

India Amends Article 370: A Constitutional Perspective

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Summary

The government of India, which through complex legal manoeuvring, has done away with the special status provided to the state of Jammu and Kashmir after the Instrument of Accession was signed in 1947. The government has amended Article 370, reconstituted the state in two union territories and ensured the state's total integration with the Indian parliament and its laws.

The government of India has taken some resolute steps to end the special status of the state of Jammu and Kashmir, became an integral part of the Union of India on 26 October 1947 through an instrument of Accession, which was executed by the then ruler of the province, Maharaja Hari Singh. The state had its own constitution and framed its own laws except in the areas of defence, external affairs and communications. Unlike other states of the Union, it also had its own penal code, and separate laws for transfer of property, inheritance, personal laws, Right to Information etc. Many of the items in the Union and Concurrent list applied to J&K also, but parliament needed the state legislature to ratify them.

The J & K state drew this mandate from Article 370 of the constitution of India, which was introduced in 1949. By moving resolutions, in the Rajya Sabha on 5 August 2019 and the Lok Sabha on 6 August 2019, the government has leveraged the provisions of Article 370 itself which gave special status and more autonomy to the state, to scrap Article 35A which gave special privileges to the permanent residents of the state. The resolution struck off all but one of the existing clauses of the Article 370 which gave special exceptions to the state. The only clause retained was one that said that all provisions of the constitution would apply to the state¹.

Article 370(3) read: "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 the recommendation of the constituent assembly referred to in clause (2) shall be necessary before the President issues such notification." Taking recourse to this provision, the government undertook a two-step process:

¹ New Art.370. "All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmirhaving the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under Article 363 or otherwise".

1. It first issued a presidential proclamation, called the Constitution (Application to J&K Order) 2019, superseding the Constitution (Application to J&K Order) 1954. The proclamation included two further provisions:
 - a. Added a clause to Article 367 (clause 4). This clause replaces the expression "constituent assembly" of the state with "Legislative assembly" and states that any reference to the state assembly shall also be construed to be a reference to the Governor. This clause enabled the Union government to bypass concurrence of the state legislature for the landmark changes introduced on 5 August. and,
 - b. The order supersedes Constitution (Application to J&K Order) 1954, effectively nullifying Article 35A which empowered the state government to define permanent residents, giving them special rights and privileges.
2. The government then moved a resolution for the President to issue a notification that would amend Article 370, using the Article's own clause 3, (the 'kill button') to state that all provisions of the Indian constitution will now apply to the state of J&K, irrespective of the state's own constitution or, "any other instrument, treaty or agreement". This was necessary since, as per Article 370(3), the recommendation of the Constituent Assembly was necessary. The amendment to Article 367, ensured that the Governor could be counted as the state, on whose recommendation the new Presidential order was issued.

The amendment of Article 370 brings J & K completely under Indian Law, as opposed to only the functions of defence, external affairs and communications being under it, as per the Instrument of Accession. Article 35A also stands nullified.

The Parliament has also passed the Jammu & Kashmir (Reorganisation) Bill, 2019, which reconstitutes the state into two Union Territories. There will be the Jammu and Kashmir Union territory with a Legislative Assembly (as in Delhi and Puducherry) and the Union Territory of Ladakh, which will not have an Assembly. The Bill also provides for delimitation of parliamentary and assembly constituencies in the newly created union territory of J&K. The Governor of J&K has been designated as the Lieutenant Governor of the two territories.

The practical repercussions of this would now be that J & K will neither have a flag nor constitution of its own. The Indian Penal Code will replace the Ranbir Penal Code which was prevalent in that territory. All the state's laws, including those that pertain to land, property and inheritance, will be nullified and all laws passed by parliament will now be applicable, including those that pertain to reservation for economically weaker sections and instant *talaq*². The J&K legislature will continue to make some laws. However, certain subjects will be with the central government to legislate on, such as land, law and order as it is for the Delhi government.

There is likely to be an electoral impact of the bifurcation of J&K also. BJP's electoral support is skewed towards the Jammu region. The promise of abrogating Article 370 is likely to further consolidate the Hindu vote in BJP's favour. If a delimitation exercise

²The Arabic word for divorce used by Muslim men in India to divorce their wives if said three times.

were to redraw assembly boundaries in this region such that the proportion of Hindu population increases in some of the non-Hindu majority constituencies, the BJP could gain in some of these dozen odd constituencies. Another possibility is that the delimitation exercise reduces seats in the Kashmir region and increases them in the Jammu region.

While there seems to be fairly widespread support for the actions taken by government since what was a “Temporary Provision” had stayed far too long, thereby in some ways alienating the local population and retarding development activities, the legality of the process seems to be under question. From a constitutional law perspective there are bound to be interesting challenges in Courts.

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