

## THE ABROGATION OF ARTICLE 370 AND ITS' CONSTITUTIONAL VALIDITY

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### ABSTRACT:

The State of Jammu and Kashmir went through extraordinary and potentially notable changes on August 5, 2019, while the President was in power. These changes drastically impacted the State's constitutional relationship with the Union of India. As a rule, these noteworthy improvements incorporate the compelling cancellation “of Article 370 of the Indian Constitution and the division of the State of Jammu and Kashmir into the Union Domains of Jammu and Kashmir and Ladakh, ending Jammu and Kashmir's unique status under the Indian Constitution. This article initially portrays the legitimate activities used” to achieve these alterations prior to analyzing their constitutionality.

The paper likewise gives a lawful criterion to such decisions that the President and Parliament might make when President's rule is set up, and makes the contention that, when held up to this norm, canceling Article 370 and parting the State of Jammu and Kashmir are unlawful. The examination additionally looks at past Supreme Court judgements on executive and legislative policy issues to decide the extent of judicial review in the ongoing case.

**Keywords:** Article 370, Indian Constitution, Legislative Policy, Supreme Court

### REVIEW OF LITERATURE:

#### 1) **ARTICLE 370: A constitutional history of Jammu and Kashmir<sup>1</sup> by A.G. Noorani:**

The materials in this book detail the five months of talks that took place before the adoption of article 370 on October 17, 1949. It discusses the importance of the article, how it was compromised, and how the State's constitution developed over time in connection to the Union of India.

#### 2) **“THE SPECIAL POSITION OF JAMMU AND KASHMIR IN THE INDIAN CONSTITUTION<sup>2</sup> by B.R. Sharma”**

This article discusses the special position of the state of Jammu and Kashmir in our Indian Constitution, the reasons for its creation, the rationale for it, how it functions, and what new things it brings to the table.

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<sup>1</sup> “Noorani, A. G., Article 370: A Constitutional History of Jammu and Kashmir (Delhi, 2011; online edn, Oxford Academic, 20 Sept. 2012), <https://doi.org/10.1093/acprof:oso/9780198074083.001.0001>, accessed 21 Oct. 2022.”

<sup>2</sup> “Sharma, B. R. (1958). THE SPECIAL POSITION OF JAMMU AND KASHMIR IN THE INDIAN CONSTITUTION. *The Indian Journal of Political Science*, 19(3), 282–290. <http://www.jstor.org/stable/42743614>”

3) **THE STORY OF THE INTEGRATION OF INDIAN STATES<sup>3</sup>, by V.P. Menon:**

This book by one of our founding fathers, V.P. Menon, discusses all of the behind-the-scenes labor that was necessary to unite the then various provinces into what is now known as the Republic of India.

4) **“ABROGATION OF ARTICLES 370 AND 35A: ASSAULT ON THE CONSTITUTION<sup>4</sup>, by V.Venkatesan”**

In this essay, the author discusses how the procedures and tactics used to repeal the relevant articles are a clear breach of Supreme Court decisions, the constitution, and constitutional morality.

5) **“ABROGATION OF ARTICLE 370 A VERY COMPLEX AFFAIR<sup>5</sup> by D.P. Satish”**

The topic of the applicable articles 370 and 35-A is thoroughly covered in this article. It also tackles the key problem of the highly convoluted structure of the repeal procedure. It explores what numerous constitutional experts have to say about the matter and presents contrasting perspectives.

**RESEARCH QUESTION:**

The government of India's abrupt move to repeal portions of Article 370 and 35-A has created a debate among academicians and stakeholders over whether the act was constitutional or not. Thus, in this paper, we will attempt to investigate the same subject and reach a logical conclusion.

**INTRODUCTION:**

N. Gopaldaswami Ayyangar proposed draft Article 306A (eventually renumbered as Article 370) in the Constituent Assembly on October 17, 1949, at the conclusion of the Indian Constitution-making exercise. The proposed Article granted Kashmir special status inside India's federal structure. Ayyangar was guiding the Assembly through the language of the Article when Maulana Hasrat Mohani, founder of the Communist Party of India, intervened and said sharply, 'Why this discrimination, please?'<sup>6</sup>

Ayyangar noted that this was because of "the unique characteristics of Kashmir." Kashmir, unlike other states, was not 'ready' for complete absorption into the soon-to-be Republic. He mentioned the Kashmir conflict and the fact that the United Nations was now involved in the matter.<sup>7</sup>

“Part XXI of the Indian constitution, headed "Temporary, Transitional, and Special Provisions," contains Article 370. It said that the Jammu and Kashmir Constituent Assembly would be given the position to prescribe how much the Indian constitution would apply to the state. The state governing

<sup>3</sup> “Menon V. P. (1956). *The story of the integration of the indian states*. Macmillan.”

<sup>4</sup> “V. Venkatesan, Abrogation of Articles 370 & 35-A: Assault on Constitution, Frontline The Hindu (October 25, 2022, 13:50), <https://frontline.thehindu.com/cover-story/article29048647.ece>”

<sup>5</sup> “D.P. Satish, Abrogation of article 370- A very complex affair, News18.com (October 25, 2022, 18:34), <https://www.news18.com/news/india/abrogation-of-article-370-a-very-complex-affair-say-legal-experts-690866.html>.”

<sup>6</sup>“ConstitutionofIndia.net ,[https://www.constitutionofindia.net/blogs/article\\_370\\_and\\_the\\_constituent\\_assembly\\_debates](https://www.constitutionofindia.net/blogs/article_370_and_the_constituent_assembly_debates)”  
<sup>7</sup> Id.

body could possibly nullify Article 370 altogether, in which case the entire Indian Constitution would apply to the state.”<sup>8</sup>

#### **THE FOURTH OF AUGUST, 2019:**

**Timesnow** on **August 3** reported “*As uncertainty looms over Kashmir after the government asked Amarnath yatis and tourists to leave the valley at the earliest, speculations are doing rounds that the Centre may be preparing to abrogate Article 370*”<sup>9</sup>.

**India Today** reported “*According to experts, trifurcation of the state, one of the proposals that could be on the table as part of the larger plan to deal with the issue, could not be ruled out. There are provisions in the Constitution to change boundaries of states sharing border with Pakistan, they say*”.<sup>10</sup>

Pakistan’s esteemed newspaper **Tribune** reported “*The latest Indian media reports are suggesting that New Delhi is mulling over plans to trifurcate the occupied part of Kashmir – the main cause of friction between Pakistan and India.*”<sup>11</sup>

**Aljazeera** Reported “*Parts of India-administered Kashmir have been placed under lockdown and local politicians reportedly arrested as tensions intensify in the disputed region following a massive deployment of troops by the Indian government*”<sup>12</sup>.

**BBC News** reports “*In the first few days of August, there were signs of something afoot in Kashmir*”<sup>13</sup>.

On the night of 4th August at exactly 11:30 PM **Omar Abdullah** tweets “*I believe I’m being placed under house arrest from midnight tonight & the process has already started for other mainstream leaders*”<sup>14</sup>.

Thus, everyone in the country and every action of the government was pointing towards the fact that something big was happening or is going to happen in Jammu and Kashmir.

#### **THE 5TH OF AUGUST:**

“At the point when Article 370 was drafted, just two arrangements of the Indian Constitution were completely relevant to Jammu and Kashmir. Other constitutional arrangements would apply, with special cases and adjustments stated by the President in his Order in discussion with or with the endorsement of the state organization.”<sup>15</sup>

Amit Shah, India's home minister, submitted a bill in the Rajya Sabha on the morning of August 5, 2019, seeking the repeal of Article 370 of the constitution and the reformation of the state of Jammu and Kashmir. The chain of events may be understood as follows<sup>16</sup>-

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<sup>8</sup> “India Today , <https://www.indiatoday.in/elections/highlights/story/article-370-issue-omar-abdullah-jammu-and-kashmir-jawaharlal-nehru-194780-2014-05-28>”

<sup>9</sup> “Times of India, <https://timesofindia.indiatimes.com/india/jammu-and-kashmirs-special-status-what-is-article-370/articleshow/70512062.cms>”

<sup>10</sup> “India Today ,<https://www.indiatoday.in/india/story/jammu-kashmir-trifurcation-article-370-1576852-2019-08-03>”

<sup>11</sup> “Tribune, <https://tribune.com.pk/story/2027543/changing-iok-status-will-violate-international-law-experts>”

<sup>12</sup> “Aljazeera, <https://www.aljazeera.com/news/2019/8/4/india-imposes-kashmir-lockdown-puts-leaders-under-house-arrest>”

<sup>13</sup> “BBC,<https://www.bbc.com/news/world-asia-india-49234708>”

<sup>14</sup> “Twitter, <https://twitter.com/OmarAbdullah/status/1158075327333031941>”

<sup>15</sup> “Sharma, B. R. (1958). THE SPECIAL POSITION OF JAMMU AND KASHMIR IN THE INDIAN CONSTITUTION. *The Indian Journal of Political Science*, 19(3), 282–290. <http://www.jstor.org/stable/42743614>”

<sup>16</sup> “The Hindu, <https://www.thehindu.com/news/national/other-states/explained-how-the-status-of-jammu-and-kashmir-is-being-changed/article28822866.ece?homepage=true>”

- 1) Under Article 370 (1) of the Constitution, President Ram Nath Kovind issued a presidential order. This section allows the President to designate the issues that apply to Jammu and Kashmir. Because it may only be released with the approval of the Jammu and Kashmir government, the notification includes the phrase "with the approval of the Government of the State of Jammu and Kashmir." This likely signifies that the Governor, who is now in charge of the state under President's Rule, has granted his approval on behalf of the state government.
- 2) The "Order supersedes the Order of 1954. This essentially infers that each of the provisions that filled in as the establishment for a different "Constitution" for Jammu and Kashmir have been canceled. The Order says that the laws of the Indian Constitution apply to Jammu and Kashmir also.
- 3) "Interpretations are found in Article 367. They give help on the best way to peruse or decipher specific areas. As per the amended provisions, when applied to Jammu and Kashmir, any references to the 'Sadar-I-Riyasat,' following up on the guidance and help of the Council of Ministers, will be deciphered as references to the Governor of Jammu and Kashmir. All references to the State government should allude to the Governor."
- 4) Most vitally, a proviso to Article 370 (3) presently alludes to the "Legislative Assembly of the State" as opposed to the "Constituent Assembly." This is the arrangement that states that the President might pronounce Article 370 inoperative provided that the Constituent Assembly suggests it. Since there is currently no Constituent Assembly, there is no element to "suggest" the repeal of Article 370. Accordingly, the State Assembly should fill that obligation.

#### **RATIONALE BEHIND THE SCRAPPING:**

- 1) The provision conferring 'special' status on the State has always been the elephant in the room. Because of its standing in our Constitution, Jammu and Kashmir, together with its sensitive geography, has emerged as a foreign policy concern rather than a domestic one.<sup>17</sup>
- 2) Article 35-A was enacted by a Presidential decree rather than through legislation. It abused the legislature's constitutionally mandated legislative powers. Article 370 was designed to be transitory; in fact, the first word of the Article is "temporary".<sup>18</sup>
- 3) Article 370 was plainly a deterrent to private or worldwide interest into the state.<sup>19</sup>
- 4) How could worldwide enterprises or global associations put resources into land or property if Indians (non-Kashmiris) can't? It additionally made it challenging for state organizations, like as medical schools, to successfully fill opening. Teachers can't be employed from outside the state, save under profoundly restricted circumstances. These and different elements guarantee that joblessness develops, improving the likelihood of the arrangement of radicalism.<sup>20</sup>
- 5) Article 370 itself was impartial, however how permanent residents were characterized in the state constitution — in light of notifications given between April 1927 and June 1932 during the Maharaja's reign — seemed, by all accounts, to be one-sided against ladies. As indicated by the 1927 notification, "the wife or widow of the state subject... will get the status of her husband as state subject of a similar class as her husband, inasmuch as she resides in the state and doesn't leave the state for permanent residence outside the state." This was frequently perceived to imply that a Jammu and Kashmir woman who weds outside the state loses her status as a state subject.<sup>21</sup>

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<sup>17</sup> "The Hindu, <https://www.thehindu.com/news/national/full-text-of-document-on-govts-rationale-behind-removal-of-special-status-to-jk/article28821368.ece>"

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

### **THE ABROGATION CONSTITUTIONAL OR NOT?**

“In the landmark *Kesavananda Bharati* case,<sup>22</sup> the Supreme Court's Constitution Bench, made out of 13 judges, separated between a straightforward amendment to the Constitution and revamping a part of it, deciding that the last option was unlawful since it would suggest leaving the Constitution's essential framework. As such, the power to amend does exclude the capacity to change the central structure of the Constitution to modify its personality. The majority of the judges in that decision accepted that the federal character of the Constitution was essential for its basic structure”.<sup>23</sup>

It was held that Democracy and federalism are the fundamental highlights of our Constitution and are important for its basic structure<sup>24</sup>. Justice R.F. Nariman recorded in paragraph 2 of his judgment in *SBI v. Santosh Gupta*<sup>25</sup> that State of J&K is indisputably a part of the federal structure of India, but has been accorded a special provision due to historical reasons. Furthermore, as Nariman J. went on to note in paragraphs 11 and 12 of the same judgment, the legislative relations between the State of J&K and the Union of India, within the framework of Article 370; conform to the principles of federalism as laid down in *West Bengal v. Union of India*<sup>26</sup>. Degradation of State into union territories is an affront to the principle of federalism.

At the end of the day, the power to amend does exclude the capacity to change the key construction of the Constitution to adjust its personality. The majority of the judges in a decision accepted that the federal person of the Constitution was important for its key development.<sup>27</sup> This is reflected in Articles 371A through 371J, which give Nagaland, Mizoram, Manipur, Maharashtra, Karnataka, Sikkim, and others unique status in different ways. The ideal of pluralistic federalism is obviously subverted if one of the two gatherings to the federal relationship (i.e., the Union) may singularly change the boundaries of their partnership without going through the afflictions of the amendment method under Article 368. As part of the core framework of the Constitution, such a state's federal connection with the Union of India is at a federal balance, which can be altered but not harmed or destroyed. It is respectfully argued that the critical right at risk in this case is the right to representation and to be governed by one's chosen representatives, as stated by this Honorable Court in *NCT of Delhi v. Union of India*<sup>28</sup>. As a result, once a State's peoples have acquired the degree of representation provided by Statehood, they cannot be retrograded to the smaller degree of representation provided by a Union Territory. With the adoption of the contested act, the people of Ladakh's political aspirations and right to be represented in parliament have been significantly decreased, since the state previously had four MLAs and two MLCs, which have now been removed, depriving democratic representation. This betrayal of the people's democratic aspirations is a violation of the democratic ideal enshrined in our Constitution.

### **PRESIDENTIAL ORDER:**

A presidential order ostensibly issued under Article 370(1) of the Constitution violates the power granted by such provision. This is on the grounds that official order, first and foremost, erroneously invoke article 370(1)(d) to successfully amend the proviso to article 370(3); besides, the simultaneousness being referred to is lacking constitutional establishment whereupon to base an official order of this nature; thirdly, the power under article 370(1)(d) doesn't mull over the entire use of —all the arrangement of the constitution as of now and in ceaselessness to —apply corresponding to the Province of J&K and fourthly, regardless of whether order was generally legitimate, to the extent that it seeks to amend article 370(3), it is lawfully invalid, as the regulative gathering of the Territory

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<sup>22</sup> *Kesavnanda Bharati V State of Kerala*, (1973) 4 SCC 225.

<sup>23</sup> “Frontline The Hindu, <https://frontline.thehindu.com/cover-story/article29048647.ece>”

<sup>24</sup> *S.R. Bommai v. UOI*, (1994) 3 SCC 1

<sup>25</sup> (2017) 2 SCC 538.

<sup>26</sup> (1964) 1 SCR 371.

<sup>27</sup> “*R.C.Poudyal v. UOI*, 1994 Supp 1 SCC 324.”

<sup>28</sup> (2018) 8 SCC 501.

of J&K has no power under the constitution of J&K to achieve an amendment to any arrangement under the constitution of India. However, because clause (2) of the presidential order claims to alter article 367 of the constitution, the impact of these adjustments is to make changes in the wording of article 370 of the constitution via article 367. Specifically, subclause (d) of clause 2 of the presidential order states that, subject to clause 3 of Article 370 of the Constitution, the word "constituent assembly of the State" referred to in paragraph (2) should be replaced with "legislative assembly of the State." It is respectfully urged that the presidential order effectively changed article 370; it is a well-established principle in the law of colorable legislation that what cannot be done openly cannot be done indirectly. If, in respect to the State of J&K, article 370 cannot be altered by a presidential order, it also cannot be withdrawn or amended using the mechanism of adding a new proviso into article 367.

#### **MISINTERPRETATION OF THE WORD “MODIFICATION” UNDER 370(3):**

The central government clearly exceeded their power of ‘modification’ under Article 370(3) by declaring the Constitution of Jammu and Kashmir null, which was in force for the last 70 years. Earlier in cases like *Puranlal v. President of India* and *Sampath Prakash v. State of Jammu and Kashmir*<sup>29</sup>, the court implied that the powers of the President, under Article 368, are wide and unlimited. This misinterpretation was overruled in the landmark case of *Kesavananda Bharati v. State of Kerala*. In this case, the 13-judge constitutional bench held that “no power is unlimited and all power, including constituent amending power is subjected to limitations.”<sup>30</sup> Therefore, according to this landmark judgment, the President has abused his powers under this article.

#### **VIOLATION OF THE DOCTRINE OF FEDERALISM:**

The Union Government's conduct of removing Article 370 obviously contradicted the Constitution's characteristic of Federalism. The court ruled in *State Bank of India v. Santosh Gupta* that J&K has a quasi-federal organization under the Indian Constitution. Shehla Rashid's plea to the Supreme Court contended that if “Article 370(1)(d) is read in conjunction with Article 368, the State of Jammu and Kashmir is free to determine whether or not the revisions to the Indian Constitution apply to it.” Furthermore, “the Parliament has limited jurisdiction over Jammu and Kashmir, including in the realms of Foreign Affairs, Defense, and Communication, as well as other departments named in the 1954 order,” it was argued.

In *R.C Poudyal v. Union of India*, the court said that the states can have non-identical relations with the Union government as it depends on their accession and their social, political and cultural history. This implies that the Union cannot amend the relationship between states under Part XXI of the Constitution, arbitrarily, without consulting the State.<sup>31</sup>

“A book by the former CJI, A.S Anand, called ‘The Constitution of Jammu and Kashmir: Its Development Comments’, mentioned, “the temporary provision does not mean that the article is capable of being abrogated, modified unilaterally.”

#### **VIOLATION OF FREEDOM OF PRESS:**

On the fourth of August 2019, all networks and internet providers were ended and closed down in Jammu and Kashmir with no orders by the authorities. There was a virtual blackout in the state. This outright and complete network closure in Kashmir valley, at such a period “is a grave infringement of the right of individuals to know about the data that straightforwardly influences their lives and their future”.

There was a violation of freedom of press. The media plays an essential role in the preservation of democratic character. Under Article 19(1)(a) of the Indian Constitution, the Hon’ble Supreme Court, in numerous cases, held that the no authority can interfere with the content and circulation of

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<sup>29</sup> “*Sampath Prakash v. State of Jammu and Kashmir*, (1970) A.I.R. 1118 (India).”

<sup>30</sup> “*Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225 (India).”

<sup>31</sup> “*R.C Poudyal v. Union of India*, (1983) A.I.R. 1804 (India).”

newspapers, even in the name of public interest. “In the case of *Indian Express Newspapers v. Union of India*, the Hon’ble Supreme Court held” “*The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgements. Newspapers being surveyors of news and views having a bearing on public administration very often carry material which would not be palatable to governments and other authorities*”.<sup>32</sup>

According to the case of *Sakal Papers Ltd v. Union of India*, the court held that the state cannot use indirect means to restrict the freedom of newspaper circulation and such an act was held unconstitutional. The court said, “*The circulation of a newspaper is a part of the right of freedom of speech and the freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved*”.

The European Court on Human Rights held in *Ahmet Yildirim v. Turkey*, “*In modern democracies, the internet has acquired significant importance in terms of the exercise of fundamental rights and freedoms, especially the freedom of expression. Social media platforms are thus indispensable tools for the exercise of the right to freedom of expressing and sharing information and ideas.*”<sup>33</sup>

### **NEHRU’S LETTER:**

On May 17, 1948 “with the concurrence of Vallabh Bhai Patel and N. Gopaldaswamy Ayyangar” a letter was sent by then Prime Minister Jawaharlal Nehru to Sheikh Abdullah stating:

“*It has been settled policy of Government of India, which on many occasions has been stated both by Sardar Patel and me, that the constitution of Jammu & Kashmir is a matter for determination by the people of the state represented in a constituent assembly convened for the purpose.*”<sup>34</sup>

### **CONCLUSION:**

The decision of the Court in the instant matter is without a doubt one of the most enthusiastically expected decisions of late times because of the complex lawful issues and strategy implications at play. The lasting discussion on the changelessness of Article 370 without even a trace of the Constituent Gathering of Jammu and Kashmir may at last be settled. All the more explicitly, the Court would have to address whether the component set down in condition (3) of Article 370 can in any case be used and provided that this is true, in what way. Thus, even if this amendment is struck down completely, the Court's observations on proviso (3) would not in the slightest bit just be scholar yet rather clarify the legitimate strategy for a potential revocation of Article 370 later on.

From the above discussion it can be clearly concluded that what was done was right but the procedure adopted was not correct. Procedure was clearly given in Article 370 and it must be harmoniously constructed with the Constitution of J&K and Constitution of India. Though we all know that plebiscite at this point is not possible practically, but consent of people of J&K was mandatorily required in order to scrap Article 370, it could also be taken through the representatives of the peoples or we can say the MLAs. Hence, it can be clearly concluded from here that the Act passed in order to remove article 370 from the Constitution of India was a clear Fraud on constitution and must be struck down by the Judiciary.

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<sup>32</sup> *Indian Express Newspapers v. Union of India*, (1985) 1 S.C.C. 641 (India).

<sup>33</sup> “*Anuradha Bhasin v. Union of India & Ors*, Writ Petition (Civil) No. 28817 of 2019 (Supreme Court of India, 10/08/2019).”

<sup>34</sup> “*The Wire*, <https://thewire.in/law/article-370-amendment-reorganisation-jammu-kashmir-unconstitutional-violate-fundamental-rights-petition-supreme-court>.”