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# **ANALYSING THE CONSTITUTIONALITY OF ARTICLE 370 WITH SPECIAL REFERENCE TO THE BASIC STRUCTURE DOCTRINE**

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## **ABSTRACT**

This paper aims to explore the constitutionality of Article 370 and explore the main argument against the abrogation of the same by doing an in-depth analysis of the basic structure doctrine and the nature of Article 370. This paper will also use constitutional law foundations and principles laid out by the Kesavanada Bharati case and the Golaknath case to prove the given contentions. The paper also aims to analyse and highlight whether the abrogation of Article 370 created a constitutional law precedent for similar sections to be abrogated. This will be done by highlighting the difference in the intention behind both articles in the constitution.

## Introduction

The basic structure doctrine of the Indian lays out certain characteristics that are essential to the very purpose of the constitution. The basic structure doctrine is intended to stop parliament from misusing Section 368 of the Indian constitution wherein it gives the parliament the right to amend the Indian Constitution whenever there is a necessity for the same. The basic structure doctrine also sets out principles that carry forth the main intention of the constitution as decided by the makers of the constitution

The objective of this research paper is to determine whether Article 370<sup>1</sup> (which deals with the special status of the Indian State of Jammu and Kashmir) of the Indian Constitution read with Article 35A<sup>2</sup> was inherently unconstitutional as the abrogation of the same is not violative of the basic structure doctrine and the preamble. This research paper also aims to determine whether this article has set a legal precedent for the special status of other states to be scrapped.

### What is the basic structure doctrine?

To understand how the abrogation of article 370 is not violative of the basic structure doctrine we must first understand what exactly the basic structure doctrine means and how it is related to the preamble.

The basic structure doctrine is a constitutional law principle that protects the basic intentions of the makers of the constitution against amendments from the parliament. The basic structure doctrine intends to protect the fundamental nature of the constitution and to ensure that the essential principle of the constitution is upheld properly. The basic structure doctrine, while being a provision that essentially restricts the parliament from altering the fundamental rights of its citizens, has not been properly defined. The best attempt at defining the basic structure doctrine and initiating some context into the basic structure doctrine was seen in the *Kesavananda Bharati v Union of India*<sup>3</sup> case, wherein several judges such as Justice Hegde and Justice Shelat gave their views on what should be considered the basic structure of the constitution. The basic structure doctrine is given precedence over most parliamentary bills or ordinances. The judges also remarked in this case that the basic structure doctrine reinforced the fact that only the power to amend the constitution is given and not the power to destroy the

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<sup>1</sup> The Constitution of India, Article 370.

<sup>2</sup> The Constitution of India, Article 370.

<sup>3</sup> Kesavandna Bharti v Union of India, (1973) 4 SCC 225

essential features of the constitution. The basic structure doctrine is inherently important to our case as the basic structure doctrine not only limits parliament but inherently can also be a standard test to determine what can or cannot be constitutional in nature. The basic structure doctrine ultimately creates a set of guidelines as to where it can be determined if an article in the constitution is in line with the main intentions of the constitution.

### **How is the preamble similar to the basic structure doctrine?**

The preamble of the constitution works as an extension of what the makers of the constitution believe were the main intentions of the constitution. The preamble, like the basic structure doctrine, gives certain guidelines and definitions to what future lawmakers in the country should intend to follow. The remarks of the justices in the majority judgment in the Kesavananda Bharti case are inherently like what is written in the preamble of the constitution. This is explicitly stated by justice Jagmohan Reddy wherein he stated that the “basic features of the constitution are to be found in the preamble” such as the mandate on the state to work towards building a sovereign democratic republic, a parliamentary democracy. This is also supported by Justice Shelat and Grover wherein they place that the maintenance of Unity and integrity of the nation is a basic feature of the constitution. All these statements are in line with the preamble of the constitution; hence we can say that the preamble of the constitution is essentially a written representation and a clear definition of the basic structure doctrine.

This is also defined in the Golaknath case<sup>4</sup> wherein it is stated that the preamble is about the democratic aspirations and the core ideals of the people of India. Another instance of this ideal being reinforced is in the Indra Sawhney case<sup>5</sup> wherein it was stated that “the preamble does not consist of a mere flourish words but the preamble sets the tone of an ideal atmosphere for practice and observance as a matter of law through constitutional mechanisms” this is similar to the intent of the basic structure doctrine wherein, as stated previously, the main intention of which was to limit how much Parliament could amend the constitution.

Based on the above contentions, we can say that the preamble and the basic structure doctrine in the constitution are inherently intertwined and related. This relation can help us define the bounds of the basic structure doctrine and will help us understand how Article 370 was inherently unconstitutional

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<sup>4</sup> Golaknath v State of Punjab v State of Punjab, 1967 AIR 1643

<sup>5</sup> Indra Sawhney and Ors v Union of India, AIR 1993 SC 477

## **What is Article 370?**

Article 370 was a section in parliament that gave “special status” to the Indian State of Jammu and Kashmir. The description of this act wherein it gives the residents and the state a special status that distinguishes the same from other residents of the same nation. The section is violative of the promotion of unity clause that is present in the preamble of the constitution. The special status given to Jammu Kashmir essentially allowed Jammu and Kashmir to be not governed by the Indian Constitution but rather be governed by their own sets of rules and principles where everything apart from fundamental rights was up to the state’s own discretion. Article 370 is usually read along with Article 35A due to both sections being in reference to Jammu Kashmir’s special status.

Article 35A gives power to the state government to define what the permanent residents of the state are, these permanent residents may be given special privileges which may not be given to standard Indian Citizens. This includes the right to purchase immovable property in the state and become a resident of the state itself. This provision clause is blatantly unconstitutional but due to the geopolitics of the state, the unconstitutional nature of this provision was looked over by the courts. This was also overlooked as the basic structure doctrine was interpreted as a way in which it did not accommodate for the deletion of clauses that were present in the inception of the constitution.

The Maharaja of Jammu and Kashmir during the incorporation of the state into India had stated that “The constitution of India would be adopted by the Indian constituent assembly”<sup>6</sup>, whereas there would be a separate creation of a Jammu and Kashmir constituent assembly wherein the Indian Constitution except for fundamental rights would not be applied. Essentially this declaration by the Maharaja of Jammu and Kashmir made residents of Jammu and Kashmir have their own rights and allowed the state of Jammu and Kashmir to evade the unity and fraternity clause laid down by the constitution preamble of the constitution. This means that the state of Jammu and Kashmir was a separate entity that the Indian Government had very limited power over and was able to enforce the laws of the union efficiently without undertaking special powers such as the President's Rule and the AFSPA act.<sup>7</sup> The Union

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<sup>6</sup> Munshi S, 'Decommissioning of Article 370: The Legal Perspective' (India Foundation, 2021) <<https://indiafoundation.in/articles-and-commentaries/decommissioning-of-article-370-the-legal-perspective/>> accessed 30 April 2022

<sup>7</sup> Haji, Mustafa. “Armed Forces Special Powers Act: A Call for Repeal.” *Counter Terrorist Trends and Analyses* 4, no. 7 (2012): 12–15. <http://www.jstor.org/stable/26351073>.

government in order to enforce proper law and order in the state had to use emergency powers such as the ones mentioned above to ensure basic law and order was maintained for the people. There are contentions given regarding the misuse of power by the union of government which infringes on human rights, but this argument still does not address the unconstitutional nature of the act. Essentially Article 370 allowed for the state government in Jammu and Kashmir to exercise almost unlimited powers without any judicial checks and balances that the constitution of India would have essentially provided.<sup>8</sup>

The constitution of Jammu and Kashmir, at the time of its existence, was exempt from provisions such as the fundamental duties of every citizen and the directive principles of state policies. Both provisions are highlighted under Article 36 – 51 and 51A respectively. This exemption to the constitution of Jammu and Kashmir allowed for the citizens in the state to have a superior right to what was provided to the citizens of India who were aligned to the Indian Constitution. However, Article 3 of the Jammu and Kashmir Constitution highlighted the fact that Jammu and Kashmir was a state which was part of the Union of India. This is highly contradictory in nature as India only had the power to legislate subjects relating to defense, external affairs, and communication. Which essentially made the state more independent from the Union than other states in the country.

### **Was the abrogation of Article 370 Against the Basic structure doctrine?**

One of the main arguments against the abrogation of Article 370 is that the act of abrogation is inherently against the basic structure doctrine. The act of abrogation was an act of parliament that was done on 5<sup>th</sup> August 2019. The argument given by the opposition is that under article 364 wherein parliament was conferred the power to amend the constitution, the abrogation of the article was not an amendment, but it was the destruction or the changing of the basic nature of the constitution which is violative of the basic structure doctrine. The opposition in this matter is incorrect as the introduction of the article itself was violative of the basic structure doctrine which makes it unconstitutional from the very beginning. The scrapping of Article 370 was also done through a presidential order rather than an act of parliament. The removal of Article 370 was in line with the basic structure doctrine. This was argued in the *case Dr. Shah Faesal v Union of India*<sup>9</sup> wherein it was argued that the federal structure between the

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<sup>8</sup> Mustafa F, 'Article 370, Federalism and The Basic Structure of The Constitution' (The India Forum, 2019) <<https://www.theindiaforum.in/article/article-370-federalism-and-basic-structure-constitution>> accessed 1 May 2022

<sup>9</sup> Dr Shah Faesal v Union of India – W.P (Civil) No. 1099 of 2019.

union and the states is part of the basic structure doctrine. The honorable counsel Ramachandran argued that the concept of federalism places an 'implied limitation' on the president. This implied limitation was discussed in the *Kessavananda Bharti* case. Since the abrogation of article 370 was a presidential order, the case argued against the constitutionality of the same. The petitioner argued that since the deletion of an entire clause in the constitution was against the basic structure doctrine, the abrogation of Jammu and Kashmir should be declared void under Article 13 of the Indian Constitution. The court ruled that the constitution also facilitated participatory governance and the reorganization of the Jammu and Kashmir act, so the supreme court ruled against the petitioner in favour of the sovereignty of India to be extended to the state of Jammu and Kashmir (now bifurcated into two union territories.) This paper will explain this contention in the points below and India's extension of India's sovereignty in the points below.

The main reason for the existence of the basic structure doctrine is as a means to prevent parliament from fundamentally amending the fundamental nature of the constitution. In the case of Article 370, the main contention was that Article 370 was a fundamental part of the constitution. This can be disproven as many of the implications of Article 370 were inherently unconstitutional and the main intention of the Basic structure doctrine was to protect the fundamental principles of the constitution from any external threat from the state. This can be proven in the *Indira Gandhi election*<sup>10</sup> case wherein Justice Y.V Chandrachud had affirmed that it is up to the state to uphold a government of laws and not of men, which essentially meant that the state should uphold the rule of law rather than the intentions of a few people. Which can interpret as the state should focus on upholding the basic structure of the constitution rather than the wishes of the arbitrarily created constituent assembly of Jammu and Kashmir. In the same case, Justice Y.V Chandrachud had also stated that India has a sovereign democratic republic status is a feature that is unamendable in the constitution, however, since Kashmir has its own separate constitution and the fact that most Indian laws do not apply in the state, we can say that that Indian sovereignty does not even extend to the state. The union government's role in the daily affairs of most of Kashmir's residents is negligible, at least in the sense of how the union government has been empowered by the constitution.

The Constituent Assembly of Jammu and Kashmir was also given full discretion by the Indian constitution on whether the Article should remain or not. The "temporary" nature of the article

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<sup>10</sup> *Indira Nehru Gandhi v Shri Raj Narain*, 1976 (2) SCR 347

is not entirely enforceable as the constitution of India gave full discretion to the Jammu and Kashmir state assembly to modify delete or retain Article 370. This essentially gave a 'state' government power to modify articles in the Indian Constitution. This creates a precedent wherein the constitution which is the supreme law of the land can only be amended by the parliament through an act however giving full freedom to the state government undermines the supremacy of the constitution as the supreme law of the land.<sup>11</sup>

Even though the basic structure doctrine was not properly defined during the time of the incorporation of Article 370, the main argument against the same is the abrogation of Article 370 is against the basic structure doctrine. Through the above contentions, we can say that Article 370 was not against the basic structure doctrine as it was not a protector of fundamental rights or helped the state enforce fundamental rights. This can be seen in the Golaknath case where the term "basic structure" had first come to fruition.

We can see that the basic structure doctrine is applied to all acts in general but the intention of the same was to apply to constitutional amendments. This is highlighted in the book Supreme but not infallible wherein the author was against the application of the basic structure doctrine to normal acts of parliament and the same should only apply to constitutional amendment.

### **Did Article 370 create a precedent for other states?**

There exists an argument that the abrogation of Article 370 will lead to the abrogation of all other articles which have to give certain states special status. These states are highlighted under Section 371 of the constitution. They include states such as Meghalaya, Nagaland, Mizoram, and Arunachal Pradesh. These states share similar characteristics to the state of Kashmir wherein they are plagued with civil unrest, separationist tendencies, and the lack of a rule of law. The states which have a special status believe that since Article 370 was abrogated on the grounds of the law being unconstitutional and temporary, the rest of the articles present in article 371 will also be abrogated under the same article. The below paragraphs will prove this notion to be false.

The special status highlighted under article 371 concerning Maharashtra and Gujarat only mentions the responsibility of the governor to create "special development boards", whereas

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<sup>11</sup> Nayak V, 'The Basic Structure of The Indian Constitution' (ConstitutionNet, 2018) <<https://constitutionnet.org/v1/item/basic-structure-indian-constitution>> accessed 30 April 2022

Article 371A<sup>12</sup> (13<sup>th</sup> Amendment Act, 1962) which talks about the special status of Nagaland mentions the fact that the state cannot legislate in matters of Naga religious or social practices. The state here refers to the Parliament not being able to legislate laws that interfere with the rights of the Naga indigenous practices. Article 371B mentions the elections of people from tribal areas and the functions of a committee from the said elected representatives. Article 371C is similar to article 371B except it devotes a clause of special responsibility to the indigenous people of Manipur.<sup>13</sup>

As we can see, these clauses are added to the constitution to mainly protect the indigenous people of the state and to provide equitable development for the same. This is in line with the basic structure doctrine and the preamble of the constitution as discussed earlier. These articles also do not empower the respective state assembly to supersede the parliament. Article 370 made the State of Jammu and Kashmir a separate entity in itself and the main intention of the article was to give a sense of autonomy, however, the main intention of provisions under article 371 was to protect the marginalized committees of the state.

We can say that Article 371 is well within the basic structure doctrine and the amendments provided in the same are not violative of the basic nature of the constitution which is brought forth in the preamble. Article 371 also works to enhance the enforcement of fundamental rights rather than downgrade the same as provided in Article 370.

## Conclusion

Through the above contentions, we can say that Article 370 was unconstitutional as it did not enforce, nor did it enhance the fundamental rights in the constitution which are highlighted by the preamble. Article 370 is indirectly violative of many fundamental rights and the removal of the same is not violative of the basic structure doctrine as laid out in the Golaknath case and the Indira Gandhi case. The argument that abrogation of Article 370 is violative of the basic structure doctrine is inherently nebulous as we have proven that the article was not in line with the basic features of the constitution and using the supreme court's decision from the case *Dr. Shah Faesal v Union of India*<sup>14</sup> we can say that the sovereignty and fraternity aspect of the

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<sup>12</sup> The Constitution of India, Article 371.

<sup>13</sup> Venkatesan V, 'Eight Cases That Will Test Whether 'Basic Structure Doctrine' Can Safeguard India's Democracy' (The Wire, 2022) <<https://thewire.in/law/eight-cases-that-will-test-whether-basic-structure-doctrine-can-safeguard-indias-democracy>> accessed 1 May 2022.

<sup>14</sup> *Dr Shah Faesal v Union of India* – W.P (Civil) No. 1099 of 2019.

preamble of the constitution takes precedent over the 'implicit exception' that is enforced to keep the power of the president in check.

We can also see that the abrogation of article 370 did not create a constitutional law precedent for Article 371 and other articles which provide special provisions to entities that are considered as a 'state' of the union of India. This is formulated by comparing the situations and intentions of Article 370 and Article 371 and addressing the differences in the same.