

# Supreme Court of India Upholds Abrogation of Article 370

Vinod Rai



## Summary

*A Constitution Bench of the Supreme Court of India unanimously upheld the power of the President to abrogate Article 370 of the Constitution, which, in August 2019, led to the reorganisation of the state of Jammu and Kashmir (J&K) into two Union Territories and denuded it of its special privileges. It held that Article 370 was only a ‘temporary provision’ to ease the accession of the then princely State to the Union at a time of internal strife and war.*

## Introduction

The Indian Supreme Court pronounced its verdict on 11 December 2023 on a batch of 23 petitions that challenged the abrogation of Article 370 of the Constitution in 2019.<sup>1</sup> In August and September this year, a five-judge constitution bench, headed by the Chief Justice of India, heard the petitioners and the government over the provision on the erstwhile state of Jammu and Kashmir (J&K).

## Significance of Article 370

Article 370 accorded a special status to the erstwhile state of J&K within the Indian Union. Included in the Constitution on 17 October 1949, Article 370 exempted J&K from the Indian Constitution (except Article 1<sup>2</sup> and Article 370 itself), permitting the state to draft its own Constitution. It restricted the parliament’s legislative powers with respect to J&K. For instance, extending a central law on subjects included in the Instrument of Accession signed by the princely states when they joined the Union of India, mere “consultation” with the state government was needed. However, to extend it to other matters, “concurrence” of the state government was mandatory.<sup>3</sup>

<sup>1</sup> “SC verdict on Dec 11 on pleas challenging abrogation of Article 370”, *The Indian Express*, 8 December 2023, <https://indianexpress.com/article/india/supreme-court-verdict-monday-pleas-challenging-abrogation-of-article-370-9058972/>.

<sup>2</sup> Article 1, Constitution of India 1950

1) India, that is Bharat, shall be a Union of States.

2) The states and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule.

3) The territory of India shall comprise:

a) the territories of the States;

b) the territories specified in Part D of the First Schedule; and

c) such other territories as may be acquired.

<sup>3</sup> “Supreme Court to deliver verdict on Article 370: The challenge and issues, explained”, *The Indian Express*, 8 December 2023, <https://indianexpress.com/article/explained/explained-law/supreme-court-verdict-article-370-issuesexplained-9059739/>.

## **Why was it Revoked?**

Revocation of Article 370 has found a place in the manifesto<sup>4</sup> of Bharatiya Janata Party (BJP) over the years. The party maintains that Article 370 was harmful to the unity of the nation and that Article 370 had confined the Kashmiri culture to a geographical corner of the country, and with its removal, the culture of the state would spread to other parts of the nation.

## **Why was the Abrogation of Article 370 Challenged?**

On 5 August 2019, the central government revoked Article 370 of the Indian Constitution. A Constitutional Order was issued (Order 272), which made certain changes to Article 367, affecting how Article 370 would be read. This allowed for changes to be made to Article 370. Subsequently, Constitutional Order 273 was issued to formalise this recommendation, confirming the abrogation of Article 370. On 9 August 2019, the parliament passed the Jammu and Kashmir Reorganisation Act, which bifurcated the state into two Union Territories – J&K and Ladakh.

## **Orders issued by the Union Government following Article 370 Abrogation**

Consequent to the abrogation of Article 370, the Union government issued orders bringing the newly constituted Union Territory at par with those in the rest of the country. These are:

### **Amendments to Land Laws**

In October 2020, the Indian government amended fourteen laws of the former state of J&K and repealed twelve others. Two of the laws that were repealed — the Jammu and Kashmir Alienation of Land Act, 1938, and the Big Landed Estates Abolition Act, 1950 — both of which had provided protections on land holdings for permanent residents.

### **Application of the Indian Penal Code**

With the revocation of J&K's special status through the striking down of Articles 370 and 35A, the Ranbir Penal Code, applicable in J&K until August 2019, was replaced with the Indian Penal Code. In November 2019, the prosecution wing was also separated from the executive police in J&K.

### **Introduction of District Development Councils**

In October 2020, District Development Councils (DDC) were created as new governance units in J&K. Legislation to this effect was brought in through an amendment to the Jammu and Kashmir Panchayati Raj Act, 1989.<sup>5</sup> The system functions as a third tier of governance in

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<sup>4</sup> In 2009 and 2014, the BJP reiterated its stand on the abrogation of Article 370. In 2019, the BJP's Sankalp Patra stated, "We reiterate our position since the time of the Jana Sangh to the abrogation of Article 370".

<sup>5</sup> The system functions as a third tier of governance in the Union Territories, with each district sending 14 elected members (in rural areas) to constitute the District Development Councils.

the Union Territory, with each district sending fourteen elected members (in rural areas) to constitute the DDC.

### **Establishment of the Delimitation Commission**

In March 2020, the government set up the Delimitation Commission. The delimitation of assembly constituencies was completed in May 2022, with the Commission recommending seven additional constituencies — six for Jammu and one for Kashmir — taking the total number of seats in the Union Territory to 90, from 83 earlier.

### **State Commissions Defunct**

Since the former state was downgraded to a Union Territory, the legal frameworks that directed the functioning of its state commissions were also taken away. Key among these were the State Human Rights Commission, the State Women's Commission and the State Information Commission.

### **Creation of State Investigation Agency**

In November 2021, the J&K administration accorded sanction for creating a new, specialised investigating agency termed the State Investigation Agency. The agency was set up as the nodal agency for coordinating with the National Investigation Agency and other central agencies and to take measures for speedy and effective investigation and prosecution of terrorism-related cases.

## **Key Contentions of the Petitions filed in Court and Counter by the Central Government**

We examine some of the key arguments of the petitions filed against the abrogation of Article 370 and the counter contentions by the central government.

The main issue to be decided was whether the Indian parliament could have assumed the role of the state constituent assembly to make such amendments. It was contended that parliament could not have converted itself into a constituent assembly as accepting that would have severe political consequences leading to fraud on the Constitution. It was also argued that J&K historically had a unique relationship with the Union of India as there was no merger agreement between the princely state of J&K and the Union of India. There was only the Instrument of Accession. Hence, there was no transfer of sovereignty, and the state's autonomy had to be maintained. The petitioners had argued that Article 370 provided limitations regarding parliament's power to make laws for J&K. To make laws on a subject in List I (Union List) or List III (Concurrent List),<sup>6</sup> which the Instrument of Accession does not cover, the concurrence of the state government was mandatory.

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<sup>6</sup> The seventh schedule under Article 246 of the constitution deals with the division of powers between the union and the states. It contains three lists – Union List, State List and Concurrent List. The Union list details the subjects on which the parliament may make laws while the state list details those under the purview of state legislatures.

The petitioners had also questioned the role of the J&K Governor, arguing that the Governor could not have dissolved the legislative assembly without the aid and advice of the Council of Ministers.

A very significant issue raised was that of the non-permissibility of reorganisation and downgrading of the state into a Union Territory. They contended that a state cannot be extinguished and converted into a Union Territory. Such an action would contradict all principles of the representative form of government.

As against the arguments above, the Union government contended that in signing the Instrument of Accession, the erstwhile state of J&K had fully surrendered its sovereignty to the Union of India upon accession. The proclamation<sup>7</sup> issued by Karan Singh, son of J&K's then ruler Hari Singh, on 25 November 1949, said that the Government of India Act, 1935, which until then governed the constitutional relationship between J&K and the dominion of India, will stand repealed. It stated that the "Constitution of India shortly to be adopted by the Constituent Assembly of India shall, in so far as it applies to the State of Jammu and Kashmir, govern the Constitutional relationship between this State and the contemplated Union of India and shall be enforced in this State by me, my heirs and successors in accordance with the tenor of its provisions", and "the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State". Hence, this proclamation was beyond any Instrument of Accession or merger; it accepted the supremacy of the Indian Constitution.

## **The Supreme Court Verdict**

The final orders of the Supreme Court of India, after taking into consideration all the arguments raised by the different parties, on the three key issues under contention, were as follows:

### **The 'Unique' and 'Special Status' of Jammu and Kashmir**

The Supreme Court held that J&K did not retain any element of sovereignty after its accession to India in 1947. The Court stated that although Maharaja Hari Singh, the erstwhile ruler of the princely state, issued a proclamation that he would retain his sovereignty, his successor Karan Singh issued another proclamation that the Indian Constitution would prevail over all other laws in the state. This, in essence, had the effect of a merger like every other princely state that joined India. The Court emphatically concluded that Jammu and Kashmir have always been an integral part of India, citing Section 3<sup>8</sup> of the J&K Constitution, apart from Articles 1 and 370 of the Indian Constitution.

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<sup>7</sup> "Landmark Article 370 verdict coming: here's what happened in Supreme Court during hearings", *The Indian Express*, 10 December 2023, <https://indianexpress.com/article/explained/explained-law/article-370-verdict-supreme-court-hearings-9061978/>.

<sup>8</sup> "THE STATE (3) The State of Jammu and Kashmir is and shall be an integral part of the Union of India under the provisions of the Constitution of India", The Constitution of J&K. <https://jkdat.nic.in/pdf/Rules-Constitution-of-J&K.pdf>.

Article 3 of the J&K Constitution<sup>9</sup> reads, “The State of Jammu and Kashmir is and shall be an integral part of the Union of India.” The state’s Constitution also provided that this provision cannot be amended. The court ruled that the transfer of sovereignty to the dominion of India by acceding states, including J&K, was not conditional but absolute, as is reflected in Article 1 of the Indian Constitution. The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1972, which amended Article 248 in relation to its application to J&K, “makes it now beyond the pale of doubt that sovereignty vested exclusively in India and, therefore, no vestige of sovereignty was retained post the Instrument of Accession”.

The reference to Article 1, a permanent feature of the Constitution of India, in Article 370 is a clear indicator that the latter was never intended to be permanent.

### **Is Article 370 a ‘Temporary’ or a Permanent Provision of the Constitution?**

The petitioners had argued that Article 370 was meant to be temporary until the constituent assembly for J&K, which existed from 1951 to 1957, decided on whether to abrogate it. Since no decision was taken, it became permanent. Thereafter, there was no constitutional process left to touch Article 370 and changes, if any, could only be made through a political process.

The Court deliberated on the position of Article 370, stating that if Article 370 had become permanent after 1957, why was it then placed in Part XXI of the Constitution, which deals with temporary, transitional and special provisions? If it became permanent, does that mean there is a provision of the Constitution, besides the basic structure, which lies even beyond the amending power of the parliament? Sub-clause 3 of Article 370 envisages a process by which it can be de-operationalised; thus, it is difficult to propose that Article 370 has such a permanent character that it can never be amended.<sup>10</sup>

The Supreme Court, therefore, held that Article 370 is a temporary, transitional provision, citing evidence of the historical context for the inclusion of Article 370 and the placement of Article 370 in Part XXI of the Constitution dealing with temporary provisions.

### **Questions relating to the Effective Abrogation of Article 370**

Apart from the larger federal issues and the debate around the special status of J&K, the key legal challenge was to the two Presidential proclamations in 2019, which, in effect, abrogated Article 370. The Court upheld both the proclamations, including the one that gave a new meaning to “Constituent Assembly of Jammu and Kashmir” as “Legislative Assembly of Jammu and Kashmir”. The central issue was whether these actions could be taken by the Union government assuming powers of the state when it is under President’s rule. Here, the Supreme Court referred to the landmark 1994 ruling in ‘S R Bommai v Union of India’, which dealt with the powers and limitations of the Governor under the President’s rule (where it held that when President’s Rule is imposed, it was a necessary consequence

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<sup>9</sup> Ibid.

<sup>10</sup> “V-P Jagdeep Dhankhar sparks debate with remarks on Basic Structure of Constitution; what is it?”, *The Indian Express*, 26 April 2023, <https://indianexpress.com/article/explained/explained-law/vp-jagdeep-dhankhar-basic-structure-indian-constitution-explained-8377438/>.

that the government is removed, to avoid simultaneous governance by the Union and state governments).

On the final issue regarding when statehood would be restored to the region, the court accepted the assurance of the Union government that the Union Territory status for J&K is temporary.

The court observed, “Should we not permit the parliament to postulate that for a certain period, in the interest of the preservation of the nation itself...this particular state shall go in the fold of Union Territory, on the clear understanding that this shall revert to a State?”<sup>11</sup>

The decision of the Supreme Court puts to rest all contentions regarding the actions taken by the government of India in abrogating Article 370 and withdrawing the ‘special status’ of J&K, thereby establishing it as an integral part of India with all laws, as applicable in any other state, being applicable to that region.

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Mr Vinod Rai is a Distinguished Visiting Research Fellow at the Institute of South Asian Studies (ISAS), an autonomous research institute in the National University of Singapore (NUS). He is a former Comptroller and Auditor General of India. He can be contacted at [isasvr@nus.edu.sg](mailto:isasvr@nus.edu.sg). The author bears full responsibility for the facts cited and opinions expressed in this paper.

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<sup>11</sup> Record of Proceedings, Supreme Court of India, 11 December 2023, [https://main.sci.gov.in/supremecourt/2019/29796/29796\\_2019\\_1\\_1501\\_49019\\_Order\\_11-Dec-2023.pdf](https://main.sci.gov.in/supremecourt/2019/29796/29796_2019_1_1501_49019_Order_11-Dec-2023.pdf).