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FEDERALISM OR CON-FEDERALISM: RE-EVALUATING INDIA'S FEDERAL STRUCTURE

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ABSTARCT

To resolve the ever-persisting dilemma of the identifying the true nature of the Indian 'federal' set-up, the Article begins by unravelling the character of the Indian Constitution taking a look at both federal and unitary features of our Constitutional provisions to ascertain whether India qualifies as a federation in terms of the yardsticks laid down by K.C Wheare and other prominent scholars. Multiplicity of power devices in federalism produces potentialities of differentiations and disparities, but federalism's commitment to justice and democracy imposes obligation upon power holders to act with a sense of responsibility to avoid disparities in access to positive rights and welfare. The paper therefore presents a heuristic perspective on Indian federalism by analysing historical evidence to propose a contemporaneous balance between conflicting questions of state autonomy, self-determination, human rights and national integrity and unity. The Kashmir Imbroglio, as a manifestation of this conflict has often been seen as an intractable and stubborn problem that has defied resolution despite persistent and protracted efforts at it. In unravelling this imbroglio, the paper methodically analyses the contrived conflict, its origin and history and scrutinizes the archived narratives surrounding the integration of Kashmir into the Indian federation as well as the consequent birth of Article 370 and the contentious issues that its introduction was inevitably accompanied by. Ultimately the Article analyses the legal and constitutional validity of the abrogation of Article 370 and its irreversible impact on the federal orientation of India while discerning its aspirations to resolve the impending issues that its genesis brought about.

CHARACTERISATION OF THE INDIAN CONSTIUTION

The nature of the Indian Constitution has been the subject of many an academic question. One such question that repeatedly arises is of the nature of the Indian Constitution. A few scholars have accepted this as a federal Constitution.[1] Most scholars hesitate to characterise the Constitution as 'federal' and have labelled it as 'quasi-federal', 'unitary with federal features' or even 'federation with a strong centralizing tendency'. The most commonly accepted and professed academic characterization of our Constitution has been made by Austin, who characterizes it as co-operative federalism.[2]

A. ESSENTIAL FEATURES OF INDIAN FEDERATION

Article 1 of the Constitution[3] describes India as a Union of States and Territories as specified in the First Schedule. None of the constituent units of the Indian Union was sovereign and independent in the sense the American colonies were before they formed their federal unions, in fact even the princely states and territories had eventually become subject to the authority of the British Crown.

[1] Nicholas, *The Constitution of India*, 23 AUSTRALIAN LJ. 639.

[2] M.P Jain, *Indian Constitutional Law with Constitutional Documents* (7th ed. 2014).

[3] Indian Const. Art 1.

The definition of India as a Union of States emphasizes the important part which the States have to play in our Constitution. The Constitution itself states by Article 1 that India is a Union of States and in interpreting the Constitution one must keep in view the essential structure of a federal or a quasi-federal Constitution namely that the units of the Union have also certain powers as has the Union.[4]

There are various provisions within the Constitution itself that establish the essence of federalism and convey the intent of the framers of the Constitution for maintenance of such a federal structure. These provisions include among others List II and List III of the Seventh Schedule which confer plenary powers of the States. Another important provision is that of Article 252[5] which confers conditional power on the Centre (Parliament) to legislate on a field covered by the States only with the Consent of two or more States with provision for adoption of such legislation by any other States. It is evident that these provisions have been meticulously drafted with the intent of ensuring that such powers are not misused in any manner by providing for a limited scope of application or extension of the Centre's powers over the States. The competence of Parliament to legislate in matters pertaining to the State List, remains only for a limited period under Article 259[6] in the "national interest" or under Article 250[7] during "emergency" vesting the President with powers under Article 258[8] to entrust a State Government with the consent of the Governor function in relation to matters to which executive power of the Union extends.

Dr. Ambedkar in all his vision and wisdom, foresaw a criticism of the Constitutional Structure as favourable to the Centralism. In in his final address to the Constituent Assembly, he addressed this concern by referring to this criticism as an 'exaggeration'. In his view, the basic principle of Federalism is that Legislative and Executive authority is partitioned between the Centre and the States by the Constitution itself. Since the States are in no way dependant on the centre for their executive or legislative authority and the Centre and States are co-equal in this matter, the constitutional structure cannot be described as centralism despite the larger field of operation granted to the Centre for its legislative and executive authority.

B. JUDICIAL INTERPRETATION

The debate whether India has a federal Constitution has been grappling the Apex court in India because of the theoretical labels given to the Constitution of India over time, namely federal, quasi-federal, unitary etc. The Supreme Court has invariably shown favour to expansive interpretation of legislative powers and upheld the law when it comes to contests between individuals and the State, however, contests between the State and the Centre have resulted in the Apex Court showing its strong predilection for a strong Centre, which may be viewed as undermining of certain federal principles.

In the landmark case of West Bengal v. Union of India,[9] the Supreme Court contemplated the traditional view of Federalism and characterised the Indian Constitution as not being true to any traditional pattern of federation. This case

[4] H.M. Seervai, *Constitutional Law*, 307 (4th ed. 1994).
[5] Indian Const. Art 252.
[6] Indian Const. Art 259.
[7] Indian Const. Art 250.
[8] Indian Const. Art 258.
[9] West Bengal v. Union of India, (1964) 1 SCR 371.

was followed by State of Rajasthan v. Union of India,[10] where the court chose to judge Indian federalism by the yardstick laid down by K.C Wheare and characterised our Constitution as more unitary than federal. The court also went on to say that "the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically co-ordinated, and socially, intellectually, and spiritually uplifted."

Although there undoubtedly exists a division of functions as envisioned in Part XI of our Constitution, there is no watertight compartmentalisation of functions. As the Governments of the States and the Centre act side by side in the furtherance of the same objectives and within a singular framework, inevitably many types of relations arise amongst them and many instrumentalities to promote intergovernmental co-operation come into existence. Thus, the view taken by CJ Beg in the State of Rajasthan case [11] still holds true.

Another landmark case of SR Bommai,[12] helped instantiate the nature of the Constitution, with various judges taking different views of the federal structure in India. Firstly, Democracy and federalism were described as essential features of our constitution and held to be part of the basic structure. As far as the nature of this 'federalism' is concerned, J. Ahmadi, alluding to K.C Wheare described the Constitution as "quasi-federal" because "it is a mixture of the federal and unitary elements, leaning more towards the latter".[13] Another important principle was laid down in this case, with regard to the powers of the State and Centre and their interrelation. The court held that although greater powers are conferred upon the Centre, within the sphere allotted to them, States are supreme and the Centre cannot tamper with their powers.

Despite the evident Unitary bias in our Constitution, the irrefutable federal features like supremacy of the constitution, division of subjects between the union and states, bicameralism, dual administration, and independence of judiciary distinguish our set up as a unique blend of the two, perhaps best described by Austin as co-operative federalism.

A HEURISTIC PERSPECTIVE ON INDIAN FEDRALISM

Although these federal features appear to be dominant in our Constitution, the Courts in India generally tend to lean in favour of a strong Centre, a feature that militates against the concept of strong federalism. Apart from the aforementioned Emergency powers and in the event of a proclamation being issued under Article 356 [14] that the governance of the State cannot be carried on in accordance with the provision of the Constitution, Article 251 when read with Article 259 in effect permits the Rajya Sabha to encroach upon the specified legislative competence of a State legislature by declaring a matter to be of national importance. Thus, although these powers had been initially included as a constitutional safeguard, the political interest of conflicting State and Central Governments often subvert the constitutional interests

[10] State of Rajasthan v. Union of India, (1977) 3 SCC 592.
[11] *Ibid.*
[12] SR Bommai v Union of India, AIR 1994 SC 1918.
[13] K.C. Wheare, *Federal Government* 10 (4th ed., 1963).
[14] Indian Const. Art 356.

leading to the misuse of the additional powers given to the Centre.

Financially, the constitution has created a dependency of the States on the Centre, which has kept with itself the power to levy important taxes. States have only been given the option to seek grants and loans for the upliftment of the weaker sections of the society. The Union government can borrow money from within India and abroad on the security of consolidated funds of India, however, States can do so only within India. Furthermore, no state can have a separate constitution from that of India (except the erstwhile State of Jammu and Kashmir which along with its Constitution has ceased to exist). There is also no double citizenship allowed in India.

Moreover, barring the provisions dealing with presidential elections, representation of states in the upper house of parliament, amendment procedure and changes in the Seventh Schedule, the rest of the constitution can be amended by the parliament by a simple majority for which the states' consent is not required.

Apart from the aforementioned aspects, Centralized planning, office of the governor, Article 356, and All India Services, have all been major irritants in the Indian federation. The model of federalism which India adopted is unique in the sense that it favours a strong centre. The autonomy of States has eroded considerably over a period of time on account of the continuous rule of one party at the centre and states, and misuse of constitutional provisions against the state governments. States do not enjoy a free hand in shouldering the responsibilities entrusted to them by the Constitution.[15]

A. FEDERALISM AND STATE AUTONOMY

Regardless of the degree of State autonomy or the extent of centralism sanctioned by a Constitution serving as the Rule of Law in a Federation, there is bound to be an inevitable tussle between greater demands for greater State autonomy and demands for greater centralization. There exists no magical formula for ensuring stability and balance in a federation, regardless of the allocation of powers between the Centre and State. However, certain essential powers such as common defense, foreign affairs, regulation of interstate commerce etc. are generally retained by the central government.

American federalism contemplates that States will retain a significant degree of autonomy so that state power can serve as a meaningful counterweight to national power. It is often said that states exercise this function through extraconstitutional processes centered on the political party system.[16] As discussed earlier, State autonomy in the Indian Federation has been generally subverted by the Centre in favour of the greater 'national interest'. This is justifiable as a natural reaction to protect independence after over 2 centuries of British rule. However, it is important to understand that both federalism and regional autonomy, are based as much on the idea of self-rule and

[15] Ranjit Singh, *Indian Federalism and the Demand for State Autonomy: The Akali Perspective,* 4 PAKISTAN HORIZON 62, (October, 2009).

[16] James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics,*29 JOURNAL OF LAW AND POLITICS 1, (December 18, 2012).

autonomy of the individual as democracy and respect for human rights.[17]

The working of the federal arrangements in India took a big turn in 1967 when the monopoly of one party rule at the Centre and the states started crumbling with splits within the party and emergence of several regional parties in different states. Since 1989 either a minority government consisting of a combination of different political groups or of one political party supported by other parties from outside or a coalition of several national and regional parties had been in office at the Center, coalitions continue to govern at the Centre despite resounding majority in favour of a single party.[18] This has led to a situation wherein over the past decade, a coalition of several parties is ruling at the Centre while some of these parties and parties in opposition are ruling in different states. These political developments and future projections have deeply changed the character of Indian federalism, with regional parties demanding greater State autonomy, motivated either by political ambitions or the welfare of the constituents. Any country that has this kind of diversity must develop a robust federal structure ensuring enough scope for national unity consistent with regional autonomy, which cannot be fixed forever but has to be a flexible and dynamic process.[19]

B. STRIKING A BALANCE

The perception created when demand for greater autonomy is raised by any State is generally founded on a more fundamental demand- the demand for rights. Generally, this demand is one projected as Human Rights or some other fundamental right that the constituents of that state are purported to have been deprived of. If diffusion of powers assures respect for human rights then, division of powers between different levels of government is even a greater assurance of respect for human rights than separation of powers. The totality of powers gets divided not only between different wings of the same government but also between different governments conscious of their identity, independence and autonomy, but when such a demand for autonomy turns into a threat to the unity and national integrity of the Union, thus becoming a threat to its very existence, the demands have historically been ignored. Be it the Akakli movement, the Dravidnadu movement or the Kashmir uprising, difference of politics does not seem to deter the heads of the Union from taking adverse steps to secure national integrity, albeit at the cost of International condemnation. This militant determination, although at great costs, has been the primary reason that many an integral component of India still remains a part of it. State autonomy, religious autonomy, the Right to self determination and even Human Rights have all been undercut when there is a threat to the national integrity. Since this manuscript is an academic one, the correctness of these actions cannot be commented upon but questions as to the legal and constitutional validity of these moves have been 5nalyse5 subsequently.

[17] *Ibid.*

[18] Mahendra Singh, *Federalism, Democracy and Human Rights: Some Reflections*, 47 JOURNAL OF INDIAN LAW INSTITUTE 4, (2005).

[19] *Ibid.*

FEDRALISM AND SELF-DETERMINATION

Federalism has undeniably served as the most accepted solution to challenges posed by multi ethnic, multi-cultural secular societies of the modern era. Failures of federalism as a system of governance over the years have generally been due to human deficiencies and not due to any systemic shortcomings in the federal set-up. A large cause of this failure tends to emanate from the very nature of most modern federations, where politics of nationalism ends up feeding into a set of grievances that have the potential to mobilize individuals behind calls for territorial redistribution of power, including independence.[20] The question of whether or not a federal set-up would be a lasting solution to the aforementioned challenges posed in a multi-ethnic State depends on a number of factors, including nature of the federal arrangements, the fairness with which the system is operated and the political maturity displayed by the leaders of the federation as well as the leaders of its constituent units.[21] As long as the costs of remaining a member are not seen as excessive in relation to the benefits accruing from membership, there is a reasonable chance of the federation succeeding without secession.

While federations can be seen as the binding force between constituent units of a federation having different religious, cultural and social fabric, they can also become the first step towards secession. The right to self-determination, although still a very recent concept, has gained wide international acceptance and occupies a significant position in International Human Rights Instruments. It is often used by various separatist movements who base their claims in finding a common ethnic, cultural or religious idea, that is so diverse from the rest of the federation that peaceful co-existence becomes impossible.

However, the tenability of these claims in International Law is a matter of debate. Claims based on national, ethnic or religious identity in a time where pluralism and cosmopolitanism are given global recognition and encouragement have to be analysed in the light of the well-entrenched principles of International Law that give sanction to the territorial integrity and sovereignty of a nation.[22] It therefore follows that a representative and inclusive government would receive more support and less sanction from the International Community, despite the representations made by those advocating for secession.

Justifications for secession in the opinion of the writer are subjective and no definite parameters can be drawn out in determining whether a particular cause is worthy of being deemed as just or reasonable. Neither is it possible to categorize or compartmentalize these causes as it impossible to ascertain their plausibility and legitimacy in absence of verifiable empirical evidence. It would therefore be appropriate to contextualize these causes, 6nalyse their validity and determine how to address them in a definitive manner.

THE KASHMIR CONUNDRUM

The erstwhile State of Jammu and Kashmir has long occupied a peculiar position in the

[20] Graham Smith, *Federalism the Multi-ethnic Challenge*, 10 (1995).

[21] Venkat Iyer, *Federalism and Self-Determination: Some Reflections*, 11 LEGAL ISSUES ON BURMA JOURNAL 42, (April, 2002).

[22] *Ibid.*

Indian federation just as Article 370,[23] occupied a *sui generis* locus in our Constitution. In Jammu and Kashmir, the Hindu Maharaja, Sri Hari Singh, with his predominantly Muslim subjects in the Kashmir Valley had "acceded" to India under imminent threat from Muslim tribesmen sent by Pakistan.

A. BRIEF HISTORY & BACKGROUND

On the day India became independent, in accordance with the Cabinet Mission plan of May 1946, following the creation of the dominions of India and Pakistan, Kashmir bordering on both India and Pakistan had, like any other native state, three alternatives, viz., to assert complete independence, to accede to Pakistan or to accede to India. Power to take the decision vested exclusively in the Ruler according to the British Government's declared policy.

In his letter dated 26 October 1947, addressed to the Governor-General, the Maharaja of Jammu and Kashmir, offered to accede to the Dominion of India. The Governor-General accepted the offer on 27 October 1947 with certain stipulations. On 5 March 1948, the Maharaja issued a proclamation forming a responsible Government of Council of Ministers headed by the Prime Minister which was to take steps to constitute a National Assembly based on adult franchise to frame a Constitution for the State.[24]

This Instrument of Accession was in no way different from that executed by some 500 other states. It was unconditional, voluntary and absolute. It was not subject to any exceptions. It bound the State of Jammu and Kashmir and India together legally and constitutionally. The execution of the Instrument of Accession by the Maharaja and its acceptance by the Governor-General should have ideally settled the issue of accession of the State of Jammu and Kashmir. It was only after the accession that the Governor General in his personal capacity replied to the Maharaja's Letter stating that the "accession should be decided in accordance with the wishes of the people of the State" and "the question of State's accession should be settled by a reference to the people."[25]

M.C. Mahajan rightly opined that the "finality which is statutory cannot be made contingent on conditions imposed outside the powers of the statute. Any rider which militates against the finality is clearly ultra vires and has to be rejected".[26]

The accession of the State of Jammu and Kashmir to India imposed an obligation on the dominion of India to defend the State. To drive the invader out of the State was the task which the dominion of India was asked to face as soon as it finally accepted the Instrument of Accession. However, it is pertinent to note that despite the aforementioned events, Sheikh Abdullah had declared in the Constituent Assembly that any suggestion for altering arbitrarily the basis of the Kashmir's relationship with India would not only constitute a breach of the spirit and letter of the constitution but would lead to "serious consequences" for

[23] Indian Const. Art 370.

[24] DD Basu, *Commentary on the Constitution of India*, (9th ed., 2018).

[25] Adarsh Anand, *Accession of Jammu and Kashmir State - Historical & Legal Perspective*, 43 JOURNAL OF INDIAN LAW INSTITUTE 455 (2001).

[26] M.C Mahajan, *Accession of Kashmir to India*, THE INSIDE STORY 2 (Sholapur, 1950).

harmonious association with the State of India.[27]

Therefore, the controversy with regards to integration of Kashmir in India without bringing the question for reference to the people of the state in light of the aforementioned events and the right of self-determination earlier discussed, continues to persist.

B. CONTEXTUALIZING ARTICLE 370

Article 370 is a self-applying Article and applies *ex proprio vigore* without having to depend on any other Article of the Constitution of India for its enforceability. The Article has been described as a "temporary provision" in the Constitution. The temporary nature of this Article arises merely because the power to finalize the constitutional relationship between the State and the Union of India had been specifically vested in the Jammu and Kashmir Constituent Assembly.

By the accession, the Dominion of India acquired jurisdiction over the State with respect to the subjects of Defence, External Affairs and Communications, and like other Indian states which survived as political units at the time of the making of the Constitution of India, the State of Jammu and Kashmir was included as a Part B State in the First Schedule of the Constitution of India, as it was promulgated in 1950.

Given the special circumstances of the accession, all the provisions of the Constitution applicable to Part B States contained in Article 238[28] were not extended to Jammu and Kashmir. The Government of India declared that it would be the people of the State that would have the power, being represented by their Constituent Assembly, to decide which provisions of the Indian Constitution would apply to the State. The application of the other Articles was to be determined by the President in consultation with the Government of the State.[29]

The first official act of the Constituent Assembly of the State was to put an end to the hereditary princely rule of the Maharaja. It was one of the conditions of the acceptance of the accession by the Government of India that the Maharaja would introduce popular Government in the State. Thus, came to an end the princely rule in the State of Jammu and Kashmir and the head of the State was henceforth to be an elected person.

The Government of India accepted this position by making a Declaration of the President under Article 370(3), to the effect that for the purposes of the Constitution, "Government" of the State of Jammu and Kashmir would be who the legislative assembly of the State recognizes as the Sadar-i-Riyasat of Jammu & Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.[30]

This "Sardar-i-Riyasat" was later construed to mean the Governor of the of Jammu and Kashmir as mentioned in Article 367[31] which the President applied to the State of Jammu and Kashmir, by virtue of the Constitution (Application to Jammu and Kashmir) Order, 1954, with concurrence of the Government of

[27] J&K Constituent Assembly Debates, Vol IV, No. 1–3, (11 August 1952).
[28] Indian Const. Art 238.
[29] *Id.* at 24.
[30] Justice A.S. Anand, *The Constitution of Jammu & Kashmir: Its Development and Comments*, 113 (6th ed., 2010).
[31] Indian Const. Art 367.

the State of Jammu and Kashmir.[32] The references to the Sadar-i-Riyasat were to be construed to mean references to the Governor of the State of Jammu and Kashmir and the same was upheld in a multiplicity of cases.[33]

ABROGATION OF ARTICLE 370- THE FINAL SOLUTION?

Article 370 (3) of the Constitution, raised an important question of law- Could Article 370 ever "cease to be operational" since the "Constituent Assembly" of Jammu and Kashmir no longer exists? This question was answered by virtue of the notification issued by the President on August 6, 2019, wherein the President declared that all clauses of Article 370 would become inoperative except a clause that read into it application of all provisions of the Indian Constitution to the State of Jammu and Kashmir.

The acting Central Government of India, making use of Clause 1(d)[34], of Article 370 which gives the President the power to apply other provisions of the Constitution to the State, subject to appropriate modifications, modified Article 367 of the Constitution, more particularly the terminology used within the Article to enable de-operationalization of Article 370. Since this move, various questions have been raised over its constitutionality and legal validity. These questions have also been brought before the Supreme Court and the matter is currently sub-judicia. Regardless of the eventual judicial outcome, it raises an important academic question, which is not restricted to the legality and constitutionality of the move but has implications on the federal structure of India.

A. LEGAL VALIDITY OF THE ABROGATION OF ARTICLE 370.

In making the amendment to Article 367, which has a slew of definitions of Constitutional expressions and making its application available for usage in Article 370, the Central Government enabled the use of terms 'Government of the State of Jammu and Kashmir' to mean a reference to the 'Governor of Jammu and Kashmir, acting on the advice of his Council of Ministers' and the use of term 'Constituent Assembly of the State' to be read as 'Legislative Assembly of the State'. This was done by the virtue of Constitution (Application to Jammu and Kashmir) Order, 2019, which added clause (4) to Article 376.[35]

Questions as to the permissibility of these actions of substitution and attribution of new meaning to existing terms have already been answered by the Apex Court, when dealing with term "Sardar-i-Riayasat" in Article 370, which was by Presidential Order, allowed to be construed as the Governor of the State of Jammu and Kashmir. The legal juxtaposition with this subject and the judicial opinion on the same has also already been substantively dealt with earlier.[36] The power of the Union, by the President to alter the existing terminology must stand vindicated. The Constituent Assembly of Jammu and Kashmir had resolved to be dissolved on November 17, 1956 and it finally ceased to exist on January 26, 1957.[37]

[32] *Id.* at 29.
[33] State of J&K v Goodwill Forest Lessees, AIR 1974 J&K 1; Mohammad Maqbool Damnoo v State of Jammu and Kashmir, AIR 1972 SC 963 etc.
[34] Indian Const. Art 238., Cl.1 (d).
[35] [C.O. 272], vide G.S.R. 551(E), dated 5th August, 2019.
[36] Supra note 33.
[37] A.G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir,* 9 (2014).

There can be no doubt cast over the intent of Article 370 or the nature of the provision. Undoubtedly, it was meant to occupy a temporary place in our Constitution and it is for this very reason that it has been classified as 'temporary, transitional and special provision' and has neither occupied nor was intended to occupy permanent position in our Constitution. This is because, the Article in itself foresaw the possibility and the inevitability of its own termination.

A bare glance at the provisions of the Article reveals that the temporary nature of Article 370, specifically clause (3), which opens with a non-obstante clause, "Notwithstanding anything in the foregoing provisions of this article." Literally construed, this clause emphasizes that whatever is given in the preceding clauses of this article in terms of special consideration shown to the State of Jammu and Kashmir, the President is empowered to undo the same. He may, by public notification, declare that this Article shall cease to be operative or shall be operative with such exceptions and modifications and from such date as he may specify. This overriding clause seems to affirm that the provisions contained in clauses (1) and (2) of Article 370 are indeed 'temporary provisions'.

By the very fact that the Constituent Assembly has ceased to exist and can never be reconvened, it is manifest that the concurrence of the prevailing governing body- that is to say the State Legislative Assembly is required. In the current situation, the President has by Order directed the use of the term 'Government of the State of Jammu and Kashmir' to mean a reference to the 'Governor of Jammu and Kashmir, acting on the advice of his Council of Ministers'[38]
Being under President's rule, all the functions of the State Assembly has been transferred to the Parliament. Since all powers and functions have been transferred to the Parliament, the concurrence of the State has been delegated to the Parliament, when put under Presidents Rule as per Article 356,[39] to "express its views". Since there exists no State Assembly in the State concerned, the Parliament has acted on behalf of the State Assembly to enable the abrogation. As a matter of Constitutional Law, this must be viewed as an exercise of a purely Legislative function of the State and is distinct from the exercise of the Executive power which may be open to judicial challenge.

Without delving into the political motivations or the sagacity of the move, it is evident that based on the altered definitions, the reassignment of authority to dictate concurrence and the technical competence to make such changes, there can be no legal impediment to the validity of the move.

B. CONSTITUTIONAL VALIDITY OF THE ABROGATION OF ARTICLE 370- A THREAT TO INDIA'S BASIC STRUCTURE?

The Basic Structure doctrine as expounded upon in the SR Bommai case,[40] where democracy and federalism were described as essential features of our constitution and held to be part of the basic structure, now holds constitutional and legal relevance in answering the question of whether this abrogation constitutes a potent threat to

[38] Supra note 35.
[39] Indian Const. Art 356.
[40] SR Bommai v Union of India, AIR 1994 SC 1918.

India's federal structure and therefore it's prevailing constitutional framework.

The Indian Constitution foresaw the inevitability of different center-state relations in maintenance of our federal structure and this is the very reason that special, temporary powers were allowed to be made part of our constitutional structure, which enabled these special provisions to be exercised for the benefit of those states in light of different needs and requirements of these States. The application of these provisions is not limited to the State of Jammu and Kashmir but also extends to other States such as Nagaland in the form of Article 371-A. [41]

However, these provisions have been created not with the object of granting special favour or bestowing unwarranted benevolence on these States, but with the non-partisan object of ensuring conformity to overriding constitutional principles of state welfare and equality. The underlying idea was to address the dissimilarity and disproportionality in an adequate way to ensure over-arching equality and parity amongst the States quantitively. Once the objectives of these temporary provisions have been met, there would remain no reason to keep such special provisions operative as they would then digress from the limited constitutional intent of securing parity.

Moreover, the executive powers of the Centre over Kashmir have been largely tamed and the State and its citizens have been brought on par with other citizens of the country, by allowing them access to the same benefits, privileges and rights that other citizens of the country, which is in line with the constitutional objective of ensuring parity amongst the states. Be it at the individual level of the citizen or the at the State level, keeping in mind the goal of achieving equality of citizenship the State has the power to decide to do away with the temporary provisions once it deems its objectives to have been met.

Apart from these equalizing tendencies, it also addresses certain other issues that existed with the special status of the State of Jammu and Kashmir. Before abrogation of Article 370, the State of Jammu and Kashmir was the only State in India that is governed by its own separate Constitution which defines the relationship of the State of Jammu and Kashmir with the Union of India and certain provisions of the Indian Constitution that were deemed to be applicable by Presidential Order.

The rule of this separate Constitution also allowed the State to enact certain draconian, unjust and regressive laws that were constitutionally impermissible. The Jammu and Kashmir Constitution enabled the State to enact a bill that seeks to deprive married daughters of the rights accrued to them as permanent residents. This bill was earlier enacted by the State Legislature, despite its inherently discriminatory nature. In fact, the full bench of J & K High Court in State of J & K v. Susheela Sawhney,[42] also ruled that the daughter of a permanent resident of the State of Jammu and Kashmir will not lose status as a permanent resident of the State of Jammu and Kashmir on her marriage with a person, who is not a permanent resident of the State of Jammu and Kashmir.

[41] Indian Const. Art 371-A.

[42] State of J & K v. Susheela Sawhney, AIR 2003 J & K 83

Article 35A[43] of the Indian Constitution was an article that empowered the Jammu and Kashmir state's legislature to define "permanent residents" of the state and provide special rights and privileges to those permanent residents. Furthermore, Article 35-A in itself legitimised the laws enacted by the State Legislature of Jammu and Kashmir and freed them from constitutional challenge on the basis of rights conferred to other citizens of India. This constitutional infirmity acted as a double-edged sword which subject the citizens of the State of Jammu and Kashmir to some and draconian laws which could not be challenged on the basis of the rights conferred upon Indian Citizens.

At the same time, it also conferred an unfair advantage upon the people of the State of Jammu and Kashmir who enjoyed all the rights guaranteed to the Citizens of India under the Constitution of India, but also had the additional rights and privileges to the exclusion of the other non-permanent residents, such as the right of suffrage to the Legislature of the State, to the local bodies and other institutions, preferential claims to the services and scholarship and above all to the exclusive rights for the acquisition and possession of immovable property.

The move to repeal the Article has also brought about equality of citizenship by ensuring rule of the *grund norm*, therefore ensuring supremacy of the Indian Constitution. Not only have the unfair advantages to the permanent residents of the State of Jammu and Kashmir been eliminated, but the laws of the State are now also subject to the same constitutional challenge as any other law in India, therefore ensuring an all-pervasive check on their reasonability and their conformity to the constitutional principles.

CONCLUSION- PUTTING AN END TO THE IMBROGLIO

The Kashmir Imbroglio that has often been seen as an intractable and stubborn problem that has defied resolution despite persistent and protracted efforts at it. The strained situation in Kashmir, has marked the international landscape for close to seven decades now. It has understandably caused apprehension and trepidation amongst the international community for it is seen, and legitimately so, as a potential flashpoint for the two nuclear-armed neighbours- India and Pakistan who are contesting the dispute.

This manuscript refrains from delving into political questions of intent, wisdom and motivations behind the move to abrogate, limiting itself to scrutinizing the legality and constitutionality of the move and therefore cannot make any astrological predictions as to the success or failure of the move in terms of the effect it would have on the lives of the common citizen and the eventual outcome of such impact. Therefore, it cannot be conclusively stated that this move would either successfully resolve the conflict or cause further snowballing and sensationalism at the International stage to elevate to another potential flashpoint.

What has been conclusively established is that the move is legally and constitutionally sound and does not pose a threat to the basic structure or federal nature of the Indian Union. In any case, the scholarly classifications of India's federal structure are unlikely to be amended based on the abrogation of temporary provision that foresaw its own end. Over the years, the

[43] Indian Const. Art 35-A.

interplay of certain extra-constitutional forces like the multiparty system, political attitudes and political movements have considerably influenced the actual pattern of Centre-state relations, in spite of which, classification of India as quasi-federal and the description of the Indian federal structure as co-operative federalism has remained the same.

However, what remains imperative is not some scholarly label attached to the description of what the Indian federation can be classified, but the success of the federation in itself. It would perhaps be appropriate to end with a quote from Dr. Rajendra Prasad, our first President, who commented upon nature of the Indian Constitution saying: "Personally, I do not attach any importance to the label which may be attached to it- whether you call it a federal Constitution or a unitary constitution or by any other name. It makes no difference so long as the Constitution serves our purposes."[44]

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[44] Constituent Assembly Debates, Constituent Assembly of India - Volume XI, 26th November, 1949.