

INTRODUCTION

Article 370 of the Indian Constitution signifies the special relation that the State of Jammu and Kashmir shares with the Union of India. By virtue of Article 370 Jammu and Kashmir was allowed to have special powers within the Union. The provision set out the extent of applicability of the laws followed by the rest of India on the State of Jammu and Kashmir. In August, 2019 the Indian Government revoked the special status of the State leading to an alteration of the federal position of the state with respect to the Centre. Therefore, this paper seeks to assess the implications of the abrogation of Article 370 on the State of Jammu and Kashmir's federal relations with the Centre.

The author has divided the paper into two parts. Part I of the paper deals with the examination of the relation between the Indian federal units and the Union. The study seeks to reveal the true nature of Indian Federalism vis-à-vis its unitary tendencies and its asymmetric relation with its distinctive units within the Union. Secondly, the relationship of the erstwhile Jammu and Kashmir with the Union of India has been examined to understand the true nature and meaning of Article 370¹ read with other Constitutional Provisions, keeping in mind the relevant Historical Context.

Part II of the paper examines the Constitutional legality of the Procedure adopted by the Centre for abolition of Article 370. Secondly, the author looks into the larger Implications that follow after the removal of Article 370 on the Federal Structure of India so as to determine whether this move has weakened the federal structure or not. This is achieved by the study of 'Jammu and Kashmir Reorganisation Act, 2019'² and its effect on the future of erstwhile Jammu and Kashmir including the new Union Territory of Ladakh.

The paper ends by analysing the impact of the removal of Article 370 on the future of Federalism in India, and the way forward.

PART I:

BACKGROUND AND IMPORTANT LEGAL PROVISIONS

A. NATURE OF INDIAN FEDERALISM

¹ The Constitution of India, art. 370.

² THE JAMMU AND KASHMIR REORGANISATION ACT, 2019 (ACT. 34 OF 2019).

The concept of Federalism means Governments at two levels i.e. Centre and State with a clear division of legislative and executive roles.³ Every nation has a different kind of federal structure, which is reflective of its history and political reality.⁴ Similarly, India has its own version of federalism primarily based on the backdrop of the British Raj and the partition of 1947.⁵ To understand the relation of India with Jammu and Kashmir and the essence of Article 370 it is important to understand the nature of Federalism that the Constitution of India has set out for the country.

It is a settled point in Constitutional Law that federalism is a part of the Basic Structure Doctrine.⁶ The Constitution of India gives out the division of powers between Centre and State.⁷ The division that the Constitution makes is not equal, rather there is a tilt towards the Centre in terms of powers granted, and therefore, the federal structure of India is defined as a ‘quasi-federal’ system.⁸ This however does not mean that the Constitution is unitary, it has been clearly laid down by the Apex Court that the ‘States are not mere appendages of the Centre’ and in the spheres allotted to the States they are Supreme.⁹ The Centre has been given certain overriding powers to deal with exigencies or situations that have been clearly defined in the Constitution.¹⁰ The clear wordings of the Constitution deny the Centre to make unwarranted or uncalled for interference in the powers reserved for the States.¹¹ The father of the Constitution Dr. B.R. Ambedkar described the Indian Constitution as both unitary and federal depending on the requirements of time and circumstances.¹² Therefore, it can be concluded that the federal structure envisaged by the Constitution creates a tilt towards the Centre so as to be classified as ‘quasi-federal’, but such powers with the Centre can only be exercised in situations and via procedure provided in the Constitution.

The second important feature of Indian federal structure is that it is an ‘asymmetric’ federal structure.¹³ This is due to the Union having a separate set of relations with certain distinct federal units as compared to others.¹⁴ This asymmetry of relations is enshrined in the

³ *State (NCT of Delhi) v. Union of India and Anr.*, 2018 8 SCC 501.

⁴ *Jindal Stainless Steel Limited v. State of Haryana*, 2017 12 SCC 1.

⁵ *Prem Nath Kaul v. State of Jammu and Kashmir*, AIR 1959 SC 749.

⁶ *S.R. Bommai v. Union of India*, 1994 3 SCC 1.

⁷ *International Tourist Corporation v. State of Haryana*, 1981 AIR 774.

⁸ *Kuldip Nayar v. Union of India*, 2006 7 SCC 1.

⁹ *S.R. Bommai v. Union of India*, 1994 3 SCC 1.

¹⁰ *State (NCT of Delhi) v. Union of India and Anr.*, 2018 8 SCC 501.

¹¹ The Constitution of India, art. 246 r/w Schedule VII

¹² *Shamsher Singh v. State of Punjab*, 1974 2 SCC 831.

¹³ Sonia Dasgupta, “Article 370: An Example of Asymmetrical Federalism”, 11 *NUALS L.J.*, 27 (2017).

¹⁴ The Constitution of India, Part XXI.

Constitution by way of States that have a special status under it which is due to its distinct identity seen along with other multiplicity of factors.¹⁵ These asymmetrical states are granted certain special rights under the Constitution for governance and there are prescribed procedures to take away such rights along with the circumstances of imposition of Governance by the Centre.¹⁶ Kashmir is a prime example of an asymmetric federal unit.

It is important to observe that amendment to the rights of the asymmetric regions have to follow the Constitutional Mandate. These regions are also supreme in the functions and role allocated to them via the Constitution and any infringement by the Centre will have to pass the test of Constitutionality. It is therefore concluded that the nature of Indian Federalism is Quasi-Federal and Asymmetrical subject to the Provisions of the Constitution.

B. RELATION OF JAMMU AND KASHMIR WITH THE UNION OF INDIA.

The relationship between Jammu and Kashmir with the Union of India has always been delicate and complex. Geographically, the Kashmir Valley is neighbours with Pakistan whilst being a predominantly Muslim area, whereas Jammu contains a majority of Hindus. Therefore, the State of J & K assumes great importance in the context of India and Pakistan both. The relation of Jammu and Kashmir with the Indian Union can be divided into three major heads:

(i) Historical

The Indian Independence Act of 1947 created two dominions out of the erstwhile British Empire being India and Pakistan.¹⁷ The princely states under the British were given the option of joining either of the two dominions or acceding to form a new dominion of their own.¹⁸ As the new Constitution had not come into being during the above-mentioned period, the Government of India Act, 1935 was made applicable during this transitional phase subject to conditions by virtue of the Indian Independence Act, 1947.¹⁹ The Governor General of India exercising his powers

¹⁵ Micheal Burgess, *Comparative Federalism: Theory and Practice*, 209 (rev. edition., 2006).

¹⁶ The Constitution of India, Part XXI.

¹⁷ Indian Independence Act of 1947, s. 1(1).

¹⁸ Indian Independence Act of 1947, s. 7 (1)(b).

¹⁹ Indian Independence Act of 1947, s. 8.

under the Indian Independence act executed the India (Provisional Constitution) Order, 1947²⁰ making certain that certain sections of the Government of India Act, 1935 applies to the Dominion of India. Under the Government of India Act by virtue of Section 6 the Princely states could have joined the Indian Union by execution of the Instrument of Accession.²¹ On 15th August, 1947 India attained Independence, at the time of which Jammu and Kashmir had not joined the Indian Union.

Instrument of Accession

The Instrument of Accession was signed by Maharaj Hari Singh on 26th October, 1947 containing the following important clauses:

- (a) The Union of India will only have legislative powers for Defence, External Affairs and Communication in the State of Jammu and Kashmir.²²
- (b) It prescribes the amendment procedure of the Instrument by a supplementary instrument to be accepted by the Maharaj.²³
- (c) Nothing in the Instrument could have been deemed to be an acceptance of any future Constitution.²⁴
- (d) The Instrument envisaged the Sovereignty of the State.²⁵

In January of 1949 the first war against Pakistan took place. Subsequently in June of the same year, the state had then under the next ruler Yuvraj Karan Singh, nominated four representatives of the state to the Constituent Assembly which then, after deliberation adopted Article 370 as part of the Constitution so as to govern the relations between Jammu and Kashmir vis-à-vis the Union.²⁶

(ii) Constitutional Provisions along with Judicial Precedents

Article 370

Article 370 of the Indian Constitution was enacted under Part XXI of the Indian Constitution which reads as, “*Temporary, Transitional and Special Provisions*”.²⁷ Article 370 gave limited

²⁰ Provisional (Constitution) Order, 1947.

²¹ Government of India Act, 1935, s. 6.

²² Instrument of Accession of Jammu and Kashmir, 1947, Schedule.

²³ Instrument of Accession of Jammu and Kashmir, 1947, cl. 5.

²⁴ Instrument of Accession of Jammu and Kashmir, 1947, cl. 7.

²⁵ Instrument of Accession of Jammu and Kashmir, 1947, cl. 8.

²⁶ *Prem Nath Kaul v. State of Jammu and Kashmir*, AIR 1959 SC 749.

²⁷ Constitution of India, 1950, Part XXI.

autonomy to the State of Jammu and Kashmir vis-à-vis the Centre. The salient features of the relation between the State of Jammu and Kashmir and the Centre are:

- (i) The Parliament can legislate on matters in the Union and Concurrent List in consultation with the Government of the State and via a declaration by the President of India with regard to matters specified in the Instrument of Accession.²⁸
- (ii) Legislative powers of the Parliament with respect to matters other than those mentioned in the Union and Concurrent List could be exercised by the Union with the “concurrence” of the State via a declaration by the President of India²⁹
- (iii) The provision of Article 1 shall be applicable to the State.³⁰
- (iv) Provisions of the Constitution maybe made applicable to the State with certain ‘exceptions’ and ‘modifications’ as the President may by order specify, provided the State Government gives its concurrence.³¹

The Supreme Court has had very limited opportunities to examine Article 370. In *Puranlal Lakhanpal v. President of India*³² the Supreme Court opined that the word ‘modification’ in Article 370 should be given the widest meaning possible, including amendments with respect to application in Jammu and Kashmir. The court held that the word modification must not be limited to such modifications that do not make any “radical transformations”.

- (v) Importantly, cl. (3) of the article provides the methodology to remove Article 370 i.e. reproduced, “*Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify: Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification*”³³

In the most important judicial precedent on Article 370 i.e. *Sampath Prakash v State of Jammu and Kashmir*³⁴ an issue was raised questioning the temporary nature of the Article:

²⁸ Constitution of India, 1950, Art. 370 (1) (b) (i).

²⁹ Constitution of India, 1950, 370 Art. (1) (b) (ii).

³⁰ Constitution of India, 1950, Art. 370 (1) (c).

³¹ Constitution of India, 1950, Art. 370 (1) (d).

³² *Puranlal Lakhanpal v. Union Of India*, 1958 1 SCR 460.

³³ Constitution of India, 1950, Art. 370 (3).

the argument advanced was that, since the dissolution of the Constituent Assembly of the State, the Article has ceased to be operative. The court in this regard held:

“Article 370(3) envisages that the Article will continue to be operative until and can cease to be operative only if, on the recommendation of the Constituent Assembly of the State, the President makes a direction to that effect. In the situation under consideration, no such recommendation was made nor was any order made by the President. On the contrary, the Constituent Assembly of the State made a recommendation that the Article should be operative with a modified Explanation. Therefore, the Article did not cease to be operative.”

Constitution (Application to Jammu and Kashmir) Order, 1954

After the adoption of Article 370, the President had exercised his powers under Art. 370 (1) by virtue of the Constitution (Application to Jammu and Kashmir) Order, 1954.³⁵ The order sets out the exceptions, modifications and modalities of the application that the Indian Constitution will have on the State of Jammu and Kashmir. The provision important in terms of the scope of the research paper is the Application of Article 3 of the Indian Constitution which gives the Parliament the power to *“Form new States and alter areas, boundaries or names of existing State”* which is set out as follows in Cl. (2) of the order adding a proviso to the original Article 3 i.e., *“Provided further that no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State.”*³⁶

Article 367

The next crucial Constitutional provision that needs to be studied comes in the form of Article 367,³⁷ which contains general rules for the interpretation of the Constitution. Originally, under Article 370 the Government of the state was to mean the ,*“the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja’s*

³⁴ *Sampath Prakash v. State of Jammu and Kashmir*, 1970 AIR 1118.

³⁵ Constitution (Application to Jammu and Kashmir) Order, 1954.

³⁶ Constitution (Application to Jammu and Kashmir) Order, 1954, cl. 2.

³⁷ Constitution of India, 1950, Article 367.

*Proclamation dated the fifth day of March, 1948.*³⁸ Subsequently, this was modified under the provision of A. 370 (3) via a public order in 1952 to mean the following, “*references to the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office*”³⁹ In 1965 the word “*sadar-I-riyasat*” was substituted to mean “*Governor*” of the State and references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers.⁴⁰ In 1972, the Supreme Court held in the case of *Mohd. Maqbool Damnoo*⁴¹ that as the Sadar-i-riyasat was no longer existent it must be replaced by the Governor of the State for giving concurrence with regard to Article 370 (1) and (2). On the question of Article 370 (3) the court held, “*We are not concerned with the question whether art. 370(3) can now be utilised to amend the provisions of art. 370(1) and (2), and therefore we do not express any opinion on that point.*”

Most recently in *SBI v. Santosh Gupta*⁴² it was held that Jammu and Kashmir was a part of the Indian Federal structure and even though Article 370 is temporary, the President cannot abrogate the same without the recommendation of the Constituent Assembly.

PART II

ABROGATION OF ARTICLE 370 AND FEDERALISM

A. PROCEDURE ADOPTED FOR ABROGATION OF ARTICLE 370

The abrogation of Article 370 has been one of the most controversial moves by any Government in the political history of India. The move is shrouded with constitutional issues. A chronological set of events that occurred leading up to the abrogation of Article 370 is set out below to analyse and establish the Constitutionality of the move.

(i) Emergency in State of Jammu and Kashmir

The State of Jammu and Kashmir was put under the Governor’s rule on 20.06.2018 post the resignation of the erstwhile Chief Minister on 19.06.2018, subsequently due to no political

³⁸ Constitution of India, 1950, Article 370 (1) Explanation clause.

³⁹ Constitution (Application to Jammu and Kashmir) Order, 1954, cl. 4 (aa).

⁴⁰ Constitution (Application to Jammu and Kashmir) Order, 1965.

⁴¹ *Mohd. Maqbool Damnoo v. State of Jammu and Kashmir*, 1972 AIR 963.

⁴² *SBI v. Santosh Gupta*, (2017) 2 SCC 538.

party thereafter forming a majority in the Legislature. Elections could not be held in the state after the expiration of the 6 month period, therefore, via a proclamation under Art. 356, the Presidents rule was imposed on 19.12.2018.

Therefore, the State of Jammu and Kashmir was effectively under the President's Rule during the time of the Presidential Order C.O. No. 273 that abrogated article 370.

(ii) Amendment to Article 367

Article 367 shares a special relation with Article 370 (3) which is that the erstwhile process to abrogate Article 370 required the recommendation of the Constituent Assembly of the State. On 05.08.2019 the President of India, vide Article 370 (1) (d), issued the Constitution (Application to Jammu and Kashmir) Order, 2019 to amend Article 367 by virtue of S. 2 (d) of the said order i.e., "*(d) in proviso to clause (3) of article 370 of this Constitution, the expression "Constituent Assembly of the State referred to in clause (2)" shall read "Legislative Assembly of the State."*"⁴³

At this juncture, it is pertinent to note that the powers of the Legislative Assembly of J&K, at the time of the emergency, were vested in the Parliament.⁴⁴ Therefore, the recommendation of the Parliament which had now stepped into the shoes of the Legislative Assembly was taken and Presidential order given to execute the declaration under Article 370 (3).

It is argued that though constitutionally the act seems in line with the Provision of Article 370 due to the following reasons:

1. In the duration of the Presidents Rule the powers of the Legislative Assembly of the State stood transferred to the Governor of the State.
2. The requirement of the Constituent Assembly was amended to mean Legislative Assembly of the State.

⁴³ Constitution (Application to Jammu and Kashmir) Order, 2019, cl. 4 (d).

⁴⁴ Constitution of India, Art. 356 (1)(b).

3. By virtue of the amendment the requirement of the Constituent Assembly in the erstwhile 370 (3) did not exist ipso facto nullifying the judicial precedents based on the former Article 370 (3).
4. In *SBI v. Santosh Gupta*⁴⁵ the Court categorically held that, “*the State of Jammu & Kashmir has no vestige of sovereignty outside the Constitution of India and its own Constitution, which is subordinate to the Constitution of India.*”

B. IMPACT ON THE FEDERAL SYSTEM

(i) Distrust within Asymmetrical Federal Units.

The federal structure in India has been discussed in part I of the paper. It is concluded that the Indian federal system has a tilt towards the centre while being asymmetric in nature. Firstly, it is argued that the move of abrogation of Article 370 will create federal distrust among the units. With regard to Article 370, the Union having brute majority had amended all the Constitutional constraints that hampered the abrogation of Article 370 by amending Article 367 and implementing Article 370 (3) during a period of Emergency in the State.

All Amendments were passed through the Parliament which goes to show that a majoritarian government at the Centre can within one day change the federal status of a State. It is due to certain characteristics that states that are accorded a special status under the Constitution. Usually, these asymmetrical states are given a special status as a result of a struggle or an agreement with the Centre. Now, the move creates an environment of distrust between the Union and other states under the Constitution that have been accorded a special status and the fear that they can be reduced to a Union Territory.

The move has shown the fragility of the Indian federal structure and the extent of power that a majoritarian government at the Centre carries with regard to changing the position of a state.

(ii) Centralisation of Power

By virtue of the Jammu and Kashmir Reorganisation Act, 2019 the centre has reduced the erstwhile State of Jammu and Kashmir into Union Territories. The same has two implications:

⁴⁵ *SBI v. Santosh Gupta*, (2017) 2 SCC 538.

- (i) That the Union Territories of Jammu and Kashmir and a new Union Territory of Ladakh come directly under the control of the Centre.
- (ii) Secondly, it is important to note that the new Union Territories are governed by a mere legislation rather than a Constitutional Provision.
- (iii) By virtue of governance via an ordinary legislation, the area is left at the mercy of the Central Government that changes can be made by a mere ordinance by-passing the Amendment procedure under Article 368.

CONCLUSION:

The move of Removing Article 370, though procedurally correct, has wide implications on the federal structure. The centre has reduced the State of Jammu and Kashmir to a mere Union territory, thereby exercising direct control over the territory. Though the centre has cited reasons of terrorism and extending constitutional benefits to the State behind the unprecedented act, it seems to beckon the argument that the Centre could have achieved the same by letting Jammu and Kashmir retain its position as a State leading to it being wholly integrated into the Union of India with the autonomy and powers that are exercised by States.

It is understandable that the change in Article 367 to change the recommendation of Constituent Assembly to Legislative Assembly had to be done due to the non-existence of the former and the temporary nature of Article 370, but the removal in an ideal situation should have been done by the Legislative Assembly even though it meant waiting until the Emergency is over which would have meant actual concurrence and the trust of the State. It is the submission of the author that the move of the Government is procedurally correct but it has shown the weakness of Indian Federalism and the strong tilt towards the centre. It is now upon the Centre to build trust amongst the erstwhile State of Jammu and Kashmir.