



From Special Status to Lieutenant Governor: A Genealogy of Article 370

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Abstract:

The disputed State of Jammu and Kashmir was accorded a special status under Article 370 of the Indian Constitution when it acceded to the Dominion of India in 1947. The nature and operation of Article 370 has in the past generated a lot of debate and controversy between the protagonists and antagonists of this special position. The special position, which was constantly eroded over the decades, was finally neutralised on August 5, 2019 by the President of India. This was followed by the Constitution Order 273 and the Jammu and Kashmir Reorganisation Act, 2019 that terminated the existence of the State and bifurcated it into two Union Territories: Union Territory of Jammu and Kashmir and Union Territory of Ladakh.

The present paper aims at studying the nature and operation of Article 370 in the backdrop of the circumstances in which it found its place in the Constitution of India. It argues that Article 370 as originally enacted was permanent and formed a part of the basic structure of the Constitution. As such its unilateral amendment without the concurrence of the State Constituent Assembly is constitutionally suspect and ultra vires the Constitution. This paper also analyses the impact of the impugned Constitution Order on the reorganisation of the erstwhile state of Jammu and Kashmir and affirming that such practices have eroded the federal character of the Indian Constitution in the process.

Keywords:

Abrogation, Article 370, Constitutional Orders, Instrument of Accession, Special Status.

I. INTRODUCTION

The British left India in August 1947. The process of leaving was mediated by the Indian Independence Act, 1947 (here after referred as “Act”), which stipulated for the division of the British Indian Empire into two independent dominions— Dominion of India and Dominion of Pakistan. At the time of passing of this Act there were more than 500 *Princely*

*States*¹ including the State of Jammu and Kashmir (Lamb 1990). The political relationship of the States with the British Crown was described as *Paramountcy*. *Paramountcy* was an arrangement that entitled the British Crown control over the foreign affairs, admiralty and maritime rights of the States (Gledhill 1970). Most often subject to the restrictions indicated, internal affairs of an Indian State were the Prince's responsibilities. In each State there was a member of the Indian Political Department known as the Resident or the Agent whose duties were to advise the ruler and report to the Viceroy (Gledhill 1970). In practice these States had been divided into three categories. First category was fully empowered and enjoyed in principle full legislative and jurisdictional powers. The Jammu and Kashmir was included in this category. Second category was not fully empowered, the British exercised a measure of control specified in some formal engagement over internal administration. This varied from state to state. Rest were just landed estates possessing extremely limited governmental rights (Lamb 1990). With the passing of the Act, the British *Paramountcy* over the *Princely States* lapsed.² The States were free to join either of the Dominions.³

The *Princely State* of Jammu and Kashmir acceded to the Dominion of India under extraordinary circumstances created by the entry of tribal raiders (Anand 2006). The State was accorded a special status under Article 370 of the Constitution of India (Anand 2006). Under this status, the provisions of the Constitution of India continued to apply with modifications and exceptions to the State. However, the special status as provided under Article 370 could not remain static as more and more provisions of the Constitution of India were applied to the State under different Presidential orders from time to time. This eventually resulted in the erosion of the State's autonomy. Finally, on August 5, 2019 the Indian President issued a notification whereby Article 370 was amended in such a manner that the State was finally stripped off its autonomy and special position.

II. ACCESSION OF JAMMU AND KASHMIR WITH UNION OF INDIA

In 1947, the *Princely State* of Jammu and Kashmir was governed by the Dogra ruler, *Maharaja* Hari Singh. To run the administration, the State had instituted the Jammu and Kashmir Constitution Act.⁴ At the time of division of the Indian Empire the *Maharaja* had failed to accede to either of the Dominions which rendered the political future of the State complicated. Eventually he offered to sign a standstill agreement with both India and Pakistan aimed at continuing the existing relationship pending his final decision regarding the future of the State (Anand 2006). This was a device which had emerged from the mechanism of Indian Independence Act, 1947. The Act enabled the State, what to do, following the lapse of British *Paramountcy* to ensure that the old arrangements of trade, communications and services continued as

¹ There were at least 562 of them. Alastair Lamb, *Kashmir A Disputed Legacy: 1846-1990*.

² "... the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at the date with respect to Indian States, all obligations of His Majesty existing at the date towards Indian State or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise" Section 7 (1) (b) of the Act.

³ Section 2 (3) and 2 (4) of the Act provided that:

"(3) Nothing in this section shall prevent any area being at any time included in or excluded from either of the new Dominions, so, however, that- (a) no area not forming part of the territories specified in subsection (1) or, as the case may be, subsection (2), of this section shall be included in either Dominion without the consent of that Dominion; and (b) no area which forms part of the territories specified in the said subsection (1) or, as the case may be, the said subsection (2), or which has after the appointed day been included in either Dominion, shall be excluded from that Dominion without the consent of that Dominion. (4) Without prejudice to the generality of the provisions of subsection (3) of this section, nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions."

⁴ Act XIV of Samvat 1996 (A.D. 1939)

earlier in British India. Pakistan agreed to the arrangement but India did not respond immediately and desired time (Lamb 1991).

It is significant to note that even if *Maharaja* had not negotiated a standstill agreement, both the Dominions were required to maintain the status quo in connection with the matters intended to be regulated by the Agreement. In this connection, Proviso to Section 7, clause 1 (c) of the Indian Independence Act, 1947 is significant. The Act maintained that,

Notwithstanding anything in paragraph (b) dealing with the lapse of *Paramountcy*... effect shall nearly as may be continued to be given to the provisions of any such agreement as is therein referred to which relate to Customs, Transit and Communications, Posts and Telegraphs or other like matters, until the provisions in question are denounced by the rulers of the Indian States on the one hand, or by the Dominion or Prince or other part thereof concerned on the other hand, or are superseded by subservient agreements.

In the course of these events, Kashmir came under a tribal attack from the north western region which created abnormal conditions in the State (Lamb 1990; Anand 2006). Amidst these abnormal conditions the *Maharaja* on 24 October, 1947, sent his Deputy Prime-Minister, B. L. Batra to New Delhi to seek help in the form of men, arms and ammunition from India (Lamb 1990). This was followed by a meeting of the Defence Committee of India on October 25, 1947 which was presided over by Lord Mountbatten, the Governor-General. It was realised that India would be justified in sending military assistance only if Kashmir acceded to the Indian union (Korbel 2008). While accepting the Instrument of Accession, Mountbatten, wrote a separate letter to *Maharaja*, which inter alia provided that:

In the special circumstances mentioned by Your Highness, my government have decided to accept the Accession of Kashmir State to the Dominion of India. Consistently, with their policy that in case of any State, where the issue of accession should be decided in accordance with the wished of the people of the State. It is my Government's wish as soon as the law and order have been restored in Kashmir and her soil cleared of the invader, the question of State's accession should be settled by a reference to the people...(Korbel 2008).

Meanwhile the government of Pakistan branded Kashmir's accession as an act based on fraud and violence and refused to accept it (Anand 2006). Following this India submitted a complaint against Pakistan under Article 35 of the Charter of the United Nations and thus the legality of the accession became a subject matter of debate. After prolonged deliberations United Nations Commission for India and Pakistan was established. A series of resolutions under Chapter VI of the United Nations Charter were adopted by the Security Council requiring a plebiscite for the people of Jammu and Kashmir to decide on the country which they wished to accede to.⁵

III. SPECIAL STATUS OF JAMMU AND KASHMIR

On January 26, 1950, the Constitution of India came into force. The Constitution accorded a special status to the State of Jammu and Kashmir under Article 370 which provided that:

Temporary provisions with respect to the State of Jammu and Kashmir.—(1) Notwithstanding anything in this Constitution,— (a) the provisions of article 238 shall not apply in relation to the State of Jammu

⁵ For details see S.C. Res. 702, U.N. Docs/Res/702 (April 21, 1948).

and Kashmir; (b) the power of Parliament to make laws for the said State shall be limited to— (i) 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 specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and (ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify. 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 the fifth day of March, 1948; (c) the provisions of article 1 and of this article shall apply in relation to that State; (d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order² specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State: Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government. (2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon. (3) 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

The Special Status of the State generated a lot of discussion and debate amongst the members of the Constituent Assembly of India. *Moulana* Hasrat Mohani, one of the members of the Constituent Assembly, at the outset questioned the very special status of the state. Shri Gopalaswamy Ayyangar, also a member of the Constituent Assembly, while replying to Mohani, pointed out the special conditions of Kashmir.⁶ Mr. Ayyanger emphasised that the Government of India had committed to the position that an opportunity would be given to the people of the State to decide for themselves, whether they would remain with the Republic or wish to go out of it. It had also been agreed that the will of the people through the Constituent Assembly of the State would determine the Constitution of the State as well as the sphere of the Union's jurisdiction over the State.⁷ He further pointed out that under the Instrument of Accession the Dominion of India acquired power to legislate for the State of Jammu and Kashmir in respect of defence, external affairs and communication. Ayyangar clearly explained to the Constituent Assembly that:

the second portion of this Article relates to the legislative authority of Parliament over the Jammu and Kashmir state. This is governed primarily by the Instrument of Accession—Broadly speaking that legislative power

⁶ See, Constituent Assembly Debates, Vol. X, p. 422.

⁷ Ibid., p. 424.

is confined to the three subjects of defence, foreign affairs and communications but as a matter of fact these broad categories include a number of items which are listed in the Instrument of Accession...⁸

Alan Gledhill prefers to call the State of Jammu and Kashmir an anomalous State because it stands on a different relationship to the Union from other States and enjoys a higher degree of autonomy (Anand 2006). According to him, other *Princely States* too had signed the instruments of accession similar to that signed by *Maharaja* Hari Singh. However, most of them later surrendered all political power including power of framing state Constitutions to complete the integration. By 1956, all States other than Kashmir had almost identical internal Constitutions and relations with the Union, prescribed by the Constitution. The Instrument signed by *Maharaja*, while relinquishing power over foreign affairs, the armed forces and communications, reserved all other attributes of sovereignty.⁹ The very fact that Article 370 as it found its place in the Constitution of India began with the words, "Notwithstanding anything in this Constitution..." shows that it was a self-contained provision which had a specific purpose of its own. A careful examination of the provisions of Article 370 clearly establishes that at the time of the commencement of the Constitution of India on January 26, 1950, the real basis of Constitutional relationship between the State of Jammu and Kashmir and the Union of India is determined by:

- i) The Instrument of Accession, and
- ii) Article 370.

IV. Deliberations of Jammu and Kashmir Constituent Assembly

The Constitution containing provisions relating to the State of Jammu and Kashmir was accepted and applied by the *Maharaja* through a proclamation issued on November 25, 1949. The proclamation stated that:

Whereas with the inauguration of the new Constitution for the whole of India now being framed by the Constituent Assembly of India, the Government of India Act, 1935, which now governs the Constitutional relationship between this State and the Dominion of India will stand repealed (Noorani 2011).¹⁰

It further stated that the Constitution of India shortly to be adopted by the Constituent Assembly of India shall in so far as it is applicable to the State of Jammu and Kashmir, govern the Constitutional relationship between this State and the contemplated Union of India (Noorani 2011). By virtue of Article 370 the Constituent Assembly of Jammu and Kashmir as mentioned in the Article itself was given authority not only to frame a separate Constitution for the State but to concur in the application of the Indian Constitution. The further progress of the Constitutional relation was thus contingent on the recommendations of the Constituent Assembly of the State. The Constituent Assembly of the State as provided by Article 370 (2) was convened and different committees were formed. The Assembly turned to its tasks and made the following decisions:

1. On the recommendations of the Land Compensation Committee, no compensation to be paid for the expropriation of the Big Landed Estates.
2. On the recommendations of the Basic Principles Committee, it was resolved that:
 - a. The basis of the political set up of the State should be fully democratic.

⁸ Ibid., p.426.

⁹ Ibid., p. 155

¹⁰ For proclamation see, "White Paper on Indian States", Appendix (LIV)

- b. The hereditary ruler ship should be abolished and instead there should be an elected head for the State to be designated as *Sadr-e-Riyasat*.
- c. The State should have a flag of its own (Anand 2006).

In order to implement the decisions of the Committees, the representatives of the Governments of Jammu and Kashmir and India met and arrived at an agreement known as Delhi Agreement, 1952 (Anand 2006). After Delhi Agreement, certain developments of far-reaching significance took place within the State. The then Prime-Minister of the State, Sheikh Mohammad Abdullah, was suspected of planning a session of the Constituent Assembly, which, instead of ratifying the accession of Jammu and Kashmir to India, would declare Kashmir independent. On top of these reports, there was also the highly inflammatory rumour that the United States was backing the idea of Kashmir's independence and the Sheikh had been encouraged in it when Adlai Stevenson had visited Srinagar (Korbel 2008). This eventually led to the dismissal and dissolution of the Sheikh's government and his subsequent arrest (Korbel 2006). After the dismissal of Sheikh, the Constituent Assembly met again in October 1953 to finalise the principles on which the Constitution of the State would be based and consider the implementation of the Delhi Agreement pertaining the relation between the State and the Union (Anand 2006).

V. THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER 1954

The Constitutional status of Jammu and Kashmir and its relationship with the Union of India has not remained static since it became its constituent unit. After the execution of Instrument of Accession and even after the commencement of the Constitution, more and more provisions of the Constitution of India were applied to the state under different Presidential orders issued from time to time under Article 370. While extending these provisions, not only was the autonomy of the State eroded but equally the spirit behind the incorporation of Article 370 in the Constitution of India was defeated.

The President, with the concurrence of the State Government, issued the Constitution (Application to Jammu and Kashmir) Order, 1954 primarily aimed at the implementation of the bulk of the provisions of the Delhi Agreement 1952 (Anand 2006). This Order elaborated the Constitutional position of the State of Jammu and Kashmir and its relationship with the Union of India. The main feature of the Order was that the legislative power of the Union Parliament which originally extended only to the matters specified in the Instrument of Accession. However, it was now extended *en-extendio* in respect of other matters in the Union and Concurrent Lists with exceptions and modifications specified in the Order in their application to the State of Jammu and Kashmir. The most important exceptions and modifications are listed hereunder: ¹¹

- I) Part I of the Constitution of India¹² was made applicable to the State, but in its application to the State, the following proviso was added to Article 3:
 "Provided further 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 State Legislature."
- II) Part III of the Constitution of India dealing with the Fundamental Rights was made applicable. However, in its application to the State of Jammu and Kashmir, Article 35A was added:

¹¹ For details see Constitution (Application to Jammu and Kashmir) Order, 1954.

¹² Part I of the Constitution of India specifies the territory of the Union.

35A—Saving of Laws with respect to the Permanent Residents and their Rights: Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the legislature of the State, —

- a) defining the classes of persons, who are, or shall be, permanent residents of the State of Jammu and Kashmir, and
- b) conferring on such permanent residents any special rights and privileges, or imposing upon other persons any restrictions, as respects—
 - (i) employment under the State Government;
 - (ii) acquisition of immovable property in the State;
 - (iii) settlement in the State, or
 - (iv) right to scholarship and such other forms of aids as the State Government may provide.

III) Article 248 of the Constitution of India dealing with the residuary powers of legislation by Parliament was not made applicable to the State.

IV) In relation to the treaty making powers of the Parliament under Article 253, the following proviso was added to:

“Provided that after the commencement of the Constitution (Application to Jammu and Kashmir) Orders, 1954 no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of the Government of that State.”

V) To Article 368, dealing with the procedure and power of the amendment of the Constitution, the following proviso was added:

Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by the Order of the President under clause 1 of Article 370 (Basu 1970).

VI. THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954 AND AMENDING ORDERS (1964 & 1965)

In 1964, by the Constitution (Application to Jammu and Kashmir) Order, Articles 356 and 357 (dealing with emergency-failure of constitutional machinery) were extended to the state. While there was already a provision in the State Constitution according to which the *Sadr-e-Riyasat* could proclaim emergency in case of failure of Constitutional machinery, following this Order an interesting legal position obtained wherein two state emergencies could be invoked within the State. Under this legal regime the Governor and the President could severally exercise their powers under Section 92 of the State Constitution and Article 356 of the Indian Constitution respectively.¹³

¹³ See Section 92 of the Jammu and Kashmir Constitution provided that 92. Provisions in case of failure of constitutional machinery in the State.- (1) If at any time, the *Governor 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 *Governor may by Proclamation- (a) 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; (b) make such incidental and consequential provisions as appear to the *Governor to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provision of this Constitution relating to anybody or authority in the State: Provided that nothing in this section shall authorise the *Governor to assume to himself any of the powers vested in or exercisable by the High Court or to suspend in whole or in part the operation of any provision of this Constitution relating to the High Court. (2) Any such Proclamation may be revoked or varied by a subsequent Proclamation. (3) Any such Proclamation whether varied under subsection (2) or not, shall except where it is a Proclamation revoking

One of the distinguishing features of the Constitution of the State was the title and appointment of the executive head. However, with the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1965, a change in the title of the headship of the State by substituting the word Governor for *Sadr-e-Riyasat* was instituted. Besides, the power to appoint Governor was given to the President. Earlier under section 27 of the State Constitution this power was exercised by the Legislative Assembly. By these changes State's autonomy was taken away and the State made at par with other states of Union of India.

In addition to these important Constitution orders various other orders were issued by the President eroding the special status of the State.¹⁴ A process of erosion that actually began in 1954, finally climaxed in August 2019, when the President issued Constitution (Application to Jammu and Kashmir) Order 2019.¹⁵ It was followed by Constitution Order 273. Almost simultaneously, the Parliament of India enacted *Jammu and Kashmir (Reorganisation) Act, 2019*. As a result of these measures, not only has the essence of Article 370 been completely compromised, the Constitutional autonomy of the erstwhile State has also been withdrawn and Jammu and Kashmir has been downgraded to the status of a Union Territory.¹⁶ Under the Reorganisation Act, the State has been bifurcated into two Union Territories called, Union Territory of Ladakh, and Union Territory of Jammu and Kashmir.

An analysis of the provisions of Article 370 clearly indicates that at the time of the commencement of the Constitution of India, on January 26, 1950, the legality of Constitutional relationship between the State of Jammu and Kashmir and the Union of India was determined by the Instrument of Accession dated October 26/27, 1947, and Article 370 of the Constitution of India.

Although Article 370 provided that the State was part of the Union by virtue of Article 1, which applied ipso facto through Article 370, yet the relations between the State and the Union were to be governed primarily by the provisions of Article 370 itself. Article 370 made Article 1, defining the territory of the Union, and the provisions of Article 370 defining the relationship of the State with the Union, applicable to the State at once and by their own force. The nature of this fact is further clarified by the proclamation issued by Dr. Karan Singh on November 29, 1949 which made the Constitution of India applicable to the State of Jammu and Kashmir. The proclamation stated that the Constitution of India shall in "so far as it is applicable to the State of Jammu and Kashmir, govern the Constitutional relationship between the State and the contemplated Union of India" (Poplai 1995). Consequently, the proclamation did not carry the Constitutional position any further than it stood after and as a result of the Instrument of Accession.¹⁷ The other provisions of the Constitution could be made applicable only on the recommendations of the Constituent Assembly of the State which did not exist at that time. Further, since Article 394 of the Constitution of India was not made applicable to the State under which it came into effect in rest of the Union. On the contrary, it was Article 370 itself which applied the Constitution of India to the State of Jammu and Kashmir subject to the provisions contained in that very Article. It was

a previous Proclamation, cease to operate on the expiration of six months from the date on which it was first issued. (4) If the Government or by a Proclamation under his section assumes, to himself any, of the powers of the Legislature to make his laws, any law made by him in the exercise of that power shall, subject to, the terms there of continue to have effect until two years have elapsed from the date on which the proclamation ceases to have effect, unless sooner (5) No Proclamation under this section shall, except where it is a Proclamation revoking a previous Proclamation, be laid before each House of the Legislature as soon as it is convened.

¹⁴ More than 45 constitution orders were issued from time to time amending the Constitution (Application to J&K) Order, 1954. A. G. Noorani, *A Constitutional History of Jammu and Kashmir*

¹⁵ C.O. 272, August 5, 2019.

¹⁶ Union Territories under the Indian constitutional scheme are directly governed by the Central Government without any semblance of real autonomy.

¹⁷ P N Kaul v. State of Jammu and Kashmir AIR 1959 SC 757.

also because of this very fact that the provisions of the Constitution of India relating to the States specified in Part B, contained in Article 238 were not applied to the State.¹⁸

The question of placing Article 370 in Part XXI¹⁹ of the Constitution of India has been contested by those who claim that the Article needed to be abrogated in order to complete the integration of the State with the Union of India and also by those who hold the view that the State can secede even after the commencement of the Constitution. There is also a view that Article 370 was placed in this Chapter as the future disposition of the State had remained undetermined. Since Article 1 was applied in relation to the State by Article 370 only, which itself being of a temporary character could go lock, stock and barrel.²⁰ In his book, *The Kashmir Question*, Noorani has also commented on the nature of Article 370. He has relied on the Constituent Assembly Debates of India and focussed on Shri Ayyangar's speech in the Assembly. According to him it highlights two features:

First, Article 370 was not intended and did not rule out a plebiscite. Second, the Constituent Assembly which Mr. Ayyangar mentioned was meant only to give a representative government of Kashmir and was not intended, likewise, to be an alternative to plebiscite (Noorani 1964).

It is also argued that the Instrument of Accession could be changed or abrogated by a bilateral act of the State and the Union, and accordingly it is conceived that the accession by the State would need nothing more than a Presidential declaration to the effect on the request of the Government of Kashmir (Diwan 1953). Nevertheless while the State of Jammu and Kashmir became a Constituent unit at the time of accession, yet its relationship with the Union of India needed a special provision in the Constitution of India. Since the Constitution of India was expected to be completed by November 1949, and the situation regarding Jammu and Kashmir both at the United Nations and in the State had entered a stalemate, it was deemed necessary to make provisions in the Constitution of India regarding the status of Jammu and Kashmir and its relationship with the Union of India. Article 370 accordingly provided that though the State became a constituent unit of the Union by virtue of Article 1, the relations were to be governed by the provisions of Article 370 itself. Accordingly, with these provisions the jurisdiction of Union Parliament was restricted (Jain 1978).

VII. ARTICLE 370—TEMPORARY OR PERMANENT?

The question whether Article 370 is temporary or permanent in nature has been considered by the judiciary from different perspectives. In *Prem Nath Kaul v. State of Jammu and Kashmir*,²¹ where the validity of the Jammu and Kashmir Big Landed Estates (Abolition) Act, 1950 had been challenged, the Court considered the nature and effect of the provision of Article 370. It was observed by Gajendragadkar J., that the execution of the Instrument of Accession by *Maharaja* with the Indian Union did not affect in any manner the legislative, executive and judicial powers in regard to the government of the State which then vested in him. Commenting upon the effects and object of Article 370, the judge observed that the effect of the application of Article 370 is to be judged in the light of its objects and its terms considered in the context of special features of the constitutional relationship between the State and the Union of India.²² The judge further

¹⁸ Sub-clause (a) of clause (1) of Article 370

¹⁹ Temporary, Transitional and Special provisions

²⁰ See White Paper on Constitutional Relationship of Kashmir with India, issued by Jammu and Kashmir Plebiscite Front, Srinagar (June 23, 1964).

²¹ AIR 1959 SC 749.

²² Ibid, SC 757.

emphasised that the Constitution makers were obviously anxious that the relationship between the States and the Union should be finally determined by the Constituent Assembly of the State itself and that was the main basis for, and purport of, the temporary provisions made by Article 370. So, the effect of its provisions must be confined to its subject matter.²³ However, it is interesting to note that the judgement does not decide the article in its entirety to be temporary. It appears that the judgement took a layered yet careful approach in characterising the permanence of article. In Sampat Prakash v. State of Jammu and Kashmir,²⁴ the continued application of Article 370 was challenged. Bhargava J; dealing with the contention raised by the petitioner, observed that clause (3) of Article 370 laid down that Article 370 would cease to be operative only when the President issued a notification to that effect on the recommendation of the Constituent Assembly of the State. But it was quite obvious that no such recommendation was made by the Constituent Assembly, nor was any order made by the President in that behalf. On the contrary, the Constituent Assembly made a recommendation that the Article would be operative with one modification to be incorporated in the Explanation to Clause (1) of Article 370. This modification was notified by the President.²⁵ This abundantly made it clear that the Constituent Assembly did not desire that Article 370 should cease to be operative, but in fact expressed its agreement to its continued application by making a recommendation that it should be operative with the said modification.²⁶ In one of the comparatively recent judgements on the point in SBI v. Santosh Gupta,²⁷ the appellants challenged the decision of the High Court striking down the application of a Union legislation, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002, to Jammu and Kashmir, on the ground that it conflicted with the corresponding State legislation controlling the legislative field, namely, Jammu and Kashmir Transfer of Property Act, 1920. In the course of this determination, the court while tracing the history behind the relationship between the Union and the state Jammu and Kashmir observed:

The first thing that is noticed in Article 370 is that the marginal note states that it is a temporary provision with respect to the State of Jammu and Kashmir. However, unlike Article 369, which is also a temporary provision limited in point of time to five years from the commencement of the Constitution, no such limit is to be found in Article 370. Despite the fact that it is, therefore, stated to be temporary in nature, sub-clause (3) of Article 370 makes it clear that this Article shall cease to be operative only such date as the President may by public notification declare. And this cannot be done under the proviso to Article 370 (3) unless there is a recommendation of the Constituent Assembly of the State to do so.²⁸

It has also been argued by writers like Noorani that the continued existence of the provision in the Constitution after the dissolution of the Constituent Assembly of the State has made it permanent, making its abrogation impossible without satisfying the condition precedent in clause (3). It is not difficult to associate this kind of permanence with anything other than the basic structure doctrine (Noorani 2000). The theory of basic structure was established in the Constitutional Jurisprudence of India in Keshvananda Bharti v State of Kerala.²⁹ The basic structure doctrine places an implied limitation on the amending power of Parliament to destroy the identity or integrity of the Constitution (Krishnaswamy

²³ Ibid., SC 761.

²⁴ AIR 1969 SC 1153.

²⁵ See the Ministry of Law Order No: (C.O. 44 November 15, 1952).

²⁶ AIR 1959 SC 761 .

²⁷ AIR 2017 SC 25.

²⁸ Ibid., para 12.

²⁹ AIR 1973 SC1461

2012). Although few features which are fundamental to the identity of the Constitution were spelled out in Keshvanada and some other cases³⁰ yet there is no exhaustive catalogue of such features. It seems that the determination of a particular provision or a particular feature has been left to the option of the Apex Court. The Supreme Court could have deliberated on this issue in Mohd Maqbool Damnoo v. State of Jammu and Kashmir³¹ while considering whether there were some basic features of the State Constitution. In this case the petitioner challenged the validity of Jammu and Kashmir Preventive Detention (Amendment) Act, 1967 on the ground that the Act had not been assented by the *Sadr-e-Riyasat* as provided in the explanation to Article 370. The counsel on behalf of the petitioner argued that the explanation to Article 370 (1), which contemplated *Sadr-e-Riyasat* as head of the State and as such neither President nor the Jammu and Kashmir Legislative Assembly had power to abolish the office. Because the position and importance of the explanation formed the kingpin of the whole Constitutional relationship, and to change this either there had to be an amendment of Article 370 (3) or a fresh Constituent Assembly had to be convened. The petitioner relied on the findings of the Supreme Court in Sampat Prakash v. State of Jammu and Kashmir³² and contended that the only way to modify Article 370 was specified in Article 370 (3) itself.³³ It is interesting to note that the Court speaking through Sikri J. upheld the argument of the Attorney General of India that the explanation to Article 370 (1) merely recognised the Constitutional position in the state and the essential feature of Article 370 (1) (b) and (d) is the necessity of the concurrence of the State Government at a particular time to be determined in the context of the Constitution of Jammu and Kashmir.³⁴ The petitioner contended that the amendment of sections 26 and 27 along with the change in the explanation had changed the fundamentals of the State Constitution. The counsel for the petitioner in support of his contention submitted for the consideration of the Court, the following passage from Golak Nath v. State of Punjab:³⁵

...if the fundamentals would be amenable to the ordinary process of amendment, the institution of the President can be abolished, the parliamentary executive can be removed, the fundamental rights can be abrogated, the concept of federalism can be obliterated and in short, the sovereign democratic republic can be converted into a totalitarian system of government.³⁶

It seems that the passage was quoted to draw the attention of the Honourable Court towards some fundamental or basic features of the Constitution. However, at that time the Supreme Court had not accorded recognition to the basic structure. But after the Keshvananda Bharti³⁷ and other cases that followed,³⁸ the concept has become a firmly embedded in the Constitutional jurisprudence of India. However, Sikri C.J. observed that the passage cannot be availed of by the petitioner as the nature of the explanation had not brought any change in the fundamentals of the State Constitution.³⁹ It is

³⁰ Waman Rao v. Union of India AIR 1981 SC 271; Raghunath Rao Ganpat Rao v. Union of India AIR 1993 1267; Indira Nehru v. Raj Narain AIR 1975 SC 2299; S R Bommai v. Union of India AIR 1994 SC 1918; L Chanra Kumar v. Union of India AIR 1997 SC 1125.

³¹ AIR 1972 SC 963.

³² AIR 1959 SC 761.

³³ Ibid. SC 965.

³⁴ Ibid.

³⁵ AIR 1967 SC 1643.

³⁶ Ibid, SC 969.

³⁷ AIR 1973 SC 1503.

³⁸ AIR 1959 SC 761.

³⁹ Ibid., SC 969.

worthwhile to mention that the Court did not take into cognizance the limitations imposed by section 147 of the State Constitution.⁴⁰

It appears that in principle these observations agreed with the point that there were some fundamental features of the State Constitution although it rejected that the change of designation of *Sadr-e-Riyasat* to Governor had not brought any alteration in the framework or the fundamentals of the State Constitution. It seems the Court has gone far beyond the well-settled principles of interpretation and thus misconstrued the provisions of Article 370 as well as section 147 of the State Constitution. Clause (3) of Article 370 clearly provides the mechanism or procedure for making changes in Article 370 itself. The clause makes it clear that,

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.

This makes it abundantly clear that any change in Article 370 could be done by the President on the recommendation of the Constituent Assembly alone. An argument has been offered by some writers that the framers of the Constitution of India while incorporating Article 370 visualised in sense a perpetual Constituent Assembly for the State (Teng 1975). Perhaps the makers of the Constitution visualised that in case the 'temporary provisions' under Article 370 were continued beyond the tenure of the Constituent Assembly, the Constituent Assembly would by a resolution initiate amendment in the provisions and recommend to the President accordingly. However, this was not done and the Constituent Assembly of the State was dissolved in 1957 after completing the task of the framing of the State Constitution. The force of this position was recognised by the Supreme Court in Sampat Prakash's case⁴¹ when it observed on the contrary that the Constituent Assembly of the State made a recommendation that the Article should be operative with one modification to be incorporated in the explanation to clause (1) of Article 370. This modification was notified by the President through the Ministry of Law Order No. C. 44.1952.

The rationale of the theory of basic structure lies in the implied limitation on the amending power of the Parliament to destroy the identity or integrity of the Constitution. The kind of permanence of a particular provision is difficult not to associate with anything other than the basic structure doctrine (Noorani 2000). The Supreme Court itself, in some cases, has used "permanent" in the sense of something becoming part of basic structure of the Constitution.⁴² In case of Article 370, the limitations on the amending power of Parliament are not only implied but express and specific. Apart from the non-obstante clause with which Article 370 (1) begins, clause (b) of Article 370 (1) mentions in categorical terms that the power of Parliament to make laws for the State shall be limited to those matters in the Union and Concurrent Lists which in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession. According to Article 370 (1) (c), the only provision which applied of their own force are Articles 1 and 370 itself. It is established beyond doubt that the Apex Court has time and again pointed to an implied limitation on the power of the Union to abrogate the provision. There is one more reason to think that the Article has

⁴⁰ Section 147 curtails the power of the State Legislature to amend the provisions of that very section.

⁴¹ AIR 1959 SC 761

⁴² See Raghunath Rao v. Union of India AIR 1993 SC 1267.

become part of the basic structure, since under clause (3) it requires the recommendation of a “higher law-making body” which cannot be equated even with the legislature, not to speak of President or the Governor (Nair 2019).

VIII. LEGALITY OF THE CONSTITUTION ORDERS

On August 5, 2019, the President of India issued Constitution Order 272 which was followed by the Constitution (Application to Jammu and Kashmir) Order, 2019.⁴³ Apparently, the Constitution Order 272 was issued by the President under Article 370 (1) with the concurrence of the Government of State of Jammu and Kashmir. Apart from making all the provisions of the Constitution of India applicable to the State of Jammu and Kashmir by superseding the Constitution (Application to Jammu and Kashmir) Order, 1954, it brought about an amendment to Article 367—an interpretation provision. The Constitution Order 272 provided that

To article 367, there shall be added the following clause, namely

(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir— (a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;

(b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the *Sadr-e-Riyasat* of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;

(c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers; and

(d) 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.

Almost simultaneously, the Parliament passed *Jammu and Kashmir (Reorganisation) Act, 2019*. Both, when Orders were issued and legislation passed, the State was under President’s Rule.⁴⁴ The reasoning of the Government seemed to be that it had only to take the consent of the Parliament, which acted on behalf of the Legislative Assembly which stood suspended under the President’s rule.⁴⁵ The Order 272 dated August 5, 2019 is shown to be based on the “concurrence” of the Government of Jammu and Kashmir. Whereas, the concurrence in real terms has been given by the “Governor” of Jammu and Kashmir which has not been mentioned in the notification. The basic issue that arises for consideration here is whether the Governor had any Constitutional or legal jurisdiction to give concurrence on behalf of the Government of Jammu and Kashmir to the impugned Notification (Constitutional Order 272) dated August 5, 2019? It may be argued that the Governor had no Constitutional or legal jurisdiction to give any concurrence because of following reasons:

- i) During President’s Rule under Article 356 of the Constitution, the Governor acts as an agent of the President and as such he can exercise only such powers as are delegated to him. The administration of the State under the Proclamation issued under Article 356 (1), is carried on by the State Governor as a delegate of the Centre (Jain 2016). It follows that the President of India, as the donor of power had himself no authority to give

⁴³ For Notification, See Notification issued by the Ministry of Law and Justice on 5th August, 2019.

⁴⁴ <https://economictimes.indiatimes.com/news/politics-and-nation/president-rule-in-jk-to-be-extended-for-6-more-months/articleshow/69759938.cms?from=mdr> (Last visited September, 12, 2020).

⁴⁵ <https://rstv.nic.in/bill-introduced-jk-will-cease-state-2-union-territories-created.html> (Last visited September, 12, 2020).

concurrence under Article 370. Thereby, he had no constitutional or legal jurisdiction to delegate the authority to the Governor to accord concurrence contemplated by the provisions of Article 370;

- ii) That the Governor of the State of Jammu and Kashmir has no authority of his own to give concurrence under Article 370 which is supposed to be preceded by an advice of the Council of Ministers. The Council of Ministers did not exist at all at that time;
- iii) The concurrence by the Governor as such amounts to usurpation of Constitutional jurisdiction and is nothing more than a colourable exercise of power.

IX. IMPLICATIONS OF THE EXERCISE OF POWER UNDER ARTICLE 370 (1) TO ALTER ARTICLE 367

A major lacuna in the validity of the Constitution Order, 272 remains that it indirectly amended Article 367 which being an interpretation provision provides the following:

(1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.

In its application to the State of Jammu and Kashmir, vide Constitution Order 48 (1954) clause 4 provided that the,

(a) references to the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the *Sadr-e-Riyasat* of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.

Later by the Constitution Order 74 (1965), it was provided that the reference to the Government of the State shall be construed as reference to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers. It is evident that the President of India by incorporation of the aforesaid provision in Article 367 has bypassed the procedure prescribed by the amendment as was adopted by an amendment carried out in Article 370 vide Constitution Order 44 on the recommendations of the Constituent Assembly.

It is argued that under the impugned Constitution Order 272, the President has superseded the Constitution Application Order, 1954 under which Article 367 with aforesaid modification had been made applicable as once again, after supersession, reapplied the same modification as it existed prior to the passing of the impugned order. This, for all practical purposes and implications is Constitutional fraud. To make an amendment to Article 370 a mechanism is provided in the Article itself. Needless to mention that Article 370 is a self-contained provision which is substantive as well as procedural in nature and prescribes the procedure for its amendment. It has been argued by Noorani that the powers of the President requiring concurrence was purely an interim mechanism and they were not meant to be applied once the Constituent Assembly of Jammu and Kashmir was formed. He has referred to the decision in the case of Premnath Kaul by clarifying that the exercise of powers both by the Parliament and the President were subject to the approval of the Constituent Assembly of the State (Noorani 2011). To substantiate his argument he cites the following portion from the judgement:

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 by the said Constituent Assembly in the said matters (Noorani 2011).

X. The Jammu and Kashmir (Reorganisation) Act, 2019

The impugned legislation which came into force on October 31, 2019 has bifurcated the State of Jammu and Kashmir and reduced its status to a Union-Territory. The Parliament, obviously, has assumed the jurisdiction only on the basis of Constitutional Orders, 272 and 273. The two Presidential orders for the reasons discussed above, are bad in law and against the prescribed procedure for any amendment to the provisions of Article 370. Therefore, no power vests in the Premnath Kaul Parliament to enact the impugned legislation.

Federalism in general represents a political system that binds a group of States into a larger, non-centralised, superior State while allowing them to maintain their political identities. Certain characteristics and principles are common in successful federal systems: a written Constitution or basic law stipulating the distribution and diffusion of powers among the constituent elements, which are substantially self-sustaining. Changes ordinarily require the consent of those affected.⁴⁶ The framers of the Constitution of India learnt a great deal from the experiences—the problems faces and the solutions attempted—of the federations of U.S.A., Canada and Australia and their approach to the structuring of Indian federalism was conditioned in a good measure by that knowledge (Jain 2015).⁴⁷

In Dr. Ambedkar's well-known description, "the Constitution of India is a federal Constitution in as much it establishes what may be called a dual-polity...which will consist of the Union at the centre and the States at the periphery each endowed with sovereign powers to be exercised in the fields assigned to them respectively by the Constitution." (Austin 1966).⁴⁸

In case of State of Jammu and Kashmir, keeping in view the circumstances under which it acceded to the Dominion of India and because of opting out of merger agreement, a kind of asymmetrical federalism was adopted which found its place in the provisions of Article 370. Federalism itself has been recognised as a basic feature of the Constitution of India.⁴⁹ In *Government N.C.T. of Delhi v. Union of India*,⁵⁰ the Supreme Court again noted that the federal balance of distribution of legislative and executive powers is a fundamental feature of Indian federalism. No doubt the existence of Article 3 of the Constitution of India vests a wide discretion on the Union to, inter alia, alter the boundaries of a State, or even create a new State. However, Article 3 does not specifically envisage the destruction of a State. The *Jammu and Kashmir (Reorganisation) Act, 2019* by splitting the State into two Union Territories, Ladakh and Jammu and 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 the principle of federalism.⁵¹ Article 3 of the Constitution of India was made applicable to the State of Jammu and Kashmir by the Constitution Order, 1954. In its application to the State, the following proviso was added:

To article 3, there shall be added the following further proviso, namely:

⁴⁶Britannica Concise Encyclopedia. Ukraine: Encyclopaedia Britannica (2006), P. 663, available at: https://www.google.co.in/books/edition/Britannica_Concise_Encyclopedia/ea-bAAAAQBAJ?hl=en&gbpv=0 (Last visited on 2nd October, 2020).

⁴⁷ Available at: http://14.139.60.114:8080/jspui/bitstream/123456789/1315/1/015_Indian%20Federalism.pdf (last visited on 2nd October, 2020).

⁴⁸ CAD VII, I, 33-34

⁴⁹ S R Bommai v. Union of India AIR 1994 SC 1918.

⁵⁰ Civil Appeal No. 2357 of 2017 (Supreme Court, July 4, 2018).

⁵¹ See Jhanvi Sindhu and Vikaram Aditya Narayan, "Parliament Doesn't Have the Power to Downgrade Jammu and Kashmir's Status to UT", Quint (August 5, 2019), available at: <https://www.thequint.com/voices/opinion/kashmirbifurcation-unionterritory-unconstitutional-violationfeudalstructure>, (Last visited on 12th September, 2020).

Provided further 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

Thus, although the State of Jammu and Kashmir formed a part of the territory of India under Article 1(3), it is not legal for Parliament to increase or diminish the area of Jammu and Kashmir or to alter its name or boundaries in the manner provided in Articles 3 and 4, if the legislature of Jammu and Kashmir does not consent. It is to be noted that here the status of Jammu and Kashmir, under Article 370, markedly differs from that of other States.⁵² Article 3 presents a remarkable feature of the Indian federalism, as under the provision of this Article, the territorial limits of the Constituent units can be altered, their names may be changed by an ordinary legislation enacted by the Parliament and the President has to ascertain only the views of the legislature of the affected State. But the expressed view of the concerned legislature is not binding on Parliament. This seems to be an unusual provision in the federal Constitution whose basic principle is the guarantee of the territorial integrity of the Constituent units (Joshi 1965). But in case of Jammu and Kashmir a strict federal principle was followed as it guaranteed the territorial integrity by virtue of the proviso added to Article 3.

It may be concluded that the de jure asymmetry cannot be retained if the territorial sanctity of the State is completely destroyed. Article 3 can be exercised in a manner to further the asymmetry and not destroy it—more so in the case of Jammu and Kashmir where it has to be exercised only with the consent of the State.⁵³ Neither the amendment orders nor the *Jammu and Kashmir (Reorganisation) Act, 2019*, can do away with the asymmetrical arrangement without the recommendation of the Jammu and Kashmir Constituent Assembly.

XI. CONCLUSION

The amendment of Article 370 of the Constitution of India and the *Reorganisation Act, 2019*, in pursuance of the Constitutional Orders 272 and 273 have raised constitutional issues of great significance. The day Jammu and Kashmir acceded to the Dominion of India; its constitutional position has not remained static. The State was accorded a special status under Article 370 because of the extraordinary circumstances under which the State acceded to the Dominion of India and because of not accepting the merger agreements and a model constitution for the states. Primarily only Articles 1 and 370 of the Constitution applied by their own force as per the mechanism devised by Article 370. However, by applying different provisions other than these two Articles through various Presidential Orders, not only the autonomy and the special status of the State has been eroded, but equally the spirit behind the incorporation of the Article has been defeated.

The limited nature of accession, non-execution of Merger Agreement between the Union and the State, the commitments made before the United Nations followed by its Resolutions, the position explained in the Constituent Assembly debates clearly demonstrate and establish the reasons and the cause of this special position. Article 370, as it came to be incorporated in the Constitution of India as a constituent unit recognised an asymmetry in the federal scheme recognised

⁵² In case of the other States, only the views of their legislatures are ascertained by the President before recommending the introduction of bill relating to these matters (Proviso to Article 3).

⁵³ See, Constitution (Application to J&K) Order, 1954.

by the Constitution⁵⁴ (Tillin 2016). It emerged in nature and operation both as a substantive as well as a procedural Article which prescribed its own procedure for its amendment. The main and essential link in the process of its amendment continues to remain the Constituent Assembly of the State of Jammu and Kashmir which was dissolved in 1957 after completing its task of framing the State Constitution. The continued existence of the provision in the Constitution after the dissolution of the Constituent Assembly of the State has made it permanent albeit the marginal note, making its abrogation impossible without satisfying the condition precedent in clause (3). Further, any amendment of the Constitution to destroy the identity or integrity of the Constitution violates the basic structure of the Constitution. The kind of permanence of a particular provision like Article 370, it is submitted, is difficult not to associate with anything other than the basic structure doctrine.

A major lacuna in the validity of the Constitution Order 272 remains that it indirectly attempts to amend Article 370 in the garb of amending Article 367. The amendment of Article 367 has been used as a tool to circumvent clause (3) under which the President is obligated to take prior recommendation of the Jammu and Kashmir Constituent Assembly for abrogating the provision. This is for all practical purposes and implications a fraud on the Constitution.

Federalism has been characterised as a basic feature of the Constitution of India. Keeping in view the circumstances under which it acceded to the Dominion of India and because of opting out of merger agreement, a kind of asymmetrical federalism found its place in Article 370. The *Jammu and Kashmir (Reorganisation) Act, 2019*, without obtaining the consent of the State Legislature as provided by the proviso to Article 3, in its application to the State, virtually extinguishes the State by splitting it into two Union Territories. 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 itself founded on the principle of federalism.

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⁵⁴ Louis Tillin has extensively deliberated upon the asymmetric character of the Indian Constitution alluding to the special status of the State of J&K and the North Eastern States of India. Louis Tillin, "Asymmetric Federalism" Sujit Chaudhary, Madhav Khosla et.al (eds), *The Oxford Handbook of The Indian Constitution*.

Reference List

1. Lamb, Alastair. 1991. *Kashmir: A Disputed Legacy: 1846-1990*. London: Roxford Books.
2. Gledhill, Alan. 1964. *The Republic of India: The Development of its Laws and Constitution*. London: Stevens & Sons Limited.
3. Jain, M. P. 1978. *Indian Constitutional Law*. Nagpur: Lexis Nexis.
4. Anand, A. S. 2006. *The Constitution of Jammu and Kashmir—Its Development and Comments*. Delhi: Universal Law Publishing Company.
5. Korbelt, Josef. 2008. *Danger in Kashmir*. Srinagar: City Book Center.
6. *White Paper on Indian States*, Appendix (LIV);
7. Noorani, A. G. 2011. *Article 370: A Constitutional History of Jammu and Kashmir*. New Delhi: Oxford University Press.
8. Basu, D. D. 1970. *Commentary on the Constitution of India* (Vol. 5). Nagpur: Lexis Nexis
9. Poplai, S. L. 1959. *Select Documents on Indian Affairs (Vol. II) -India-1947-50*. Bombay: Oxford University Press.
10. Noorani, A. G. 1964. *Kashmir Question*. Bombay: P.C. Manaktala & Sons Ltd.
11. Krishnaswamy, Sudhir. 2012. *Democracy and Constitution in India-A Study of Basic Structure Doctrine*, Oxford Scholarship Online
12. Teng, M. K. 1975. *Kashmir's Special Status*. Delhi: Oriental Publishers & Distributors.
13. Joshi, G. N. 1965. *Aspects of Indian Constitutional Law*. Bombay: University of Bombay.
14. Tillin, Louis. 2016. Asymmetric Federalism. In *The Oxford Handbook of The Indian Constitution*, ed. Sujit Chaudhary, Madhav Khosla, et. al. 540-559. Oxford: Oxford University Press
15. Austin, Granville. 1966. *The Indian Constitution: Cornerstone of a Nation*. Oxford: Clarendon Press.
16. Jain, M. P. 2015. *Indian Federalism: A Background Paper in Constitutional Developments Since Independence*, Indian Law Institute, New Delhi. 1-75.
17. Diwan, Paras. 1953. Kashmir and the Indian Union. *International & Comparative Law Quarterly* 2: 333-353.
18. Sindhu, Jhanvi and Vikaram Aditya Narayan. 2019. Parliament Doesn't Have the Power to Downgrade Jammu and Kashmir's Status to UT. *Quint* (August 5, 2019)
19. Nair, Balu G. 2019. Abrogation of Article 370: Can the President act Without the Recommendations of the Constituent Assembly? *Indian Law Review* 3: 254-279.
20. Noorani, A. G. "Article 370: Law and Politics", *Frontline* (September 16, 2000).
21. White Paper on Constitutional Relationship of Kashmir with India, issued by Jammu and Kashmir Plebiscite Front, Srinagar (June 23, 1964).

Web links:

1. <https://economictimes.indiatimes.com/news/politics-and-nation/president-rule-in-jk-to-be-extended-for-6-more-months/articleshow/69759938.cms?from=mdr>
2. <https://rstv.nic.in/bill-introduced-jk-will-ceases-state-2-union-territories-created.html>
3. https://www.google.co.in/books/edition/Britannica_Concise_Encyclopedia/ea-bAAAAQBAJ?hl=en&gbpv=0
4. http://14.139.60.114:8080/jspui/bitstream/123456789/1315/1/015_Indian%20Federalism.pdf
5. <https://www.thequint.com/voices/opinion/kashmirbifurcation-unionterritory-unconstitutional-violationfeudalstructure>

Acts/Statutes/Orders:

1. The Constitution of India, 1950.
2. The Jammu and Kashmir Constitution, 1952.
3. Constituent Assembly Debates.
4. Act XIV of Samvat 1996 (A.D. 1939).
5. The Constitution (Application to J&K) Order, 1954.
6. C.O. 272, August 5, 2019.

7. S.C. Res. 702, U.N. Docs/Res/702 (April 21, 1948).
8. The Ministry of Law Order No: (C.O. 44 November 15, 1952).
9. Constitution (Application to Jammu and Kashmir) Order, 1954.

List of Cases:

1. Waman Rao v. Union of India AIR 1981 SC 271.
2. Raghunath Rao Ganpat Rao v. Union of India AIR 1993 1267.
3. Indira Nehru v. Raj Narain AIR 1975 SC 2299.
4. S R Bommai v. Union of India AIR 1994 SC 1918.
5. L Chanra Kumar v. Union of India AIR 1997 SC 1125.
6. P N Kaul v. State of Jammu and Kashmir AIR 1959 SC 757.
7. Raghunath Rao v. Union of India AIR 1993 SC 1267.

