demand for Sixth Schedule Status: An Emerging Constitutional Debate*, *Economic and Political Weekly*, Vol. 58, No. 12, at 14 (2023).

³⁶ Zafar Choudhary, *Kashmir Conflict and Muslims of Jammu* 142-146 (Sage Publications, 2020).

³⁷ Suhrith Parthasarathy, *The Article 370 Verdict and the Perils of Interpretive Amendment*, 6 *Indian J. Const. L.* 45, 52-58 (2023).

³⁸ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 (holding federalism to be part of the basic structure).

³⁹ Sheikh Showkat Hussain, *Kashmir and the Changing Paradigm of Article 370*, 12 *NUJS L. Rev.* 221, 233-238 (2019).

⁴⁰ Sonam Wangchuk, *Ladakh's Demand for Sixth Schedule Status: An Emerging Constitutional Debate*, *Economic and Political Weekly*, Vol. 58, No. 12, at 14 (2023).

⁴¹ *In Re: Article 370 of the Constitution*, 2023 SCC OnLine SC 1647, at para 461.

⁴² Faizan Mustafa, *Reading Down Article 370: A Critical Constitutional Appraisal*, 61 *J. Indian L. Inst.* 411, 425-427 (2019).

issue at the United Nations Security Council without success in obtaining any kind of resolution. India has always adhered to the principle enshrined in the Simla Agreement of 1972, to the effect that the status of Jammu and Kashmir was a bilateral matter to be settled between India and Pakistan without any outside intervention and that the reorganization of 2019 had been purely an internal constitutional process not involving any international commitment. The presence of this unsettled international dimension means that the constitutional developments which have taken place in Jammu and Kashmir continue to be seen both in India and internationally as being connected with the wider issue of the territorial dispute between the two countries.

Last but not least, the whole episode raises a number of questions regarding the correct constitutional approach to the alteration of the federal status of one of the constituent units. The Supreme Court has upheld the constitutionality of the procedure followed but leaves many questions regarding the constitutional appropriateness of the procedure applied, including in particular whether fundamental alterations to the federal structure should in general terms be done only through the participation of a democratically elected State Government.

VIII. CONCLUSION

This history of Article 370 underlines how difficult it is to reconcile a transitional mechanism created under the unique conditions of 1947 with the imperatives of constitutional permanency and federal stability. From its creation as a provision which was explicitly declared as temporary by N. Gopalaswami Ayyangar to its erosion through years of successive Presidential Orders, from its erosion to its judicial interpretation as a downgrading of its provisions, Article 370 shows that constitutional provisions of uncertain status can evolve as much through political practice as through their letter. The judgment of the Supreme Court ends the debate on the validity of the decision to abrogate Article 370. It does not put an end, however, to the larger normative debate on the permissible limits of executive power in matters of federal restructuring, the role of asymmetric autonomy in India's constitutional scheme, and the way in which the aspirations of the people of Jammu & Kashmir should be accommodated within the Union in the future. What will decide whether the new constitutional settlement of 2019 finds acceptance or continues to remain controversial is how the restoration of statehood, the functioning of a freely elected government, and the Union's response to ongoing identity concerns is handled.⁴³

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⁴³ Radha Kumar, Paradise at War: A Political History of Kashmir 289-293 (Aleph Book Company, 2018).