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# ANALYZING POST-ABROGATION MEASURES, PERMANENCE OF ARTICLE 370 AND CONVERSION OF STATE TO A UNION TERRITORY

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## **I. BACKGROUND:**

“Would it be possible?” B.N. Rau asked, “to have a transitional provision keeping alive the present Instrument of Accession of the State even under the new Constitution until we know what the ultimate position of that State will be”<sup>1</sup>. While the Constituent Assembly pondered over the status of the State of Jammu & Kashmir (**‘J&K’**) during the making of the Constitution of India (**‘Constitution’**), B.N. Rau posed this question which presented a conundrum for the drafters.

Gopalaswami Ayyangar, on 17<sup>th</sup> October 1949, moved a new clause, Article 306A (subsequently renumbered as **‘Article 370’**) which present the transitional arrangement referred to by Rau. He explained the necessity of introducing a provision because of such ‘special conditions’ that were then prevailing in Kashmir. The conditions were described to be as follows: existence of a war in Kashmir which rendered the conditions of the State as ‘still abnormal and unusual’; part of the State in the hands of ‘rebels and enemies’; and India’s entanglement with the United Nations in regard to J&K<sup>2</sup>.

The Supreme Court (**‘SC’**) in the *Kesavananda Bharti*<sup>3</sup> case propounded the principle of ‘basic structure’. This principle articulated by the SC significantly altered the trajectory of constitutional history by rejecting the claim of Parliament’s absolute supremacy in amending Constitution provisions solely based on the necessary voting strength. The Court was mindful of safeguarding the fundamental rights of citizens in this context.<sup>4</sup> Fali S. Nariman participated

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<sup>1</sup> Abhinav Chandrachud, *The Abrogation of Article 370*, Festschrift in Honour of Nani Palkhivala (2020).

<sup>2</sup> *ibid.* at 12.

<sup>3</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

<sup>4</sup> Virendra Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance [From Kesavananda Bharati to I.R. Coelho]*, 49 JOURNAL OF INDIAN LAW INSTITUTE 365, 365 (2007).

in the debate on *India at Sixty* and published an article titled, “*Constitution under threat*”. While he reflected upon 60 years of India’s independence, he stated that, “*Our Constitution has survived – and that is a plus point*”<sup>5</sup>. The authors believe that one reason attributed to this survival is the basic structure doctrine which lists down the basics of this basic document. It has been beneficial by efficiently preventing any unwarranted interference with the Constitution.

The Bharatiya Janata Party (**BJP**) withdrew its support from the alliance with the People’s Democratic Party post which the ‘Governor’s Rule’ was imposed on 20th June, 2018. This alliance, enduring since 1st March, 2015 was later regarded by the Hon’ble Prime Minister Narendra Modi as a ‘*mahamilawat*’<sup>6</sup>. However, on 20th December, 2018, the state was put under the President’s rule in accordance with Section 92<sup>7</sup> of the J&K Constitution.

On 5<sup>th</sup> August, 2019, the Presidential Order titled, ‘Constitution (Application to Jammu and Kashmir) Order, 2019 (**C.O. 272**)’ was passed. This order superseded the former ‘Constitutional (Application to Jammu and Kashmir) Order, 1954’ (**C.O. 48**) that extended certain provisions of the Constitution to J&K and additionally, made certain amendments and exceptions in the Constitution to maintain the special status of the state. C.O. 272 introduces three key clauses which substantially impact the constitutional status of Jammu and Kashmir. Firstly, it supersedes prior Presidential Orders related to the state. Secondly, the order extends all the existing constitutional provisions to the state of Jammu and Kashmir, aligning it with the national framework. Thirdly, it modifies Article 367<sup>8</sup>, replacing ‘Constituent Assembly of the State’ with ‘Legislative Assembly of the State’ in the proviso to clause (3) of Article 370.<sup>9</sup> A constitutional bench of the SC has delivered a judgement on several petitions challenging the Jammu & Kashmir Reorganization Act, 2019, C.O. 272 that abrogated Article 370<sup>10</sup> of the Constitution and the powers enjoyed by the Parliament under President’s Rule. The Court ruled that J&K did not retain their sovereignty and placed reliance on Section 3<sup>11</sup> of the J&K Constitution which read as, “*the State of Jammu and Kashmir is and shall be an integral part*

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<sup>5</sup> *ibid.* at 397.

<sup>6</sup> Arif Ayaz Parrey, Gursimran Kaur Bakshi, *In Re Article 370 judgment: The challenge and what is at stake*, The Leaflet (December 10, 2023) <https://theleaflet.in/in-re-article-370-judgment-the-challenge-and-what-is-at-stake/>.

<sup>7</sup> J&K CONST. sect. 97.

<sup>8</sup> INDIAN CONST. art. 367.

<sup>9</sup> Kashish Mahajan, *The Abrogation of Article 370 and Bifurcation of Jammu and Kashmir – A Bridge Too Far*, *THE INDIAN JOURNAL OF CONSTITUTIONAL LAW*, (2020).

<sup>10</sup> INDIAN CONST. art. 370.

<sup>11</sup> J&K CONST. sec. 3.

of the Union of India”. This provision remained absolute and Section 147<sup>12</sup> therein prohibited making any amendments to it. The Court ruled that the Constitution framers placed Article 370 with the intention of providing a temporary and transitional arrangement in order to stabilize the situation and unrest in the region. The Hon’ble Chief Justice of India (‘CJI’) held that the Article 1<sup>13</sup> of the Constitution is applicable to J&K in its entirety.

In the case related to C.O. 272, the Court acknowledged that although paragraph 2 of C.O. 272 seemed to modify Article 367, its actual impact was an amendment to Article 370 itself. Despite this, the Chief Justice determined that the entire C.O. 272 was not unconstitutional because the President had the authority under Article 370(1)(d)<sup>14</sup> to apply “*all or part of the Constitution*” to J&K. The petitioners argued that 370(1)(d) only allowed a piece-meal approach, while the entire Constitution could only be applied by abrogating Article 370 under 370(3)<sup>15</sup>. However, the Court held that applying the entire Constitution under 370(1)(d) had the same effect as abolishing Article 370 under 370(3). The Court also ruled that consultation with the state government was not essential under 370(3), as the President had the unilateral power to declare Article 370 ceased to exist. The Court concluded that C.O. 272 was valid in applying all provisions of the Indian Constitution to J&K.

The BJP government imposed a mass under curfew in J&K post-abrogation of Article 370. The individuals residing in the state faced strict penalties and punishments. The 11 months of lockdown in J&K had not only resulted in an “across-the-board violation of human rights”, it also led to the “denial of the right to bail and fair and speedy trial, coupled with misuse of draconian legislation, such as the Public Safety Act (PSA) and the Unlawful Activities Prevention Act (UAPA), to stifle dissent”. Around 38,000 additional troops were flown into J&K to enforce a lockdown. Section 144<sup>16</sup> of the Code of Criminal Procedure (‘CrPC’) was invoked, prohibiting public assembly, and thousands, including minors and almost all elected legislators of J&K (except those from the BJP), were placed under preventive detention. Just five days later, Parliament passed the Jammu and Kashmir Reorganisation Act, dividing the state into two union territories – J&K, and Ladakh.

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<sup>12</sup> J&K CONST. sec. 147.

<sup>13</sup> INDIAN CONST. art. 1.

<sup>14</sup> INDIAN CONST. art. 370, cl. 1, sub cl. (d).

<sup>15</sup> INDIAN CONST. art. 370, cl. 3.

<sup>16</sup> The Code of Criminal Procedure, 1973, §144, No. 2 of 1974 (India).

The Hon'ble SC considered Article 370 a 'temporary provision'. However, the intention behind the actions of the Government before the de-operationalization imply that the provision is intended to function permanently to maintain the special status accorded to J&K. Actions such as the C.O. 48 of 1954 which inserted Article 35A<sup>17</sup>; change in phraseology of '*Sadar-i-riyasat*' to Governor through the Constitution of J&K (Amendment) Act, 1965; and Sheikh-Indira Accord, 1975. Therefore, although the provision may be transitional in nature yet it aimed to ensure permanency to ensure the special status granted to J&K.

Article 3<sup>18</sup> provides for the '*formation of new States and alteration of areas, boundaries, or names of existing States*'. However, it does not contemplate the formation of a Union Territory ('UT') by altering the boundaries of the existing State. The administration of a UT is in the hands of the Central Government while that of the states is vested in the State Government with a greater degree of autonomy. The reorganization of an existing state into two UTs can be viewed as a direct attack upon the federal structure of the Constitution, which is considered to be an essential feature of the 'basic structure doctrine'.

## **II. STATEMENT OF PROBLEM:**

The authors after a careful perusal of the existing literature identify the vacuum present in this area of Constitutional law. The SC has failed to recognize the implications of deeming such an abrogation to be constitutional<sup>19</sup>. The judgement of this nature may lead to a judicial evolution that serves as an instrument to be exploited by the Government to increase their power and influence over the various states in the territory of India. Therefore, the authors acknowledge the existence of such a gap in reasoning adopted by the Court and bring out the implications that may reasonably follow.

## **III. RESEARCH QUESTIONS:**

The authors have sought to answer the following crucial questions through the paper:-

1. Whether the imposition of excessive or arbitrary measures post-abrogation amounted to violation of rights guaranteed to the residents under Article 19 and 21 of the Constitution?

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<sup>17</sup> INDIAN CONST. art. 35A.

<sup>18</sup> INDIAN CONST. art. 3.

<sup>19</sup> Gauri Kashyap, R. Sai Spandana, *Abrogation of Article 370 | Judgement Summary*, SUPREME COURT OBSERVER (December 11, 2023) <https://www.scobserver.in/reports/abrogation-of-article-370-judgement-summary/>.

2. Whether Article 370 assumed permanence due to the actions of the Government throughout its lifespan?
3. Whether conversion of an existing State into two UTs amounted to a misinterpretation of the powers granted under Article 3?

#### **IV. RESEARCH OBJECTIVES:**

The authors in this paper attempt to critically evaluate the judgment of the Hon'ble Supreme with a specific reference to the basic structure doctrine. Additionally, the authors point at the excessive use of power by the executive and flawed reasoning given by them to defend the abrogation of Article 370. Firstly, the authors aim to bring out the arbitrary imposition of measures equivalent to putting the state under a lockdown in isolation from the rest of the world. Secondly, with reference to the remarks of the Hon'ble CJI with respect to considering Article 370 a '*temporary provision*', the authors bring out the contrary intentions apparent in actions of the Government prior to the abrogation. Thirdly, the authors throw light on another crucial aspect that Article 3 of the Constitution does not envisage the convey a State into a Union Territory.

#### **V. RESEARCH METHODOLOGY:**

This research study is doctrinal in nature and analytical in approach. The research will depend on both primary and secondary sources.

1. **Primary Source:** The primary sources used in this research include the Constitution of India, Precedents and Statutes.
2. **Secondary Source:** This includes data gathered from different sources such as the internet blogs, journals, and articles.

#### **VI. KEYWORDS:**

Abrogation, Constitutional Order, Conversion, Federalism, Instrument of Accession.

#### **VII. EXCESSIVE AND ARBITRARY MEASURES POST-ABROGATION:**

On 5<sup>th</sup> August, 2019, the Government of India ('GoI') abrogate Article 370 of the Constitution and revoked the special status that had been accorded to J&K for almost 72 years after the independence of the country in 1947. On the eve of the abrogation that is, 4<sup>th</sup> August, 2019, the GoI imposed a curfew through Section 144 of the CrPC which prohibited the assembly of four

or more people at one place at a particular point of time. The restrictions imposed by the BJP Government are equivalent to the imposition of a lockdown. The roads remain empty with no tourist movements as a result of which the financial stability of J&K comes under the scanner since tourism remains their main source of revenue<sup>20</sup>. Since August 2019, the GoI led by BJP has implemented severe restrictions in the Kashmir region. These measures include a communications blackout, stringent limits on freedom of movement for residents, recurring curfews, the detention of local political leaders, and other harsh containment policies<sup>21</sup>.

As reported by renowned news reporters of various new channels, the roads in J&K continue to remain blocked after the abrogation of Article 370 even for vehicular traffic at times. The pedestrians in some regions of the state are prevented from walking on the roads as well. In interviews with the owners of the famous hotels in J&K it was understood that the hotel industry has suffered a huge loss due to the imposition of such a 'lockdown'. Additionally, the communication channels have been disrupted by the GoI making it extremely cumbersome for people to communicate amongst themselves apart from sharing their views with the individuals living outside J&K. This blackout has rendered the mobile phones, landlines, internet and other messaging tools unusable. The citizens of J&K continue to express their resentment and anger for such measures on majorly two grounds; firstly, that their decades-long privileges have been undemocratically and arbitrarily curtailed; and secondly, that the communication channels' disruption make it implausible for the ensure that their family members are sound and safe. However, apart from these reasons, a major factor that contributes to such resentment is what the citizens have usually stated, "*Article 370 has been snatched from us*"<sup>22</sup>.

The imposition of such an '*unprecedented*' lockdown by the GoI curtailed the freedom of the citizens living within the territory of J&K arbitrarily and unreasonably. The imposition of Section 144 may be considered as the tip of the iceberg with the communication being completely disrupted, leaders of mainstream political parties, separatist leaders, lawyers and youth organizations being arrested and a widespread health crisis. The communications

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<sup>20</sup> Shantanu Nandan Sharma, *Life after 370: Beyond the silence of Kashmir Valley*, THE ECONOMIC TIMES POLITICS BLOG (August 11, 2019 8:01 AM), <https://economictimes.indiatimes.com/news/politics-and-nation/life-after-370-is-a-silent-crisis-simmering-in-kashmir/articleshow/70622668.cms?from=mdr>.

<sup>21</sup> Leoni Connah, *Double Lockdown in Kashmir during the Covid-19 Pandemic*, 38 SOCIAL JUSTICE L.J. 33, 33-38 (2021).

<sup>22</sup> Shantanu Nandan Sharma, *Life after 370: Beyond the silence of Kashmir Valley*, THE ECONOMIC TIMES POLITICS BLOG (August 11, 2019 8:01 AM), <https://economictimes.indiatimes.com/news/politics-and-nation/life-after-370-is-a-silent-crisis-simmering-in-kashmir/articleshow/70622668.cms?from=mdr>.

blockade is an extreme form of collective punishment, ostensibly justified as a way to prevent potential disruptors from stirring up unrest following the revocation of Article 370's protections. However, it also represents a covert strategy of media control - cutting off the free flow of information from independent sources and imposing a singular, state-sanctioned narrative. When information is so restricted, citizens are left in a state of uncertainty and anxiety, unable to reliably connect with loved ones. This contradicts the government's claims that the situation is normal. The communications clampdown serves to restrict the spread of competing perspectives and keep the populace isolated from uncensored updates<sup>23</sup>.

The country has witnessed a similar situation during the national emergency proclaimed by the then President Late Shri. Fakhruddin Ali Khan under Article 352(2)<sup>24</sup> of the Constitution on account of the security of India being threatened due to an '*internal disturbance*'. During that period a similar situation as in the instant case had occurred. There was large-scale communal violence on the basis of the deep ideological divide amongst the citizens. There was violence in multiple parts of the nation and the situation became hostile. Leaders of many political parties were arrested and detained under the Maintenance of Internal Security Act, 1971 ('MISA')<sup>25</sup>. The Hon'ble SC in *ADM Jabalpur v. Shivkant Shukla*<sup>26</sup> by a majority of 4:1 held that as per the then Article 359 of the Constitution the emergency proclaimed by the President can suspend the enforcement of all the Fundamental Rights guaranteed under the Constitution and therefore, a writ of Habeas Corpus filed against the detention of the individuals was non-maintainable. However, on the basis of the dissent of Justice H.R. Khanna the Parliament passed the Constitution (Forty-Fourth Amendment) Act, 1978<sup>27</sup> which added the phrase, "*except for Articles 20 and 21*" in Article 359<sup>28</sup>. The effect of such an amendment was that the emergency cannot suspend the enforcement of such Fundamental Rights ('FRs').

The authors argue that in the instant case although the situation was not as violent as the one before the *ADM Jabalpur* case, yet the GoI enacted measures very similar to the ones adopted

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<sup>23</sup> Laxmi Murthy and Geeta Seshu, *Silence in the Valley: Kashmiri Media After the Abrogation of Article 370*, ECONOMIC AND POLITICAL WEEKLY L.J. BLOG (October 11, 2019), <https://www.epw.in/engage/article/silence-valley-kashmiri-media-after-abrogation>.

<sup>24</sup> INDIAN CONST. art. 352, cl. 2.

<sup>25</sup> Pradhyuman Singh, *Why ADM Jabalpur vs. Shivkant Shukla is criticized for wrong reasons: A case for constitutionalism*, THE LEAFLET L.J. BLOG (August 30, 2021), <https://theleaflet.in/why-adm-jabalpur-vs-shivkant-shukla-is-criticized-for-wrong-reasons-a-case-for-constitutionalism/>.

<sup>26</sup> *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521.

<sup>27</sup> Constitution (Forty-Fourth Amendment) Act, 1978, §40, Bill No. 88 of 1978 (India).

<sup>28</sup> INDIAN CONST. art. 359.

during that period. In the instant situation, the GoI undertook the said measures in anticipation of future violence and protests that could plausibly be raised by the citizens. It is important to define the extent till which the Government can go with the imposition of such preventive measures since there is very thin line in such measures being valid and them being violative of the FRs. The authors advocate for the measures to be violative of the FRs guaranteed under Articles 19<sup>29</sup> and 21<sup>30</sup> of the Constitution. The measures deprive the citizens of their freedom to practice their profession, move freely throughout the territory of India and that of free speech and expression. The unprecedented lockdown imposed by the GoI which was preventive in nature curtailed the FRs of the citizens. The right to life and liberty of the arrested individuals was restricted without any substantive evidence against such individuals to treat them in the said manner. The GoI has skirted the provisions of Article 359 which provides for, “*enforcement of rights by Courts*” and justified the imposition of arbitrary restrictions upon the FRs and freedoms by claiming that this Article does not disallow the suspension of the enforcement by the GoI itself.

The arguments of the authors are carried forward to the next section of the paper which deals with the second research question related to permanent nature of Article 370 during its existence.

### **VIII. PERMANENCE OF ARTICLE 370:**

Article 370(3)<sup>31</sup> of the Constitution states that the Article 370 can be rendered inoperative by the President of India but only a ‘*recommendation*’ of the ‘*Constituent Assembly of J&K*’. The Constituent Assembly of J&K (‘**Assembly**’) was empowered to draft a separate Constitution for J&K and decided on Articles of the Constitution that would be applicable to J&K. The Assembly was dissolved on 26<sup>th</sup> January 1950, after the Constitution of J&K was adopted by the Government of J&K. From a mere perusal of Article 370 it can be inferred that after the dissolution of the Assembly, Article 370 cannot be rendered inoperative. The C.O. 272 states that the Legislative Assembly of J&K is equivalent to the Assembly<sup>32</sup> and therefore, justifies the abrogation of Article 370 despite the recommendation of the Assembly. However, the authors argue that the Assembly and Legislative Assembly cannot be equated on the fundamental premise that the nature of the institutions is completely different from each other.

<sup>29</sup> INDIAN CONST. art. 19.

<sup>30</sup> INDIAN CONST. art. 21.

<sup>31</sup> INDIAN CONST. art. 370, cl. 3.

<sup>32</sup> The Constitution (Application to Jammu and Kashmir) Order, 2019, §2(d), C.O. 272 of 2019 (India).

This C.O. 272 stands in stark contrast with the judgment of the Hon'ble SC in April 2018<sup>33</sup> where the Court held that, “*despite the head-note of Article 370 using the word 'temporary', that it was not temporary*”<sup>34</sup>. The authors further enunciate on the permanence of the Article 370 in the subsequent paragraphs.

The Constitution (Application to Jammu & Kashmir) Order, 1954 ('C.O. 48') passed by the then President, Late Shri Rajendra Prasad on 14<sup>th</sup> May, 1954 in concurrence with the Government of J&K brought about significant changes with respect to J&K that furthered the intention of the GoI to ensure the permanence and continuation of Article 370. *Firstly*, Part I of such an order adds a *proviso* to Article 3 of the Constitution which categorically states that the Bill to alter or diminish the boundaries of J&K must only be introduced upon the recommendation of the Legislature of J&K. *Secondly*, the insertion of Article 35A of the Constitution gave exclusive rights to the ‘*permanent residents*’ or ‘*hereditary state subjects*’ to own and acquire immovable property within the territory of J&K and to have government jobs. Such laws which accorded special privileges to the residents would be valid notwithstanding them being violative of the FRs guaranteed under Part III of the Constitution. *Thirdly*, the recognition of *Sadar-i-riyasat* as the Governor of J&K without any prejudice to the Constitution of that State<sup>35</sup>.

From the aforementioned changes brought forward by the C.O. 48, it can be inferred that the GoI was keen on ensuring the autonomy of the Constitution of J&K and the recommendation of the State Legislature was given utmost importance. The Bills related to the territory of J&K could not have been introduced in the Houses of the Parliament without the recommendation of the State Legislature. These measures ensured that the Parliament does not unlawfully or unreasonably interfere with the individual autonomy of Article 370 and the Order remained silent on the re-constitution of the Assembly after its dissolution post the adoption of the Constitution of that State. It can be reasonably understood that the Assembly while drafting the Constitution for J&K must have realized the alleged ‘temporary’ nature of Article 370 and recommended its de-operationalization however, the Assembly was not of such opinion and thus, Article 370’s permanence was furthered strengthened by such acts of the Assembly and the Parliament (through C.O. 48).

<sup>33</sup> State Bank of India v. Santosh Gupta and Anr., (2017) 2 SCC 538.

<sup>34</sup> Kaushik Deka, *How Kashmir changed on August 5*, India Today Insight L.J. Blog (August, 2019 11:50 AM), <https://www.indiatoday.in/india-today-insight/story/how-kashmir-changed-on-august-5-1577706-2019-08-06>.

<sup>35</sup> The Constitution (Application to Jammu and Kashmir) Order, 1954, C.O. 48 of 1954 (India).

The power shift in the subcontinent after India's victory in the 1971 India-Pakistan War prompted Sheikh Abdullah to accept India's terms, recognizing India's increased influence. Indira Gandhi's enhanced position after the war allowed her to take a firm stance on Kashmir, rejecting demands for a plebiscite and the restoration of pre-1953 relations<sup>36</sup>. By 1975, Sheikh Abdullah abandoned his call for Kashmiri self-determination, a significant departure from his earlier opposition to India. In furtherance of the same, the Sheikh-Indira Accord of 1975 (**'the Accord'**). It is pertinent to state that the Accord did not categorically envision the temporary governance of Article 370 over Kashmir, section 1 merely stating that "*The State of Jammu and Kashmir which is a constituent unit of the Union of India, shall, in its relation with the Union, continue to be governed by Article 370 of the Constitution of India*"<sup>37</sup>. It is clear that there was no intention of Article 370 operating as a temporary provision.

Therefore, on the basis of the aforementioned actions undertaken by the GoI it is apparent that Article 370 was merely conceived as temporary however, this conception was disapproved by the actions of the Government itself. The authors in the next section stress upon the wrongful downgrade of the State of J&K to two UTs and its impact on federalism as a part of the basic structure of the Constitution.

## **IX. RETROGRESSION OF 'STATEHOOD' – A MISINTERPRETATION OF ARTICLE 3:**

The State of Jammu and Kashmir was divided into two union territories, Jammu and Kashmir and Ladakh, on 31<sup>st</sup> October, 2019, as a result of the Jammu and Kashmir Reorganisation Act, 2019<sup>38</sup> (**'2019 Act'**). The State was divided into the UT of Ladakh without a legislature and the UT of J&K with a legislature, essentially stripping J&K off its statehood and converting it into a UT. Article 3<sup>39</sup> of the Constitution provides for formation of new States and alteration of areas, boundaries or names of existing States. The SC in *Re: Article 370 of the Indian Constitution*<sup>40</sup> took up the question on whether such a change of status of a state to a UT is permissible within the ambit of Article 3. The Court reasoned that the Parliament can extinguish the statehood of a State and bifurcate it into UTs if it is believed that it can lead to

<sup>36</sup> Ankit, R., *Sheikh Mohammad Abdullah of Kashmir, 1965–1975: From Externment to Enthronement. Studies in Indian Politics*, (2018).

<sup>37</sup> Sheikh-Indira Accord, 1975, §1 (India).

<sup>38</sup> Jammu and Kashmir Reorganisation Act, 2019, No. 34, Acts of Parliament, (India).

<sup>39</sup> INDIA CONST. art. 3.

<sup>40</sup> In Re: Article 370 of the Indian Constitution 2023 INSC 1058 (India).

better administration and governance. Despite the law already being settled on the fact that the mere possibility of a power being abused is not a valid reason to deny its existence<sup>41</sup>, the repercussions of giving the Parliament the power to alter statehood under the shaky ground of '*better administration*' are huge. It has already been seen that the people of J&K have severely suffered and continue to suffer to this day due to the poor implementation of Article 370 which led to internet shutdowns and imposition of lockdowns on them. The Union cannot use this power to convert all states of Indian into UTs as such a move would be visibly unconstitutional and would effectively override the constitutional structure of the country, i.e., a union of States. However, they would still have the power to alter the statehood of at least a few states on very shaky reasoning. It is also pertinent to state that the UTs are administered directly by the Union. The entire concept of federalism in India revolves around the fact that federalism exists with a bias towards the Union. But such acts of the Union affect the autonomy of the states to make certain decisions themselves. Section 3<sup>42</sup> of the 2019 Act provides for the formation of Ladakh as a UT without a legislature while section 4<sup>43</sup> provides for the formation of J&K as a UT with a legislature. However, the very fact that no elections were held for the J&K UT in order to implement the 2019 Act, in practice, creates 2 UTs directly under the control of the Union.

Article 1<sup>44</sup> of the Constitution provides India to be a '*Union of States*' which embodies the principle of federalism in India. However, when the Union is given the power to carve out UTs out of existing states under the principle of '*better administration*', the scope for misuse is heightened. Such a drastic change in the statehood was only justified on the grounds of it being '*temporary*' in nature, which is refuted by the authors under the previous question. Even after the abrogation of article 370, it is seen that the situation of J&K had never really improve. While the reorganization of J&K may have been driven by purported administrative benefits, it underscores the need for a more cautious and transparent approach to territorial changes to uphold the principles of democracy, federalism, and the rule of law. It is crucial to recognize that such drastic changes should not be justified solely on the grounds of being '*temporary*', especially when they have lasting implications for governance and autonomy.

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<sup>41</sup> State of West Bengal v. Union of India, AIR 1963 SC 1241 (India).

<sup>42</sup> Jammu and Kashmir Reorganisation Act, 2019, §3, No. 34 (India).

<sup>43</sup> Jammu and Kashmir Reorganisation Act, 2019, §4, No. 34 (India).

<sup>44</sup> INDIA CONST. art. 1.

## X. CONCLUSION:

The de-operationalization of Article 370 of the Constitution as the authors argue stands in the way of the Federal structure of the nation and attempts to abrogate a provision which remained permanent in its application over the years until 5<sup>th</sup> August, 2019. The GoI ensured that the entire process of the abrogation of Article 370 was carried smoothly without giving the slightest of a hint to the people involved in the J&K administration. The Government starts off by proclaiming the President's rule in J&K and states that from the time of such proclamation wherever previously the recommendation of the J&K State Legislature was required that would be substituted by the recommendation of the Parliament. The irony remains in the fact that the President being the nominal head of the State ordinarily functions only on the aid and advice of the Government. Further, the Government conveniently misinterprets Article 3 of the Constitution and 'downgrades' the status of J&K from that of a State to a UT. The Government defends the C.O. 272 by stating that the consultation of the Parliament was taken and therefore no such 'procedural violation' in case of Article 3. Therefore, the entire roadmap of abrogating an allegedly 'temporary' provision of the Constitution was executed in the most 'efficient' manner by the GoI led by BJP.

The 2019 Act enacted on the premise of better administration falls short of upholding the essential features of the basic structure of the Constitution that is democracy, federalism and rule of law. The GoI arbitrarily and erroneously revoked the 'statehood' of J&K which significantly violated the principle of federalism by completely destroying the autonomy of a State which had been granted special privileges since the time of independence. The quasi-federal structure after such measures adopted by the Government becomes a less 'quasi'-federal structure. The unitary bias already existent in the federal structure of the nation becomes all the stronger. The federal structure of the nation is violated by the action of the Government relying on the sole basis that Article 3 does not permit a retrogradation of 'statehood' especially, merely for administrative reasons. The opinion of the citizens through their representatives in the Legislative Assembly was disregarded even before the abrogation by proclamation of President's rule.

The fundamental pillars of the basic structure of the Constitution stand violated that is, democracy, federalism and rule of law. The Hon'ble Supreme while upholding the abrogation and stating that the Article 370 was merely temporary in nature goes against the Court's

previous ruling in April 2018<sup>45</sup> that did not disregard the permanence of Article 370. The Assembly of J&K before its dissolution in 1957 did not recommend the Parliament to de-operationalize Article 370 and therefore, such an action further strengthens the arguments of the authors regarding the '*historical*' permanence of Article 370. The SC while holding the abrogation accept that '*asymmetric federalism*' is a part of the basic structure of the Constitution however, on the contrary the Court accepts the removal of such a permanent provision with respect to J&K. The authors argue that the action of the GoI and the SC's accord of the same violates the basic structure of the Constitution significantly whilst promising a '*naya Kashmir*' (new Kashmir) without the opinion of the Kashmiris themselves. The authors conclude their analysis in the aforesaid paper with the opinion that merely because of Article 370 was 'conceived' as temporary its continuance cannot be dispensed with in furtherance of asymmetric federalism while at the same time ignoring the disastrous consequences upon the basic structure of the Constitution.

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