

A Critical Analysis of Abrogation of Article 370 with special reference to Article 368 of the Constitution

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ABSTRACT

Article 370 and Article 35A of The Constitution of India is a unique and most debatable provision which exclusively deals with Jammu and Kashmir. Article 370, which granted special status and more autonomy to Jammu and Kashmir and defined the relationship of Jammu and Kashmir with the rest of the country, has been abrogated by the Government of India by issuing a Presidential Order (C.O272) and a statutory resolution on August 5, 2019, and scrapped the Article 35A which defines the State 'permanent resident' and their special rights and privileges which are attached to such residency. Now the existing state of Jammu & Kashmir is bifurcated into two Union territories – (1) the Union Territory of Jammu & Kashmir with a Legislative Assembly and (2) the Union Territory of Ladakh without a Legislative Assembly. The primary purpose of this paper is to critically analyze various aspects of Article 370, the constitutionality of the procedure of abrogation of Article 370, and its relation with Article 368 of the Constitution.

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1. Introductory

The Indian Independence Act passed on July 18, 1947, divided British India into two independent countries, i.e., India and Pakistan, from August 15, 1947. The princely states could join either the Dominion of India or the Dominion of Pakistan. However, due to geographical location, the Maharaja of Jammu of Kashmir, Hari Singh, initially opted to remain independent. Nevertheless, on October 26, 1947, the princely State of Jammu and Kashmir was invaded by Afridis tribe members from the Northwest Frontier Province, supported by Pakistan. Maharaja Hari Singh sought military help from India. In exchange for help, the 'Instrument of Accession of Jammu and Kashmir' (from now on referred to as IoA) was signed by him with condition according to section 6 (a) of the Independence Act, 1947, with India. From that day onwards, Jammu and Kashmir become part of India. The IoA gave the Union of India authority to legislate only on defense, foreign affairs, and communication⁴.

At that time, there was a consistent policy of the Indian government where accession was in dispute; the question of accession should be decided according to the will of the people of the State, and Lord Mountbatten, the governor-general of India, promised a plebiscite. A similar referendum was held on February 20, 1948, in Junagadh with a Muslim ruler with a Hindu population. The ruler had chosen Pakistan⁵.

On October 17, 1949, Article 370 was incorporated into our Constitution by Constituent Assembly after ample discussion. On January 26, 1950, our constitution was started applicable. Article 1 (2) and Schedule 1 aforesaid declare Jammu and Kashmir as the State of India, and Article 370, states the temporary provisions concerning the State of Jammu and Kashmir.

On May 14, 1954, a specific Presidential order, i.e., 'The Constitution (Application to Jammu and Kashmir) Order, 1954' was passed by Dr. Rajendra Prasad. Article 35A was incorporated from this order, and it deals with who can be a permanent resident in Jammu and Kashmir and also provides protection to the laws passed by the State legislature regarding permanent residents. No such legislation can be challenged on the ground that

⁴Faizan Mustafa, "Article 370 and Territorial Pluralism", *The Indian Express* August 5, 2020.

⁵ ibid

they violate Part 3 of the Constitution, i.e., Fundamental Rights. Generally, we cannot see this Article in our bare act of the Constitution, but we can get it in the Constitution of Jammu and Kashmir⁶.

The Constitution of Jammu and Kashmir started applying on November 17, 1956, and it also stated that Jammu and Kashmir are an integral part of the Union of India. After that constituent assembly of Jammu and Kashmir was dissolved after the first legislative elections of Jammu and Kashmir, which were held in 1957.

Seven times the Presidential order was imposed in the State of Jammu and Kashmir from 1977 to 2016.

The State government of Jammu and Kashmir collapsed in 2018 as BJP broke its alliance with PDP, and on June 20, 2016, the governor's rule was imposed there. Subsequently, on December 21, 2018 Governor of Jammu and Kashmir dissolved the Legislative Assembly of Jammu and Kashmir.

On August 5, 2019, President Ram Nath Kovind used his power in clause 1 of Article 370 and issued another presidential order, and the name of the presidential order was 'The Constitution (Application to Jammu and Kashmir) Order, 2019'. The said order supersedes the order of 1954 with immediate effect. Since it replaced the order of 1954, the existence of that order came to an end. Article 35A and the Constitution of Jammu and Kashmir also ceased to exist. Also, it has added clause (4) to Article 367⁷.

On the same day when the Presidential Order of 2019 was released, home minister Amit Shah proposed two resolutions:

1. Statutory Resolution, i.e., Inapplicability of Article 370 as because of Article 370 discrimination issue is going all round.
2. Jammu and Kashmir (Reorganization) Bill, 2019

The Rajya Sabha passed this Bill unanimously. Section 3 says that a new Union Territory will be made, which will contain the region of Ladak, i.e., Kargil and Leh, without a legislative assembly, and Section 4 says that a new Union Territory named Jammu and Kashmir will be made with legislative assembly.

⁶Faizan Mustafa, Article 370 & Jammu and Kashmir Article 35A, *available at*: <https://www.youtube.com/watch?v=sPELkkD6SWk>(last visited on December 16, 2021)

⁷Mohd. Akbar Lone and Anr. v. UOI (2019SC)

On August 9, 2019, the President consented to Jammu and Kashmir (Reorganization) Act 2019.

The changes above give rise to several important questions. *First*, whether Article 35A is discriminatory? *Second*, do J&K is an integral part of India, and is it temporary? *Third*, to whom Article 370 gives more autonomy, and what is the legal capacity of the Instrument of Accession? *Fourth*, whether the consent of the governor during the operation of the President's rule implies the consent of the legislative assembly of the State? *Last*, whether Parliament has the power to amend Article 370 under Article 368 and has the constitutional power to bifurcate the State of J&K into two separate Union Territories? The later parts of this paper seek to answer each question in detail.

2. Article 35A and Discrimination

Article 35A empowers the State Legislature of Jammu and Kashmir to define who is or will be a permanent resident of the State of Jammu and Kashmir and what special rights and privileges will be attached to such permanent residency. It also imposes restrictions on outsiders in the form of employment under the State Government, Acquisition of immovable property in the State, the right of settlement and scholarship in the State, and other forms of assistance provided by the State government⁸.

This provision mandate that no act of legislature falling under it cannot be challenged on the ground that it is inconsistent with the rights or violate the rights conferred on the other citizens of India by the Constitution of India or by any other law of the land⁹.

Article 35A is in contravention of the right to equality as it is very discriminatory and unfair to Jammu and Kashmir Women. It states that if a female of Jammu and Kashmir marries a person who is an outsider or a non-permanent resident, then she loses her permanent resident status and will not be able to use her property rights anymore. Nevertheless, suppose a male of Jammu and Kashmir marries a non-resident of the State. In that case, he is not disqualified from using her property right and does not lose her permanent resident status. Moreover, if a Kashmiri woman marries a Pakistan resident person, then that person will get citizenship of Jammu and Kashmir.

⁸ The Constitution of Jammu and Kashmir, 1957, art. 35A

⁹ The Constitution of Jammu and Kashmir, 1957, art. 35A.

In *State of Jammu and Kashmir v. Dr.SusheelaSawhney*¹⁰, the High Court of Jammu and Kashmir held that the property rights and status of a permanent resident of a daughter of a permanent resident would not lose if she marries a non-permanent resident. However, in this case, the court did not decide the matter of the rights of the children and spouses of such women.

Another kind of discrimination lies in Muslim divorces, which fall under Jammu and Kashmir Muslim Personal Law Application Act, 2007. According to this Act, all Muslims are governed by the principles of Islamic laws, which give men utter power to divorce their wives by simply pronouncing triple talaq. The women of Jammu and Kashmir have consistently challenged this discriminatory practice.

In *Mohammed Naseem Bhat v. Bilquees Akhter and others* (April 30, 2012), the High Court of J&K abolished pronouncing triple talaq and upheld that a husband cannot pronounce Triple Talaq to his wife for divorcing her. In 2014, in another case of *Masrat Begum v. Abdul Rashid Khan*, the Jammu and Kashmir High Court overruled the Judgment above and held that interpreting Quranic verses without knowing the context in which they were made is beyond the competence of the court.

A petition review for the case of **Naseem Bhat** was filled in 2016, where the High Court of J&K again reversed his earlier judgment and upheld the original 2012 Judgment. Still, the State Legislative Assembly of J&K did not adopt any permanent legislation for women's equal rights in marriage and divorce.

The amendment of Article 370 ends the discrimination against women, empowers women with more equality and equal opportunities, and facilitates better access to justice as the Muslim Women (Protection of Rights on Marriage) Act prohibits the practice of instant triple Talaq, which is now applicable¹¹.

There is no discrimination in the case of employment based on residence. Under Article 16(3) of the Constitution of India, Parliament has the power to make any law in the case of employment or appointment to the office under the government with a prior requirement of residence for such employment or appointment. If by Article 35A, we give such power

¹⁰AIR 2003 J K 83, 2003 (1) JKJ 35

¹¹Women's Rights and the Jammu and Kashmir Reorganisation Act, 2019, http://www.ipcs.org/comm_select.php?articleNo=5639(last visited on December26, 2021).

to State Legislative Assembly, then it is not discrimination. It is for the protection and preservation of local interest and shows India's Federalism and diversity of the country.

3. Integrity: Constitution Provision

Article 1 of the Constitution of Jammu and Kashmir clearly says it is an integral part of India¹².

The preamble of the Constitution of India "*WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens.....*"¹³

Whereas Preamble of the Constitution of Jammu and Kashmir "*We, the people of the State of Jammu and Kashmir, having solemnly resolved, in pursuance of the accession of this State of India which took place on the twenty-sixth day of October 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof..*"¹⁴

The word 'Sovereign' is missing in the preamble of the Constitution. It means they have not considered themselves a free country, and there is a categorical acknowledgment in the Jammu and Kashmir Constitution that this Constitution is made to further define the existing relationship of the State with the Union of India as an integral part thereof. So the Constitution of Jammu and Kashmir clearly says it is an integral part of India.

Those who are the people of Jammu and Kashmir have not been called a citizens of Jammu and Kashmir by the Constitution of Jammu and Kashmir. They are called the resident there. It means Jammu and Kashmir are not independent; instead, it is the State of India. The question of Jammu and Kashmir is not related to an integral part of India but to the autonomy of Jammu and Kashmir.

4. Constitutional Mandate- Temporary & Transitional

In 1956 the constituent assembly of Jammu and Kashmir was dissolved after making the Constitution of Jammu and Kashmir, which took the final decision on the form of government the State of Jammu and Kashmir should adopt. One opinion on this is that by using Article 370, no law

¹² The Constitution of Jammu and Kashmir, 1957, art. 1.

¹³ The Constitution of India, 1950, Preamble.

¹⁴ The Constitution of Jammu and Kashmir, 1957, Preamble.

can be implemented in Kashmir because a constituent assembly does not exist. Another opinion is that Article 370 is not temporary. It can still be used today.

In the case of *Prem Nath Kaul v. State of Jammu and Kashmir*¹⁵, it held that Article 370 was temporary after considering the various issues. However, the subsequent judgment of *Sampat Prakash v. State of Jammu and Kashmir*¹⁶ reversed the position above recognizing Article 370 as a permanent provision giving perennial power to the President to regulate the relationship between the Union and the State and also held that neither the Constituent Assembly nor the President ever made any declaration that Article 370 has ceased to be operative. Moreover, this Court, in the case above, further held that in the light of the proviso to Article 368, the President under Article 370 is required to exercise his powers from time to time in order to bring into effect constitutional amendments in the State of Jammu and Kashmir, under Article 368".

Therefore, by the mechanism above, it cannot be said that Article 370 was temporary.

In *State Bank of India v. Santosh Gupta*¹⁷, after relying on the earlier decisions, this Court concluded that the Constitution of Jammu and Kashmir is subordinate to that of the Constitution of India. Temporary provision is when we give a time frame like we had given ten years in SC/ ST reservation or 15 years for English as the official language. When the time frame is not given in Article 370, then it is not constitutionally correct to call it temporary.

5. Special Status to Jammu And Kashmir

Article 370 of the Constitution of India, enacted in Part XXI, under Temporary and Transitional Provisions of the Constitution, confers special autonomous status to the State of Jammu and Kashmir and provides a constitutional link between India and the State of Jammu and Kashmir.

It says that other laws of India followed by the other States shall not apply in the State of Jammu and Kashmir, and the President shall decide with State Legislature which laws shall apply in Jammu and Kashmir...

As per Article 370(1), parliament has the power to make the law for Jammu and Kashmir only in defense, foreign affairs, and communication on the union's list and concurrent list, and the other matters; parliament can make laws only in consultation with State government.

¹⁵ AIR 1959 SC 749.

¹⁶ AIR 1970 SC 1118

¹⁷ (2017) 2 SCC 538.

Special status is not given only to Kashmir. However, similar provisions in the Constitution are listed in Articles 371 to 371J in Part XXI. In addition, there are twelve other States to which special status is given, i.e., Maharashtra, Gujarat, Nagaland, Assam, Manipur, Andhra Pradesh, Telangana, Sikkim, Mizoram, Arunachal Pradesh, Goa, and Karnataka. The intention behind them is to meet the aspiration of the people of backward regions of the States or protect the cultural and economic interests of the tribal people of the States or deal with the disturbed law and order conditions in some parts of the States, or to protect the interests of the local people of the States. Initially, the Constitution did not have any special provisions for these States. However, they have been incorporated by subsequent amendments made in the context of the reorganization of States or conferment of statehood on the Union Territories¹⁸.

Special status in a federal constitution does not consider a bad thing. Special status has been given to some districts in a State like West Bengal given to Darjeeling. Similarly, in Nagaland, the Act of Parliament would not apply to Nagaland if it is related to matters of religious or social practices of Nagas, Nagas customary law and procedure, administration of civil and criminal justice involving decisions according to Naga customary law, and ownership and transfer of land and its resources unless the State Legislative Assembly of Nagaland so decides¹⁹.

If this kind of autonomy is given to the States, then it is not a threat to the integrity of the country, but it keeps the country united as we have *Unity in diversity*, i.e., *Anekta m Ekta*. There may be different religions, laws, and languages in a country.

6. Article 370: Autonomy Provision

Article 370 gives more autonomy to India instead to Jammu and Kashmir. Using Article 370, we applied most of the parts of the Constitution of India in Jammu and Kashmir. The power of Parliament is given in Union List, which has 97 items on which Parliament can make laws. 94 out of 97 items, seven schedules out of 12 we had already applied in Jammu and Kashmir.

We can impose the President's rule only by one presidential order. In contrast, in other States, we must follow the procedure in Article 356.

¹⁸ M Laxmikanth, *Indian Polity* (McGraw Hill Education (India) Private Limited, Chennai, 6th edn.,2019).

¹⁹ The Constitution of India, 1950, art. 371A

Under Article 249²⁰, Parliament has the power to make laws concerning the matters in the State list only if the matter is of national interest. State Assembly has passed the resolution by a two-thirds majority for this. Nevertheless, in Kashmir, article 249 has applied only by the governor's order, which we cannot do in the case of the other State. Hence, it gives more autonomy to India as we can apply any law in Jammu and Kashmir by using Article 370 with only a president's order.

7. Legality of Instrument of Accession

According to the Indian Contract Act 1872, there are four essential elements required for a valid contract, i.e., offer acceptance, consideration, and contractual capacity. Furthermore, in the law of contract, the agreement does not need to be done in written form. It can be oral or written, but it is written so that we can easily prove this. When there is an agreement between two countries or a treaty, the International law principle *pactasuntservanda* will apply, which means "agreement must be kept."

Instrument of Accession is a contract between Jammu and Kashmir and India as Raja Hari Singh, in exchange for military help ready to accede to India with certain conditions, and if there is any violation, then the principle of breach of contract will apply. If the principle of breach of contract is applied, the parties will be restored to their original position. Moreover, if parties are restored to their original position, then Kashmir can become a question mark in being part of India. So we have to consider this point also²¹.

In Clause 5, Hari Singh explicitly stated that the terms of "*my Instrument of Accession cannot be varied by any amendment of the Act or of Indian Independence Act unless I accept such amendment by an Instrument supplementary to this Instrument.*" Moreover, IOA's Clause 7 stated that "*nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India.*" Clause 8 stated that nothing in the IoA shall affect "*the continuance of His sovereignty in and over the state.*"

The abrogation of Article 370 violated our promise of autonomy.

8. Constitutional Procedure for Amendment

There are two ways to amend or remove Article 370

²⁰ The Constitution of India, 1950, art. 249.

²¹Article 370 & Special Status of Kashmir: Myths and Legalities, *available at*: https://www.youtube.com/watch?v=pz3qACXl_gs (last visited on December26, 2021).

1. By procedure which is given in Article 370 itself
2. By a Constitutional Amendment under Article 368

Let us discuss both ways one by one:

8.1 By the Procedure which Article 370 states for its removal

Article 370(3) states that whenever a president wants, he can issue a public order or a public notification and say that Article 370 is not applicable or has ceased to be operative from today onwards. However, this order is subject to one condition, i.e., before issuing this order, he has to take permission from the Constituent Assembly of the State of Jammu and Kashmir. Furthermore, according to Article 370 (1) (c) and 370 (1) (d), the applicability of all other provisions of the Constitution other than Article 1 and 370 and amendment in the applicability of these provisions can be through a Presidential Order.

It means the recommendation of the Constituent Assembly of Jammu and Kashmir is required to declare Article 370 inoperative or operative only with such "exceptions" and "modifications" as may be specified. It can be amended only with the concurrence of the Constituent Assembly.

However, the Constituent Assembly of Jammu and Kashmir was dissolved in 1957, and it should be noted that Legislative Assembly and Constituent Assembly are two different things. It is the main deadlock because of which we cannot remove it.

C.O 272 seeks to amend Article 367, which interprets Article 370. It says that the word 'constituent assembly' used in article 370 will be known as the 'legislative assembly' of Jammu and Kashmir.

Home minister Amit Shah introduced a statutory resolution for the deletion of clause (2) and clause (3) of Article 370 on the ground that there is a president's rule in Jammu and Kashmir and has the consent of the governor, who is a representative of the Central government imply the consent of legislative assembly of Jammu and Kashmir. Accordingly, the government deleted Articles 370(2) and 370(3) and amended article 370(1) through this statutory resolution.

If we interpret the amended Articles 367 and 370(3) purposively, the concurrence of the legislative assembly, which is an elected body, cannot be substituted by the concurrence of the governor under the President's Rule.

The primary purpose of Article 356 is only to ensure governance in the State. It cannot implement decisions of a permanent nature that change the structure and status of the State under the framework of the Constitution when the State Government is not elected. Article 357(2) also strengthens the point, which states that any law made by Parliament or President or such other authority on behalf of the State during the pendency of Proclamation shall, "after the Proclamation has ceased to operate, continued in force until altered or amended or repealed by a competent State Legislature." Therefore it is clear that during the president's rule, permanent decisions cannot be implemented, and it is against the spirit of Article 370, which mandates the consent of the State Government before implementing a constitutional decision concerning Jammu and Kashmir²².

8.2 By the Constitutional Amendment: As per article 370(3), any amendment can be made to Article 370 through public notification. This public notification can be issued only after permission from the constituent assembly of Jammu and Kashmir. Permission from the constituent assembly is a pre-condition only when Article 370 is amended through a public notification²³. After the dissolution of the constituent assembly, we can say that the proviso of Article 370(3) has been made ineffective, and now it is similar to any other Constitutional provision. Moreover, it can be amended through a constitutional amendment under Article 368.

Article 368 of the Constitution gives the power to Parliament to amend any constitutional provision, and no constitutional provision can be considered permanent. It is further supported by the words of Article 368(1), which gives absolute powers to Parliament to amend any provision of the Constitution by way of *addition, variation, or repeal*²⁴

It is the most legally sound route to amend Article 370 instead of a statutory resolution, which was brought when there was no elected Legislative Assembly.

²²Kashish Mahajan, "The Abrogation of Article 370 and Bifurcation Of Jammu and Kashmir – A Bridge Too Far", https://ijcl.nalsar.ac.in/wp-content/uploads/2020/08/9IndianJConstL106_Mahajan.pdf.

²³The Article 370 amendments: will non-use of Article 368 prove costly, *available at*:<https://lawschoolpolicyreview.com/2019/10/25/the-article-370-amendments-will-non-use-of-article-368-prove-costly/>. (last visited on January 27, 2022).

²⁴The Constitution of India, 1950, art. 368.

Probably, this is the first instance where Parliament has used its legislative powers instead of constitutional powers to amend the constitutional provision. A constitutional amendment can only be passed by two-thirds majority in each house of Parliament, whereas a statutory resolution can be passed only by a simple majority²⁵.

8.3 Bifurcation of a State: Under Article 3 of the Constitution, Parliament has the power to "*form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;*"²⁶ but it is subject to the proviso that it required the consent of the Legislature of the State. Thus, it violates Article 3 if State were to be bifurcated without the consent of the State Legislature.

9. Conclusion & Suggestive Measures

After analyzing various aspects and possible interpretations of Article 370 and 35A of The Constitution, it is concluded that Article 370 is a bridge between Jammu and Kashmir and India, and it is not constitutionally right to call it temporary, as pointed out by the apex court. This bridge is necessary for maintaining the relations between India, Jammu, and Kashmir, but we cannot ignore the discrimination against women and the violation of the fundamental rights of the citizen. We have to find a middle ground so that the bridge can be maintained and discrimination can be eliminated. Even the method for removing Article 370 is not constitutionally valid as the Government of India did not follow the legitimate procedure for its removal, which is constitutionally valid.

In light of the above discussion, before the removal of Articles 370 and 35A of the Constitution Indian government needs to win the faith of the general public of Kashmir and create trust in general people who have been victims of the cross-border politics of India and Pakistan and victims of the abuse of human rights which includes mass killings, fake encounters, torture, rape, sexual abuse to control of freedom of speech which Army does, militant groups, etc. there is a need to assure them their fundamental rights will be protected even after removal.

²⁵The Article 370 amendments: will non-use of Article 368 prove costly, *available at*: <https://lawschoolpolicyreview.com/2019/10/25/the-article-370-amendments-will-non-use-of-article-368-prove-costly/>. (last visited on July 26, 2022).

²⁶ The Constitution of India, 1950, art. 3

The best solution for this is either Parliament to amend Article 35A by the president's order and annul all the discriminatory provisions or Parliament to extend the chapter of Fundamental Rights to Jammu and Kashmir by the president's order. As a result, all the discriminatory provisions will automatically be null and void.