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Abrogation of Article 370: Legal Issues and Constitutional Perspective

Aditi Gupta ^{1*}, Dr. Prahalad ²

¹ Research Scholar, IEC School of Law, IEC University, Himachal Pradesh, India

² Supervisor, Associate Professor, IEC School of Law, IEC University, Himachal Pradesh, India

Corresponding Author: * Aditi Gupta

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Abstract

Abrogation of Article 370 of the Constitution of India on 5th August 2019 is among the most significant constitutional interventions made by the Indian Republic since its independence. Abrogation of this provision by a combination of a Presidential order under Article 370(1), reinterpretation of Article 367, and a Statutory Resolution passed by the Parliament functioning as the State legislature in President's Rule led to the termination of the special status conferred by Article 370 on the former State of Jammu and Kashmir, with the reorganization of the State into two Union Territories through the Jammu and Kashmir Reorganisation Act, 2019. This paper attempts to conduct a doctrinal analysis of legal and constitutional aspects pertaining to this abrogation, focusing on the historical background of Article 370, the constitutional means used to remove this provision and the Supreme Court's historic decision in *In Re: Article 370 of the Constitution* (2023). The paper also looks at this abrogation in the context of federalism, asymmetric federalism and the basic structure doctrine, and ends with a critique of the constitutional consequences of this decision.

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I. INTRODUCTION

The Indian Constitution's Article 370 was unique in its own right as far as the constitution-making process for the Indian Union is concerned. As Article 370 is included in Part XXI, which is called "Temporary, Transitional and Special Provisions," the Article provides a unique constitutional standing to the State of Jammu and Kashmir.¹ It is true that for over seven decades, the clause has been the subject matter of heated political, academic, and judicial debates between those seeing it as something permanent and temporary.

On 5 August 2019, the Government of India, via executive and legislative means, effectively repealed the special status conferred under Article 370, followed by which, they redrew the state into two Union Territories of Jammu & Kashmir and Ladakh.² The way this constitutional revolution was accomplished, without the involvement of a Constituent Assembly of the State, which no longer existed at this point in time, resulted in a plethora of legal proceedings and academic debate regarding its constitutionality.

II. Historical Background of Article 370

The history of Article 370 can be traced back to the unique situation that prevailed in relation to the incorporation of the Princely State of Jammu and Kashmir into the Dominion of India in October 1947. In view of the threat posed by the invasion of the State by tribal invaders from Pakistan, Maharaja Hari Singh of Jammu and Kashmir signed the Instrument of Accession on 26 October 1947.³ In contrast with the other princely States where there were comprehensive Instruments of Merger whereby they became an integral part of the Indian constitutional system, the Instrument of Accession entered into with the Maharaja allowed the Dominion Legislature to legislate only on three matters concerning the State, namely, defence, external affairs, and communications.

It was in this context of a limited accession that N. Gopalaswami Ayyangar, who had himself been the Prime Minister of Jammu and Kashmir, moved the draft of Article 370 in the Constituent Assembly. Ayyangar argued before the Constituent Assembly that the particular situation of Jammu and Kashmir, with the issue of a plebiscite under UN supervision and hostilities on its frontiers, justified the inclusion of such an article, as he himself put it, of a "temporary nature." Consequently, the article was included in the Constitution enacted on 26 January 1950, consciously placed in Part XXI dealing with the temporary and transitional provisions and not in Part XI concerning Centre-State relations.⁴ The clause, in

clause (2), provided that the approval of the State Constituent Assembly would have been necessary in order to expand the jurisdiction of Union laws from the three subjects referred to in the Instrument of Accession, and in clause (3), that the President was empowered to notify in writing that Article 370 had ceased to be operative, but "only on the recommendation of the Constituent Assembly of the State."

It is pertinent to mention here that the Constituent Assembly of Jammu & Kashmir, established in 1951 and which expired after formulating its constitution in 1956, did not recommend the annulment of Article 370 at all.⁵ This reality would years later become the very foundation of the constitutional dispute regarding the abrogation of 2019, given that the proviso to Article 370(3), as understood literally, meant that the power of the President to abrogate the Article could no longer be exercised owing to the permanent disappearance of the body whose recommendation was needed.

Close to Article 370 is Article 35A, which was included in the Constitution through the Constitution (Application to Jammu and Kashmir) Order of 1954, as opposed to a constitutional amendment pursuant to Article 368, and which itself was enacted under Article 370(1). Article 35A vested the power in the State Legislature of Jammu and Kashmir to determine the "permanent residents" of the State and confer on them special rights and privileges in respect of State employment, acquisition of immovable property, and settlement, and to place restrictions in such matters against other Indian citizens.⁶ Article 35A was also done away with on account of the Presidential Order of 2019 due to the fact that it replaced the 1954 order completely, an effect that made the legal tangle more complex regarding the vested right of the permanent residents.

III. Constitutional Text and Nature of Article 370

Article 370, prior to its revocation, had three substantive provisions. Provision (1) allowed the President to make provisions of the Constitution applicable to Jammu and Kashmir, either with or without modifications, in consultation with or, in some cases, with the consent of the State Government. Provision (2) laid down that in case the consent of the State Government is given prior to the formation of the Constituent Assembly, such consent shall be referred to that body for determination. Provision (3) allowed the President to make a declaration of revocation of the provision through public notice, subject to the condition of recommendation from the State's Constituent Assembly.

The legal nature of Article 370, whether a temporary article awaiting its extinction or a permanent feature enshrining the autonomy of Jammu and Kashmir, was a source of judicial and academic controversy. The Supreme Court, in the case of *Prem Nath Kaul v. State of Jammu and Kashmir*, through a Constitution Bench had declared Article 370 as an article

¹ The Constitution of India, Part XXI, arts. 369-392 (temporary, transitional and special provisions). See generally M.P. Jain, *Indian Constitutional Law* 987 (LexisNexis, 8th edn., 2018).

² The Jammu and Kashmir Reorganisation Act, 2019 (Act No. 34 of 2019), s. 3.

³ Instrument of Accession executed by Maharaja Hari Singh, 26 October 1947. See A.G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* 25-31 (Oxford University Press, 2011).

⁴ The Constitution of India, art. 370 read with Part XXI.

⁵ Balraj Puri, *Kashmir Towards Insurgency* 41-45 (Orient Longman, 1993).

⁶ Anuradha Bhasin, *A Dismantled State: The Untold Story of Kashmir After Article 370* 55-59 (HarperCollins, 2022).

conferring complete constitution making powers on the Constituent Assembly of the State itself.⁷

Yet another approach took shape around a decade later when the Supreme Court ruled in *Sampat Prakash v. State of Jammu and Kashmir* that Article 370 was still in force and continued to form part of the Constitution despite the dissolution of the Constituent Assembly of the State because there was no indication in the language of the Article that the two had a co-terminus life.⁸ This judgment carried weight in the sense that it was an indirect repudiation of the notion that Article 370 became spent or permanently dead with the dissolution of the Constituent Assembly in 1957. Article 370 remained in operation despite the apparent extinction of the procedure for its abrogation consequent upon the dissolution of the Constituent Assembly.

Various interpretations have been proffered by constitutional experts on this jurisprudence. According to A.G. Noorani, the dissolution of the Constituent Assembly without a recommendation for its abrogation made Article 370 permanently operative even though it fell within the "temporary" Articles of Part XXI of the Constitution.⁹ Others, including members of the legal team of the Government itself in 2019, have argued that the term "temporary" used in the heading of Part XXI is a deliberate constitutional word choice indicative of the framers' intent to see the section ultimately extinguished, and that the lack of a Constituent Assembly does not render the Presidential powers perpetual.¹⁰

Another jurisprudential issue, which has its origin in Article 370(1), dealt with the authority of the President to apply the provisions of the Constitution in Jammu and Kashmir "with such exceptions and modifications" as he thought fit. The Supreme Court in *Puranlal Lakhanpal v. Union of India* interpreted the word "modifications" very widely, so much so that it can cover even substantial departures from the parent provision so long as it does not affect the basic character of the Constitution.¹¹ This broad interpretation of "modification" was later utilized by the Union Government in 2019 to introduce a new section in Article 367 on the basis of the idea that introducing a new section in Article 367 is nothing but "modification" of the constitution of Jammu and Kashmir.

IV. The Process of Abrogation: August 2019

Article 370 was repealed by the use of an executive-legislative process carried out between 5 August and 9 August 2019 in a series of well-coordinated steps. The first step involved the issuance of the Constitution (Application to Jammu and

Kashmir) Order, 2019 by the President under Article 370(1). It superseded the older Constitution (Application to Jammu and Kashmir) Order, 1954 and, importantly, inserted an additional clause (4) in the interpretation Article 367 of the Constitution, as applied to Jammu and Kashmir.

This newly inserted Article 367(4)(d) stated that whenever reference is made in Article 370 of the Constitution to the "Constituent Assembly of the State," such reference shall be deemed to refer to the "Legislative Assembly of the State." As Jammu and Kashmir was at this time under President's Rule under a Proclamation under Article 356, the powers of the State Legislative Assembly vested in the Parliament. On this basis, "concurrence" of the State Government, as required under Article 370(1), was provided by the Governor acting for the State Government and the "recommendation" of the Legislative Assembly, read as the Constituent Assembly, was provided by Parliament.

On the basis of this reinterpretation, Statutory Resolution recommending to the President to declare Article 370 inoperative was passed by both Houses of the Parliament on 5 and 6 August 2019 and on the basis of this resolution, the President issued the Constitution (Application to Jammu and Kashmir) Order, 2019 (C.O. 273), declaring that all provisions of Article 370 would become inoperative except clause (1) which was kept intact in a modified form applying the entire Constitution of India to erstwhile State of Jammu and Kashmir. Meanwhile, the Parliament passed the Jammu and Kashmir Reorganisation Act, 2019 using the power under Article 3 of the Constitution bifurcating the State into two Union Territories: Jammu and Kashmir, with a Legislative Assembly, and Ladakh, without a Legislative Assembly. The views of the State Legislature under the proviso to Article 3 being provided by the Parliament, the whole process remained untouched by the representatives of the people.

V. Legal Issues Arising from the Abrogation

The process outlined above has resulted in the emergence of multiple legal disputes that have been brought to the Supreme Court as a part of the petition package that led to the ruling of 2023.

A. Use of Article 367 to Amend Article 370 Indirectly

The basic issue revolved around whether the interpretative jurisdiction under Article 370(1) was being used for amending the interpretation clause applicable in general, namely Article 367, which in essence changed the substance of Article 370. The petitioners contended that this was an unconstitutional method of amending the Constitution without following the procedure as provided in Article 368.¹² It was argued that the power of "application with modifications" could not be extended so far as to allow the alteration of the meaning of an expression employed in Article 370 itself, because it would have made the interpretative power an amending power, thus

⁷ Prem Nath Kaul v. State of Jammu and Kashmir, AIR 1959 SC 749.

⁸ Sampat Prakash v. State of Jammu and Kashmir, AIR 1970 SC 1118, 1123.

⁹ A.G. Noorani, "Article 370: Law and Politics", 34(29) Economic and Political Weekly 2957, 2960 (1999).

¹⁰ Rajeev Dhavan, "Reconstructing Article 370", 44(37) Economic and Political Weekly 8, 11-12 (2009).

¹¹ Puranlal Lakhanpal v. Union of India, AIR 1961 SC 1519, 1523-1524.

¹² Radha Kumar, *Paradise at War: A Political History of Kashmir* 312-315 (Aleph Book Company, 2018).

negating the very safeguard the framers had introduced in clause (3).

B. Absence of the Constituent Assembly's Concurrence

Another similar question which arose in connection with the revocation of Article 370 was the survival of the proviso of Article 370(3), whereby the power of the President to abrogate this article was made subject to the recommendation of the Constituent Assembly of the State. If this proviso survived in its immutable form after the dissolution of the Constituent Assembly of Jammu and Kashmir in 1957, then the power to revoke Article 370 expired along with the Constituent Assembly.¹³ The argument advanced by the Union against this was that it was not possible to construe the proviso in such a way that Article 370 would become entrenched, because this would lead to the absurdity of an expressively "temporary" clause never being able to be deleted in any legal sense at all.

C. Substitution of the Legislative Assembly for the Constituent Assembly

The third issue was the question about whether it would have been appropriate to equate the terms "Legislative Assembly" and "Constituent Assembly" in relation to Article 370(3). It has been contended that a Constituent Assembly, which enjoys the powers of making a constitution, is different from a Legislative Assembly that makes laws under the delegation of power, and such difference cannot be overlooked through defining terms in Article 367.¹⁴

D. Reorganisation of a State into Union Territories under Article 3

Fourthly, the question of great importance from the viewpoint of the federal government was that whether Parliament had the authority under Article 3 to reduce a complete state into two union territories without the consent of the State Legislature, especially when one of the union territories had a legislative assembly and the other did not.¹⁵ The argument is that even though Article 3 provides for the creation of new states and the modification of boundaries, yet it cannot, through a purposive construction, provide for the total and permanent extinction of the entity of a State under any circumstances, especially since Article 1 talks about India being a "Union of States" rather than a union of states that can be downgraded to Union territories.

E. Colourable Exercise of Power and Mala Fides

Petitioners also relied upon the principle of colourable legislation, stating that all this order-making process was aimed at achieving something indirectly, which was impossible to achieve directly by virtue of the Article 370(3), and this

amounted to fraud on the Constitution.¹⁶ Conversely, The Union contended that every action taken was grounded on a provision of the Constitution, and motive did not matter constitutionally, so long as the power was granted by the document.

F. Justiciability and the Political Question Doctrine

The sixth issue, a more preliminary one, related to whether the abrogation of Article 370 was a justiciable issue in the first place, or whether it was an inherently political decision that the courts should refrain from making. On the side of the Union, the question of wisdom behind extending the constitutional provisions to the state of Jammu and Kashmir had been presented as a high-policy issue beyond the reach of judicial intervention, but the petitioners pointed out that what was on the table for consideration was not a policy question but a question of process.¹⁷ The Court finally heard the petitions on merits, thus implicitly dismissing the argument that the matter was a political question. It thereby established that even if the executive action under Article 370 had political ramifications, its constitutionality was still open to judicial review.

VI. The Supreme Court's Verdict in In Re: Article 370 of the Constitution

Constitutionality of the abrogation was eventually resolved by a five-judge Constitution Bench of the Supreme Court headed by the then Chief Justice of India, D.Y. Chandrachud, in In Re: Article 370 of the Constitution, which was decided on 11 December 2023.¹⁸ The decision on the Bench was unanimous in affirming the abrogation of Article 370, although the Bench showed its concerns on some subsidiary matters.

With regard to the matter of the sovereignty of Jammu and Kashmir, the Court ruled that no residual or internal sovereignty remained with the State after it had acceded to India in 1947, and that on accession all matters pertaining to sovereignty had been surrendered by the State, and thus the State stood on the same footing as any other State, so far as its relations with the Union were concerned.

Regarding the character of Article 370, the Court ruled that the Article was and had always been a temporary provision even though the provision had been in force for about seventy years, and that the cessation of the existence of the Constituent Assembly of the State could not convert a temporary provision into a permanent one. As regards the specific issue of the power of the President under Article 370(3), the Court ruled that once the Constituent Assembly ceased to exist without making a recommendation, the power of the President to make a notification under Article 370(3) remained valid independently of a recommendation since the condition for the invocation of the proviso had ceased to exist.

¹³ Faizan Mustafa, "Article 370: A Constitutional History", 54(36) Economic and Political Weekly 12, 15 (2019).

¹⁴ Zaid Deva, "The Constitutional Sleight of Hand: Reinterpreting Article 370", 4 Indian Law Review 211, 219-221 (2020).

¹⁵ Sudhir Krishnaswamy, "Article 370 and the Federal Structure", 4 Indian Constitutional Law Review 45, 52-54 (2020).

¹⁶ K.C. Wheare, Federal Government 93-97 (Oxford University Press, 4th edn., 1963).

¹⁷ S.P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits 289-293 (Oxford University Press, 2002).

¹⁸ In Re: Article 370 of the Constitution, 2023 SCC OnLine SC 1647.

However, the Court had concerns about the reorganisation of the State into Union Territories. The Court described the reorganisation of a State into Union Territories as a matter which called for caution, but it did not declare the Reorganisation Act unconstitutional because the Solicitor General had assured the Bench that statehood would be restored. The Court directed the Union Government to restore statehood of Jammu and Kashmir as soon as possible and arrange elections to the Union Territory's Legislative Assembly by 30 September 2024.

It is also pertinent to mention the dissenting opinion of Justice Sanjay Kishan Kaul, who, while endorsing the majority on the issue of constitutional interpretation, has gone ahead to advocate for the formation of a Truth and Reconciliation Commission, which could probe into the cases of human rights violations committed by State and non-State actors in Jammu & Kashmir since the 1980s and suggest ways for reconciliation within a specified time limit. Although this suggestion was not incorporated in the operative part of the judgement, many commentators have interpreted this as an indication of the judicial recognition of the human cost of resolving the issue of Article 370 through law.

VII. Constitutional Perspective: Federalism and the Basic Structure

In this context, the abrogation of Article 370 raises further issues concerning the nature of Indian federalism and whether the basic structure concept places any constraints on the capacity of the parliament to make amendments to the territorial and constitutional position of a constituent unit.

India's constitution has been called quasi-federal in nature, whereby it is both a strong union and federal in nature, a description that stems from the classic definition by K.C. Wheare, whereby he referred to the 1950 Constitution as federal in form but unitary in spirit in emergencies.¹⁹ The provision of Article 370 was another aspect of asymmetry in this inherently asymmetric federal setup, whereby Jammu & Kashmir had a different kind of constitutional relationship with the Union as compared to any other State, a situation that has been described as "asymmetric federalism" in comparative federal literature.²⁰

The landmark judgment in the case of *S.R. Bommai v. Union of India* affirmed federalism to be an essential component of the Basic Structure Doctrine of the Constitution, according to which the distribution of power between the Union and the State could not be taken away through ordinary law.²¹ Thus was posed the question, forcefully argued before the Constitution Bench, whether the restructuring of the entire State into Union Territories without consulting in any way the representative

body of the State's citizens was in accordance with the concept of federalism forming a part of the basic structure.

The answer provided by the Court in substance was that the powers vested in Parliament through Article 3 of the Constitution to change the territorial boundaries of States, and even to destroy Statehood, were very broad, and since this was a power granted by the constitutional text, it could not in itself violate the basic structure on account of being asymmetrical in effect.²² But, the critics of the judgment argue that such an approach fails to address the issue of the difference between the normal implementation of Article 3, which is usually done in order to reorganize due to linguistic and administrative considerations, and the manner in which the same has been implemented in 2019, with the intention of wiping out the state's autonomy as well as the constitutional guarantee attached to it.²³

Some insight can be gleaned from comparative federal experience with regard to the Indian case. It is typical of federations like Canada and the US that any change to the status and/or boundaries of the province or state must have the agreement of the legislature of that unit or a constitutionally required super-majority. This is to make sure that the central government does not do it unilaterally.²⁴ However, India's Constitution provides Parliament with a highly exceptional unilateral power via Article 3 of the Constitution, which is limited only in terms of the necessity of referring the concerned Bill to the State Legislature to hear its views, views which anyway do not bind the Parliament in any way. This 2019 case is one such illustration where the constitutional impact of the mismatch between consultation and consent is seen in its most vivid form because the State Legislature being consulted is nothing but the Parliament itself.

VIII. Critical Analysis and the Way Forward

The abrogation of Article 370 and its judicial validation demonstrate the adaptability built into the constitutional framework of India; however, they highlight the vulnerability of procedural guarantees in the face of institutions that can no longer be invoked to enforce them. While the Court's ruling that the power of the President under Article 370(3) survives the dissolution of the Constituent Assembly is a reading of the provision which is technically sound, it is a strained interpretation of a provision based on an ordinary legal principle.²⁵

¹⁹ K.C. Wheare, *Federal Government* 28 (Oxford University Press, 4th edn., 1963).

²⁰ Alfred Stepan, Juan J. Linz & Yogendra Yadav, *Crafting State-Nations: India and Other Multinational Democracies* 62-68 (Johns Hopkins University Press, 2011).

²¹ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, 216-218 (per K. Ramaswamy, J.).

²² H.M. Seervai, *Constitutional Law of India* 316-322 (Universal Law Publishing, 4th edn., 2015) (on the scope of Parliament's power under Article 3).

²³ Rekha Saxena, "Federalism and the Abrogation of Article 370", 55(4) *Journal of Indian Law and Society* 401, 408-412 (2021).

²⁴ Ronald L. Watts, *Comparing Federal Systems* 121-126 (McGill-Queen's University Press, 3rd edn., 2008).

²⁵ Anuj Bhuvania, "Reading Down the Proviso: The Article 370 Judgment Reconsidered", 58(2) *Economic and Political Weekly* 19, 22 (2023).

In other words, the insistence of the court on the restoration of statehood shows an implicit acknowledgment that even where it might be permissible under the Constitution to reduce the status of a state to that of a union territory, it cannot simply be taken as a matter of convenience in legislation. The way ahead, through constitutional design, would be to codify, in a clearer manner, the circumstances in which Article 3 can be applied to modify the status of statehood, so as to avoid a repeat of a situation in which the elected legislature of a state is altogether bypassed.²⁶

It must be noted that the controversy around Article 370 has never been an entirely legal one, but has been intertwined with issues of security, regional identity, and the legacy of the people of Jammu and Kashmir. An exclusively doctrinal analysis of the 2023 decision, regardless of how thorough it may be, will fail to encompass the political economy behind the act of repeal and its execution. Any future constitutional scholarship on the matter will benefit from analyzing, along with the legal doctrine, the institutional implications of the case in terms of how the autonomy of the constituent parts of the federation can be protected so that issues of this gravity can be addressed through the deliberative process.²⁷

IX. CONCLUSION

The revocation of Article 370 is one of the most notable examples of a constitution's alteration through the joint action of the executive and the legislature that was successfully tried and justified by the judiciary. Regardless of whether one agrees with the policy sense of the abrogation, this case provides an interesting example of how the flexibility of the constitutional provisions can be demonstrated through the correct exercise of interpretation. The decision of the Supreme Court in *In Re: Article 370* has answered the questions raised by the abrogation of the Article once and for all, confirming that it was of a temporary nature and that the President still has the ability to revoke it despite the fact that the recommending body ceased to exist. However, the problems of interpretation of Article 3, the significance of the procedural requirements of the exercise of constitutional power, and federalism in the asymmetric Union continue to raise questions in academic and judicial circles.

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²⁶ Bhanu Pratap Mehta, "After Article 370: Rethinking Asymmetric Federalism in India", 12 *NUJS Law Review* 88, 95-97 (2019).

²⁷ Sumit Ganguly, "Kashmir and the Politics of Article 370", 31(2) *Journal of Democracy* 45, 52 (2020).