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Zaid Deva
University of Oxford, deva.zaid@outlook.com

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Cover Page Footnote
Zaid Deva is a DPhil candidate, Faculty of Law, University of Oxford.

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CASE COMMENT

TOWARDS A MONIST CONSTITUTIONAL IDEOLOGY? IN RE: ARTICLE 370 OF THE CONSTITUTION, SUBORDINATION OF JAMMU AND KASHMIR, AND THE SUPRA-CONSTITUTIONAL PRESIDENTIAL POWER

Zaid Deva*

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Abstract

This case comment shows how the fascination for a certain form of a monist constitutional order, first articulated by the opposition during the Nehru years, was institutionalised in the form of a judicial discourse, culminating in the Article 370 judgement. At the heart of this discourse lay two imaginaries: (i) a subordinated Jammu and Kashmir (J&K) and (ii) an unbounded or supra-constitutional power vested in the Indian president to deal with J&K, freed of the express conditions precedent laid down in the proviso to Clause 3 of Article 370. In this case comment, I trace the continuities between these monist claims articulated in relation to Article 370 in the early years of the republic and the justifications provided by the Supreme Court for its abrogation.

I. Introduction

The discourse on Article 370, which gave special status to the former state of J&K, has never remained static. It has evolved over the years, while the provision has been interpreted and deployed towards different and often contradictory ends. Yet, one thing that has indeed remained a constant is the imbrication of the discourse on Article 370 with an emergent monist constitutional ideology, particularly the brand of monism offered by the opposition parties in India during the Nehru (1947–1964) years as a justification for ending J&K's autonomous status. By 'monism', I refer to a framework that emphasises the unity of J&K's legal order and the Indian legal order, effectively subsuming the former into the latter. This framing not only diminishes but rather rejects the independent authority and claims of J&K's legal order, its history, antecedents, and imaginaries,

* Zaid Deva is a DPhil candidate, Faculty of Law, University of Oxford.

rendering it either nugatory or subordinate to Indian constitutional law.[1] It is questionable not only because the text of Article 370 defies the monist logic in the most unequivocal words, but also because the actors who were responsible for and operationalised Article 370—particularly on the Indian government's side—recognised and functioned within a framework of dualism, at least in form if not in spirit. On the contrary, the Supreme Court's decision *In Re: Article 370 of the Constitution* (hereafter *In Re: Article 370)* acts as the ultimate legitimating tool of the monist logic,[2] a decision with far-reaching consequences not only for the history of Article 370, but also for the future of Indian federalism and the shared sovereignty framework that has been envisioned to define it.

On 5 August 2019, the Government of India adopted a circuitous mechanism to abrogate Article 370. The actions were taken during the period of president's rule in the state, which was imposed following the collapse of the People's Democratic Party (PDP)-Bharatiya Janata Party (BJP) government. Under the scheme of Article 370, the recommendation of the J&K Constituent Assembly was a condition precedent for the Indian president to revoke Article 370. However, in 2019, the Constitution (Application to Jammu and Kashmir) Order 272, or CO 272, was promulgated on the concurrence of the state's governor (appointed by the centre), which led to the extension of all provisions of the Indian Constitution to the state. Additionally, Article 367 of the Indian Constitution was invoked to substitute the term 'constituent assembly' with 'legislative assembly' in J&K. Since the Indian Parliament was functioning as the state assembly under Article 356 of the Indian Constitution, it passed a resolution advising the president to revoke Article 370. It was based on these textual manoeuvrings that Declaration under Article 370(3) of the Constitution, or CO 273, was subsequently promulgated by the Indian president, which de-operationalised Article 370. While the Supreme Court's judgement set aside the circuitous process adopted by CO 272—to the extent that the order invoked Article 367 to indirectly amend Article 370 by substituting the term 'constituent assembly' with 'legislative assembly'—it ruled that the powers of the Indian president were never contingent on the J&K Constituent Assembly. What is noteworthy here is

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1 For monism in legal theory, see Robert Kolb and Momchil Milanov, 'Dualism/Monism' in *Max Planck Encyclopaedia of Comparative Constitutional Law* (Oxford Constitutional Law 2020).

2 See generally *Writ Petition (Civil) No 1099 of 2019, In Re: Article 370 of the Constitution* (2023) INSC 1058.

that for many years now, this emergent monist discourse had envisaged the abrogation of Article 370 following this very pathway, whereby presidential action would be exercised while disregarding the constraints and the conditions imposed on it in the form of a prior recommendation from the J&K Constituent Assembly.[3]

When Article 370 was introduced in 1949 in the Indian Constituent Assembly, many inside and outside the assembly were not on board with what they saw as special concessions given to J&K.[4] While the autonomy of J&K was originally based on and necessitated by a pre-constitutional agreement,[5] it eventually assumed the form of a 'special status' granted by a benevolent state, keen on appeasing its Muslim population.[6] At the heart of this lay two imaginaries: (i) a subordinated J&K and (ii) an unbounded or supra-constitutional power vested in the Indian president to deal with J&K, freed of the express conditions precedent laid down in the proviso to Clause 3 of Article 370. While Nehru operated within the terms set by Article 370 to erode J&K's autonomy, for his opposition in the Indian Parliament, the framework and the mechanism of the provision were subject to a unilateral presidential power.[7] Article 370 embodied the logic of a dualist constituent power—India's, which had resulted in the Indian Constitution, and J&K's, which would be operationalised in the form of its constituent assembly—for determining the nature of the India-J&K relations. This dualism would come undone in both the Nehruvian logic to erode Article 370 and his opposition's demand to abrogate the provision altogether.[8]

In this case comment, I trace the continuities between the discourse around Article 370 during the Nehru years and the justification provided by the Supreme Court for the abrogation of Article 370. In Part I of the case

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3 See, for instance, its antecedents in NC Chatterjee, Lok Sabha Debates (4 December 1964) as quoted in AG Noorani, *Article 370: A Constitutional History of Jammu & Kashmir* (Oxford University Press 2011) 310.

4 For an account of the opposition to Article 370, see *Nehru-Mookerjee-Abdullah Correspondence* (Kashmir Bureau of Information 1953).

5 The Instrument of Accession embodied bilateralism as no change could be made to the relationship without the consent of the state government (Clause 5 of Article 370). For J&K-India negotiations over Article 370, see Noorani (n 3) 50–88.

6 See Hasrat Mohani, Indian Constituent Assembly Debates (17 October 1949) 10.154.287, <https://www.constitutionofindia.net/debates/17-oct-1949/#135237> accessed 5 April 2025.

7 See Chatterjee (n 3).

8 For the erosion of Article 370 and the role of Nehru, see Noorani (n 3) 303–306.

comment, I map the monist claims articulated in relation to Article 370 in the early years of the republic. I argue that these monist claims imagined J&K's subordination and a simultaneous subjection to an unbounded presidential power. In Part II of the case comment, I will show how the Supreme Court's decision *In Re: Article 370* institutionalised this logic for justifying the abrogation of J&K's autonomous status.

II. Nationalism and a Monist Constitutional Order

A. Prelude to the Erosion of Article 370

For the right-leaning within and outside the Congress Party, Article 370 was a matter of existential threat, as a distinct status for J&K represented the potential for an entity rival to the Indian state to emerge. While Nehru had acquiesced to a very limited autonomous status for J&K by 1952,[9] for many others, this was reminiscent of the incomplete accession of J&K and therefore a contradiction to the Indian state's sovereignty.[10] A common thread in the Lok Sabha and Rajya Sabha debates of the early 1950s against Article 370 was the concern with the supremacy of the Indian Constitution, as expressed and manifested in the position of the Indian president and a simultaneous subordination of J&K. The express condition precedent of a prior recommendation from the J&K Constituent Assembly for the president to exercise the power envisaged under Clause 3 of Article 370 was not acceptable to the opposition.

As the J&K Constituent Assembly proceeded to draft its constitution, members of the Jana Sangh—the precursor to the BJP under whose rule Article 370 was abrogated in 2019—questioned this right when the Indian Constitution had already been applied to all the princely states. The framing of a distinct constitution for J&K also brought up the question of the Indian state's sovereignty. SP Mookerjee inquired of Nehru whether it was the Indian Parliament or the J&K Constituent Assembly that was the sovereign in the state.[11] As the J&K Constituent Assembly produced a draft constitution in 1956, Mookerjee and others moved a resolution calling for a debate in the Indian Parliament, arguing that if the J&K Constitution was

9 See Nehru's statement in the Lok Sabha on 24 July 1952 on the Delhi Agreement as quoted in Noorani (n 3) 138–146.

10 SP Mookerjee, Lok Sabha Debates (7 August 1952) 5,919.

11 ibid.

inconsistent with the Indian Constitution, the Indian Parliament would reserve the right to amend it.[12]

The opposition's framing of India's sovereignty as requiring the subordination of the J&K Constituent Assembly and Constitution was accompanied by the claim regarding the supra-constitutional nature of the Indian president's powers. It was supra-constitutional because the express limits and conditions of that power were negated in these imaginaries. One member called the prior concurrence of the state government or recommendation of the J&K Constituent Assembly, for presidential action as jarring to his ears.[13] While Nehru conceded that the president could not act on his own accord under Article 370 and therefore needed prior concurrence from the state constituent assembly, for the opposition, not only was this concurrence inconsequential but also the constituent assembly was *subordinate* to the Indian president.[14] Hence, the question of making the presidential action contingent on a power-bearing entity in Kashmir would not arise.

The underlying current in all of this remained the claim to the Indian Constitution's supremacy and the imagination of all the power-bearing entities in J&K as without power and authority, and therefore, subordinate in status to the Indian counterparts.

B. The Emptied Shell

The collapse of the Delhi Agreement, which resulted in Sheikh Abdullah's dismissal and arrest in 1953, marked the beginning of the erosion of Article 370.[15] This was initiated through the promulgation of the Constitution (Application to Jammu & Kashmir) Order of 1954, or CO 48, which replaced the earlier presidential order that had only permitted a limited application of the Indian Constitution in the state.[16] Under CO 48, Indian constitutional and legislative authority over J&K was significantly expanded, leading to the simultaneous squeezing out of the state's constitutional and legislative authority.

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12 See 'Point re Draft Constitution for Jammu and Kashmir', Lok Sabha Debates (16 November 1956) 268–270.

13 'Situation in regard of Kashmir', Rajya Sabha Debates (5 August 1952) 3,043.

14 See Mookerjee (n 10). Also see Chatterjee (n 3).

15 For the Delhi Agreement, see Noorani (n 3) 123–173.

16 For CO 44, see Noorani (n 3) 242–289. See also Jawaharlal Nehru, Lok Sabha Debates (27 November 1963) as quoted in Noorani (n 3) 303–306.

Interestingly in 1964, when an amendment, in terms of Article 368,[17] was moved to repeal Article 370, it was denied.[18] This was not for the lack of competence of the Indian Parliament or for it being against the text and framework of the amendments that the provision itself envisaged, but because Article 370 became the 'tunnel' that allowed the Indian Constitution to be transported to J&K, and to repeal it would snap this link and lead to the automatic withdrawal of the Indian Constitution from the state.[19] Alternatively, NC Chatterjee pointed out, the president would still retain the power to abrogate Article 370; as the J&K Constituent Assembly was no longer in existence at the time of Chatterjee's argument, the president was free to act in terms of Clause 3 of Article 370.[20] As Chatterjee would argue, ' ... the Constituent Assembly is gone. Therefore, the proviso is otiose ... and the President has got unfettered powers to act under clause (3)'.[21] Therefore, a contingent *constitutional* power emanating from and bounded within the framework of Article 370 was transformed into a supra-constitutional power that superseded express constitutional text and mandate. In both instances—be it the Indian Parliament exercising the power to amend Article 370 through the route of Article 368 or the Indian president being vested with the power under Article 370(3)—Indian authority becomes unbounded and not defined or limited by the terms of Article 370 nor contingent on the prior decision of a power-bearer in the state.

C. The Judicial Discourse on the Erosion of Article 370

AG Noorani argues that the Supreme Court's engagement with Article 370 began on a promising note with the decision in *Prem Nath Kaul*,[22] whereas, the later judgements have led to the legitimisation of Article 370's erosion.[23] What is noteworthy about the *Prem Nath Kaul* ruling is that it reflected the compromise of the Delhi Agreement to the extent

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17 Article 368 allows for the amendment of the Indian Constitution. With respect to Kashmir, such amendments could only be extended to the state through the route of Article 370; see Noorani, ibid.

18 Gulzarilal Nanda, Lok Sabha Debates (4 December 1964) as quoted in Noorani (n 3) 305–315.

19 See Nanda, ibid. See also Nehru (n 16).

20 See Chatterjee (n 3).

21 ibid.

22 *Prem Nath Kaul v Union of India* (1959) Supp (2) SCR 270.

23 Noorani (n 3) 6–28.

that the court acknowledged the residuary sovereignty of the state.[24] Once the erosion of Article 370 enabled significant constitutional integration, there was a marked shift in how the Supreme Court interpreted the text and mandate of Article 370.[25] *Sampat Prakash* stands out for its reasoning. Consider the following passage:

> The legislative history of this article will also fully support this view. It was because of the special situation existing in Jammu & Kashmir that the Constituent Assembly framing the Constitution decided that the Constitution should not become applicable to Jammu & Kashmir under Art. 394, under which it came into effect in the rest of India and preferred to confer on the President the power to apply the various provisions of the Constitution with exceptions and modifications. It was envisaged that the President would have to take into account the situation existing in the State when applying a provision of the Constitution and such situations could arise from time to time. There was clearly the possibility that, when applying a particular provision, the situation might demand an exception or modification of the provision applied; but subsequent changes in the situation might justify the rescinding of those modifications or exceptions. This could only be brought about by conferring on the President the power of making orders from time to time under Art. 370.[26]

This paragraph and the judgement in general provide the broad framework of the monist constitutionalism concerning Article 370. First, for the Supreme Court, it was the Indian president that lay at the heart of Article 370 and the whole scheme of the provision revolved around the presidential power to unilaterally extend or withdraw any constitutional provision from J&K. Second, the state's constituent assembly and government were rendered secondary as it was the president who must take the decision regarding the quantum of autonomy enjoyed by J&K. Third, the autonomous status of J&K was seen as not necessitated by a pre-constitutional agreement but owing to the 'special situation' in J&K (a reference to the war and the involvement of the United Nations Organisation). The very articulation of Article 370 as a special status

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24 See *Kaul* (n 22), para 26.

25 Noorani (n 3) 387–402.

26 *Sampath Prakash v State of Jammu & Kashmir & Another* (1969) 2 SCR 365, paras 4 and 12.

instead of autonomy premised on a pre-constitutional agreement connotes special treatment conferred unilaterally by a benevolent state, justifying the eventual unilateral withdrawal of the special status. More recently, the Supreme Court in 2017 ruled that J&K had parted with its sovereignty when it acceded to India, and therefore, the J&K Constitution was subordinate in status to the Indian Constitution.[27]

III In Re: Article 370 and the Institutionalisation of a Monist Constitutional Ideology

Prior to the 2023 judgement, the concept of monism regarding Article 370 largely remained within the realm of political discussions, as previously illustrated. However, traces of this idea had begun to take root in the legal discourse, evident in certain court judgements and academic scholarship. The judgement *In Re: Article 370* not only institutionalised but also acted as the legitimating tool for monist constitutionalism. It achieved this by a three-tiered framework: i) equating J&K's loss of sovereignty with its subordination to India; ii) a historical narrative that diminished the bilateralism involved in the framing of Article 370, instead imagining the Indian Constituent Assembly as the sole bearer of power and authority, unilaterally conferring a special status on J&K; and iii) freeing the presidential power of the constraints imposed by Article 370 and in the process transforming and elevating it into an unbounded, supra-constitutional power. Deploying this three-tiered logic, the court institutionalised a monist logic that has historically aspired to subordinate J&K and subject it to the unbounded power of the Indian president.

A. Subordination of J&K

The court began its inquiry by determining the nature of J&K's loss of sovereignty in favour of India and held that this happened in two phases.[28] In the first phase, it lost external sovereignty on signing the Instrument of Accession in 1947. In the second phase, it lost internal sovereignty with the regent Karan Singh's proclamation of 1949, which led to the extension of Article 370 to the state. This, the court treated as the pre-constitutional loss of sovereignty. Then, the court inquired whether either the constitution of India or J&K provided for any sovereign status for the

[27] *State Bank of India v Santosh Gupta & Others* (2017) 2 SCC 538, para 43.

[28] *In Re: Article 370* (n2), paras 141 and 148.

state.[29] Relying on constitutional provisions[30] and the J&K Constituent Assembly debates, the court concluded that there existed a 'system of subordination' between the legal orders of J&K and India.[31]

While these provisions and the pre-constitutional history reflect a relationship of shared legal authority, the court, by framing the question of loss of legal authority as ushering in a system of subordination, concluded that J&K's loss of sovereignty also lead to its subordination.[32] The question of sovereignty in federal relations has remained deeply contested, but a loss of this sovereignty does not necessarily imply a relation of subordination.[33]

B. Special Status Owing to 'Special Conditions'

The second prong in this monist framing was the court's explanation for J&K's autonomy, that is, the contextual reading of Article 370. Instead of recognising constitutional autonomy as having a distinct constitutional value or emanating from a pre-constitutional settlement, the court held that the genesis of the special status lay in the 'special conditions' in J&K, that is, war conditions in the state and the reference to the United Nations Security Council.[34]

Next, the court delineated between the transitional and the temporary purposes of Article 370.[35] It held that Article 370 was a temporary provision owing to the *context* in which the provision came to be negotiated—the 'special conditions' in J&K between 1947 and 1949. While the special conditions led to a temporary provision, the terms of Article 370 made the provision transitional—the transitional status emanated from the *constitutional text*. The court held that the future convening of the state's constituent assembly and the pending determination of the constitutional relationship between India and J&K made the provision transitional.

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29 ibid, para 148.

30 Jammu & Kashmir Constitution (1957), sections 3, 4, 5, and 137.

31 *In Re: Article 370* (n2), para 161.

32 ibid.

33 See generally Stephen Tierney, *The Federal Contract: A Constitutional Theory of Federalism* (Oxford University Press 2022) 123–151.

34 Gopalaswami Ayyangar, Constituent Assembly of India Debates, Vol X (17 October 1949). On the UNSC resolutions and the promise to hold a referendum, see Shrimoyee Ghosh, 'One Nation, One Flag, One Constitution? – II: Internal, Bilateral, or International?' (*Indian Constitutional Law and Philosophy*, September 26, 2019) <https://indconlawphil.wordpress.com/2019/09/26/one-nation-one-flag-one-constitution-ii-internal-bilateral-or-international/> accessed 16 March 2025.

35 *In Re: Article 370* (n2), para 278.

By combining the contextual and textual readings of Article 370, the court completely overlooked the bilateralism that preceded its framing. Therefore, the making of Article 370 became, at best, an act of benevolence by the Indian Constituent Assembly in view of the special situation in J&K and not due to the pre-constitutional agreement between the dominion of India and the princely state of J&K.[36]

C. Absoluteness of Presidential Powers

The court squared the circle by reading the presidential power under Article 370 as absolute. Under this imagination, the powers of the president were elevated to a supra-constitutional status and considered unbounded in nature to the extent that the power to promulgate the presidential order was de-linked from the express condition precedent laid down in the proviso to Article 370(3).

To arrive at this conclusion, the court laid down an account of the princely states' integration and retrofitted the case of J&K in this master historical narrative.[37] With some of the princely states, the ruler's concurrence for the application of the Indian Constitution was made subject to the decision of a future constituent assembly in the state that would 'earnestly be considered by the Indian government' but would not be binding on it.[38] The court, in complete disregard of the text and history of Article 370, incorporated J&K in this narrative and held that the concurrence/recommendation of its constituent assembly in terms of the proviso to Clause 3 was of this kind and therefore not binding on the president.[39] So the Indian president could have, at any time between 1951 and 1957, abrogated Article 370 even though the J&K Constituent Assembly was operating in this period. Justice Kaul held that the president could have abrogated Article 370 even before the convening of the state's constituent assembly.[40] This, of course, contradicted the court's logic that Article 370 was a transitional provision, because it envisaged the convening of a constituent assembly for the final determination of the constitutional relationship between India and J&K. As the court held, '... the dissolution of the Constituent Assembly of the State would not impact the substantive power vesting in the President

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36 For the negotiations on Article 370, see Noorani (n 3) 50–86.

37 *In Re: Article 370* (n2), paras 176–185.

38 See generally *White Paper on Indian States* (Ministry of States, Government of India 1950). See also ibid, para 346.

39 *In Re: Article 370* (n2), paras 245–246.

40 *In Re: Article 370* (n2), Justice Kaul, para 93.

under Clause 3'.[41] Therefore, the presidential power to abrogate Article 370 was de-linked from the textual constraints and conditions and was as a result elevated to a supra-constitutional status.

By combining its purposive reading of Article 370 with a particular reading of history, the court established a relationship of subordination between the J&K Constitution and the Indian Constitution. At the same time, it made J&K subject to a presidential power that was freed of constraints and limits imposed by a power-bearer in the state, elevating, in the process, the presidential power to a supra-constitutional status.

Conclusion

This case comment shows how the fascination for a monist constitutional order, first articulated by the opposition during the Nehru years, was institutionalised in the form of a judicial discourse, culminating in the Article 370 judgement. Through its approach, the Supreme Court not only defined a new path for abrogating Article 370 but also, in the process, institutionalised a monist constitutional logic on J&K in the form of judicial precedent.

[41] *In Re: Article 370* (n2), para 346 (d).