

Understanding the recent Constitutional amendment on J&K - And the questions we all must ask

This note outlines the Constitutional amendment related to revoking J&K special status under Article 370 and reorganization of J&K through Article 3. It then raises key questions that all of us should think about.

Constitutional amendments are necessary to allow for adaptations with changing times and needs. Till March 2019, the Constitution of India has had 103 amendments. Normally, amendments to the Constitution are done through the process stated in Article 368. However, the amendment related to J&K was not done using Article 368. It was done through a Presidential Order.

Revoking Article 370

Here, first, is the process outlined by the Constitution on how Article 370 could be revoked. Article 370 gives special status to the State of J&K. Clause (3) of the Article 370 gives the provisions to revoke or modify itself. The President has this power **BUT only on the recommendation of the Constituent Assembly of the State.**

(3) 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 referred to in clause (2) shall be necessary before the President issues such a notification.

Reorganisation of State of J&K

Article 3 of the Constitution explains the procedure of formation of new States and alteration of areas, boundaries or names of existing States. It is silent on any procedure needed to change a State to a Union Territory. The bill for any change is to be presented to the Parliament on the recommendation of the President and the President is to refer the bill to the Legislature of the State for expressing its views on it.

<small>Formation of new States and alteration of areas, boundaries or names of existing States.</small>	3. Parliament may by law— (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; (b) increase the area of any State; (c) diminish the area of any State; (d) alter the boundaries of any State; (e) alter the name of any State: ⁴ [Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries
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¹Subs. by the Constitution (Seventh Amendment) Act, 1956, s. 2, for cl. (2).
²Subs. by s. 2, *ibid.*, for sub-clause (b).
³Article 2A was ins. by the Constitution (Thirty-fifth Amendment) Act, 1974, s. 2 (w.e.f. 1-3-1975).
⁴Subs. by the Constitution (Fifth Amendment) Act, 1955, s. 2, for the proviso.

The facts are that Constituent Assembly of J&K dissolved in 1956 and presently, the Legislature of J&K stands dissolved and J&K is under President's Rule.

Thus, to revoke Article 370 and to use Article 3 to reorganize J&K, the President used his power under Article 370 Clause 1(d), to amend another Article of the Constitution, Article 367.

This is the power of the President under Article 370 Clause 1(d) i.e. **the President can modify the Constitution in relation to J&K by President Order subject to consultation with the Government of the State which further means the Governor on advice of the Council of Ministers.**

Using this power, the President by order amended Article 367. This is Article 367: Interpretation as it stood before the amendment.

With the amendment, a new clause was added – Clause 4. This Clause is stated in the Presidents Order - The Constitution (Application to Jammu and Kashmir) Order, 2019) given below.

With this new clause in Article 367, this Article now defines significant power functions. **It has made the powers of the Constituent Assembly of J&K = Legislature of J&K = Governor of J&K Also, Government of the State = Governor of J&K Also, Governor acting on the advice of the Council of Minister of the State = Governor of J&K**

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such	
<p><i>In exercise of the powers conferred by this article the President, on the recommendation of the Constituent Assembly of the State of Jammu and Kashmir, declared that, as from the 17th day of November, 1952, the said art. 370 shall be operative with the modification that for the Explanation in cl. (1) thereof, the following Explanation is substituted, namely:—</i></p> <p><i>“Explanation.—For the purposes of this article, the Government of the State means the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the “Sadar-I-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.”.</i></p> <p><i>(Ministry of Law Order No. C.O. 44, dated the 15th November, 1952).</i></p> <p><i>*Now “Governor”.</i></p>	
244	<p>THE CONSTITUTION OF INDIA</p> <p><i>(Part XXI.—Temporary, Transitional and Special Provisions.—Arts. 370-371.)</i></p> <p>exceptions and modifications as the President may by order¹ specify:</p> <p>Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:</p> <p>Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.</p>

<p>367. (1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.</p> <p>(2) Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State^{2***}, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor^{3***}, as the case may be.</p> <p>(3) For the purposes of this Constitution “foreign State” means any State other than India:</p> <p>Provided that, subject to the provisions of any law made by Parliament, the President may by order⁴ declare any State not to be a foreign State for such purposes as may be specified in the order.</p>	<p>Interpretation.</p>
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<p>1. (1) This Order may be called the Constitution Application to Jammu and Kashmir) Order, 2019.</p> <p>(2) It shall come into force at once, and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1954 as amended from time to time.</p> <p>2. All the provisions of the Constitution, as amended from time to time, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows: To article 367, there shall be added the following clause, namely:“(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir</p> <p>(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State:</p> <p>(b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir:</p> <p>(c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers, and</p> <p>(d) in the proviso to clause (3) of Article 370 of this Constitution, the expression “Constituent Assembly of the State referred to in clause (2)” shall read “Legislative Assembly of the State”.</p> <p>RAM NATH KOVIND,</p> <p>President</p>

Hence, the

1. Governor's consent has been taken to replace the recommendation needed from Constituent Assembly to revoke Article 370
2. Governor's consent has been taken to replace the consultation necessary from the Legislature of J&K to change the State into UT.

This wordplay has made it possible to achieve the twin aims of revoking J&K special status and its reorganization.

The questions are:

How did the President use his power under Article 370 1(d) to redefine Article 367 without the consultation of the Government of the State as required by Article 370 1(d) in the first place?

Why did the Articles 370 and Article 3 have the words Constituent Assembly and Legislature in the first place? What was the role they were expected to play in the event of any change concerning their state? Why is this role important in democracy?

How does the wordplay affect two core constitutional principles

- (a) Democratic Representation (representation of people's voice in the decisions that affect them) and
- (b) Separation of Powers (checks and balance so that no one has complete power, that decisions are not unilateral and arbitrary)?

These core principles and institutions project and protect our voice and rights as citizens. They ensure that the Government, which has legitimate constitutional power also has restraints and checks.

Are we ready for these core principles to be compromised? Are we ready for changes in our rights as we experience them today?

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References:

1. The Constitution of India: Online copy: https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf
2. The Jammu and Kashmir Reorganisation Bill, 2019 http://www.prsindia.org/sites/default/files/bill_files/jammu%20and%20Kashmir%20Reorganisation%20Bill%2C%202019.pdf
3. The Constitution (Application to Jammu and Kashmir) Order, 2019) <https://indianexpress.com/article/india/article-370-jammu-and-kashmir-removal-full-text-of-presidents-order-5879178/>