



## Dichotomy of asymmetrical federalism and abrogation of article 370 in India: A constitutional debate

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### Abstract

The framers of the Constitution have embodied asymmetrical federalism in India by Article 370, which imposed some procedural limitations over the union. Such limitations include not abrogating Article 370 unilaterally. As per the procedural setup, a temporary provision such as Article 370 cannot be repealed unless its opponents acquire sufficient political support in the form of a Constituent Assembly. However, these procedural aspects have not been achieved before such abrogation. On the other hand, Article 370 of the Constitution of India 1950 as it provides special privileges to the State of Jammu and Kashmir (J & K) that has been recently abrogated in 2019. Earlier in 2018 its constitutionality was challenged on the ground that it is temporary provision in the constitution which creating many issues relating to political and human rights violation. The author in this research article endeavors to depict the true nature of the Article 370 in the light of the historical and political background. Further, the author seeks to find out the impact of the abrogation of the Article 370 of society in general in the state of Jammu and Kashmir.

**Keywords:** Abrogation of Article 370, Human Rights issues in J&K, Asymmetric Federalism, and Constitutionalism

### Introduction

The Government of India signed three legal instruments in August 2019 that significantly changed the status of Jammu and Kashmir (J&K) in India. *Firstly*, the President issued an order withdrawing the special status of J&K and its residents through Article 35A which had existed since 1954. *Secondly*, the President issued another order essentially abrogating Article 370 of the Constitution of India. *Thirdly*, by passing a new Act the Parliament has converted the State of J&K into a Union Territories from independent State <sup>[1]</sup>.

This came amid a historic crackdown on civil freedoms in J&K, when political leaders were placed under house arrest, telephone lines were cut off, and the Internet was turned off to avoid a rebellion sparked by social media. During its 2014 general election victory, the Bharatiya Janata Party (BJP) pledged in their 2019 program to repeal Article 370 of the Indian Constitution <sup>[2]</sup>.

The central government placed the Kashmir Valley under lockdown before the bill's introduction and the state's special status being revoked <sup>[3]</sup>. This included the deployment of more security forces, the implementation of Section 144, which forbade assembly, and the house arrest of political figures like former chief ministers of Jammu and Kashmir, Omar Abdullah and Mehbooba Mufti. Since June 20, 2018, the State has alternated between governor and president control, following the BJP's withdrawal of support for Mehbooba Mufti's coalition administration. Prior to the deployment of an additional 35,000 paramilitary personnel was deployed to Jammu and Kashmir on the pretext of the potential for terrorism <sup>[4]</sup>. One of the limits put in place was the restricting of phone and internet services.

Article 370 (also known as "Article 370") of the Indian Constitution of 1950 may have divided public opinion more than any other provision of the Indian Constitution. In its original version, the Article stated that the state of Jammu & Kashmir ("J&K") will have its own constitution of the State and shall have separate legislative authority of the Union Parliament (the 'Parliament') over the State. If we give the

significance to the political past of the J & K there are some strong support in favour of the Article 370 and a wide range of the politician have expressed strong feelings in reaction against the abrogation of Article 370.

There will always be gaps in understanding the different factors at relating to the studies of the Article 370 of the Constitution in this paper the research aims to only investigate the legality and normative validity of the against and favour of the justification of abrogating article 370 of the Constitution. In this research paper the author has restricted his studies only to examine the i) power of the President to abrogate under a proclamation of emergency (as was done recently) (ii) power of the President to unilaterally abrogate the provision under Art 370 (1) (d), and (iii) power of Parliament to abrogate using Article 368. (iv) What are the present situations of J & K after abrogating Article 370.

### Review of existing literature

Kashika Mahajan (2019) in her paper titled as "Abrogation of Article 370" talks about abrogation of Article 370 and Article 35A of Indian constitution. These two Articles talks about special status given to residents of Jammu and Kashmir and who are permanent residents of that state and provide them exclusive rights which are not available to rest of the Indians. The Jammu and Kashmir Reorganization Act was passed by the parliament, enacting the division the state of Jammu and Kashmir into two union territories to be called Union Territory of Jammu and Kashmir with legislation and Union Territory of Ladakh without legislation. The aim of abrogation and reorganization of these articles were to integrate Kashmir into India so that they can avail the opportunities which are not available to them as they had separate constitution. All the provisions concerning the status of Jammu and Kashmir are outlined in Part XXI of the constitution. The main goal was to eradicate terrorism in the nation and meet the aspirations of the people of Ladakh, who desired it to be a union territory.

This research paper discusses the historical background of Jammu and Kashmir, the impacts of the abrogation of Article 370 of the Indian constitution, the consequences of the amendment, the global reactions to this change, and finally, the future and recent developments in the state. The BJP government initiated this significant move to repeal Article 370 to unite people together. So that citizen can confidently claim India is united. UNder this research paper the author by analysing various secondary data has tried to find out the reason behind the urgency of repealing Article 370 of the Constitution <sup>[5]</sup>. Further, Ayjaz Wani (2020) in his article titled as “Life in Kashmir After Article 370” The author of this special report has collected information from many segments of the Kashmiri population about how the repeal of Article 370 has affected their life. After the Indian government, led by the Bharatiya Janata Party (BJP), revoked the implementation of Article 370 of the Constitution, which has granted the state of Jammu & Kashmir (J&K) near-autonomy since 1950, on August 5, 2019, the interviews were augmented by secondary sources, mainly news articles in the national and international media. This paper suggested a way forward for the future based on these findings <sup>[6]</sup>. However, Nazir Hussain Paswal and Syed Irfan Haider Jafri *et al.* (2020) in their paper “*Historical Analysis of the Abrogation of Article 370*” have vehemently criticized the BJP Government for the abrogation of Article 370. They opined that it was focused on the revocation of Article 370 by the NDA Government on 5 August 2019 by using majoritarian power, which is against the very spirit of the Indian Constitution, principles of humanity, and democratic norms at a broader level. This action also infringed upon the constitutionally protected rights under Articles 26 to 28 of freedom of religion and otherwise victimized one specific community by the BJP-led government, considering J&K is the sole state that is predominantly Muslim, with about 67 percent of the population being Muslims. The objective of abrogating Article 370 was indeed included in the BJP’s policy document since 1980. Following the Indo-Pak partition in 1947, J&K was a regionally autonomous state that was previously purchased by the British Government. Sadly, Pakistan attacked Kashmir on August 20, 1947, post-partition. In reaction, Maharaja Hari Singh called on India to assist him in defense, subsequently joining the Indian Union on a provisional basis by signing the “Instrument of Accession.” It is the political parties of J&K who are fully accountable for the revocation of Art. 370; thus, this paper will scrutinize the various political parties’ roles. This study is a critical and theoretical analysis to understand the actual myth and reality <sup>[7]</sup>.

Some of the studies has shown the immediate impacts of internet blockage Safat Mustaq Misgar and Zahid Ashraf Wani *et al.* (2021) in their article “*Impact of Internet Blockade Post Abrogation of Article 370 of Indian Constitution on Doctoral Students Pursuing Research in Kashmir*” <sup>[8]</sup>. This paper aims to gauge the impact of the internet blockade on the research students pursuing research in Kashmir post-abrogation of Article 370 of the Indian constitution that granted political autonomy to the erstwhile state of Jammu & Kashmir. The survey method was used to gather the data. A closed questionnaire was given to the chosen group of scholars. The information for the research was collected from these questionnaires according to the objective of the studies, and it was analyzed and interpreted

to draw logical conclusions. The research showed that most (i.e., 76.92%) of scholars believe that the internet serves as a foundation for education and research. Without internet access, most research students (74.04%) could not carry on with their research, and the research activities of 61.54% were severely hindered by 76-100%. It was noted that most researchers (78.85%) did not finish their research within a designated timeframe, which hindered their academic development. The majority of the research students (77.88%) failed to access the internet in e-kiosks set up by the administration due to the huge rush outside these centres, while 42.31% migrated to mainland India to avail of the internet facility. The study also explored the information-seeking pattern of respondents before the internet blockade and it was observed that the majority of scholars (80.77%) consulted both print and online sources of information before the blockade. The researchers also claimed that the resources of the library are not current and comprehensive. Furthermore, Maqsood Hussain (2022) in his article titled “*Abrogation of Article 370: A State Project of Legibility and Simplification*,” Jammu and Kashmir (J&K) occupied a unique place in the Indian federal structure as encoded in Article 370 of the Indian constitution. Incorporating Art. 370 in Indian Constitution reflected the recognition of the unique history and circumstances of J&K’s accession to India. However, the article proved a roadblock in the Indian state’s march to dictate and structure the politics of the state subservient to the perceived national interest, hence the unflinching attempts to gradually dilute it culminating in its total abrogation recently. The article demonstrated an obstacle in the Indian state’s efforts to control and organize politics in a manner aligned with its perceived national interest, leading to consistent attempts to gradually weaken it, ultimately resulting in its recent total abrogation. The article seeks to analyze the Indian government’s focus on undermining Article 370 by claiming it serves the goal of promoting uniformity, ultimately aiming to exert greater control over a border state that is sensitive to security issues. The article argues that the attempts at uniformity were ultimately ineffective; it is far from bringing stability but has caused more political fragility in the state, thus feeding the very dynamics that it has been seeking to contain. In conclusion, the paper offers deepening federalization as the likely pacifier for the festering conflict <sup>[9]</sup>.

Again, it was criticized by Tanya Bhattamishra (2023) in her paper titled as “*Abrogation of Article 370: Political Attack or Step for Holistic Democracy?*” The abrogation of Article 370 of the Indian Constitution in August 2019 marked a significant turning point in the history of the Indian subcontinent. This paper aims to comprehensively analyse the decision to revoke the special status of the state of Jammu and Kashmir and its implications on the region, as well as the wider political and socio-economic landscape of India. This paper begins by providing a historical context of Article 370 and its evolution, shedding light on the unique provisions that granted the state of Jammu and Kashmir a level of autonomy distinct from other Indian states. Following this, it delves into the complex legal and constitutional dimensions that surrounded the abrogation process. The paper then examines the geopolitical consequences of this monumental decision, with a focus on its impact on India-Pakistan relations and the security dynamics in the region. The paper also explores the

implications for the residents of Jammu and Kashmir, including the altered demographics and the socio-economic challenges faced by the region in the post-370 era. Through a multidisciplinary approach that integrates historical, legal, political, and socio-economic perspectives, this paper aims to provide a comprehensive understanding of the abrogation of Article 370 and its far-reaching consequences. It underscores the complex interplay of factors that have shaped the region and the nation, and it invites further discussion on the impact of this historic event on the ongoing challenges and opportunities facing the people of Jammu and Kashmir and the Indian subcontinent as a whole. The paper finally closes by making a harms-benefits analysis of the impact that Article 370 has had on the modern Jammu and Kashmir and Ladakh region <sup>[10]</sup>.

In this regard, Imran Ahmed and Muhammad Saad Ul Haque (2024) have revealed their concern in their article titled “Abrogation of Article 370: An Analysis of the Supreme Court Verdict” that despite the anticipation of a reversal, the Supreme Court of India upheld the constitutional validity of the abrogation of Article 370, leading to a continued divide in public opinion. This article examines the latest judgement of the Supreme Court and explores the historical background, obstacles to constitutional amendments, reasoning of the Supreme Court, and the continuing effects of the repeal, such as media restrictions, human rights issues, and political changes. Likewise, Vinod Rai (2024), in his paper titled as “*Supreme Court of India Upholds Abrogation of Article 370,*” A Constitution Bench of the Supreme Court of India unanimously upheld the power of the President to abrogate Article 370 of the Constitution.

In August 2019, the reorganization of the state of Jammu and Kashmir (J&K) into two Union Territories occurred, and its special privileges were revoked. It maintained that Article 370 was merely a 'temporary measure' to facilitate the integration of the then princely State into the Union during a period of internal conflict and war.

Similarly, Bhaswat Prakash (2024), in his article “*Upholding the Abrogation of Article 370: Can It Be Called Another Black Spot on Indian Judiciary?*” This paper primarily focuses on the revocation of Article 370 by the Modi government on 5 August 2019 by using Majoritarian power. The abrogation of Article 370 was against the very spirit of the Indian Constitution, principles of humanity, and the democratic norms at a broader level. This move was also against the fundamental rights from Articles 26-28—freedom of religion on one hand and, on the other, the targeting of one particular community by the BJP government because J&K is the only Muslim-majority state, which has around 67 percent Muslim population. The mission of the abrogation of Article 370 was mentioned in the manifesto of the BJP since 1980. After the partition of Indo-Pak in 1947, J&K was a provincially independent state that was earlier sold by the British Govt. to Maharaja Gulab Singh for a sum of 7.5 million. After partition, unfortunately, on 20 August 1947, Pakistan invaded Kashmir. In its defense, Maharaja Hari Singh sought help from India and then acceded to the Indian Union temporarily by signing the “Instrument of Accession.” The political parties of J&K are solely responsible for the abrogation of Art. 370 so this paper will critically analyze the role of political parties. This study is a critical and

theoretical analysis to understand the actual myth and reality.

Moreover, Maqsood Hussain Najar (2024), in his paper titled “The Bridge Abridged: Abrogation of Article 370” states that Article 370 of the Indian Constitution constituted the basis of the relationship between India and the erstwhile state of Jammu and Kashmir (J&K). It served as a legal and emotional link between J&K and India. Its recent repeal signified a betrayal of the bridge, which included the trust of the J&K populace in Indian politics and the promises made by the Indian state to J&K at the time of its integration into India. The paper seeks to explore if its repeal enhances state security based on historical insights. To achieve this, the document aims to explore the contextual circumstances that render the implementation of Article 370 unavoidable. It seeks to highlight the calming influence of the unaltered and intact Article 370 on Kashmir's political landscape, while its weakening leads to a state of conflict. With the advantage of historical perspective, the article aims to alert policymakers to the negative outcomes of repealing Article 370, which could jeopardize the secular nature of Indian politics, alongside unforeseen effects arising from the internal political landscape of J&K. The techniques utilized in this research are primarily qualitative, encompassing but not limited to historical analysis, content examination, textual critique, and discourse evaluation <sup>[11]</sup>.

Therefore, Mohd Amin Mir (2024), in his article titled as “*The Kashmir Dilemma and the Repeal of Article 370: A Comparative Analysis,*” In August 2019, the Indian government introduced the Reorganization Bill, which revoked the special status granted to Jammu and Kashmir by Article 370 and divided it into two Union Territories—Ladakh and J&K—under the direct control of the Union government. The government argued that this move would end separatism and terrorism in the region. This article assesses whether the repeal of Article 370 reduced separatism and militancy or intensified it. In examining this analogy, it has become clear that this choice was viewed through the lens of 'demographic change,' which intensified the situation. While the decision led to some beneficial governance changes, it also undermined mainstream politics in Kashmir that depended on Article 370 for its political existence. Lastly, this paper emphasizes the need to address the political concerns of the people and revive the democratic process in the region as essential steps towards establishing peace <sup>[12]</sup>.

Lastly, Sudheshna Kumar Muvva (2024), in his article titled “*Abrogation of Article 370 of The Indian Constitution –A Study*” states that an important turning point in the history of the Indian subcontinent was the abrogation of Article 370 of the Indian Constitution in August 2019. The goal of this essay is to provide a thorough analysis of the decision to remove Jammu and Kashmir's special status. This essay starts by laying out the background information and growth of Article 370, highlighting the special clauses that gave Jammu and Kashmir's state an aspect of autonomy that set it apart from other Indian states. The conditions both before and after Article 370's abrogation are examined in this research <sup>[13]</sup>.

### Genesis of Article 370

It's critical to remember the context in which Article 370 was passed as well as the events that transpired afterward in order to comprehend the arguments put forth by both the

provision's opponents and proponents. After Pakistan and India gained their independence, the British Crown's suzerainty over the princely states ended, returning the states' supreme authority to them. A few dominions, like the state of Kashmir, desired to maintain their independence, while the majority of states chose to join either India or Pakistan. Kashmir stood out even among the states that opted to maintain their independence because it was a Muslim-majority state ruled by a Hindu and geographically contiguous to both India and Pakistan.

Despite his desire to keep Kashmir independent, Maharaja Hari Singh quickly found himself in an untenable position as a result of a tribal invasion within the state, with forces outside the state's borders providing support. Maharaja turned to the Indian government for assistance because of concern about the state's integrity. However, the government made it clear that no assistance would be provided in the absence of an Instrument of Accession ("IoA"). Soon after, an Instrument of Accession (IoA) was signed, giving India authority over J&K in the areas of communication, defense, and external affairs. The agreement itself stipulated that the Maharaja would not be bound by the Constitution, which was customary for the type of IoA he had signed.

Pandit Nehru declared that "Kashmir's future will be decided by the means of the plebiscite" or referendum following the agreement between India and Kashmir on November 2, 1947, but since then, no plebiscite has been held in Kashmir, and the government of India has only made ambiguous promises about it. Following this kind of incident, Kashmiri were given protection and assurances on their ability to vote in municipal and general elections. Thus, the state did not require a plebiscite. On the other hand, Pakistan has always supported holding plebiscites in place of traditional elections. They have consistently incited Muslims in Kashmir to demand their rights and a state-wide referendum. They believed that Kashmiri voters would scarcely ever cast ballots or hardly make any difference in the State because they only urge to get the basic amenities and resolved issues of Kashmir which they would get by the means of elections.

On 14<sup>th</sup> May 1954 a presidential order was made to pass the Constitution applicable to J & K, 1954 this is the introduction of Constitution of J & K where Article 35 A is also included. This Article restrains all citizens other than Kashmiri residents to enter into State of J & K and become permanent resident of the state. The Constitution of Jammu and Kashmir came into effect on 26 January 1957. It basically defines the framework for the government of Jammu and Kashmir. Article 370 gave J&K a special status in the country, and article 35A empowered J&K to determine who is a 'permanent resident' of the state. Further, only permanent resident can purchase the land and take the government jobs in the state of J & K.

On 5 August 2019, a new Presidential order was issued by the country's President stating that all the provisions of the Indian Constitution will be applicable to Jammu and Kashmir without any special provisions. This implied that all special privileges granted by Article 35A would stand inoperative in the state.

Why it was possible as Article 370 is a temporary provision and Article 370 Clause (3) itself has declared that it can be removed by the President as public order but before that President has to take an approval from the Constituent

Assembly of the State of Jammu and Kashmir. The problem is that now there is no existence of the Constituent Assembly of the state of J & K. That constituent assembly as dissolved in 1957 now legislative Assembly and Constituent Assembly are different.

Further, the presidential order ceased the deadlock created by the term of the Constituent Assembly in Article 370, and it says that from now on, the State legislative assembly will act as the Constituent Assembly. Furthermore, new union territories are created, and J & K (it will have a legislature) will be a new union territory, like Ladakh.

Before its abrogation, Clause 3 of Article 370 clearly stated "Notwithstanding anything in the foregoing provisions of this article, 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 that the recommendation of the Constituent Assembly of the State is required. As the parliament unilaterally abrogated Article 370 without the recommendation of the Constituent Assembly of State of J & K and its abrogation of Clause 3 of Article 370. On the other hand, recently, D.Y Chandrachud has mentioned in his judgment that the Constitution of India was a complete code for constitutional governance. He proclaimed: "The President in exercise of power under Article 370(3) can unilaterally issue a notification that Article 370 ceases to exist." Thus, the Judiciary has supported the unilateral decision of the Parliament. Further, Justice Chandrachud said, "The President did not have to secure the concurrence of the Government of the State or Union Government acting on behalf of the State Government under the second proviso to Article 370(1)(d) while applying all the provisions of the Constitution to Jammu and Kashmir because such an exercise of power has the same effect as an exercise of power under Article 370(3) for which the concurrence or collaboration with the State Government was not required." Representatives from J&K joined the Constituent Assembly of India, which was established to draft the country's constitution, when admission was complete. A draft Article 306A was created specifically to serve J&K, taking into account the state's unique circumstances. It eventually became Art 370 in the final Constitution. Minister Gopaldaswamy Ayyangar made a reference to the unique conditions in Kashmir that call for the particular treatment provided by Article 306A during his address when carrying the draft of the provision through the Constituent Assembly. In his view, Art. 370 resulted from about seven factors. These included the invasion's exceptional and irregular ground conditions in the State and the commitment made to the people of J&K to allow them to decide both on the question of accession and the sphere of Union jurisdiction by the referendum or plebiscite.

However, this was not mandated by any of the existing domestic laws, and Nehru's personal fondness for the concept of self-determination may have been the driving force behind it. Afterwards, the argument for a plebiscite was a fundamental component of the UN Security Council's resolution plan when it became involved in the Kashmir dispute, as seen by the resolutions' frequent references to it <sup>[14]</sup>.

The second textual argument that the petition puts forth is that the Constituent Assembly mentioned in the proviso to clause (3) is the same as the one in clause (2), which is

convened for the “purpose of framing of the Constitution of the State”. 49 Given that this constituent assembly has already been dissolved, the only logical conclusion is that the President now has the power to abrogate the provision without the recommendation of the J&K CA. The Petition also emphasizes how any other interpretation would lead to the ever-greening of a provision which was always meant to be temporary and would amount to a fraud on the Constitution, shackling the powers of the President. The Petition thus questions the propriety of allowing the provision to evolve into some sort of an “everlasting and eternal special provision” when all the evidence point to its temporary nature.

### The Judicial Approaches to Article 370

The first notable decision dealing with the Article 370 came in 1959 in *Prem Nath Kaul v. State of Jammu and Kashmir* <sup>[15]</sup>, wherein the validity of the Jammu and Kashmir Big Landed Estates Abolition Act, 1950 (“Act”), was challenged on the ground that the Maharaja did not have the requisite legal authority to pass the said legislation as he was a mere constitutional monarch do not have any legislative powers. In the course of determining Maharaja’s power, the court went into each of the legal instruments, including the Article 370, which could have had an impact on his powers to promulgate the emergency. The observations of the Court in relation to the Article 370, specifically clause (3), are noteworthy: <sup>[16]</sup>

This clause shows that the Constitution makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provisions of Art. 370(1) is made conditional on the final approval by the said Constituent Assembly in the said matters. Cl. (3) authorizes the President to declare by public notification that this article shall cease to be operative or shall be operative only with specified exceptions or modifications; but this power can be exercised by the President only if the Constituent Assembly of the State makes recommendation in that behalf. Thus the proviso to cl. (3) also emphasizes the importance which was attached to the final decision of the Constituent Assembly of Kashmir in regard to the relevant matters covered by Art. 370.

In *Sampat Prakash v. The State of Jammu and Kashmir and Another* <sup>[17]</sup> it has been argued that as was already indicated, one of the main defenses is that the marginal note of the Article remark makes reference to its transient character. The fact that the clause is found in Part XXI of the Constitution, which deals with “Temporary, Transitional and Special Provisions,” further emphasizes the nature of the clause. The Petitioner goes on to explain that the sunset clause in clause (3) of the provision, which gives the President the authority to declare the provision to be inoperative, can be used to determine the Article transience. Later sections of the petition suggest that the sunset clause was intended to occur by the time the J&K CA was dissolved, even though the petitioner does not immediately draw this connection <sup>[18]</sup>.

It is also noted that clause (3), which the petitioner refers to as the sunset clause, begins with a non obstante phrase, indicating that in the event of a disagreement between clause (3) and other clauses of the article, clause (3) will take precedence. The second textual argument made by the

Petition is that the constituent assembly that is called for the “purpose of framing of the Constitution of the State” in clause (2) is the same as the one that is specified in the proviso to clause (3). The President may now revoke the provision without the J&K CA’s advice because this constituent assembly has already been dissolved, which is the only reasonable conclusion.

Soon after Prem Nath Kaul, in 1961, the Article came under scrutiny again in *Puranlal Lakhanpal v. The President of India and Ors* <sup>[19]</sup>. (“Puranlal”). The Petitioner in Puranlal challenged a provision in the Presidential Order, 1954 which modified Article 81 of the Constitution in its application to the State of J&K. In essence, the altered Article 81 provided for indirect election of representatives from J&K to the Lok Sabha (lower house of the Parliament) whereas it had provided for direct election of representatives from all other states. One of the primary contentions of the Petitioner was that such a modification to Article 81 was too radical in nature and impermissible under the terms of Art. 370, which only allowed for minor modifications of the provisions of Article 370. The Supreme Court dismissed the petition on the ground that the presidential powers under Art. 370(1) was to be interpreted in its widest possible sense, with the use of “*modify*” in the Article to be given the widest amplitude so as to include even an amendment <sup>[20]</sup>.

The first of the two notable judgments in the second phase emerged from the J&K High Court in the matter of *Ashok Kumar and Others v. State of J&K and Others*. <sup>22</sup> The Petition was a Service Writ Petition (“SWP”) primarily concerned with the validity of certain government orders which saw officers junior to the Petitioners being promoted ahead of them by virtue of the J&K Reservation Act, 2004 and corresponding Rules i.e. J&K Reservation Rules, 2005. The Petitioners however challenged the very validity of the J&K Reservation Act, 2004 and the Rules in question. As per the Petitioners, Article 16 (4A) of the Constitution, which provided for reservation in promotions, was not applied to J&K through Presidential orders and hence could not provide immunity to the J&K Reservation Act, 2004 and the Rules. Given this, the J&K Reservation Act, 2004 and Rules were *ultra vires* the Constitution, and orders under them were liable to be struck down. One of the issues framed by the High Court to determine the question at hand was: [w]hether Article 370, being a temporary provision, lost its force once Constitution of the State was framed by its Constituent Assembly and therefore, can no more be used by the President to modify a provision of the Constitution in its application to the State

What sets Ashok Kumar apart from previous decisions like Sampat Prakash, which too had affirmed the continuing validity of the Article, is that it provided the Article with almost a perpetual place in the Constitution. Apart from the use of the word “permanent” as opposed to “continued operation” in Sampat Prakash, the decision also went on to mention that [i]t cannot be abrogated, repealed, or even amended as the mechanism provided under Clause (3) of Article 370 is no more available. Furthermore, Article 368 cannot be pressed into service in this regard, inasmuch as it does not control Article 370—a self-contained provision of the Constitution. Since the abrogation of Article 370 of the Indian Constitution, which granted special autonomous status to the region of Jammu and Kashmir, several significant legal cases have emerged. Here’s a summary of

some key cases along with their facts, issues, and judgments:

However, this approach has been change after the abrogation of the Article 370 in 2019 by the BJP ruled government. In *Dr. Shah Faesal v. Union of India* <sup>[21]</sup> does not revived the earlier status of Article 370. As it states that the continuation or cessation of the operation of Article 370 it the matter of parliament and constituent assembly of the state. The court see no reason to interfere in the presidential order.

In this regard, we can mention *Anuradha Bhasin v. Union of India* <sup>[22]</sup> where the question raised concerns the constitutionality of the prolonged restrictions on fundamental rights such as freedom of speech and expression and freedom of movement. The Supreme Court ruled that the indefinite suspension of internet services in Jammu and Kashmir was unconstitutional and emphasized that freedom of speech and expression through the internet is a fundamental right. However, the court did not comment directly on the abrogation of Article 370 itself.

After that the Apex Court was asked to solve the question of how can an independent state be converted into two union territories in *Mohammad Akbar Lone v. Union of India* <sup>[23]</sup> that challenged the Jammu and Kashmir Reorganization Act, 2019, which bifurcated the state into two Union Territories. The case the prime minister focused on was the constitutionality of the reorganization and the legislative changes made without the consent of the Jammu and Kashmir legislature. The petitions raise broadly two challenges. The first challenge pertains to the constitutionality of the presidential orders; the second one challenges the bifurcation of the State of Jammu and Kashmir into two Union Territories.

The petitioners applied the ‘doctrine of colourable legislation’ which means that ‘what cannot be done directly cannot be done indirectly’. The petitioners say that the President has indirectly amended Article 370, a constitutional provision, without the concurrence of the Constituent Assembly of Jammu and Kashmir. This was enabled by substituting ‘constituent assembly’ with ‘legislative assembly’.

Secondly, they contend that the Jammu and Kashmir Reorganisation Act, 2019 was unconstitutional under Article 3. This Article empowers the Parliament to form new States and alter or modify the boundaries of existing states. The petitioners argue that Article 3 does not give the Parliament powers to downgrade federal democratic states into a less representative form such as a Union Territory. The petitioner further contends that in a federal democracy, the right to autonomous self-government, specifically with respect to constitutional and political status, is a fundamental right under Part III of the Constitution and cannot be taken away without the due procedure established by the law.

The Supreme Court upheld the reorganization, stating that Parliament had the power to reorganize states under Article 3 of the Constitution and that the consent of the Jammu and Kashmir legislature was not required.

These judgments show there is some ideological shift in the judicial approaches after the abrogation of Article 370 of the Constitution.

### Is Article 370 a basic structure or not?

This was more often than not done with the authority of the Supreme Court, Specific mention may be made of the orders made in 1950 and 1954 (“1950 Order”, “1954 Order”), through which the Union’s competence to legislate for J&K was substantially widened. Similarly, these Orders also enabled the extension of almost the entirety of the Constitution to J&K, including Article 368, which provides for Parliament’s power to amend the Constitution. As mentioned earlier, all such orders required the stamp of approval from the J&K CA. The J&K CA, which was constituted close on the heels of the adoption of the Constitution of India, gave its stamp of approval for these Orders. Interestingly, all the executive orders that actually followed the 1954 Order were issued as amendments to the 1954 Order, ostensibly to circumvent the lack of approval from the J&K CA. Prior to its dissolution, the J&K CA recommended the continuation of Art 370 with a minor modification. In other words, the approval of the J & K constituent assembly was continued in further orders of Article 370 of the Constitution. Therefore, it was just a constitution of presidential order nothing permanent, and it is no way a basic structure. And no court has decided to utter or pronounce it as part of basic structure.

### Significance of Asymmetric Federalism and the Status of J & K

By the introduction of Article 370 the Constituent Assembly introduces asymmetric federalism in India. In this regards we need to know what is the Asymmetric Federalism and the formula is that Asymmetric federalism or asymmetrical federalism is found in a federation or other types of union in which different constituent states possess different powers: one or more of the sub-states or provinces have considerably more autonomy than the other sub-states, although they have the same constitutional status. This is in contrast to symmetric federalism, where no distinction is made between constituent states. As a result, it is frequently proposed as a solution to the dissatisfaction that arises when one or more constituent units feel significantly different needs from the others as the result of an ethnic, linguistic, or cultural difference <sup>[24]</sup>. We can take the example of the Canadian Constitution, it gives special privileges and autonomy to meet the aspirations of French –speaking Quebec <sup>[25]</sup>.

### Situation of J & K after abrogation of Article 370

After the abrogation of Article 370 in Jammu and Kashmir, the region has seen several developments aimed at economic growth, infrastructure improvement, and overall stability. The move to integrate Jammu and Kashmir more closely with the rest of India has paved the way for significant initiatives such as infrastructure projects, healthcare improvements, educational reforms, and investment opportunities <sup>[26]</sup>. Efforts to boost tourism have also been prioritized, capitalizing on the region's natural beauty and cultural richness. While the political landscape continues to evolve, the focus on development projects signals a concerted effort to foster prosperity and inclusivity in Jammu and Kashmir, aiming to uplift its residents and integrate the region more fully into India's national fabric.

### Concluding remarks

It may raise international issues as the State of J & K became an armed occupied state, or as its become Union territory, it has lost its democratic power even below the state assembly. It has to be reminder the state even before 2019 had the autonomy in place of Article 370.

In this regard, the view of the petitioner's lawyer, Mr. Sibal emphasized that the revocation of the special status of Kashmir conflict is not a representation of the will of the people and also that the parliament has actually abrogated the powers given by it to the Indian state. The constitution bench countered Mr. Sibal and asserted that the clause 3 had a temporary provision in 1950 and only J&K's Constituent Assembly had the exclusive discretion to determine J&K's relationship with India and also to recommend any modification or abrogation in it.

Actor-turned-politician Kamal Haasan ignited controversy by questioning why the Indian government was 'afraid' to organize a plebiscite (referendum) in Kashmir, just three days after the terror assault in Pulwama that claimed the lives of at least forty CRPF troops. Although Haasan's comment drew a lot of criticism, it raised the question, "What is the narrative surrounding the issue of plebiscite?" And from whence does it originate? <sup>[27]</sup>

Eminent lawyer Fali Nariman holds a different position. In an interview with *India Today* following the judgment, he said that Article 370 could be discarded from the Constitution. But even Nariman contended that the central government's legal strategy had been erroneous and should have been called out as such by the Supreme Court.

In Nariman's view, the correct route to remove Article 370 would have been under Article 368, which gives the president the power to amend the Constitution. Under this process, the amendment can get presidential assent after it has been tabled and debated in the two Houses of Parliament. The majority requirement is clear: the bill has to be passed by a majority of the total membership of the house and a majority of not less than two-thirds of the members that are present and voting. Even as Nariman refuted the allegation that the Supreme Court is reluctant to take on the executive on controversial political issues, he said that the Court had gone "with the wrong approach" in this case.

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