

Abrogation of Article 370 and Its Constitutionality

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INTRODUCTION

Article 370 was created with a view that its existence would be temporary. The Ruler of J&K signed the Instrument of Accession whereby only three subjects were surrendered i.e. External affairs, Defence and Communications, by the state to the Dominion of India. The relationship between the state of J&K and the Union of India is exceptional. The state enjoys a greater measure of autonomy and the power of the Union of India is restricted, as regards other states. The Union of India is incompetent to declare financial emergency and emergency in case of failing of constitutional machinery with respect to the state of J&K. Only emergency due to war or external aggression can be declared as within the scope of defence as surrendered to Union of India.

In August 2019, three legal documents were executed by the Government of India which brought a tectonic shift in the status of Jammu and Kashmir (J&K) in India.

Firstly, the President issued an order withdrawing the special status of Jammu and Kashmir which had existed since 1954.

Secondly, the President issued another order essentially abrogating Article 370 of the Constitution.

Thirdly, Parliament passed a statute which carved up the state of Jammu and Kashmir into two Union Territories.

This was also accompanied by an unprecedented clampdown on civil liberties in J&K - telephone lines were suspended, the Internet was disabled so as to prevent a social media fomented uprising, and political leaders were placed under house arrest. This Research largely relies on the Constitutional validity of the government's decision to alter the status of J&K and it argues that the government's attempt to abrogate article 370 and convert it into union territories as unconstitutional. Since 1947, the basis of J&K's accession to India was that India wouldn't exceed the boundaries of Maharaja Hari Singh's Instrument of Accession without the consent of the people of J&K, or through their elected representatives. By not even consulting the leaders of Kashmir, let alone obtaining their concurrence, the President of India has violated the essence of Article 370 of the Constitution. Further by failing to obtain the views of the legislative assembly of the state in order to convert J&K into a Union Territory, now the Parliament has violated the spirit of Article 3 of the Constitution. In one sudden political strike, executed with surgical precision a year ago, the Government has abrogated the provisions of Article 370 and 35-A, that went against the core values of our Constitution. This very attempt to adduce a conclusive meaning of Article 370 is itself erroneous as it is not the special status of J&K but the Constitutional Position.

THE EROSION OF ARTICLE 370 – TEMPORARY PROVISION

In short when the Constitution of India was being prepared J&K was in an uncertain position. The U.N. Security Council was still seized of the dispute between India and Pakistan over Kashmir. India made a promise to the world that once the hostilities had ceased and the raiders had been repelled from Kashmir, a plebiscite would be held there by which the people of J&K would decide which side to join. However, the process of drafting and finalizing the Constitution of Independent India could not be temporary had to be put into the constitution concerning J&K. The underlying understanding always was, however, that the Indian government would not exercise powers over the state without the consent of its people. Importantly Ayyangar pointed out that India had agreed “that the will of the people, through the instrument of a constituent assembly, will determine the constitution of the state as well as the sphere of Union jurisdiction over the state”. In other words, it was the people of Kashmir, speaking through a constituent assembly, who would determine the extent of India’s power over Kashmir. Ayyangar reiterated that a plebiscite would be held in Kashmir “provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be guaranteed”.

Parliament’s Legislative Power

Firstly, that India wouldn’t exceed the powers which had been given to it in the Instrument of Accession to legislate over the three enumerated subjects without the “concurrence” (i.e., consent) of the government of J&K. If India wanted to legislate for J&K on topics covered by the Instrument of Accession, it would only have to ‘consult’ the government, but if it wanted to go beyond those subjects, it required the concurrence of the Government. The Government of J&K was the Maharaja acting on the advice of the council of Ministers “for the time being in force” under the Maharaja’s proclamation of March 1948. Sheikh Abdullah wanted the word “appointed” to be used instead of “for the time being in force” in Article 370. That would have meant that India’s parliament would not be able to legislate on subjects outside the Instrument of Accession without the concurrence of Sheikh Abdullah and his fellow ministers. Instead, Article 370 now said that even if Abdullah and his cabinet ceased to be in power, the concurrence of the new state government could be obtained for India’s parliament to legislate on matters outside the Instrument of Accession. As it turned out, Abdullah was dismissed as Prime Minister and arrested in 1953, when it looked like he would declare J&K’s independence from India.

Applicability of the Constitution

Secondly, except for Article 1 of the Constitution (which described India as a Union of states) and Article 370, no part of the constitution (including the fundamental rights and directive principles) applied to J&K. If India’s President wanted to make parts of the Constitution that dealt with matters other than defence, external affairs and communication apply to J&K, he required the “concurrence” of the “government” of J&K. This clause “excludes altogether”, wrote President Rajendra Prasad, “the Parliament of India from having any say regarding the constitution of Jammu and Kashmir”. The President could also make parts of the Indian Constitution apply to J&K with “exceptions and modification”. Prasad also wrote to Nehru later on that this involved “an amendment by executive order of the Constitution in relation to the state of Jammu and Kashmir.”

JUDICIAL INTERPRETATIONS – ARTICLE 370

The Supreme court has held that the President’s power to apply the Indian Constitution to J&K with suitable modifications under Article 370 includes the power to radically amend the constitution as far as it applies to that state.

1. In Puranlal Lakhanpal v. President of India¹

The Petitioner challenged a provision of the 1954 Presidential order which modified Article 81 of the Indian Constitution in its application to J&K. Article 81 provides that members of the Lok sabha are to be directed by the people of India. However, the 1954 order said that representatives of J&K would be nominated to the Lok sabha on the basis of a recommendation made by the legislature of J&K, i.e., a process of Indirect Elections. The petitioner argued before the Supreme court that the President’s power to apply the Indian Constitution to J&K didn’t give him the power to radically transform the Constitution. Rejecting this argument, the Supreme court held that Article 370 was to be given the “widest possible amplitude”. Under it the President could “efface” a provision and could also amend it radically.

2. P.L.Lakhanpal v. State of J&K²

The Petitioner was aggrieved by the fact that he was not informed by the authorities why he had been arrested under a Preventive detention statute. This was possible because of Article 35 (c) which had been inserted by the President into the Indian Constitution only as far as it applied to J&K. This provision said that a preventive detention statute in J&K could not be challenged on the grounds that it violated a fundamental right under the Indian Constitution. The Supreme Court held that the insertion of this provision into the Constitution in its application to the state was consistent with the President’s powers under Article 370.

3. Prem Nath Kaul v. State of J&K³

The Supreme Court held that “the Constitution- makers attached great importance to the final decision of the constituent assembly” and held that the President’s powers under Article 370 could only be continued if the constituent assembly of J&K gave its “final approval” for him to do so.

4. Sampat Prakash v. State of J&K⁴

The Court held that since the constituent assembly of J&K had not expressly put an end to Article 370 it would be considered as operational even after the Constitution of J&K came into being and the constituent assembly was dissolved. In that case, the petitioner argued that orders issued by the President under Article 370 of the Constitution in 1959 and 1964 were unconstitutional because Article 370 ceased to have effect once the constituent assembly of J&K was dissolved. The court held that Article 370 did not cease to operate after the constituent assembly of J&K had framed the state’s Constitution. This was because Article 370(3) provided that Article 370 would only cease to

¹AIR 1961 SC 1519 (SCC Online version)

²AIR 1956 SC 197

³AIR 1959 SC 749 (SCC Online version) (5 Judges)

⁴AIR 1970 SC 1118 (SCC Online version) (5 Judges)

operate if the President made an order to do so on the recommendation of the constituent assembly of J&K. On the contrary, the constituent assembly had recommended that Article 370 should continue to operate with only one modification, i.e., that the word “Maharaja” in the explanation be replaced with the word “Sardar-i-Riyasat”.

5. Mohd. Maqbool Damnoo v. State of Jammu and Kashmir⁵

An Interesting question that came up before the Supreme Court, On 24 November 1965, the president issued an order under Article 370 of the Constitution which amended Article 367, the definition clause of the Constitution. The amendment sought to change the meaning of “Sardar-i-Riyasat” in the explanation to Article 370 to “Governor”. Whereas Article 370(3) required the constituent assembly of J&K to recommend any modification of Article 370. The petitioner in this case argued that the presidential order was unconstitutional since it was issued without the recommendation of the constituent assembly of J&K, and that it sought to achieve by the “back-door” (i.e., by an amendment of Article 367) what could not be done through the front door (i.e., an amendment of the Explanation of Article 370 without the recommendation of the constituent assembly of J&K).

The court rejected the argument and held that since the office of “Sardar-i-Riyasat” had ceased to exist in J&K, the Explanation to Article 370 had become otiose, and the Presidential order only sought to clarify something that the court would have held through an interpretive exercise anyway, i.e., that the Governor was the successor to the “Sardar-i-Riyasat”, and that any reference in the Constitution to Sardar-i-Riyasat would have to be taken as being a reference to the “Governor” of J&K. Importantly, however, the court held that it was “not concerned with the question whether Article 370(3) can now be utilized to amend the provisions of Article 370(1) and (2) and it therefore didn’t “Express any opinion on that”.

6. State Bank of India v. Santhosh Gupta⁶

The Supreme court held that the State of J&K had “no vestige of sovereignty outside the Constitution of India” and that the J&K Constitution was subordinate to India’s Constitution. However, the court reiterated that the president cannot issue an order ceasing to make Article 370 operative without the recommendation of the Constituent Assembly of J&K.

THE AUGUST 2019 AMENDMENTS

In August 2019, three legal documents were executed by the Government of India which brought about a tectonic shift in the status of Jammu and Kashmir in India.

1. THE CONSTITUENT ASSEMBLY OF THE STATE IS SUCCEEDED BY THE STATE LEGISLATURE.

⁵(1972) 1 SCC 536

⁶(2017) 2 SCC 538.

It has been argued that the actions of the government are unconstitutional because the President didn't obtain the recommendation of the Constituent Assembly of J&K to modify the definition of "Constituent Assembly of the State" in the proviso to Article 370(3) of the Constitution. The argument goes that C.O.272, which sought to change the definition of "Constituent Assembly of the State" of J&K in Article 370(3) of the Constitution by adding a clause to Article 367 of the Constitution is illegal. Article 370(3) says that Article 370 itself cannot be modified without the recommendation. However this argument is untenable in the light of what the Supreme Court held in *Damnoo's case*⁷. Recall that there, the supreme court had allowed the Explanation to Article 370 to be altered in a similar manner when the word "Sardar-i-Riyasat" was changed to mean "Governor". In that case, relying on Section 18 of the General Clauses Act, the court had held that the office of "Sardar- i- Riyasat itself had ceased to be functional and had been replaced by the Governor. Since the explanation in Article 370 had become otiose, the President had only clarified that the successor to the office, i.e., the Governor, would take over the functioning of the Sardar-I- Riyasat. Similarly, the constituent assembly of the state of J&K, referred to in the proviso to Article 370(3), has now been dissolved. It is the ordinary state legislature of J&K which exercises the power, under Article 147 of the J&K Constitution, to amend that Constitution. Therefore, the state legislature is the successor of the Constituent Assembly of J&K. As such, C.O.272 is not unconstitutional for this reason.

2. NO CONSENT OF THE PEOPLE

However, since October 1947, the underlying understanding between India and J&K was that the Instrument of Accession was the basis of J&K's accession to India and that no change would be made to it without the consent of the people. In the early years, Indian leaders had gone so far as to suggest that a plebiscite would be held wherein the people in Kashmir would be given the right to decide to even secede from the Union of India. Though a plebiscite is no longer feasible, the underlying motive force of Article 370 was that no fundamental constitutional change would be brought about in J&K without the 'concurrence' of its people or through their elected representatives. Through a process of clever drafting, the government of India has radically altered the constitutional position of J&K without so much as consulting her elected representatives. For this reason, the President's declaration under C.O.273 which relies on the resolutions of both houses of parliament instead of the state legislature of J&K, violates the spirit of Article 370 of the Constitution.

3. CONVERTING A STATE INTO AN UNION TERRITORY

It is been argued that converting a state into a Union territory is impermissible. Normally, states in India have a tenuous existence. Article 3 of the Constitution gives parliament the power to "form a new (Union Territory) by separation of territory from any state", to diminish the area of any state", to "alter the boundaries of any state and to alter the name of any state". It is for this reason that the Supreme Court has said that India is an indestructible Union destructible unit. The court has also held that Parliament cannot merely change the boundaries of a state but also 'extinguish a state'.⁸

⁷(1972) 1 SCC 536

⁸*Kuldip Nayar v. Union of India* (2006) 7 SCC 1 (Para. 71)

However, under the 1954 Presidential order, before exercising any powers under Article 3 of the Constitution in J&K, Parliament was required to secure the consent of the state legislature there. Once again, in repealing the 1954 order without the concurrence of the state legislature, the President has violated the spirit of Article 370 of the Constitution. Even in the absence of the 1954 order, as far as states other than J&K are concerned, Article 3 of the Constitution requires Parliament to obtain the views of the state legislature before doing any of the above.⁹ Since J&K was under President's rule, Parliament in effect did not have to take into account public opinion in J&K at all in order to carry out the drastic changes under Article 3 of the Constitution. This is also against the spirit of the provision.

CONCLUSION

The actions of the government in abrogating Article 370 and in changing the status of Jammu and Kashmir has been challenged before the Supreme court. The apex court now has the task of deciding whether Article 370 of the Constitution can be abrogated without the concurrence of the elected representatives of J&K, and only on the consent of Parliament while the state is under President's rule. If this impugned constitutional order and impugned act is upheld, India can be reduced into a Union of union territory rather than a state as a whole merely by parliamentary legislations, which is neither permitted by the text nor the spirit of the constitution.

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⁹Babulal Parate v. State of Bombay, AIR 1960 SC 51.