

Should Article 370 be revoked?

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[Manifest pedagogy](#)

The issue of Kashmir has been eternally in news. The issue has been covered holistically in Manifest-11 through various articles both in Polity and IR sections. Students are advised to read them together to get a holistic view

In news

Home Minister Amit Shah have recently said that Article 370 is temporary.

Placing in syllabus

- Constitutional Provisions

Static dimensions

- What is Article 370 and why was it given
- Important provisions under it
- Terrorism and conflict and need for article 370's removal

Current dimensions

- Why can't it be removed immediately
- Solution for this

Content

When India and Pakistan gained their independence, Jammu and Kashmir remained independent from the India and Pakistan. In October 1947, when Muhammad Ali Jinnah sent Pakistani Muslim tribes to attack Maharaja Hari Singh and the people of J&K, to

defend his state Maharaja chose to accede J&K to India and that's how Article 370 was incorporated. **Article 370, is of a temporary nature**, which grants special status to J&K. All the provisions of the Constitution which are applicable to other states of India are not applicable to J&K.

Chairperson of Constitution Drafting Committee , Dr. BR Ambedkar refused to draft Article 370. However Gopalaswami Ayyangar finally drafted Article 370 stating that " for a variety of reasons Kashmir, unlike other princely states, was not yet ripe for integration. India had been at war with Pakistan over Jammu and Kashmir and while there was a ceasefire, the conditions were still "unusual and abnormal." Part of the State's territory was in the hands of rebels and enemies".

This Article is **Under Part XXI** of the Indian Constitution which **deals with "Temporary, Transitional & Special provisions"**. While Article 370 grants special status to the state of Jammu and Kashmir, **Article 35A** gives power to the state legislature to not only define the state's "permanent residents" but also their special rights and privileges.

Similar protections for unique status exist in tribal areas of India including those in Himachal Pradesh, Arunachal Pradesh, Andaman & Nicobar Islands and Nagaland. However, it is only for the state of Jammu and Kashmir that the accession of the state to India is still a matter of dispute between India and Pakistan. **1974 Indira-Sheikh accord** committed that "The State of Jammu and Kashmir which is a constituent unit of the Union of India, shall, in its relation with the Union, continue to be governed by Article 370 of the Constitution of India".

What are the provisions under Article 370 ?

- Part VI of the Indian constitution (dealing with the state governments) is not applicable to J&K. The State was allowed to have its own Constitution.

- Central legislative powers over the State are limited to the three subjects of **defence, foreign affairs and communications**.
- Other constitutional powers of the Central Government could be extended to the State only with the concurrence of the State Government.
- The preventive detention laws made by the parliament are not applicable to the state.
- The Article 370 could be abrogated or amended only upon the recommendation of the State's Constituent Assembly.
- Part IV (dealing with Directive Principles of state policy) and Part IVA (dealing with Fundamental duties) are not applicable to the state.
- The entire set of laws governing citizenship, ownership of property and most essentially fundamental rights are different in J&K as compared to rest of India.
- Indian Citizen from any other state cannot purchase land or property in J&K.
- The Government of India cannot declare Financial Emergency under Article 360 in the state of J&K, Emergency can only be declared in state in cases of external aggression and war.
- The emergency under President's rule can be imposed in the state on the ground of failure of the constitutional machinery under the provisions of state constitution and not Indian constitution.

Terrorism and Conflict and need for Article 370's removal

During 1989, a widespread and armed insurgency started in J&K. After the 1987 state legislative assembly election, some of the results in elections were disputed which resulted in the creation of militant groups which laid the foundation of the Mujahadeen insurgency, which continues to this day. The attack on a CRPF convoy in Jammu and Kashmir's Pulwama district that killed at least 40 jawans in February, 2019 is the biggest terror attack in the past five years. The responsibility for

the Pulwama Feb 14, 2019 attack was claimed by the Pakistan-based Islamist militant group Jaish-e-Mohammed

The DUSK (PIL after Pulwama Attack on February 14, 2019)

The honourable Supreme Court of India accepted the urgent hearing of a PIL (Ashwini Kumar Upadhyay V. Union of India) challenging the constitutional validity of the infamous Article 370 of the Constitution of India. In a PIL , which was raised in September 2018, Supreme Court has contended that the Article 370 special provision was temporary in nature at the time of framing of the Constitution.

The PIL also requests for declaration from the Supreme Court that the separate Constitution of J&K is arbitrary and unconstitutional on many grounds, including that it is **against the supremacy of the Constitution of India and conflicting to the motto of 'One Nation, One Constitution', 'One National Anthem and One National Flag'**. The Constitution of J&K is invalid mainly for the reason that the same has still not got the assent of the President, which is a mandatory as per provisions of the Constitution of India.

Article 370 is a temporary provision given to Jammu and Kashmir and it wrongly restricts the powers of many provisions of the Constitution of India by "curtailing" the power of Parliament to make laws on matters which includes under the Union and Concurrent lists. PIL also challenged Articles 6, 7, 8 and 144 of the Constitution of Jammu & Kashmir as arbitrary and contrary to the fundamental rights under the Indian Constitution i.e equality before law, equal protection of law, equal opportunity in public employment, right to establish educational institution, right to trade /business, etc., guaranteed under Articles 14, 15, 16, 19 and 21 of the Constitution of India.

Article 35A is part of a 1954 presidential order issued under Article 370. And so far as the Constitution goes, since it was

brought in a by presidential order, it can be changed by presidential order. But that also requires the state government's consent.

Solution for this

- The consent of the state constituent assembly is a pre-condition for changing Article 370. In the Constitution, there can be no vacuum and hence there must be a successor to the constituent assembly. The successor can be Jammu and Kashmir government or Assembly or whosoever and the consent of that body should be enough.
- Article 370 is an article in the Constitution of India and under **Article 368, any article can be repealed or amended by Parliament** in accordance with the procedure prescribed there.

Why can't it be removed immediately ?

- As the nature of the accession of J&K into the Union of India is totally different from the merger of all other small and big states many legal experts are of the view that abrogating the provision would put the accession of the state to India in jeopardy.
- According to former Union Law minister Shanti Bhushan, under Article 368 of the Constitution, the Parliament has the power to amend the Constitution. But in view of the Supreme Court's ruling in the **Kesavananda Bharati case(1973)**, Parliament can't amend the basic structure of the Constitution. Hence obtaining the opinion of the Supreme Court is a must before going ahead with the abrogation of Article 370. But there are doubts over whether Article 370 is a part of the basic structure of the Constitution or not.

Enough lives have already been laid down and the time has now come for the government to finally strike down the Article 370 and integrate Jammu and Kashmir with the nation so that a

clear message of One Nation is sent to our neighbour and a total elimination of the terrorist groups hiding in the J&K can be achieved. The urgent hearing of this PIL is an excellent step by the Supreme Court of India to finally end this chapter