

# From a Sovereign State to a Union Territory: A History of the Constitutional Erosion in Kashmir

By *Burhan Majid\**

**Abstract:** The unilateral abrogation of Article 370 on August 5, 2019, by the Government of India signalled the culmination of the constitutional erosion in Jammu & Kashmir (J&K). This move, now endorsed by the Indian Supreme Court, prompts a retrospective glance at the State's gradual loss of sovereignty since its signing of the Instrument of Accession with the Dominion of India in 1947. Unlike other States, J&K retained sovereignty, delegating legislative power exclusively for defence, external affairs, and communication to the Indian Dominion legislature. This article endeavours to delineate J&K's distinct status, meticulously tracing the erosion of its semi-autonomous position post the dissolution of its Constituent Assembly in 1957. Through a critical analysis of the Instrument of Accession, Article 370's role in codifying the terms of accession, pivotal judgments from the Supreme Court and the J&K High Court, and other pertinent documents, it sheds light on the gradual dismantling of J&K's unique constitutional position within India's framework.

**Keywords:** Sovereignty; Constitutional Autonomy; Kashmir

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## A. Introduction

In the post-colonial Indian landscape, Jammu and Kashmir held a unique and distinct position, standing apart from other States in its accession to the Indian state. While most States merged with India post-independence, J&K retained a distinct status, acceding but not merging. The Instrument of Accession (IoA), signed by Maharaja Hari Singh, the then ruler of the State, in 1947, emphasized this exceptional arrangement<sup>1</sup>, reserving legislative authority on all matters except defence, external affairs, and communication.

J&K is the only State which negotiated the terms of its membership with the Union of India<sup>2</sup>. Over five months, from May 15 to November 16, 1949, discussions between India's first Prime Minister, Pandit Jawaharlal Nehru and J&K's Prime Minister, Sheikh

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1 Instrument of Accession of Jammu and Kashmir, [https://cjp.org.in/wp-content/uploads/2019/08/instrument\\_of\\_accession\\_of\\_jammu\\_and\\_kashmir\\_state.pdf](https://cjp.org.in/wp-content/uploads/2019/08/instrument_of_accession_of_jammu_and_kashmir_state.pdf) (last accessed on 5 July 2023).

2 *Abdul Gafoor Abdul Majeed Noorani*, Article 370: A Constitutional History of Jammu and Kashmir, Delhi 2011, p.1.

Mohammad Abdullah, forged a unique constitutional arrangement with an asymmetrical skew in favour of the State. Interestingly, pre-1965, J&K had its own Prime Minister and ‘*Sadr-i-Riyasat*’ (President of the State). Nehru’s letter to Abdullah from May 18, 1949, solidified two pivotal decisions. First, J&K would craft its own Constitution, saddled on the promised autonomy. Second, the Constituent Assembly would determine the extent of powers ceded to the Centre, beyond those outlined in the IoA.<sup>3</sup> The subsequent codification of these negotiations in Article 370<sup>4</sup> of the Indian Constitution furnished an elaborate framework elucidating the intricate relationship between the State and the Indian Union, reinforcing the exceptional nature of J&K’s accession.

As per the Nehru-Abdullah negotiations, once the Constituent Assembly of the State convened on October 31, 1951, the State Government relinquished its authority to accord any “concurrence” to the Union—something also unambiguously stated under Clause (2) of Article 370.<sup>5</sup> Gopaldaswami Ayyangar, in the Indian Constituent Assembly<sup>6</sup>, made this unequivocally clear: “The State Government’s concurrence should be placed before the Constituent Assembly when it meets and the Constituent Assembly may take whatever decisions it likes on those matters”. Everything concerning J&K from October 27, 1947, to the Constituent Assembly’s dissolution on January 26, 1957, was deemed provisional, awaiting the Assembly’s final word. Notably, Article 370 stood as it was as of January 26, 1957, as the Constituent Assembly did not recommend its revocation.

Both political and legal commitments underscore the temporary nature of the accession. On the political side, the Government of India acknowledged this in the 1948 White Paper on Jammu and Kashmir<sup>7</sup>: “Jammu and Kashmir, until August 15th, 1947, was an autonomous State in treaty relations with, and subject to the paramountcy of, the Crown of England”, emphasizing the provisional nature of the accession until the people’s will was ascertained. In a letter dated October 27, 1947, the Governor General, too, had emphatically stated that “it is my Government’s wish that, as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State’s accession should be settled by a reference to the people”.<sup>8</sup>

3 Jawaharlal Nehru’s Letter to Sheikh Abdullah, in: Durga Das (ed.), *Sardar Patel’s Correspondence 1945–50*, Ahmedabad 1971, pp. 275–309.

4 Article 370, *The Constitution of India 1949*.

5 Clause 2 of Article 370 reads: “the concurrence of the Government of the State referred to in paragraph (ii) of sub clause (b) of clause (1) or in the second proviso to sub clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.”

6 See Constituent Assembly Debates, <https://www.constitutionofindia.net/constitution-assembly-debates/> (last accessed on 9 July 2023).

7 *The White Paper on Jammu and Kashmir*, Government of India 1948, *Noorani*, note 2, p. 3.

8 Reply from Governor-General, India, Delhi, Dated 27 October 1947, in: *White Paper on Jammu & Kashmir*, Government of India, 1948, pp. 46–47, 26 October 1947.

On the legal side, the provision<sup>9</sup> added to Article 253 of the Indian Constitution by the Constitution (Application to Jammu & Kashmir) Order, 1954 (hereinafter, the Basic Order) echoed the temporary nature of J&K's accession, requiring the State's consent for any decision affecting its disposition. Article 253's amendment emphasizes two crucial points. First, it allows for potential alteration of the State's relationship with the Union to implement international agreements. The 'White Paper on the Constitutional relationship of Kashmir with India' released by The Plebiscite Front<sup>10</sup> in 1964 even goes on to state that the Article, by implication, even allows room for the State to decide its future vis-a-vis its relationship with the Union. Second, it reinforces the necessity of the consent of the State for any disposition related to J&K as part of the implementation of an international treaty or agreement. This supports the argument that J&K's accession was provisional, subject to a referendum or plebiscite as promised by India to the Kashmiri leadership<sup>11</sup> and the United Nations Security Council<sup>12</sup>. Effectively, Article 1<sup>13</sup> of the Indian Constitution applied to J&K temporarily and transitionally within the context of Article 370 itself.

Despite these commitments, no plebiscite was conducted in J&K, and the special constitutional status guaranteed under Article 370 saw a gradual erosion. Different Constitution Application Orders, amendments to the State Constitution, and judicial decisions steadily diluted this status after the Constituent Assembly dissolved on January 26, 1957, coinciding with the enforcement of the J&K Constitution. The effective 'abrogation' of Article 370 on August 5, 2019, and the reorganization of the State into two Union Territories<sup>14</sup> marked the final blow to J&K's constitutional identity, concluding the prolonged erosion of its unique status.

- 9 The provision reads: "Provided after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of the State of Jammu & Kashmir shall be made by the Government of India without the consent of the Government of that State."
- 10 A political party in the State of Jammu and Kashmir that campaigned for a 'popular plebiscite' to decide whether the State should remain part of India, or join Pakistan or become independent. It was founded on 09 August 1955 by Mirza Afzal Beg of Kashmir, and later, dissolved in 1975.
- 11 Nehru's First Speech On Kashmir, <https://kashmirilife.net/nehru-first-speech-on-kashmir-165556/> (last accessed on 10 July 2023).
- 12 UN Security Resolution, 47 (1948), Resolution of 21 April 1948.
- 13 At the time of enforcement of the Indian Constitution, the only Article other than Article 370 that was extended to J&K was Article 1. Article 1 reads: "(1) India, that is Bharat, shall be a Union of States. (2) The States and the territories thereof shall be as specified in the First Schedule. (3) The territory of India shall comprise - (a) the territories of the States; (b) the Union territories specified in the First Schedule; and (c) such other territories as may be acquired."
- 14 J&K Reorganisation Act, 2019.

## B. Conceptualising J&K's Internal Sovereignty

Jammu & Kashmir's accession to the Indian Dominion set it apart from the roughly 600 princely States due to its distinct geographic and demographic complexities. Even sixty years later, Union Home Minister P. Chidambaram, on August 6, 2010, reiterated in the Indian Parliament the exceptional nature of J&K's situation : "the State poses a unique problem which requires a unique solution".<sup>15</sup> This reaffirmation by an Indian Home Minister on the floor of the Parliament underscores the enduring nature of these distinct circumstances and reinforces the significance of the now-abrogated special constitutional arrangement between J&K and the Indian Dominion. The IoA and Article 370 validated these unique conditions, delineating an arrangement where J&K retained autonomy (referred to as 'sovereignty' in the IoA<sup>16</sup>) except in defence, external affairs, and communication matters, granting the Indian Government legislative authority.

This unique accord resembled an agreement between two sovereign entities, emphasizing J&K's empowerment of the Government of India to legislate on specific domains while maintaining "sovereignty" in others, putting in place an asymmetrical federal model. Such an arrangement symbolised a division of sovereignty—something that builds on a mix of practical politics and constitutional principles and constitutes a normal feature of a federation. Effectively, by executing an IoA, the State ceded external sovereignty only and retained internal sovereignty. Needless to say, the division of internal sovereignty by a distribution of legislative powers is an essential feature of federalism as underscored by the Indian Supreme Court in a catena of cases.<sup>17</sup> Holding that federalism is part of the basic structure of the Constitution in *S.R. Bommai v. Union of India*,<sup>18</sup> the Court stated: "States are sovereign in the field left to them and they have the plenary power to make laws accordingly".

Article 370 formally recognized the political agreement between J&K and the Indian Dominion onto a constitutional pedestal, providing a legal framework to the agreed upon IoA terms. Put simply, its extension necessitated "consultation" for IoA-related matters and "concurrence" for others, as stipulated in Clause (2), requiring the consent of the "Constituent Assembly of the State" after its convening in 1951.<sup>19</sup> Other than the powers transferred by it to the Indian Dominion, the State enjoyed complete "residuary sovereign-

15 Indian Express, Will Resume Talks Win Hearts, <http://archive.indianexpress.com/news/will-resume-e-talks-win-hearts-in-j-k-pc/657217/> (last accessed on 13 July 2023).

16 Clause 8 of IoA reads: "Nothing in this instrument affects the continuance of my sovereignty in and over this state, or save as provided by or under this instrument the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law in force at present in this State."

17 State (NCT of Delhi) v Union of India, (2018) 8 SCC 501, Government of NCT of Delhi v Union of India & Another [C. A. No. 2357 of 2017] decided on 11 May 2023.

18 (1994) 3 SCC 1.

19 Cf. note 5.

ty”<sup>20</sup> against other States in which case the residuary power was retained by the Union. J&K’s retention of the residuary powers singularly affirms that sovereignty resides in the “people” now in contrast to the Maharaja’s, in pursuance of Clause 8 of the IoA.

Having codified the terms of the IoA, Article 370 was a pact, no less than a treaty, between two sovereign units, which is why the high bar of the requirement of a recommendation of the Constituent Assembly of the State for extension of non-IoA related matters and its abrogation. As a corollary, any unilateral alteration by one of the parties to the pact would fly in the face of the principle of *pacta sunt servanda* (agreements/treaties are binding in good faith)—the cardinal principle that governs contractual obligations and is now part of international law.

Additionally, Clause 5 of the IoA put an embargo on its amendment in any form, “unless such amendment is accepted by the ruler by an Instrument supplementary to the original Instrument”. No such supplementary Instrument was ever signed by the State of J&K. Consequently, the State of J&K forged its own Constitution,<sup>21</sup> subsequently nullified upon the Article’s abrogation in 2019. The IoA, Article 370, the State’s Constitution, and the 1952 Delhi Agreement, reinforced by the Basic Order,<sup>22</sup> formed a web of legal instruments securing J&K’s semi-autonomous position within the Indian Union.

Article 370’s controversy partly stems from the word “temporary” in its marginal note. Arguments persist, including from sections of India’s political class both in the Constituent Assembly and the Parliament, and the Central Government, contending its temporary nature. Even the Indian Supreme Court has altered its stance on this, oscillating between perceiving the Article as temporary<sup>23</sup> and permanent.<sup>24</sup> What is more, even when the Supreme Court described the Article as permanent, it did so by interpreting it to widen the presidential power of making modifications to the provisions of the Indian Constitution while applying them to J&K.<sup>25</sup> Notably, the word “temporary” was put in the marginal note because the final form of the constitutional relationship between the Centre and the State was to be decided by the Constituent Assembly of the State. Since the Constituent Assembly of the State had not been convened yet, and its recommendations were awaited,

20 The Delhi Agreement of 1952 was entered into between the Government of India and the Government of Jammu and Kashmir. Under this Agreement, the Government of India agreed that while residuary powers of the legislature vested in Parliament in respect of other states, in the case of Jammu and Kashmir, such powers vested in the State itself.

21 The Constitution of Jammu and Kashmir, 1956 further defined the relationship between the State and the Government of India.

22 Constitution (Application to Jammu & Kashmir) Order, 1954 issued on 14 May 1954.

23 *Apurva Vishwanath*, Article 370 Abrogation Upheld: How SC Answered Three Key Questions in the Government’s Favour, *Indian Express* (2023), <https://indianexpress.com/article/explained/explained-law/article-370-abrogation-upheld-supreme-court-explained-9063145/> (last accessed 11 December 2023).

24 *Sampat Prakash v State of J&K*, 1969 AIR 1153; *State Bank of India v Santosh Gupta* (2017) 2 SCC 538.

25 *Ibid.*

Article 370 was initially meant to be temporary when the Indian Constitution was enforced on January 26, 1950. The Constituent Assembly was dissolved, however, without making any recommendations on the abrogation of the Article. A similar reasoning was echoed in the J&K Legislative Assembly during a debate on the Autonomy Report 2000.<sup>26</sup>

It is worth noting that J&K is not the sole State enjoying a special provision in the Indian Constitution. To accommodate regional diversities, the Constitution extends special status to Nagaland,<sup>27</sup> Sikkim,<sup>28</sup> Mizoram,<sup>29</sup> and Arunachal Pradesh.<sup>30</sup> Particularly noteworthy is that, in Nagaland and Mizoram, Parliament is barred not only from altering religious or social practices but also customary law, civil and criminal justice administration, and land ownership and transfer. Special provisions exist for certain areas within States like Maharashtra and Gujarat,<sup>31</sup> reflecting the Constitution's effort to accommodate diverse regional contexts.

### C. Erosion Through Executive Fiat

The constitutional encapsulation within Article 370 acknowledged a distinctive relationship between J&K and the Indian Union. Yet, a disconcerting trend emerges: post-Partition, 47 presidential orders extended 260 of India's Constitution's 395 Articles to Kashmir.<sup>32</sup> Additionally, 94 out of 97 entries in the Union List were extended<sup>33</sup>, effectively stripping Article 370 to an empty shell. However, it symbolized the popular sentiment in Kashmir towards its guaranteed special constitutional position, largely sustained through Article 35

26 J&K Legislative Assembly, Debates on Autonomy Report 2000, p. 6.

27 Article 371-A.

28 Article 371-F.

29 Article 371-G.

30 Article 371-H.

31 Article 371.

32 From Domicile to Dominion: India's Settler Colonial Agenda in Kashmir, *Harvard Law Review* 134 (2021), p. 2530, <https://harvardlawreview.org/print/vol-134/from-domicile-to-dominion-indias-settler-colonial-agenda-in-kashmir/> (last accessed on 22 June 2023).

33 *Noorani*, note 2, pp. 336-441.

A.<sup>34</sup> The Article was a continuation of the pre-independence definition<sup>35</sup> of permanent residents and an epitome of the autonomy of J&K.<sup>36</sup> This provision limited property ownership, settlement, and government aid to permanent residents.

Even Nehru defended Article 35 A's symbolism in the Lok Sabha in 1963,<sup>37</sup> acknowledging its value in preserving Kashmir's distinctiveness. He observed:

*"No, I repeat that Kashmir is fully integrated. The fact that there may be some special matters attached to it does not come in the way of integration at all, and I gave as an instance that in Kashmir citizens of India other than those of Kashmir are not allowed to buy land or own property. That is an old rule coming on, not a new thing, and I think that it is a very good rule which should continue, because Kashmir is such a delectable place that moneyed people will buy up all the land there to the misfortune of the people who live there".<sup>38</sup>*

Ironically, the erosion of Kashmir's autonomy was methodically engineered, notably by figures like Nehru and his colleagues. Nehru himself declared the gradual erosion of Article 370, dismissing its significance while endorsing its transformation into a hollow shell. In the same November 27 speech, Nehru declared:

*"Article 370 has been eroded, if I may use the word, and many things have been done in the last few years which have made the relationship of Kashmir with the Union of India very close. There is no doubt that Kashmir is fully integrated... We feel that this process of gradual erosion of Article 370 is going on. Some fresh steps are being taken and in the next month or two they will be completed. We should allow it to go on".<sup>39</sup>*

34 Article 35A of Constitution of India, 1949 reads: "Saving of laws with respect to permanent residents and their rights - Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State,- (a) defining the classes of persons who are, or shall be permanent residents of the State of Jammu and Kashmir; or (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects- (i) employment under the State Government; (ii) acquisition of immovable property in the State; (iii) settlement in the State; or (iv) right to scholarships and such other forms of aid as the State Government may provide, shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part."

35 J&K State Notification No. I-L/84, 20 April 1927, read with State Notification No. 13/L, 27 June 1932.

36 *Burhan Majid*, Why 35 A Matters, *The Wire* (2019), <https://thewire.in/law/why-article-35a-matters> (last accessed on 30 June 2023).

37 Lok Sabha Debates, Sixth Session (3rd Lok Sabha), 27 November 1963, pp. 1636-1638.

38 *Ibid.*

39 *Ibid.*, p. 1637.

Later, in a revealing statement on December 4, 1964, Nehru's colleague and the then Home Minister Gulzari Lal Nanda went a step ahead and delineated Article 370's instrumental role as a 'tunnel' to expand the Indian Constitution's reach into J&K.<sup>40</sup> He emphasized the emptied shell of Article 370, outlining how several executive orders subverted the State's autonomy.<sup>41</sup> He stated:

*"The only way of taking the Constitution of India into Jammu and Kashmir is through the application of Article 370. It is a tunnel. It is through this tunnel that a good deal of traffic has already passed and more will. What happens is that only the shell is there. Article 370, whether you keep it or not, has been completely emptied of its contents. Nothing has been left in it".*

Nanda further added:

*"Article 370 is the only way of bringing back the Constitution to J and K. That is my reading of the Constitution. It is Article 370 which provides for the progressive application of the provisions of the Constitution to Jammu and Kashmir. What does it actually do? As things are, it only regulates the progressive application; it provides for that and regulates it, affirms it; it does not negate. The negations are elsewhere. It is, therefore, wrong to say that Article 370 has outlived its utility."*<sup>42</sup>

Nanda went on to state that while the elaborate procedure laid down in Article 368 will have to be followed for any normal constitutional amendment, for the state of J&K, all that is needed is a mere executive order by the President under Article 370.<sup>43</sup> In the years that followed, the interpretation given by Nanda to Article 370 became the norm. Subsequent amendments further diluted J&K's status, notably replacing elected roles with centrally nominated positions, subjugating the State's Constitution to executive orders. The Indian Government utilised Article 370 inversely, augmenting Centre-State control far beyond standard constitutional purview. The extensive application of executive orders bypassed constitutional norms, granting unprecedented powers to the Centre over J&K, in stark contrast to other states. This erosion continued after the Constituent Assembly's dissolution, rendering numerous executive orders unconstitutional.

Criticism intensified as politicians' rhetorical promises failed to preserve the State's autonomy. Several Indian Prime Ministers have time and again made lofty and rhetorical promises to contain the alienation among the people of J&K owing to the hollowing out of the Article. In 1995, the then Prime Minister Shri P.V. Narsimha Rao famously said

40 Lok Sabha Debates, Tenth Session (3rd Lok Sabha), 4 December 1964, p. 3455.

41 Ibid., p. 3460.

42 Ibid., p. 3455.

43 Ibid., p. 3455.

“sky’s the limit and short of independence, any demands can be considered”.<sup>44</sup> A year later, another Indian Prime Minister, Shri Deve Gowda promised “maximum autonomy to be discussed with people’s representatives”.<sup>45</sup> Far from translating any of the promises into practice, the State stands robbed of even a facade of autonomy it had on 4 August 2019.

The erosion of Jammu & Kashmir’s autonomy, ongoing since the Basic Order, starkly contradicts the promised autonomy. The 1966 constitutional amendment replaced the elected ‘*Sadr-i-Riyasat*’ with a Centre-nominated Governor, granting the Central Government authority to amend both the Indian and State Constitutions. The title of Prime Minister was also replaced by Chief Minister through the same amendment. A significant blow occurred on July 23, 1975, with the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1975, prohibiting the State legislature from amending the State Constitution concerning the Governor, Election Commission, and Legislative Council composition.

Paradoxically, the Indian Government has used Article 370 to expand its writ in J&K. Article 370 was used by the Indian Union in a totally opposite direction, giving the Centre more powers over the State than it had ordinarily under the Constitution.<sup>46</sup> Two prominent events prove the point. One, the Parliament had to amend the Constitution multiple times to extend the President’s rule imposed in Punjab in 1987 beyond one year. On the contrary, the same result was achieved in J&K from 1990 to 1996 by mere executive orders under Article 370. Two, in a similar move, Article 249 of the Indian Constitution, which confers the power on Parliament to make laws on entries in the State list, was extended to J&K without a resolution by the State Legislative Assembly, let alone the Constituent Assembly as stipulated by Article 370 (2). Ironically, ‘concurrence’ for this was rendered by the Centre’s own nominee, Governor Jagmohan. This constitutes a brazen misuse of the framework under Article 370 itself. In his seminal book *Article 370: A Constitutional History of Jammu and Kashmir*, A.G. Noorani, a leading constitutional law scholar, echoes the diagnosis, stating that ‘J&K has been put in a status inferior to that of other states’.<sup>47</sup>

In the absence of the Constituent Assembly of the State from 26 January 1957, all the executive orders except the Basic Order are unconstitutional. But the damage has already been done. The intensity of the erosion was succinctly summed up in an interview by Sitaram Yechury, one of the members of the Parliamentary delegation which visited Kashmir in September of 2010 after the widespread agitation over the killing of a school-boy:

44 *Saleem Rashid*, Review of S. Narendra’s *India’s Tipping Point—The View from 7 Race Course Road: Big-bang reform*, *The Hindu* (2023), <https://www.thehindu.com/books/books-reviews/india-n-prime-minister-narasimha-rao-politics/article66803164.ece> (last accessed on 4 July 2023).

45 *Harinder Baweja*, PM Deve Gowda Sets Tone for Revival of Political Process in War-Weary Kashmir Valley, *India Today* (1996), <https://www.indiatoday.in/magazine/nation/story/19960731-pm-deve-gowda-sets-tone-for-revival-of-political-process-in-war-weary-kashmir-valley-833653-1996-07-30> (last accessed on 4 July 2023).

46 See generally *Madhav Khosla*, *The Indian Constitution*, New Delhi 2012, pp. 75-76.

47 Cf. note 2, p. 436.

*“We believe that Article 370 has constantly been diluted and is not being implemented. ... Article 370 is a historic commitment we made to Kashmiris. How can you nullify that? An order passed in 1954—the Constitution (Application to Jammu & Kashmir) Order—circumscribed the provisions of Article 370. The starting point for any discussion on Kashmir should be the pre-1953 status.”<sup>48</sup>*

Yechury’s strong remarks underscore the erosion process, questioning the legality and legitimacy of the Basic Order itself, which is not the argument of this article. Yet, the strong words he uses send out a clear message with regard to the continuous process of erosion of the autonomy J&K once enjoyed under Article 370. Worthwhile to note here is that questions have also been raised about the legality of Basic Order for a host of reasons. The Report of the State Autonomy Committee (1999), for instance, points out that the resolution of the Constituent Assembly recommending the proclamation of the Order was not addressed to the President. Apart from this, the Order erroneously mentions in the preamble that it was made “with the concurrence of the Government of J&K”. The truth is that, according to the Autonomy Report, “once the Constituent Assembly was convened, the State Government lost the power to accord any such concurrence.”<sup>49</sup> Yet, the Order has still been regarded as valid as it has substantially complied with the requirement of a recommendation to the President under Article 370.<sup>50</sup>

Additionally, concerns arise regarding the hollowing out of Article 370, with recommendations often coming from Governors, undermining the constitutional process. Surprisingly, the requirement of a recommendation of the Constituent Assembly, loosely the people of the State, for the abrogation of the Article or issuance of any other presidential order under it was even reinforced by Nehru himself when he observed: “We do not want to take the initiative in this matter and completely put an end to Article 370. The initiative, we feel, should come from the Kashmir State Government and people.”<sup>51</sup> However, the reality is that the recommendations under Article 370 have been invariably given by the Governor of the State from time to time, making the presidential orders legally questionable.

Worse still, as the final nail in the coffin, the Constitution (Application to Jammu & Kashmir) Order, 2019, by taking the route of Article 367, has essentially changed the reference to “Constituent Assembly of the State” to mean “Legislative Assembly of the State” in Article 370. Such a sweeping alteration of the phraseology of Article 370 by amending Article 367 constitutes a colourable exercise of power, which has been time and again frowned upon by the Indian Supreme Court.<sup>52</sup> The constitutional reality is that a

48 *Tehelka*, 16 October 2010, cited in *Noorani*, note 2, p.25.

49 Cf. Report of the State Autonomy Committee, Srinagar, July 2000.

50 See generally *Noorani*, note 2.

51 Lok Sabha Debates, Sixth Session (3rd Lok Sabha), 27 November 1963, p. 1638.

52 *Burhan Majid*, Kashmir and Abrogation of Article 370: Making Sense of a Governor’s Interview, *The Quint* (2023), <https://www.thequint.com/opinion/kashmir-abrogation-article-370-making-sense-governor-satyapal-malik-karan-thapar-interview> (last accessed on 2 July 2023).

Legislative Assembly and a Constituent Assembly are different; the former was created under the Constitution of J&K, while the latter is a constituent body and, hence, sovereign.

The Union contends that this is permissible as what is modified is the interpretation clauses contained in Article 367, namely Article 367 (4). The purported exercise of power under Article 367 is clearly contrary to Article 370 (1) (d), which permits only modification of other provisions of the Constitution and not Article 370 itself. The impugned Constitutional Orders cannot be sustained as what cannot be done directly cannot be done indirectly, and therefore, clause 3 of Article 370 cannot be amended by recourse to Article 367.

In retrospect, the erosion of J&K's autonomy, once protected by Article 370, paints a troubling picture. The promises made have proven hollow, leaving the State stripped of its constitutional distinctiveness, a far cry from the commitments made.

#### **D. Understanding the Erosion Through *Sampat Prakash v State of J&K*: The Beginning of the Court's Complicity**

The judiciary's role in the hollowing out of Article 370 has been significant, particularly after it decided *Sampat Prakash v State of J&K*<sup>53</sup> in 1968. What is even more glaring is that the Court's judgement conflicted with an equal bench judgement that came a decade before it in *Prem Nath Kaul v State of J&K*.<sup>54</sup> While the judgements given in the two cases appear to cover the common ground, there is a stark difference between the interpretive framework that the Court has used in each of these cases. This contradiction, highlighted by petitioners challenging Article 370's abrogation, was dismissed by the Supreme Court, declining referral to a seven-judge Constitution Bench.<sup>55</sup> Now that the Indian Supreme Court has upheld the constitutionality of the Article 370 abrogation,<sup>56</sup> the refusal speaks for itself.

In *Sampat Prakash*, the Court drastically deviated from its stance in *Prem Nath*. While the latter emphasised 'ratification by the Constituent Assembly' for extending the Indian Constitution's provisions to the State, the former took a troubling turn. To drive home the centrality of the J&K Constituent Assembly to the scheme of things, the Court, in *Prem Nath*, looked at clauses (2) and (3) of Article 370. Clause (2), the Court said, showed that the "Constitution makers attached great importance to the final decision of the Constituent Assembly" by mandating that any matters for which the government has provided its "concurrence" before the formation of the Assembly had to be placed before

53 1969 AIR 1153.

54 1959 AIR 749.

55 Shah Faesal and Ors. v Union of India, Writ Petition (Civil) No. 1099 OF 2019 decided on 2 March 2020; *Murali Krishnan*, Article 370 matter stays with 5-judge bench, SC accepts govt's stand, *The Hindustan Times* (2020), <https://www.hindustantimes.com/india-news/no-need-f-or-larger-bench-rules-supreme-court-on-plea-on-scrapping-article-370/story-OgFNM16Bpwyvc-Qh5QswT7I.html> (last accessed on 12 July 2023).

56 Cf. note 23.

it for consideration. The proviso to clause (3)—which mandated the “recommendation” of the Constituent Assembly for the President to alter or revoke the Article—also “emphasises the importance which was attached to the final decision” of the Assembly “in regard to relevant matters covered by Article 370”. Clauses (2) and (3) of Article 370 are a clear recognition of the sovereign nature of the J&K’s Constituent Assembly having the power to give consent to the extension of additional provisions of the Indian Constitution and any alteration of the Article itself.

A closer reading of *Sampat Prakash* points to an egregious interpretation that the Court has given to Article 370, particularly with regard to the standing of the Constituent Assembly in the larger constitutional spectrum on which the autonomy of the erstwhile State rested. Two reasons stand out. One, the Court, ignoring its own 1959 ruling in *Prem Nath Kaul*, gave a deeply problematic interpretation to the requirement of ratification by the Constituent Assembly of the State and held that “Article 370(2) only refers to the concurrence given by the Government of the State before the Constituent Assembly was convened and makes no mention at all of the completion of the work of the Constituent Assembly or its dissolution”. The Court went on to state that since the Constituent Assembly of the State was dissolved without making any recommendation under Clause (3) for the abrogation of Article 370, it should continue. This raises far more questions than it addresses. On the one hand, the Court almost states that Article 370 is permanent as “neither the Constituent Assembly made a recommendation nor the President issued an order declaring that the Article shall cease to be operative”. On the other hand, the Court has virtually left scope for ambiguity and, therefore, misuse of the provision by stating that the Article makes no mention at all of the completion of the work of the Constituent Assembly or its dissolution vis-a-vis the concurrence given by the Government of the State under Article 370 (2).

Two, the *Sampat Prakash* ruling has widened the presidential power of making modifications to the provisions of the Indian Constitution while applying them to J&K to the extent of its imminent abuse. The Court observed:

*“Thus, in law, the word ‘modify’ may just mean ‘vary,’ i.e., amend, and when Art. 370 (1) says that the President may apply the provisions of the Constitution to the State of Jammu & Kashmir with such modifications as he may by order specify, it means that he may vary (i.e., amend) the provisions of the Constitution in its application to the State of Jammu & Kashmir. We are, therefore, of the opinion that in the context of the Constitution, we must give the widest effect to the meaning of the word ‘modification’ used in Art. 370 (1) and in that sense it includes an amendment. There is no reason to limit the word ‘modifications’ as used in Art. 370 (1) only to such modifications as do not make any ‘radical transformation’.”*

Thus, the *Sampat Prakash* verdict vastly expanded the President’s authority to modify Indian Constitution provisions for J&K, potentially risking abuse. The Court’s interpretation of “modification” in Article 370 (1) essentially permitted radical amendments, transforming it into a procedural tool for constitutional alteration rather than safeguarding J&K’s auto-

my. The Court could have explicitly observed that such a wider interpretation of the word ‘modify’ should not defeat the purpose of the Article, which is not merely to guarantee but safeguard the special constitutional position of J&K. But since the Court did not deem it proper, the absence of a caveat from the Court enabled subsequent executive orders to exploit this interpretation.

Pertinent to mention, the seeds of constitutional erosion of J&K’s autonomy were sown by another five-judge bench of the Court in *Puranlal Lakhanpal v The President of India and Ors.*<sup>57</sup> In *Puranlal*, the Court had upheld a Presidential Order under Article 370(1) that amended Article 81 to allow the President to appoint the representatives of the State in the Lok Sabha on the recommendation of the State legislature.

All the Supreme Court orders since *Sampat Prakash* appear to have sanctioned executive actions, even after the dissolution of J&K’s Constituent Assembly, the sole body authorized to endorse presidential orders. The Court’s ruling in *Mohammed Maqbool Damnoo v State of J&K*, unable to differentiate between an elected “Sadr-i-Riyasat” and an appointed Governor, exemplifies this trend. The judiciary’s recurrent validation of executive actions despite institutional constraints underscores a concerning trend in the erosion of J&K’s constitutional autonomy.

The decision in *Sampat Prakash* brazenly narrowed down the precedent because it didn’t even consider the judgement of an equal-judge bench in *Prem Nath*. Since, in both cases, the judges had to examine the questions of the special constitutional status of the State, it follows that the decision in *Prem Nath* had to have been considered, and ideally, followed in *Sampat Prakash*. Considering the significance of the Article 370 abrogation challenge and *Sampat Prakash* having legitimised the erosion of constitutional autonomy through executive fiat, the Supreme Court had more reasons to refer the matter to a larger Constitution Bench. That did not happen, however, as the Court finally put together its decision in the challenge to the Article 370 abrogation.

## E. Sovereignty of J&K and the Indian Supreme Court

The Indian Supreme Court’s stance in *State Bank of India v Santosh Gupta*<sup>58</sup> was blunt: it rejected that J&K has any “vestige of sovereignty” outside the Constitution of India and its own Constitution, which is subordinate to the Constitution of India, diminishing it to constitutional conformity. The Court added that “it is therefore wholly incorrect to describe it as being sovereign in the sense of its residents constituting a separate and distinct class in themselves”. The Court, ironically, invoked Section 3 of the now scrapped Constitution of J&K, which stated that “the State of Jammu & Kashmir is and shall be an integral part of the Union of India” to drive home the point. Interestingly, now that the Constitution of J&K has been effectively abrogated, questions arise as to what binds the State with the Union.

<sup>57</sup> 1961 AIR 1519.

<sup>58</sup> (2017) 2 SCC 538.

This lends credence to the theory that the abrogation of Article 370 and the Constitution of J&K on 5 August 2019 have turned the clock back to the pre-accession era. The framing of the Jammu and Kashmir Constitution had taken the colour of a social contract between the people of the State of Jammu and Kashmir and the Indian Union, which was to be respected and protected in line with the Constitutional scheme. While the State has held its side of the bargain, the Union has retreated in its promise and has deployed subterfuges to encroach upon the State's powers and has reduced it to a mere Union Territory. Apart from being violative of the federal principle, which Article 370 is a reflection of, the *Santosh Gupta* ruling flies in the face of the IoA, which specifically makes a mention of the "sovereignty" of J&K.

Contrary to this, in 2015, the J&K High Court, in *Union of India v S Mubarik Shah Naqishbandi*,<sup>59</sup> acclaimed the "sovereign character" of J&K's Constitution and the sovereign power of the State's Legislative Assembly to make laws concerning the rights of its permanent residents about their immovable properties. This echoes the 1959 judgement of the Supreme Court in *Prem Nath*, emphasizing the Maharaja's retention of sovereignty despite the signing of the IoA with the Indian Union. In *Prem Nath*, the Court invariably cited Clause 8 of the IoA, which, in no ambiguous terms, has made the Maharaja's sovereignty in and over his State immune from anything stated in other clauses of the IoA. The Court also rubbished the argument that Maharaja Hari Singh had surrendered his sovereign powers as he replaced the emergency administration with a popular interim Government headed by Sheikh Mohammad Abdullah and constituted a Council of Ministers through a proclamation on 5 March 1948.<sup>60</sup> The Court, therefore, held that:

*"in the result, subject to the agreements saved by the proviso, Maharaja Hari Singh continued to be an absolute monarch of the State, and in the eyes of international law he might conceivably have claimed the status of a sovereign and independent State".*

Highlighting the continuance of the sovereignty of Maharaja in and over his State as recognised by Clause 6 of the IoA, *Prem Nath* rejected the argument that the execution of the Instrument of Accession affected the power of rulers of the State in legislative, executive and judicial realm. Similarly, the contention that the application of certain specified Articles of the Indian Constitution to the State by the Constitution (Application to Jammu and Kashmir) Order issued by the President on 26 January 1950 affected the sovereign powers of the Yuvaraj (the then Crown Prince) was held to be untenable.

The *Prem Nath Kaul* reasoning was emphatically reiterated by the J&K High Court in *Mubarik Shah*. A Division Bench comprising Justices Muzaffar Hussain Attar and Ali Mohammad Magrey examined the legal and constitutional relationship between J&K and India and came to the conclusion that "the State of J&K occupies a distinct, unique and

59 Decided on 16 July 2015.

60 See Proclamation of Shreeman Indar Mohinder Rairajeshwar Maharaj Adhiraj Shri Hari Singh Ruler of Jammu and Kashmir and Dependencies, 5 March 1948, Legal Document No.118.

special position. The State of J&K constitutes a class in itself and cannot be compared with the other States of the country”.<sup>61</sup> The Court observed:

*“The Parliament has no legislative competence to make laws in respect of J&K, which would affect the interests of the State subjects/citizens of the State as defined by law and section 6 of the Constitution of J&K qua their immovable properties. It is the State in terms of section 5 of the Constitution of J&K, which has the absolute sovereign power to legislate laws touching the rights of its State subjects/citizens qua their immovable properties”.*<sup>62</sup>

The Court, interestingly, invoked the now abrogated Article 35A of the Indian Constitution as not only having recognized but clarified the special constitutional and legal position, particularly with respect to the transfer of immovable property.

In the same year, in *Abdul Qayoom Khan v State of J&K and Ors.*<sup>63</sup> the J&K High Court emphasised the sovereign character of J&K, holding that the J&K and Indian Constituent Assemblies were equals and sovereign in their respective domains. Acknowledging the efforts of the people of the State while giving themselves a flag in the same manner as the people of India gave themselves one, the court observed that to have a “ flag is one of the attributes of constitutional autonomy or ‘limited’ or ‘residuary’ sovereignty enjoyed by JK”. Although subsequently stayed by a Division Bench of the Court,<sup>64</sup> the judgement together with *Mubarik Shah* is some sort of renaissance of the jurisprudential architecture of shared sovereignty on which the constitutional relationship between J&K and the Indian Union rested.

Yet, as *Sampat Prakash* and other subsequent cases show, the Indian Supreme Court’s role has been contentious—either passively watching Article 370’s erosion or actively contributing. This is amplified by the fact that it took close to four years for the Indian Supreme Court to list the petitions challenging the August 2019 unilateral abrogation of Article 370 by the GoI for hearing, only to uphold in the final verdict.<sup>65</sup> The delayed hearing on petitions challenging the 2019 abrogation confirms what many had feared – that the Court would eventually endorse the abrogation. Denying that J&K retained any vestiges of sovereignty, the Court held that the President of India can unilaterally abrogate Article 370. The Court’s ruling is questionable for it mostly employs political rhetoric instead of constitutional principles.

61 Cf. note 59.

62 Cf. note 59.

63 2016 (1) JKJ 506.

64 *Arun Shrama*, J&K High Court stays order to hoist state flag on buildings, *Indian Express* (2016), <https://indianexpress.com/article/india/india-news-india/jk-high-court-stays-single-bench-order-on-state-flag/> (last accessed 3 December 2023).

65 Cf. note 23.

The Court's approval of the systematic erosion process defies its own jurisprudence vis-à-vis federalism and sovereignty, reiterated by it in several key decisions, most recently, in *Government of NCT of Delhi v Union of India & Another*.<sup>66</sup> In the *Delhi NCT* case, in sharp contrast to some of its own previous precedents, the Court observed that "sovereign powers" of the States in their own domains are to be respected. The Court specifically cited one of the seminal speeches of Dr B.R. Ambedkar in the Constituent Assembly in order to emphasise the sovereignty of the federal units:

*"Dual Polity under the proposed Constitution will consist of the Union at the Centre and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution... The Indian Constitution proposed in the Draft Constitution is not a league of States nor are the States administrative units or agencies of the Union Government."*<sup>67</sup>

## F. Concluding Remarks

The events culminating in the effective abrogation of Article 370 in 2019 conclude a long-standing erosion of J&K's semi-autonomous status, tracing back to the dispersal of the State's Constituent Assembly in 1957. This erosion systematically weakened the State's legislative powers, contradicting the assurances embedded in the IoA and Article 370. The Indian Central Government's actions indicate a departure from the promised autonomy that underpinned the State's accession and particularly highlight a permanent degradation of the constitutionally recognised internal sovereignty of the State.

Notably, executive orders preceding the 2019 decision consistently disregarded the absence of the Constituent Assembly, which was pivotal in determining the relationship between J&K and India under Article 370's clauses (2) and (3). On the contrary, the consent of State Governments or later Governors was equated with the people's consent, sidestepping the crucial democratic process. The judiciary has largely acquiesced to this erosion.



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<sup>66</sup> C. A. No. 2357 of 2017 decided on 11 May 2023.

<sup>67</sup> *Ibid.*