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## FROM AUTONOMY TO INTEGRATION: A COMMENTARY ON THE ABROGATION OF ARTICLE 370

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### ABSTRACT

The abrogation of Article 370, which granted the erstwhile State of Jammu and Kashmir (J&K) special status within the Indian constitutional framework, marked a seismic shift in the nation's constitutional and political history. This decision not only redefined the relationship between J&K and the Union of India but also raised significant questions about constitutional principles, federalism, and democratic governance. The Supreme Court's decision in *In Re: Article 370 Abrogation* (2023) upheld the constitutional validity of the abrogation and related measures, such as the bifurcation of J&K into two Union Territories. This paper examines the historical context, legal reasoning, and critical implications of the judgment. It highlights the contentious interpretation of Article 370, the procedural validity of the Presidential Orders, and the Court's stance on federalism and democratic governance. Drawing from constitutional theory, comparative federalism, and international law, this case commentary critiques the judgment and its ramifications for India's constitutional structure.

## **INTRODUCTION**

The abrogation of Article 370 in August 2019 by the Union Government of India was a transformative moment in Indian constitutional history. This provision, originally drafted to reflect the unique accession terms of J&K, accorded the state a special status within the Indian Union. Article 370 was not just a constitutional anomaly but also a political compact aimed at integrating J&K while preserving its autonomy.

The events of August 5, 2019, unfolded in a dramatic sequence:

- The President of India issued C.O. (Constitutional Order) 272, amending Article 367 to redefine the term “Constituent Assembly” as the “Legislative Assembly.”
- The President then issued C.O. 273, rendering Article 370 inoperative.
- Parliament passed the Jammu and Kashmir Reorganisation Act, 2019, bifurcating J&K into two Union Territories: J&K and Ladakh.

These actions were challenged in multiple petitions before the Supreme Court, culminating in the landmark judgment in *In Re: Article 370 Abrogation* (2023). The Court upheld the abrogation, addressing three major issues:

- The temporary or permanent nature of Article 370.
- The procedural validity of the Presidential Orders.
- The legality of J&K’s reorganization under Article 3 of the Constitution.

This paper delves into these issues and provides a critical analysis of the judgment, contextualizing its significance within India’s constitutional, federal, and democratic frameworks.

## **HISTORICAL AND LEGAL CONTEXT**

Article 370 emerged from the unique circumstances surrounding J&K’s accession to India. Following the tribal invasion supported by Pakistan in October 1947, Maharaja Hari Singh sought India’s assistance and acceded to India under the Instrument of Accession. This instrument limited India’s jurisdiction to defense, foreign affairs, and communications.

Sheikh Abdullah, a prominent leader in J&K, demanded substantial autonomy as a condition for integration. The negotiations culminated in Article 370, a temporary provision granting J&K autonomy, with India retaining control over a few specified subjects. The provision

required the concurrence of J&K's Constituent Assembly for any amendments or abrogation.

Over the years, the scope of Article 370 was diluted through Presidential Orders, extending various provisions of the Indian Constitution to J&K. However, its "temporary" nature became a contentious issue, with critics viewing it as a barrier to national integration and proponents arguing it represented a federal compact.

## ISSUES ADDRESSED BY THE SUPREME COURT

### 1. Temporary or Permanent Nature of Article 370

The Court rejected the argument that Article 370 became permanent after the dissolution of the J&K Constituent Assembly in 1957. It held that the provision retained its temporary character, allowing the President to render it inoperative under Article 370 (3).

#### Critical Analysis

The judgment relies heavily on a literal reading of the term "temporary." However, A.G. Noorani, in his seminal work *Article 370: A Constitutional History of Jammu and Kashmir*, argues that the provision's "temporary" nature reflected its transitional character, subject to the completion of the J&K Constituent Assembly's mandate. The Court's failure to address this contextual nuance weakens its reasoning.

The unilateral abrogation violates the federal compact embedded in Article 370. Scholars like Granville Austin emphasize that Indian federalism operates on the principle of cooperative federalism, wherein states retain significant autonomy. The judgment undermines this balance, centralizing power in the Union government.

The judgment disregards precedents such as *Prem Nath Kaul v. State of Jammu and Kashmir* (1959), which highlighted the need for mutual agreement in altering J&K's status. Moreover, the unilateral abrogation challenges the basic structure doctrine, as it undermines the principles of federalism and constitutionalism.

### 2. Procedural Validity of Presidential Orders

The abrogation process relied on two Presidential Orders:

- C.O. 272 amended Article 367 to redefine the J&K "Constituent Assembly" as the "Legislative Assembly."
- C.O. 273 rendered Article 370 inoperative based on the concurrence of the redefined Assembly, represented by Parliament.

The Court upheld these actions, reasoning that Parliament could act as the Legislative Assembly in the absence of an elected body.

### **Critical Analysis**

The Court's acceptance of these Presidential Orders expands executive power at the expense of legislative and federal safeguards. Scholars like Upendra Baxi, in *Judicial Activism in India*, warn against judicial deference in matters that fundamentally alter constitutional structures.

The absence of a functioning J&K Legislative Assembly during the abrogation process underscores a democratic deficit. H.M. Seervai, in *Constitutional Law of India*, argues that procedural safeguards in constitutional amendments are essential to preserve democratic values. The Court's reasoning disregards this principle.

In federal systems such as Canada and Australia, constitutional amendments affecting provincial autonomy require explicit provincial consent. The Court's interpretation deviates from these international norms, reflecting a centralizing trend in India's federal structure.

### **3. Legality of Reorganization under Article 3**

The petitioners challenged the bifurcation of J&K into two Union Territories as a violation of federal principles. Article 3 requires the consent of a state legislature for altering state boundaries. The Court held that Parliament could fulfill this requirement in the absence of an elected Assembly.

### **Critical Analysis**

The reorganization of J&K undermines India's asymmetrical federalism, enshrined in provisions like Articles 371A to 371J, which grant special status to various states. The judgment becomes alarming by setting a precedent for altering these arrangements unilaterally, eroding the golden principle of diversity within unity.

The decision to bifurcate J&K without consulting its people or representatives exemplifies democratic disenfranchisement. As Rajeev Bhargava argues in *Politics and Ethics of the Indian Constitution*, federalism in India is not just a division of powers but a reflection of pluralistic democracy.

### **BROADER IMPLICATIONS**

The Supreme Court's judgment in *In Re: Article 370 Abrogation* has ramifications that extend beyond the specific case of J&K. It impacts the broader constitutional framework, principles

of federalism, the role of the judiciary in governance, international relations, and the nature of India's democracy. This section delves into these wider implications, emphasizing how this judgment reshapes foundational ideas within the Indian Constitution and affects its standing globally.

### **1. Erosion of Federalism**

The Indian federal structure, often described as "quasi-federal," has long sought a balance between centralized authority and regional autonomy. Article 370, in its original form, was a symbol of asymmetrical federalism, recognizing the distinct identity and historical conditions of J&K.

The judgment sets a precedent for unilateral decisions by the central government that could erode the autonomy of other states enjoying special provisions under the Constitution. Articles 371A to 371J, which accord unique protections to states like Nagaland, Mizoram, and Maharashtra, may now be viewed as susceptible to similar unilateral alterations. This poses risks to states and regions that rely on such provisions to preserve their cultural, social, and political identities.

In other federal democracies like Canada and the United States, constitutional amendments affecting provinces or states often require their explicit consent. For instance, Canada's *Clarity Act* requires a clear referendum before secessionist moves by a province. By contrast, the Court's judgment in this case endorses a centralizing tendency that undermines India's federal spirit and disregards global norms of cooperative federalism.

This erosion of federal principles could incite distrust between the Union and states, particularly in regions with historical grievances or distinct identities. For example, northeastern states might resist central policies perceived as diminishing their autonomy, potentially fueling regional unrest.

### **2. Centralization of Power**

The judgment marks a decisive shift toward a more centralized model of governance, diminishing the role of states in determining their future.

The Court's endorsement of the procedural steps taken for Article 370's abrogation effectively places significant power in the hands of the executive branch. This bypasses the intended checks and balances envisioned in the Constitution, particularly in matters affecting state boundaries or status.

Gautam Bhatia, in *The Transformative Constitution*, highlights how constitutional morality entails respecting diversity and fostering inclusive decision-making. The unilateral nature of the decision on J&K contradicts these principles, as the people of J&K or their representatives were not consulted.

This centralizing precedent could embolden future governments to reconfigure state boundaries, dilute autonomy, or impose policies without adequate consultation, undermining the role of regional representation. The judgment risks being viewed as an endorsement of a majoritarian approach to governance.

### **3. Judicial Approach and Constitutional Doctrine**

The judgment raises significant questions about the judiciary's role as the guardian of constitutional values.

The Court's reasoning reflects an apparent deference to the executive branch in matters of national security and political expediency. While judicial restraint is often justified in such cases, it should not come at the expense of constitutional principles like federalism, democracy, and fundamental rights.

India's basic structure doctrine, established in *Kesavananda Bharati v. State of Kerala* (1973), emphasizes the inviolability of federalism, democracy, and the rule of law. By validating actions that unilaterally altered J&K's status, the judgment arguably weakens the basic structure doctrine, raising concerns about judicial inconsistency.

Conversely, some scholars have critiqued the Court for overstepping its role by interpreting political questions, such as Article 370's abrogation, as legal rather than political issues. This risks judicial overreach into domains traditionally reserved for the legislature and executive, creating a delicate balance for the judiciary in future cases.

### **4. Democratic Deficit and Popular Disenfranchisement**

The judgment reflects a broader democratic deficit in the processes surrounding the abrogation of Article 370 and the reorganization of J&K.

The abrogation was carried out during the President's Rule in J&K, effectively sidelining the voice of the state's residents. This undermines the principle of representative democracy, as decisions with profound implications were made without consulting the people most affected.

By approving a process perceived as bypassing democratic norms, the judgment risks

alienating sections of the population, particularly in J&K. This could exacerbate political alienation and fuel unrest in an already volatile region.

Internationally, India is often celebrated as the world's largest democracy. However, actions perceived as undermining democratic processes could tarnish this image. Christine Bell's work on constitutional transitions in conflict zones emphasizes the importance of inclusive governance to maintain legitimacy, a principle that seems compromised in this case.

### **5. Impact on Human Rights and Regional Stability**

The abrogation of Article 370 has led to significant human rights concerns, including restrictions on civil liberties, communication blackouts, and the prolonged detention of political leaders in J&K.

The judgment does not address the human rights implications of the abrogation, focusing instead on procedural validity. This omission is significant, as the judiciary has historically played a proactive role in protecting fundamental rights.

The abrogation has escalated tensions between India and Pakistan, with the latter viewing it as a violation of United Nations Security Council Resolutions on Kashmir. The lack of judicial scrutiny over these geopolitical implications raises questions about the broader consequences of the decision for regional stability.

The abrogation disregards international norms that emphasize self-determination in conflict zones. Scholars like Christine Bell argue that durable peace in such regions requires respecting the aspirations of local populations. The judgment's silence on this aspect reflects a narrow legalistic approach.

### **6. Constitutional Morality and Transformative Justice**

The Indian Constitution, as envisioned by its framers, is a transformative document aimed at fostering inclusivity, equality, and justice.

The judgment could have provided a platform to address the historical grievances of the people of J&K and foster a dialogue toward reconciliation. Instead, its validation of unilateral executive action deepens the divide between J&K and the rest of India.

The Court's reasoning does not adequately reflect the pluralistic ethos of the Constitution. As Rajeev Bhargava notes in *Politics and Ethics of the Indian Constitution*, true constitutional morality lies in balancing unity with diversity. The judgment's centralizing implications risk

undermining this balance.

## **7. Precedent for Future Constitutional Amendments**

The Court's decision has implications for how future constitutional amendments and provisions might be interpreted and implemented.

By endorsing a reinterpretation of Article 367 to redefine the J&K Constituent Assembly, the judgment lowers the threshold for constitutional amendments. This could embolden future governments to bypass procedural safeguards in other contexts, threatening the stability of India's constitutional framework.

Provisions aimed at protecting minority rights and regional identities could become more vulnerable to unilateral alterations. These risks erode the social contract that underpins India's diversity.

## **CONCLUSION**

The Supreme Court's judgment in *In Re: Article 370 Abrogation* represents a watershed moment in India's constitutional and political history. While it resolves the legal validity of Article 370's abrogation, it leaves unresolved questions about federalism, democracy, and constitutional morality.

The broader implications of this decision extend beyond J&K, affecting the balance of power between the Union and the states, the role of the judiciary in safeguarding constitutional values, and India's standing as a pluralistic democracy. Moving forward, it is essential to strengthen procedural safeguards, foster inclusive governance, and uphold the transformative vision of the Constitution to navigate the challenges posed by this judgment.

As B.R. Ambedkar, the architect of the Indian Constitution, profoundly stated,

“However good a constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.”

This case is a clarion call for responsible governance and vigilant judiciary, reminding us that the strength of any democracy lies not merely in its constitutional text but in the moral and ethical commitment of its interpreters and enforcers.

## REFERENCES

- H.M. Seervai, *Constitutional Law of India* (4th ed., Universal Law Publishing, 2015).
- Canada, *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference* (S.C. 2000, c. 26). Available at: <https://laws-lois.justice.gc.ca/pdf/c-31.8.pdf>
- A.G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (Oxford University Press, 2011).
- Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 1999).
- Sujit Choudhry, “Managing Linguistic Diversity: Federalism and Language Policy in India,” 7(1) *International Journal of Constitutional Law* 13 (2009).
- Upendra Baxi, *Judicial Activism in India* (LexisNexis, 2012).
- Gautam Bhatia, *The Transformative Constitution* (HarperCollins, 2019).
- Christine Bell, “Constitutional Transitions in Conflict Zones,” 6(4) *Global Constitutionalism* 236 (2017).
- *In Re: Article 370 Abrogation* (2023) 8 SCC 175.
- D.D. Basu, *Commentary on the Constitution of India* (LexisNexis, 2020).
- Rajeev Bhargava, *Politics and Ethics of the Indian Constitution* (Oxford University Press, 2008).