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INDIA CRITICIZES INDIA

INDIAN LAWYERS CRITICISM ON THE ABROGATION OF ARTICLE 370

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FOREWORD

This document provides a useful compilation of analyses written by prominent Indian legal scholars on the implications of revoking Article 370 from the Constitution of India. It serves as an important resource for the relevant stakeholders in Pakistan as it allows them to understand the complexities of India's domestic law—and the actions of the BJP-led government—through the lens of Indian legal experts. In particular, it explains the background surrounding the promulgation of Article 370; the manner of its revocation; and, the legal consequences of India's actions vis-à-vis said revocation. Since its original publication, the compilation has been continuously updated to reflect the current debates within India's academic and legal circles.

The articles herein are only for the purpose of generating awareness about the Indian actions relating to the territory of Jammu and Kashmir.

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Abrogation of Article 370 Unconstitutional. Kashmir: Murder of Insaniyat

Date: August 30, 2019

Author: A.G. Noorani

The writer is an Advocate Supreme Court, and is a Constitutional Expert

The amendment of the provisions of Article 370 is constitutionally invalid; it flies in the face of pledges made by India to the Kashmiri people and the international community and breaks the bond that bound Kashmir to the Union.

And I say with all respect to our Constitution that it just does not matter what your Constitution says; if the people of Kashmir do not want it, it will not go there. Because what is the alternative? The alternative is compulsion and coercion—presuming, of course, that the people of Kashmir do not want it. Are we going to coerce and compel them and thereby justify the very charges that are brought by some misguided people outside this country against us?

Do not think that you are dealing with a part of Uttar Pradesh, Bihar or Gujarat. You are dealing with an area, historically and geographically and in all manner of things, with a certain background. If we bring our local ideas and local prejudices everywhere, we will never consolidate. We have to be men of vision and there has to be a broad-minded acceptance of facts in order to integrate really. And real integration comes of the mind and the heart and not of some clause which you may impose on other people.

— Jawaharlal Nehru in the Lok Sabha on June 26, 1952.

The President's Order under Article 370, made on August 5, 2019, the Jammu and Kashmir Reorganisation Bill, and the two resolutions by Parliament were conceived in malice and executed in deceit. They reduce Kashmir to India's colony.

Union Home Minister Amit Shah's Statement of Objects and Reasons on the Bill refers to Ladakh's demand for Union Territory status and concludes: "The Union Territory of Ladakh will be *without* a legislature." The Union Territory will include Kargil as well, though Ladakh has long been on inimical terms with Kargil. There will be another Union Territory comprising Jammu and Kashmir.

AG Noorani, 'Kashmir: Murder of insaniyat' (*Frontline*, 30 August 2019) <<https://frontline.thehindu.com/cover-story/article29049528.ece>>

It contains a revealing gem: “Further, keeping in view the prevailing internal security situation, fuelled by cross-border terrorism in the existing State of Jammu and Kashmir, a separate Union Territory for Jammu and Kashmir is being created. The Union Territory of Jammu and Kashmir will be with a legislature.” Have you ever heard of a state robbing its regions of autonomy because they had suffered terrorist attacks? But, of course, this is a sham. The nearly 40-page Bill must have taken weeks to prepare. It scraps the Constitution of the State of Jammu and Kashmir adopted by its elected Constituent Assembly and imposes on it constitutional provisions on which the views of Kashmiris were not sought.

Article 370 was abused to scrap Jammu and Kashmir’s Constitution by a law made by India’s Parliament. The Bill goes further. Significantly, it promises a fresh delimitation of constituencies. The *Hindustan Times* of August 6 has two reports. One by Vijdan Mohammad Kawoosa and the other by Smriti Kak Ramachandran, which expose the motive behind the whole game. The Bharatiya Janata Party aspires to increase the number of seats in Jammu and, thus, its strength in the Jammu and Kashmir Assembly so as to woo some in the Valley and form a BJP government.

The BJP seeks to fulfil its old demands: repeal of Article 370, a uniform civil code, and Ayodhya. The last, through the courts; the second, by legislation; and the first through Parliament. Nehru had foreseen the trouble we are now in. On January 1, 1952, he said in a speech in Calcutta:

There can be no greater vindication than this of our secular policies, our Constitution, that we have drawn the people of Kashmir towards us. But just imagine what would have happened in Kashmir if the Jana Sangh or any other communal party had been at the helm of affairs. The people of Kashmir say that they are fed up with this communalism. Why should they live in a country where the Jana Sangh and the Rashtriya Swayamsewak Sangh [RSS] are constantly beleaguering them? They will go elsewhere and they will not stay with us.

(Selected Works of Jawaharlal Nehru, Volume 17, page 78)

An old demand: trifurcation

Trifurcation of Jammu and Kashmir was mooted by Jammuites 70 years ago, as the Home Secretary, H.V.R. Iyengar, warned Prime Minister Nehru in a letter of April 17, 1949. Karan Singh supported it then (as B.K. Nehru mentioned, at length, in his memoirs, *Nice Guys Finish Second*, page 589), as he does now. A closet Hindu fundamentalist, he aspired to rule Jammu. The RSS’ spokesman, M.G.

Vaidya, thought “it would help contain virulence in the Valley” (*The Times of India*, September 4, 2000) and make it easier to convert it into a huge concentration camp.

Farooq Abdullah warned that trifurcation would split Jammu evenly; three of its (old) six districts have a Muslim majority: Doda, Poonch and Rajouri. The other three are Udhampur, Jammu and Kathua. A tehsil in Udhampur, Gool Gulab Garh, and three in Rajouri will join the Valley. Farooq Abdullah warned that India would be left with two and a half districts. A Greater Kashmir would be presented on a silver platter to Pakistan. Nehru warned Vallabhbhai Patel of this danger and wrote to his friend B.C. Roy, Chief Minister of West Bengal, on June 29, 1953, on the RSS-backed Praja Parishad’s agitation for trifurcation of Jammu and Kashmir. “If Hindu communalists could organise a movement in Jammu, why should not Muslim communalists function in Kashmir? The position now is that if there was a plebiscite, a great majority of Muslims in Kashmir would go against us. In fact, there has been some petty violence also.

“So, this movement of the Praja Parishad, which aims at a closer integration of Kashmir State with India, has had the opposite effect. It is true that so far as Jammu province is concerned, it has demonstrated that a majority of Hindus there want closer integration. Nobody ever doubted that and, whatever happens, Jammu cannot leave India. There need be no apprehension about that. The whole difficulty has been about the Valley of Kashmir and we are on the point of losing it because of the Praja Parishad movement. Psychologically we have lost it and it would be difficult to get back to the old position.... In the ultimate analysis, we gain Kashmir if we gain the goodwill of the people there. We cannot keep it at the point of the bayonet if it is clear that the people do not want us. For the first time public cries are raised in Kashmir that the Indian Army should get out” (*Selected Works of Jawaharlal Nehru*, Volume 22, pages 203-205).

The eruption of militancy did not dampen the RSS’ zeal. On June 29-30, 2002, its Akhil Bharatiya Karyakari Mandal (ABKM) baithak at Kurukshetra passed a resolution that said: “(i) The people of Jammu think that the solution of their problems lies in *the separate statehood for Jammu region*. This has been demonstrated by the agitation spearheaded by the Jammu-Kashmir National Front and other organisations. The ABKM offers its support to their demand. To brand this demand for a separate statehood for Jammu region, which includes the Muslim-majority districts of Poonch, Rajouri and Doda, as communal is either crass ignorance or motivated prejudice. (ii) The ABKM supports the demand for UT status for Ladakh region. (iii) ABKM offers all its support to the forces in the Kashmir

Valley that are for full integration with Bharat [*Reorganisation of the J&K State, Problem & the Solution*].”

The Modi regime’s Bill is only a step towards that goal. Before long, Jammu will be separated from Kashmir as a State proper. This is what Modi’s radio broadcast of August 8 meant.

In the entire exercise, vile passions have triumphed over elementary concern with the law. The President’s Order is patently unconstitutional. It is made avowedly “with the concurrence of the Government of the State of Jammu and Kashmir”. But no such government has existed there for over a year, evidently to facilitate this constitutional skulduggery through a stooge, Governor Satya Pal Malik.

President’s Order Unconstitutional

Article 370 itself defines the “Government of the State” in an Explanation which reads thus: “Explanation. — For the purposes of this Article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja’s Proclamation dated fifth day of March, 1948.” The Maharaja gave way to the Sadar-e-Riyasat and he to the Governor. Thus the Governor cannot act under Article 370 singly as “the Government of the State”. The object of the provision is to buttress the State’s autonomy. The Centre’s appointee cannot give his concurrence to the Centre.

There is a precedent directly on this very point. It is a ruling by the Supreme Court of Sri Lanka, reported by Puneeth Nagaraj in *The Hindu* of December 6, 2012. It concerned the Divineguma Bill. Divineguma means “uplifting lives”, and the legislation was for a poverty alleviation scheme through community-level organisations. What was problematic about it was that it put the Minister of Economic Development, Basil Rajapaksa (younger brother of the then President), in charge, giving him wide discretionary powers and funds, overriding the powers devolved to the provinces.

The report said: “The Bill was challenged before the Supreme Court under Article 154G(3) of the Constitution. The Supreme Court sent it back to the government saying it had to be ratified by the Provincial Councils. There has never been a Provincial Council in Northern Sri Lanka (not counting the short-lived North-Eastern Provincial Council), and the province is run by Colombo through the Governor. It was the Governor who ratified the Divineguma Bill on behalf of Northern Province. This

was immediately challenged by the Tamil National Alliance before the Supreme Court through two petitions. On November 1, *the Supreme Court held that the Governor cannot ratify the Bill in place of the Provincial Council.*”

The President’s Order falls in the very same test, and with it, the Bill. There is another aspect to it: Article 1 of the Constitution of India. The order supersedes all previous Orders made under Article 370, including the Order inserting Article 35A in the Constitution. Part III of the Constitution of Jammu and Kashmir contains elaborate provisions for the same purpose.

The Order of 2019 *does not abrogate Article 370* as the RSS and the BJP have always demanded. No Member of Parliament noticed this. Home Minister G.L. Nanda mentioned it in the Lok Sabha on December 4, 1964. “It is through this tunnel [Article 370] that a good deal of traffic has already passed *and more will.*” To reduce it to a shell. The Modi regime has gone further. It has also scrapped the Constitution of Jammu and Kashmir. Article 370 itself does not permit that. It begins by saying that Article 235 will not apply to Kashmir. Article 370 limits the President’s power to apply to the State only items in the Union and Concurrent Lists, after consultation with the State if they are already comprised in the Instrument of Accession, namely, those comprised in defence, foreign affairs and communications. But if they go beyond those, the concurrence of the State’s Constituent Assembly is necessary. However, until it was “convened”, the government of the State could give concurrence, but that would be subject to ratification by the Constituent Assembly [(Article 370 (2)].

Clause (3) is relevant. It says:

Notwithstanding anything in the forgoing provisions of this Article, the President may, by public notification, declare that this Article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in Clause (2) shall be necessary before the President issues such a notification.

Article 368 on Parliament’s power to amend India’s Constitution does not apply to Jammu and Kashmir unless the amendment is applied to the State by the President under Article 370.

Once the Constituent Assembly of Jammu and Kashmir was “convened”, to use the exact word in Article 370, the State government lost its interim power to accord its concurrence. When this body dispersed on January 26, 1957, after adopting the State’s Constitution, there vanished also the

President's powers under Article 370 to add more legislative powers to the Centre in respect of Jammu and Kashmir or extend to the State any other provision of the Constitution of India.

Conscious of this, the President of the Kashmir Constituent Assembly, G.M. Sadiq, formally dissolved it on January 26, 1957, pursuant to its formal resolution on dissolution passed on November 17, 1956. India's Constituent Assembly simply dispersed without any such formality. Kashmir's Constituent Assembly consciously decided on November 17, 1956, that "it shall stand dissolved on the 26th January 1957". No more powers to the Centre can be added thereafter and no more extensions of the Constitution of India, either.

Article 370 refers to Jammu and Kashmir's Constituent Assembly twice, thus recognising its right to have its own Constitution. That cannot be nullified by an executive Order by the President at the instance of the Central government, even if it claims to have been made with the consent of Governor Satya Pal Malik.

It is a matter of common sense that Article 370 cannot be used, rather misused, until eternity. It had to end once Jammu and Kashmir's Constituent Assembly decided finally on the Constitution and relatedly the Union's powers. President Rajendra Prasad, himself a distinguished lawyer, pointed out to Prime Minister Nehru in a Note dated September 6, 1952 (for the full text, see A.G. Noorani, *Article 370*, OUP, pages 205-210). He said specifically:

This clause is of a peculiar and exceptional nature inasmuch as it authorises amendments of Constitution by an executive act of the Government of India as distinguished from Parliament.... While it safeguards in Clause (2) the right of the Constituent Assembly of Jammu and Kashmir to revise or annul any action taken by the Government of that State in giving concurrence under Clause 1(b)(ii) and the second proviso to Clause 1(d) of Article 370, *it excludes altogether the Parliament of India from having any say regarding the Constitution of Jammu and Kashmir.*

Abrogation of that Article would result in the whole Constitution becoming applicable to the State of Jammu and Kashmir without any exception or modification. But the Article itself has been very peculiarly worded, for paragraph (c) of Clause (i) of that Article expressly applies the provisions of Article 1 and of that Article to the State. In fact, it is because of this application of Article 1 to the State that the State is included within the territories of the Union. The abrogation of Article 370

abrogates along with its application of Article 1 to the State, *with the result that the State ceases to be part of the territory of India....*

Extensive power is conferred on the President to apply the Constitution to the State with such exceptions and modifications as may be specified in the notification, and the question at once arises whether such an extensive power is exercisable from time to time or is exhausted by a single exercise thereof. Judging by the language employed and by the very exceptional nature of the power conferred, I have little doubt myself that the intention is that *the power is to be exercised only once*, for then alone would it be possible to determine with precision which particular provisions should be excepted and which modified. The fact that the President is also required to specify the date from which the notification is to take effect also tends to confirm this view. Although the phrase 'exceptions and modifications' is used, there can be no doubt that what is involved is really an amendment by executive order of the Constitution in relation to the State of Jammu and Kashmir. *Parliament could never have intended that such an extraordinary power of amending the Constitution by executive order was to be enjoyed without any limitation as to the number of times on which it could be exercised or as to the period within which it was exercisable or as to the scope and extent of the modifications and exceptions that could be made.* It cannot be seriously maintained that for all time to come the application of our Constitution to Jammu and Kashmir would derive its authority from Article 370, to the complete exclusion of Parliament. The marginal note to Article 370 itself describes the nature of the Article as 'Temporary Provisions with respect to the State of Jammu and Kashmir'.... The correct view appears to be that recourse is to be had to this clause only when the Constituent Assembly of the State has been fully framed.

N. Gopaldaswamy's Exposition

N. Gopaldaswamy Ayyangar sponsored Article 370 in India's Constituent Assembly. His exposition is authoritative, as the Supreme Court has repeatedly declared. He said on October 17, 1949: "Part of the State is still in the hands of rebels and enemies. We are entangled with the United Nations in regard to Jammu and Kashmir and it is not possible to say now when we shall be free from this entanglement. That can take place only when the Kashmir problem is satisfactorily settled.

Again, the Government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic

or wish to go out of it. We are also committed to ascertaining this will of the people by means of a plebiscite provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be guaranteed. We have also agreed that the will of the people, through the instrument of a Constituent Assembly, will determine the Constitution of the State as well as the sphere of Union jurisdiction over the State. ...

In some of the clauses of this Article we have provided for the concurrence of the Government of the State. The Government of the State feel that in view of the commitments already entered into between the State and the Centre, they cannot be regarded as final authorities for the giving of this concurrence, though they are prepared to give it in the interim periods but if they do give this concurrence, this clause provides that concurrence should be placed before the Constituent Assembly when it meets and the Constituent Assembly may take whatever decisions it likes on those matters....

The provision is made that when the Constituent Assembly of the State has met and taken its decision both in the Constitution for the State and on the range of federal jurisdiction over the State, the President may on the recommendation of the Constituent Assembly issue an order that this Article 306A shall either cease to be operative, or shall be operative only subject to such exceptions and modifications as may be specified by him. But before he issues any order of that kind, the recommendation of the Constituent Assembly will be a condition precedent....

When it has come to a decision on the different matters, it will make a recommendation to the President who will either abrogate Article 306A or direct that it shall apply with such modifications and exceptions as the Constituent Assembly may recommend.

This, read with Rajendra Prasad's Note, establishes that Kashmir's Constituent Assembly had to determine the final position and then ask the President to notify that Article 370 shall cease to be operative. This explains its "temporary" character.

A Union Home Minister, a Prime Minister and a President, all more intelligent than Amit Shah, referred pointedly to Article 1 of India's Constitution establishing a "Union of States", which applies to Jammu and Kashmir by virtue of Article 370(1)(C). On March 1, 1993, S.B. Chavan pointed out that Article 370 is "the only link" India has with Kashmir (*The Statesman*, March 2, 1993). As Prime

Minister P.V. Narasimha Rao said on June 12, 1996: “Abrogation of this Article is just not possible, unless you want to part with the State.”

Though the BJP regime has, in breach of its solemn promises, not abrogated Article 370 by enacting the Order and the Bill, it has parted with the Kashmiris’ confidence politically, with its repercussions constitutionally.

Legislative skulduggery emerges in Clause 2(d) of the Order. It amends Article 370(3) to say that the expression “Constituent Assembly of the State” referred to in Clause (3) of Article 370 “*shall read ‘Legislative Assembly of the State’*”. This is shocking.

A Constituent Assembly is a body wielding constituent powers as a *sovereign body*. It itself establishes a Legislative Assembly with limited powers it defines. Jammu and Kashmir’s Constituent Assembly ceased to exist on January 26, 1957. The Assembly it created in Jammu and Kashmir’s Constitution survives still (Article 46). How can you endow it with constituent powers to accord its concurrence to the Centre to destroy the State’s autonomy?

Thus, the entire Order is afflicted with defects and is a nullity. So, in consequence is the entire Act which is based on it. The State of Jammu and Kashmir has had an identity, a persona, since 1846, domestically and internationally. It has been reduced to a colony by the Order and the Act. Article 370 permitted the Centre to extend legislative powers and constitutional provisions to Kashmir. It does not permit the Centre, even in its hollowed form, to amend the State’s Constitution. The Act does just that. It has no power (Section 4) to make Jammu and Kashmir a Union Territory. *The State’s Constitution is not formally repealed*; a new one is imposed by the Act. It has detailed provisions. Uniquely among the princely states, one of the biggest among them will have a Constitution in whose drafting it had no say. Amendments to the State’s Constitution are made freely, explicitly, by some babu in the Central Secretariat.

Clause 134(1) says: “There shall be an Administrator appointed under Article 239 of the Constitution of India in the territory of Jammu and Kashmir and shall be designated as Lieutenant Governor of the said Union Territory”. What followed is a detailed Constitution for this godforsaken State of Jammu and Kashmir.

The Centre can appoint some Kiran Bedi as Lt Governor. The Legislative Assembly will have no powers in respect of “public order” and the “police”. Parliament will have unlimited powers on Jammu and Kashmir and so will the Central government—unchecked by the State List or the Concurrent List. Kashmir’s Legislative Assembly is not emasculated. It is castrated. Financial Bills cannot be moved in the Assembly without the prior approval of the Lt Governor (Section 36). It will have less power than the provinces of British India under the Government of India Act, 1935.

Fear of Revolt

Part V (Section 59 to 64) deals with delimitation of constituencies. An Act of 103 Sections, containing a host of minutiae, could not have been drafted in the short period in which the Centre and the Governor were pouring out one assurance after another. Justice S.R. Tendulkar, a fearless judge of the Bombay High Court, once remarked: “The dark hours of the night are used for perpetration of dark deeds, not for execution of lawful orders.” Morarji Desai, as Chief Minister, put an end to orders requisitioning flats which were executed at night. The build-up of armed forces, the ban on all forms of communication and on movement of people suggest that the Centre feared a popular revolt on its repressive laws. If not immediately, at some time or the other revolt they will.

Amit Shah said on August 5 that if the Union Territory model worked well, the government would consider giving Jammu and Kashmir the status of a State again and “no constitutional amendment would be required”. In colonial times, the British offered similar assurances to their vanquished British subjects. Modi affirmed this in his radio broadcast on August 8. Not only has the most elementary respect for political morality been thrown to the winds but so is concern for legality. Amit Shah’s two so-called “statutory resolutions” of August 5 made one laugh. One reads thus: “In exercise of the powers conferred by Clause (3) of Article 370 read with Clause (1) of Article 370 of the Constitution of India, the President, on the recommendation of the Parliament, is pleased to declare that, as from 5th August 2019, all clauses of the said Article 370 shall cease to be operative except Clause (1) thereof which shall read as under, namely:

All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in Article 152 or Article 308 or any other Article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgment,

ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under Article 366 or otherwise.” Kashmir’s Administrative Services are abolished. The Indian Administrative Services alone will govern.

Illegality in the other is even more scandalous: “That the President of India has referred the Jammu and Kashmir Reorganisation Bill, 2019, to this House under the proviso to Article 3 of the Constitution of India for its views as this House is vested with the powers of the State Legislature of Jammu and Kashmir, as per proclamation of the President of India dated 19th December 2018. This House resolves to express the view to accept the Jammu and Kashmir Reorganisation Bill, 2019.

One illegality is mounted on another. Article 3, on the formation of new States and alteration of States’ boundaries, was applied to Jammu and Kashmir with this revealing additional provision:

Provided further that no Bill for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of the State shall be introduced in Parliament without the consent of the Legislature of the State.

This was in addition to a safeguard promised to all the other States; namely, the President had to refer the Bill to the affected State’s Legislature and the Bill could be introduced in Parliament only after the President’s recommendation. In regard to Jammu and Kashmir, its consent was necessary; for all others consultation was all that was required.

What the second resolution does is to discard even the requirement of consultation.

That the President of India has referred the Jammu and Kashmir Reorganisation Bill, 2019, to this House under the proviso to Article 3 of the Constitution of India for its views as this House is vested with the powers of the State Legislature of Jammu and Kashmir, as per proclamation of the President of India dated 19th December 2018. This House resolved to express the view to accept the Jammu and Kashmir Reorganisation Bill, 2019.

This is a solemn fraud. The provisos to Article 3 are designed to respect the federal principle. This resolution turns it on its head. It holds that since Parliament is vested with the powers of Kashmir’s Legislature when it is under President’s Rule, it can give its consent to the President as if it was the

State Assembly itself: “This House [of Parliament] resolved to express the view to accept the Jammu and Kashmir Reorganisation Bill.”

To sum up:

- 1(a). The Order under Article 370 is made with the concurrence of the Centre’s appointee, the Governor, on the pretext that he is the State government. After 1951 even the State government had lost its interim power to accord consent. It now belonged to the State’s Constituent Assembly.
- (b) It makes the State’s Legislative Assembly the Constituent Assembly, dissolved in 1957, with retrospective effect.
2. The Bill reduces an ancient State of Jammu and Kashmir to the status of a Union Territory. Forget “the basic structure” of the Constitution.
3. The resolutions cap all this by substituting Parliament for the State Legislature and empowering Parliament to give consent to itself.

So much for the law. These three measures together inflict on the people of Kashmir a humiliation more degrading than the one inflicted on August 8, 1953, by the ouster of Sheikh Abdullah from the office of Premier of Jammu and Kashmir. It deepens the divide between India and Kashmir and between Kashmir and Jammu and Ladakh. As in the case of the crime of 1953, these measures have won popular jingoistic approval today but are certain to arouse deep regrets later. “They now ring the bells, but they will soon wring their hands,” Sir Robert Walpole famously said on the declaration of war with Spain in 1739.

Ignored, will of the people

One cardinal factor which successive Union governments since Nehru have deliberately ignored is the people of Kashmir. They were opposed to the State’s accession to India from the very beginning. The raiders from Pakistan forced Sheikh Saheb’s hands.

To Nehru’s knowledge he proposed to a British Minister, Patrick Gordon-Walker, accession to *both* countries. The minutes of the meeting of the Defence Committee of the Cabinet on October 25, 1947, before the accession tell the tale. Nehru, the accessionist, said: “The question was whether temporary accession would help the people in general to side with India or whether it would only act as an

irritant.” Why? Because they were opposed to accession then, as they are now. That is why on October 26 the hardliner Gopalaswamy Ayyangar, former Dewan of Jammu and Kashmir, opined “immediate accession might create further opposition”.

On May 14, 1948, Indira Gandhi wrote to her father from Srinagar: “They say that only Sheikh Saheb is confident of winning the plebiscite...” (Sonia Gandhi (ed.), *Two Alone, Two Together*, Penguin, New Delhi, 2004, pages 512-18). Five years later, even Sheikh Abdullah had abandoned hope as President Rajendra Prasad reported to Prime Minister Nehru on July 14, 1953.

In a letter to Nehru on May 1, 1956, Jayaprakash Narayan reported: “95 per cent of Kashmir Muslims do not wish to be or remain with India.” Nehru had foreseen the danger that the Sangh Parivar posed. At a rally in Calcutta on New Year’s Day 1952, Nehru warned: “If tomorrow Sheikh Abdullah wanted Kashmir to join Pakistan, neither I nor all the forces of India would be able to stop it because if the leader decides, it will happen. So what the Jana Sangh and the Rashtriya Swayamsewak Sangh are doing is to play into the hands of Pakistan.... Just imagine what would have happened in Kashmir if the Jana Sangh or any other communal party had been at the helm of affairs. The people of Kashmir say that they are fed up with this communalism. Why should they live in a country where the Jana Sangh and the Rashtriya Swayamsewak Sangh are constantly beleaguering them? They will go elsewhere and they will not stay with us” (*Selected Works of Jawaharlal Nehru*, Volume 17, pages 77-78).

What is the way forward?

In 2019, secession is ruled out; not so an accord acceptable to all the three parties—India, Pakistan and the people of Kashmir.

One fears that New Delhi will go further still. On July 20, 2019, Defence Minister Rajnath Singh said in threatening words that “resolution of Kashmir issue is bound to happen and no power on earth can stop it. If not through talks.” We know how. Plans for crackdown were in place. As Tacitus, the historian of ancient Rome, said: “They created desolation and call it peace.” The people of Kashmir will not submit to it. Rise they will.

Kashmir’s leadership is now on trial as never before. It must go beyond the Gupkar Declaration. A small committee comprising Dr Farooq Abdullah, Omar Abdullah, Mehbooba Mufti and Shah Faesal should prepare a Manifesto of the United Movement of Kashmir and take to the streets, after

renouncing all forms of violence, and assert their right to freedom of speech and freedom to move in peaceful procession. It must put forth a constructive agenda of action.

No self-respecting Kashmiri can possibly agree to stand for elections to any Assembly of the Union Territory. Gandhi asked Congressmen to boycott elections under the colonial Government of India Act, 1919. They took to satyagraha. The time has come to abandon shutdowns and the like. A united front alone can impress nationally and internationally. The Simla Pact speaks of “a final settlement of Jammu and Kashmir”. To break up the State is to wreck the pact.

Remember, Article 370 is no mere provision enacted by the Constituent Assembly of India. It gives effect to a solemn compact negotiated for five long months between the Government of India and the Government of Jammu and Kashmir. History will never forgive all those who have wrecked it calculatedly since 1954.

The first street protests erupted on August 9. Wait for what follows.

Four Reasons why the Presidential Order on Kashmir is not Kosher, yet

Date: August 06, 2019

Author: Jeet H. Shroff

The writer is a Mumbai-based lawyer involved in dispute resolution

On Monday the government sought to all but scrap Article 370 from the Constitution through Presidential Order. While the media popularly reported the Presidential Notification as having scrapped Article 370, this is not accurate.

First let us understand the legal provisions and history. Article 370 was included in the Indian Constitution as a temporary provision for J&K. Articles 370(1)(c) and 370(1)(d) (which are relevant) deal with the applicability of the Indian Constitution to J&K. Article 370(1)(c) states that Article 1 and Article 370 of the Constitution shall apply to J&K. Article 370(1)(d) states that other provisions of the Constitution can be made applicable to J&K with such “modifications as the President may by order specify”.

However, Article 370(1)(d) requires that the President secure the concurrence of the J&K government before issuing such an order. Finally, Article 370(3) states that the President can issue a notification making the whole of Article 370 inoperative if such a recommendation is made to the President by the Constituent Assembly of J&K.

Article 370 was brought into being as a compromise. When Kashmir acceded to India, Kashmir was given the right to draft its own Constitution. All princely states were given this right but other states accepted the Indian Constitution as being applicable to themselves. Kashmir however constituted its own Constituent Assembly and reserved for itself the right to make its own laws on all but a few matters. Article 370 gives constitutional effect to this understanding.

However, Article 370 was intended to be temporary until Kashmir’s Constitution was drafted and the Constituent Assembly of Kashmir has the power to recommend the abrogation of Article 370 to the President. The Constituent Assembly of Kashmir however dissolved itself in 1957 without making any recommendation for amendment or abrogation and for this reason, the Indian Supreme Court has ruled

Jeet H Shroff, 'Four reasons why the Presidential Order on Kashmir is not kosher, yet' (*The Hindu: Business Line*, 6 August 2019) <<https://www.thehindubusinessline.com/opinion/three-reasons-why-the-presidential-order-on-kashmir-is-not-kosher-yet/article28836245.ece>>

on multiple occasions that Article 370 is now a permanent part of the Indian Constitution since the only body that could have abrogated it has been dissolved without doing so.

This is the principal difficulty that the government has to overcome in order to successfully ‘scrap’ Article 370 in its entirety.

Let us now understand what the Indian government did on Monday.

First, the Presidential Order was issued. The Presidential Order uses Article 370(1)(d) to apply all provisions of the Indian Constitution (other than Articles 1 and 370 – which are already applicable) to J&K. The concurrence of J&K government is necessary to effect such a step but since J&K is presently under President’s rule and has no state government, this was effectively dispensed with.

Second, when applying provisions of the Indian Constitution to J&K, the President effected one ‘modification’— to Article 367. Article 367 is the interpretation clause of the Constitution. In Article 367, the Presidential Order inserts a new sub-clause (4)(d) which states that the words “Constituent Assembly” in Article 370(3) must be read as “Legislative Assembly of the State”. What does this mean? The government has sought to overcome the problem of the Constituent Assembly not having abrogated Article 370 by requiring that “Constituent Assembly” in Article 370(3) be read as the J&K Assembly.

By doing so, it now becomes possible for the J&K Assembly to do what the Constituent Assembly did not i.e. recommend the abrogation of Article 370. To be clear, the President has not amended Article 370(3) itself because he does not have the power to do so. He can only modify other provisions of the Constitution when making them applicable to J&K.

Third, applying this new interpretation of Article 370(3), the President could have abrogated Article 370 upon a recommendation to this effect being made by the J&K Assembly. But since J&K is now a Union Territory and is under President’s rule and has no legislative assembly at the moment, it fell upon Parliament to make this recommendation under the newly ‘modified’ Article 370(3). Accordingly, the recommendation to the President abrogate Article 370 was issued by the Home Minister through his Resolution.

Through these three steps, the government calculates that it has finally paved the way for scrapping of Article 370. Were alternatives available? Yes, but these would either have required the concurrence of J&K’s properly elected representatives or a two-third majority in Parliament to effect constitutional

amendments. The government calculated it would not be able to achieve either. Hence this bit of jugglery.

The government's action is, from a legal standpoint, clever. But is it perhaps a bit too clever? It appears so for four reasons.

First, the President does not have the power to modify Article 370 itself. But that is precisely what the Presidential order purports to do indirectly. Article 370 is already applicable to J&K under Article 370(1)(c). Under Article 370(1)(d) the President's has the power to modify and apply other provisions of the Constitution to J&K i.e., provisions other than Article 370.

By modifying Article 367 (as it applies to J&K) and requiring that 'Constituent Assembly' in Article 370(3) be read as the J&K Assembly, the President has attempted to indirectly amend Article 370. Therefore, the Indian Constitution as it is applicable to J&K today now has two provisions that say contradictory things. Article 370(3) says that the Constituent Assembly of J&K can recommend the abrogation of Article 370. Article 367(4)(d) says that Constituent Assembly must be read to mean J&K Assembly. Which provision prevails? This is where the government is likely to encounter problems:

The Presidential Order is tantamount to the President doing indirectly what he cannot do directly i.e. amending Article 370 through Article 367 because he has no power to amend Article 370 directly. This is problematic.

The President has exceeded the confines of the power delegated to him under Article 370(1)(d). He cannot do so. This was settled in the Keshavananda Bharati case which established the Basic Structure doctrine i.e., a constitutional functionary cannot use the powers given to him under the Constitution to do to the Constitution that which the Constitution never intended for him to do.

Multiple Supreme Court decisions have established that Article 370 is a permanent provision precisely because the Constituent Assembly of Kashmir dissolved itself without making such a recommendation.

The law recognises acts of omission (in this case, not recommending the abrogation of Article 370). That is to say that by dissolving itself without recommending abrogation, the Constituent Assembly of J&K made clear its intention to not abrogate Article 370.

Finally, principles of statutory interpretation require that the meaning of a provision must be derived from its own wording unless it is unclear. An interpretation clause cannot override the clear meaning of the actual provision i.e., Article 367(4)(d) cannot override Article 370(3).

Second, Article 370(1)(d) only empowers the President to modify existing provisions of the Constitution when they are made applicable to J&K. The Presidential Notification however adds a fresh provision to the Constitution in the form of Article 367(4). The President's power to legislate provisions into the Constitution in this manner is suspect.

Third, the Presidential Order is also problematic because J&K is currently under President's Rule. The requirement of obtaining the concurrence of the J&K Assembly was therefore dispensed with. Can a decision such as this one be taken by the President himself relying on the imposition of President's Rule in a State? Is that a breach of India's commitment to federalism? This is also up for debate.

Fourth, the Presidential Order may also run into trouble because (while the President may have modified Article 367(4)(d) as it is applicable to J&K) a similar amendment has not been made either to Article 367(4)(d) or Article 370(3) of the Indian Constitution itself by Parliament. The President's power to modify the Indian Constitution under Article 370(1)(d) is only limited to J&K. The power to amend the Constitution vests exclusively with Parliament. Currently therefore, the Constitution as it is applicable to J&K contains Article 367(4)(d) which requires 'Constituent Assembly' in Article 370(3) to be read as the J&K Assembly but this is only applicable to J&K.

Absent is a Parliamentary amendment to this effect, even if the President intends to act on the recommendation of the J&K Assembly (issued through the Home Minister's Resolution) he is bound by his oath of office to uphold the Indian Constitution as it stands today and the Constitution as it stands today (except in the case of J&K) does not contain either Article 367(4)(d) or an amended version of Article 370(3). The President's power to act on the recommendation contained in the Home Minister's Resolution is therefore suspect.

For these reasons, unless the President (and by extension, the government) is confident that the Supreme Court's view will change when the Presidential order is challenged, a formal amendment to Article 367 or Article 370(3) would strengthen the President's hand as and when he does issue a notification to abrogate Article 370. Voting for the J&K bifurcation bill suggests that the government

will not find it hard to push through these constitutional amendments with a two-third majority in Parliament.

The abrogation of Article 370 was a historical promise. Prime Minister Nehru himself agreed that Article 370 would be rendered obsolete by the passage of time. The abrogation move may bolster the government's ability to make the fruits of India's economic progress directly available to Kashmir. Yet, the manner in which this has been done is unlikely to inspire trust in the ordinary Kashmir and may well cause lasting damage to the tradition of constitutional propriety.

Kashmir: Why Amendments to Article 370 may not Withstand Judicial Scrutiny

Date: August 06, 2019

Author: Sanjay Hedge & Pranjal Kishore

The authors are lawyers who practice in the Supreme Court.

I say with all respect to our Constitution that it just does not matter what your Constitution says; if the people of Kashmir do not want it, it will not go there. Because what is the alternative? The alternative is compulsion and coercion...We have fought in good fight about Kashmir on the field of battle... (and) ...in many a chancellery of the world and in the United Nations, but, above all, we have fought this fight in the hearts and minds of men and women of that State of Jammu and Kashmir.

– Nehru, speaking in the Lok Sabha in 1952

Nehru's promise lies in tatters today; as does every other promise of autonomy made by the Government of India. Article 370 gives a special status to the State of Jammu and Kashmir. On Monday, the Government effectively abolished that status. It did so without touching the provision. It also brought in a constitutional amendment, without amending the constitution. Crucially, it did all of this after zero consultation with the people affected by it all. Before delving into the legalities of what happened in Parliament, it is imperative to understand the background in which Article 370 was made a part of the Indian Constitution.

Partition and the Indian Independence Act

British rule ended with the creation of two new dominions – India and Pakistan. The princely states were not incorporated into either dominion. The Indian Independence Act provided that all powers returned to the individual states. Rulers had the authority to determine their state's future. They were encouraged by then Viceroy Lord Mountbatten to accede to one of the dominions. Prior to partition, 562 accessions were accepted by the incoming Indian and Pakistani governments. However, three major princely states, declined to accede to either dominion.

Sanjay Hedge and Pranjal Kishore, 'Kashmir: Why amendments to Article 370 may not withstand judicial scrutiny' (*Business Standard*, 6 August 2019) <https://wap.business-standard.com/article-amp/economy-policy/kashmir-why-amendments-to-article-370-may-not-withstand-judicial-scrutiny-119080600557_1.html>

The Accession of Kashmir

At the time of partition, Jammu and Kashmir was a Muslim majority state ruled by a Hindu king. Accession to either India or Pakistan seemed equally plausible. When British sovereignty lapsed, Maharaja Hari Singh had not decided as to whether Kashmir would accede to India or Pakistan. He executed a standstill agreement with Pakistan, and requested India for time to consider an agreement.

During this standstill, Pakistani raiders, with the support of the Pakistani Army, began advancing on Kashmir in October 1947. A panicked Maharaja invited Indian forces into Kashmir to provide temporary protection. Subsequently, the Maharaja executed an instrument of accession with India. Under the instrument, defence, external affairs, and communications were listed under the exclusive domain of the central government. All other plenary powers would remain vested within the state government.

Kashmir and the Indian Constitution

Article 370 limits the authority of Parliament to pass legislation for the State of Jammu and Kashmir. Under Articles 370 (1) (b) and 370 (1) (d), the Parliament has to confine legislation affecting the state to areas enumerated in a list attached to the Instrument of Accession. Legislation on other matters can be passed only if it is explicitly concurred to by the Government of Jammu and Kashmir. Under Article 370 (3), the President can modify or even repeal Article 370. However, this could be done only with the concurrence of the Constituent Assembly of the state.

The Amendments

The Constituent Assembly of Kashmir disbanded in 1956. Almost all members are presumably dead. Since Article 370 could be modified only with the concurrence of the Assembly, many believed that Article 370 had become a permanent part of the Constitution. The Government has however paved the way for amending Article 370 by a novel way. At the core of yesterday's legislative business, lies Presidential Order C.O. 272 which amends Article 367. Article 367 is the interpretation clause of the Constitution.

The amended Article 367 declares that — the expression Constituent Assembly of the State... in Article 370 (3) shall be read to mean Legislative Assembly of the State. Now bear in mind, that Article 370 could only be modified by the Constituent Assembly of the state. However, because of the amendment, it can now be done away by a recommendation of the state legislature. Given that the State does not

presently have a legislature, this role can be performed by the Governor. Thus, all the Government now needs to do away with Article 370 is to get a recommendation from the Governor.

Legal Issues

The Presidential Order amending Article 367 draws its authority from Article 370 (1). Article 370 (1) deals with the power of the Parliament to make laws for the State of Jammu and Kashmir. It does not provide the President the power to amend sundry provisions of the Constitution. An amendment to the Constitution can only be made under Article 368. It requires a 2/3rd majority of Parliament, present and voting. This has not been attempted, and leaves the legality of the Presidential Order in serious doubt.

Further, assuming that the President did indeed have the power to pass the order under Article 370 (1), the same could only have done with the concurrence of the State Government. In fact, the order itself begins by saying that it has been made — *in exercise of powers conferred by clause (1) of Article 370 of the Constitution, the President with concurrence of the Government of State of Jammu and Kashmir.*

Jammu and Kashmir has not had a government for months. Instead of consulting the government, the President has consulted the governor. As is well-known, the governor is the representative of the Union Government in the State. So, in effect, the Union Government has consulted itself. It is hard to see how this is legal.

It must also be noted that the Presidential Order does not ostensibly amend Article 370. It amends Article 367. However, assuming that these amendments are legal, the ultimate effect of the amendments is on the substance of Article 370. Thus, in essence, since the Government could not amend Article 370 directly, it chose to do so indirectly. The Supreme Court has time and again held that this is not legal.

Conclusion

Article 370 has not been amended yet. However, given the amendments to Article 367, the writing is on the wall. The Rajya Sabha has already passed a resolution recommending that the president abrogate most of Article 370. The government has also introduced a re-organization bill that splits up the state of Jammu and Kashmir into the Union Territories of Ladakh (without a legislature) and Jammu and Kashmir (with a legislature).

In the aftermath, cheerleaders of the Government have tried to sell the constitutional changes as ones that will usher in a prosperity for the people of Kashmir. If that was the case, the people would have been consulted. Yesterday's events come at the end of weeks of troop mobilisation, lies by those in the highest offices of the state, and a complete shut-down of communications in the valley. They are a fraud on the people of Kashmir, on the Constitution and on all the values that our democracy holds dear.

The Article 370 Amendments: Key Legal Issues

Date: August 06, 2019

Author: Gautam Bhatia

The author is a constitutional lawyer.

In this post, I will attempt to break down the constitutional changes to Article 370, and highlight some key legal issues surrounding them. In essence, to understand what has happened today, there are three important documents. At the heart of everything is Presidential Order C.O. 272, which constitutes the basis for everything that follows. The second is a Statutory Resolution introduced in the Rajya Sabha, which – *invoking the authority that flows from the effects of Presidential Order C.O. 272* – recommends that the President abrogate (much of) Article 370. The third is the Reorganisation Bill, that breaks up the state of Jammu and Kashmir into the Union Territories of Ladakh (without a legislature) and Jammu and Kashmir (with a legislature).

To understand the legal issues, we need to begin with the language of unamended Article 370. Under Article 370(1)(d), constitutional provisions could be applied to the state from time to time, as modified by the President through a Presidential Order, and upon the concurrence of the state government (this was the basis for the controversial Article 35A, for example). Perhaps the most important part of 370, however, was the proviso to clause 3. Clause 3 itself authorised the President to pass an order removing or modifying parts of Article 370. The proviso stated that:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

In other words, therefore, for Article 370 *itself* to be amended, the recommendation of the Constituent Assembly of Jammu and Kashmir was required. Now, the Constituent Assembly of the state ceased functioning in 1957. This has led to a long-standing debate about whether Article 370 has effectively become *permanent* (because there is no CA to give consent to its amendment), whether it would require

Gautam Bhatia, 'The Article 370 Amendments: Key Legal Issues' (*Indian Constitutional Law and Philosophy*, 5 August 2019) <<https://indconlawphil.wordpress.com/2019/08/05/the-article-370-amendments-key-legal-issues/>>

a revival of a Jammu and Kashmir CA to amend it, or whether it can be amended through the normal amending procedure under the Constitution.

C.O. 272, however, takes an entirely different path. C.O. 272 uses the power of the President under Article 370(1) (see above), to *indirectly* amend Article 370(3), via a third constitutional provision: Article 367. Article 367 provides various guidelines about how the Constitution may be interpreted. Now, C.O. 272 *adds* to Article 367 an additional clause, which has four sub-clauses. Sub-clause 4 stipulates that —in proviso to clause (3) of Article 370 of this Constitution, the expression Constituent Assembly of the State referred to in clause (2) shall read —legislative Assembly of the State.

In other words, this is what has happened. Article 370(1) allows the President – with the concurrence of the government of Jammu and Kashmir (more on that in a moment) – to amend or modify various provisions of the Constitution in relation to Jammu and Kashmir. Article 370(3) proviso states that Article 370 *itself* is to be amended by the concurrence of the Constituent Assembly. C.O. 272, therefore, uses the power under 370(1) to amend a provision of the Constitution (Article 367) *which*, in turn, amends Article 370(3), and *takes out* the Constituent Assembly's concurrence for any further amendments to Article 370. And this, in turn, becomes the trigger for the *statutory resolution*, that recommends to the President the removal of (most of) Article 370 (as the Constituent Assembly's concurrence is no longer required).

This is very clever. Is it legal? One serious objection is Article 370(1)(c). Article 370(1)(c) (unamended) stated that — *notwithstanding anything contained in this Constitution, the provisions of Article 1 and this Article shall apply in relation to that State*. This is absolutely crucial, because it makes clear that the power of the President to amend provisions of the Constitution in relation to Jammu and Kashmir does not extend to Article 1 and — this Article, i.e., *Article 370 itself*. 370(1)(d) makes it even clearer where it refers to the —other provisions^{ll} of the Constitution that may be altered by Presidential Order (and this is how the present Presidential Order is different from previous ones, such as those that introduced Article 35A). Article 370 itself, therefore, cannot be amended by a Presidential Order such as C.O. 272 (the one exception was a clarificatory amendment, which is not analogous to this one).

Now, it may be immediately objected that C.O. 272 does not amend Article 370: it amends Article 367. The point, however, is that the *content* of those amendments do amend Article 370, and as the Supreme Court has held on multiple occasions, you cannot do indirectly what you cannot do directly. I would therefore submit that the legality of C.O. 272 – insofar as it amends Article 370 – is questionable, and as that is at the root of everything, it throws into question the entire exercise.

There is a second important point to be noted here. C.O. 272 says – as it must – that the concurrence of the government of the state of Jammu and Kashmir has been taken. However, Jammu and Kashmir has been under President’s Rule for many months now. Consequently, *actually*, the consent is that of the Governor. However, there are two serious problems with basing C.O. 272 upon the consent of the Governor. The first is that the Governor is a representative of the Central Government – like the President. In effect, therefore, Presidential Order 272 amounts to the Central Government taking its own consent to amend the Constitution.

There is, however, a more important issue. President’s Rule is temporary. It is only meant to happen when constitutional machinery breaks down in a state, and an elected government is impossible. President’s Rule is meant to be a stand-in *until* the elected government is restored. Consequently, decisions of a *permanent* character – such as changing the entire status of a state – taken *without* the elected legislative assembly, but by the Governor, are inherently problematic. *Formally*, they may be within the bounds of legality; however, as the Supreme Court held in *DC Wadhwa*, on the question of re-promulgation of Ordinances, formal legality can nonetheless, in effect, amount to a fraud on the Constitution. Using the Governor to sign off on a Presidential Order that fundamentally alters the constitutional character of a federal unit appears, to me, to be straying dangerously close to the constitutional fraud line.

For these two reasons, therefore – *first*, on the indirect amendment of Article 370(3) proviso via 370(1), and *secondly*, on the use of the Governor as a substitute for the elected assembly in a matter of *this* kind – I would submit that there are serious legal and constitutional problems with Presidential Order C.O. 272 – which, of course, forms the basis of both the statutory resolution and the Reorganisation Bill.

Route taken by Government to Scrap Article 370 isn't only Constitutional, it also complies with all Legal Requirements

Date: August 06, 2019

Author: Raghav Pandey

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First of all, understanding the contours of the issue from a legal theoretical standpoint is essential. It has been argued that Article 370 was a repository of the contractual obligation of the Indian State with the promises that were made to the then independent princely state of Jammu and Kashmir. Although the line of argument is broadly true, however, under International Law, the contractual obligation of any sovereign State, like India, is usually towards another sovereign State, or an international organisation, and not some entity which loses its sovereignty by the virtue of signing that contract (Instrument of Accession), which is Jammu and Kashmir in this case.

The state that lost its sovereignty can't compare or claim its rights with or from a sovereign State in the same sense, the ones to which it could have been entitled had it been a sovereign. Sovereignty in its essence means absolute independence and no subordination. Moreover, it's interesting to note that the Instrument of Accession (IoA) was signed between the princely state of Jammu and Kashmir and the Dominion of India. Dominion of India was a political body created through the legislative process of the British Parliament (Indian Independence Act, 1947), in the exercise of its own sovereignty (British Parliament's) and by no legal theoretical standpoint can be called a sovereign entity (Dominion of India, that is).

Hence, it can be understood that the IoA was signed between two non-sovereign entities. With the promulgation of the Indian Constitution, the Dominion of India was vanquished and the Union of India emerged as the successor State with full sovereignty. Therefore, the contractual obligations of the Union of India towards Jammu and Kashmir, which by now had lost its autonomy of accession, could only have been claimed in good faith, and the entire basis of claiming them legally stood scrapped.

Raghav Pandey, 'Route taken by government to scrap Article 370 isn't only constitutional, it also complies with all legal requirements' (*Firstpost*, 6 August 2019) <<https://www.firstpost.com/india/route-taken-by-government-to-scrap-article-370-isnt-only-constitutional-it-also-complies-with-all-legal-requirements-7116771.html>>

The argument that Article 370 contained contractual obligations of the Indian State arising out of the IoA, therefore, lacks any legal basis. This then begs the question, what actually is the constitutional intention behind Article 370. This question can only be answered politically, not legally. The provision intended to guard the politics of the day of its enactment, which meant the unstable political situation of the state, resulting from the Pakistani invasion. The Constitution-makers, through Article 370, just intended to make sure that the condition is eased through such a measure.

As it turned out, even after 70 years, the political situation was hardly influenced in the positive sense through the provision. Hence, doing away with it or preserving it remained a political choice and not a legal one. In US Constitutional Law, such situations are governed by an explicit legal mechanism, known as the doctrine of political question. The doctrine stipulates that there are certain situations or disputes that are best settled by politics and not through the process of the court. These matters are essentially 'nonjusticiable'. The Indian Supreme Court has on various occasions not dismissed the doctrine, but has imported it with limitations.

In the Indian context, the apex court has also time and again, and as recently as in the Aadhaar verdict, held that matters pertaining to State policy are non-justiciable and hence out of the domain of legal scrutiny and judicial review.

A non-justiciable measure can be understood as simply as the increase or decrease of monetary policy rates by the Reserve Bank of India, as adverse they might be on occasions, one just can't imagine challenging them in a court of law. The situation of Jammu and Kashmir and its dynamics with the Indian State are again exclusively matters of policy and politics and there is nothing much the legal system can do about it.

The important ramification of understanding the situation as that of policy and politics rather than that of law and Constitution, is that the entire debate on the legality of the action of the government is rendered infructuous.

The issue had to be decided through an executive action simply because, executive exclusively wields and manifests the real sovereign authority of the State, and when it has signaled through a proclamation, its intent, the requirement of legality is that of *prima facie* relevance.

That said, the legal requirement was also satisfied in the sense it was required. There are doubts that since Article 370 (3) required the consent of Constituent Assembly of the state, which had long been

abolished, how can a proclamation be issued? This is a very weak legal standpoint to sustain. It is a settled position of constitutional law, globally, that any legislative body having the power to amend the Constitution, has constituent power and functions as a Constituent Assembly while doing so.

One only has to go through Article 368 of the Indian Constitution, which reads as Constituent Power of the Parliament, meaning that the Parliament functions as a Constituent Assembly while amending the Constitution. Since Jammu and Kashmir had the power to amend its own Constitution, it can very well be regarded as the Constituent Assembly. When Parliament assumed the legislative function of the State, it naturally also assumed the constituent function of the Assembly.

Hence, all the questions pertaining to the legality of the government's action do not stand up to legal scrutiny; it is only a matter of time before the same will be iterated by the Supreme Court, if the action is at all challenged.

Obviating the Framework of Article 370 is Intentionally Mala Fide: Senior Advocate Rajeev Dhavan

Date: August 09, 2019

Author: Arshu John

Arshu John is an assistant web editor at The Caravan. He was previously an advocate practicing criminal law in Delhi.

On 5 August, the union home minister Amit Shah announced in the Rajya Sabha that the Bharatiya Janata Party government had effectively nullified Article 370 of the Indian Constitution, which granted special status to Jammu and Kashmir. Shah tabled two bills in the upper house that necessitated revoking the special status guaranteed to the state. In addition to the bills—the Jammu and Kashmir Reorganisation Bill, 2019 and the Jammu and Kashmir Reservation (2nd Amendment) Bill, 2019—Shah also brandished a presidential order, dated the same day, which extended all the provisions of the Constitution to the state, defanging Article 370. Both bills passed in the house.

Following Independence, Article 370 had formalised the terms of Jammu and Kashmir's accession to the Indian union—as stipulated in the Instrument of Accession. Among other things, Article 370 mandated that barring certain subjects—such as defence and foreign policy—the central government was required to seek the concurrence of the Jammu and Kashmir government before it could legislate in the state.

Yet, as the state has been under President's Rule since December 2018, the centre circumvented this requirement—the presidential order allowed the governor to assent in lieu of the state legislature. Through the Reorganisation Bill, the government split the state into two union territories—Ladakh and Jammu and Kashmir. That the centre acted in the absence of a state government and through an executive order also raised questions about the constitutional validity of its decisions.

On 6 August, the first challenge to the presidential order was filed before the Supreme Court. Arshu John, an assistant editor at *The Caravan*, spoke to Rajeev Dhavan, a senior advocate and constitutional lawyer, about the grounds for a challenge to the presidential order. Dhavan explained why the changes

Arshu John, 'Obviating the framework of Article 370 is intentionally mala fide: Senior advocate Rajeev Dhavan' (*The Caravan*, 9 August 2019) <<https://caravanmagazine.in/law/obviating-the-framework-of-article-370-is-intentionally-mala-fide-senior-advocate-rajeev-dhavan>>

to Article 370 required a constitutional amendment and traced how the Parliament has historically followed such a practice.

Arshu John: Could you comment on the presidential order and the changes to Article 370?

Rajeev Dhavan: This order seeks to supersede a constitution—Jammu and Kashmir has a constitution devised by a constituent assembly. Therefore, Article 370 came into being [in 1950] while Jammu and Kashmir had not established its constitution. Article 370 was transitional only to the extent, and until, Jammu and Kashmir constitution came into place. That is the temporary part.

There is nothing temporary about Article 370. The Jammu and Kashmir constitution [formed] by an independent constituent assembly is a fact—it is a legal fact, a spatial fact and a temporal fact. You cannot abolish it, as simple as that—it does not grow out of the [presidential] order.

The structure of Article 370 is such that if the government of India seeks to legislate on an issue that it is empowered to do so under the Instrument of Accession, it will consult the government of Jammu and Kashmir. If it [seeks to legislate] beyond that, it needs concurrence. The fact that Article 370 mentions the constituent assembly means that if the Indian government wanted to legislate during this period [when the constituent assembly was active], it will consult the constituent assembly. And if it's beyond, you will consult under the Jammu and Kashmir constitution. So, the comparable part would be that you would consult, instead of the constituent assembly, the legislature of the state.

Just look at this [Presidential Order]. It says that the expression “Constituent Assembly of the State,” referred to in Article 370 shall mean the “Legislative Assembly of the State.” What does that mean? The legislative assembly under the Jammu and Kashmir constitution, obviously. Therefore, this order recognises the Jammu and Kashmir constitution—how in god's name was it abolished?

AJ: How do you expect the court to respond? Would the court find substance in these arguments?

RD: The court should not say, “This is not judicially manageable.” The imprint of politics does not mean that the court will not hear questions of law and jurisdiction. And it would be a very sad day if they said that this is not judicially manageable. It is judicially manageable. They have to go into [whether it is] mala fide; they have to go into the interpretation of Article 370; they have to go into the interpretation of this presidential order. We do not want any judicial abdication.

AJ: The advocate ML Sharma has filed a petition in the Supreme Court challenging the Presidential Order.

RD: No, no, no. The carriage of proceedings in this important matter should not rest in petitioner ML Sharma, who, in my view, is a publicity-interest litigant.

AJ: What constitutional arguments arise from the order and the changes to Article 370?

RD: A challenge has to be made—the government has restructured an entire state without consulting the legislature, without consulting the people. And you have demoted [a state] and created two union territories. When you gave [special] powers to Delhi [in 1991] and you created a legislature, you inserted Article 239AA into the Constitution, and it was done through a constitutional amendment. So, why don't you need an amendment for this?

When you created local legislatures for union territories, Article 239A—inserted [in the Constitution, in 1962] through the 14th amendment—said that parliament may by law create a body that will function as a legislature of a union territory. If there is a union territory you can give it a legislature, but how do you convert it from a state to a union territory? If you could [bring a constitutional amendment] for Delhi, then why the hell can't you do it here?

Look at Article 164 of the Constitution [which pertains to the council of ministers in a state government]. This is not noted by people—the proviso to Article 164(1) says that the states of Chhattisgarh, Jharkhand, Madhya Pradesh and Odisha require a tribal welfare minister. The states of Chhattisgarh and Jharkhand were substituted for Bihar by a constitutional amendment. Now if you did that by constitutional amendment, what the hell are you doing now?

The only other state that acceded to us is Sikkim. And we put in Article 371F by the 36th constitutional amendment. For every one of these creations, you have amended the Constitution. Every single goddamn one of them.

My last argument, equally simple, is that this actually has nothing to do with *vikas*—development. The idea that people from outside cannot buy land is to protect the forests and to keep them with those people. This is a land policy across the board—in Himachal Pradesh, in Uttarakhand, in Arunachal Pradesh, in Sikkim. In some states you say, “It's okay, we must protect the hill states”—but you do not want to protect Kashmir? All the hill states by and large are protected. You can start a business there, but you cannot own land—in many of the states.

Is Kashmir any different from Arunachal Pradesh or from Sikkim? If in Arunachal and Sikkim you can have a land policy because the border is there, what about the Pakistan border? Can anyone go there and buy? Can Mr. Shah Mohammad, “the undetected terrorist,” go and buy it? Or can it only be Mr. Ram Gopal? The idea of having certain states where land transactions cannot take place is consistent with the Constitution. You want to give the [Kashmiri] Hindu Pandits land? They are entitled. You want to give them protection? Give them protection. Because they are entitled. But you’re saying anybody from India can go there.

AJ: Could you comment on the constitutionality of the Jammu and Kashmir Reorganisation Bill which bifurcates the state?

RD: This bill subverts both democracy and federalism. It should have been in the nature of a constitutional amendment. Reorganisation is done under Articles 3 and Article 4 of the Constitution [which govern the formation of new states or alteration of boundaries]—like how you reorganised Maharashtra [in 1960, to create the state of Gujarat]. This [bill] means that you can take Uttar Pradesh tomorrow, split it up into seven states, and convert—since it’s so important to them—Prayagraj into a union territory. Tomorrow, Mumbai could be made into a union territory.

AJ: Why would this require a constitutional amendment?

RD: Let’s look at Article 368 [which describes the procedure and the powers of the parliament in amending the Constitution]. This procedure includes amendments to representation of the states in the parliament—such as Jammu and Kashmir—and to any of the lists in the Seventh Schedule [which delineates the subjects over which the central and state governments may each exercise jurisdiction].

Remember, [the National Capital Territory of] Delhi was created by a constitutional amendment [in 1991]. To create union territories, it doesn’t happen like this—you need a constitutional amendment. When you create a union territory, the lists of subjects that were applicable to that territory [when it was a state]— those lists you have tinkered with.

In any case, the procedure requires two-third majority of parliament. In addition to that, if the amendment seeks to make changes to all these [referring to the representation in parliament or the Seventh Schedule] it requires ratification of at least half the state legislatures.

So, first, it cannot be done because it is changing the Constitution—Article 370 is part of the Constitution. And since it’s a change in the Constitution, you have to follow the procedure in Article

368—you have to have two-thirds majority and you have to have ratification of half the state legislatures.

You cannot choose Articles 3 and Article 4. What happens in these articles? In Article 3, what you do is you take the consent of the state legislature. Consultation is the root if you are invoking Article 3—and it does not mean Satya Pal Malik, or the parliament substituting for consulting the representatives of a democracy. But going by what the government has done, the legislature of Jammu and Kashmir is now the parliament.

AJ: What about the argument that the President's Rule empowers the governor of Jammu and Kashmir to give consent on behalf of the state legislature?

RD: President's Rule is terrifying. It is terrifying. It is an emergency provision.

You have not consulted the state. And if you are a democracy, at least consult the people, consult somebody—you have consulted nobody. The use of President's Rule to obviate the entire framework of Article 370 and the Jammu and Kashmir constitution could be called constitutional escapism. But in fact, it is intentionally mala fide.

AJ: The presidential order amends Article 367, and it could be argued that it technically has not amended Article 370.

RD: A change in definition does not mean anything. What does Article 367 have to do with it? All Article

367 is saying is how you interpret the Constitution. It says nothing about substantive provisions. It's an interpretation provision. Article 367 does not give substantive powers.

AJ: But is that not what the government has done? They have added a provision to Article 367 to change the interpretation of Article 370.

RD: Yes, but it does not give them any power. You see, you cannot do indirectly what you cannot do directly—it's as simple as that.

This interview has been edited and condensed.

How Modi Govt. used J&K Constitution to Seek Concurrence of Governor, Defang Article 370

Date: August 07, 2019

Author: Utkarsh Anand

The special provisions in respect of Jammu and Kashmir have been exactly the ones used by the Narendra Modi government to nullify operation of Articles 370 and 35A.

While legal luminaries delve into the soundness of Monday's presidential order that acted as the foundation of the monumental change, the NDA government, apart from a clause in Article 370 of the Constitution of India, also used the Jammu and Kashmir Constitution to achieve its objective.

Many would not realise that there is no provision of the President's Rule in J&K but the Governor's Rule is to be imposed by virtue of Section 92 of the Constitution of J&K. This provision is specific to J&K and was added as an additional safeguard.

Section 92, however, also played a crucial role in paving the way for the Governor to assume the role of the state legislature in J&K, which in turn led to the abrogation of the state's special status. Section 92 empowers the Governor of J&K to assume any and all functions of the state government when there is no elected government in place.

The presidential order substituted the term 'Constituent Assembly' of J&K as its 'legislative assembly' but to negate Article 370, the Centre still needed a recommendation from the Governor to meet the constitutional necessity.

It's here the J&K Constitution came handy for the Modi government as it employed the special provision included in the J&K Constitution itself do away with the special status granted to the state under Article 370.

Section 92 (1) (a) of the J&K Constitution read as: "If at any time the Sadar-i-Riyasat is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the Sadar-i-Riyasat may by Proclamation assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by anybody or authority in the State."

Utkarsh Anand, 'How Modi Govt Used J&K Constitution to Seek Concurrence of Governor, Defang Article 370' (*News18*, 7 August 2019) <<https://www.news18.com/news/india/how-modi-govt-used-jk-constitution-to-defang-article-370-seek-concurrence-of-governor-2261011.html>>

Under this provision of the J&K Constitution, the Governor could send his recommendation to the President, which enabled the latter to exercise his authority under Article 370(3) to hold that special status to the state shall henceforth cease to operate.

It was on Sunday night that J&K Governor Satya Pal Malik, using this authority under Section 92(1)(a) of the J&K Constitution, sent his recommendation to President Ram Nath Kovind. And then the President, treating this to be as good as recommendation of the state legislature, issued the new order that rendered Articles 370 and 35A inoperative.

Interestingly, the legal brains working with the government also cited some previous instances in the 1980s wherein the J&K Governor had exercised this authority and those decisions were later ratified by Parliament.

The decision-makers in the government were assured that every legal aspect has been taken care of and should a challenge be laid before a constitutional court, it would be repelled effectively by citing the same provisions which had so far kept the special status of J&K intact.

Re-writing Article 370: The Legal Test Ahead

Date: August 08, 2019

Author: Dr. Aman Hingorani

Dr. Aman Hingorani is an Advocate at Supreme Court of India and Author of Unravelling the Kashmir

The President has, on the recommendation of Parliament, issued the "Declaration under Article 370(3) of the Constitution" in exercise of his powers under Article 370(3) read with Article 370(1) of the Constitution to declare that all clauses of Article 370 would cease to be operative from 6 August 2019, except the clause to the effect that *"(a)ll provisions of this Constitution, as amended from time to time, without any modifications or exceptions" shall apply to Jammu and Kashmir (J&K), notwithstanding anything contrary contained in the Constitution or the J&K constitution or "any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under Article 363 or otherwise"*.

Such Presidential Order is the culmination of dramatic steps taken by New Delhi in issuing the Constitution (Application to Jammu and Kashmir) Order, 2019 under Article 370(1) and the passage of the Jammu and Kashmir Reorganization Bill, 2019 in Parliament.

By this move, New Delhi has achieved three objectives: firstly, it has removed the preferential treatment accorded to J&K and applied the entire Constitution to J&K; secondly, it has bifurcated J&K into two Union Territories – J&K with a legislature and Ladakh without a legislature; thirdly, it has made the state legislative assembly (instead of its Constituent Assembly) the competent authority to make the recommendation to the President to declare Article 370 inoperative.

New Delhi has justified its move by arguing that Article 370 was the root of terrorism in J&K, had ruined the state, stalled its development, prevented proper health care and education and blocked industries; and it was therefore necessary to integrate the region with the rest of India and develop it. New Delhi has asserted that its move has popular support in Jammu, Ladakh and even in most parts of Kashmir.

The purpose of this article is not to examine the merits of New Delhi's Kashmir policy. Such policy, however, is not surprising as the political discourse in India identifies the Kashmir issue with Article

Dr Aman Hingorani, 'Re-writing Article 370: The Legal Test Ahead' (*Live Law*, 8 August 2019) <<https://www.livelaw.in/amp/columns/re-writing-article-370-147035>>

370 and holds it just as responsible for the turmoil in J&K as the generous support of Pakistan for cross-border terrorism.

I have long maintained that the genesis of the Kashmir issue or its resolution is not located in Article 370 for reasons detailed in my book, *Unravelling the Kashmir Knot* (www.kashmirknot.com). The Kashmir issue is not only about the Valley (about 9 % of J&K) or cross-border terrorism but is far more complex and multi-layered. It also includes the legally misconceived stand taken in New Delhi in 1947 on the unconditional accession of J&K to India by viewing it as being "provisional"; the formulation of the policy by New Delhi to introduce the "wishes of the people" as the factor to decide the accession of J&K – a policy which was ultra vires the constitutional law that created modern day India; the filing of the complaint in the UN by New Delhi accusing Pakistan of aggression against Indian territory but returning with a promise to hold an UN supervised plebiscite to determine whether such territory was even Indian territory; the taking of the Kashmir issue out of the domestic jurisdiction of India by New Delhi; the internationalization of the Kashmir issue by New Delhi to give standing on every member of the UN to comment on the happenings in J&K; the conferral of the "disputed territory" tag on J&K by New Delhi; the formulation by New Delhi of the legally untenable policy of territorial status quo; the disowning of the occupied territories of J&K and of the Indian citizens residing there under Pakistan and Chinese rule for decades; the failure to act on the 1994 Parliamentary resolution to have Pakistan vacate the occupied territories of J&K; the formal protests by New Delhi at the ostensible annexation of the Gilgit-Baltistan region by Pakistan; the absence of pro-active steps to block China's expansionist plans as also the ChinaPakistan Economic Corridor cheekily conceived through the occupied territories of J&K and so on so forth. The road to root out terrorism in J&K and bring peace to the region therefore does not run through Article 370, and certainly not by focusing only on the part of J&K with India.

New Delhi's move on Article 370 has already been challenged in the Supreme Court. The question that is being debated is whether it will pass judicial scrutiny. I am accordingly confining myself in this article to the constitutional issues that may arise for consideration.

At the outset, it may be noted that New Delhi has dealt with Article 370 with J&K being under President's rule. Article 356 of the Indian Constitution is an emergency provision that empowers the President to assume the functions of the state government and Parliament to exercise the powers of the state legislature in a situation in which the government of the state cannot be carried out in accordance with the Constitution. Article 356 is not meant to take far reaching decisions but is to be resorted to sparingly. The exercise of the power under Article 356 is limited by time as provided in Article 356

itself. It is a temporary arrangement only until the government of the state can be carried on in accordance with the Constitution.

Let us now consider each objective achieved by New Delhi – namely; the removal of the preferential treatment accorded to J&K and the application of all the provisions of the Constitution to J&K; the bifurcation of J&K into Union Territories; and the making of the state legislative assembly the competent authority to make the recommendation to the President to declare Article 370 inoperative.

Removal of preferential treatment and the application of the entire Constitution to J&K

J&K, a sovereign state as of 15 August 1947, acceded to India through the accession instrument of 26 October 1947 and became an integral part of India. Such accession by the Ruler, though unconditional, was only in matters of external affairs, communications and defence and certain ancillary matters. The accession instrument expressly declared that nothing therein would affect the continuance of the sovereignty of the Ruler in or over J&K. Unlike other princely states acceding to India, the sovereign Ruler of J&K did not merge the territory of the state into the Indian Union nor cede further subjects to India.

The 11-Judge Bench of the Supreme Court held in *Madhav Rao* (1971) that the accession instrument was an Act of State on the part of the sovereign ruler of a princely state and bound all concerned, and that relations between the princely state and India were strictly governed by the accession instrument.

Given that India was to be a democratic republic, the Constitution-makers contemplated a transfer of power from the Ruler of J&K to a duly elected state constituent assembly, and for this state constituent assembly to finally determine the constitutional relationship of J&K with the Indian Union, as emphasized by the Constitution Bench decision of the Supreme Court in *Premnath Kaul* (1959).

Meanwhile, the Constitution was made applicable to J&K through Article 370, which inter alia provided in Article 370(1) that the President could apply other provisions of the Constitution to J&K relating to matters specified in the accession instrument in "consultation" with the J&K government, while such application in respect of other matters required the "concurrence" of the J&K government. Similarly, Parliament could make laws for J&K in respect of matters specified in the accession instrument in "consultation" with the J&K government, and other matters with the "concurrence" of the J&K government.

The state Constituent Assembly, set up in 1951, regarded the constitutional relationship of J&K with India as one of an autonomous republic within the Indian Union. This relationship was later crystallized in the Delhi Agreement, 1952, which was duly ratified by Parliament and the state Constituent Assembly, and which inter alia permitted the state legislature to make laws conferring special rights

and privileges upon the state subjects. The President, with the concurrence of the J&K government, issued the Constitution (Application to Jammu and Kashmir) Order, 1954, under Article 370(1) which inserted provisions like Article 35A into the Constitution to give effect to the Delhi Agreement and also applied further Articles of the Constitution to J&K.

Thereafter, successive regimes at New Delhi issued a series of executive Presidential Orders under Article 370(1) over the decades to apply almost the entire Constitution to J&K, and that too, often with modifications that would have been impermissible for other parts of the country. This ran counter to the very purpose of introducing Article 370 into the Constitution. Thus, ironically, J&K state did get a 'special status', though certainly not that of an autonomous republic within the Indian Union. Rather, it found itself at the other end of the spectrum, with mere executive directions by New Delhi deciding its fate.

And now, the President, apparently with the "concurrence" of his own nominee, the J&K Governor, who has been equated with the J&K government, issued the said 2019 Order superseding the 1954 Order that had given effect to the preferential status of J&K, followed by the application of the entire Constitution to J&K. This is vitiated by the same infirmities that made the erosion of Article 370 over the decades unconstitutional.

Bifurcation of J&K into Union Territories

It is true that the Constitution does not guarantee the territorial integrity of the constituent states of the Indian Union. Article 3 of the Constitution provides that Parliament may by law form a new State and alter the areas, boundaries or names of any State. The proviso to Article 3, however, provides that no Bill for such purpose will be introduced in Parliament unless the Bill has been referred by the President to the state legislature for expressing its views thereon when the proposal contained in the Bill affects the area, boundaries or name of that state.

The only exception so far was J&K. Article 370 applied Article 1 to J&K thereby recognizing it as a constituent State within the Indian Union. The 1954 Order applied Article 3 to J&K with an additional proviso that mandated that 'no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State.' In other words, not only did J&K not merge its territory into the Indian Union but it explicitly preserved its territorial integrity as also identity.

Assuming the 2019 Order (which supersedes the 1954 Order and applies the entire Constitution to J&K) to be valid, Parliament may by law alter the areas, boundaries and name of J&K without the

consent of the state legislature. However, it was still a requirement of the proviso to Article 3 for the 2019 Reorganization Bill to have been referred to the state legislature for expressing its views thereon. But then, with J&K being under President's rule, there was no state legislature that could have expressed its views on the 2019 Reorganization Bill. In light of the scope of emergency provision of Article 356 discussed above, surely Parliament should not have exercised the power of the state legislature in matters that dismember the state itself as also its identity. More-so, in view of the principle of federalism enshrined in the Constitution.

While the Constitution is not strictly federal in nature, it is also not strictly unitary in nature – it is often described as quasi-federal. In fact, the state in relation to which the Constitution was closest to being federal was J&K, due to the historical reasons. The 13-Judge Bench decision in *Keshavan and a Bharati* (1973) has gone to the extent of viewing the federal character of the Constitution as part of its basic structure. Parliament, by exercising the power of the state legislature to bifurcate J&K into Union territories, has plainly violated the federal structure of the Constitution.

State legislative assembly to recommend to President to declare Article 370 inoperative

The proviso to Article 370(3) mandated a recommendation from the state Constituent Assembly (which was to be convened for the purpose of framing the state constitution) to the President to declare Article 370 inoperative before he could do so. Since the state Constituent Assembly dispersed after framing the state Constitution in 1957, without making any such recommendation, it follows that the competence of any organ of the Indian State to declare Article 370 inoperative no longer existed.

Now, the 2019 Order adds to Article 367 of the Constitution (an Interpretation clause) a provision to the effect that the state Constituent Assembly referred to in the proviso to Article 370(3) shall be read as the state legislative assembly. Simply put, New Delhi has sought to exercise the power under Article 370(1) to nullify or circumvent the protection given to J&K by Article 370(3). That runs counter to the elementary proposition of law that a constitutional provision cannot be used to defeat another constitutional provision or to render it nugatory.

Further, recourse is usually taken to an interpretation clause where there is ambiguity, thus requiring the aid of interpretation. There is no ambiguity in Article 370, which expressly states that it is the state Constituent Assembly (convened to frame the state constitution) which would be the competent authority to make a recommendation to the President to declare Article 370 inoperative. There is, accordingly, no warrant to use Article 370(1) to substitute the reference to the state Constituent Assembly in Article 370(3) with the state legislative assembly. Clearly, the intent was to denude the protection guaranteed by Article 370(3). To allow New Delhi to do so would amount to it indirectly

amending Article 370(3) – which in turn would violate Article 370(1) (c) and (d) that mandate that the provisions of Article 370 shall apply to J&K and that it is only other provisions of the Constitution that may be modified in their application to J&K.

The effect of the 2019 Order with J&K under President's rule is that the power to make the requisite recommendation has been taken away from the state Constituent Assembly and vested in the state legislative assembly only to have been eventually exercised by Parliament. And so, New Delhi (Government of India) needed a 'yes' only from New Delhi (Parliament) to declare Article 370 inoperative!

Surely that cannot be the position in law.

The crux of New Delhi's three objectives has been to let New Delhi define the constitutional relationship of J&K with the Indian Union; instead of J&K deciding such relationship. This action is therefore inconsistent with the binding terms of the accession instrument, the constitutional mandate of Article 370, the Delhi Agreement as also the view taken by the Supreme Court, notably in Premnath Kaul (1959). New Delhi would therefore need to address these issues as and when the legal challenge to its move is taken up. But then, the constitutional and statutory formalities are already in place, while the determination of the legal challenge is bound to take time. New Delhi has presented the country with a *fait accompli*.

Article 370 of Constitution Redundant not Scrapped: Legal Experts Spar on Status

Date: August 05, 2019

Author: IANS

A section of lawyers, part of the Congress leadership, has claimed that legally Article 370 cannot be scrapped by the President without the state Assembly's recommendation, but experts say the article has been made redundant instead of being scrapped.

Jaiveer Shergill, Supreme Court lawyer and Congress national spokesperson, said in a tweet, "Legally, as per proviso to Article 370 (3) of the Constitution, it cannot be scrapped by the President without the Assembly's recommendation. Currently, there is no valid Assembly and the BJP has been avoiding elections. Scrapping Article 370 in current manner is unconstitutional". Shergill also cited a Supreme Court judgement to buttress his interpretation of the Constitution.

Former Finance Minister P. Chidambaram described the government decision on Article 370 and its provisions a "catastrophe". "What the government has done is unprecedented. We anticipated that they are embarked on a misadventure. They have not got rid of Article 370, but have dismembered J&K by misinterpreting Article 3 and Article 370 of the Constitution", he told media persons outside Parliament.

Legal experts have a contrary view to the Congress leaders. Speaking to IANS, Rakesh Dwivedi, an expert on the Constitution, said, "Article 370 is operationally dead, though not scrapped yet, after this notification by the government. This article will continue to remain in the Constitution, but it's redundant. To pull it out, the government will have to amend the Constitution. But it's not required any more. After this notification, J&K has been formally integrated into the Constitution."

The government has also proposed to change the definition of the state and make it a Union Territory with the Assembly. The Bill, introduced in Parliament by Home Minister Amit Shah, would go through the due parliamentary process, Dwivedi said.

Dwivedi's perspective was validated by former Secretary General Subhash Kashyap. He said the government had exceptionally fine-tuned its strategy to make Article 370 defunct despite keeping it in the Constitution.

Ians, 'Article 370 made redundant, not scrapped: Experts' (*Outlook*, 5 August 2019) <<https://www.outlookindia.com/newscroll/article-370-made-redundant-not-scrapped-experts/1590503>>

"The proviso to Article 370(3) of the Constitution can be interpreted to look at Parliament as a legislative head of the state, as it was under the Centre's rule. Therefore, no concurrence is required from the state government." said Kashyap.

Article 370, Federalism and the Basic Structure of the Constitution

Date: August 05, 2019

Author: Faizan Mustafa

Faizan Mustafa is an expert on constitutional law and Vice-Chancellor of NALSAR University of Law, Hyderabad.

The Article 370 debate is back centre-stage. The new Union Home Minister, Amit Shah, has made a detailed statement on Article 370 after his return from Kashmir. In tune with his party's ideological position, he has yet again termed this constitutional provision as "temporary". At the same time, he has been candid enough to confess for the first time that most elections in Kashmir had been rigged.

The importance of Article 370 to Kashmir and the significance it holds in our Constitution are issues that need to be constantly reiterated to dispel the considerable misinterpretation and misunderstanding about this provision in the Constitution of India.

History of Article 370

The most important feature of federalism in the United States of America (USA) was the "compact" between the erstwhile 13 British colonies that constituted themselves first into a confederation and then into a federal polity under the 1791 constitution of the USA. In a confederation, units do have a right to secede, but in a federation, they do not have such a right though in this system they are given a lot of autonomy to operate within their allotted spheres.

Our Supreme Court in *State of West Bengal v. Union of India* (1962) too had attached the highest importance to an "agreement or compact between states" as an essential characteristic of federalism. Since such an agreement was not there in India, it held that India was not a federal polity. Subsequently, this ruling was overruled and federalism was recognized as the basic structure of the Constitution in the *Keshavand Bharti* case (1973) and reiterated in the *SR. Bommai* judgment (1994).

Article 370 of the Constitution of India is an essential facet of our federalism as like in the compact in the US, it governs the centre's relationship with Jammu & Kashmir. The National Democratic Alliance (NDA) government in New Delhi may now want to have a relook at this relationship as the Bharatiya Janata Party (BJP) has consistently maintained that Article 370 has outlived its utility and the time has come for its abrogation. If an NDA government is installed in Jammu & Kashmir in September-

Faizan Mustafa, 'Article 370, Federalism and the Basic Structure of the Constitution' (*The India Forum*, 5 July 2019) <<https://www.theindiaforum.in/article/article-370-federalism-and-basic-structure-constitution>>

October 2019 after elections are held in the state, it would not be difficult to get such a resolution passed by the state assembly.

It is, therefore, necessary to understand the origin of Article 370, the related constitutional issues such as its temporary status and frequent calls for its abrogation, and the Supreme Court's response to these issues.

At the time of Independence, there were two kinds of territories in India — one was British India that was under the direct administrative control of the British. The other comprised the princely states that had signed subsidiary alliance treaties with the British and had a British resident posted in the territories. The maharajas, rajas, and nizams were still the de jure rulers administering these territories/states. In vital matters of war and peace, these rulers were required to take the concurrence of the British resident.

The Indian Independence Act 1947 divided British India, i.e., the territories under the direct administration of the British, into two countries — India and Pakistan — on August 15, 1947. But some 580 princely states that had signed subsidiary alliances with the British also had their sovereignty fully restored to them and given three options — to remain as independent countries, or join the Dominion of India or join the Dominion of Pakistan. Section 6(a) of the 1947 Act said that this act of joining one of the two countries was to be through an Instrument of Accession. Though no prescribed form was provided, a state so joining under Section 6(2) could specify the terms on which it was deciding to join one of the new dominions. These terms would be those which the ruler of the princely state accepted as matters on which the dominion legislature (Indian Parliament) may make laws for the state. And also with respect to the limitations on the power of the dominion legislature to make laws for the state and exercise executive authority of the dominion in the said princely state.

Thus, the Instrument of Accession was supposed to regulate and govern the distribution of powers between the central government and the concerned princely state.

Technically speaking, the Instrument of Accession was therefore like a treaty between two sovereign countries which had decided to work together. It was just like any other contract between the two countries. The maxim under international law which governs contracts or treaties between states is *Pacta Sunt Servanda*, i.e., promises between states must be honoured. If there is a breach of contract, the general rule is that parties are to be restored to the original position, i.e., the pre-agreement status.

In any talk of abrogation of Article 370, this aspect of international law must be kept in view because if due to the breach of any condition of the Instrument of Accession, the princely state of Kashmir gets its pre-accession status, it will not be in India's interests.

Pre-1947, Kashmir was a princely state with a Hindu king and a majority Muslim population. Due to its strategic geographical location, its ruler Maharaja Hari Singh initially decided to remain independent and preferred to sign standstill agreements with India and Pakistan. Pakistan had accepted his proposal and operated the post and telegraph system in Kashmir. But when there was an invasion by the Afridis, tribesmen and army men in plainclothes from Pakistan, Hari Singh sought India's help and India responded that it could send its army only after Kashmir acceded to India. This was a just demand.

Hari Singh, on the advice of Sheikh Abdullah, thus signed the Instrument of Accession on certain terms on 26 October 1947 and Lord Mountbatten as Governor General of independent India accepted it on 27 October 1947 on behalf of the Government of India. The Schedule appended to the Instrument of Accession gave the Indian Parliament power to legislate for Jammu and Kashmir on only defence, external affairs, and communications. In Clause 5 of Kashmir's Instrument of Accession, Hari Singh explicitly mentioned that the terms of "my Instrument of Accession cannot be varied by any amendment of the Act or of Indian Independence Act unless such amendment is accepted by me by an Instrument supplementary to this Instrument." Its Clause 7 said, "nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such [a] future constitution."

Sheikh Abdullah was a popular leader of Kashmir and the chief of the National Conference. Hari Singh first appointed Sheikh Abdullah as head of the Emergency Council on 30 October 1947 with 22 other officers. Hari Singh then appointed Sheikh Abdullah as his prime minister on 5 March 1948. Through the March 1948 proclamation, Hari Singh also directed that a constitution be framed for his state with adequate safeguards to minorities. Hindus were in minority in his state.

It is a myth that the Congress party was too soft on the issue of Kashmir. As a matter of fact, in the decades that followed, the Congress government at the centre kept Sheikh Abdullah in prison for many years and later also dismissed his son Farooq Abdullah's government. The BJP, on the other hand, was more accommodating. Under Atal Bihari Vajpayee it did form a government in the centre with the National Conference as a coalition partner and also under Narendra Modi a state government with the

Progressive Democratic Party. During the tenure of these governments, the idea of abrogation of Article 370 was conveniently forgotten.

The question of a plebiscite in Kashmir also keeps coming up in any discussion on Kashmir. Some people blame Jawaharlal Nehru for agreeing to a plebiscite. As a matter of fact, it was the Government of India's stated policy that wherever there was a dispute to an accession, it was to be settled in accordance with the wishes of the people rather than by a unilateral decision of the ruler of the princely state. India took such a stand as in a few princely states the rulers were Muslims but the majority of subjects of those princely state were Hindus, while in others, like Kashmir, the rulers were Hindus but a large majority of people living in such princely states were Muslims. India's policy was thus consistent with democratic principles and the people's right to self-determination.

Accordingly, in India's acceptance of the Instrument of Accession of Kashmir, Governor-General Mountbatten, clearly stated "it is my Government's wish that as soon as law and order have been restored in Kashmir and her soil is cleared of the invader, the question of the State's accession be settled by a reference to the people". Thus, India regarded accession as purely temporary and provisional. This was said in the Government of India's White Paper on Jammu and Kashmir in 1948. In a letter to Sheikh Abdullah dated 17 May 1949, Nehru, with the concurrence of Vallabhbhai Patel and N. Gopaldas Ayyangar (who drafted Article 370), wrote:

[I]t has been settled policy of Government of India, which on many occasions has been stated both by Sardar Patel and me, that the constitution of Jammu and Kashmir is a matter for determination by the people of the state represented in a Constituent Assembly convened for the purpose.

Between Nehru and Patel, Nehru due to his Kashmiri lineage was keen to have Kashmir in India. Patel on the other hand was more interested in getting Hyderabad. The BJP, of course, conveniently suppresses this historical fact.

The Instrument of Accession eventually had to be made part of the Constitution of India so that the powers of the Government of India and Parliament vis-a-vis Kashmir are clearly delineated. Article 370 is nothing but a constitutional recognition of the conditions mentioned in the Instrument of Accession that the ruler of Kashmir signed with the Government of India in 1948. It reflects the contractual rights and obligations of two parties.

The original draft of Article 370 was given by the Government of Jammu and Kashmir. This was then modified and negotiations were held between the Government of India and the state of Jammu & Kashmir for over five months. Finally, Article 306A (now 370) was passed in our Constituent Assembly on 27 May 1949. N. Gopalaswami Ayyangar, member of the Assembly moved the motion. He also reiterated, “though accession is complete but we have offered to have plebiscite taken when conditions are created for the holding of a proper, fair and impartial plebiscite.” He also said if accession is not ratified then “we shall not stand in the way of Kashmir separating herself away from India.”

On 16 June 1949, Sheikh Abdullah and three others joined our Constituent Assembly as its members. Our commitment to the plebiscite and drafting of a separate Constitution by Kashmir’s Constituent Assembly was repeated by Ayyangar on 17 October 1949 when Article 370 was finally adopted and included in the Constitution by the Constituent Assembly.

Many of us are not aware that, Article 370 has been quite useful for India as this Article itself mentions Article 1 which includes Jammu & Kashmir in the list of Indian states. Article 370 is thus a tunnel through which the Constitution of India is applied in Kashmir.

Court Rulings

Article 370 is the first article of Part XXI of our Constitution and is unique in many ways. The heading of this part is “Temporary, Transitional and Special Provisions.” The article exempted Jammu and Kashmir from the Indian Constitution and permitted it to draft its own constitution. It restricted Parliament’s legislative powers in respect of Jammu and Kashmir. To extend a central law to Jammu and Kashmir on the subjects included in the Instrument of Accession, mere “consultation” with the state government is needed but to extend other matters, “concurrence” of the state government is mandatory. There is a huge difference between consultation and concurrence. In the former, discussions would suffice but in the latter acceptance by the other party, i.e., the Government of Jammu and Kashmir is mandatory.

Article 370 was temporary in the sense that the Constituent Assembly of Jammu & Kashmir was given the right to modify/delete/retain it. The Constituent Assembly of Kashmir decided in its wisdom and rightly so to retain it. The other view was that it was temporary till a plebiscite was held to ascertain the people’s wishes. The Narendra Modi government itself said in 2018 in a written reply in Parliament that there was no proposal to remove Article 370.

The Delhi High Court in *Kumari Vijayalaxmi (2017)* rejected a petition arguing that Article 370 was temporary and its continuation a fraud on the Constitution. The Supreme Court too said in April 2018 that despite the headnote using the word “temporary”, Article 370 was not temporary. The apex court in *Santosh Kumar (2017)* also accepted that due to historical reasons, Jammu & Kashmir had a special status.

In *Prem Nath Kaul (1959)*, a five-judge bench of the Supreme Court observed on Article 370(2):

This clause shows that the constitution-makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provisions of Article 370(1) is made conditional on the final approval of the Constituent Assembly of Kashmir.

Kashmir’s Constituent Assembly was thus given the right to take a call on Article 370. The unanimous judgment was authored by Justice PB Gajendragadkar on his behalf and on behalf of Chief Justice of India SR Das, Justices SK Das, KN Wanchoo and Mohammad Hidaytullah. Thus, the bench of eminent judges was convinced that Jammu and Kashmir’s relationship with India was to be finally determined by the Jammu and Kashmir Constituent Assembly. But in *Sampat Prakash (1968)*, another bench of the apex court, without even bothering to cite its own 1959 judgment, decided that Article 370 could still be invoked even after the dissolution of Jammu and Kashmir’s Constituent Assembly.

The Supreme Court has refused to accept that Article 370 is temporary in nature. A five-judge bench said, “Article 370 has never ceased to be operative”. Thus, Article 370 is a permanent provision. If it is a permanent feature of our Constitution then it cannot be amended and thus can be said to be the part of the basic structure. Under Article 368, Parliament can amend any provision of the Constitution but as per the *Keshvanand Bharti* judgment, no constitutional amendment can either destroy the Constitution or alter its basic features. Interestingly, those opposed to Article 370 make contradictory arguments-. On the one hand, they argue it was a temporary provision and therefore is no more valid or needed. On the other, they continue to justify repeated use of Article 370 by the Government of India.

The Supreme Court has the power to interpret words used in the Constitution. In fact, its decisions under Article 141 are considered binding law. Thus, the Court in its interpretation of “life” under Article 21 held that life means “to live with human dignity”. It even held that the right to privacy is implicit in Article 21. Similarly, it held that the word “temporary” in the heading of Chapter XXI does

not mean temporary. Any temporary provision may indeed be termed as “special”. Thus the word “special” in the heading of this chapter was inserted by the 13th constitutional amendment in 1962. Sardar Patel himself had said in the Constituent Assembly that a “special provision” had been made for the Kashmir in view of the existing relationship of the centre with the state.

In fact, there are temporary provisions in the Constitution such as reservation for the Scheduled Castes (SCs)/ Scheduled Tribes (STs) in Parliament and state assemblies which were initially there just for 10 years. English, for instance, was temporarily permitted as the language of governmental work.

Special Status in the Constitution

Jammu and Kashmir is not the only state, which has a special status accorded to it in the Constitution. Under Article 371A, Nagaland has special status and no Act of Parliament is automatically extended to Nagaland unless its legislative assembly so decides in matters of the religious or social practices of the Nagas, Naga customary law, and practices, ownership and transfer of land and its resources. Even the administration of civil and criminal justice of Nagas is exempt from Indian laws. Thus, the Indian Penal Code, the Code of Criminal Procedure, etc. do not automatically extend to Nagaland. Moreover, we have another level of autonomy in Nagaland under which even the Acts passed by the state legislative assembly do not extend to Tuensang District of Nagaland. There has to be a Minister of Tuensang Affairs. Thus, there can be autonomy to even certain districts within a state.

Similarly, there is a special status for Maharashtra and Gujarat in Article 371. Under this provision, the President may provide for special responsibilities to the governors of the two states for establishing separate boards for Vidarbha and Marathwada (in Maharashtra), and Saurashtra and Kutch (in Gujarat), and equitable distribution of funds to these areas.

There are special provisions for many other states as well like Assam (Art.371B), Manipur (Art.371C), Andhra Pradesh (Art.371 D&E), Sikkim (Art.371F), Mizoram (Art.371G), Arunachal Pradesh (Art.371H) and Goa (Art.371I). With respect to Sikkim, even the Supreme Court’s jurisdiction has been restricted on issues of treaties.

As an asymmetric federal polity, our Constitution gives varying degrees of autonomy to different states. Those who think of all states as having just one kind of relationship with the centre are neither aware of Indian diversity nor have they read various provisions of Article 371(A to I) as applicable to states other than Jammu and Kashmir. Moreover, the Fifth and Sixth Schedules also give a lot of autonomy to certain areas.

Article 370(3) states:

Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification. (emphasis added).

Article 370(3) can certainly be deleted by presidential order, but due to the proviso given in this clause such an order is to be preceded by the recommendation of the Constituent Assembly of Jammu and Kashmir. Since the assembly was dissolved on 26 January 1957, one view is that Article 370(3) cannot be deleted and has acquired permanent status.

The Constituent Assembly of Jammu and Kashmir was convened on 31 October 1951 and after adopting the Jammu and Kashmir Constitution a decision was taken to dissolve it from 26 January 1957. On the other hand, after the signing of three copies of the Constitution of India on 24 January 1950, India's Constituent Assembly was merely adjourned "sine die".

The other view is that Article 370(3) can probably be deleted with the concurrence of the state legislative assembly, which today represents the will of the people through the elected representatives. If we can create an atmosphere of trust between the Kashmir Valley and New Delhi, people may on their own agree to the deletion of Article 370. Winning the hearts of the people should be the first step.

Presidential Orders and the Hollowing Out of Article 370

Over time the frequent use of presidential orders – allowed under Article 370 – to extend the writ of the centre to Jammu and Kashmir has considerably weakened this special provision in the Constitution. Nehru himself admitted in Lok Sabha on 27 November 1963 that "Article 370 has eroded". India has used Article 370 more than 45 times to extend provisions of the Constitution to Jammu and Kashmir. Even President Rajendra Prasad was not very happy about the frequent use of Article 370 and he wrote a letter to Nehru on 6 September 1952 specifically saying that executive powers should not be used in this manner. As a matter of fact, by the use of mere presidential orders, we have almost nullified the effect of the special constitutional status of Jammu and Kashmir.

By the Presidential Order of 1954, almost the entire Constitution (including most constitutional amendments) was extended to Jammu and Kashmir. Ninety-four out of 97 entries of the Union List

are today applicable to Jammu and Kashmir. Thus, on 94 subjects Parliament already has the exclusive power to pass laws that will be applicable to Kashmir just like any other state. Two hundred and sixty out of 395 Articles of the Constitution have been extended to the state. Similarly, of the 12 Schedules of the Constitution of India, seven have already been extended to Jammu and Kashmir.

Surprisingly, the central government has used Article 370 to even amend a number of provisions of Jammu and Kashmir's Constitution though that was not the power given to it under this Article of the Constitution of India. Article 370 had a limited mandate to extend the applicability of the Constitution of India to Jammu and Kashmir. Thus Article 356 (on the imposition of President's rule in the states) was extended to Jammu and Kashmir though a similar provision was already there in Article 92 of Jammu and Kashmir's Constitution, which indeed required the imposition of President's rule in the state only with the concurrence of the President of India.

To change the provision (in the Jammu and Kashmir Constitution) of the governor being elected by the state assembly, Article 370 was used to convert the position into a nominee of the President. This was an undemocratic step as governors have proved to be the centre's agents in the state. In fact, ideally, the governor of each state should be elected by the legislative assembly of the state. If he is to be nominated by the centre, the concurrence of the chief minister should always be taken.

To extend President's rule beyond one year in Punjab, we had to bring in the 59th, 64th, 67th and 68th constitutional amendments as Article 356(5) explicitly lays down that President's rule in a state cannot be extended beyond one year unless there is a national emergency or the Election Commission of India certifies that elections cannot be held to the state's legislative assembly. We achieved the same result in Jammu and Kashmir just by invoking Article 370 without any need to amend the Constitution.

Similarly, Article 249, i.e., the power of Parliament to make laws on entries in the state list, was extended to Jammu and Kashmir without a resolution by the state assembly. It was done just on the recommendation of the then Governor Jagmohan. There is hardly anything in Article 370 today except the shell. In fact, decades ago Gujari Lal Nanda, the then Union Home Minister, had said it had been almost completely emptied. It is more useful for the central government today than for the people of Jammu and Kashmir.

Even while the core of Article 370 has been eroded, it does, of course, does have huge sentimental value for the people of Jammu and Kashmir who would view its abrogation with a great deal of

unhappiness. In any case it will be violation of commitments given by us to at the time of accession of Jammu & Kashmir.

Article 3 of the Jammu and Kashmir Constitution itself declares the state to be an integral part of India. In the preamble of the Kashmir Constitution, not only is there no claim to sovereignty like in the Constitution of India, but rather there is a categorical acknowledgment about the object of the Jammu and Kashmir Constitution which is “to further define the existing relationship of the state with the Union of India as *its integral part thereof*.” (emphasis supplied). Moreover, the people of the state are referred to as mere “permanent residents” not “citizens”. Thus, due to Article 370 and the decision by the Kashmir’s Constituent Assembly to remain part of the Indian Union, the Jammu and Kashmir Constitution did not proclaim the sovereignty of Jammu and Kashmir. It makes no claim to independent citizenship.

It may be worthwhile to mention here that in the US, there is a concept of dual citizenship, i.e., in addition to citizenship of the US, people also have citizenship of states. Moreover, the US Congress has been given just a few enumerated powers listed in Article 1, Section 8. Other than these powers, all powers and residuary powers are with the provinces or states. The dual citizenship and great autonomy to the states have not in any way affected the integrity of the US.

Article 35A and Permanent Residents

The Jammu and Kashmir Constituent Assembly, while deciding to have Indian citizenship, did lay down that the then existing three classes of state subjects be merged into one to create one category of “permanent residents”. Thus, every person who was a state subject of Class I or Class II or who after having acquired immovable property in the state and had been ordinarily residing there for a period of not less than ten years prior to the enforcement of this provision, was considered a permanent resident under the Jammu and Kashmir Constitution.

Article 35A gives certain benefits to the permanent residents of Kashmir such as in employment in the state government, acquisition of immovable property, settlement in the state and scholarships and other government aid. This was just the continuation of pre-existing laws so that the benefits to which residents of the erstwhile princely state were entitled were not withdrawn with Kashmir joining the Indian Union.

Article 35A also lays down that any law dealing with the definition of “permanent residents” or abovementioned benefits shall not be invalid on the ground that it is inconsistent with or takes away

or abridges any rights conferred on other citizens of India. Such an exemption from fundamental rights is also there in our Constitution in the form of Article 31B. Thus any law that is included in the IXth Schedule cannot be challenged on the ground that it violates fundamental rights. There are some 285 laws that have so far been included in the IXth Schedule.

Article 35A is the consequence of the autonomy given to Jammu and Kashmir under Article 370. It is the continuation of the pre-independence definition of permanent residents. In many states, there is a reservation on the basis of domicile in educational institutions. Article 35A was certainly not passed as per the amending process outlined in Article 368. It was inserted by a presidential order on the explicit recommendation of Jammu and Kashmir's Constituent Assembly. Any challenge to it may open a Pandora's box about the validity of several other presidential orders.

The BJP makes a lot of hue and cry about Article 35A being inserted into the Constitution without following the procedure of passing a constitutional amendment under Article 368. But there are other amendments that have similarly been carried out through presidential orders under Article 370. Thus, the Constitution (Application to Jammu & Kashmir) Order, 1950 did amend Article 368 itself. It inserted a further proviso in Article 368, (which like Article 35A is not printed in the text of the Constitution of India) which lays down that no constitutional amendment shall have effect in relation to the state of Jammu & Kashmir unless applied by an order of the President under Clause (1) of Article 370.

Thus, for any constitutional amendment to be applicable to Jammu & Kashmir, we need to follow the process under Article 368 plus have an order by the President. Moreover, the President can pass an order only in consultation with the state government. Therefore, it is not right to say that Article 35A is the only amendment to our Constitution that had been passed without following the amendment process under Article 368.

Similarly, while no word can be replaced in the Constitution without a constitutional amendment, yet the expression "Maharaja acting on the advice of the council of ministers" was replaced first by the expression "Sadr-e-Riyasat of Jammu and Kashmir" and subsequently by "the Governor". Indeed, Article 370 is a self-applying Article of the Constitution and applies *ex proprio vigore* (meaning "of its own force") without having to depend on any other Article for its enforceability.

In fact, Article 370 is not only part of the Constitution of India but is part of the federalism that is the basic structure of the Constitution. Accordingly, courts have upheld successive presidential orders

under Article 370. Certain benefits had been given to the permanent residents so that the wealthy from outside Jammu and Kashmir do not exploit the state's resources, including by purchase of land, to their own benefit. Since Article 35A predates the basic structure theory of 1973, as per *Wamon Rao (1981)*, it cannot be tested on the touchstone of the basic structure.

Certain types of restrictions on the purchase of land are also there in several other states like Arunachal, Nagaland, Himachal Pradesh, and Manipur, etc. Land laws of several states are also discriminatory and do not treat women equally with men. In many states, daughters do not inherit agricultural land in the presence of sons. These laws also discriminate between married and unmarried daughters and sisters. But still, there is a need for improvement in the rights of Kashmiri women who marry outside Kashmir. Under Article 35A, children of Kashmiri women marrying outside Kashmir do not have the same rights that are available to Kashmiri men marrying outside. Article 35A does need a relook in this respect. The India of 2019 is entirely different from the India of 1947. The pre-Independence laws that are discriminatory to women and others cannot be continued anymore.

Prior to the 2019 Lok Sabha elections, the central government used Article 35A to extend reservation benefits to the SCs, STs and OBCs and those who live along the international borders. Parliament has since endorsed it, though it may not be strictly speaking in consonance with the text of Article 370 since the state government was not consulted.

Conclusions

Since Jammu and Kashmir is an integral part of India, keeping in view federalism and the unique history of the state joining the Indian Union, the state has been given some autonomy under Article 370.

Article 370 is certainly not an issue of integration; it is an issue of granting autonomy or federalism. Those who advocate its deletion are more concerned with uniformity rather than integration. Uniformity and integration are not the one and the same. Preservation of diversity and granting autonomy indeed lead to lasting integration.

Article 370 has not been scrapped. What does Modi govt move on Kashmir mean?

Date: August 05, 2019

Author: Prabhash K. Dutta

Much against the clamour raised by many Opposition members in and outside Parliament, what Union Home Minister Amit Shah today said in the Rajya Sabha was not scrapping or abrogating Article 370 of the Indian Constitution.

Article 370 is an enabling provision. It explains which parts of the Indian Constitution have jurisdiction over Jammu and Kashmir, which adopted a separate state constitution for itself during 1950s. Clause 3 of Article 370 empowers the President to decide the limit of the jurisdiction of the Indian Constitution over the state.

Article 370 stays very much as part of the Constitution and cannot be repealed or abrogated without a constitutional amendment in accordance with Article 368. No such bill was moved by Amit Shah in Parliament today.

The government has used the same Article 370 to announce that special status granted under this Article to Jammu and Kashmir has ended. Amit Shah said, "Not all the provisions of Article 370 will now be implemented in Jammu and Kashmir." This was done through a Presidential Order, which in effect, will supercede previous Presidential Orders issued under Article 370.

In other words, the latest move by the government gives full applicability of the Indian Constitution in Jammu and Kashmir. Earlier, only a set of limited provisions such as foreign relations, communication and defence had jurisdiction over Jammu and Kashmir. This means the separate constitution of Jammu and Kashmir ceases to be in operation in the state. With state constitution rendered inoperative and Articles 1-2 applicable to Jammu and Kashmir, the central government got the power to redraw the map of the state.

Amit Shah, accordingly, moved another resolution for bifurcation of Jammu and Kashmir. The resolution, if adopted by Parliament, turns the existing state of Jammu and Kashmir into two Union Territories of Jammu-Kashmir and Ladakh respectively.

Prabhash K Dutta, 'Article 370 has not been scrapped What does Modi govt move on Kashmir mean?' (*India Today*, 5 August 2019) <<https://www.indiatoday.in/news-analysis/story/article-370-has-not-been-scrapped-what-does-modi-govt-move-on-kashmir-mean-1577411-2019-08-05>>

The Union Territory of Jammu-Kashmir will have a legislature. Its new status will be comparable with that of Delhi and Puducherry, only two other Union Territories to have legislatures of their own. The Governor of Jammu and Kashmir will now become Lieutenant Governor.

Ladakh will have a separate identity as Union Territory much like five other centrally administered areas which don't have separate legislatures of their own. Its status will be comparable with that of Lakshadweep, Andaman and Nicobar Islands, Chandigarh and others.

The separate Ranbir Penal Code (RPC) will give way to the Indian Penal Code. The separate state constitution allowed a separate penal code for Jammu and Kashmir. With separate constitution gone, the Indian Penal Code will supercede the RPC.

Article 35A, making a distinction between the permanent residents of Jammu and Kashmir and the outsiders, will also cease to have any effect. It remains part of the Constitution as annexure of the Constitution. Its constitutional status - or lack of it -- does not change with the latest move of the Modi government on Article 370.

The sectors of education and employment will open up to all Indians without any discrimination that Article 35 brought by means of the clause of permanent residents. The central quota laws in school-college admissions and state government jobs will apply just like other Indian states.

Purchasing land and owning property by people, considered outsiders till now, would be possible. This was considered a major reason preventing corporates setting up big units in Jammu and Kashmir.

The clause relating to permanent residents deny Kashmiri women, who marry non-Kashmiri men, and their children their right of inheritance. They may now claim inheritance in ancestral property.

The status of Jammu and Kashmir police cadre will be redefined. They may be included in DANIPS (Delhi, Andaman and Nicobar Islands Police Services) or may be granted a separate status.

REVOKING ARTICLE 370



BEFORE

- Special powers exercised by J&K
- Dual citizenship
- Separate flag for Jammu & Kashmir
- Article 360 (Financial Emergency) not applicable
- No reservation for minorities such as Hindus and Sikhs
- Indian citizens from other states cannot buy land or property in J&K
- RTI not applicable
- Duration of Legislative Assembly for 6 years
- If a woman from J&K marries out of state, she would lose the citizenship of the state
- Panchayats did not have any rights
- Right to Education (RTE) was not applicable



NOW

- No special powers now
- Single citizenship
- Tricolour will be the only flag
- Article 360 will be applicable
- Minorities will be eligible for 16% reservation
- People from other states will now be able to purchase land or property in J&K
- RTI will be applicable
- Assembly duration in Union Territory of J&K will be for 5 years
- If a woman marries out of state or country, she will still retain all her rights and Indian citizenship
- Panchayats will have the same rights as in other states
- Children in the state will benefit from RTE

J&K Bifurcation: Top lawyers divided over move's validity

Date: August 06, 2019

Author: IST

Eminent legal eagles are divided over the bifurcation of Jammu and Kashmir into two Union territories — J&K and Ladakh; with one section contending that it goes against the constitutional provisions, and other justifying it as wholly in conformity with the Constitution.

Describing it as “unconstitutional”, Prashant Bhushan told this newspaper: “The bifurcation of J&K and the allocation of subjects can’t be done in the absence of an elected Assembly. It can’t be done by the President with the consent of the governor.”

“Both the bifurcation of J&K and the amendment to Article 370(1) relating to the subjects that the Centre can deal with now are unconstitutional as the reorganisation of the state cannot be done without the consent of the state Assembly”, he said.

Similarly, “amending Section 370(1), that defines the subjects on which the Centre would have control and the subjects over which state would have jurisdiction, can’t be altered without the consent of the state legislature,” he added.

Mr Bhushan said: “The bifurcation of J&K requires the consent of the elected Assembly of the state. Also, any amendment through Article 370 to the subjects the Union can deal with in J&K also requires the consent of the J&K Assembly. Can’t be done by just (the) President or the governor’s consent. Unconstitutional.”

Article 3 of the Constitution, that provides for formation of new states and alteration of areas, boundaries or the names of existing states, says: “Provided that no bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless... the bill has been referred by the President to the legislature of that state for expressing its views thereon....”

Sub-clause (b)(i) of Clause (1) of Article 370 says that the power of Parliament to make laws for the said state shall be limited to only those matters “in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters

Parmod Kumar, 'J&K bifurcation: Top lawyers divided over move's validity' (*The Asian Age*, 6 August 2019) <<https://asianage.com/india/all-india/060819/jk-bifurcation-top-lawyers-divided-over-moves-validity.html>>

specified in the Instrument of Accession governing the accession of the State to the Dominion of India...”

While Mr. Bhushan is relying on these two provisions of the Constitution to question the validity of the Centre’s decision, former Lok Sabha secretary-general Subhash Kashyap says that “technically and constitutionally” the bifurcation decision does not offend any provision of the Constitution.

“The absence of the J&K Assembly is no impediment to the requirement of taking the consent of the state Assembly before altering the boundaries of the state or reorganising it. Under President’s Rule, the powers of the state government gets vested in the Central government and similarly the powers of the Assembly get vested in Parliament”, says Dr Kashyap.

If the state is under President’s Rule, the former Lok Sabha secretary-general says, then the role of the state government and that of the state legislature would be discharged by the Central government and by Parliament respectively.

Former chief information commissioner and Minorities Commission chairman Wajahat Habibullah says that the bifurcation of the state was not going to solve the problem or achieve greater peace. Any reorganisation of J&K had to be done in consultation with the people of the state and its elected representatives, he said.

Describing the action as politically-driven but unwise, former attorney-general Soli Sorabjee, who served in the Atal Behari Vajpayee government, said it was a “very complicated legal issue”. Senior counsel Rakesh Dwivedi welcomed the decision, asserting that it was “long overdue” and “completely legal ... with no chance of any challenge to it succeeding”.

Jammu & Kashmir Reorganisation Bill 2019

Date: August 06, 2019

Author: InsightIAS

Context: Ending Jammu & Kashmir's special status in the Indian Union, the government has extended **all provisions of the Constitution to the State in one go, downsized the State into two Union Territories and allowed all citizens to buy property and vote in the State.**

In this regard, Union Minister for Home Affairs, Shri Amit Shah, introduced two bills and two resolutions regarding Jammu & Kashmir (J&K). These are as follows:

1. Constitution (Application to Jammu & Kashmir) Order, 2019 {Ref. Article 370(1) of Constitution of India} – issued by President of India to supersede the 1954 order related to Article 370.
2. Resolution for Repeal of Article 370 of the Constitution of India {Ref. Article 370 (3)}.
3. Jammu & Kashmir (Reorganisation) Bill, 2019 {Ref. Article 3 of Constitution of India}.
4. Jammu & Kashmir Reservation (2nd Amendment) Bill, 2019.

Background:

So far, the Parliament had only residuary powers of legislation in J&K. This included enacted of laws to prevent terror and secessionist activities, for taxation on foreign and inland travel and on communication.

Key changes:

1. **The President had used his powers under Article 370 to fundamentally alter the provision, extending all Central laws, instruments and treaties to Kashmir. However, the drastically altered Article 370 will remain on the statute books.**
2. While **the Union Territory of Jammu and Kashmir will have a legislature**, the one in Ladakh will not.
3. The notification by the president has effectively **allowed the entire provisions of the Constitution, with all its amendments, exceptions and modifications, to apply to the area of Jammu and Kashmir.**

4. The **Bill proposes wide powers to the Lieutenant Governor** of the proposed Union Territory of Jammu and Kashmir and makes it the “duty” of the Chief Minister of the Union Territory to “communicate” all administrative decisions and proposals of legislation with the LG.
5. **All Central laws and State laws of J&K would apply to the new Union Territories of J&K and Ladakh.**
6. **Assets and liabilities of J&K and Ladakh would be apportioned on the recommendation of a Central Committee** within a year.
7. Employees of State public sector undertakings and autonomous bodies would continue in their posts for another year until their allocations are determined.
8. The **police and public order is to be with the Centre.**
9. The notification amends the expression “**Constituent Assembly**”, contained in the proviso to clause (3) of Article 370, to mean “Legislative Assembly”.

Legislative powers of the Union Territory of Jammu and Kashmir:

1. The Legislative Assembly may make laws for the whole or any part of the Union Territory of Jammu and Kashmir with respect to any of the matters enumerated in the state list except on subjects “public order” and “police” which will remain in the domain of the Centre vis-a-vis the LG.
2. In case of inconsistencies between laws made by Parliament and laws made by the Legislative Assembly, earlier law shall prevail and law made by the Legislative Assembly shall be void.
3. The role of the Chief Minister will be to communicate to the L-G all decisions of the Council of Ministers relating to the administration of affairs of the Union Territory and proposals for legislation and to furnish such information relating to the administration of affairs as the L-G may call for.

Role and Powers of the Lieutenant Governor:

1. The Bill specifies that the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh will have a common Lieutenant Governor.
2. **Appointment of L-G in Ladakh:** The President shall appoint the L-G under article 239. The L-G will be assisted by advisors appointed by the Centre since the Union Territory will not have a Legislative Assembly.

3. In the case of Union Territory of Jammu and Kashmir, the L-G shall “act in his discretion” on issues which fall outside the purview of powers conferred on the Legislative Assembly, in which he is required to exercise any judicial functions, and/or matters related to All India services and the AntiCorruption Bureau
4. The Chief Minister shall be appointed by the L-G who will also appoint other ministers with the aid of the CM. The L-G shall also administer the oath of office and of secrecy to ministers and the CM.
5. The L-G will have the power to promulgate ordinances which shall have the same force and effect as an act of the Legislative Assembly assented by the L-G.

Impact:

1. The tabling of the proposed Reorganisation Bill is also proof that the long reign of the 1954 Order has ended. The 1954 Order had introduced a proviso to Article 3, namely that “**no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State**“. That power of the State Legislature to give prior consent does not exist anymore. This has provided a free hand to the Centre to table the Reorganisation Bill.
2. With the removal of the 1954 Order, **the power of the State Legislature ceases to exist and Parliamentary laws, including that of reservation, would apply to Jammu and Kashmir as it does in other parts of the country.**
3. The government called this the end of “**positive discrimination**” and the closing of the “**chasm**” **between residents of J&K and citizens of other parts of the country.**
4. The removal of the 1954 Order further also negates a clause which was added to **Article 352**. The Order had mandated that no proclamation of Emergency on grounds “only of internal disturbance or imminent danger shall have effect” in the State unless with the concurrence of the State government.

Rationale behind this move:

1. Article 370 has prevented J&K to merge with India rather than being a basis of its merger.
2. Article 370 was seen **as discriminatory** on the basis of gender, class, caste and place of origin.
3. Post the repeal of the Article 370, doors to **private investment in J&K would be opened**, which would in turn increase the potential for development there.

4. **Increased investments would lead to increased job creation** and further betterment of socioeconomic infrastructure in the state.
5. **Opening of buying of lands would bring in investments from private individuals and multinational companies and give a boost to the local economy.**

Criticism:

1. The **mechanism that the government used to railroad its rigid ideological position on Jammu and Kashmir through the Rajya Sabha** was both hasty and stealthy. This move will strain India's social fabric not only in its impact on Jammu and Kashmir but also in the portents it holds for federalism, parliamentary democracy and diversity.
2. The **passing of legislation as far-reaching as dismembering a State without prior consultations** has set a new low.
3. The entire exercise of getting Article 370 of the Constitution effectively **abrogated has been marked by executive excess.**
4. **A purported process to change the constitutional status of a sensitive border State has been achieved without any legislative input** or representative contribution from its people.

Challenges Ahead:

1. The move will be legally challenged on grounds of procedural infirmities and, more substantively, that it undermines the basic feature of the compact between Delhi and Srinagar that was agreed upon in 1947.
2. The President's power under Article 370 has been used both to create an enabling provision and to exercise it immediately to modify the Order, thereby dispensing with the role envisaged for the State Assembly.
3. While it is true that in 1961 the Supreme Court upheld the President's power to 'modify' the constitutional provisions in applying them to J&K, it is a moot question whether this can be invoked to make such a radical change: a functioning State has now been downgraded and bifurcated into two Union Territories.
4. But beyond the legality, the real test will be on the streets of Srinagar, Jammu and Delhi once the security cordon is lifted from the State.
5. What was unbecoming is the unwillingness to enter into consultation with the mainstream political leaders; in no other State would former Chief Ministers have been dealt with so cavalierly.

Conclusion:

The special status of J&K was meant to end, but only with the concurrence of its people. The Centre's abrupt move disenfranchised them on a matter that directly affected their life and sentiments. Moreover, that this was done after a massive military build-up and the house arrest of senior political leaders, and the communications shutdown reveals a cynical disregard of democratic norms. Whatever its intent in enabling the full integration of Jammu and Kashmir with India, this decision to alter the State's status could have unintended and dangerous consequences.

SHARING OF POWER

The Jammu and Kashmir Reorganisation Bill, 2019, will bring about the following changes to the State

- Two Union Territories to be formed out of the State of Jammu and Kashmir: UT of Ladakh (Kargil and Leh districts; ●) and UT of J&K (all other districts of the State of J&K ●)



- Both UTs to have L-G, for now the Governor of State will continue as both

- Four sitting Rajya Sabha members of the State will become MPs of UT of J&K
-
- Five Lok Sabha seats to go to the UT of J&K
-
- Legislative Assembly of UT of J&K will have 107 seats to be chosen through a direct election
-
- One Lok Sabha seat to go to the UT of Ladakh
-
- 24 seats in PoK will be vacant

No entry: Barbed wire erected by the security personnel to block vehicles on a road during restrictions in Srinagar on Monday.

■ REUTERS

Difference between states and UTs:

1. States have their own elected government, but in **Union Territory (UT)** is administered by the **Central Government**.
2. The state is administered by Chief Minister, whereas **UT is administered by Administrator appointed by President**.
3. The states have the Governor as its executive head, **in UTs, President is its executive head**.
4. A state mandatorily has its own Legislative Assembly and make law for the state, **for UT, it is not mandatory to have a Legislative Assembly**.
5. Powers in states are distributed through Federal mode that is powers divided between states and centre. Whereas, **in case of UTs, powers are Unitary in nature that is power is in the hands of the Centre**.

Parliament Doesn't Have the Power to Downgrade J&K's Status to Union Territory

Date: August 08, 2019

Author: Jahnvi Sindhu and Vikram Aditya Narayan

Jahnvi Sindhu and Vikram Aditya Narayan are advocates based in Delhi.

With the passage of the Jammu and Kashmir Reorganization Act, 2019, the number of States in the Union of India will reduce from 29 to 28 and the number of Union Territories will increase from 7 to 9. The Act, by splitting the State into two Union Territories of Ladakh and Jammu & Kashmir, extinguishes the State of Jammu and Kashmir.

This is not merely a change of nomenclature or mere semantics, but a move that raises grave and fundamental questions about the nature of India's constitutional democracy, which is founded on a principle of federalism.

In our view, the Act jeopardizes India's federal structure in two primary ways:

- First, it proceeds on a manifestly incorrect interpretation of Article 3 of the Constitution to extinguish a State altogether; and
- Second, its disregard for the State legislative assembly disrupts the balance between the Union and States provided for in the Constitution.

Parliament Does Not Have the Power to Extinguish a State

The power of Parliament to form a new State or Union Territory or alter the boundaries of a State is provided for and curtailed under Article 3 of the Constitution. Article 3 states:

3. Formation of new States and alteration of areas, boundaries or names of existing States:

Parliament may by law

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

Jahnvi Sindhu and Vikram Aditya Narayan, 'Parliament Doesn't Have the Power to Downgrade J&K's Status To UT' (*The Quint*, 8 August 2019) <<https://www.thequint.com/voices/opinion/kashmir-bifurcation-union-territory-unconstitutional-violation-federal-structure>>

(d) **alter** the boundaries of any State;

(e) **alter** the name of any State;

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and **unless**, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, **the Bill has been referred by the President to the Legislature of that State for expressing its views thereon** within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired

Explanation I: In this article, in clauses (a) to (e), **State includes a Union territory**, but in the proviso, State does not include a Union territory

Explanation II: The power conferred on Parliament by clause (a) includes the power to **form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory**.

The Limits of Parliamentary Power Under Article 3

The provision may seem complicated on a first reading as it offers a number of permutations and combinations by which States and Union Territories may be combined to create a new entity.

However, a careful reading makes it clear that Parliament does not have the power to extinguish a State altogether: a Union Territory or State may be formed by “separating a territory from any State”, thus implying that the State must still remain in existence after such separation.

Similarly, the Parliament may “diminish” i.e. reduce the area of the State. Logically the word diminish cannot be equated with reducing the State to nothing. In the same vein, a State may be created by a union of States or of a union of a State or Union Territories or a union of two Union Territories and so on, but Article 3 does not contemplate the division of the State into two Union Territories such that nothing of the State remains.

The Framers carefully and exhaustively enumerated the powers vested in Parliament with respect to changing of boundaries and creation of States under Article 3. If it was the intention of the Framers (and even Parliament which subsequently amended Article 3) to allow for the possibility of extinguishing a State by converting it into one or more Union Territories under Article 3, the wording of Article 3 would have been clear to that effect.

Violation of Principle of Federalism

The federal structure of the country means that States are autonomous units, and that control over matters fundamental to the governance of the State such as public order, police, public health, agriculture, water, and communication are exercised by the legislature elected by the people of that State.

Voters often choose different Governments at the Centre and in their State based on their evaluation of which party is better suited to serve national issues and which party is better suited to handle issues of local governance. The Central Government cannot, unless there is a breakdown of constitutional machinery in the State, interfere with powers reserved to the State.

On the other hand, a Union Territory does not have the same autonomy, it is controlled by the Central Government through an administrator appointed by the Government and do not typically have a legislative assembly elected by its people.

Even the Union Territories that have elected legislative assemblies (Delhi and Puducherry) do not have complete autonomy – disputes arising out of both Union Territories about the extent of independent power vested in the legislative assemblies and the governments of the Union Territories have been taken to Court.

Both these disputes have adversely affected governance in the Union Territories. In this context, any move by the Centre to take control of it by converting it into a Union Territory or multiple Union Territories amounts to a subversion of the principle of federalism that respects the autonomy of States.

Has This Ever Been Done Before?

If the downgrading of a State to a Union Territory were permissible, it would have become the *modus operandi* of all Central Governments with strong majorities to take over control of the States that they did not control electorally.

Yet, while the country has gone through its share of reorganization of States, a State has never been extinguished by converting it into one or more Union Territories for the Central Government to control.

One may seek to counter this statement with the example of Delhi, which was a “State” and was made a Union Territory in 1956 under the State Reorganization Act, 1956. However, Delhi was a State in “Part C” of the First Schedule of the original Constitution. States included in Part C were effectively similar to Union Territories and were not given the same status as other States.

This can be understood by seeing how both States in Part C of the original Constitution and most of the Union Territories included in the amended Constitution were to be “administered by the President”, acting through an administrator appointed by her.

In 1956, Parliament amended the First Schedule of the Constitution through the Seventh Constitution Amendment Act, whereby it removed “Part C” and introduced the concept of Union Territories. Section 17 of the Act tellingly stated that the heading of Part C of the First Schedule would be changed to Union Territories. Thus, the conversion of any Part C State into a Union Territory is no precedent for the Bill pertaining to Jammu & Kashmir.

Has the Supreme Court Ever Dealt with This Issue?

In seeking to defend the Bill against this objection, the Central Government may attempt to rely on a judgment of the Supreme Court passed in 1963, where the Court observed that “*Parliament is ... invested with the authority to alter the boundaries of any State and to diminish its area so as even to destroy a state with all its powers and authority.*”

This observation was made by the Court in the case of *State of West Bengal v. Union of India*, where the State of West Bengal had challenged the competence of Parliament to enact a law authorizing the Central Government to acquire land within the territory of States for the purpose of mining coal.

However, the Court made this observation to illustrate Parliament’s power in theory, and thereby demonstrate why the argument of the State of West Bengal – that the State was a sovereign body – must be rejected. It was not however based on any detailed analysis of the text of Article 3, as that provision was not directly involved in the case.

The observation cannot therefore be regarded as a binding view on the meaning of Article 3, especially on the question of whether States can be downgraded into Union Territories to be controlled by the Central Government. In legal terms, this non-binding observation would be known as *obiter dicta*.

All things considered, Article 3 cannot be read as conferring upon Parliament the power to extinguish a State and convert it into one or multiple Union Territories, and for this reason the Jammu & Kashmir Reorganisation Act 2019 is patently unconstitutional.

The State Legislative Assembly Cannot be Ignored

The second manner in which the Bill violates India’s federal setup is that the State legislative assembly has been completely disregarded while passing it.

While Article 3 confers upon Parliament the power to create States and alter State boundaries, the proviso to the provision clarifies that no bill that affects the boundaries of a State can be initiated unless a resolution is first tabled in the legislative assembly of the State that would be affected. During the discussion over Article 3 in the Constituent Assembly, Dr. Ambedkar explained,

I have not the least doubt about it that the method of consulting, which the President will adopt, will be to ask either the Prime Minister or the Governor to table a resolution which may be discussed in the particular State legislature which may be affected, **so that ultimately the initiation will be the local legislature and not by the Parliament at all.** (emphasis supplied)

Dr. Ambedkar was thus clear that to prevent the Parliament from unilaterally misusing its power under Article 3, any proposal to change the boundaries of a state would have to initiate from the State legislatures, as it is they who represent the will of the people.

In the present case, the State legislative assembly of the State of Jammu and Kashmir was dissolved a year ago, owing to the Governor declaring a breakdown of constitutional machinery in the State, followed by a Proclamation of President's rule bringing the State under the control of the Central Government as per Article 356.

However, the onus is on the Central Government to explain how the Governor or President or Parliament can be an effective substitute for the will of the people for the purposes of Article 3.

The Framers of the Indian Constitution were clear that reorganization of a State could only happen after the elected representatives of the people of the State discussed the issue. They never envisaged that the proviso in Article 3 would be bypassed by maintaining President's rule in a State so as to avoid any discussion in the concerned State legislative assembly.

Such an approach is clearly contrary to the spirit and purpose of the proviso to Article 3. Every citizen of India, including those who voted in favour of the Bill, should be worried about the precedent this move sets for the future of federalism in the country.

India's move sans Kashmir assembly's say 'illegal': Expert

Date: August 09, 2019

Author: Iftikhar Gilani

Special status cannot be stripped without concurrence of elected Kashmir government, says constitution expert.

Prime Minister Narendra Modi-led government's recent act of abrogating the special status to Jammu and Kashmir is "illegal" and equivalent to "committing a fraud", said a top constitutional expert in India.

Speaking to Anadolu Agency from his home in India's commercial capital Mumbai, A.G. Noorani, author and an expert on Jammu and Kashmir affairs, said the task has already begun to challenge the act in the Supreme Court.

But he expressed scepticism about the period and time the apex court may take to decide about the legality of the government decision.

On Monday, the Indian government stunned the world by revoking nearly all provisions of Article 370 of its constitution that guaranteed a special status to Jammu and Kashmir and helped protect its Muslim character in a Hindu majority country. The provision also defined region's complex relationship with India.

Author of many books on Kashmir -- including an internationally acclaimed scholarly work, titled Article 370: A Constitutional History of Jammu and Kashmir -- the veteran legal expert said the government decision was "utterly and palpably unconstitutional".

He said the Indian Supreme Court for sake of its credibility must strike the decision down as void.

'Threat to Kashmiris'

Noorani felt that the repeal of special provisions have posed an existential threat to Kashmiri population.

The legal expert said that the Indian government's power to abrogate Article 370 had vanished after the dissolution of Kashmiri's Constituent Assembly in 1956.

Jahnvi Sindu and Vikram Aditiya Narayan, 'Parliament Doesn't Have the Power to Downgrade J&K's Status To UT' (*The Quint*, 8 August 2019) <<https://www.thequint.com/voices/opinion/kashmir-bifurcation-union-territory-unconstitutional-violation-federal-structure>>

“Article 370 was meant to express the identity of Jammu and Kashmir, because of the special circumstances, in which it acceded to India. And that identity is sought to be destroyed. It got a special status because of the historical circumstances,” he explained.

The author also said that by removing this provision, the Hindu nationalist government was not aiming at unifying Kashmir with India, but removing identity of Kashmiri people.

In legal terms, Noorani said, the Indian parliament was not empowered to either amend or delete the provision.

“For this, the approval of the [J&K] State’s Constituent Assembly was necessary. Any concurrence of the state government is always subject to the elected assembly’s final approval. When the state is under governor’s rule or president’s rule, neither can accord that concurrence,” he said.

Explaining further, the constitutional expert on Jammu and Kashmir affairs explained that the central government cannot acquire concurrence from its handpicked appointee.

“Currently, Jammu and Kashmir is under central rule. There is no elected government now,” he said.

He further said that the Indian constitution has itself defined that the state government mean a council of ministers in the state.

“There was no such council of ministers headed by a chief minister right now,” he added.

Precedent

Referring to a judgement by the Supreme Court of Sri Lanka delivered in Nov. 2012 in which it reversed a central government’s order that had been passed without ratification by the provincial council, the author said: "It aptly applies to current situation in Kashmir."

The Divineguma Bill was challenged before the Supreme Court through several petitions. In absence of a provincial council in Northern Sri Lanka, the governor had ratified the law on behalf of the Northern Province.

“This was immediately challenged by the Tamil National Alliance before the Supreme Court through two petitions. On Nov. 1, the Supreme Court held that the governor cannot ratify the legislation, in place of the provincial council,” said Noorani.

'Kashmir for Kashmiris slogan'

Much before India’s freedom in 1947, Hindu ruler of Kashmir Hari Singh had issued an order, imposing a ban on “foreign nationals” in respect of citizenship and purchase of immovable property and seeking employment in state government.

In a notification of April 20, 1927, Singh had defined “State Subjects”. The law was later incorporated in both Kashmir and Indian constitution.

The law was passed in response to an agitation by Kashmiri Hindus called "Pandits", who raised slogan “Kashmir for Kashmiris” as outsider Punjabi Muslims were dominating in administration and buying land. Now, a century later the Kashmiri Muslims are having similar fears that Hindus had in 1920s.

In 1920s, Hindus even forced the ruler to add a provision that in case a Kashmiri woman married a non-Kashmiri, she will forfeit right to inheritance.

Historian Pandit Prem Nath Bazaz records in his book "Inside Kashmir" that the cry of “down with the outsider” was raised by the Kashmiri Pandits.

Muslims had no say, as they were excluded from state jobs by the Hindu ruler and they were too poor to own lands.

“The poverty of the Muslim masses was appalling. Dressed in rags which could hardly hide his body and barefooted, a Muslim peasant presented the appearance rather of a starving beggar than of one who filled the coffers of the state,” wrote the noted historian.

He said the ruler’s order at once stopped the recruitment of the Punjabis in the services.

“With Hari Singh’s pro-Dogra Hindu policy in operation, the people of Jammu, particularly Rajput Hindus, got the most of the big jobs while the Pandits were recruited as clerks in offices vacated by the Punjabis. Needless to say that the Muslims were as yet out of the picture,” Bazaz wrote.

Over past 70 years now, the spread of education and avenues have led Kashmiri Muslims to claim jobs and posts, edging out their Pandit counterparts.

“So, a decree that was meant for someone became a blessing in disguise for other and thus became a thorn in the eye,” writes a Kashmiri scholar Hurrair Ashraf.

‘Genesis of the Kashmir issue does not lie in Article 370; solution doesn’t lie in (removing) it’

Date: September 01, 2019

Author: Express News Service

What are the legal and constitutional bases — and implications — of the removal of the special status of J&K? What is the historical context of the ‘Kashmir issue’, and what were the key questions involved in the accession of the princely state to India? These, and associated issues, were explained to the readers of The Indian Express last week by Dr Aman Hingorani, eminent lawyer and author of *Unravelling the Kashmir Knot*. He spoke to Apurva Vishwanath

Dr Aman Hingorani is an eminent lawyer, teacher of law, and an expert who has studied the Kashmir issue closely. He is the author of *Unravelling the Kashmir Knot*. He practises in the Supreme Court of India.

On the background and the context of the ‘Kashmir issue’

The political discourse in this country equates the Kashmir issue with Article 370 of the Constitution. And so, the government says, we strip the preferential treatment given to the state, terrorism will go away, peace will come, there’ll be investment, there’ll be assimilation of the people from the state into the mainstream, there’ll be development, there’ll be job opportunities.

(But) the genesis of the Kashmir issue does not lie in Article 370; the solution (also) does not lie in Article 370. The Kashmir issue is much wider and multi-layered... By the time we are through with this, I hope I am able to persuade some of you that what has happened was entirely unnecessary, and it is not going to make an impact on the ground.

Now, India may be a very ancient civilisation, but modern-day India and Pakistan are creations of a political agreement: the Partition Plan of June 3 (1947), which was announced by the British, accepted by the Muslim League, and eventually by the Indian National Congress, for partitioning the subcontinent.

That political agreement was crystallized in law; the British Parliament amended the Government of India Act of 1935; it enacted the Indian Independence Act of 1947.

Dr Aman Hingorani, 'Genesis of the Kashmir issue does not lie in Article 370; solution doesn't lie in (removing) it' (*Indian Express*, 1 September 2019) <<https://indianexpress.com/article/explained/kashmir-issue-art-370-solution-removing-it-dr-aman-hingorani-5954862/>>

This law talked about partitioning the provinces, etc. But at that point of time, about 45% of the subcontinent was made up of 562 princely states, and Jammu and Kashmir was one of them. Externally, they owed allegiance to the British Crown; internally they were sovereign. The British statutes said that as of August 15, 1947, British sovereignty would lapse, the states will become legally sovereign. So you had, in theory at least, 560-odd countries in the continent.

As of August 15, 1947, Jammu and Kashmir was sovereign; it was not part of India. Jammu and Kashmir did not want to go to India or to Pakistan. The ruler was Hindu. He did not want to go to Islamic Pakistan. He did not want to come to India either, because Jawaharlal Nehru had said excellencies did not count in the new mood of India.

Then the tribal invasion, etc. happened, a strategy employed by the British and Pakistan to get J&K to accede to Pakistan, which boomeranged. The ruler acceded to India on October 26, 1947. With that accession, in terms of the law which created India and Pakistan, the entire state of Jammu and Kashmir became an integral part of India — the Northern Areas that has Gilgit-Baltistan, PoK, Jammu, Ladakh, Kashmir.

The Accession Instrument was identical, the template was given by New Delhi to all the princely states to accede in three areas unconditionally, external affairs, communications, defence, and ancillary matters. The other states executed supplementary instruments ceding further powers, or adopting the future

Constitution of India. They executed instruments of merger merging their territory, but Jammu and Kashmir refused to do so. The four representatives sent by the ruler of J&K to the Constituent Assembly of India said we want to limit the accession of the state to the terms of the accession. That is, we are giving only external affairs, communications, and defence, for which, if you want to legislate, take the consent, or consult the state. If you want to talk about matters other than the Instrument of Accession, you need the consent of the state.

This position was reflected in Article 370. It said the President can apply powers of the Indian Constitution to the state in respect of matters mentioned in the Instrument of Accession after consulting the state; on matters outside the Instrument of Accession, with the consent of the state. Article 370 identified the body that could recommend this particular provision to be inoperative — the state Constituent Assembly, which would frame the state Constitution.

Thereafter, came the Delhi Agreement of 1952... There had to be a transition from monarchy to a form of government, which was to be decided by the state Constituent Assembly, which was to further

define the constitutional relationship of the state with India. (But) the state Constituent Assembly was yet to be set up, that constitutional relationship was yet to be decided. And that was the purpose of making this provision (Article 370) transitional or temporary.

The state Constituent Assembly was set up in 1951. It was an elected body. The chairperson defined the constitutional relationship of J&K as being an autonomous republic within the Union of India. The Delhi Agreement was ratified not only by the state Constituent Assembly, but by the Indian Parliament in 1952. Then there was the 1954 Order, which talked about giving certain preferential rights to the citizens or the residents of the state, some of them were prejudicial also...

Article 370(1) talked about applying provisions of the Indian Constitution, with or without modification, to the state. This started a process of eroding the state's autonomy, and executive action was considered good enough to do that. And here I am talking about regimes right from the 1950s onward.

Before the events of August 5 (2019), virtually the entire Constitution of India was any way applicable to the state. Article 370 was an empty shell, the contents had been emptied long ago. Article 370 has never come in the way of New Delhi dealing with the state in the way it wanted to deal with the state.

On what really has changed in Jammu and Kashmir now

In my doctoral research, which was published as a book in 2016, I had pointed out that Article 370 is quite irrelevant. New Delhi had all the powers it wanted qua the state... If there was a particular law which was discriminatory, it could be struck down; that does not justify making the Article itself inoperative. Many states have restrictions on people buying land; what's so special about it? You challenge the law, you don't get rid of the Article! Accession is an act of state, it binds everybody. An organ of the Indian state cannot reopen the terms of accession. But I'll come back to this point later.

I mentioned that the state acceded unconditionally to India in three areas and ancillary matters. New Delhi said, we'll accept this accession provisionally; let the people of the state decide the future of the accession.

And then what did we do? [We said] let us go to the United Nations. Bring in the world community to comment on the happenings of the state. We went to the United Nations complaining of aggression, and committed to a plebiscite there. We are the only country in history to have gone to the United Nations saying there is aggression on our territory, and come back with the promise to have a plebiscite to see whether it is even part of our territory! It is New Delhi which has made Kashmir disputed territory. We can say it is an integral part of India, it is an integral part of India, but outside the borders

of India, it is till date marked as a disputed territory. This is because we have cast doubts on our own title to the state by accepting the accession provisionally, internationalising it, and then following a policy... of territorial status quo. Now we say it's a bilateral issue, and that the UN's got nothing to do with it, forgetting that each time we say it is a bilateral issue, we are conferring a standing on Pakistan other than that of an aggressor.

Here is a state which is Indian territory. But more than 50% of it is occupied by China and Pakistan. China has no claim to J&K, but it occupies about 20% of J&K... In 1963, another part of Jammu & Kashmir — Indian territory — was gifted by Pakistan to China. 35% of the state is with Pakistan.

What did we do? In 1957, we informed the United Nations that we believe in letting sleeping dogs lie. In the 1965 War, we won back Haji Pir — Indian territory as per the Constitution of India. We returned Indian territory to Pakistan in Tashkent in 1966. Simla Agreement, 1972, [inviolability of the ceasefire line]; Lahore Declaration, 1999, reiterated the same position. We may have a parliamentary resolution which says Pakistan must vacate, but our whole policy... has been territorial status quo...

The 'Kashmir issue' is not Article 370, focusing on the part of the territory with us; the 'Kashmir issue' is getting back our territory, getting back our citizens, and getting rid of the 'disputed territory' tag on J&K. Unless that happens, nothing will work in Kashmir.

Yes, you need to address the feeling of injustice which is there in the state. We keep saying we gave special status to Jammu and Kashmir, but isn't it the other way round? It was a sovereign country, they gave us some powers... Here of course, there is a caveat. J&K is not a homogeneous state, people in Ladakh have been clamouring for Union Territory status, people in Jammu are welcoming (the government and Parliament's move), there may be popular support in the state...

To be honest with you, nothing will change on the ground because the Indian Constitution was anyway applicable to the state. But is that a justification for doing what we did, and confining the Kashmir issue only to Article 370? Will that bring peace to the region when part of the state is not even with us?

On the move made by the government on August 5

I hope the government is right when it says it will help the nation. I have no reason to doubt what they're doing. I am just examining the constitutional process, because we are a country which is supposed to follow the rule of law. Now, three things have essentially happened.

Firstly, the 1954 Order been replaced by the 2019 Order, applying the entire Indian Constitution to the state. Secondly, the state has been broken into two Union Territories, one with a legislature, the other without. And thirdly, there has been a substitution as to the body that can recommend to the President to declare Article 370 inoperative. And this has happened at a time when there is Presidential Rule.

Now, Presidential Rule is an emergency provision. It is not meant for taking far-reaching decisions. It's meant to be there when there's a breakdown of the constitutional machinery, as a stopgap adjustment, as a temporary arrangement. The Centre steps in, takes over the power of the state government, takes over the power of the Legislative Assembly, and it is limited in scope and duration...

The entire Constitution of India has been applied to the state. That could have been applied with the consent of the state in matters not mentioned in the Instrument of Accession, or not subsequently given away by the state Constitution, etc. During Presidential Rule, the power of the state government is exercised by the Governor, who is New Delhi's appointee. So, New Delhi's appointee is giving consent to New Delhi to apply the entire Constitution to the state.

As per Article 3 of the Constitution of India, there is no guarantee of territorial integrity to any state... Parliament can by law alter the boundaries, change the name, etc. Of course, there is a proviso which says you must take the view of the state, but it is non-binding on Parliament, and after ascertaining the views of the state, Parliament can do so by law.

In the 1954 Order, a proviso had been added to Article 3, that if you want to do this with J&K, you need the consent of the state Assembly. Let us assume that the the application of the Constitution of India is valid on the state; that means Article 3 becomes applicable. But that still means you must take at least the views of the state Assembly. Now, when the Presidential proclamation is in force, Article 356 is applied, who takes over the power of the state Assembly? Parliament. So, what the government is doing is that it is consulting or taking the views of Parliament, where it has a majority, to dismember the state. New Delhi is taking a yes from itself.

Can you use emergency provisions to dismember and destroy the identity of a state? Tomorrow, if you don't like a particular state, so can you just say we dismiss the government now, and it is a UT? We may not have a strictly federal Constitution, but we also don't have a strictly unitary Constitution. The Supreme Court has held it to be quasi federal, and said that the federal character of the Constitution is part of the basic structure...

The third point is about substituting the state Constituent Assembly with the state Assembly. Now Article 370(1) said the President can apply parts of the Indian Constitution to the state with or without modification. The protection is in Article 370(3): that the same Constituent Assembly which framed the state Constitution is the only competent body that can recommend to the President to make Article 370 inoperative.

That Constituent Assembly was set up, it framed the Constitution, it dispersed. It did not make any recommendation. And that's the reason why the Supreme Court has been saying it has become permanent. Article 370 could have been made inoperative — but with the dispersal of the state Constituent Assembly, the competence of the organs of the Indian state ceases to declare 370 inoperative.

Now, Article 370(1) has been used to add a provision in Article 367, an interpretation clause, to replace the state Constituent Assembly with the state Assembly to be the competent body. And in a time of emergency provision — 356 — who exercises the power of the state Assembly? Parliament. So again, the power which was to be exercised by the state Constituent Assembly, has to be exercised by the state Assembly, which under President's Rule will be exercised by Parliament, so New Delhi is again taking recommendation from itself to make 370 inoperative.

Therefore, you have exercised one constitutional provision in such a way that you have nullified the protection given by another constitutional provision. That's an elementary proposition of law: what you can't do directly, you can't do indirectly.

What has happened is this: It is New Delhi which has defined the constitutional relationship between India and the state, and not the state defining its constitutional relationship with India. The Instrument of Accession, Article 370, Delhi Agreement, Supreme Court decisions, notably Prem Nath Kaul (1959), all have emphasised that it is only the state that can define the constitutional relationship, and the Indian Constitution makers don't have the competence to impinge on the powers of the state. That is something which the government would need to defend, and quite robustly, if it wants to get away with what they've done.

(Edited excerpts from the Conversation)

The Kashmir crisis isn't about territory. It's about a Hindu victory over Islam

Date: August 16, 2019

Author: Kapil Komireddi

Kapil Komireddi is the author of “Malevolent Republic: A Short History of the New India.”

For two weeks, Kashmir, India's sole Muslim-majority state, has existed in a surreal state of nonexistence. Since a presidential decree abolished the state, revoked its autonomy and partitioned it into two federally administered territories, the Internet has been shut down, cellular networks have been disabled, and even landlines went dead. Public assembly is banned, and citizens are under curfew. A soldier has been stationed outside every house in some villages. Eight million people have been cut off from the world — and from one another. Pharmacies are running out of medicine, households are low on food, and hospitals are clogging up with injured protesters. Narendra Modi, India's prime minister, insists that all this is for the good of the Kashmiris. India's grip on Kashmir has seldom been stronger. Its hold on Kashmiris, however, has never been more threadbare.

Modi's sudden takeover in Kashmir is the fulfilment of a long ideological yearning to make a predominantly Muslim population surrender to his vision of a homogeneous Hindu nation. It is also a way of conveying to the rest of India — a union of dizzyingly diverse states — that no one is exempt from the Hindu-power paradise he wants to build on the subcontinent. Kashmir is both a warning and a template: Any state that deviates from this vision can be brought under Delhi's thumb in the name of “unity.”

Those who believe that such a day will never come — that India's democratic institutions and minority protections will assert themselves — also never thought that someone like Modi would one day lead the country. Modi once seemed destined to disappear into history as a fanatical curio. As the newly appointed chief minister of Gujarat, he presided over the worst communal bloodletting in India's recent history in 2002, when 1,000 Muslims, by a conservative estimate, were slaughtered by sword-wielding Hindus in his state over several weeks. Some accused Modi of abetting the mobs; others said he turned a blind eye to them. The carnage made Modi a pariah: Liberal Indians likened him to Hitler, the United States denied him a visa, and Britain and the European Union boycotted him.

Kapil Komireddi, 'The Kashmir crisis isn't about territory It's about a Hindu victory over Islam' (*Washington Post*, 16 August 2019) <https://www.washingtonpost.com/outlook/the-kashmir-crisis-isnt-about-territory-its-about-a-hindu-victory-over-islam/2019/08/16/ab84ffe2-bf79-11e9-a5c6-1e74f7ec4a93_story.html>

But Modi expanded and solidified his appeal among India's Hindus, a religious majority whose resentment at being invaded and ruled for centuries by Muslims had been papered over for decades with platitudes from India's secular elites. He used three powerful tools to propel his ascent. The first was sadism, the hint that, under him, Hindu radicals could indulge a dormant bloodlust: After the killing of a Muslim man in police custody, for instance, Modi mused at a 2007 rally, "If AK-57 [sic] rifles are found at the residence of a person ... should I not kill them?" (The crowd roared back: "Kill them! Kill them!") The second was schadenfreude, an exultation in the torment of defenseless minorities: At an earlier rally in 2002, Modi had ruminated on the fate of the Muslims displaced by the recent Gujarat riots, asking: "What should we do? Run relief camps for them? Do we want to open baby-producing centers?" His audience erupted with laughter. "We have to teach a lesson to those who are increasing population at an alarming rate," he said. The final affect was self-pity, a license for Hindus to regard themselves as the real victims. He told Parliament that India had been a slave nation for more than 1,000 years and claimed that there were forces out to kill him.

Since his 2014 election to the premiership, bigotry has been ennobled as a healthy form of self-assertion. Lynchings of Muslims — breathlessly demonized as jihadists devoted to seducing and converting Hindu women — by aggrieved Hindu mobs have become such a common sport that dozens of videos of grisly murders circulate on WhatsApp groups run by Hindu nationalists. Last summer, a minister in Modi's cabinet garlanded eight men who had been convicted of lynching a Muslim man. In this universe, Kashmir could never remain autonomous, a place impervious to the desires of a majority happy to see its will done by violence.

Modi's re-election this year emboldened the supporters whose rage he skillfully incited. The prime minister rarely acknowledges the murders of minorities. Rarer still are instances when he condemns them. Not once, in fact, has he memorialized, by name, Muslims slain by Hindu fundamentalists. This is not an accident. It is a small step from letting Hindu vigilantes subjugate their Muslim neighbours to subjugating them himself, using the power of the state, as he has now done in Kashmir.

Modi's political awakening occurred in the training camps of the Rashtriya Swayamsevak Sangh, a rightwing paramilitary group that incubated the modern politics of Hindu nationalism. The RSS introduces young "volunteers" to the vast pantheon of supposed villains who plundered and emasculated India over the ages — the medieval Islamic invaders, the accommodationists like Mohandas Gandhi and the Congress party he led, the Muslim nationalists who mutilated India to create Pakistan and sought to abscond with Kashmir — and exhorts them to shed their Hindu impotence. The

effect on Modi's young mind was so powerful that he came to regard the RSS as his family, abandoned his wife and mother, and wandered through India as a catechist of the Hindu nationalist cause.

By seizing Kashmir, Modi has mollified votaries of Hindu nationalism and established himself as the father of what they proudly call the "New India." Kashmir was always at the top of their wish list, which also includes the construction of a temple in Ayodhya, where a mosque stood for half a millennium before Hindu nationalists razed it in 1992; the erasure of small privileges granted to minorities (such as a subsidy for the Muslim pilgrimage to Mecca); a legal end to religious conversions by Hindus; an extralegal suppression of interfaith romance and marriages, especially when the bride is Hindu and the groom Muslim; and, ultimately, the rewriting of the constitution to declare India a formally Hindu state.

But can India, the most heterogeneous society on Earth, survive the ascent of a majority like this? In his stirring inaugural speech to the first freely elected assembly of Kashmir in 1951, Sheikh Abdullah, the wildly popular socialist who championed Kashmir's accession to India, laid out the choices before Kashmiris. India's commitment to "secular democracy based upon justice, freedom and equality," he explained, negated the "argument that the Muslims of Kashmir cannot have security in India." India's constitution, Abdullah said, "has amply and finally repudiated the concept of a religious state, which is a throwback to medievalism." Abdullah denounced Pakistan, a quasi-theocracy that waged a war in 1948 to seize Kashmir, as "a feudal state" where "the appeal to religion constitutes a sentimental and a wrong approach." But his rejection of Pakistan was also a reminder to India that secularism was the nonnegotiable condition of Kashmir's allegiance. Kashmiris, he said, "will never accept a principle which seeks to favor the interests of one religion or social group against another." That sentence was aimed then at Pakistan. It applies now to India.

Kashmiri separatists who once labeled India a "Hindu state" could be dismissed at the time as chauvinists, and India could credibly argue for Kashmir's place within its polyglot fold: The religion of Kashmiris was irrelevant to their full citizenship of the Indian state. But now the separatists' claim against India has as much substance and weight as Abdullah's against Pakistan. The argument of "inclusive nationalism" deployed by Modi's predecessors to persuade Kashmiri separatists to participate in elections is unavailable to him, a religious nationalist. An India that has ceased to be secular will have forever lost its argument for Kashmir. The calm currently imposed on the region conceals a deep rage that is waiting to erupt. The abuse of Kashmir justified by Modi as "integration" may, if it is not confronted and reversed, be the beginning of the end of India's unity.

The Right Law for the Wronged People

Date: August 17, 2020

Author: Aman

Aman is a lawyer working in Delhi and Kashmir and is an Assistant Professor of Legal Practice at Jindal Global Law School.

Speaking about the Supreme Court's delayed and evasive responses to the questions around the lack of 4G internet in Jammu and Kashmir for a year now, lawyers Suhrith Parthasarathy and Gautam Bhatia ended a recent piece by saying that the court must now ask itself if "the people of J&K are subjects to be ruled over, or are they citizens who possess rights against the state?"

The suggestion that the people of Jammu and Kashmir are 'subjects' raises an important question: if this is their effective status in the eyes of India's highest court, then is it possible to grapple with questions that their 'subject hood' raises without seeking recourse to international law?

Even without the Supreme Court's evident lassitude, how is it conceivable that questions about the historical title of a contested territory (confounded by the process of colonisation and decolonisation of the "princely states"), on self-determination, on the legality of the accession and the continued administration, and now the scuttling of Article 370 can avoid the scrutiny of international law? More so, when these questions are far from settled, and, consequently, not a purely "internal" matter for India.

In choosing to look towards international law, it is not my suggestion that themes in international law like sovereignty, statehood, self-determination and occupation, and the institutions that engage with them, are not contested. I am also not oblivious to the fact that the very discipline of international law – as Noura Erakat, Victor Kattan and Eyal Benvenisti point out in the context of Palestine – has also been weaponised to justify oppression. Such "lawfare", for example, finds manifestation in Israel denying the pre-mandate status of Palestine – and its status as an occupier, on the grounds that it supposedly took the "land" from "no sovereign".

At the same time, international law has also given liberation movements a site for resistance. The efforts towards bringing Israel's occupation and crimes within the scrutiny of institutions like the International Criminal Court is evidence of such resistance in our times. Outside the context of

Aman, 'The Right Law for the Wronged People' (*The Wire*, 17 August 2020) <<https://thewire.in/law/jammu-and-kashmir-international-law>>

Palestine too, there is the relatively recent example of the International Court of Justice ruling against the illegality of the “continued occupation” of the Chagos Islands by the British.

In fact, international law also has a huge relevance for post-colonial states – especially those which have themselves started aping the power structures and practices of their predecessors. This is also especially true of questions around self-determination, where post-colonial states tightly hold on to territorial boundaries produced as a result of what is, many times, an incomplete decolonisation. And, often, justifying this by invoking the (in)famous tenet which is used “[to ensure] that acts of self-determination occur within the established boundaries of colonies, rather than within sub-regions” without regard (and, often, in active denial) to known exceptions, practices, lived realities and other nuances.

The limitations of constitutional law and constitutional courts

The criticism of international law being shaped by power also applies, in a varying degree, to domestic law as well. Take for example, Article 370 whose drafting and adoption is mired by lies (for example, admissions about the status of the accession in the constituent assembly), and is itself premised on a questionable accession – shadowing the history and aspirations of many.

The eventual result, as Parthasarathy himself points out, was the use of the provision for an unaccountable method of extension (with significant changes) of the Indian constitution to Jammu and Kashmir (through executive orders), chipping away the autonomy through several cuts over many years. Similarly, the taking away of the limited benefits of such autonomy last August (for instance the protection and privileges assured to permanent residents) through ostensibly constitutional means, and premising such a move on false promises of equality and development, is nothing but “lawfare”. It is, in fact, quite similar to the motivation of weaponising domestic law for the “defensive annexation” of the Golan Heights.

Going back to the question that Parthasarathy and Bhatia ask *now* – this should have actually been posed on many occasions in the past, seeing the institutional response towards questions about Jammu and Kashmir.

For years, the Supreme Court has failed miserably in speaking the right “law” to power in cases directly about impunity in Kashmir, such as Lakhwinder Kumar, Karmveer Singh, Masooda Parveen, the Kunan Poshpora incident and the Pathribal massacre. Even if one were to (incorrectly) discount impunity related issues on the ground that the issue is a general one, the Supreme Court has also gone

against the text and intention of Article 370, and turned a blind eye to the events that orchestrated the impugned constitutional changes by:

1. Validating executive orders used to amend the constitution that applied to Jammu after the dissolution of the Constituent Assembly of Jammu and Kashmir in 1957, through legal fictions per which the legislative assembly of Jammu and Kashmir had similar constituent powers.
2. Allowing broad, unfettered powers of “modifications” to the Indian constitution as it applied to the state Jammu and Kashmir.
3. Destroying the institution of the elected Kashmiri *Sadar-i-Riyasat* (and also strengthening the conduit for Union interference through governors rule) by allowing the Union to go against the strict amendment procedures of Article 370.
4. Subordinating the Jammu and Kashmir constitution to the Indian constitution despite the former drawing no power or validity from the latter.

In doing these, it is important to not lose sight of the civil liberty issues that were attached to cases like *Sampath Prakash*. The court in allowing the amendments through executive orders – also sanctified an “Article 35(c)” of the constitution as it applied to the state. This effectively provided for an embargo on judicial review of the executive’s powers to detain people without charge or trial. Interestingly, this provision challenged in *Sampath Prakash* was in operation for 25 years from 1954.

This, along with the limited vocabulary of domestic law to call something an occupation/annexation, illustrates how constitutional law may not be effective in dealing with questions like historical title, accession, or the right of self-determination. This is all the more so seeing the response of the court in failing to do what it is/was constitutionally expected to do. In such times, it is indeed an irony that it is international law that has been criticised for being slow and ineffective.

Whose law is it anyway?

Looking exclusively towards the constitution and domestic law also poses a few other challenges.

First, is the import of using constitutional law in such a context. Take for example, the Israeli Supreme Court’s decision to strike down the law that regularised the confiscation of private Palestinian lands by settlers. It did so on the ground that it violated the Israeli Basic Law on Human Dignity and Liberty and was, therefore, unconstitutional. Though a welcome result, Joseph Weiler and Michal Saliternik argue that the “choice to evade the preliminary question of whether a Knesset law can apply in the Territories, and to examine instead whether the law’s infringement of Palestinians’ property rights is

compatible with Israeli constitutional norms, can be seen in some paradoxical way as ‘annexationist reasoning’.”

Naturally, though not in an entirely similar scenario, taking recourse to constitutional law in Jammu and Kashmir when the accession and its terms (that form the basis of the constitutional link), are subjects of inquiry makes the use of the constitution somewhat doubtful.

Secondly, constitutional law and its remedies may for many questions be only “inward looking” – explorable only within domestic laws and territorial imaginations. Also, the constitution should not be used to provide conscience to our own colonialism. One can ask how useful is it going to be to retrieve Article 370 in its unabrogated avatar? Would we be fine if it allows for the same executive powers highlighted above with the same Supreme Court as the watchdog?

Further, the use of a fundamental rights regime *alone* often invisibilises the nature of the Indian administration in Jammu and Kashmir. Take for instance the reference to “collective punishment” by the five UN Special Rapporteurs in their report on the communication blockade imposed in August last year. The blockade is undeniably a violation of the human rights framework that finds space in our fundamental rights chapter. Yet, calling it out as a human rights violation *alone* takes away from the appropriateness, historical usage and gravity of a term usually reserved for occupations and armed conflicts.

Third is the question of “faith” that people – especially ‘subjects’ – have on a normative framework. As mentioned above, international law has often been the site for resistance in such contexts. Quite recently, speaking on the ICJ hearings on the alleged Rohingya genocide, Raiss and Azeezah write how “The importance of the moment exceeded what was happening inside the courtroom during the hearings and spilled over into the streets outside – where hundreds of Rohingya and their allies [...] gathered to demonstrate their solidarity with the Rohingyas’ historic quest for justice and accountability.” A similar parallel, though not necessarily representative of every voice, can be seen in how Kashmiris have viewed “UNO Sahab” – the nickname for the United Nations Military Observer Group in India and Pakistan in Srinagar – and the ‘UNO Chalo’ marches, indicating how the UN, though not without question, has often been seen as “a powerful interlocutor committed to enacting their aspirations and delivering their long-awaited justice”.

The recent UN High Commissioner for Human Rights reports on Jammu and Kashmir in 2018 and 2019, despite their limitations, were seen by some as a welcome intervention by the UN, and somewhat reflective of a similar faith. Together with this, the use of terms like “self-determination” and

“occupation” by many, and the acknowledgement of India’s laws being instruments of an occupying force also suggests the utility of looking beyond constitutional law.

Conclusion

In acknowledging the role of international law, we also need to come to terms with how international law plays out on streets and in resistance (quite like the constitution during the anti-Citizenship Amendment Act protests), and brings visibility and sometimes attached pressures by international actors to end abuses of power.

Looking beyond constitutional/domestic laws and institutions does not necessarily mean giving up on engagement with them altogether. Further, despite the inertia of the international legal process and the frustrations it has seen in places like Palestine and Western Sahara, it is important to start asking these questions and counteract, in the limited capacity that law can, the barriers and blind spots seen elsewhere in attaining results. By delaying a debate on these questions in our discussions, or *at least* an acknowledgement, we make the delay attached to international law a self-fulfilling prophecy.

Encounters of the ‘Fake’ Kind

Date: May 09, 2020

Author: Anuradha Bhasin Jamwal

“Allegations of fake encounters and other abuses by Indian security personnel abound. None of the accused men have been tried in civil courts during three decades of the armed conflict owing to the legal impunity provided by Armed Forces Special Powers Act (AFSPA) that requires Indian government’s sanction for prosecuting the personnel accused of abuse.”

Three families belonging to the poor nomadic tribe from Rajouri in Kashmir are still waiting for the DNA results more than three weeks after they identified three men slain in a gunfight with Indian forces as their ‘missing’ kin. According to the official version of the ‘encounter’, three men were killed on July 18 inside an orchard during a joint operation of Army, Police and CRPF. It was not until August 10, 23 days later, that the Rajouri families discovered the photograph of the dead men on social media and made their claim, averring that they were innocent and laborers. The Army and Police have ordered two separate probes and DNA samples were collected within days of the allegations.

Kashmir, however, is neither unfamiliar with ‘staged encounters’, nor with fudged DNAs and forgotten probes. Ten years ago, in a similar case of killing of three civilians, who were passed off as foreign terrorists, in Macchil area of Kashmir had ended up in the rare conviction and sentencing of the army personnel in court martial proceedings in 2015. The convicted men were subsequently let off by the Army Tribunal which reversed the verdict.

Allegations of fake encounters and other abuses by Indian security personnel abound. None of the accused men have been tried in civil courts during three decades of the armed conflict owing to the legal impunity provided by Armed Forces Special Powers Act (AFSPA) that requires Indian government’s sanction for prosecuting the personnel accused of abuse.

In 2011, a Kashmir based human rights group, JKCCS, filed a slew of applications under Right to Information Act (RTI) to find that at least 35 such pleas for prosecution sent to India’s defence ministry had been rejected but grounds were not explained. In 2018, the J&K government had sought sanction

Anuradha Bhasin Jamwal, 'Home Opinion Encounters of the ‘Fake’ Kind' (*Kashmir Times*, 5 September 2020) <http://www.kashmirtimes.com/newsdet.aspx?q=104774&fbclid=IwAR0oMzmvQOhCmUgKR41%E2%80%8EbaKXhifO_WPBN%20Si2r6kNyjmt-m-xahd8rjVATno%20%E2%80%8E>

for prosecuting the accused men in uniform. A subsequent query filed by an RTI activist revealed that the government had rejected the request for sanctioning prosecution in 47 cases.

The culture of impunity is best epitomized by the Pathribal fake encounter of March 2000 which coincided with then US president Bill Clinton's visit to India. Five army personnel accused of killing 5 civilians and passing them off as foreign ultras evaded the net by using AFSPA as a shield. It took 14 years of litigation for Indian Supreme Court to direct the army to conduct court martial proceedings against the accused personnel. Two years later, the summary court martial proceedings into the case concluded with a clean chit to the accused men without placing details of the trial in the public domain. The present case in question bears an uncanny resemblance to that of four casual laborers allegedly picked up by army personnel from Jammu city with the lure of promising them jobs as porters in April 2004. They were taken to Lolab, 365 kilometers away, and allegedly killed and buried. An anonymous letter that named eight army-men reached the family of one of the porters a year later, triggering a probe but its outcome was lost in the oblivion.

Accountability and fair probes have been a casualty in the face of allegations of human rights abuse. This should be of far greater concern at a time when the trust deficit between Kashmiris and Indian government has deepened to irreparable levels. Since April this year, after 100 people turned up at a militant's funeral, the security forces are discreetly burying the bodies at undisclosed places, using pandemic as a pretext. The decision is probably also guided by the recent past of mammoth gatherings at the funerals, which some security experts view as sites of mobilizing support for insurgency. But as three of those bodies interred in unmarked graves are now a ground for contestation, all the other unidentified slain militants are being seen with skepticism, feeding local perceptions of being reduced to expendables as a policy, especially when the past is littered with stories of enforced disappearances and unmarked graves.

The anxieties of the security agencies that in the past bodies have become sites of mobilizing rebellion may not be entirely misplaced. However, perpetuation of abuse, impunity and institutional injustice provide the main fuel in inspiring young men to pick up the gun. Militancy had plunged in Kashmir coinciding with peace process between India and Pakistan at the beginning of the first millennium. However, the brutal handling of street protests, initially peaceful, in 2008, 2010, denial of fair probe in Shopian rapes and murders of 2009 began to give a fresh impetus to militancy 2012 onwards. Many young men were driven by their own personal experiences of harassment and abuse to pick up the gun and this is well-documented. A possible spiral of anger stemming from the fake encounter allegations and bid to hush up the probe may well threaten security in the region. A related incident may add to

India's headache. Apanch believed to have been kidnapped in Kashmir went missing on August 19. Five days later, an audio clip, purportedly of some militant emerged on the social media with the claim that the man has been killed and his body not returned to his family "in view of Covid-19". Though, police were tight-lipped and questioned the veracity of the clip, few days later the body was found buried in an orchard in Shopian and speculations are rife whether this is a retaliatory offensive by a militant organization. In 2018, when allegations of police harassment to families of local militants in a bid to force the latter to surrender surfaced, some militants had kidnapped family members of some cops as a bargaining point.

Further adding to India's spiral of human rights abuse are the latest cases of brutal action on a religious procession of Muharram, teargassing and shot-gun pellets injuring and even blinding dozens of people. According to one media report, 250 people have been injured in the last weekend. In the summer of 2016, 80 people were killed and thousands injured by bullets, pellets and tear-gas shells, leading to prolonged spiral of violent anger on the streets and triggering an epidemic of young men joining ranks of armed rebels to fight the mighty Indian state.

As trust deficit between India and Kashmir hits rock-bottom, the latest trends, providing ample arsenal for eruption, could well multiply India's headaches. The primary concern should, thus, be to address the violations and the culture of impunity to stop Kashmir's further descent into chaos and salvage India's tarnished image abroad with respect to human rights.

J&K's Controversial New Domicile Law Faces a Legal Challenge

Date: August 08, 2020

Author: Umar Maqbool

The domicile law brought in by the Bharatiya Janata Party-led Central government in the union territory of Jammu and Kashmir is now facing a legal challenge. Petitioners have said that parliament has not delegated its authority of enacting laws for prescribing employment or appointment for a government job on the basis of residence to the Central government under the J&K Reorganisation Act.

The new domicile rules, enacted by the Ministry of Home Affairs through an executive order in March this year, reserves government jobs in J&K for its 'domiciles', which also includes non-locals living in the UT for 15 years and children of Central government employees serving here for 10 years.

Before the reorganisation of J&K, non-locals were not eligible for jobs in the erstwhile state due to special constitutional safeguards incorporated in the constitution of India through a presidential order of 1954.

Grounds for legal challenge and route adopted for enacting law

Three petitioners – two domiciles of Haryana and one from the Ladakh union territory – have challenged amendments made in the Jammu & Kashmir Civil Services (Decentralization and Recruitment) Act, 2010, on the grounds that they violate Articles 14, 16, 19 and 21 of the constitution.

On August 4, the Jammu and Kashmir high court sought responses from the Centre and J&K administration on the petition within four weeks.

Notified by the MHA on March 31 under The Jammu & Kashmir Re-Organisation (adaptation of state laws) Order 2020, these amendments were incorporated into the law by invoking Section 96 of the J&K Reorganisation Act.

As per this provision, the Central government has powers to make adaptations and modifications to laws, whether by way of repeal or amendment, for facilitating the application of any law to the J&K and Ladakh union territories.

Umer Maqbool, 'J&K's Controversial New Domicile Law Faces a Legal Challenge' (*The Wire*, 8 August 2020) <<https://thewire.in/government/jammu-and-kashmir-domicile-rules-legal-challenge>>

One of the main grounds for challenging the law is that parliament has not delegated its lawmaking powers under Article 16(3) of the constitution to the Central government under Section 96 of the Jammu and Kashmir Reorganization Act, 2019.

The petitioners have also submitted that the power delegated under Section 96 shall not be, in any manner, construed as a delegation of parliamentary power under Article 16(3) of the constitution. Article 16(3) says parliament can make any law prescribing employment or appointment for a government job on the basis of residence.

“Nothing in this Article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment,” reads the constitutional provision.

According to the petitioners, the power delegated under Section 96 was only for the purpose of facilitating the applications of already prevailing laws in the former state of Jammu and Kashmir, or to make laws applicable to new union territories of J&K and Ladakh.

They have contended that every modification or adaptation of any law must be done in that reference only, and not beyond.

Spotlight on Article 35A

The legal challenge to the domicile rules has underlined the importance of Article 35A, which safeguarded exclusive rights of permanent residents of the erstwhile state in jobs before last year’s unilateral constitutional changes.

Article 35A, which was incorporated in the constitution through “The Constitution (Application to Jammu and Kashmir) Order, 1954’, protected special rights of J&K’s permanent residents on employment, acquisition of immovable property, etc.

On August 5 last year, Article 35A was abrogated by superseding The Constitution (Application to Jammu and Kashmir) Order, 1954 through constitutional order 272.

A former law secretary of J&K, who did not want to be named, said that domicile law and rules are susceptible to challenge on the grounds of discrimination, unless some kind of protection is given in the constitution itself on the pattern of Article 371A-G.

“Article 14 and 16 of the constitution of India do not permit discrimination in matters of employment on the grounds of residence. In that sense, barring non-residents from employment in the UT is

violative of Article 14 and 16. This was why Article 35A had protected any challenge to restrictions placed on employment and purchase of immovable property in the J&K state,” he said.

He said the concessions made in northeastern states are protected by Article 371.

“Domicile law and rules are vulnerable unless some kind of protection is given in the constitution itself on the pattern of Article 371A to 371G,” he opined.

Criticism of domicile law

The domicile law has faced widespread criticism in J&K, as people see it as a first attempt towards changing the region’s demography.

The law opens jobs to ‘outsiders’, which was not possible before the abrogation of J&K’s special status.

Under the law, a person living in J&K for at least 15 years is eligible for all jobs in the UT. It also extends domicile rights to children of Central government employees who have served in the UT for at least 10 years.

J&K's New Domicile Order: Disenfranchising Kashmiris, One Step at a Time

Date: May 30, 2020

Author: Mirza Saaib Beg

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In the absence of any representative government in Jammu and Kashmir, the Centre has exercised undiluted and direct control in the region through a bureaucratic administration since June 2018.

Nine months ago, India's parliament, acting on legislation moved by the Narendra Modi government, unilaterally terminated Jammu and Kashmir's unique constitutional position, ending its autonomous status within the Indian Union.

Last week, the Jammu and Kashmir administration notified the Jammu and Kashmir Grant of Domicile Certificate (procedure) rules, 2020. These rules provide a fast-track procedure for issuance of Kashmiri domicile certificates, within 15 days, to people from any part of India. The sense of urgency to legalise the region's new status is further underscored in the new rules since non-compliance with the time frame provided therein attracts a penalty of Rs. 50,000 from the salary of an errant officer.

The domicile certificate has been made mandatory for employment in Kashmir following amendments to the Jammu and Kashmir Civil Services rules. Eligible individuals from any part of India will also be granted the right to purchase immovable property in J&K, something that has not been possible till now in J&K and is still not possible in those parts of India governed by special laws and provisions.

Over the past one year, we have observed a grotesque, euphoric celebration by a broad cross-section of people across India on the disenfranchisement and dispossession of Kashmiris through these legislative changes. In response, Kashmiris have realised that we cannot indulge in the luxury of despair and despondency. We need to, and will continue to, engage in the persistent labour of resistance and hope, despite the reckless violation of our rights, and of democracy, by the Indian state.

The new 'domicile' rules are a major departure from an established body of historical precedent, law and jurisprudence. This position was guaranteed to Kashmiris under the Delhi Agreement of 1952, the

Mirza Saaib Beg, 'J&K's New Domicile Order: Disenfranchising Kashmiris, One Step at a Time' (*The Wire*, 30 May 2020) <<https://thewire.in/rights/kashmir-domicile-law>>

Presidential Order of 1954, Article 35A of the constitution of India and Part III Section 6 of the constitution of Jammu and Kashmir.

These instruments and articles recognised the right of Jammu and Kashmir to define its citizens, known as “permanent residents” or popularly called “state-subjects” based on a 1927 notification by the erstwhile king of Jammu and Kashmir. Through the new rules, with retrospective effect, a “permanent resident” has now been replaced with “domicile” even though no instrument has ever granted such power to the Indian government.

The rules grant eligibility of domicile to new classes of people, including migrants, Central government employees, Indian armed forces personnel and their children who meet the eligibility criteria.

It is pertinent to add that in this new arrangement, there is no space for a diaspora Kashmiri whose parents do not have an existing certificate of permanent residence, to obtain domicile without living in the region for 15 years or serving the Indian government for 10 years. Effectively, the child of an Indian citizen from any part of the country is eligible, even if the child has never lived in Kashmir, but the child of a diasporic Kashmiri may not be eligible if the parent does not possess an existing certificate of residence.

Despite the Indian state being overwhelmed with the economic collapse, migrant labour crisis and COVID-19 pandemic, the desire to subdue the Kashmiris has been funnelled with astringent and virulent zeal. It drives home the message to the people of Kashmir that nothing, not even a medical emergency, can prevent the Indian state from doing what it wants to do in J&K.

The rules do not merely grant people from all parts of India a right of residence in Kashmir. They also engineer a situation where Kashmiris must submit a certificate of permanent residence for verification of domicile if Kashmiris want the jobs where a domicile certificate is now required.

The certificate of permanent residence was a constitutionally valid document and has been held by numerous judgments to be a “conclusive proof of residence”. Under the new rules, it merely carries evidentiary value for residence. Therefore, if a Kashmiri fails to meet the new criteria, whether by malice, manipulation or by design of the new rules, the revocation of residency rights will inevitably lead to their involuntary transfer from Kashmir in search of shelter and employment. All these initiatives have sparked fears of demographic change, militarised settlements, dispossession and alienation of land in Kashmir.

It is relevant to mention that since 1995, Israel has been escalating the use of residency revocation as a punitive measure when the Israeli interior ministry started reinterpreting the 1952 Law of Entry. In 1952 Israel enacted its own Nationality law and repealed the Palestine Citizenship Order of 1925.

Israel uses three discriminatory (and illegal) criteria to forcibly transfer Palestinians:

1. If they have been living abroad for an extended period.
2. Based on a 1995 high court judgment, Palestinians need to establish that their “centre of life” is in Jerusalem in order to maintain residency rights.
3. Accused of breaching “allegiance” or “minimum loyalty” to Israel. In 2006, this provision was first used against four Hamas members elected to the Palestinian Legislative Council. International humanitarian law explicitly forbids the occupier, in this case, Israel, from demanding the allegiance of an occupied population.

The revocation of residency forms part of a widespread and systematic policy to transfer the protected Palestinian population, and may amount to a crime against humanity under Article 7 of the Rome Statute, to which Palestine is a party.

For Kashmir, the new domicile rules are just another reminder that the Indian government can alter its position at any point to suit the circumstances. Earlier, Prime Minister Modi had given an assurance to a delegation of members of a pro-India political group that the interests of J&K residents would be protected in government jobs and land laws. However, by these changes, all eligible Indians can compete against J&K residents for jobs and benefits, indicating how much respect the prime minister has even for pro-India politicians, as well as how much he values his own words. While earlier, a total of 480,000 government jobs were only for permanent residents, the new law opens the field for any Indian citizen who has been living in the state for a certain period.

This is especially disconcerting at a time when the 2016 Economic Survey Report had pegged a quarter of J&K’s population between 18 and 29 as unemployed. The diminution of our rights is set to increase the levels of unemployment as well as hasten the disenfranchisement of Kashmiris while setting the stage for demographic changes. With the dilution of their ‘domicile’ status, Kashmiris will find it difficult to obtain work in most sectors of employment. While the rules are silent on this aspect, there are fears that through incremental displacement of rights, Kashmiris could also lose benefits from welfare schemes for food, health care, children, the elderly and people with disabilities.

These changes are an erasure of Kashmir's history as a princely state that was not under direct British rule, and a project in creating homogeneity – so that there is no legal difference between a Kashmiri and someone from any part of India who has lived in Kashmir for a specified period.

Kashmiris were once state-subjects of a princely state. We were then made permanent residents of an autonomous state within the Indian Union. Today we are being made 'domiciles' of a Union territory, that too, without our consent. Extrapolating from the developments taking place, it is not hard to imagine the Kashmiri landscape seeded with predatory militarised settlements similar to Palestine. The implications can only be calamitous.

The threat of demographic change, loss of livelihood and increased competition for scarce resources is bound to electrify an already incensed population. In any sensible democracy, this situation would be alarming but authoritarian and xenophobic actions seen over the last year suggest that Modi's government is neither sensible nor democratic.

It's Been 9 Months. What Did the Revocation of J&K's Special Status Achieve?

Date: April 27, 2020

Author: Badri Raina

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Taking the revocation of Articles 370 and 35A to be a *fait accompli* – since it may be a vain expectation that the Supreme Court will, at any time in the future, restore what the government has scrapped – the question that may now be asked is: nine months down the road, what has this revocation delivered?

Politically, of course, the Hindutva right wing has succeeded in realising its long-standing “nationalist” agenda. It has stamped and sealed a message to Kashmiri Muslims that their decision to throw their lot in with a Hindu-majority India in the wake of the partition was no great favour, and that they must learn to view themselves, not in terms of any exclusive historical perspective, but as just another part of India’s country-wide Muslim minority.

Thus, the revocation has achieved the erasure of the extraordinary choice that the then only Muslim-majority state had made while acceding to the Indian dominion when the terms of the partition may, more naturally, have induced them to a contrary resolve. And most remarkably, when the Hindu maharaja of the then princely state had wished to retain his independence from both dominions.

Such erasure, therefore, conterminously cocks a snook at the struggles that Kashmiri Muslim nationalist leaderships had waged for long years against the twin sectarianisms of Dogra rule and the Muslim League – struggles which, more than most things then happening, had contributed to cementing the secular foundations of the freedom movement, and of India’s claim to becoming the opposite of what the League had brought about by obtaining a separate state on the grounds of faith.

The scrapping of Article 370 has also repudiated Sheikh Abdullah’s political idealism – expressed resonantly in his inaugural speech to the constituent assembly of Jammu and Kashmir on November 5, 1951 – that the decision J&K was making would, in the decades to come, help bolster the conviction of all Indian Muslims in a secular and democratic future, guaranteed by a constitution that enshrined the principle of equality to all Indian citizens, and respect for all religious faiths. And, even more particularly, help to shore up respect for regional identities in an egalitarian, federal republic, citing what Gandhi had said in our darkest hour: “I look at the hills, and my help comes from there”.

Badri Raina, 'It's Been 9 Months What Did the Revocation of J&K's Special Status Achieve?' (*The Wire*, 27 April 2020) <<https://thewire.in/rights/jammu-kashmir-article-370>>

Beginning from the first stirrings for freedom among Kashmiri Muslims in 1931, evolving Hindutva opinion in the Jammu region had come to view such stirrings as inimical to the majority Hindu population in Jammu, leading to the emergence and foregrounding of the Praja Parishad, and later on, the Jana Sangh. Sheikh Abdullah and the National Conference were beginning to be viewed as hegemony that would garner all the fruits of independence and of the accession to India and, chiefly, political control.

That the terms of integration with India, based on the terms of the accession, had been negotiated by a popular Kashmiri leadership for over five long months with the constituent assembly of India, and the draft of what was to become Article 370 prepared by Gopalaswamy Ayyangar, and piloted by Sardar Patel despite opposition from both within the CWC and the constituent assembly, did not weigh with the RSS.

It must be recalled that Sardar Patel wrote to Nehru on November 3, 1949, when Nehru was abroad in the US, about how he (Patel) had “prevailed” in obtaining the consent of the constituent assembly on the matter of granting special status to Jammu and Kashmir. Not to speak of the fact that Shyama Prasad Mookerjee was a member of the constituent assembly when the draft was approved with his signature on it as well.

The decision of the Abdullah government, however, to grant land to the tiller without any compensation to erstwhile landowners was to become a trigger for the Praja Parishad agitation in Jammu, led by Mookerjee, who now sought full integration of the state with the Union, and the rescinding of the special status formalised in the Delhi Agreement of 1952.

Sadly, it is a little-known fact that the imbroglio had actually reached a solution endorsed by all parties in Jammu and Kashmir and the Central government as a result of a tripartite exchange of letters between Nehru, Abdullah, and Mookerjee.

On January 9, 1953, Mookerjee wrote to Nehru that while the Parishad would not object to any special position given to the Kashmir Valley, it demanded the full integration of Jammu and Ladakh with India.

Nehru rejected the proposal outright, reminding Mookerjee that the latter had assented to the Delhi Agreement, but, in a detailed response, Abdullah pointed out how forces in Pakistan and elsewhere were looking forward to such divisions, to unleash all kinds of mayhem.

In his letter of February 17, 1953, Mookerjee agreed to the proposal that would grant regional autonomy to all three regions – contained in a 45-page report submitted to all parties – and that the

Delhi Agreement which had formalised special status to Jammu and Kashmir be “implemented in the next session of the Jammu and Kashmir Constituent Assembly”.

As a result, Nehru asked for a withdrawal of the agitation in Jammu, which Mookerjee agreed to consider. Sadly, Mookerjee passed away in June 1953.

On July 2, the Regional Autonomy Report was sent to Durga Das Verma, the underground dictator of the agitation, who returned it with his assent on July 3. Had this tripartite agreement not been vetoed by the RSS eventually, there may well have been no “Kashmir problem”.

Be that as it may, having now accomplished a “full legal integration” of the territories of the erstwhile state, and expecting the full endorsement of the Jammu region to the move, the Central government through its agent, the lieutenant governor, has now formulated new domicile rules pertaining to the new Union territory – a move that many have seen as betokening the real point and purpose of the revocation of Article 370 and 35A.

It is now stipulated that anyone who may have resided in the state for 15 years, or whose wards may have studied there for seven years and taken a class 10 or 12 examination, will be eligible to be a state subject; and thereby eligible both for jobs, scholarships and land rights in the state.

Many see this as a window for absorbing security personnel, bureaucrats and academicians into state services, public sector undertakings, state-run educational institutions etc., causing a shrinkage of opportunities for local residents who previously under the old state subject laws were alone eligible for these positions. Not to speak of parcelling out precious lands and other immovable property as well to hitherto non-eligible Indians – a provision in line with those that continue to exist in many other parts of the republic in Himachal Pradesh, the tribal regions of Telangana, Arunachal Pradesh, Sikkim, Nagaland and so on. But none of the latter is a Muslim-majority state.

Suddenly, however, the Hindutva right wing experienced concerted opposition to these new rules, not just in the Valley but in the Hindu-majority Jammu province – as matters of livelihood and identity came to the fore, transcending nationalist sentiments.

This new resistance is reminiscent of the decade of the 1920s when a combined opposition was launched in the erstwhile princely state against the induction of officers from outside, resulting in the state subject laws of 1927 – events in which Kashmiri Pandits had taken a leading role and raised the slogan “Kashmir for Kashmiris”.

As to the claim that the revocation of the impugned Articles would see a surge of development in the erstwhile state, there is very little that has happened over the last nine months that encourages such a prospect. There has been no beeline of investors either in Jammu or in the Valley, and no roadmaps for any such deluge to happen is in evidence either. That the “development” argument was always a red herring has been substantiated by studies that have shown that the erstwhile state was considerably ahead even of Gujarat in the matter of development as well as human development indices.

What, then, has the revocation achieved?

A complete abrogation of democracy in the state, and an unconscionable suppression of civil and democratic rights? A terminal alienation of the peoples, especially in the Valley, from the republic and its purported vision and promise?

The ruling Hindutva forces have tirelessly accused the Indian National Congress and Kashmir’s nationalist parties of having denied democracy to Kashmiris. Yet, what has happened is that the state has been demoted to a Union territory run by an unelected bureaucrat, and without an elected assembly now for close to a calendar year.

With no permission accorded to freedom of opinion if it is considered inimical to the powers that be, no right to free assembly or peaceful protest, and no permission even to the republic’s elected parliamentarians to visit and see things for themselves, even as chosen public representatives from select countries have been taken on guided tours to deliver an endorsement of the ruling dispensation’s actions.

Where is the full integration with the Union, and what are its contours? Has this been anything more than a political and cultural appropriation of the region with little or no benefit to the local residents, Kashmiri Pandits included?

Not to mention that this glorious assimilation has made not a jot of difference to the number of Indian security forces who have remained stationed there as before, battling an insurgency in a continuing saga of “disturbance”.

There is clearly little likelihood of the state assembly being reconstituted until after the proposed delimitation exercise is over. But the question remains: even if the delimitation exercise were to alter the balance of political weight in the state towards the Hindu-majority Jammu region, would that solve the problem in Kashmir, or instead exacerbate it?

All told, it does seem that beyond thumbing the nose of the historical aspiration for autonomy, deriving from the erstwhile constitutional arrangements between the state and the Centre, little of value has thus far been accrued to the people, be it in the Jammu region or in the Valley. Unless, of course, the collapse of the state's customary sources of revenue – tourism, crafts, horticulture – is to be counted as an achievement.

It must appear to be a cruel irony that even the exiled Kashmiri Pandits feel obliged to make the point that the dominance of the ruling Bharatiya Janata Party in the state has carried little change in their conditions and their so hoped-for return to the Valley on their desired terms—or any terms at all.

Even they have come to see the new domicile rules as a challenge as much to their livelihoods and status in their home state as a challenge to all other domiciles of old, regardless of region or community. A cruel consummation indeed.

As to a return to civic “normalcy,” the state has yet to see a full restoration of internet services; the common complaint is that the 2G facility is grossly inadequate for the needs of users. Those in Jammu are askance that the withdrawal of these facilities should have been made applicable to them as well, as though they also constitute a threat to internal peace.

Having opted for an authoritarian course in the erstwhile state over a democratic one – most reputed constitutional experts aver that the revocation could not have been operationalised without the concurrence of the state assembly and that the governor could not have been deemed to represent the elected, democratic opinion of Kashmiris – the Modi government continues to be on test with respect to the claims made on behalf of that course.

Who knows what is in store for the people of that blighted part of the republic?

Article 370 and The Paradox of Kashmir's Accession

Date: September 21, 2019

Author: Priyaranjan Jha and Pranay Jha

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The reading down of Article 370, which granted limited autonomy to the state of Jammu and Kashmir (Kashmir hereafter), by the Indian parliament on August 5, 2019, has evoked strong reactions from the supporters and the opponents of this move.

Those in favour of repealing Article 370 have often argued that its revocation is consistent with the principles of Indian federalism (albeit in more crude terms).

They contend that while state governments may exist and deal specifically with local issues, ultimately, the federal government should reign supreme.

Following this line of reasoning, Kashmir's special status under the constitution is an affront to the founding principles of India. To constrain the Union government's powers to make legislation affecting Kashmir is to elevate Kashmir's status above all other Indian states. And that is something India's ruling party and its supporters simply cannot abide.

These notions certainly seem to be forthcoming in Indian Home Minister Amit Shah's position on the special status of Kashmir. In a speech made to Parliament, he asserted "This treaty (Instrument of Accession) was not only made with Jammu-Kashmir, it was made with the 630 princely states of the nation. The treaty was made with 630 princely states, and 370 was not there."

The claim that Kashmir's instrument of accession (IOA) was functionally no different to those signed by other princely states is incredibly disingenuous.

By signing the IOA, the princely states ceded power to the dominion of India regarding defence, external affairs and communications. If the process of integration had stopped there, India would have remained a loose federation of autonomous states.

The India we know today was formed through a series of merger agreements signed by the heads of princely states, which incorporated their polities into the Union of India. These merger

Priyaranjan Jha and Pranay Jha, 'Article 370 and The Paradox of Kashmir's Accession' (*The Wire*, 21 September 2019) <<https://thewire.in/government/article-370-and-the-paradox-of-kashmirs-accession>>

agreements were often signed under duress with limited reference to the interests of the people they were affecting. Regardless, however, they can be perceived to have been accepted and entrenched by the acquiescence of subsequent generations residing in the state.

A faulty argument

Kashmir is different from other princely states because it never signed a merger agreement fully accepting the constitution of India. Instead, it explicitly negotiated autonomy which was entrenched in the Indian constitution through Article 370.

The provision allowed Kashmir to have a parallel constitution, ensuring that the provisions of Indian constitution were effective in Kashmir only with the concurrence of the Kashmir assembly – representative body of the state.

In light of this, to claim Kashmir's treaty was the same as that signed by 630 other states is to reduce the complex process of integration to one document. Integration was a multi-stage process that required negotiation with various princely states and unions. It cannot be condensed into a single procedure, as the BJP would have the world believe.

One justification for the reading down of Article 370 offered by the ruling BJP and its supporters is that it would accelerate the economic development of the state. Dubious as this argument is, even if one were to take it seriously, it would call for convincing the people of Kashmir, or their elected representatives, to vote for a complete integration with India.

There is a precedent for it. The state of Sikkim signed a treaty with India in 1950, which limited the role of India to defence, external affairs and communication, similar to the IOA signed with princely states. It was only in 1975 that Sikkim was fully integrated with India after its assembly passed a resolution to this effect and was ratified by a statewide referendum. That is the democratic way!

Ultimately, however, Modi's government seems unconcerned with historical realities in its path to reading down Kashmir's constitutional protections. In light of this, pointing to the inaccuracies in the way Kashmir's IOA and Article 370 are construed are unlikely to alter the position of BJP supporters and their ilk.

What hope then is left for those in favour of upholding Kashmir's constitutional status?

One option would be to seek a remedy under international law. This would involve making appeals to an international community that is often reticent to intervene in state matters, particularly when questions of 'territorial integrity' and sovereignty are raised.

Additionally, even if the international law could provide a resolution, its primary body, the International Court of Justice relies on the consent of the involved parties to hear matters. That nationalistic vigour with which the BJP has promoted its position on Kashmir makes it seem incredibly unlikely that it would now surrender itself to international law.

The Supreme Court

Perhaps a more realistic prospect is a favourable ruling from the Supreme Court of India. The question of whether Article 370 is indefinitely entrenched in the Indian constitution has been a vexing one for Indian courts. The article provides that it may only be repealed in conjunction with the assent of Kashmir's constituent assembly. That body was dissolved in 1957 and made no recommendations regarding an amendment to Article 370.

This poses a challenging issue for Indian courts as to whether the requirement for assent from the constituent assembly is a dead letter. Lower courts in India have posited that the requirement continues to operate, with Kashmir's state government now taking the place of the constituent assembly. Some, perhaps more ambitiously, have posited that following the dissolution of the constituent assembly, Article 370 has an eternal effect.

In any case, treating the assent of the governor of the state, a representative of the centre, as tantamount to the assent of Kashmiris or their representatives, which is what the current process of abrogation of article 370 has done, would make a mockery of the notion of federalism.

If the Supreme Court rejects these views and upholds the unilateral reading down of Article 370, an intriguing paradox comes into play for the BJP. Kashmir's IOA, which had been entrenched in Article 370(b)(i), would be successfully dislodged from the Indian constitution.

This would relegate the IOA's legitimacy in the domestic sphere and significantly alter the constitutional protections on Kashmiri autonomy.

Problematically though, the IOA is the very nexus of India's claims over Kashmir, which it often reverts to in disputes with Pakistan. It is the legal validation of Kashmir's status as *de jure* Indian territory.

Declaring the instrument meaningless would betray the inconsistencies of India's position over Kashmir. It would involve undermining the very document which India relies on as a source of its authority before the international community.

The aforementioned situation creates a paradox, which calls for immediate explanation. It seems that Modi is faced with a perplexing choice. He may either relentlessly dismiss the rights of Kashmiris or maintain India's legitimacy in the global sphere.

One Year On, Modi's Kashmir 'Master Stroke' Has Proven to Be a Massive Flop

Date: August 04, 2020

Author: Manoj Joshi

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It's been a year now that the Bharatiya Janata Party government delivered its Kashmir "master stroke". Just like the other "greatest hits" – demonetisation, Goods and Services Tax, the Christmas Day descent on Lahore, the 9 pm-9 minute lighting plan to destroy COVID-19 – the Kashmir one has also been a flop, if not disaster.

Yes, militant leaders have been eliminated and public protest and stone-throwing prevented. Figures show that the level of violence has not really come down. Data collected by the South Asia Terrorism Portal reveals that the levels of violence were coming down at the beginning of this decade, with the lowest point reached in 2012 when 19 civilians, 18 security personnel and 84 terrorists/extremists killed. But in just eight months of 2020, 17 civilians, 34 security personnel and 154 terrorists/extremists have been killed.

It is convenient to blame Pakistan for the continuance of violence in the state, but the reality is that the August 5 decision has only increased the recruitment of locals into the separatist militancy. Pakistan, if anything, is playing a waiting game.

It is difficult to describe what happened in Jammu and Kashmir as anything else but political vandalism. A state which was part of the Union under very difficult and dangerous circumstances, was demoted and ripped apart through questionable legal means.

The highest court of the land has yet to hear the urgent issue of the constitutionality of the J&K Reorganisation Act, as well as a slew of petitions relating to the detentions of various leaders, the withdrawal of 4G services and the misuse of draconian preventive detention legislation.

Even today, we have no answer as to why this happened, other than the fact that the BJP's founding ideology says that Article 370 needs to be removed. But the demotion of a state to Union territory status? Was this not something purely punitive? Manifested by the detention of mainstream Kashmiri leaders ranging from the pro-BJP Sajjad Lone, to the former political ally of the BJP Mehbooba Mufti and the Abdullahs – politicians who have upheld the Indian

Manoj Joshi, 'One Year On, Modi's Kashmir 'Master Stroke' Has Proven to Be a Massive Flop' (*The Wire*, 4 August 2020) <<https://thewire.in/politics/narendra-modi-kashmir-master-stroke>>

flag in the state under extremely trying circumstances. In one fell stroke, the entire spectrum of Kashmiri political opinion was declared hostile.

All this happened without any form of consultation with the people of the state, either directly through a referendum or through its elected representatives in the state legislative assembly. The notion that the Delhi-appointed governor somehow represented the 7.5 million people of the state is laughable.

Rajasthan is the latest example of how the combination of the executive and judiciary are working to deprive the people of the country of their democratic rights and processes. On one hand you have the governor preventing the elected state assembly from convening, and on the other you have the judiciary blocking moves to implement the anti-defection law.

And just why did Modi decide on this master stroke? The only answer is narrow political gain. It had nothing to do with terrorism, since all the indicators show that militancy and terrorism had been declining in the state since the mid 2000s. It had nothing to do with Pakistan, whose influence in the affairs of the state, too, had been declining.

But at what cost? The whole state has been imprisoned for the past year, deprived of political rights, modern means of communications, the internet. The reality is that protest has been contained simply because the state has become a large jail. Locking everyone up can be a strategy to fight crime, but with everyone in, on whose behalf are you fighting crime, anyway? Alarming, what is happening in Kashmir does have unpleasant echoes of China's Xinjiang policy.

The army and the paramilitary forces remain a major presence, with their numbers boosted since last August. The media functions under a censorship regime, more draconian than the one that operated in the dark days of the insurgency in the early 1990s. The economy of the state is, of course, devastated. And what can one say about the judicial system when just last week, the J&K administration extended the detention of People's Democratic Party leader and former chief minister Mehbooba Mufti by another three months – she has been held since August 5 last year – even as her petition challenging the detention has been pending with the Supreme Court since February this year?

Since the mid-1950s, the reality has been that Article 370 was something of a bogeyman. It had been systematically hollowed out by various presidential orders over the years. In the process, J&K became more closely integrated to the country. The process was long drawn out, as it should have been, given the background of the state's accession to the Union. But the BJP saw

the need to remove the article as an exercise in political showmanship aimed at signalling their animus against Muslims in the country. Now, a fraudulent delimitation of exercise is planned to gerrymander the state's constituencies so that the salience of the Valley, which is Muslim-majority, is reduced, if not eliminated.

The whole notion that the demotion of the state was aimed at promoting economic growth is looking like a cruel joke. But it will be easy to blame COVID-19 for it. All the talk about companies fighting with each other to invest in the Valley is a chimera. In the present situation, Kashmir is simply not a place anyone would want to invest in, with or without the coronavirus.

Having put the entire Kashmiri political class on the other side of the pale, the government is now left with no alternative but to carry on with its repressive policies. An effort to create a new level of political discourse through panchayats has been a failure. The reality is that we have an angry and sullen population in the Valley.

Notwithstanding its hollowing out, the Kashmiris were content with the fig-leaf of "specialness" that Article 370 provided. Wanting to feel special is not something unusual in India. Several states in the north-east get special treatment under Article 371.

Actually, the issue is about the idea of India. It is one thing to celebrate the diversity of the country and encourage the self-esteem of the people by celebrating their uniqueness, and quite another to iron out all the differences into one uniform Hindi-speaking Hindutva nation with one history, one culture and one leader that the BJP seems to be wanting to do.

Kashmir's future

Date: October 24, 2020

Author: A.G. Noorani

The writer is an author and a lawyer based in Mumbai.

THE National Conference led by Dr Farooq Abdullah and the People's Democratic Party (PDP) led by Mehbooba Mufti have joined hands to face the onslaught on Kashmir's rights launched by the BJP government on Aug 5, 2019. On the eve of that vicious attack, these two and other political parties had come together to set up a united front to combat the dire threat to the very existence of Kashmir. A well-drafted, unanimous statement called the Gupkar Declaration was issued.

The very next day, the blow fell. Abrogation of Article 370 of India's constitution, which supposedly guaranteed Kashmir's autonomy and its special status, was always the BJP's dream. The Modi regime did worse. It destroyed Kashmir's very identity. Kashmir was now to be ruled as a centrally governed union territory along with Jammu with a lieutenant governor at the head. Ladakh was lopped off to be centrally governed. The political parties have rightly decided not to contest an election under the new set-up and thus legitimise it. What is afoot is a plan to confer supremacy on Jammu and BJP rule over Kashmir.

The assembly has 111 seats. In 2002, the status quo was frozen by law until 2026. "Until the relevant figures for the first census taken after the year 2026 have been published, it shall not be necessary to constitute a (delimitation) commission to determine the delimitation of the assembly constituencies."

Ominously, the centre has set up a delimitation commission as part of its abrogation process. The entire game is unconstitutional and dishonest. Article 370 cannot be amended let alone abrogated. The centre has set at naught Kashmir's constitution. It will have panchayat raj.

The PDP has been split by one of its former ministers, Altaf Bukhari. He is a great admirer of Bakshi Ghulam Mohammed who, in concert with Nehru, had Sheikh Abdullah removed from office as premier and imprisoned for 11 long years.

A.G. Noorani, 'Kashmir's future' (*Dawn News*, 24 October 2020) <<https://www.dawn.com/news/1586748/kashmirs-future>>

India has based its rule on several props. One is a mole in the Kashmir government. Before his arrest, prime minister Jawaharlal Nehru had marked a copy of his letter to Shaikh Sahib to Bakshi. Abdullah mentioned that to Nehru. It had no effect.

The worst of the lot was P.D. Thakur. “What does morality have to do with politics?” he asked governor B.K. Nehru, who records in his memoirs how the Intelligence Bureau’s pouches were used to send lakhs of rupees to buy MLAs to remove Farooq Abdullah as chief minister.

India’s Intelligence Bureau was itself suborned by Vallabhbhai Patel early enough, as its director B.N. Mullick recorded in his memoirs. Unlike Nehru, Patel did not like his reports and he did as desired. Former spy chief A.S. Dulat writes that that the Intelligence Bureau was “key ... to the central government’s hold on Kashmir”.

This sordid game succeeded only because the principal political elements in Kashmir were divided and fought bitterly against each other. That explains the roots of militancy. Gupkar holds out hope that Farooq Abdullah would at long last bury the hatchet and present a united front to New Delhi. After their release from imprisonment the major parties of the Gupkar conclave of Aug 4, 2019, met again in Srinagar at Farooq Abdullah’s residence on Oct 15, 2020. They decided to form an alliance called People’s Alliance for the Gupkar Declaration.

Farooq Abdullah struck a fresh note: “Dialogue with all the stakeholders who are involved in the problems of Jammu & Kashmir” — ie Pakistan. He pledged to reach out to the people. Above all, Kashmir’s leaders must come out with sets of proposals; a duty they have evaded. Why not a conclave on the lines of the one Shaikh sahib convened in 1968 and 1970?

President Pervez Musharraf and prime minister Manmohan Singh had brought Kashmir to the gates of a settlement. Small minds in India, Pakistan and Kashmir wrecked it; some for personal reasons. Kashmiris were obsessed with Geelani & Co. He is now a spent force.

The red lines are: India will not accept Kashmir exercising autonomy; Pakistan will not accept the LoC as the international border; Kashmiris will not accept partition or denial of democracy. The Musharraf-Manmohan formula met all these tests in its famous four-point formula.

Domestically, the alliance must heed the needs of the common man who has suffered a lot. Its agitation must be peaceful and constitutional. Once confidence is established it must assert the fundamental rights to assemble peaceably and march in procession.

The hateful politics has harmed the poor shopkeepers. The alliance must draw up a programme for attending to the needs of the common man which the Hurriyat harmed.

It must win the confidence of the people, draw up a list of grievances and work for their redress. The test for the top leadership of Kashmir has just begun. They have acted wisely. History will not forgive them if they fall apart and fail the people.

