

LAWFOYER INTERNATIONAL
JOURNAL OF DOCTRINAL LEGAL
RESEARCH
(ISSN: 2583-7753)

Volume 1 | Issue 4

2024

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SUPREME COURT'S FINAL VERDICT ON ARTICLE 370: CURRENT SCENARIO AND HISTORY

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I. ABSTRACT

The abrogation of Article 370 from the then state of Jammu & Kashmir has brought many dissenting opinions from people which have led the matter to the Supreme Court. The Supreme Court in its recent judgement has upheld the validity of the abrogation of Article 370. This move has brought many developmental changes in the territory of Jammu & Kashmir in terms of economy, education etc. Overall, this abrogation can be said to be beneficial for the country in the future run.

II. KEYWORDS

Abrogation, validity, developmental changes, beneficial

III. INTRODUCTION

Recently, the Supreme Court of India has held the abrogation of Article 370 in the UT of Jammu and Kashmir to be constitutional. In 2019, the relationship between the government of India and UT of Jammu & Kashmir was altered because Article 370 of the constitution was abrogated and the state of Jammu & Kashmir was bifurcated into UT of Jammu & Kashmir² and UT of Ladakh. All of this was done when the territory was under central rule by the President. The government argued that since the territory was under the rule of President the President acted as the Legislative Assembly of Jammu & Kashmir. This had brought many questions regarding the validity, constitutionality and correctness of such a step by the government. Many people are of the view that changes made in Jammu & Kashmir are deterrent to the rights of its citizens. Many scholars have also argued that Jammu & Kashmir was not the only territory to have such rights, the states in North east also have certain

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² B Baskar, Purnima Joshi, *Decoding the Supreme Court Order on Article 370*, The Hindu, (December 15 2023), <https://www.thehindubusinessline.com/blexpainer/decoding-the-supreme-court-order-on-article-370/article67640837.ece>, (last visited on December 28 2023)

privileges under Article 371 whereby the laws made by the central legislature are not directly followed but are reviewed by the state legislature first.³

After independence the princely state of Jammu & Kashmir was given the liberty to join with either India or Pakistan or remain independent. The then population of Jammu & Kashmir comprised of majority of muslims with a Hindu ruler. Although the power was with the ruler of the princely state to decide this issue, many scholars believe that it had to be the ruled (and not the rulers) who were to be made to decide on this issue. Mahatma Gandhi himself said that the people of Kashmir should decide its fate. The objective of this article is to highlight the historical background behind the bringing of Article 370 in the state of Jammu & Kashmir and also highlight the current scenario after its abrogation.

IV. WHAT WAS ARTICLE 370: THE HISTORY

During British rule, there were a lot of princely states. India was then divided into 2 dominions India and Pakistan. The princely states' rulers were the given option to join either of the dominions India and Pakistan, or to stay independent. Jammu & Kashmir being princely a state, its ruler (or Maharaja) also had to decide upon this. Jammu & Kashmir ruler Maharaja Hari Singh retained the independence⁴ of Jammu & Kashmir for 73 days because he decided to not join either of the two dominions. However, Pakistan occupied Jammu & Kashmir⁵ and wanted to forcibly acquire it. The last Viceroy of British India Lord Mountbatten put forward before the ruler the "Instrument of Accession" when the ruler asked for help from India.⁶ Eventually Maharaja Hari Singh signed an Instrument of Accession by which Jammu & Kashmir was made part of Union of India, but on a condition that only 3 powers were allowed to Government of India: Defence, External affairs and communication. Jammu & Kashmir was sovereign on 26 oct 1947 but its ruler hadn't signed the merger

³ Anuradha Bhasin, "As Supreme Court Rules on Article 370 in J&K, Here's Why History, Legal Context Matters", Kashmir Times, 11th December 2023, available at <https://thewire.in/history/article-370-understanding-the-history-legal-contexts-and-why-it-matters> last accessed on January 3 2023

⁴ Tariq Ahmad, "FALQs: Article 370 and the Removal of Jammu & Kashmir's Special Status", Library of Congress Blogs, available at <https://blogs.loc.gov/law/2019/10/falqs-article-370-and-the-removal-of-jammu-and-kashmir-special-status/> last accessed on January 3 2023

⁵ Supra note 2 at 1

⁶ Supra note 2 at 1

agreement. The Government of India decided⁷ to provide a constituent assembly so that the state of Jammu & Kashmir can have its own constitution and that constitution will define the relationship between the state of Jammu & Kashmir and the Union of India. But the formation of constituent assembly could take time, so till that time a temporary provision was formed which was Article 370 which said that only 2 articles will apply to the state of Jammu & Kashmir: Article 1 and 370. Other items of the union list other than the 3 items could also be applicable on some conditions. As per Article 370, the president could make other powers applicable through his orders only with the concurrence of the govt of Jammu & Kashmir. No amendment to the constitution was to be applied to the territory of Jammu & Kashmir. Further the President with the concurrence of the govt of Jammu & Kashmir ordered many provisions to be made applicable like Fundamental rights, Fundamental duties, Supreme Court etc. in 1954. In 1956 the constitution of Jammu & Kashmir was adopted and its constituent assembly was dissolved but before its dissolution the assembly didn't recommend the dissolution of Article 370. The president was given wide powers under Article 370; he could make any big changes. Article 35 A of the constitution was such article which was applicable only to the state of Jammu & Kashmir but not to the rest of India. Under this article, the legislature of Jammu & Kashmir was empowered to recognize its permanent residents and only permanent residents were given benefits such as right to buy land in Jammu & Kashmir, get government jobs in Jammu & Kashmir and get govt scholarships in Jammu & Kashmir. Due to such discrimination to the citizens, the matter went to the court. However, the court said that it was totally constitutional because it was according to the President's order given under article 370. SC was asked how can it be a constitutional order even after it violates the fundamental rights of other citizens of the country. But the SC held that the President could issue any orders and it was not unconstitutional. Over time many amendments were made to the constitution of Jammu & Kashmir.

⁷ Arif Ayaz Parrey and Gursimran Kaur Bakshi, "In Re Article 370 Judgement: The Challenge and What is At Stake", The Leaflet, available at < <https://theleaflet.in/in-re-article-370-judgment-the-challenge-and-what-is-at-stake/> > last accessed on January 3 2023

In the SBI case⁸ in 2016 the SC held that article 370 can be abrogated only after the recommendation of the constituent assembly of Jammu & Kashmir.

Various provisions of the constitution were made applicable to the state of Jammu & Kashmir over these years till 2019.

Then came the BJP. The ideological parent of BJP was Jana Sangh and one of the important leaders of Jana Sangh was SP Mukherjee who was against the favour of Article 370. He believed that there cannot be two flags and two constitutions in one country. Dr SP Mukherjee died in a jail in Jammu & Kashmir. He was put behind the bars because he entered the state of Jammu & Kashmir without taking any explicit permission from the state.

Therefore, one of the aims of BJP after coming into power was to get rid of Article 370. And so, when the elections were held in 2014 to the Jammu & Kashmir Legislative Assembly, no political party was able to form a government on its own. 2 political parties, Peoples' Democratic Party and BJP decided to come together and form the govt in 2015. This govt was formed with Mufti Mohammad Sayeed as the Chief Minister and BJP had its Deputy CM. Mufti Mohammad Sayeed passed away and his daughter Mehbooba Mufti became the CM. Then in 2018 the BJP withdrew support from the government and as a result the Governor's rule was imposed in Jammu & Kashmir. After 6 months, the President's rule was imposed under Article 356 of the constitution and the Legislative Assembly of Jammu & Kashmir was dissolved. At that time the President had the powers of executive and the Governor, while the state legislature's power was given to the Parliament.

On August 5, 2019 the President issued an order specifying that all the provisions of the Indian Constitution will apply to the state of Jammu & Kashmir and will supersede the presidential order of 1954. The President got the power to pass such order without the concurrence of the Constituent Assembly or Legislative Assembly because the Legislative Assembly was dissolved and on its place the Parliament gave its concurrence to such order. With this, Article 370 ceased to exist. By the Jammu &

⁸ State Bank Of India vs Santosh Gupta And Another, AIR 2017 SC 25

Kashmir Reorganization Act, 2019 state of Jammu & Kashmir was bifurcated into Union Territory of Jammu & Kashmir and Union Territory of Ladakh.⁹

V. CURRENT SCENARIO

Whether this was done correctly was a question before the Supreme Court. Now, 5 judges of Supreme Court had to decide whether this was constitutional or not, whether Article 370 was temporary or permanent. Kapil Sibal and some others represented the petitioner side. The Petitioner said that it was temporary till 1956 when Jammu & Kashmir had its constituent assembly. After its dissolution it became permanent as the Constituent assembly did not recommend its dissolution. The petitioners argued on many issues including the power of parliament to abrogate Article 370, the constitutional validity of the J&K Reorganization Act etc. Numerous petitions challenging these issues were filed before the Supreme Court in 2019. The petitioners contended that the parliament had no such powers while citing Article 354 of the constitution.¹⁰

All the 5 judges unanimously rejected this contention and directed that Article 370 had a self-destruct clause (clause 3 said Article 370 says that it could be ceased to exist). Chief Justice of India stated that Jammu & Kashmir did not retain an element of sovereignty¹¹ when it joined the Union of India. CJI while answering the constitutional validity of Article 370 said that the merger of Jammu & Kashmir into the Union of India was done in a war-like situation. At that time temporary special rights were given to its people to make them feel safe. This “temporary” word, clearly written in

⁹ “Article 370: Decoding the Supreme Court Verdict”, Indian Express, (December 12 2023), <<https://www.drishtiiias.com/daily-updates/daily-news-editorials/article-370-decoding-the-supreme-court-verdict>> last visited on December 28 2023

¹⁰ “Supreme Court’s Article 370 Verdict: A Guide to Key Questions, Arguments”, The Hindustan Times, 10th December 2023, available at <<https://www.hindustantimes.com/india-news/supreme-court-s-art-370-verdict-tomorrow-a-guide-to-key-questions-arguments-101702216477638.html>> last accessed on January 3 2023

¹¹ Padmakshi Sharma, “Article 370 A Temporary Provision: Supreme Court Upholds Abrogates Abrogation of Special Status of Jammu and Kashmir”, Live Law, available at <<https://www.livelaw.in/top-stories/article-370-supreme-court-abrogation-of-special-status-of-jammu-and-kashmir-244198>> last accessed on December 28 2023

Article 370¹² shows that it can be legally abrogated. CJI while answering the third allegation regarding the authority of parliament said that Jammu & Kashmir had presidential rule and under this, the President could issue any orders and the Parliament would act as the Legislature of the state. Hence the parliament had such powers.

The petitioners also argued that the Jammu & Kashmir Reorganisation Act was unconstitutional for two reasons. First, it did not fulfill the requisites as per Article 3 and secondly, it divided the state into two Union Territories. CJI in reply to this stated that Article 3 was made as per the needs of that time but it was required to be altered eventually with the passing of such a long time.¹³In this way, the Supreme Court held the abrogation of Article 370 to be unconstitutional and valid in the eyes of law.

VI. CONCLUSION

When Article 370 was abrogated there arose many protests against this decision. Many scholars, jurists and experts had conflicting opinions on this. Internationally, Pakistan strongly opposed this decision. Pakistan's then PM Imran Khan said that this will lead to many more attacks from India's side in future. China also opposed the separation of Ladakh as a separate Union Territory.

In my view, the abrogation of Article 370 has brought immense economic development in the territory of Jammu & Kashmir. After 2019, the Central government has largely invested in the area for the development of buildings, roads, residential buildings, offices etc. The difference in the condition of roads has also improved after 2019. Due to these investments many private sector units have also invested in the area. This is also leading to an increase in the creation of jobs. The development of all-weather roads have also lead to easy transportation of goods and

¹² Aaratrika Bhaumik, *Supreme Court's Verdict Upholding the Abrogation of Article 370*, *The Hindu*, (December 12 2023), < <https://www.thehindu.com/news/national/supreme-courts-verdict-abrogation-of-article-370-explained/article67626973.ece> > , (last visited on December 28 2023)

¹³ Gauri Kashyap and R. Sai. Spandana, "Abrogation of Article 370 | Judgement Summary", *Supreme Court Observer*, December 11 2023, available at < [https://www.scoobserver.in/reports/abrogation-of-article-370-judgement-summary/#:~:text=On%202011%20December%202023%2C%20five,Jammu%20and%20Kashmir%20\(I%26K\).](https://www.scoobserver.in/reports/abrogation-of-article-370-judgement-summary/#:~:text=On%202011%20December%202023%2C%20five,Jammu%20and%20Kashmir%20(I%26K).>)> last accessed on January 4 2023

logistics to the army. Apart from such developments, movie theaters are also being built for the very first time since the past 30 years. The development of educational institutions is also taking place; many IITs and IIMs are being developed in the region. Many people who were against the abrogation of Article 370 are gradually coming in its favour. One of the evidence is that the original two petitioners who filed the petition before the court challenging the constitutional validity of such a decision by the government have themselves taken a step back from this. Such instances can be noted to prove the point that the abrogation of Article 370 in the Union Territory of Jammu & Kashmir have been a strong and beneficial decision, both for the Indian government and the citizens.