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## LEGAL CHALLENGE TO CHANGES IN ARTICLE 370

This article covers “Daily Current Affairs” and the topic details “Legal Challenge to Changes in Article 370”. The topic “Legal Challenge to changes in Article 370” has relevance in the “Polity” section of the UPSC CSE exam.

### **For Prelims:**

What is Article 370?

What were the changes in status of Jammu and Kashmir?

What is the doctrine of colorable legislation?

### **For Mains:**

GS2: Indian Constitution and Issues related to it



### **Why in the news?**

On 11th July, a panel of five judges from the Supreme Court will commence hearings on petitions that challenge the alterations made to Article 370 and the reclassification of Jammu & Kashmir (J&K) state into two Union Territories.

### **What is Article 370?**

**Article 370 of the Constitution accorded Jammu & Kashmir a special status that substantially limited Parliament’s power to legislate for the State as compared to other States.**

- The provision was implemented through the signing of the Instrument of Accession by Maharaja Hari Singh, the former ruler of Jammu & Kashmir, in 1947.
- Its purpose was to serve as a temporary measure, facilitating the transition of the state from an independent princely state to a democratic state under the dominion of India.
- This provision exempted the state from most provisions of the Indian Constitution, except for Article 1 and Article 370, granting the state the ability to draft its own constitution.
- However, on August 5, 2019, the Indian government revoked Article 370, resulting in Jammu and Kashmir being reconstituted as a union territory with a legislature.

## Chronology of Events

Date	Event
June 19, 2018	Governor's Rule implemented in Jammu & Kashmir
November 21, 2018	Legislative Assembly dissolved
December 12, 2018	President's Rule imposed on Jammu & Kashmir before the completion of six months
June 12, 2019	Extension of President's Rule for another six months
August 5, 2019	The Constitution (Application to Jammu and Kashmir) Order, 1954, amended
August 6, 2019	Declaration by the President under Article 370(3)

### The constitutional changes introduced:

- The Constitution (Application to Jammu and Kashmir) Order, 1954, amended with **The Constitution (Application to Jammu and Kashmir) Order, 2019, making all provisions of the Indian Constitution applicable to Jammu & Kashmir.**
- **Amendment of Article 367, adding Clause (4) to make the Constitution of India directly applicable to Jammu & Kashmir.**
- The President's declaration on August 6, 2019, rendered **all clauses of Article 370 ineffective, except for the provision mandating the application of all articles of the Constitution to Jammu & Kashmir.**

### Changes to Article 370

- Article 370 of the Indian Constitution had specific provisions for the application of laws to Jammu & Kashmir.
  - It only applied Article 1 (which defines India's territory) and Article 370 itself to the state.
  - The extension of other provisions of the Constitution to Jammu & Kashmir did not occur automatically.
  - However, Clause (1)(d) of **Article 370 empowered the President of India to extend other provisions through an executive order, but with the concurrence of the government of J&K.**
- **Clause 3 of Article 370 allowed the President to declare that the article would cease to be operative, either completely or partially, but only if recommended by the Constituent Assembly of J&K.**
  - However, since the Constituent Assembly no longer existed after dispersing in 1957, the President's power to act under this clause was no longer applicable.
- **The provisions of Article 370 made it clear that the state government of Jammu and Kashmir, acting on the advice of the council of ministers, was responsible for making decisions.**
- However, due to the **absence of a functioning state government in J&K**, the President had no avenue to obtain the agreement or consent of the state government.
- This lack of constitutional and legal mechanisms meant that the central **government had no clear way to repeal or amend Article 370.**
- However, the **central government utilized the President's powers under Article 370(1)(d) to amend Article 367**, which provides guidelines for interpreting the Constitution.
  - They added a **new clause to Article 367, replacing the reference to the "Constituent Assembly of the State" in Article 370(3) with "Legislative Assembly of the State."**
- In essence, the **central government used the route of a presidential order under Article 370(1)(d) to amend Article 370 itself.**

## Legal Challenges

### Equating Parliament with State Legislative Assembly

- During the direct rule imposed by the President in Jammu & Kashmir, all functions of the state government were assumed by the President.
  - The **President also took over the powers of the Governor as defined in both the Indian Constitution and the J&K Constitution.**
  - Furthermore, the **powers of the state legislature were extended to Parliament.**
- In practical terms, this meant that the President of India effectively became the J&K state government, and Parliament became the state legislature.
- The authority originally held by the J&K Constituent Assembly was transferred to the state legislature.
- It is worth noting that when the “**state government**” gave its concurrence to these significant changes, it **was essentially the President providing consent to his own decision.**
- There is an **argument that President’s Rule**, which is considered an interim arrangement until an elected government is established, **should not be used to make decisions that fundamentally alter the constitutional structure of the state.**

### Legislative Assembly of J&K

- The attempt to abolish the Jammu and Kashmir (J&K) Constitution has faced opposition due to the limitation of power held by the J&K Legislative Assembly.
- **According to Article 147 of the J&K Constitution, the Legislative Assembly was prohibited from proposing any changes to the provisions of the Indian Constitution as applicable to the state.**
- As a result, it has been argued that the **Legislative Assembly lacked the legal authority to give consent to the President’s order.**

## Article 3

**Article 3 in The Constitution Of India states that- Parliament may by law –**

- (a) form a new State by separation of territory from any State or by uniting two 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;

- **The Jammu and Kashmir (Reorganisation) Act, 2019 divided J&K into two Union Territories:**
  - J&K with a Legislative Assembly
  - Ladakh without an Assembly
- This is the first time in India’s constitutional history that a state has been downgraded to a Union Territory.
- While Article 3 of the Indian Constitution allows Parliament to create new states, unite states, change boundaries, or add areas to existing states, it is argued that the Centre’s decision violates Article 3.
- According to the proviso to this article, **if a Bill affects the area, boundaries, or name of any state, the President must refer it to the state’s legislature.**

- The **argument is that** – the view of Parliament cannot replace the view of the state legislature, as the state legislature represents the opinion of the people.
- **Under President’s Rule, only essential powers of the state legislature can be exercised to manage day-to-day affairs, and Parliament cannot represent the specific views of a state legislature.**

### What is the Doctrine of Colourable Legislation?

- The challenge is based on the argument that the constitutional changes are “colourable legislation,” which means they are legally invalid.
- **This doctrine holds that if something cannot be done directly, it cannot be done indirectly either.**

### Need for the Doctrine

- **Separation of powers** refers to the division or sharing of powers among different branches of government. Its purpose is to prevent the misuse of power by any branch. **The Constitution mandates that each branch should have distinct powers, creating a system of checks and balances. Powers are allocated between the central government and the states, each with their own specific jurisdictions.**
- However, **sometimes the legislative body exceeds its authority and enacts laws outside its scope.** This is known as the **colourable exercise of legislative power**, where laws are made indirectly when direct enactment is prohibited.
- To prevent such transgressions, the doctrine of colourable legislation was established as a check on legislative authorities.

#### Sources:

The issues in challenge to Centre’s 2019 Jammu & Kashmir decisions | Explained News, The Indian Express

### Q1. With reference to Constitution of India, consider the following statements:

1. Article 2 of the Constitution empowers the Parliament to add or establish new states in the Union of India.
2. Article 3 of the Constitution deals with internal readjustment of the states of Union of India.
3. Schedule 3 to the Constitution contains the list of states and union territories and their extent and territorial jurisdictions.

#### Which of the statements given above is/are correct?

- (a) 1 and 2 only
- (b) 2 and 3 only
- (c) 3 only
- (d) None

**Answer: (a)**

### Q2. Consider the following statements in context of Article 3 of the Constitution?

1. Article 3 of the Indian Constitution allows the Constituent Assembly to create new states, unite states, change boundaries, or add areas to existing states.
2. A bill for changes stated above can be introduced only with prior recommendation of the President.
3. The President has to refer the bill to the State Legislature and is bound by the views of the State Legislature.

**How many of the above mentioned statements are correct ?**

- (a) Only one
- (b) Only two
- (c) All three
- (d) None

**Answer: (a)**

**Q3. Critically analyse the provisions of Article 3 in the light of the recent changes in the status of Jammu and Kashmir under Article 370.**

**Gaurav Nikumbh**

