

# CONVERSATIONS ON ARTICLE 370 OF THE CONSTITUTION OF INDIA: A CRITICAL RESPONSE

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## **Abstract:**

*This article brings forth transformative ways of thinking on Article 370 of the Constitution of India beyond the contours of the predominant liberal and rightwing narratives. The narrative formed around Article 370 as a site for India's traditional, broadly accepted liberal discourse on Kashmir, restricted in terms of interpretation and devoid of any solution to the larger Kashmir problem, is unmasked. The article thus criticises dominant narratives that have come to define Article 370.*

## **Introduction:**

In a “unilateral” move, the Government of India, on August 5, 2019, revoked Article 370 of the Constitution of India (hereinafter Article 370), a controversial provision steering the relationship between the Union of India and the State of Jammu and Kashmir.<sup>1</sup> Article 370 was framed as an interim arrangement that existed between the newly formed Indian state and the princely state of Jammu and Kashmir and would cease to exist “only when the Kashmir problem [was] satisfactorily settled”<sup>2</sup> and when the people of Jammu and

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<sup>1</sup> ‘India revokes disputed Kashmir’s special status with rush decree’ (*Aljazeera*, 5 August 2019) <<https://www.aljazeera.com/news/2019/8/5/india-revokes-disputed-kashmirs-special-status-with-rush-decree>> accessed 20 November 2023

<sup>2</sup> Constituent Assembly Debates, vol 10, 17 October 1949 (10.154.293) <<https://www.constitutionofindia.net/debates/17-oct-1949/#135272>> accessed 20 November 2023

Kashmir would be given the opportunity “to decide for themselves whether they will remain with the Republic or wish to go out of it.”<sup>3</sup> With Kashmir unresolved for decades, this interim arrangement crystallised into a widely accepted “constitutional arrangement” in India’s federal political polity and tied Kashmir’s future to India permanently. Legally and constitutionally speaking thus, Article 370 was the only link connecting the Indian Union with the erstwhile state. In the liberal Indian imagination, however, Article 370 was understood to be an instance of a “special status” or “autonomy” accorded to a Muslim-majority state in a Hindu-majority country, and it was in opposition to this idea that the Hindu nationalist parties have always wanted to assert full control over Kashmir which would come in the elimination of Article 370. When the Parliament of India was in the process of abrogating Articles 370 and 35A, the whole of the population in Jammu and Kashmir was put under siege, and there was a complete communication blockade, including an internet shutdown lasting many months.<sup>4</sup> Taking note of the situation in Kashmir, the United Nations called the internet shutdown a “collective punishment of the people of Jammu and Kashmir.”<sup>5</sup> The siege, however, was not new to the people of Kashmir. In its modern history, Kashmir has had a tumultuous past, with mass movements being suppressed by the might of the state right from the year 1989 when the first armed insurgency started to continuous peaceful demonstrations in the first two decades of the 21st century.<sup>6</sup>

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<sup>3</sup> *ibid* (10.154.294)

<sup>4</sup> ‘145 days of internet shutdown in Kashmir, no word on service restoration’ (*The Economic Times*, 27 December 2019) <<https://economictimes.indiatimes.com/news/politics-and-nation/145-days-of-internet-shutdown-in-kashmir-no-word-on-service-restoration/articleshow/72996839.cms>> accessed 20 November 2023

<sup>5</sup> ‘Kashmir communications shutdown a ‘collective punishment’ that must be reversed, say UN experts’ (*UN News*, 22 August 2019) <<https://news.un.org/en/story/2019/08/1044741>> accessed 20 November 2023

<sup>6</sup> Sanjay Kak (ed), *Until My Freedom Has Come* (Haymarket Books 2013), see generally; See also, Javid Iqbal, *Kashmir: A State of Impunity* (Gulshan Books 2015)

The situation in 2019 was unprecedented for numerous reasons. One, it put Kashmir directly into the hands of the Hindu nationalists, who have consistently opposed autonomy for Kashmir and have demanded a “complete integration” of the State into the Union of India.<sup>7</sup> Two, it exposed the region to irreversible (and now normalised) changes impacting the possibilities of long-term peace and justice in the region. Aggrieved by the unilateral constitutional changes, people from different walks of life, including lawyers and politicians, approached the Supreme Court, praying to reverse all such changes, including the revival of the “autonomy” and the invalidation of the Presidential Orders passed in 2019 to reorganise the erstwhile state into the territories of the Union. As a result, many conversations have taken place on Article 370 and the BJP’s move to abrogate the provision. While this article is being written, the hearings in the Supreme Court are underway, and as this article argues, are representative of the liberal democratic rhetoric on the one hand and the right-wing discourse on the other. Keeping the hearings in the Supreme Court at the centre of the discussion, I explore various ideas defining Article 370. The premise of this article is that the “liberal-secular” defence and right-wing opposition to Article 370 have practically not had much of a difference as they have sustained the propaganda of the state in one form or another and have denied to the Kashmiri people the agency to decide their political future.

Even the Article 370 hearings in the Supreme Court were representative of two entities: the liberal elite (inheritors of the Congress party) and the right-wing Hindu nationalist Bharatiya Janata

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<sup>7</sup> Dibyesh Anand, ‘Kashmir Is a Dress Rehearsal for Hindu Nationalist Fantasies’ Foreign Policy (Washington, 8 August 2019) <<https://foreignpolicy.com/2019/08/08/kashmir-is-a-dress-rehearsal-for-hindu-nationalist-fantasies/>> accessed 20 November 2023

Party (BJP), leaving a void for the representations of the Indigenous Kashmiri demands.

I thus open the discussion with the question of sovereignty in Kashmir and seek to understand the indigenous meanings of sovereignty, whether they come from the “mainstream” or the “resistance” camp of politics.<sup>8</sup> Keeping the hearings in the Supreme Court at the centre of the discussion, I cite various documents, scholarly works, and political speeches to understand the idea of sovereignty and how Kashmiris grapple with it.

Similarly, the “development” narrative advocated by the BJP has come as a justification for the revocation of Article 370. The government has also vowed to bring “democracy” to Kashmir. I draw parallels of the development narrative in colonial conquest and make a case for its falsity and hollowness. I attempt to understand the role development plays in colonial situations.

I then refer to the liberal Indian attitudes to understand their approach towards Article 370. Citing one such lawyer, I go on to understand the approach of the petitioners’ lawyers and their position with respect to Kashmir. In my estimation, therefore, things become more apparent, and I do not see much of a difference between the lawyers representing the petitioners and the state, except the former trying to preserve a liberal order of which they are the inheritors and from which the promises made to the people of Kashmir flow.

Finally, I explain the interpretation of the basic structure doctrine with respect to Article 370 from the liberal Indian perspective,

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<sup>8</sup> ‘Pro-India’ political parties or parties who take participation in the elections are generally presented as ‘mainstream’ in the Indian media. See also, Samreen Mushtaq and Mudasir Amin, ‘In Kashmir, Resistance is Mainstream’ (*Himal SouthAsian*, 16 April 2020) <<https://www.himalmag.com/comment/in-kashmir-resistance-is-mainstream-2020>> accessed 20 November 2023

which basically converges with the Hindu nationalist idea of denial of “autonomy” to Kashmir. Attempting a ‘different’ analysis, I cite the Jammu and Kashmir High Court to make a case for “referendum” through the basic structure doctrine itself. I then refer to the statement of a lawyer, which I refer to as the “liberal outrage” over justifying and normalising the situation in Kashmir, even if it is illegal and unconstitutional, to provide a different understanding of the basic structure. The application of the basic structure doctrine, without context, is a poor understanding of law and politics.

### **The Question of Sovereignty in Kashmir:**

The question of sovereignty came to be discussed at length in the Supreme Court during the Article 370 hearings. Sovereignty came to be defined as anything short of sovereignty and was mostly representative of the dominant Indian liberal conception of sovereignty where, through different terminologies and arrangements, the ultimate control of the territory lies with the Indian state and not the people of Jammu and Kashmir. Dr Rajeev Dhavan, for example, representing one of the petitioners in the case, used the term “internal sovereignty” to define Kashmi’s status as an entity.<sup>9</sup> “External sovereignty”, he said, was lost by the Dogra monarch upon signing the Instrument of Accession. Nitya Ramakrishnan, another lawyer representing the petitioners, used the term “shared sovereignty” to describe the relationship between the Union of India and the State of Jammu and Kashmir.<sup>10</sup> She claimed that this system of ‘political sovereignty’ acted as a system of checks and balances reflecting the

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<sup>9</sup> ‘Supreme Court hearing on Article 370 abrogation | Day 6’ (*The Hindu*, 16 August 2023) <<https://www.thehindu.com/news/national/supreme-court-hearing-on-article-370-abrogation-day-6/article67200270.ece>> accessed 20 November 2023

<sup>10</sup> Gauri Kashyap and R. Sai Spandana, ‘Abrogation of Article 370 | Day 9: What makes the relationship between India and J&K binding, asks CJP’ (*SC Observer*, 23 August 2023) <<https://www.scobserver.in/reports/abrogation-of-article-370-day-9-what-makes-the-relationship-between-india-and-jk-binding-asks-cji/>> accessed 20 November 2023

power of the centre with respect to the state of J&K. Similarly, Sanjay Parikh argued that sovereignty in Kashmir was interchangeable with autonomy, and it translated into the form of the Constitution of Jammu and Kashmir.<sup>11</sup> While the Chief Justice of India rejected all such propositions, we need to address the question of sovereignty in scenarios such as Kashmir through a decolonial praxis. “Shared sovereignty” and other such terms give an incomplete conception of sovereignty and provide a strategic recognition of the less powerful that will always be exploited to the advantage of the more powerful.

It is in this context that a critical appraisal of sovereignty requires an appreciation of how the ‘dominated’ articulates the aspects of sovereignty and not just how the ‘dominant’ envisions it.<sup>12</sup> In contrast to Indian liberal understandings, sovereignty in Kashmir is a part of everyday life and language and defines the architecture of the society as well. Sovereignty thus does not only become an idea that is challenged (of the dominant or the coloniser) but also one that is asserted (by the subject or the colonised).<sup>13</sup> It is reflected in the food

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<sup>11</sup> R. Sai Spandana and Gauri Kashyap, ‘Abrogation of Article 370 | Day 8: On reorganisation of J&K, misuse of President’s Rule and protection of minorities’ (*JC Observer*, 22 August 2023) <<https://www.scoobserver.in/reports/abrogation-of-article-370-day-8/>> accessed 20 November 2023

<sup>12</sup> See generally Philip Constable, ‘Kashmir Dispute since 1947’ [2018] *The Encyclopaedia of Diplomacy* 1; see also Karen Heymann, ‘Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust’ (2003) 19 *American University International Law Review* 153. (India and Pakistan both claim sovereignty over the whole of Jammu and Kashmir, while China also lays claims to certain parts. The present study does not discuss the claims of these sovereign states but how sovereignty is imagined by the indigenous political groups.)

<sup>13</sup> Scholars have pointed out the lack of sovereignty in post-colonial states where sovereignty could not be transferred directly to the people. See, for example, Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination* (Princeton University Press 2019). Getachew dissects the Caribbean development narrative as basically colonial expansion allowing direct control to outside entities in opposition to the aspirations of the people. See also, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005); Siba N’Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law*, vol 3 (University of Minnesota Press 1996); Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004)

patterns of the people,<sup>14</sup> in the streets when people claim their political will,<sup>15</sup> how people trade,<sup>16</sup> in everyday conversations and aspirations of the people, and in the life and death of the political subject.<sup>17</sup> The choices people make in their lives are deeply influenced by the broader political happenings around them. In Kashmir, sovereignty has also been asserted in the language of what is generally referred to as “mainstream politics” and not just resistance politics. In this part, I will demonstrate how sovereignty in Kashmir is historically informed and how Kashmir’s political discourse has always centred around claims of sovereignty over the land.

After the abrogation of Article 370, significant changes were made to the land laws, and big corporations opened Kashmir for investment, fearing claims of demographic change in the region.<sup>18</sup> It also meant amending land laws and making the transfer of land easy for the corporates and the settlers. In October 2020, when the land laws were being amended to suit the interests of the ruling party, Omar Abdullah, the former Chief Minister of Jammu and Kashmir and one of its foremost leaders, tweeted that the laws were unacceptable to the people.<sup>19</sup> He made another interesting remark, signifying not just a fear

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<sup>14</sup> Samina Raja and others, ‘Planning and Food Sovereignty in Conflict Cities’ [2022] *Journal of the American Planning Association* 183. See also Omer Aijazi, ‘Textures of Violence: Foraging, Cooking, and Eating in Kashmir’ [2023] *PARISS*, 106

<sup>15</sup> Mohd Tahir Ganaie, ‘Claiming the Streets: Political Resistance Among Kashmiri Youth’ in Mona Bhan, Haley Duschinski and Deepti Misri (eds), *Routledge Handbook of Critical Kashmir Studies* (Routledge 2023)

<sup>16</sup> Aditi Saraf ‘Trade, Boundaries, and Self-Determination’ Bhan (n 15) 127

<sup>17</sup> Farrukh Faheem, ‘Interrogating the Ordinary: Everyday Politics and the Struggle for Azadi in Kashmir’ in Haley Duschinski and others(eds), *Resisting Occupation in Kashmir* (University of Pennsylvania Press 2018)

<sup>18</sup> The changes made to the land laws have opened discussions on settler-colonialism and how the revocation of the autonomy of Kashmir establishes India as a settler state. That, however, is a debate for a different time. For a discussion, see ‘From Domicile to Dominion: India’s Settler Colonial Agenda in Kashmir’, [2021] 134 *Harvard Law Review* 2530

<sup>19</sup> ‘Jammu and Kashmir put on sale’: Omar Abdullah slams Centre for amendment in land laws’, *The Indian Express* (27 October 2020) <<https://indianexpress.com/article/india/jammu-kashmir-land-laws-amendment->

but a lament of a loss that was too costly. He said, “J&K is now up for sale...” Abdullah was lamenting the loss of sovereignty in his tweet. It was a departure from how Kashmiris used to see themselves with respect to the land that they considered themselves the only owners of. The control over the land by the indigenous in Kashmir signified their claims to sovereignty over the land. Once the liberalisation of such land laws took place in a colonial fashion and the name of neoliberal development,<sup>20</sup> such a loss was huge. In fact, sovereignty as a phenomenon had a huge role to play in the dispute over the legal status of Jammu and Kashmir.<sup>21</sup>

In an extensive study titled *Anatomy of the Autonomy: A Comparative Study of some Documents related to the State of J&K*, Arif Ayaz Parrey details how different documents formed in the erstwhile State viewed the idea of sovereignty.<sup>22</sup> Parrey examines major ‘mainstream’ documents such as Naya Kashmir produced by Sheikh Abdullah’s National Conference (NC) in 1944, Self-Rule Framework for Resolution formed by the J&K People’s Democratic Party (JKPDP) in 2008, Sajad Lone’s, representing J&K People’s Conference (JKPC), Achievable Nationhood formed in 2006, J&K Regional Autonomy Report of 1999, and report of the Regional Autonomy Committee in 2000.

The Naya Kashmir document, the leftist manifesto of the National Conference, which was formed some years before the independence of India, views Kashmir as a sovereign state. Parrey

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<sup>20</sup> Nitasha Kaul, ‘Coloniality and/as Development in Kashmir: Econationalism’ [2021] *Feminist Review* 114

<sup>21</sup> Priyasha Saksena, *Sovereignty, International Law, and the Princely States of Colonial South Asia* (OUP 2023)

<sup>22</sup> Arif Ayaz Parrey, ‘Anatomy of the Autonomy: A comparative study of some documents related to the autonomy of J&K’, Centre for Dialogue and Reconciliation <[https://cdr-india.org.in/pdfs/Anatomy\\_of\\_the\\_Autonomy\\_2.pdf](https://cdr-india.org.in/pdfs/Anatomy_of_the_Autonomy_2.pdf)> accessed 20 November 2023



argues that even the drastic changes brought to this 1944 document in 1977 have failed to erase the strong Kashmiri nationalist tone prevalent throughout the text.<sup>23</sup> It remains one of the most important legal documents in Kashmir's modern history and is inspired by the Soviet Constitution.<sup>24</sup> It spoke the language of a territorially defined new nation whose self-determination was necessary to perfect the union.<sup>25</sup> The fact that there is scant or no mention of India and Pakistan in the manifesto gives the idea that the framers envisioned a sovereign state for themselves. PDP's self-rule framework and PC's Achievable Nationhood both envision a system of "shared sovereignty" with India and Pakistan. This means giving Jammu and Kashmir the power to determine its political arrangements, with both countries currently controlling its land and resources- perhaps a method to work out the idea of a 'shared sovereignty'. While the Self-Rule Framework gives India control over defence, security, foreign affairs and communications, Achievable Nationhood restricts it to defence and foreign affairs.<sup>26</sup> The State Autonomy Report does not mention the parts of Jammu and Kashmir under the administration of Pakistan but sees the solution of the part under Indian control in the pre-1953 position of autonomy.<sup>27</sup> The Report shares the political vision in the Naya Kashmir document, but the prevalent political circumstances of the time make it subscribe to notions of autonomy or a federal scheme that can translate to "shared sovereignty" between the two units.

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<sup>23</sup> *ibid*

<sup>24</sup> Andrew Whitehead, 'The Making of the *New Kashmir* Manifesto' in Ruth Maxey and Paul McGarr (eds), *India at 70: multidisciplinary approaches* (Routledge 2020)

<sup>25</sup> "Union" here refers to the State of Jammu and Kashmir. Kashmir is referred to as a "country" in *Naya Kashmir* and most of the major texts formed during that period. For a discussion, see Suvir Kaul, 'On Naya Kashmir' *Bhan* (n15) 37

<sup>26</sup> Parrey (n 22) 25.

<sup>27</sup> Pre-1953 position refers to the position before the passage of the Basic Order of 1954. The Constitution (Application to Jammu and Kashmir) Order 1954 made substantial portions of the Constitution of India applicable to Jammu and Kashmir. The year 1953 was also marked by Sheikh Abdullah's dismissal and arrest under the Public Safety Act, and much of what followed emptied Article 370 of its content.

National Conference used the plank of autonomy to contest the assembly elections of 1996 and got a huge victory, leading to the formation of the State Autonomy Committee.<sup>28</sup> The Indira-Sheikh Accord of 1975, understood as the final blow to Sheikh's aspirations of an autonomous state, was also marked by demands to restore the pre-1953 position. This was not the only instance that the National Conference was citing history to articulate its demands. In 1955, NC's plebiscite movement went to the extent of asking for a referendum and the final settlement of the Kashmir dispute.<sup>29</sup>

When the report of the State Autonomy Committee (commonly referred to as the Autonomy Report) was tabled before the Jammu and Kashmir Legislative Assembly in the year 2000, the discussions lasted a few days. While a few recalled Sheikh Abdullah's speeches, Choudhary Mohammad Ramzan, a member of the National Conference, made an impassionate speech. He opened his speech with an Urdu couplet, marking a complaint and dejection. He said: *hum wafa karte rahe, wo jafa karte rahe/ apna apna farz tha donon ada karte rahe.*<sup>30</sup> A rough translation would mean the following: We (Kashmiri unionists) kept remaining loyal to them (India), they kept betraying us/ Both of us kept performing our duties.

Appalled at the injustices committed to the people of Kashmir "in the name of legislation", he urged everyone to leave party politics and restore the constitutional rights of the people, which would restore the "integrity and sovereignty of the State."<sup>31</sup> He warned the members about the State becoming a ground of "international conspiracies" and

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<sup>28</sup> Rekha Chowdhary, 'Autonomy Demand: Kashmir at Crossroads' (2000) 35 EPW 2599

<sup>29</sup> Farooq Ahmad Waza, 'Special Position within Indian Union: Articles 370 and 35A of the Indian Constitution' in Aijaz Ashraf Wani and Farooq Ahmad Waza (eds), *Government and Politics of Jammu and Kashmir: From Princely State to Union Territory* (SAGE India 2022)

<sup>30</sup> Jammu and Kashmir Legislative Assembly Secretariat, *Assembly Debates on Autonomy Report*, (Session 9, 2000) 161

<sup>31</sup> *ibid*

reminded the members of the terms of the Instrument of Accession. He said that apart from subjects such as defence, foreign affairs, and currency, it was in terms of Article 370 that “residual sovereignty” was retained. The special treatment of Kashmir, he said, was borne out of the fact that Kashmir merely acceded to India and did not merge. His party was elected on the agenda of restoring autonomy, and this hope of restoration of autonomy sustained the people's trust.

### **The Development Narrative:**

*We must develop them with or without their consent.*<sup>32</sup>

To effect the complete annihilation of Article 370 and bring other major changes, India's Home Minister, Amit Shah, introduced the Constitution (Application to Jammu & Kashmir) Order, 2019 and Jammu & Kashmir (Reorganisation) Bill, 2019, along with the Resolution for Repeal of Article 370 of the Constitution of India, he made it clear that his government was only going to talk to those “committed to peace and *development* in J&K.”<sup>33</sup> It was the youth of the State, he said, who needed development. Article 370, he said, prevented development and strangled democracy in Kashmir. He appealed to the Members of the Lok Sabha to “join hands with the Government to bring the people of J&K in the mainstream of development.” He mentioned a number of central laws that could not be applied to Jammu and Kashmir that hampered development in Kashmir, prominent being the Prevention of Child Marriage Act, Right to Education, and Land Accusation Act. This development was to come in the form of liberalisation of land laws to “bring in investments

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<sup>32</sup> Quoted in Kaul (n 20)

<sup>33</sup> ‘Government brings Resolution to Repeal Article 370 of the Constitution’, PIB, MHA, GoI (5 August 2019, New Delhi) [https://www.mha.gov.in/sites/default/files/PressReleaseJ%26KDecisions\\_06082019.pdf](https://www.mha.gov.in/sites/default/files/PressReleaseJ%26KDecisions_06082019.pdf) accessed 20 November 2023

from private individuals and multinational companies.”<sup>34</sup> He also talked about low land prices in Kashmir because of the restrictions on land transfer to outsiders. This “development” paradigm must be critiqued and put into context, given the unique nature of Kashmir. I will use the following frameworks to put into perspective the narrative of development that reeks of colonial pride and wants to assimilate the “other”, even if the other feels robbed at every instance of such practices and modes.

In an excellent article titled *Deconstructing Development*, Ruth E. Gordon and Jon H. Sylvester question the idea of development as a hegemonic construct of the West to destroy the societies, cultures, communities and institutions of the “other” needing transformation.<sup>35</sup> Development “presumes a universal and superior way of ordering society, and that all societies are to advance toward the same goal.”<sup>36</sup> This practice does not value cultures and ways of living as it wants to “develop” the political subject into “something else”.<sup>37</sup> It is a product of a specific order that wants to assimilate or homogenise the other.<sup>38</sup> Primary among these attempts towards assimilation is the colonisation of legal systems.<sup>39</sup> Adopting the coloniser's systems would thus facilitate development and lead to the creation of better institutions. There would be “increased equality, freedom and participation...” benefitting “the poorest of the poor.”<sup>40</sup>

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<sup>34</sup> *ibid*

<sup>35</sup> Ruth E. Gordon and Jon H. Sylvester, ‘Deconstructing Development’ (2004) 22 *Wisconsin International Law Journal* 1; See also, Luis Eslava, ‘The Developmental State: Independence, Dependency and the History of the South’ in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law* (OUP 2019)

<sup>36</sup> *ibid*

<sup>37</sup> *ibid* 5

<sup>38</sup> *ibid* 8

<sup>39</sup> *ibid* 18 (The authors in the cited material have used the word “Westernization”).

<sup>40</sup> *ibid* 19

It may be helpful to situate the idea of development in an era of decolonisation the world over, as even today, these very justifications are employed to perpetuate colonialism. In her much-needed article *Decolonization, Development, and Denial*, Natsu Taylor Saito explains how the development narrative sustains colonisation and emerges as a colonial construct.<sup>41</sup> Taylor describes how even the decolonisation process established by the United Nations produced “an order privileging territorial integrity over the rights of non-self-governing peoples.”<sup>42</sup> Colonialism is presented as beneficial to the colonised and for their “good.” Even as Spain was colonising the Americas, legal justifications were provided for their colonisation as they were found unfit to rule themselves, and it was to their advantage that they were getting the benefits of “civilisation.”<sup>43</sup> This order that prefers territorial integrity over broad-based rights uses “guardianship” to justify appropriation.<sup>44</sup> The other narrative that is replicated is that the colonised need to embrace a certain idea (perhaps a myth?) – “the idea of India”, in our case, selling democracy and dreams, the idea of “integrity”, the idea of constitutionalism, expansion of the “good” to margins to civilise them- which all become the building blocks of colonial rule and make the development narrative hollow.<sup>45</sup>

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<sup>41</sup> Natsu Taylor Saito, ‘Decolonization, Development, and Denial’ (2010) 6 Fla. A&M U. L. Rev. 1; Critics argue that the claims of democratization are a historical continuity of the Western standards of “humanizing” and “civilizing” non-European societies and reproduce the notions of superiority of one race over the other. See, for example, Antony Anghie, ‘Civilization and Commerce: The Concept of Governance in Historical Perspective’ (2000) 45 Vill. L. Rev. 887; See also, Uma Kothari (ed), *A Radical History of Development Studies: Individuals, institutions and ideologies* (Zed Books 2005)

<sup>42</sup> *ibid* 21

<sup>43</sup> Justus M. van der Kroef, ‘Francisco de Vitoria and the Nature of Colonial Policy’ (1949) 35 The Catholic Historical Review 129

<sup>44</sup> Taylor (n 41) 22

<sup>45</sup> Developmentalism in India has also had a devastating impact on indigenous and lower caste communities. Tribal communities in Manipur, for example, have faced exploitation of their resources and have been subjected to dispossession. However, what makes the development narrative differ from the narrative on Kashmir is the discrimination that it comes with as the “fruits of development” hardly reach the poorer, lower castes and tribals while as in the case of Kashmir, the refusal of the people to be developed and seen

Viewed through the above prism, we see references being made in the speech of the Home Minister to development and democracy. A close scrutiny of the address would inform us of the “development horror” associated with colonialism being reproduced and replicated today. When he says that J&K would become a “true part”<sup>46</sup> of India by removing Article 370, it means a denial of every hint of sovereignty to the people. The practice of sovereignty that was so far being exercised in the form of state violence (touted as “governance”)<sup>47</sup> takes a different turn, as, without the appropriation of lands, the coloniser seems incomplete. The coloniser cannot exist without the colonised (reference is made to the claim of “integral part” by the Indian state over the whole of Jammu and Kashmir) as the erasure of pre-existing peoples is necessary, in the name of development, of course, to further their annexation. The sovereign interests of an occupying state, therefore, depend on the creation of “social, political, legal, and economic institutions that would function solely for their own benefit; and to determine who could or could not—or would be forced to—live within their claimed borders and exactly how they were to live.”<sup>48</sup>

The development aspect thus attains a unique framework in the Kashmiri context. In Indian writings supporting the move of the BJP government, “Kashmir was denied the fruits of Indian

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as “developed” in the imagination of mainland Indians is seldom accepted. While the policies of extraction of the resources are the same, the case of Kashmir also makes it a point of pride for any government in power in New Delhi to sell their ways of controlling Kashmir. However, the systemised dispossession of all the people existing in the geographical margins of India continues to follow the same modus operandi of ‘development’ and ‘democracy’. Raile Rocky Ziipao, *Infrastructure of Injustice: State and Politics in Manipur and Northeast India* (Routledge 2020). Despite India’s rapid economic growth, lower castes and tribes in India continue to be marginalised. Shah and Lerche et al., *Ground Down by Growth* (Pluto Press 2018). See also, Mukul Sharma, *Caste and Nature: Dalits and Indian Environmental Politics* (OUP 2017)

<sup>46</sup> MHA (n 33)

<sup>47</sup> Suchitra Vijayan, *Midnight’s Borders: A People’s History of Modern India* (Westland 2021) 185

<sup>48</sup> Natsu Taylor Saito, ‘Different Paths’ (2020) 1 JLPE 46

democracy.”<sup>49</sup> With the removal of the “special status”, “all the benefits of democracy will flow to Kashmir now.”<sup>50</sup> This development will include the *development of narratives* as the hearts and minds of the people have to be won.<sup>51</sup> This is a false depiction as the major portion of the Indian Constitution was already applicable to Jammu and Kashmir by what A.G. Noorani calls the “systematic hollowing out of Art. 370.”<sup>52</sup> Much of this propaganda falls flat, as we now see a demotion instead in terms of the exercise of rights by the people. Shrimoyee Nandini Ghosh notes that the rights framework, including the right to gender equality, to work, to education, are now part of the unenforceable scheme of the Directive Principles of State Policy,<sup>53</sup> giving a blow to the historic Naya Kashmir manifesto, which gave the right to education to all citizens free of charge covered under “a wide system of State scholarships”... “in the higher schools and universities.”<sup>54</sup> It is interesting to note that the Naya Kashmir manifesto has the right to work for women “in all fields of national life, economic, cultural, political, and in the state services”... to “be realised by affording women the right to work in every employment upon equal terms and for equal wages with men.”<sup>55</sup> There is also a provision for leave during pregnancy.<sup>56</sup> Even the development indicators show that Jammu and Kashmir was doing better or at par

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<sup>49</sup> Syed Firdaus Ashraf, 'Kashmir was denied the fruits of Indian democracy- Tilak Devasher Interview' (*Rediff.com* 6 August 2019) <<https://www.rediff.com/news/interview/kashmir-was-denied-the-fruits-of-indian-democracy/20190806.htm>> accessed 20 November 2023

<sup>50</sup> *ibid*

<sup>51</sup> Aditya Gowdara Shivamurthy, 'Building Indian narratives and battling new militancy in Kashmir' *Hindustan Times* (New Delhi, 8 August 2021)

<sup>52</sup> A.G. Noorani, 'Deception on Article 370' *Greater Kashmir* (Srinagar, 4 July 2016) 9

<sup>53</sup> Shrimoyee Nandini Ghosh, 'One Nation, One Flag, One Constitution' (*Lok Samvad* 7 November 2019) <<https://populareducation.in/loksamvad/article/one-nation-one-flag-one-constitution/>> accessed 20 November 2023

<sup>54</sup> New Kashmir, 1944, Article 11

<sup>55</sup> *ibid* Article 12

<sup>56</sup> *ibid*

with the rest of India in all the primary development indicators, mainly because of the land reform policies initiated in the 1950s.<sup>57</sup> It could, therefore, easily qualify as a democratic backsliding- if democracy even existed in any form- rather than democratic reform. Development in Kashmir is basically “an end that justifies using any means,”<sup>58</sup> including moral blindness.

The mention of non-implementation of laws like the Prevention of Child Marriage Act and Right to Education signals the assumption that Kashmir is a backward society, primarily because it is Muslim-majority, and needs intervention. In fact, the Jammu and Kashmir RTI Act of 2009 was more robust than the Central Act of 2005 and was implemented a year before the Central Act.<sup>59</sup> Child marriage, for example, becomes another marker of identity for the larger Muslim population, where the colonial construction of rescuing the “other” from their self-imposed oppression comes in handy, and the coloniser finds justification in imposing his systems of law.

Similarly, the changes in land laws pose unique questions about property and rights and how they interact. In October 2020, sweeping changes were made to land rules in J&K, paving the way for “the Indian capitalists to invest and accumulate resources in the region.”<sup>60</sup> These corporations will not be regulated and could possibly replace

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<sup>57</sup> Womic Baba and Anam Zakaria, ‘The false promise of normalcy and development in Kashmir’ (*ALJAZEERA* 5 August 2020) <<https://www.aljazeera.com/opinions/2020/8/5/the-false-promise-of-normalcy-and-development-in-kashmir>> accessed 20 November 2023; see also Jean Dreze, ‘Article 370 helped reducing poverty in Jammu and Kashmir’ (*National Herald* 9 August 2019) <<https://www.nationalheraldindia.com/india/economist-jean-dreze-jandk-more-developed-than-gujarat-special-status-helped-reducing-poverty>> accessed 20 November 2023

<sup>58</sup> Kaul (n 20)

<sup>59</sup> Raja Muzaffar Bhat, ‘Replacing J&K RTI Act With Centre's Law Has Weakened People's Right to Know’ (*The Wire*, 13 May 2021) <<https://thewire.in/rights/jammu-and-kashmir-rti-act>> accessed 20 November 2023

<sup>60</sup> Muhammad Mutahhar Amin, ‘Land Laws of Jammu and Kashmir: Material Consequences and Political Ramifications’ (2021) 56 *EPW* 20



governance in a place like Kashmir, benefitting the already powerful BJP government. Their partnership has already been a feature of Indian politics. Enriching the companies at the cost of the resources in Kashmir is also not recent.<sup>61</sup> However, after the appropriation of the lands, it will be made accessible, and any resistance will also be conveniently crushed. By decrying low land prices, the land is rendered “profitable”, similar to the colonial attitudes of European settlers towards American Indians and Africans.<sup>62</sup>

### **The Crisis of a Liberal Democracy:**

*“India would bind Kashmir in golden chains.” ~ Jawaharlal Nehru*

The relationship between Jammu and Kashmir and the Union of India was based on liberal democratic principles endorsed by Sheikh Abdullah, who was “enamoured of the high principles for which [India] stood.”<sup>63</sup> An artificial bond, it came to be sold to many generations of Kashmiris. The comparison was mostly made with Pakistan, which was presented as poor, undeveloped, and not so liberal or democratic. The Jammu and Kashmir Constituent Assembly echoed such comparisons and how the aspirations of Sheikh Abdullah converged with those of the newly formed Indian state. In fact, he brought about a list of differences, laying down the advantages of joining any of the dominions between India and Pakistan or remaining independent. It was the “kinship of ideals,” Abdullah said that

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<sup>61</sup> Haley Duschinski and Mona Bhan, ‘Third World Imperialism and Kashmir’s Sovereignty Trap’ Bhan (n15) 332 This passage is reproduced from the above-cited chapter: “A 2016 Right to Information application revealed that India’s National Hydroelectric Power Corporation (NHPC) has earned 3 million USD in the last 14 years from electricity sales, while Jammu and Kashmir alone bought 115,636 million units of power from the NHPC between 2001 and 2016 in order to fulfil its domestic energy requirements.”

<sup>62</sup> Taylor, *Different Paths* (n 48)

<sup>63</sup> Prem Shankar Jha, ‘Sheikh Abdullah in 1968: ‘Accession Is of Minds, Hearts; Love & Justice Are the Only Weapons You Need’ (*The Wire*, 10 August 2023) <<https://thewire.in/politics/sheikh-abdullah-in-1968-accession-is-of-minds-hearts-love-justice-are-the-only-weapons-you-need>> accessed 20 November 2023

determined the strength of the ties between the two states. The accession to India, he proclaimed, meant the death of feudalism and autocracy. Speaking before the J&K Constituent Assembly on November 5, 1951, Abdullah was confident that the Government of India would not interfere in the internal autonomy of J&K as the last four years had proven.<sup>64</sup> Abdullah was equally impressed by “the goal of secular democracy” that India had set to achieve for itself through its constitution, and the “national movement” in Jammu and Kashmir “naturally gravitate[d] towards these principles of secular democracy.”<sup>65</sup> A comparison was also made between “highly industrialised” India, which could help the state with equipment, technical services and materials, and Pakistan, where these economic advantages could not be explored.

It was this mutual interest with the newly formed secular India that tied Sheikh Abdullah to the “idea of India”, represented mainly by the Indian National Congress.<sup>66</sup> Critics have pointed out that the Indian brand of secularism reinforces notions of exclusion of Hinduness, Muslim exclusiveness and India being the homeland only of Hindus. The opposition to Hindutva has not been able to counter these problems, and the identity of India’s secular politics has rather exacerbated Hindu nationalism and created a Brahminical, socialist, secular order of the society.<sup>67</sup> Now, for India also to exist as a secular ‘nation’ and heed the Nehruvian or Gandhian brand of ‘Hindu inclusiveness’, Kashmir had to be part of it, giving it the reasons to assume what Gowhar Fazili calls a “moral high ground relative to the supposedly totalitarian regimes like China or feebler democracies like

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<sup>64</sup> Jammu and Kashmir Constituent Assembly, *Assembly Debate*, (JKCAD Part I, Vol 1) 1951-1955

<sup>65</sup> *ibid* 106

<sup>66</sup> Altaf Hussain Para, ‘Demystifying Sheikh Abdullah’ (2013) 48 EPW 23

<sup>67</sup> Gail Omvedt, *Understanding Caste: From Buddha to Ambedkar and Beyond* (2nd edn, Orient Blackswan 2012)

Pakistan?”<sup>68</sup> However, the liberal order he was subscribing to did not prove to live long, as the Sheikh was soon arrested in the Kashmir conspiracy case by his closest ally, Nehru, leading to the killings of hundreds of civilians by the Indian troops.<sup>69</sup> Sheikh’s dismissal and arrest also marked a new beginning in which local client politicians were installed to help Nehru consolidate his rule in Kashmir.<sup>70</sup>

The Indian liberal elite, represented mainly by the Indian National Congress, was complicit in this process, resulting in the decay of democracy in Kashmir. The importance of Article 370 was also known to them as nothing apart from this provision tied Kashmir to India. It has often been described as a “tunnel” responsible for the passage of Indian laws to Kashmir. The Indian liberal elite understood the treachery that had been done to rid Kashmir of its rights, including the right to self-determination. However, Article 370 (after it had been emptied of all its content) was a cover hiding all such stealth. This cover served dual purposes for the Indian liberal elite. One, it helped India maintain its control over Kashmir, citing the ‘special privileges’ the State was allowed. Two, it prevented any meaningful engagement on the larger political issue of Kashmir, thereby presenting Kashmir as an ‘internal matter’ tied to its constitution. What made the 2019 changes different then? The 2019 changes the right-wing central government made took the lid off of this arrangement, and it became apparent that the constitutional commitments carried no meaning. In that sense, Kashmir was really “special”.

I argue that the battle on Article 370 in the Supreme Court was the one between the Indian liberal class and the right-wing section of

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<sup>68</sup> Gowhar Fazili, ‘Liberal Silence on Kashmir and the Malleability of Ethics in India’ Bhan (n15) 278; see also Tariq Ali and others, *Kashmir: The Case for Freedom* (Verso 2011)

<sup>69</sup> Hafsa Kanjwal, *Colonizing Kashmir* (Stanford University Press, 2023)

<sup>70</sup> *ibid* 2

Indian society, thereby carrying little or no meaning for the subject population of Kashmir. For the liberal side, it was not just about keeping their promises made to the “mainstream” political dispensation in Kashmir but also about preserving democracy and constitutional values back home in the Indian mainland. This is reflected in the line of arguments extended in the Supreme Court, which I will explain in the following paragraphs. For the right-wing side, representing the central government, the battle was about removing every possible hint of Muslim representation, often dubbed as “separatism.”

It goes without saying that the success of the petitioners relied on subscribing to the dictates of the liberal order that exists vis-à-vis Kashmir, thereby working under the framework of phraseology such as “integral part.” However, such a framework lacks depth and meaning and serves as a dialogue with the status quo or the state itself that produces such depravity in the first instance. It negates the political as the Schmidtian approach would inform us.<sup>71</sup> On the opening day of the arguments, Senior Advocate Kapil Sibal, representing the petitioners, cleared the air, setting a caveat for the rest of the arguments to follow. He said Kashmir was an “integral part” of India, and the integration of Kashmir into the Union of India was unquestionable, keeping himself in accord with the Indian liberal view on Kashmir.<sup>72</sup> Sibal invoked the Jammu and Kashmir Constitution to say this.<sup>73</sup> Similarly, Dushyant Dave submitted that Kashmir was an “integral part” of India, arguing that the repeal of the provision does

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<sup>71</sup> Wanling Xiong, ‘Protecting Democracy from Liberalism: Defending Carl Schmitt’s Critiques of Liberal Democracy’ (MA Thesis, Leiden University 2018-2019)

<sup>72</sup> Aurif Muzafar, ‘Summary of ‘In Re: Article 370 Petitions’- Day 1’ (*LAOT Blog*, 3 August 2023) <<https://lawandotherthings.com/summary-of-in-re-article-370-petitions-day-1/>> accessed 25 November 2023

<sup>73</sup> The motive here is not to discredit Kapil Sibal for his approach or the line of arguments but to point out the prevalence of the largely liberal rhetoric in such arguments.

not serve any purpose when the integration is already a fact.<sup>74</sup> Other petitioner representatives also put limitations on their observations (in the form of arguments) and clarified their positionalities concerning the matter. Why is this important for our discussion? This is important because it prevents the court from critically reflecting on the issue beyond the contours that it holds dear in the name of integrity, sovereignty, and other such limiting phrases. An example of this is when one of the main petitioners, Mohammad Akbar Lone, was asked to submit an affidavit “stating that he would preserve and uphold the provisions of the Constitution of India and protect the territorial integrity of the nation.”<sup>75</sup> This was after Tushar Mehta, Solicitor General of India, asked the Court to demand such an affidavit from Lone. For a constitutional court to permit such an illegality was not surprising, given that it had already put limitations on the discourse.

At the same time, it is essential to understand the implications of legitimising the J&K Constituent Assembly, with some even calling it “Rousseau’s model of representative democracy.”<sup>76</sup> Such arguments have been met with objections by scholars with allegations of rigging, lack of electoral representation, and a disregard for UN Resolutions.<sup>77</sup> All these political developments need to be questioned to arrive at a logical conclusion, but the exaggeration of the liberal side seems like an attempt to deny a deeper understanding of history.

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<sup>74</sup> Transcript of hearing, ‘Writ Petition (Civil) No.1099/2019 *In re: Article 370 of the Constitution*’ (Record of Proceedings, Supreme Court of India) 17 August 2023

<sup>75</sup> Padmakshi Sharma, ‘Article 370 Case Petitioner Files Affidavit In Supreme Court Affirming Oath To Uphold Indian Constitution & Protect Territorial Integrity’ (*Live Law*, 5 September 2023) <<https://www.livelaw.in/top-stories/article-370-case-petitioner-files-affidavit-in-supreme-court-affirming-oath-to-uphold-constitution-protect-indian-territorial-integrity-237066>> accessed 20 November 2023

<sup>76</sup> Aurif Muzafar, ‘Summary of ‘In Re: Article 370 Petitions’- Day 4’ (*LAOT Blog*, 10 August 2023) <<https://lawandotherthings.com/summary-of-in-re-article-370-petitions-day-4-9th-august-2023/>> accessed 20 November 2023

<sup>77</sup> *ibid*, see author’s notes

## Your Basic Structure is Not My Basic Structure:

“What is true about [the] Constitution of India as regards, (sic) [the] “Basic Framework of the Constitution” is true about [the] Constitution of Jammu and Kashmir.” ~Justice Hasnain Masoodi

On August 5, 2022, three years after the writing down of Articles 370 and 35A, Senior Advocate Arvind P. Datar was speaking at the book release function of ‘*Hamin Ast? A Biography of Article 370*’.<sup>78</sup> He claimed that nothing was wrong- even legally and constitutionally- with what the central government did to Kashmir, as “there could be different means of achieving an end.”<sup>79</sup> He made another pertinent point: “How far would Article 35A survive after the Basic Structure came?”<sup>80</sup> He was referring to the Basic Structure doctrine laid down in the *Kesavananda Bharati* case.<sup>81</sup> The scheme of ‘special status’ was unjustified, and the presence of Article 35A was “anachronistic or paradoxical” in Part III (referring to the Fundamental Rights chapter in the Constitution of India).<sup>82</sup> The revolt in his statements no doubt points to the majoritarian views on Kashmir and these constitutional provisions, with a bit of technical phraseology, but how far are his views justified? A more straightforward way of explaining this is that if you submit your sovereignty to a larger sovereign, how is your claim of sovereignty justified? It puts your integrity in question as a claimant of something you demand of the larger sovereign. This question, of

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<sup>78</sup> Vidhi Centre for Legal Policy, ‘Launch of ‘Hamin Ast? A Biography of Article 370’ by Navi Books’ (*Vidhi*, 13 August 2022) <<https://vidhilegalpolicy.in/videos/launch-of-hamin-ast-a-biography-of-article-370-by-navi-books/>> accessed 20 November 2023

<sup>79</sup> *ibid* (1:10:00 onwards)

<sup>80</sup> *ibid*. If what Datar says is correct, it also means that the action of the BJP government implied the furthering of the Basic Structure doctrine.

<sup>81</sup> AIR 1973 SC 1461. The ‘basic structure doctrine’ was expounded by the Supreme Court of India in the above-mentioned case and permits the parliament to amend any part of the constitution without without destroying its basic features such as secularism, democracy, constitutional supremacy, separation of powers, federalism, among other features.

<sup>82</sup> *ibid*

course, has its own merit, but when we problematise it in a situation such as Kashmir, we arrive at what I call the “assimilation argument”. Datar asks: if Kashmiris are citizens of India, how is Article 35A even justified? In his argument, the upsurge points to the resolution of a longstanding issue from the coloniser’s perspective, which comes in different forms, including the “absolute and total destruction or assimilation of original inhabitants.”<sup>83</sup> It is a direct attack on the language of the colonised, on how they want to assert themselves and protect their identity and history, whose only wish is to be identified differently from the broader sovereign to which they have submitted by circumstance. But if the resolution culminated in the abrogation of the “special status”, why does the state not stop there? It imposes hegemonic nationalism, changes the curriculum, alters the education system, the boundaries of the territory, and the belief systems of the indigenous, and makes coloniality visible to the naked eye. The fact is, the state does not stop, and there is no endpoint in extending its presence in every facet of the life of the colonised. In the following part, I explain how the central government’s argument on the “basic structure doctrine” before the Supreme Court was similarly situated and needs further explication.

Terming the abrogation a “step in the historical evolution to achieve fraternity and unity of the nation”, Tushar Mehta, Solicitor General of India, contended that the abrogation was in furtherance of the basic structure doctrine.<sup>84</sup> Fraternity and equality being the facets of basic structure means that a “transitory provision” is “removed at an appropriate stage”.<sup>85</sup> Its removal thus “*furtheres the basic structure* and it enhances the equality and fraternity, which is the bedrock of the

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<sup>83</sup> Eve Tuck and K. Wayne Yang, ‘Decolonization is not a metaphor’ (2012) 1 *Decolonization: Indigeneity, Education & Society* 1

<sup>84</sup> Record of Proceedings (n 74) 29 August 2023

<sup>85</sup> *ibid*

Constitution.”<sup>86</sup> The problem comes again as ideas like fraternity and brotherhood (an extension of the “assimilation argument”?) are employed to confer legitimacy to blatantly illegal actions. Some even argued that the arrangement made as a result of Article 370 was in “oddity” with the federal structure.<sup>87</sup> The resurrection of Article 370, V. Giri proclaimed, would “be violative of the basic structure of the Constitution.”<sup>88</sup> Similarly, the petitioners’ arguments, with the exception of Dr Rajeev Dhavan, on the grounds of basic structure, illustrate the implications of the illegality concerning the whole of the country, with little attention to the purpose and effect of the move for the people of Kashmir.<sup>89</sup> Dhavan carefully located the basic structure in the design of Article 370 itself.<sup>90</sup> According to Dhavan, an analysis that deserves careful reading, Article 370, a substitute for a “merger agreement” not signed between the Union of India and the State of Jammu and Kashmir, itself formed a part of the basic structure.<sup>91</sup> In the absence of a merger agreement, sovereignty would continue with Article 370 as a repository of both the standstill and merger agreements. I conclude this paragraph with a question: does a referendum attain the stature of basic structure in the absence of

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<sup>86</sup> *ibid* (emphasis mine)

<sup>87</sup> Gursimran Kaur Bakshi, ‘On Day 15, quoting Ambedkar, V. Giri calls abrogation rightful centralisation to prevent another loss of India’s independence’ (*The Leaflet*, 4 September 2023) <<https://theleaflet.in/on-day-15-quoting-ambedkar-v-giri-calls-abrogation-rightful-centralisation-to-prevent-another-loss-of-indias-independence/>> last accessed 20 November 2023

<sup>88</sup> Record of Proceedings (n 74) 4 September 2023

<sup>89</sup> See, for example, Muzafar (n 76) (The lawyers argue that this action by the Government is a threat to India’s larger federal structure or poses a challenge to Indian democracy in general. However, this is far from true, and this lens for comparison is not justified and hardly serves the case at hand.)

<sup>90</sup> Aurif Muzafar, ‘Summary of ‘In Re: Article 370 Petitions’- Day 6’ (*LAOT Blog*, 19 August 2023) <<https://lawandotherthings.com/summary-of-in-re-article-370-petitions-day-6-11th-august-2023/>> accessed 20 November 2023

<sup>91</sup> *ibid*



Article 370 when the conditions that have led to the formation of Article 370 have either persisted or remained unfulfilled?<sup>92</sup>

The basic structure doctrine does not operate as a standalone concept but needs the application of historical and normative frameworks, particularly when evaluating a deeply political issue.<sup>93</sup> It cannot afford to miss the political and historical conditions of one constituent part of the country that has been promised constitutional accommodation and is caught in a profoundly complex political situation. In 2015, the Jammu and Kashmir High Court had an opportunity to explain the meaning of the basic structure doctrine pertaining to J&K and had a passionate view in the context of history.

It was in *Abdul Qayoom Khan Vs. State of J&K and Ors.*<sup>94</sup> that the petitioner argued that the state officials and constitutional bodies' failure to hoist the state flag of Jammu and Kashmir was a contempt of the State Flag and breach of law. He also demanded that the Republic Day of the State be celebrated "with dignity and honour demonstrating the sanctity of the State Flag."<sup>95</sup> What came as a result of the petition was a lucid interpretation of the basic structure doctrine by Justice Hasnain Masoodi. Justice Masoodi held that the constitutional autonomy of the State of Jammu and Kashmir was the "basic structure" of the State Constitution. It went further to say that the "elected head of the state", also called the *Sadri riyasat*, was part of this basic structure framework.<sup>96</sup> It called into question the Constitution of Jammu & Kashmir (Sixth Amendment) Act 1965, which amended the State Constitution and replaced "Sadri Reyasat" by

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<sup>92</sup> Muzafar (n 72)

<sup>93</sup> Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP 2009) 107

<sup>94</sup> *Abdul Qayoom Khan v State of J&K and Ors* 2016 (1) JKJ 506

<sup>95</sup> *ibid* para 5

<sup>96</sup> *ibid* para 24

the Governor by saying that the “elective” status of the constitutional post was part of the basic framework of the State Constitution and therefore beyond amending power. Apart from asking the state government to uphold the Constitution of Jammu and Kashmir, it warned that any amendment of the basic structure is “*void like a law* that offends the Constitution.”<sup>97</sup> The Court thus brought both constitutional amendments and legislative actions under the purview of the basic structure doctrine. It applied a historical framework to say the same.

It becomes clear from the discussion that the languages of expression for the basic structure doctrine differ as we consider different frameworks. The framework adopted by Justice Masoodi locates the J&K Constitution at par with the Indian Constitution, directs the government to correct the violations committed against the Constitution of J&K, and attaches binding authority to the original idea of constitutional autonomy. It is this return to the “original” that makes me think of “referendum” as part of the basic structure doctrine in the absence of Article 370. The understanding of the doctrine raises complicated questions when we contrast the views of the institutions of the liberal tradition and those that existed in Kashmir with a limited sense of autonomy.

## **CONCLUSION:**

In my article, I demonstrated the need for interdisciplinary alternative conversations on Kashmir and the ‘constitutional promises’ made to the people of the erstwhile state. While the region has not seen peace for decades, it’s essential for us to speak a clearer language and put forward narratives that are agentifying to the people rather than those that are hegemonic and make the language of the state and

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<sup>97</sup> *ibid* para 20 (emphasis mine)

the liberal elite thrive. Hindu nationalists may have perpetuated the dispossession of Kashmiri Muslims through their so-called aggressive approach towards Kashmir, but the liberal elite of India who generally subscribe to the 'Nehruvian tradition' of politics have hardly honoured the wishes of the people of Kashmir.

**Note:** This paper was written when the Supreme Court of India had yet to pronounce its judgment on the matter. While it is difficult to predict the fate of Article 370, given the Court's approach in recent cases, a reversal of the government's actions seems impossible. In any case, we must not stop imagining decolonial futures.