

Constitutional Autonomy and its (Un)making

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Abstract: To grant the Muslim majority princely state of Jammu and Kashmir (J&K) a special accommodation in the Indian context via Article 370 had been a novel constitutional experiment. The negotiations between the ruler of the state and the government of India formalized the ‘Accession’ of J&K with India, and Article 370 reflected the conditions of the constitutional relationship between the two. Being an exceptional provision that gave birth to a separate, but not independent, constitution (of Jammu and Kashmir), why has not Article 370 of the Indian constitution, or more precisely Jammu and Kashmir’s autonomous status, stood the test of time? Was the unmaking ingrained in the very making of Article 370 or an outcome of its antithetical use by successive Indian governments? What concerns, motivations, and ambitions influenced the J&K leadership during this constitutional exercise? These are questions that this paper seeks to answer. This paper argues that the repeal of Article 370 was inevitable due to the nature and context of its initial framing as much as its subsequent institutional-political working, and that the guarantee of autonomy was essentially, from the very genesis, meant to lead to a complete integration of J&K with the Indian Union without any special constitutional autonomy.

Keywords: Kashmir; Constitutionalism; Sheikh Abdullah; Dogras; Conflict; Nehru

A. Introduction

The Instrument of Accession, which was signed in 1947 by the last Dogra king of Jammu and Kashmir, Hari Singh, with the Indian Union, granted India the right to make laws on matters of defence, external affairs and communications, with J&K retaining sovereignty over all other matters. The autonomy resulting from this conditional accession, subsequently reflected in Article 370 of the Indian constitution and the State’s separate constitution, was diluted gradually to pave the way for the extension of almost the entire Indian constitution to the State until 2019, when it was nullified altogether. With this, the State’s separate constitution was rendered inoperative and hence, the more-than seven-decade old constitu-

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tional guarantee of protecting the distinction of Jammu and Kashmir (including Ladakh) within the Indian Union ended *suddenly*. Such a provision was not only in recognition of formal negotiated Accession, but also accommodated the popular political vision of leadership of J&K. The very making of Article 370, it is argued here, was ingrained with its abrogation.

Article 370 has been a controversial subject ever since its constitutionalisation. This paper traces the constitutional history of Article 370 with the objective of ascertaining the motive of the framers of the Indian constitution, behind its constitutionalisation while also investigating the intentions and actions of J&K's leadership. The public and personal utterances of the Indian constitution-framers are interpreted and juxtaposed with the narrative of constitutional-federal accommodation that was eventually built around Article 370 to foreground the dissonance between them. In doing so, this paper also challenges the dominant scholarship, which cites the "special status" of J&K as an experiment in asymmetrical federalism and blames its repeal on the incumbent government's political ideology.

Furthermore, the existing scholarship on India-J&K constitutional relationship has been preoccupied with the legal readings of Article 370—A.G. Noorani¹, and more recently, Zaid Deva² and Balu G. Nair³ have narrated its "unconstitutionality", "illegality" and "misuse". However, deviating from the legal approach, this paper argues that as much as the repeal was a result of institutional misuse, it was more an inevitable outcome of its framers' design; hence, it reads the *legal* as a subset of the *political*. Any discussions on Article 370 should, therefore, begin by problematising the politics of its constitutionalisation particularly in the academic writings which either focus on its post-constitutional life or legal basis. And doing that is primarily the purpose of this paper. Pertinently, the Supreme Court of India recently upheld the validity of the abrogation, whose analysis merits separate space and does not impact the arguments made here.

This paper relies on a critical use of Bruce Ackerman's dual conceptual distinction between the domains of "constitutional politics" and "normal politics."⁴ Ackerman argues that the former lays down the framework for post-constitutional politics. Although this classification is used as a normative prescription for constitution-making, this paper shows that in the case of J&K, the "constitutional politics" and "normal politics" were blurred because the same set of leaders acted both as ruling politicians and constitution-makers and, hence, the resultant constitutional relationship failed to establish a working framework for the patterns of political activity in J&K. In other words, the "constitutional moments" of

1 A.G. Noorani, Article 370: A Constitutional History of Jammu and Kashmir, New Delhi 2011.

2 Zaid Deva, Basic Without Structure?: The Presidential Order of 1954 and the Indo-Jammu & Kashmir Constitutional Relationship, *Indian Law Review* 3 (2020), pp. 1-36.

3 Balu G. Nair, Abrogation of Article 370: Can the President Act Without the Recommendation of the Constituent Assembly?, *Indian Law Review* 3 (2019), pp. 254-279.

4 Bruce Ackerman, *We the People*, Volume 1: Foundations, Cambridge 1991.

the State were subservient to the politics occurring in the extraconstitutional domain. The “special status” provisions of the Indian constitution should, therefore, be located in this context.

B. Tracing the Antecedents of Constitutionalism in J&K

The process of constitutionalism in J&K was heavily influenced by the contentious politics between the Hindu Dogra regime and the popular struggle against it. The protests, be it the workers’ agitation in the Silk Factory in 1924 or the demand for the overthrow of the Dogra regime in 1931, coupled with the reactionary concessions granted by the Dogra regime, formed the context of constitutionalism in J&K. Notable concessions included the state subject laws, passed in 1927 reserving jobs for “state subjects”,⁵ the Glancy Commission recommendations,⁶ the setting up of a Praja Sabha (legislative assembly) with constrained powers in 1934⁷ and the introduction of a new Constitution in 1939.⁸ A summary, and by no means a comprehensive account, of the major events that formed the antecedents of constitution-making in J&K is necessary here.⁹

In the early twentieth century, taking cue from the Hindu organizations already operating in the State,¹⁰ organizations such as the *Anjuman-i-Nusrat-ul-Islam* were formed to educate an illiterate Muslim population in order to alleviate their plight under the Dogra regime.¹¹ Later, many Kashmiris educated in Aligarh and Lahore and outraged at the lack of dignified employment for Muslims formed the Fateh Kadel Reading Room party.¹² The events of 1931—an inflammatory speech followed by mass arrests and the killing of twenty-two protestors outside Srinagar’s Sessions Court—catalysed this nascent movement.¹³

Mirwaiz Yusuf Shah and Sheikh Abdullah were instrumental in mobilizing and channelizing these demonstrations. In 1932, they formed the All Jammu and Kashmir Muslim Conference—the first organized political opposition to the Dogra king—using the Reading

5 Christopher Snedden, *Understanding Kashmir and Kashmiris*, London 2015, p. 96.

6 Report of the Kashmir Constitutional Reform Conference, Legal Document No. 50, April 1932, pp. 88-97, <https://www.ikashmir.net> (last accessed on 15 March 2023).

7 Constitution Act, 1934, Legal Document No. 52, <https://www.ikashmir.net> (last accessed on 15 March 2023).

8 Constitution Act, 1939, Legal Document No. 65, <https://www.ikashmir.net> (last accessed on 15 March 2023).

9 For a detailed account, see *Javid Ahmad Dar*, *Plight of Kashmir: A Story of Oppression*, Srinagar 2013.

10 Snedden, note 5, p. 96.

11 *Prem Nath Bazaz*, *Inside Kashmir*, Srinagar 1941, pp. 250-251.

12 *Alastair Lamb*, *Kashmir: A Disputed Legacy*, Hertfordshire 1991, p. 91.

13 *Victoria Schofield*, *Kashmir in Conflict: India, Pakistan and the Unending War*, London 2003, p. 18.

Room party as a skeleton.¹⁴ Around the same time as the *Sher-Bakra* (Lion-Goat) political rivalry between the Mirwaiz group and Sheikh loyalists, Sheikh grew closer to the Indian National Congress, specifically Jawaharlal Nehru, a proponent of secularism.¹⁵ Prem Nath Bazaz also served as a vital medium for their friendship and his magazine, *Hamcard*, which was also the party mouthpiece, constantly disseminated Nehruvian secular ideas.¹⁶ Under this influence, the Muslim Conference was converted into the National Conference in an attempt to include the non-Muslim community in its activities.

Following the subcontinental partition in 1947, Hari Singh acceded to India in a backdrop of widely contested events. What is, however, well-established is that the first full-scale war broke out between India and Pakistan, eventually leading to the division of J&K into Indian and Pakistani-administered regions. Post-war, 35% of the erstwhile state of J&K went under Pakistan's control. Their conspicuous absence in the constitution-making process implicitly buried alternative constitutional paths in J&K, corroborating what Upendra Baxi¹⁷ and Ranabir Samaddar¹⁸ have argued: That constitution-making processes foreground selected ideas and conceptions while eliminating alternative constitutional possibilities.

Parallelly, Sheikh had prioritized the overthrow of Dogra rule rather than addressing the question of accession. He launched a sustained "Quit Kashmir movement", following which, in 1948, Nehru persuaded the Maharaja to abdicate his position. Thus, Sheikh became head of an Interim government that immediately began the task of redressing the unequal distribution of resources.¹⁹ The political power thus shifted from Jammu to Kashmir.²⁰

The National Conference, in 1944, put forward the *Naya Kashmir Manifesto*, pressing the Maharaja to grant equal political representation to all communities.²¹ B.P.L. Bedi, a Punjabi Communist leader, helped produce a substantial forty-four-page document, containing a prospective constitution for Jammu & Kashmir and a detailed economic plan which proposed the redistribution of land without any compensation to landholders. However, the document did not comment on the question of accession, which had raged due to

14 Ibid., p. 18.

15 Lamb, note 12, p. 93.

16 Altaf Hussain Para, *The Making of Modern Kashmir: Sheikh Abdullah and the Politics of the State*, London 2019, pp. 114-16.

17 Upendra Baxi, Outline of a 'Theory of Practice' of Indian Constitutionalism, in: Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution*, New Delhi 2008, pp. 106-107.

18 Ranabir Samaddar, Colonial Constitutionalism, Identity, Culture and Politics 3 (2002), p. 3.

19 Lamb, note 12, p. 184.

20 Snedden, note 5, p. 98.

21 New Kashmir, Tr. 1944, <https://www.kashmirconnected.com/resources/new-kashmir-the-english-text-in-full> (last accessed on 18 December 2023).

the imminent possibility of a subcontinental partition and reorganisation of the princely states.²²

On 5 March 1948, the day Sheikh's interim government was proclaimed, Hari Singh also announced the setting up of a Constituent Assembly, which would double as a National Assembly for the time being, to establish the State's constitutional structure.²³ The Assembly was tasked to concern itself with some immediate objectives: the formulation of a state constitution, the future of the Dogra dynasty, the compensation to landholders whose land was taken away and distributed under land reforms and the determining of the State's relationship with the Indian Union.²⁴

C. Article 370 and the State's Separate Constitution

Between the Indo-Pak war on one hand and the convening of the Constituent Assembly on the other, Sheikh Abdullah's interim government abolished landlordism and redistributed the confiscated land even as deliberations on the State's future relationship with the Indian state continued.²⁵ On 27 May 1949, as the Constituent Assembly of India began discussions on the nature of the relationship that J&K would share with India, it announced the inclusion of four representatives from J&K to be nominated by the Maharaja on the advice of Sheikh Abdullah.²⁶ Sheikh Abdullah chose himself, Mirza Mohammad Afzal Beg, Maulana Mohammed Saeed Masoodi, and Moti Ram Bagda as the four representatives. On 17 October, Article 370 (as Article 306A) was incorporated into the Indian draft constitution, having been negotiated between leaders of the National Conference and the Congress in a series of letters and conversations.²⁷

It reflected the terms of the Instrument of Accession: the Indian state would legislate on matters of defence, foreign affairs, and communication only.²⁸ Gopalaswami Ayyangar, its chief architect, in response to the rightists who opposed this discriminatory provision in the Assembly, argued that Article 370 was a concession owing to "the war with Pakistan, the

22 Andrew Whitehead, *The Making of the New Kashmir Manifesto*, in: Ruth Maxey / Paul McGarr (eds.), *India at 70: Multidisciplinary Approaches*, London 2020, pp. 15-32.

23 Proclamation of Maharaja Hari Singh, 1948, Legal Document No. 118, <https://www.ikashmir.net> (last accessed on 20 March 2023).

24 *J&KCA*, Jammu and Kashmir Constituent Assembly Official Report: Part I, 1951-55, p. 85.

25 Lamb, note 12, p. 184.

26 Constituent Assembly Debates (henceforth CAD), Vol. VIII, 27th May 1949, https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-27 (last accessed on 25 March 2023).

27 CAD, Vol. X, 17th October 1949, <https://www.constitutionofindia.net/debates/17-oct-1949/> (last accessed on 25 March 2023).

28 Article 370 in the Constitution of India 1949, <https://indiankanoon.org/doc/666119/> (last accessed on 25 March 2023).

unstable ceasefire, the continued presence of rebels and enemies in the state's territory and the entanglement of the government of India in the United Nations".²⁹

Based on this, the President of India passed the Constitution (Application to Jammu & Kashmir) Order 1950 in "consultation with the State government extending provisions of the Constitution and subject-matters which corresponded to defence, foreign affairs and communications".³⁰ Pertinently, the Article became part of temporary provisions in the Indian constitution. This temporariness acted both as a shield against the constant demands of right-wing forces to integrate J&K completely as well as a sword demonstrating to the world that India was committed to holding a plebiscite in J&K.³¹

Ayyangar also made a unilateral change to Article 370's final draft. The Government of the State was earlier defined as "the person for the time being recognised by the Union as the Maharaja of Jammu and Kashmir, acting on the advice of the Council of Ministers appointed under the Maharaja's Proclamation, dated the fifth day of March, 1948".³² Ayyangar substituted "for the time being in office" for "appointed", recognising successive governments as well.³³ This "trivial change", as he called it, enabled Sheikh's removal in 1953.³⁴

This constitutionalisation of J&K's autonomy, which was frequently applauded by the members during the State's Constituent Assembly Debates, generated trust and support for the State's decision to share a constitutional relationship with India. On 11 August 1952, Sheikh Abdullah tabled the Delhi Agreement in the Assembly, which stated that the domiciles of the State were automatically citizens of India and that the power to define the domiciles, their special privileges, and rights would be vested in the State Legislature.³⁵ Additionally, the Fundamental Rights of the Indian Constitution would not be applicable in their entirety, considering that land reforms were implemented in a unique manner in the State; thus, they would need to be amended to reflect the State's specific context.³⁶

This was succeeded by a period of tumultuous events as the right-wing forces in the Indian Parliament pressurised Nehru to fulfil his word of complete integration of J&K with the Indian Union. Sensing a change in Nehru's attitude, Sheikh Abdullah reaffirmed his determination to preserve the state's autonomy.³⁷ The Working Committee of the National Conference recorded on 9 June 1953 that the only viable solutions for J&K's peaceful reso-

29 CAD, note 26.

30 The Constitution (Application to Jammu & Kashmir) Order 1950, in: White Paper on Indian States, pp. 378-383.

31 *Deva*, note 2, p. 3.

32 Final Agreed Draft of 306-A, as quoted in *Noorani*, note 2, pp. 63-64.

33 Article 370, note 28.

34 *Noorani*, note 1, p. 4.

35 *J&KCA*, note 23, p. 566.

36 *Ibid.*, p. 567.

37 *Balraj Puri*, Kashmir and Rest of India: First Emotional Rupture, Economic and Political Weekly 38 (2003), pp. 5143-5145.

lution were: a) an overall plebiscite, b) independence of the whole State, c) independence of the whole State with joint control of foreign affairs or d) the Dixon Plan with independence for the plebiscite area.³⁸ An alarmed Nehru, in an unconstitutional manner, got Sheikh's government dismissed, and Sheikh, along with some of his colleagues, was put behind bars.³⁹

When the Assembly met on 20 October 1953, Abdul Ghani Goni moved an adjournment motion to dismiss the proceedings until the arrested members were set free.⁴⁰ The motion was rejected, prompting a walk-out by Goni and six other members. Subsequently, reports of the Advisory Committee regarding Fundamental Rights and Citizenship and the Basic Principles Committee were presented in the Assembly on 3 February 1954. The latter outlined the basics of a draft constitution and established the finality of the State's relationship with the Indian Union by formally ratifying the Instrument of Accession.⁴¹ The former report recommended merging the existing three classes of State Subjects into one category of "permanent residents" of the State who would be citizens of India and yet the latter attribute would not hamper its special rights.⁴² The authority to define a Permanent Resident was retained by the State Legislature.

Both the reports were adopted on 6 February 1954, following which the Drafting Committee submitted its report—which later became the Constitution (Application to Jammu and Kashmir) Order or the Presidential Order of 1954. The Order made necessary modifications to provisions of the Indian constitution before making them applicable to J&K, creating special exemptions for "Permanent Residents" of the State and vesting the final power to define or change any provision related to them in the State Legislature. Most notably, Article 35-A granted special rights to the Permanent Residents of the State in terms of employment, acquiring property, settling in the State, scholarships and other State aid.

Along with a few other detained members, Mirza Afzal Beg was released on 20 October 1956. He moved an adjournment motion in support of the detained members, which was rejected.⁴³ He accused the incumbent government of creating an unfavourable environment for constitution-making, as Section 50 was imposed in Srinagar, arrests were made under detention laws, and a ban was put on public discussions.⁴⁴ Following his speech, after accusing the Assembly of having lost its representational character due to their detention, he and eight other members boycotted the proceedings.⁴⁵

38 Noorani, note 1, pp. 228-229.

39 Ibid., p. 11.

40 *J&KCA*, note 24, p. 780.

41 Ibid., pp. 796-801.

42 Ibid., pp. 801-809.

43 *J&KCA*, Jammu and Kashmir Constituent Assembly Official Report: Part II, 1956, p. 57.

44 *J&KCA*, note 24, p. 102.

45 Ibid., p. 119.

Beg's accusations were certainly not exaggerated but sufficiently selective insofar as Sheikh Abdullah's own reign was concerned. The latter had been "a potential dictatorship and one-party regime".⁴⁶ "One leader, one party, one programme" had been the party slogan as Sheikh exercised political power to employ his party programme in violation of ideals of pluralism, accountability and tolerance of dissent.⁴⁷ His reign witnessed killings,⁴⁸ arbitrary arrests of people in disagreement with the government through mundane conversations in public places, dissemination of official propaganda through the media, suppression of dissenting media, incarceration and deportation of dissident leaders such as Abbas and Bazaz, and most notably the use of the infamous *Peace Brigades* as the party whip.⁴⁹

D. "Asymmetrical Federalism" in the Indian Polity

Asymmetrical federalism is defined as a conscious constitutional arrangement that prescribes "the granting of differential rights to certain federal sub-units, and the recognition thereby imparted for distinct, territorially concentrated 'ethnic' or 'national' groups".⁵⁰ Scholars such as Alfred Stepan,⁵¹ Will Kymlicka⁵² and Balveer Arora⁵³ have posited that asymmetrical federalism is the characteristic that enables multinational federations like India to "hold together". J&K's autonomous status has, thus, become one of the prominent examples used in support of this argument.

Louise Tillin criticises this position, arguing that "*de facto* asymmetry"—prior historical differences between subunits—is inherent in all federations, whereas "*de jure* asymmetry" is a product of conscious constitutional design.⁵⁴ She argues that while India has "*de facto* asymmetry" in abundance along religious, linguistic, and cultural lines, constitutional asymmetry in the form of Article 370 for example, was not purposefully devised to establish "*de jure* asymmetry". In other words, the asymmetry was not a conscious consequence of granting specific rights to regions based on their distinct religion, culture, or language.

46 Lamb, note 12, p. 184.

47 Sumantra Bose, *The Challenge in Kashmir: Self-Determination and a Just Peace*, New Delhi 1997, pp. 26-27.

48 Ajaz Ashraf Wani, *What Happened to Governance in Kashmir*, New Delhi 2019, p. 130.

49 Para, note 16, pp. 210-212.

50 Louise Tillin, *Asymmetric Federalism*, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution*, Oxford 2016, pp. 751-781.

51 Alfred Stepan, *Toward a new comparative politics of federalism, multinationalism, and democracy: Beyond Rikerian federalism*, in: E.L. Gibson (ed.), *Federalism and Democracy in Latin America*, Baltimore/London 2004.

52 Will Kymlicka, *Federalism and nationalism in Canada: A comparative perspective*, in: Rekha Saxena (ed.), *Mapping Canadian Federalism for India*, New Delhi 2002.

53 Balveer Arora, *Adapting federalism to India: Multilevel and asymmetrical innovations*, in: Balveer Arora / Douglas V. Verney (eds.), *Multiple identities in a single state: Indian federalism in comparative perspective*, New Delhi 1995.

54 Tillin, note 50, p. 48.

This asymmetry, in the case of J&K, supposed to be a politically expedient strategy of accommodation in Indian constitutionalism turned out to be a privilege, as instead of ensuring differential power sharing, it gave the Indian state greater powers with regard to J&K than other states.⁵⁵ The empowerment of the state legislature beyond the purview of Indian judicial systems—unlike in the rest of India, no lawmaking in J&K was subject to judicial review—simultaneously made it easier for the Indian governments to employ exceptional legislations in connivance with the state governments.⁵⁶ A.G. Noorani has aptly described that the Indian state required mere executive orders to amend its constitutional relationship with J&K, whereas the same amendment for other states requires a two-thirds majority in the Parliament plus the ratification by the states.⁵⁷

The supposedly federal arrangement worked out by the Indian and Kashmiri leaderships could have worked on trust—which was breached repeatedly—and a shared federal culture—which was non-existent. The dishonesty in upholding their commitments manifested in the Indian leadership’s actions, as exemplified by Sheikh’s arrest ordered by Nehru and the Indian leadership’s overt as well as covert lobbying for complete integration. Regarding issues about the misuse of Article 370, whenever the judiciary was called into action, it did not limit executive power, and, thereby, provided precedence for further constitutional misuse.⁵⁸

The Indian leadership’s role merits further comment here. Tabling Article 370 in the Constituent Assembly of India on 17 October 1949, Gopalaswami Ayyangar argued that “the discrimination was due to the special conditions of Kashmir which meant it was not yet ripe for this [same] kind of integration”.⁵⁹ He further clarified this in his speech to the Council of States on 5 August 1952, wherein he stated that Article 370 was not a “permanent feature of the Constitution and when the time was ripe, could be wiped off the Constitution”.⁶⁰

While Sheikh wanted to preserve the State’s autonomous position, Nehru was eager to secure the State’s complete integration with India.⁶¹ In 1953, Nehru got Sheikh unconstitutionally dismissed from office by creating an environment of violence.⁶² The “removal of certain well-known corrupt officers, suspension of others whose loyalty is doubted” and “apprehending any persons taking a lead in creating any disturbance” were the conditions

55 *Madhav Khosla*, The Indian Constitution, New Delhi 2012, p. 75.

56 *Haley Duschinski / Shrimoyee Nandini Ghosh*, Constituting the occupation: preventive detention and permanent emergency in Kashmir, *The Journal of Legal Pluralism and Unofficial Law* 49 (2017), pp. 15-16.

57 *Noorani*, note 1, p. 21.

58 *Noorani*, note 1, p. 17.

59 CAD, note 26.

60 *Noorani*, note 1, p. 230.

61 *Ibid.*, p. 9.

62 *Ibid.*, p. 11.

under which Nehru got Sheikh arrested—as recorded by his Private Secretary, M. O. Mathai on 31 July 1953.⁶³

The post-dismissal phase was properly planned as well. Nehru had established a clout within the State government that was ready to stick by his policies. Bakshi Ghulam Mohammad was installed as the Prime Minister. Having previously asked the Constituent Assembly not to take up the question of accession as it was being deliberated in the United Nations, Nehru backtracked and got the Bakshi government to ratify the Instrument of Accession in the Constituent Assembly on 6 February 1954.⁶⁴ Bakshi was eventually replaced as well. B.K. Nehru records this state of affairs: “From 1953 to 1975, Chief Ministers of that State had been nominees of Delhi. Their appointment to that post was legitimized by the holding of farcical and totally rigged elections in which the Congress party led by Delhi’s nominee was elected by huge majorities”.⁶⁵

The nation-building project in India after independence was based on the secular model framed by its constitution-makers. Yet, paradoxically, the Indian leadership used “religiosity” for this secularisation—the Muslim-majority religious composition of J&K was instrumentalised to “secularise” an otherwise Hindu-majority polity.⁶⁶ It became proof of India’s belief in secularism despite the communal undertones evident in Nehru’s cabinet—a cabinet minister Shyama Prasad Mukherji, would go on to lead the *Praja Parishad agitation* of 1953 in Jammu and, simultaneously, the Jan Sangh pressurized Nehru to speed up J&K’s integration.⁶⁷

On the operational aspect, successive Indian regimes hollowed out Article 370 and disregarded the recognition of J&K’s unique relationship with the Indian Union. Nehru satisfactorily remarked in the Lok Sabha on 27 November 1963:

“Article 370 has been eroded, if I may use the word, and many things have been done in the last few years which have made the relationship of Kashmir with the Union of India very close. There is no doubt that Kashmir is fully integrated...We feel that this process of gradual erosion of Article 370 is going on. Some fresh steps are being taken and in the next month or two they will be completed. We should allow it to go on. We do not want to take the initiative in this matter and completely put an end to Article 370.”⁶⁸

63 Jawaharlal Nehru Memorial Fund, Selected Works of Jawaharlal Nehru, Vol. 23, pp. 303-305, <https://nehruselectedworks.com/> (last accessed on 19 December 2023).

64 *J&KCA*, note 24, p. 936.

65 *B.K. Nehru*, Nice Guys Finish Second, New Delhi 1997, pp. 614-615.

66 *Mridu Rai*, The Indian Constituent Assembly and the Making of Hindus and Muslims in Jammu and Kashmir, *Asian Affairs* 49 (2018), pp. 205-221.

67 *Ibid.*, p. 212.

68 *Lok Sabha Debates*, Vol. XXXVI, No. 8, 27th November 1963, cols. 1636-1637, Digital Library of the Parliament of India, <http://eparlib.nic.in> (last accessed on 19 December 2023).

India's Home Minister at the time, Gulzari Lal Nanda added more clarifications in the Lok Sabha on 4 December 1964:

*"The only avenue of taking the Constitution [of India] into Jammu and Kashmir is through the application of the provisions of Art. 370... It is a tunnel. It is through this tunnel that a good deal of traffic has already passed and more will... Article 370, whether you keep it or not, has been completely emptied of its contents. Nothing has been left in it."*⁶⁹

Article 370 continued to serve as a "tunnel". Despite serving the purpose of gradually integrating J&K, the Indian government's move to nullify it accomplished what Nehru had begun—complete integration sans any autonomous relationship. Hence, the federal experiment was, by its design, supposed to serve as a smokescreen before a gradual integration could be achieved.

E. "Legitimizing Vocabulary" of the J&K Leadership

To put too much focus on Indian leadership's role in J&K's constitutional process would be to minimise the role and agency of J&K's leadership. A reading of how they perceived the State's constitutional relationship with India is necessary to understand their political action. Prominent in this context is Sheikh Abdullah and his National Conference.

Rochana Bajpai, in her work on Indian constitution-making, defines "legitimizing vocabulary" as a set of normative ideas and concepts like secularism, national unity, development and social justice which were employed by the Constituent Assembly of India to do away with political safeguards for religious minorities.⁷⁰ A similar occurrence can be witnessed in the J&K Constituent Assembly Debates. The J&K Constituent Assembly members, drawn mostly from the National Conference, seem to have skipped a critical analysis of the Indian political formations from the very beginning. In almost all of their speeches, with a few exceptions of Abdul Ghani Goni and Mirza Afzal Beg, they harboured an uncritical appreciation of the Indian secular-democratic model.

They held the political formations in Indian and Pakistani states to be a simple binary of democracy and feudalism, respectively. We find ample examples of this binary in Sheikh Abdullah's inaugural address to the Constituent Assembly on 5 November 1951.⁷¹ He invoked secular values in democratic constitution-making, abolition of landlordism and advanced industrial capacity as the advantages of acceding to India. Simultaneously, he termed the Muslim League as "forces of religious bigotry" Pakistan as a strictly feudal, economically weak, politically unstable and constitutionally undemocratic state. To him,

69 *Lok Sabha Debates*, Vol. XXXVI, No. 15, 4th December 1964, cols. 3454-3460.

70 *Rochana Bajpai*, *Constituent Assembly Debates and Minority Rights, Economic and Political Weekly* 35 (2002), pp. 1837-1845.

71 *J&KCA*, note 24, pp. 82-110.

states ought to be formed on political and economic considerations and not religious congruence. In this sense, he followed Nehru and the Congress in using anti-Pakistan arguments throughout his speeches. While he denounced Pakistan as a feudal child of communal conflict, Nehru vehemently pushed the idea of a secular India.

While they took for granted the secularity of the Indian state, the same cannot be held true for the Indian Constituent Assembly members who resorted to religiously motivated perspectives in debating the question of religious minorities. Critical scholarship has shown that the Indian constitution was conceptualized with a Hindu bias⁷² and deliberate denial of political rights to its religious minorities.⁷³ Despite the presence of right-wing forces, prominently Shyama Prasad Mukherji in Nehru's cabinet, it appears that Sheikh did not consider the possibility that Nehruvian India could manifest itself as Mukherjian India in the near future. The only moment he did so, in his inaugural speech, he paradoxically expected the Muslim population of J&K to act as a check on Hindu communal assertions in India.

The realization that the Indian leadership across all political spectrums actually wanted a complete integration of J&K with the Indian Union dawned late, that too to a few members. Abdul Ghani Goni spoke in the Assembly: "Shyama Prasad Mukherji's and Nehru's goal was one, that of complete integration".⁷⁴ Sheikh's admiration lasted until his fallout with Nehru during the *Praja Parishad agitation* in 1953.⁷⁵ In a letter to Maulana Azad on 16 July 1953, he wrote: "The only difference between the government of India and Jan Sangh on the issue is whether to bring about the merger now or after sometime".⁷⁶

The motives of the Indian government had thus become clear to Sheikh albeit too late. Since his early days, Sheikh Abdullah and the National Conference had forged close ties with Nehru and the Indian National Congress. This association had a strong influence on the state politics particularly because no alternative idea that contradicted the Congress' position found currency within the National Conference. One such proposal which Sheikh rejected had come from the Punjab Muslim League members, who, at the behest of Jinnah, had offered autonomy to Kashmir along with the right to secession if it accedes to Pakistan or, if this offer is not acceptable, then it should try to remain independent of the two states.⁷⁷

72 Pritam Singh, Hindu Bias in India's "Secular" Constitution: Probing Flaws in the Instruments of Governance, *Third World Quarterly* 26 (2005), pp. 909-926.

73 Zubair Ahmad Bader, Difference and Reservation: A Reading of the Constituent Assembly Debates, *History and Sociology of South Asia* 10 (2016), pp. 74-94.

74 *J&KCA*, note 24, pp. 933-934.

75 A.G. Noorani, How and Why Nehru and Abdullah Fell Out, *Economic and Political Weekly* 34 (1999), pp. 268-272.

76 Balraj Puri, *Jammu and Kashmir: Triumph and Tragedy of Indian Federalisation*, New Delhi 1981, p. 119.

77 Munshi Mohammad Ishaq, *Nidai Haq [Voice of Justice]*, Srinagar 2014, pp. 121-122.

F. The “Normal” and the “Constitutional”

The primary problem in formalising a constitutional relationship between J&K and India arose due to the fact that the leadership involved in these discussions acted both in the capacity of a constitution-making body as well as the government of their respective territories. Nehru, Patel et al. were prominent figures in the Indian Constituent Assembly and also members of the ruling party in the Parliament. Similarly, Sheikh, Beg et al. were all from the National Conference party, which dominated the State Constituent Assembly as well as the State government. This simultaneous role-playing blurred the lines between the Indian and the J&K leaders as constitution-makers and as ruling party politicians.

Bruce Ackerman’s dualism distinguishes “normal politics” from “constitutional politics”.⁷⁸ The period of “constitutional politics” comes during times of a special constitutional crisis when a change to the fundamental state structure and functioning is required. People engage in a reasonable and deliberative process of decision-making, leaving behind particular interests. The “higher lawmaking” arrives at decisions authored by *“We the People.”* This period sets down the framework for politics in the post-constitutional times or “normal politics”. “Constitutional moments”, as he calls them, therefore possess an integrative force.

“Normal politics” occur daily under settled constitutional frameworks. Laws framed during this period are normal decisions of government and cannot override the “considered judgements of the past”, which are entrenched during “constitutional politics”. In this period, people are divided into parties, subscribe to different ideologies, and indulge in partisan politics. This division resembles an economic model wherein people and groups act as self-interested individuals concerned with maximizing their own preferences.

Ackerman’s dualism basically provides for a trajectory based on which constitutions are framed in a particular period with corresponding normative principles, and then the post-constitutional politics operate based on those constitutionalised principles. As a normative classification, Ackerman’s approach fails to explain constitutional formations in divided societies. As seen in India, for example, the constitutional debates were heavily dominated by Congress members and the official ideology whereas marginalized voices did not find a substantial say even regarding the issues that their communities faced. So, Ackerman’s proposition that “constitutional politics” transcends ideological differences among parties and groups does not entirely hold.

Nonetheless, the constitution-making of J&K was a critical constitutional moment in the Ackermanian sense with an inherent potential of founding the state polity and determining its relationship with the Indian state. The State embarked on a sovereign project of constitution-making, which included formalising a relationship with the Indian Union via Article 370 and the making of its own constitution. However, as Hanna Lerner cautions us, the integrating capacity of constitutional moments is tested when constitutionalism attempts to build an ideational consensus in societies with intense disagreements over the content

78 Ackerman, note 4, pp. 3-33.

and conception of constitutions and state formation.⁷⁹ Disagreements and conflicts in J&K were witnessed during the Partition and the Indo-Pak War of 1949, which manifested through intense violence, forced migration, displacement, and subsequently the absence of Pakistan-administered regions from constitutional activity. These events only complicated the task of constitutionalism.

Constitutions are ideally framed to address injustices of the past and incorporate political arrangements for the future. While the past was redressed by a radical redistribution of resources through the land reforms enacted in the Big Landed Estates Abolition Act and the abolition of hereditary rulership, the future was incorporated by negotiations held with the Indian leadership, which later entered the Constitution through constitutional orders and amendments. In fulfilling this second objective, “normal politics” and “constitutional politics” got mixed in deciding the content of the Constitution. The five-month-long deliberations over Article 370, for example, primarily transpired between Nehru and his colleagues, notably Gopalaswami Ayyangar, and Sheikh Abdullah and his colleagues, in the form of letters and meetings.⁸⁰ Very little activity occurred in the debates of the Constituent Assembly of India itself.⁸¹ Similarly, the Delhi Agreement, which outlined the nature of J&K’s relationship with the Indian Union, was concluded between the National Conference and the Congress and subsequently tabled by Sheikh in the State’s Constituent Assembly for its constitutionalization. The moot point here is that provisions made their way into the State’s constitution or the Indian constitution only after being agreed upon outside the domain of “constitutional politics”.

It is worthwhile to divide the constitutional history of J&K into three phases: pre-1947, 1947-1957 and post-1957. The pre-1947 phase provides the historical context through a mass mobilization against the Dogra regime in pursuit of political rights. 1947-1957 becomes the phase when the framing of Article 370 and the separate constitution entrenched those rights. And the post-1957 phase is when this constitutional framework was put into daily practice. Article 370, in this sense, was a “considered judgment” which reflected the “mobilized deliberations of the past”. Its failed story resonates in one, the manner in which “constitutional politics” occurred, which failed to preserve the incorporated rights and second, the course of subsequent “normal politics”, which supervised its erosion as well as its eventual nullification. In other words, the problems of “constitutional politics” failed to protect this “considered judgment of the past” from illegitimate decision-making of the “normal politics”.⁸²

79 *Hanna Lerner*, *Making Constitutions in Deeply Divided Societies*, New York 2011, p. 33.

80 *Noorani*, note 1, p. 1.

81 CAD, note 26.

82 *Ackerman*, note 4, p. 7.

G. Conclusion

This article provided a political interpretation of the constitutionalisation of Article 370. In doing so, the argument proposed was that the constitutional relationship enshrined in Article 370 did not endure primarily because the Indian constitution-framers did not intend to. The legislative, executive and judicial actions taken in concert to undo the autonomous relationship were merely a reflection of this foundational deficit in its making.

This foundational deficit was occasionally overt, but on the surface, to the world, it was disguised in Article 370 as a semblance of constitutionally-designed federal democracy. As we have seen, the “constitutional politics” of J&K was driven by the extraconstitutional politics, and such extraconstitutional interventions by the Indian leadership, at times in concurrence with the Kashmiri leadership, seriously undermined the principle and purpose of constitutionalism. It was unable to establish a successful constitutional order that would guide “normal politics”.

In any post-conflict society, the “constitutional moment” presents an opportunity for an inclusive and participatory process that is expected to transform the political culture in a period of transition. Its impact is primarily measured by its ability to create and sustain democracy and peace,⁸³ neither of which can be said to have happened in J&K following the constitutionalisation of Article 370 and the implementation of the State constitution in 1957. In fact, the J&K polity abounds with institutions that have failed to inculcate public trust and legitimacy.⁸⁴

Contrariwise, the gradual extension of the Indian constitution to J&K through numerous Presidential Orders under Article 370—ninety-four of ninety-seven entries in the Union List, and 260 of 395 articles of the constitution were extended to J&K until 2019—and finally, the nullification of J&K’s separate constitution in its entirety in 2019, attest to the arguments put forth in this article.



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83 *Kirsti Samuels*, Post-Conflict Peace-Building and Constitution-Making, *Chicago Journal of International Law* 6 (2006), pp. 663-682.

84 *Aijaz Ashraf Wani and Muzamil Yaqoob*, Governance and Democracy in Jammu and Kashmir: Measuring Public Trust in Formal Institutions, *Studies in Indian Politics* 9 (2021), pp. 192-207.