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EXAMINING THE HURDLES IN REMOVING THE ARTICLE 370: A CLOSER LOOK AT THE CASE HEARINGS

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Abstract:

A Writ Petition was filed for the challenges to the Abrogation of Article 370. The Petitioner were Manohar Lal Sharma, Dr. Charu Wali Khanna, Mohammed Akbar Lone, Hasnain Masoodi, Shakir Shabir, Anuradha Bhasin and the Respondent was the Union of India¹. This hearing was held on five benches for 16 days in the Supreme Court of India. Both petitioners and respondents presented their arguments. The petitioner's senior advocate stated what wrongs were done by the union during the abrogation of India and also said that Article 370(3) was violated by the union. They also stated that the state is a special, concurrent one, so the president has no power to abrogate the article without the recommendation of the state of Jammu and Kashmir, and Parliament has no power to abrogate. These points are argued by the petitioner, and the respondent side gives the argument in support of the abrogation. The Solicitor General explains how the president and Parliament will get power to revoke Article 370 and also states the benefits of the state of Jammu and Kashmir, such as reservation, development of industries, and reduced terrorism.

Keywords:

Article 370, Kashmir, Concurrent, Reservation

¹ Challenge to the Abrogation of Article 370, SCO, <https://www.scobserver.in/cases/challenge-to-the-abrogation-of-article-370-case-background/>, accessed 13th October 2023.

Introduction

This topic is about the hearings regarding the abrogation of Article 370, and you all may know about this. It is a five-bench hearing case held by Chief Justice of India D.Y. Chandrachud, S.K. Kaul J, Sanjeev Khanna J, B.R. Gavai and Surya Kant J in the Supreme Court. On both sides of the case hearings, petitioners and respondents argued about the article. The petitioner challenges the abrogation, and this side is argued by nearly 20 advocates. on behalf of many members of the Jammu and Kashmir people, and the respondents are supporters of abrogation, and this side is argued by the solicitor general and attorney general of India on behalf of the Union of India. The petitioner gives many arguments against Article 370 abrogation, and respondents give counterarguments. In this power of the President, the union constituent assembly and legislative assembly with regards to abrogate are well defined.

It is a 16-day hearing, with the first nine days for petitioners and the remaining days for respondents.

Arguments of Petitioner's side:

1st day begun by Senior Advocate Kapil Sibal focused on the political background of Article 370 from the princely state of Kashmir to agree to part of India. He said that only the Constituent Assembly of Jammu and Kashmir could abrogate Article 370, but it was dissolved in 1957. The abrogation of the article should have been repealed before it was dissolved in 1957, but it was not repealed. No other entity repeals Article 370; it is a permanent feature of the Indian constitution. Sibal said that as long as it wasn't repealed, it couldn't be repealed by the president of India, and he referred to the constituent assembly debates, where Gopala Swamy Iyengar stated that the recommendation of the constituent assembly is the condition precedent for the president of India to abrogate Article 370. He pointed out that without the consent of the Kashmir people, it was revoked. He emphasized that Jammu and Kashmir's accession to India was dependent on the will of the people. While abrogating Article 370 without the consent of the people, the union breached the constitutional framework. He said that, since the abrogation election was held in Jammu and Kashmir, the parliamentary election was conducted².

² Gauri Kashyap, Supreme Court Hears Challenge to Abrogation of Article 370 | Day 1, SCO(2rd Aug 2023), <https://www.scobserver.in/journal/supreme-court-hears-challenge-to-abrogation-of-article-370-day-1/> accessed 1st October 2023.

On day 2, he mainly noticed the presidential order in the 2018 presidential notification-imposed presidential rule under Article 356 in Jammu and Kashmir. In 2019, amended Article 367 effectively allowed the union to remove Article 370 without the recommendation of the J & K Constituent Assembly³.

On day 3, he argued that in Abrogation of Article, the president is executive action; it will be political action, and he emphasized that presidential order C.O. 272 created the constitutional myth because this order stated that the governor could act on behalf of his Council of Ministers in presidential rule, but there is no Council of Ministers in Jammu and Kashmir. He elaborated that by using the amended Article 367, in Article 370(3), the word "Constituent Assembly" was replaced by "Legislative Assembly." He clarified it is an interpretation clause, not a substitute clause, and also asked how parliament will declare itself as a constituent assembly. Finally, he said that Parliament had no power to abrogate Article 370.

On day 4, the Senior Advocate argued for the petitioner side, starting with the Presidential Order of 1954, which enumerated that not allowed to abrogate or legislative assembly to abrogate. Advocate Gopal Subramanian ensured that it was revoked unilaterally. He argued that the president of India and the Legislative Assembly of Jammu and Kashmir are bound by bilateralism and federalism, and it is a concurrence state. If there is any change, addition, or removal, it should be done bilaterally.

But when Presidential Order C.O. 272 passed in 2019, the President acted on behalf of both sides. He stated that, because of this, the abrogation of Article 370 is invalid.

On day 5, Senior Advocate Zaffar Ahmad Shah appeared on behalf of the Bar and Association of Jammu and Kashmir and stated that the autonomy was decimated and the J&K was not completely merged with India. Immediately, Justice D.Y. Chandrachud and Justice Khanna said that Jammu and Kashmir are integrated with India and that sovereignty surrender to India is absolute. Later, Advocate Shah argued that the state is a concurrence and got a peculiar position that rooted its autonomy, and various provisions of the Constitution of India applied to J&K with exceptions and modifications. Article 31 of the constitution of J&K is an oath taken by the governor, which states

³ Gauri Kashyap , Supreme Court Hears Challenge to Abrogation of Article 370 | Day 2, SCO (4th Aug 2023), <https://www.scobserver.in/journal/supreme-court-hears-challenge-to-abrogation-of-article-370-day-2/> accessed 1st October 2023.

that he or she will "preserve, protect, and defend the constitution and law" and also bind himself to "devote himself to the service and well-being of the people of the state"⁴. The Governor should communicate his concurrence with the passing of Presidential Order C.O. 272. The governor breached the oath and was liable to be breached. Then Advocate Rajeev Dhavan argued that the special status awarded to Jammu and Kashmir reflected the "diversity" they promised to the people among them. So, all actions taken by Parliament and their interpretation of the Constitution must keep this promise of diversity in mind. He argued that Article 370 was a manifestation of diversity so that the President of India could only make law for the J&K after getting concurrence from the state government.

On the 6th day, the Senior Advocate argued about Presidential Order C.O. 48 of 1954, which said that the Indian Constitution applies to Jammu and Kashmir with some exceptions and modifications. For example, Article 3 of the Indian Constitution states the formation of new states and the alteration of areas, boundaries, or the naming of the states. Now the presidential order has modified 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"⁵. He stated that it cannot be substituted during the proclamation under Article 356. Then Bench asked whether, under presidential rule, the president cannot exercise the powers under the provisions of Articles 3 and 370. Advocates make the counterargument that Article 356 is not absolute. The president's rule can't grant power to amend or deprive it of mandatory processes.

He gave more examples of other states that had some autonomous things below:

1. Article 164: In the states of Chhattisgarh, Jharkhand, Madhya Pradesh, and Odisha, ministers were appointed to govern the welfare of the scheduled castes and backward classes.
2. Articles 239A and 239AA: In Pondicherry and the NCT of Delhi, a special provision was established.

⁴ R. Sai Spandana and Gauri Kashyap , Abrogation of Article 370 | Day 5: Union Had No Authority to Dismantle Autonomy of J&K, SCO (10th Aug 2023), <https://www.scobserver.in/reports/abrogation-of-article-370-day-5/> accessed 2nd October 2023.

⁵ <https://books.google.de/books?id=qcNAEAAAQBAJ> accessed 4th October 2023.

3. Article 244A: In Assam, it allows the creation of an autonomous state within certain tribal areas⁶.

These autonomies are fundamental to our constitution, and special features are considered regular features of the constitution. He argued that India was a facet of "multi-symmetric federalism."

Dushyant Dave argued about the presidential order of 2019 and the abuse of the constitutional mandates of Article 370. During the period of the president's rule, the lawmaking power of the president is limited. The president had no power to amend the permanent provision of Article 370, so he could not abrogate the presidential rule.

On the Day 7, Senior Advocate Dushyant Dave argued that the BJP's 2019 Election Manifesto promised to abrogate Article 370, so it was one of the reasons for abrogation. Nahide stated three things:

Part II of the Indian Constitution shows the relationships between the state and the Union of India. Parts V and VI state the executive and legislative powers of J&K. In any provision, there is no express statement to abolish Article 370 by the Union.

Article 3 does not provide for the abolishment of the state, and the existence of the state is the basic structure of the constitution.

There are some disadvantages after the reorganization of the state:

1. Ladakh: No Representative Members for the Rajya Sabha
2. Jammu and Kashmir: No members represent the Lok Sabha.
3. Jammu and Kashmir: no MLA electoral college for voting president
4. Jammu and Kashmir have no representative members in the GST Council.
5. Jammu and Kashmir has no governor and has not consulted for the appointment of high court judges.

Advocate Dinesh argued that the relationship between Jammu & Kashmir and India was one of federal government and dual politics. However, the Union Act was a unitary policy.

⁶ Gauri Kashyap , Supreme Court Hears Challenge to Abrogation of Article 370 | Day 6, SCO (16th Aug 2023), <https://www.scobserver.in/journal/10299/> accessed 5th October 2023.

On the 8th day, Senior Advocate Dwivedi C.U. Singh argued that the president's power under 365 was limited. Advocate Sanjay Parikh stated in the 1944 Naya Kashmir manifesto that the people of Kashmir said, "We don't need a monarchy, and we have a democratic constitution," so how is it possible to abolish Article 370? Advocate Sen argued that the majority of people in J&K are Muslims, and there is a conscious choice. Of this, the majority of them go to Pakistan, and the minority come to India. Some other minority people need some protection, so the existence of Article 370 is necessary.

On the 9th day, Senior Advocate Nitya Ramakrishnan argued that Article 370 is "Sui generis" and that power is vested with the J&K. Advocate Maneka Guruswamy said Article 370 is a "unique brand of Federalism." Advocate Warisha Farasat ensured that the state of India except J&K is holding together federalism, but J&K was coming together federalism and asked to bench Article 370 interpreted strictly.

Impacts of the abrogation of 370:

1. Advocate Irfan Loneliness, sentiments, aspirations, or the will of people enshrined in J&K were destroyed.
2. Advocate Zahoor Ahmed Bhat says that by abrogating the article, there is a violation of constitutional morality and national interest.
3. Advocate Baig referred to A.G. Noorani's book, Abrogation of Article 370 Is Unconstitutional.
4. Advocate Gopal Sankaranarayana argued that Article 370 is a permanent feature because in this provision there is a word of consultation, concurrence, and recommendation. While abrogating the article, these are not followed by the Union⁷.

By this hearing, the petitioner's side was complete, and 18 counsels stood on the petitioner's side.

⁷Gauri Kashyap and R. Sai Spadana , Supreme Court Hears Challenge to Abrogation of Article 370 | Day 8&9, SCO (29th Aug 2023), <https://www.scobserver.in/journal/supreme-court-hears-challenge-to-abrogation-of-article-370-day-8-9/> accessed 6th October 2023.

Arguments of Respondent's side:

The respondent side argued with the solicitor general of India, Tushar Mehta, and the attorney general of India, Venkataramani, and gave more arguments that the abrogation of Article 370 is valid and the president has the power to revoke it. From day 10 to 16 day were argued by the Respondents. We will see their arguments.

On day 10, Attorney General Venkataramani stated there had been 113 presidential orders related to Jammu and Kashmir till now. After his statement, Solicitor General Tushar Mehta argued with a series of dates and historical documents. He started his arguments by arguing that J&K never had a special status and that India has retained that state's sovereignty. It is a part of India. He remembered that Hari Singh signed the agreement between us. In this agreement, J&K gave sovereignty to us, but it was acted upon by its autonomy. There is no unique autonomy because there are various autonomous entities that exist in List II, or the State List. So, this state is not special.

On the 11th day, Solicitor General Tushar Mehta argued that Article 370 had a different set of rights, as follows:

1. DPSP, States, Union Territories, 5th and 6th Schedules
2. Socialist, secular, and integrity
3. Part III of the Indian Constitution was applied partially.

Article 15(4) of the J&K Constitution disallows the state territory reasonable rest under Article 19, allowing the state legislative to continue until 1979. Articles 20, 21, 22, 31, 31A, and 32 are applied with the modifications. These are the heart and soul of Part III of the Constitution, so it should be changed.

After the abrogation of Article 370, the tourism industry and investment were expanded in the state, and employment and income were increased in this region. He also argued that the Constituent Assembly is always the Legislative Assembly because it is the "interchanged floating way." Article 1 of the J&K constitution noted that if the state is bound by another constitution, the

Constituent Assembly acts as a legislative body and makes legislative enactment⁸. Nehru The Prime Minister of India said that Article 370 is part of transitional, provisional arrangements. It isn't permanent. Mehta stated that Article 3 was suspended when the president ruled. Justice Bench was asked if the legislature was suspended automatically by presidential rule, then why was Article 3 suspended? Mehta answered that the legislative assembly was only suspended, and it couldn't reconvene or do anything to avoid the consequences.

On day 12, the petitioner side stated that the Union had broken the constitutional provisions made to the people of Kashmir, and Mehta replied to this provision with a different footing than other states, so the president had the power to abrogate. Suddenly, Justice D.Y. Chandrachud asked Article 367 if the interpretation clause for the constituent assembly was replaced by the legislative assembly and how the union would use this article as a substitute clause for the abrogation. The solicitor general replied that the president had the power to use Article 367 because, when dissolving the Constituent Assembly in 1957, it should not have mentioned the abrogation of Article 370, so the "absolute discretion" was given to the president, and the president had the power to abrogate⁹.

He also argued that Article 370(3), the word recommendation of the constituent assembly of Kashmir, is just a word, and the president should not be bound by it. The word "recommendations" was dissolved when the constituent assembly dissolved in 1957 and stated that the president's power is dependent on the decisions of other bodies.

CJI Chandrachud said it may not be correct because of some restrictions for all governments and the word "shall" in Article 370(3), so there must be a recommendation necessary. Mehta ensured that even if a recommendation is mandatory, the president cannot be bound by it. The preamble of the J&K constitution did not state the governance of J&K, and it defined the existing relationship of the state with the Union of India as integrated therewith. He enumerated Article 370 as temporary for many reasons given below.

⁸ Advay Vora and Gauri Kashyap , Supreme Court Hears Challenge to the Abrogation of Article 370 | Day 11, SCO (30th Aug 2023), <https://www.scobserver.in/journal/supreme-court-hears-challenge-to-the-abrogation-of-article-370-day-11/> accessed 8th October 2023.

⁹Advay Vora and Sushovan Patnaik , Abrogation of Article 370: Arguments Matrix, SCO(13th Sep 2023), <https://www.scobserver.in/reports/abrogation-of-article-370-arguments-matrix/> accessed 9th October 2023.

1. Inserted Article 370 under Part XXI of the Constitution states that it is temporary, transitional, and has special provisions.
2. The power of the President as well as state government under Article 370 is "extensive and extremely wide."
3. Article 370 is self-destructive under Article 370(3)¹⁰.

The abrogation of Article 370 improved the strategic borders, strategic location, strategic territory, infiltration, influence, and outside forces, and there are plans such as the gainful enlargement of youth schemes for the protection of border residents and state self-democratic government.

On the 13th day, the bench was asked to submit the "blueprint" of the reorganization of Jammu and Kashmir and also inform when the election would be conducted in the state.

Firstly, Mehta submitted that the union is ready to announce elections in J&K anytime, and the union is waiting for the Election Commission to complete updating the voter list in the state. District elections were already conducted in the state. He also said that for the first time, the third-tier Panchayat Raj system would be introduced in J&K, so panchayat elections would be held. Leh Hill development elections in Ladakh are already done, and the Kargil Hill development election will be held at the end of this September. Municipality elections will be held, and later the Legislative Assembly election will be conducted. There is an improvement in the law and order at J&K. Since August 2019, "terrorist-initiated instances" have been reduced by 45.2%, and infiltration has been a major issue in the region of the state by 90.2%. Law and order were reduced by 97.2%. There is increased employment for the youth who were misled by the outsiders of the country. In 2018, cessation forces organized 52 bands, which were reduced to zero¹¹.

The Attorney General of India argued about the president's power to repeal Article 370 and that he or she is not limited or paralyzed when there is an impossibility situation, such as a lack of a Constituent Assembly. As stated above, in Article 370(3), it is not possible to get the constituent assembly dissolved in 1957. In this case, the president decides from time to time and has the power

¹⁰ Advay Vora and Gauri Kashyap , Supreme Court Hears Challenge to the Abrogation of Article 370 | Day 12, SCO (31th Aug 2023),<https://www.scobserver.in/journal/supreme-court-hears-challenge-to-the-abrogation-of-article-370-day-12/> accessed 10th October 2023.

¹¹ Gauri Kashyap , Supreme Court Hears Challenge to the Abrogation of Article 370 | Day 13,, SCO (1st Sep 2023),<https://www.scobserver.in/journalsupreme-court-hears-challenge-to-the-abrogation-of-article-370-day-13/> accessed 11th October 2023.

to abrogate Article 370 when it's necessary for the state. Senior Advocate Rakesh Dwivedi argued that presidential power is neither executive nor legislative; rather, it was a constituent one as it framed the original constitution. Justice Khanna disagreed and said that constituent power was not made by the Constitution itself but was made by either the legislative or executive. Dwivedi replied that the power of the president under Article 370 was wider than ordinary executive power.

On the 14th day, Dwivedi argued that Article 370 was a constituent power because it amended the application of the constitution of J&K. He also stated that the recommendation of the J&K constituent assembly to abrogate was not binding upon the president. There is no ambiguity when a president acts at his or her discretion. The petitioner argued that there should be bilateralism when abrogating, and Dwivedi replied that Article 370 is the power source to create and remove the constitution and constituent assembly. The petitioner does not agree with this, and the respondent stated that the power sources of the J&K constituent assembly and its constitution flowed from Maharaja Hari Singh. The monarchy of Hari Singh was naturally dead when people needed democracy, so Maharaja could not create a constituent assembly by himself. The constitution of J&K is bound by the limitations imposed on it by the Indian Constitution. J&K is subordinate to the Indian Constitution.

1. In the Indian Constitution, J&K was declared a federal government.
2. The permanent residents of Jammu and Kashmir were declared citizens of India.

Article 370 already existed before the Constituent Assembly was established in 1951. In 1949, Yuvaraj Karnal Singh's proclamation created a relationship between Jammu and Kashmir. This state is part of India and bound by the Constitution of India. sovereignty completely with the Union of India. Article 370(2) functions are limited. The president's power to abrogate Article 370 is absolute. President power was not "cease to exist"; constituent assembly is "cease to exist"¹².

On day 15, the Solicitor General argued that the lead petitioner, Mohammed Akbar Lone, chanted "Pakistan Zindabad" publicly in the Jammu and Kashmir Assembly in 2018 and that, in its seriousness, Mehta strongly opposed the terrorism and cessations by Pakistan in Jammu and Kashmir. Senior Advocate Giri argued that Article 370 made the relationship between us different,

¹² Gauri Kashyap , Supreme Court Hears Challenge to the Abrogation of Article 370 | Day 14, SCO (5st Sep 2023), <https://www.scobserver.in/journal/supreme-court-hears-challenge-to-the-abrogation-of-article-370-day-14/> accessed 11th October 2023.

so the president should need the consent of J&K to make the laws. Article 370(3) is not a feature of federalism, so Article 370 would not be a violation of federalism.

Senior Advocate Mahesh Jethmalani argued that 73% of the scheduled tribe population of J&K were supporters of abrogation. By abrogation, it gave them protection and reservation for the first time and also pointed out that if constituted authority takes place in the constitutional assembly, then it also takes place in the legislative assembly. Advocate Guru Krishna Kumar stated that Section 6 of the Constitution of J&K and Article 370 of the Constitution created the "anomalies." It provided special rights to permanent residents of J&K only and allowed the person to be in POK. When the presidential order abrogated Article 370, which rectified the anomalies, he enumerated that 23 to 24 thousand people had received their domicile certificates from the abrogation¹³. Advocate Kanu Agarwal argued that the constituent assembly did not have original constituent power. When India was acquired, the state constituent assembly and constitution were based on the derivative power, which was subordinate to the Indian constitution.

Advocate Archana Pathak ensured that J&K women regained their rights to acquire property and beneficiaries even if they married someone outside the state by abrogating Article 370. By doing so, the respondent's arguments were completed.

It's time for rejoinders, and the petitioner gave counterarguments to the respondents. Advocate Sibal opened the rejoinder and said that the status given to Jammu and Kashmir is not special in any way and stated that the historical context in which accession was signed was different from the state, so that was special. He argued that there are two requirements for the abrogation of Article 370 where the recommendation of the constituent assembly is necessary, and it was received before the president made the decision to abrogate the article, and it should not be reversed. Article 53 of the constitution of J&K states that the governor got the advice of the Council of Ministers to dissolve the assembly. Except for Sections 36, 38, and 92, under every other condition, the governor should get advice from the council of ministers, but the governor had not acted by law.

On the last day, Rejoinder's points continued by Sibal, who stated that CJI Chandrachud pointed

¹³ Gauri Kashyap , Supreme Court Hears Challenge to the Abrogation of Article 370 | Day 15, SCO (8th Sep 2023), <https://www.scoobserver.in/journal/supreme-court-hears-challenge-to-the-abrogation-of-article-370-day-15/> accessed 12th October 2023.

out the significant silences in Article 370 on Jammu and Kashmir status and that slow integration was complete, and he also said that J&K was never consulted when issued the presidential order. Subramaniam contended that the Indian constituent assembly should give a sense of space and choice for the people of Jammu and Kashmir to decide their own will. Senior Advocate Zafar Shah from J&K for the rejoinder said that inviting the J&K Constitution as inferior wasn't correctable for its people. Dhavan clarified that they had not challenged the abrogation because there were limitations under Article 368. Dinesh Dwivedi argued that the union wrongfully relied on the Maqbool Damnoo vs. State of J&K 1972¹⁴ case to justify Article 367, and that case fact was different and did not make changes in the constitution. The main thing that requires the president to abrogate Article 370 is concurrence and consultation with the state. After his arguments, Benches instructed all other councils to submit their rejoinders on paper. After these 16 days of hearings, the challenge to the abrogation of Article 370 came to an end.

Conclusion:

Finally, the court ensured that the abrogation of Article 370 was valid and constitutional. The president has the power to abrogate. Due to abrogation, Indian security is well developed, and the people of Jammu and Kashmir get various rights. This article helps us understand the power of the president to abrogate Article 370 during the president's rule of state in 2019. It will give us various perspectives about the abrogation of the article. With this decision, the relationship between the state of Jammu and Kashmir and the union will be stronger and improve the welfare of India.

Suggestions:

From my point of view, the abrogation of Article 370 is the correct one. Before the abrogation, Jammu and Kashmir had autonomy. Except for defense, communication, and foreign affairs, the Union is not involved in the state of Jammu and Kashmir, so J&K independently exists. Due to this, the Union of India couldn't make a peaceful border, so a lot of struggles evolved. Pakistan influenced the people of J&K to become terrorists, and they did terrorism. It affects the security of the state, so it is needed to abolish Article 370 for state security. The president has the power to abrogate Article 370 without the recommendation of the state government; even a recommendation is mandatory because the president is not bound by it. The president has the

¹⁴ Maqbool Damnoo vs. State of J&K 1972 AIR 963, 1972 SCR (2)1014

power to pass presidential orders during the president's rule. It gives the various changes in the state of Jammu and Kashmir, such as

1. Introduce the 3-tier Panchayat Raj system.
2. Ladakh's Leh hill development was conducted, and Kargil hill development will be conducted.
3. Terrorist-initiated instances have decreased by 45.2%.
4. Infiltration was reduced by 90.2%.
5. The bandh organized by the cessation forces was reduced to zero.
6. 73 percent of the scheduled tribes were supported, and they got protection and reservations.
7. Women regained their rights even if they married a person of another state due to the abrogation of Article 370.
8. After abrogation, any person in other states of India can buy land in J&K, and any person in J&K can sell land to any other state of India.
9. There is enhanced industrial development, and education reservations are well improved now.
10. Expenditure on defense was reduced due to the abrogation of Article 370.

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