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# **RE- ARTICLE 370: CASE COMMENT ON ABROGATION OF SPECIAL STATUS OF JAMMU AND KASHMIR.**

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## **INTRODUCTION**

The tale of Jammu Kashmir, famed as paradise on earth, is written out of bloodshed and gunpowder. Even after the accession of the state of Jammu & Kashmir (J&K) to the Union of India it continued as a conflicting fault-line in both domestic and international sphere. Jammu Kashmir (Reorganisation) Act, 2019 and Constitutional Orders 272 and 273 have redefined the existence of J&K in a novel fashion. The legislative decision was widely criticised and the debates that followed were deeply controversial. The constitutional bench of hon'ble Supreme Court of India has recently upheld the abrogation of Article 370 unanimously.<sup>1</sup> The verdict is not a mere judicial settlement of the matter but a meticulous exploration of the historic and constitutional journey of J&K and therefore calls for an assiduous examination.

## **BACKGROUND**

Jammu and Kashmir emerged as a princely state, coming under the suzerainty of the British East India Company from 1846 onward through a subsidiary alliance.<sup>2</sup> During the departure of the British from India, they left open to the princely states with an option either to join Indian Union or Pakistan or to stay independent.<sup>3</sup> State of J&K chose to stay independent. In 1947, J&K's Maharaja Hari Singh requested aid against infiltration, leading to accession to India on 26 October 1947. By March 5, 1948, an interim government was established for framing the state's constitution. The White paper on States 1951 states that legally and constitutionally the position of the state would be the same as that of other acceding states.<sup>4</sup> However, considering the peculiar

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<sup>1</sup> Re Article 370 of the Constitution, 2023 INSC 1058.

<sup>2</sup> Sneddon, Christopher (2021), *Independent Kashmir: An incomplete aspiration*, Manchester University Press, pp. 12–13

<sup>3</sup> § 6, Government of India Act, 1935

<sup>4</sup> White Paper on States 1951 ¶ 221

situation in the state and also to ensure democratic participation in the final determination of the state's political future, the provisions of Article 370 were introduced.<sup>5</sup> Constituent assembly of J&K was convened on 31 October 1951 and the Constitution of J&K came into effect on 26 January 1957.

The contemporary socio-political scenario of J&K is also relevant in understanding the legislative decision of parliament. Following the resignation of Chief Minister Mehbooba Mufti on 19 June 2018 owing to the withdrawal of support by BJP from the coalition with People's Democratic Party (PDP), J&K Governor had invoked emergency under Section 92 of the Constitution of J&K pointing out the failure of constitutional machinery. The proclamation required concurrence of the President<sup>6</sup> and could only be exercised for six months.<sup>7</sup> On 21 November 2018 the Governor dissolved the legislative assembly of J&K exercising the power under Section 53(2) of Constitution of J&K President's rule was evoked in the state on 19 December 2018 and it was further extended for six more months on 03 July 2019.

On August 5, 2019, the President issued 'Constitution (Application to Jammu and Kashmir) Order 272 changing the recommending body in Article 370. On 06 August 2019 Jammu and Kashmir Reorganisation Act, 2019 was passed bifurcating the State of J&K into two Union Territories. On the same day pursuant to the recommendation by Lok Sabha, the president issued CO 273 by which Article 370 ceased to apply with effect from 9 August 2019. On 09 August 2019 the Union Ministry of Home Affairs issued a notification S.O. 2889E in exercise of the powers conferred by Section 2(a) of the Reorganisation Act bringing the provisions to the act into force with effect from 31 October 2019.

On 19 August 2019 invoking Article 32, a batch of petitions challenged the constitutional validity of CO 272, 273, J&K Reorganisation Act, 2019 and ultimately the revocation of Article 370 before the hon'ble Supreme Court of India.

## **SUBMISSIONS OF THE PETITIONERS**

The petitioners initially challenged the Governor's proclamation under Section 92 of the Jammu and Kashmir Constitution, claiming it to be invalid as it is a mere political tactic aimed at

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<sup>5</sup> Supra 1 at 82 ¶ 130

<sup>6</sup> § 92(5), Constitution of J&K

<sup>7</sup> § 92(3), Constitution of J&K

ultimately invalidating Article 370.<sup>8</sup> They argued that no opportunity was afforded to the other parties to demonstrate strength in the house. The Governor's report showing the failure of constitutional machinery was not placed before the parliament<sup>9</sup> and the proclamation was approved without debate<sup>10</sup>. Unilateral exercise of power would render the federal structure susceptible to the whims of the political parties in power.<sup>11</sup> The Parliament cannot make irreversible changes in the exercise of this temporary power during the Proclamation under Article 356.<sup>12</sup> Article 356 does not involve a delegation of constituent power to the President or Parliament. The President's ordinance-making power, despite a deeming provision, is not constitutionally equivalent to ordinary legislative power.<sup>13</sup>

Asymmetric federalism, involving distinct rights for specific federal sub-units, is integral to the Indian federal scheme and constitutes a fundamental aspect of the basic structure.<sup>14</sup> The absence of a merger agreement between the Maharaja or successors and the Union of India allows the state to retain residual sovereignty, acknowledged through the inclusion of Article 370 in the Indian Constitution.<sup>15</sup> The word 'temporary' in the marginal note, implies that unless the specific conditions of its repeal, that is, convening of the Constituent Assembly of the State of J&K cannot be secured, the Article will continue to operate irrespective of the duration of time.<sup>16</sup> Maharaja of J&K retained the residual sovereignty as per Clause 8 of the Instrument.<sup>17</sup> Article 370 contains a provision for its own amendment in Article 370(3).<sup>18</sup> When such a specific provision exists, the amendment cannot be done in any other manner.<sup>19</sup>

CO 272 and CO 273 are unconstitutional The Jammu and Kashmir Reorganisation Act, 2019 was argued to have the effect of suspending the will of the people since the proviso to Article 3, which requires consideration of recommendations from the state legislature was not complied.<sup>20</sup> The reduction of the state of J&K into a union territory would create a situation where the citizens of

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<sup>8</sup> Supra 1 at 18 ¶ 19, Submission by Kapil Sibal

<sup>9</sup> Supra 1 at 19 ¶ 21A, Written submissions of Mr Dushyant Dave relying on *S R Bommai v Union of India*, (1994) 3 SCC 1

<sup>10</sup> Supra 1 at 19 ¶ 21A, Submissions by Dr Rajeev Dhavan

<sup>11</sup> Supra 1 at 19 ¶ 21B, Submissions by Manish Tewari & Mr. Abhimanyu Tewari

<sup>12</sup> Written Submissions of Dr. Rajeev Dhavan, Mr. Gopal Subramaniam, Dr. Menaka Guruswamy, Ms. Nitya Ramakrishnan

<sup>13</sup> *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1.

<sup>14</sup> Supra 1 at 23 ¶ 24B

<sup>15</sup> Supra 1 at 24 ¶ 25A

<sup>16</sup> Supra 1 at 25 ¶ 25B

<sup>17</sup> Supra 1 at 27 ¶ 29

<sup>18</sup> Supra 1 at 31 ¶ 30D

<sup>19</sup> Reliance on *Prem Nath Kaul v. State of J&K*, 1959 Supp (2) SCR 270.

<sup>20</sup> Supra 1 at 39 ¶ 33B

the state may find themselves living in a new state and this diminishes the representative democracy.<sup>21</sup> The power under Article 3 cannot be used by parliament to create a 'Union of Union territories'.<sup>22</sup>

## **SUBMISSIONS OF THE RESPONDENTS**

The Respondents submitted that the new step does not infringe asymmetrical federalism or any other features of representative democracy. This is not an arbitrary act because the abrogation of Article 370 brings the residents of J&K at par with the citizens residing in the rest of the country and confers them with all the rights flowing from the entire constitution as well as hundreds of beneficial legislations.<sup>23</sup>

Once the State Constituent Assembly ceased to exist, the proviso to Article 370(3) itself ceases to exist and the President becomes the sole repository of powers under Article 370(3). Treating the absence of the Constituent Assembly in the proviso of Article 370 as rendering the President's power meaningless would open the door for potential elevation of Article 370 above the fundamental principles of the Constitution. The limited role envisaged to the constituent assembly was only to make a recommendation, which is not even binding upon the president.<sup>24</sup> Parliament, as the democratic repository of the entire nation, is the apt constitutional authority to address matters concerning the relationships among federal units, as it pertains to all states in the federal setup.<sup>25</sup> The President's authority under Article 370(3) is unrestricted, as the article commences with a non-obstante clause stating "notwithstanding anything in the Constitution of India," and the sub-clause itself begins with a similar provision, making the President's exercise of powers independent of other constitutional provisions, including those within Article 370. Unlike Indian constitution the preamble of constitution of J&K neither establishes sovereignty nor does it claim to do so.<sup>26</sup> The power of parliament under Article 3 is a plenary power which may be exercised during the sustenance of president's rule and hence the term 'modification' in Article 370(1) cannot be interpreted in a narrow manner and therefore the addition of clause (4) to article 367 by CO 272 is valid.<sup>27</sup>

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<sup>21</sup> Supra 1 at 42 ¶ 33H, Submission of Chander Uday Singh

<sup>22</sup> Ibid at 42

<sup>23</sup> Supra 1 at 48 ¶ 44, Submission of Tushar Mehta

<sup>24</sup> Ibid at 50 ¶ 51

<sup>25</sup> Ibid at 51 ¶ 53

<sup>26</sup> Ibid at 54 ¶ 61

<sup>27</sup> Supra 1 at 56 ¶ 73, Submission of Vikramjeet Banerjee

## ANALYSIS OF JUDGEMENT

### A) ON THE MATTER OF SOVEREIGNTY

After an elaborate discussion on the history of J&K from Maharaja Gulab Singh of Jammu to the last ruler Maharaja Hari Singh, the court affirmed that Paragraph 8 of IoA had stipulated that it would not impede the ongoing sovereignty of the Maharaja within the State, nor would it hinder the exercise of any powers, authority, or rights he held as a Ruler, except as explicitly outlined in the Instrument. However, the White paper on States of 1951 provides that all the merged entities have lost all vestiges of existence as separate entities. The hon'ble Supreme court emphasised on a note prepared by the ministry of states in July 1949 in which it specifically noted that the special provision is merely a transitional agreement and could be brought to the level of other states as and when required.<sup>28</sup> Therefore the court concluded that the special provision is not indicative of the fact that it retained an element of sovereignty. Rather, it was necessitated by the conditions in the State at the time and was intended to continue until the State could be brought on par with other States. The proclamation made by Yuvraj Singh of Jammu on 25 November 1949 reflects the full and final surrender of sovereignty by J&K, through its sovereign ruler, to India – to her people who are sovereign.<sup>29</sup>

The constitution of J&K was not adopted independently of the Union of India but only to further define the relationship between the two which has already been defined by the IoA and Proclamation issued by Yuvarj Karan Singh in November 1949 and more importantly by the constitution of India.<sup>30</sup> In the debates of the constituent assembly of J&K Shri Kushuk Bakula<sup>31</sup>, Kotwal Chuni Lal<sup>32</sup>, Isher Devi Mani<sup>33</sup> and GM Sadiq<sup>34</sup> reiterated that J&K is an integral part of Union of India. Section 5<sup>35</sup> however recognises that the legislative domain of Parliament in relation to the State of J&K would be prescribed by the Constitution of India. The special arrangement of different states including J&K is nothing but a feature of asymmetric federalism and it is not internal sovereignty.<sup>36</sup> The power of state legislative assembly to amend the constitution is restricted and therefore vesting residual legislative powers cannot be equated to

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<sup>28</sup> Supra 1 at 83 ¶ 133

<sup>29</sup> Supra 1 at 90 ¶ 141

<sup>30</sup> Supra 1 at 96 ¶ 150

<sup>31</sup> Debates of the Constituent Assembly of Jammu and Kashmir, 25 October 1956

<sup>32</sup> Ibid, 7 November 1956

<sup>33</sup> Ibid, 17 November 1956

<sup>34</sup> Ibid, 25 January 1957

<sup>35</sup> § 5, Constitution of J&K

<sup>36</sup> State (NCT of Delhi) v. Union of India, (2023) 9 SCC 1.

residual sovereignty.<sup>37</sup>

### **B) LIMITATIONS ON EXERCISE OF POWER UNDER ARTICLE 356**

It was settled by the hon'ble Supreme court before that Article 356 must be interpreted with reference to the marginal note, that is, failure of constitutional machinery in the state.<sup>38</sup> Relying upon *State of Rajasthan v Union of India*<sup>39</sup> the court held that the Governor's actions under Article 356 can be preventive or curative, reminding the obligation of Union Government under Article 355 to ensure that state governance aligns with the Constitution. Implicit in Article 356(1)(b) is the power to dissolve the State legislature.

The hon'ble court relying on *SR Bommai case*<sup>40</sup> undertook a textual and purposive reading of Article 356 and part XVIII. The suspension of the state government is a necessary consequence of proclamation under Article 356. However, the exercise of the power by the president must be 'desirable or necessary', i.e., legislative and executive actions which are taken during the subsistence of a Proclamation must bear a proximate relationship with the need to discharge the exigencies of governance during the period over which the Proclamation continues to remain in force in the state. Judicial review of a Proclamation is limited to mala fides or extraneous considerations. After the petitioner makes a prima facie case the onus shifts to the union government.<sup>41</sup> Moreover exercise of Article 356 cannot be challenged on the ground that it has given rise to irreversible consequences.<sup>42</sup> Routine state administration by the President is generally not subject to judicial review.

### **C) ARTICLE 370: A TEMPORARY PROVISION?**

In clarifying the scope of 370<sup>43</sup> Shri N Gopalaswami Ayyangar unambiguously explained the temporary status of the provision which the president may declare inoperative later on.<sup>44</sup> The functions of the Dominion Authorities including the legislature in J&K were limited solely by the provisions of the Constitution of India.<sup>45</sup> Article 370 is placed in the part temporary or transitional provisions. The articles were designed to be temporary either with reference to time

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<sup>37</sup> Supra 1 at 104 ¶ 163

<sup>38</sup> *State of Rajasthan v. Union of India* (1977) 3 SCC 392.

<sup>39</sup> *Ibid*

<sup>40</sup> *SR Bommai v. Union of India*, (1994) 3 SCC 1.

<sup>41</sup> Supra 1 at 145 ¶ 208

<sup>42</sup> Supra 1 at 152 ¶ 218

<sup>43</sup> Draft article 306A

<sup>44</sup> 17 October 1949, Debates of Constituent Assembly

<sup>45</sup> Supra 1 at 194 ¶ 272

or occurrence of an event. The provisions were transitional so as to facilitate the effortless transfer of power. The temporary and transitional provisions were gradually phased out after the commencement of the Constitution, by repeal.

The provisions of Article 370(1)(c) made it clear that J&K was governed by Article 1. The necessary consequence of the provision is that it is an integral part of the territory of India.<sup>46</sup> Any interpretation of Article 370 cannot postulate that the integration of J&K with India was temporary.<sup>47</sup> Article 370(3) was introduced with the purpose of enhancing constitutional integration and not disintegration. Under Clause (3), the President also has the power to modify Article 370 which includes the power of the President to remove the distinction between matters in the IoA and to apply all provisions of the Constitution to the State of J&K.<sup>48</sup>

#### **D) CHALLENGE TO CONSTITUTIONAL ORDER 272 AND 273**

CO 272 by adding Article 367(4) and by substituting the expression 'constituent assembly' in the proviso to Article 370(3) with the term 'Legislative assembly' changes the recommending body and makes a new arrangement at variance with that specific constituent assembly. The consequence of permitting amendments through the circuitous manner would be disastrous. Hence amendments cannot be carried out by bypassing a procedure which has been laid down for that purpose.<sup>49</sup> Article 370(1)(c) applies the provisions of Articles 1 and 370 to the State of J&K. Article 370(1)(d) confers the President with the power to apply "other" provisions of the Constitution subject to "exceptions and modifications". However, the President has the unilateral power under Article 370(3) to notify the cessation of Article 370. Consultation and collaboration between the units are necessary only when applying provisions of the Indian Constitution to the State requires amendments to the State Constitution. The exercise of power is not mala fide since the concurrence of the State Government was not necessary for the application of provisions under Article 370(1)(d). Deception can only be proved if the unavailable or improperly exercised power is involved, which is not the case here. Thus, CO 272 is valid to the extent that it applies all the provisions of the Constitution of India to the State of J&K.

The Constitutional Orders issued in exercise of power under Article 370(1)(d) applying the provisions of the Constitution to J&K to bring out the point that CO 273 is the culmination of the

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<sup>46</sup> Supra 1 at 217 ¶ 313

<sup>47</sup> Supra 1 at 226 ¶ 322

<sup>48</sup> Supra 1 at 242 ¶ 342

<sup>49</sup> Supra 1 at 270 ¶ 390

process of integration. Since the first constitution order under Article 370(1)(d) in 1950 the president has used the power to issue constitution orders more than forty times by which a large part of the constitution of India was made applicable to the state of J&K.<sup>50</sup> This integration was a gradual and collaborative process, with modifications made to the provisions over time. The continuous exercise of power under Article 370(1) by the President indicates an ongoing constitutional integration, and the declaration issued under Article 370(3) is seen as the culmination of this process. The court does not find evidence of mala fide intent in the President's exercise of power under Article 370(3).<sup>51</sup>

### **E) CHALLENGE TO THE REORGANISATION ACT**

The J&K Reorganisation Act which reorganised the State of J&K into two Union Territories- the union territory of Ladakh without a legislature<sup>52</sup> and the Union Territory of Kashmir with a legislature<sup>53</sup> was challenged both on substantive and procedural grounds. Taking on face value the submission of the solicitor general that statehood of J&K will be restored the court upheld that the reorganisation is permissible under Article 3. Also the court directed election commission of India to conduct elections to legislative assembly of J&K. Restoration of statehood was also directed to be carried out as soon as possible.

### **CONCLUSION**

The Supreme Court verdict upholding the abrogation of Article 370 marks a significant legal milestone in the nation's history. By affirming the constitutional validity of the government's action, the Court has underscored the principle of constitutional supremacy and the authority of Parliament to enact transformative reforms. This verdict will undoubtedly have far-reaching implications for the governance and integration of the region, setting a precedent for future legal interpretations and affirming the unity and integrity of the nation.

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<sup>50</sup> Supra 1 at 317 ¶ 464

<sup>51</sup> Supra 1 at 318 ¶ 465

<sup>52</sup> § 3, Reorganisation Act

<sup>53</sup> § 4, Reorganisation Act